XI. VERBATIM RECORD OF THE HALF-DAY SPECIAL MEETING ON "SELECTED ITEMS ON THE AGENDA OF THE INTERNATIONAL LAW COMMISSION"

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Her Excellency Dr. Vilawan Mangklatanakul, Deputy Director-General, Department of Treaties and Legal Affairs, Ministry of Foreign Affairs, Thailand and the Vice-President of the Fifty-Sixth Annual Session of AALCO in the Chair.

Vice-President: A very good morning to you all. I welcome you all to this Half-Day Special Meeting on Selected Items on the Agenda of the International Law Commission. To initiate this Half-Day Special Meeting, I have the pleasure to invite the Secretary-General of AALCO Prof. Dr. Kennedy Gastorn to make his introductory statement. This will be followed by statements from the Member States on this agenda item.

Prof. Dr. Kennedy Gastorn, Secretary-General of AALCO: Madam Vice-President, Excellencies, Distinguished Delegates, Ladies and Gentlemen, it is my pleasure to invite you all to the Half-Day Special Meeting on the topic "Selected Items on the Agenda of the International Law Commission". The ILC and AALCO have always shared a longstanding and mutually beneficial relationship. In addition to its role as a consultative body among its Member States in the field of international law, the primary roles of the AALCO are to examine subjects that are under the consideration of the International Law Commission (ILC); to forward its views to Member States; and to make recommendations to the ILC based upon the viewpoints and inputs of the Member States on the Commission's agenda items. Fulfillment of this statutory mandate over the years has helped to forge closer relationship between the two organizations. It has also become customary for AALCO and the ILC to be represented during each other's sessions. The Asian and African members of the Commission have undoubtedly made, and continue to make a valuable contribution to the work of the Commission. Their presence is essential if the ILC is to be truly representative.

Though it is customary for the Half-Day Special Meetings of AALCO on the agenda items of ILC to be addressed by the Members of ILC as panelists, this year remains an exception. The annual session of the Commission is being held from 1st May to 2nd June and from 3rd July to 4th August 2017. Because the first part of the ILC's session is underway at the moment, we do not have any representation from ILC at this meeting. However, this gives the distinguished delegates from the Member States more time to deliberate the agenda items that are the primary focus of this meeting. The three major topics that will be the subject of deliberations today are: *Protection of the atmosphere; Jus Cogens and Immunity of State Officials from Foreign Criminal Jurisdiction.* Of course, the Member States are also encouraged to present their views on other agenda items of the Commission as well.

With these initial remarks, let me move on to give a bird's-eye view of the way how the various topics of ILC were deliberated and what progress were made on them at the Sixty-Eighth session of the Commission held in 2016.

Briefly, the deliberations at the Sixty-Eighth session of the Commission focused on *nine* topics. These were: *Protection of the atmosphere; Jus cogens; Immunity of State officials from foreign criminal jurisdiction; Protection of persons in the event of disaster; Subsequent Agreements and*

Subsequent Practice in relation to the Interpretation of Treaties; Protection of the environment in relation to armed conflicts; Crimes against humanity; Provisional application of treaties; Identification of customary international law. In the following paragraphs a brief overview of how the ILC dealt with each of them is presented.

As regards the topic "***Protection of the Atmosphere***", the Commission considered the third report on the protection of the atmosphere by the Special Rapporteur, Shinya Murase. Building upon the previous two reports, the third report of the Special Rapporteur analysed several key issues relevant to the topic, namely, the obligations of States to prevent atmospheric pollution and mitigate atmospheric degradation and the requirement of due diligence and environmental impact assessment. The report also explored questions concerning sustainable and equitable utilization of the atmosphere, as well as the legal limits on certain activities aimed at intentional modification of the atmosphere. Consequently, five draft guidelines were proposed on the obligation of States to protect the environment, environmental impact assessment, sustainable utilization of the atmosphere, equitable utilization of the atmosphere, and geoengineering, together with an additional preambular paragraph. Following the debate in the Commission, (which was preceded by a dialogue with scientists organized by the Special Rapporteur), the Commission decided to refer the five draft guidelines, together with the preambular paragraph, as contained in the Special Rapporteur's third report, to the Drafting Committee. Upon its consideration of the report of the Drafting Committee, the Commission provisionally adopted draft guidelines 3, 4, 5, 6 and 7 and a preambular paragraph, together with commentaries thereto.

In their deliberations on this topic, the Member States of AALCO could focus on few areas of critical importance: 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.

As regards the topic "***Jus cogens",*** the Commission had before it 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 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 could 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.

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 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 could focus on few areas of critical importance: Article 2 that deals with the definitional aspects and Article 6 on the scope of immunity *ratione materiae*.

As regards the topic, ***"Protection of persons in the event of disasters"***, the Commission had before it the eighth report of the Special Rapporteur surveying the comments made by States and international organizations, and other entities, on the draft articles on the topic adopted on first reading at the sixty-sixth session (2014) and making recommendations for consideration by the Commission during the second reading. The Commission also had before it the comments and observations received from Governments and international organizations on the draft articles adopted on first reading. The Commission subsequently adopted, on second reading, a draft preamble and 18 draft articles, together with commentaries thereto, on the protection of persons in the event of disaster.

As regards the topic "***Subsequent agreements and subsequent practice in relation to the interpretation of treaties",*** the Commission had before it the fourth report of the Special Rapporteur which addressed the legal significance, for the purpose of interpretation and as forms of practice under a treaty, of pronouncements of expert bodies and of decisions of domestic courts. The report also discussed the structure and scope of the draft conclusions. As a result of its consideration of the topic at the present session, the Commission adopted on the first reading a set of 13 draft conclusions, together with commentaries thereto, on this topic.

As regards the topic ***"Protection of the environment in relation to armed conflicts",*** the Commission had before it the third report of the Special Rapporteur which focused on identifying rules applicable in post-conflict situations, while also addressing some preventive issues to be undertaken in the pre-conflict phase. The report contained three draft principles on preventive measures, five draft principles concerning primarily the post-conflict phase and one draft principle on the rights of indigenous peoples. Following the debate in Plenary, the Commission decided to refer the draft principles, as contained in the report of the Special Rapporteur, to the Drafting Committee. The Commission subsequently received the report of the Drafting Committee and took note of draft principles 4, 6, 7, 8, 14, 15, 16, 17 and 18, provisionally adopted by the Drafting Committee. Furthermore, the Commission provisionally adopted the draft principles it had taken note of during its sixty-seventh session, which had been renumbered and revised for technical reasons by the Drafting Committee at the present session, together with commentaries thereto.

As regards the topic ***"Crimes against humanity"***, the Commission had before it the second report of the Special Rapporteur as well as the memorandum by the Secretariat providing information on existing treaty-based monitoring mechanisms. The second report addressed, inter alia, criminalization under national law, establishment of national jurisdiction, general investigation and cooperation for identifying alleged offenders, exercise of national jurisdiction when an alleged offender is present, *aut dedere aut judicare* and fair treatment of an alleged offender. Following the debate in Plenary, the Commission decided to refer the draft articles proposed by the Special Rapporteur to the Drafting Committee. Upon consideration of the report of the Drafting Committee, the Commission provisionally adopted draft articles 5 to 10, together with commentaries thereto. The Commission also decided to refer to the Drafting Committee the question of the liability of legal persons. Following its consideration of a further report of the Drafting Committee the Commission provisionally adopted paragraph 7 of draft article 5, together with the commentary thereto.

As regards the topic ***"Provisional application of treaties",*** the Commission had before it the fourth report of the Special Rapporteur, which continued the analysis of the relationship of provisional application to other provisions of the 1969 Vienna Convention and of the practice of international organizations with regard to provisional application. The report included a proposal for a draft guideline 10 on internal law and the observation of provisional application of all or part of a treaty. Following the debate in Plenary, the Commission decided to refer draft guideline 10, as contained in the fourth report of the Special Rapporteur, to the Drafting Committee. The Commission subsequently received the report of the Drafting Committee and took note of draft guidelines 1 to 4 and 6 to 9, provisionally adopted by the Drafting Committee during the sixty-seventh and sixty-eighth sessions. Draft guideline 5 on unilateral declarations had been kept in abeyance by the Drafting Committee to be returned to at a later stage.

As regards the topic ***"Identification of customary international law",*** the Commission had before it the fourth report of the Special Rapporteur which contained, in particular, suggestions for the amendments of several draft conclusions in light of the comments by Governments. It also addressed ways and means to make the evidence of customary international law more readily available. In addition, the Commission had before it the memorandum by the Secretariat concerning the role of decisions of national courts in the case law of international courts and tribunals of a universal character for the purpose of the determination of customary international law. As a result of its consideration of the topic at the present session, the Commission adopted on first reading a set of 16 draft conclusions, together with commentaries thereto, on this topic. The Commission decided, in accordance with articles 16 to 21 of its Statute, to transmit the draft conclusions, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2018.

With those words, Madam Vice-President, I wish the distinguished delegates fruitful discussions. I thank you.

Vice-President: I thank the Secretary-General for his introductory statement. Now, let me invite the Distinguished Delegate from Sudan to make his statement.

The Delegate of Sudan:[17] In the Name of Allah, the Most Beneficial and the Most Merciful. Madam Vice-President I will talk about the topic of Legal Status of the Head of the State in International Law.

The Head of the State is the highest authority of the State who enjoys the autonomy and decision making power. The rules of International Law provide that the actions of the Head of the State must be attributed to that State. The State shall bear all the consequences of the actions and administrative steps of the Head of the State on the ground that Head of the State is the highest representative of a State.

There is a close link between the legal status of the Head of the State under the national law and his status in the international law. We find that many provisions of the national law are related with international law. The national Constitutional and political structures determine the legal nature of the Head of the State which is related to his legal status in international law. Since international law recognizes the principle of sovereign equality of States, all sovereign Heads of States deserve similar international treatment, they being highest authority of the state. The legal status of Head of the State in international law falls under the Diplomatic law which is a branch of international law. As we know the Head of the State is regarded as the first diplomat of his State and he represents the will of people of his State before the international community and also represents his State before other governments and States apart from defending their rights and interests. The international custom too remains the main source of the legal status of the Head of the State. Some international conventions have dealt with the specific issues concerning the Head of the State. We know that customary law to a large extent is recognized as established provisions among the States.

Among the Conventions that dealt with provisions concerning the Head of the State under international law is Special Missions Convention, 1969, which identified the terms in detail in Article one Para (A) including official visits made by the Head of the State and also the missions headed by the Head of the State as representative of his State. Article (21) clause (11) stipulates that (Head of the State or Head of the government or foreign minister or their counterparts of higher status enjoy facilities, privileges and immunities under international law, whenever they head or participate in special mission proceedings).

The Vienna Convention of Law of Treaties, 1969, provides under Article 7(ii) that some persons can represent the State by virtue of their positions without any need to present authorization papers. This includes the Head of the State. The 1973 Convention for the Prevention and Prosecution of Crimes against Internationally Protected Persons, Article 1 (A), 2 (iii) provides for personal protection to the Head of State on international level. It is mandatory for the States to take necessary and appropriate measures to prevent attacks on Head of the state.

The 1975 Vienna Convention on Representation of the States in their relations with international organizations, the Article 5 (1) provides that (whenever a delegation is headed by the Head of State or any member of the body assigned to perform the duties of Head of the State according to the constitution of that particular State, he enjoys in host State or any third State all the facilities, privileges and immunities granted to Head of the State under international law in addition to what he is granted under this convention.

[17] The statement was delivered in Arabic. This is an unofficial translation done by the Secretariat.

This is why we find that there is a near unanimity in rules of international law and jurisprudence that Head of the State is its highest member in the international community, and he is qualified to act on behalf of the State and all his actions would be attributed to his State and this authority of the Head of State flows from the power of international law.

We come to this conclusion that international customary law and national laws of States have determined the legal status of Head of the State at the international level as a natural person to represent the legal position under international law.

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, the 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. Article 1 of International Legal Association's resolution issued in Paris in 2001 provided that the Head of State has to be respected in the territory of any foreign country. He cannot be arrested or detained. The authorities in the foreign country must treat him with appropriate respect and take all necessary steps and measures to prevent any aggression on his freedom.[18]

Besides the personal immunity granted to Head of the State, there is a near agreement in the jurisprudence that Head of the State present outside his State in his official capacity and known to the host state authorities, enjoys full criminal immunity making him exempted from criminal jurisdiction of the host State.[19] 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.

We conclude it this way that the immunity to Head of the State is not for him, rather it is for his State. The international and customary law and judicial precedents mandate that it must be respected and must not be violated, and it also cannot be waived off. Subsequently, the International Criminal Court created in accordance with the Rome Statute applies to all State Parties to the Convention and only to them. Some Countries that have ratified the Convention have openly withdrawn the immunity of their Head of the State. 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. Therefore, no country is allowed to take measures that violate the rights of the Head of the State as long as that country is not a 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.

Vice-President: I thank the Distinguished Delegate from Sudan for making his statement. Now I invite the delegate from the Republic of Korea to make his statement.

The Delegate of Republic of Korea: Thank you, Madam Vice-President. My delegation would like to briefly touch upon two of the agenda items before us at this Session.

[18] Rgd ip. Vol. 105, No.4 2002. P.1087.

[19] (Dr. Sadiq Abu Heef .. Diplomatic Law - Alexandria - Knowledge Center 1960).

With regard to the topic, *"Jus Cogens"*, my delegation is confident that the work of the ILC on this particular topic will contribute to the promotion of the progressive development of international law and its codification.

As the Special Rapporteur mentioned in ILC report, in paragraph 108, States have consistently invoked *jus cogens*, and the norm has been identified by international courts and tribunals, as well as regional and national courts. In this sense, my delegation would like to point out that, in order to identify *jus cogens*, a comparative analysis of State practice and judicial decisions is required.

Regarding the topic, "*Immunity of State Officials from Foreign Criminal Jurisdiction*", the study of the immunity of State officials from foreign criminal jurisdiction requires in-depth research on relevant State practices. Therefore, my delegation welcomes the Special Rapporteur's report, which includes the results of a deep and systematic survey of numerous instances of State practices in this field as reflected in treaties and domestic legislation, as well as in international and national case law.

My delegation believes that, apart from the legal perspective, the limitation of and exceptions to the immunity of State officials can be a sensitive political issue as well. We hope that the ILC will examine this issue with caution and prudence by taking into account the larger political implications. Thank you, Madame Vice-President.

Vice-President: I thank the Distinguished Delegate from Korea and now invite the delegate from the People's Republic of China to make his statement.

The Delegate of People's Republic of China: Madam President, the Chinese delegation would like to thank AALCO for organizing this Special Meeting, and thank the Secretariat for preparing the Report on Matters relating to the work of the ILC at its 68th Session. The 69th Session of the ILC is being held during this month and hence the reports of many topics are not available yet. The Chinese delegation will briefly reiterate and highlight a few key points on the following three topics, taking into account the discussion on the report of the ILC on the work of its 68th session at Sixth Committee of UN General Assembly last November.

With respect to the topic of "*Protection of the Atmosphere*", China believes that protection of the atmosphere is a common and current issue faced by the human being as well as a multifaceted one that involves politics, law and science. China is of the view that the adopted draft guidelines basically comply with the condition of understanding set by the Commission in 2013 and reflect fairly objectively the outcome of relevant studies on this issue. We suggest that the Commission takes into full account the special circumstances and real needs of the developing countries, fully realizes the complexity and sensitivity of this issue and respects the existing mechanisms. China also hopes 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 this topic.

Regarding the topic of "*Immunity of States Officials from Foreign Criminal Jurisdiction*", we note the highly complicated and sensitive issue of the exceptions to the immunity of States officials that was considered last year. China supports the conclusion that there is no exception in respect of immunity *ratione personae*. We also note that the three exceptions to immunity

ratione materiae as proposed by the Special Rapporteur are mostly evidenced by, as cited in the report, 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. It is open to discussion as to whether such evidences are convincing and are of relevance to this issue. China believes that, immunity is procedural in nature, and falls under an entirely different category of rules from the substantive rules that determine the lawfulness of a given act. As to whether the application of procedural rules should be precluded when there is a violation of substantive rules, the ICJ rendered negative answer in its judgement on the *Arrest Warrant* case and the case of *Jurisdictional Immunities of the State.* The immunity of Sates officials from criminal jurisdiction in foreign courts and that in international criminal judicial bodies are different issues. Therefore, it will be questionable to copy indiscriminately theories and practice of the latter when determining rules applicable to the former.

Last year, the Commission deliberated on the topic of *"Jus Cogens"* for the first time. China is of the view that, elements of J*us cogens* concern major interests of all States whose rights, obligations and responsibilities are directly affected. The deliberation on this topic should be strictly in line with the provision in Article 53 of the *1969 Vienna Convention on the Law of Treaties*. We suggest the Commission to clarify the implications of the basic element of J*us cogens* based on stock-taking of state practice and further elaborate on the relationship between J*us cogens* and the Charter of the United Nations as well as relevant resolutions of the Security Council. The work under this topic should focus on codifying existing laws rather than developing new rules. China notices that the three "core elements" of the *Jus cogens* concept as proposed by the Special Rapporteur are obviously distinct from the basic elements as defined in the Convention. Is there a need for adding new core elements? What is the basis for such additions? And what implications would they have? These are questions that deserve further considerations. In China's point of view, it is premature at this stage to list the rules of *Jus cogens*. The more recommendable approach would be to collect and study State practice in this regard, and on that basis, clarify the specific criteria of *Jus cogens* and then consider the necessity of a list as such.

Madam Vice President, this is the first year in the tenure of the present members of the Commission. China congratulates the Commission on its fruitful progress achieved during the past five years and looks forward to another five-year success. Now, 13 out of 34 of the present members of the ILC are from the Member States of AALCO. Chinese delegation believes that their work will contribute to providing more balanced and broader perspectives and making the views of Asian and African countries better reflected in the work of the Commission in terms of codification and development of international law.

There are active interactions between AALCO and the ILC. Over the years, the AALCO Annual Sessions has considered the topics of the ILC and maintained regular exchanges with the ILC. China supports AALCO in further strengthening its communication and cooperation with the ILC, voicing out the positions and concerns of Asian and African countries, promoting the codification and progressive development of international law, and contributing to the comprehensive and balanced development of International rule of law. Thank you, Madam President.

Vice-President: I thank the Distinguished Delegate from China and now invite the delegate from India to make his statement.

The Delegate of India: Thank you Madam Vice President. I congratulate the AALCO Secretariat for their brief study on this subject and thank the Secretary-General for introducing the agenda item. Taking into consideration the discussion on the work of the Commission, we propose to make some general comments on few select topics.

On the topic, *'Immunity of State Officials from Foreign Criminal Jurisdiction'*, we appreciate the progress made thus far in the Commission. We commend the Special Rapporteur, Professor Concepcion Escobar Hernandez for her fifth report on the topic. We note that the Commission could consider her Report rather preliminarily and decided to continue the debate in the next session of the Commission, as the report was available only in English and Spanish to the Commission. The Commission considered a single draft article 7 proposed by the Rapporteur on the question of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction. Given the normative implications of the phrase, 'limitations and exceptions', we agree with the methodology used by the Special Rapporteur and the usage of title of the draft Article 7 –Crimes in respect of which immunity does not apply.

In the draft Article, the approach adopted by the Special Rapporteur is consistent and systematic, based on the State practice as reflected in treaties and domestic legislation, as well as in international and national case law. The issues involved in the draft Article are highly complex and politically sensitive for the States and therefore, prudence and caution is needed to decide whether the Commission should focus on the codification aspect or progressive development of international law *(lex lata* or *lex ferenda*).

The International Court of Justice in the Arrest Warrant Case, expressed that there existed no customary law exception to the rule according immunity from criminal jurisdiction; and thus reaffirmed inviolability of incumbent Ministers for Foreign Affairs suspected of having committed war crimes or crimes against humanity. In the Jurisdictional Immunities of the State, the ICJ rejected such exceptions, although in the context of State immunity. We consider that the 'crimes of corruption' proposed in para 1 of sub para (b) of the draft article 7 needs to be supported with sufficient State practice convincing that its character would constitute a serious international crime, similar to that of the other international crimes listed therein. Further, 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.*

We look forward to the next Session of the Commission, when the Special Rapporteur would introduce procedural aspects of immunity of State officials from foreign criminal jurisdiction.

On the topic of *Jus Cogens,* we congratulate the Special Rapporteur, Mr. Dire Tladi for his first report on the topic. It is noted that the Commission considered the report without formally adopting it in this session. In the first report, the Special Rapporteur has proposed three draft conclusions: the scope of the entire set of draft conclusions; distinction between *jus cogens* and other rules of international law that may be modified, abrogated or derogated from by the agreement of State and the third sought to describe the general character of *jus cogens*.

We support the Special Rapporteur's view reiterating that the draft conclusions would be the appropriate outcome of the topic. Articles 53 and 64 of the Vienna Convention on the Law of Treaties provide the legal basis for acceptance and recognition of a norm by the international community of States. The second para of the draft conclusion 3 proposed by the Special Rapporteur reads: Norms of *jus cogens* protect the fundamental values of the international community, are hierarchically superior to other norms of international law and are universally applicable. The peremptory norms presumably lie superior at the hierarchy of norms requires further elaboration with sufficient study as there was conflicting views within the Commission.

We welcome the future work indicated by the Special Rapporteur, in particular to study the rules for identifying of norms of *jus cogens*, including the question of the sources of *jus cogens*, and also consider the relationship between *jus cogens* and non-derogation clauses in human rights treaties.

On the topic of *'Customary International Law'*, we would like to register our appreciation for the Special Rapporteur, Sir Michael Wood for his Fourth Report on the topic, 'Identification of customary international law' 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. The Commission, in addition to this report, also considered a memorandum by the Secretariat concerning the role of decisions by the national courts in the case law of international courts and tribunals for the purpose of determining the customary international law.

The resulting 16 draft Conclusions out of this process, reflect the valuable efforts of the Commission on this topic. We would like to comment on few of these draft conclusions. Draft Conclusion 4 (3) states that "Conduct of other actors" is not a practice that contributes to the formation, or expression of rules of customary international law, but may be relevant when assessing the practice of States or international organizations."

Commentary to this draft conclusion in paragraph 9 includes 'non-State armed groups' as one of such other actors along with NGOs, transnational corporations and private individuals and stipulates that the reaction of States to the conduct of non-State armed groups may be constitutive or expressive of customary international law. Our understanding, by reading both the draft conclusion and the commentary, is that the conduct of non-state armed groups is not at all constitutive or expressive of CIL.

We agree with draft Conclusion 8 that the "relevant practice must be general, meaning that it must be sufficiently widespread and representative as well as consistent". 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. We also agree with the draft Conclusion 9 that the general practice be accepted as law (*Opinio Juris)* means that the practice in question must be undertaken with a sense of legal right or obligation. Draft Conclusion 10, refers to government legal opinions as a form of evidence of acceptance as law. Although, we agree in principle in

terms of the value of these opinions, however, it may be difficult to identify them as many countries do not publish the legal opinions of their law officers.

Draft Conclusion 11 concerns the significance of treaties, especially widely ratified multilateral treaties, for the identification of customary international law. We are of the view that all treaty provisions are not equally relevant as evidence of rules of customary international law. 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.

Finally, we agree to the provision under draft Conclusion 12 that a resolution by an international organization or an intergovernmental conference cannot create a rule of customary international law.

On the topic of '*Provisional Application of Treaties'*, we welcome the fourth report of the Special Rapporteur, Ambassador Juan Manuel Gómez Robledo, on the topic 'provisional application of treaties'. The report continues the analysis of State practice, and considers 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. The report has also dealt with the topics in which States expressed interest during the debate in the 70th Session of the General Assembly.

It may be noted that the provisional application of a treaty will depend on the provisions of domestic law, including the manner of expressing consent. India being a dualistic State, treaty will not automatically form part of the domestic law; it applies only as a result of their acceptance by internal procedures. Thus 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.

On the topic '*Protection of the Environment in Relation to Armed Conflicts'*, we take note of the third report of the Special Rapporteur Marie G. Jacobsson, on the protection of the environment in relation to armed conflicts. The report *inter alia* deals with the post-conflict phase. We would like to state that the draft principles proposed under this topic should not be in conflict with the obligations arising from existing conventions. And also the work on this topic should not duplicate the efforts already undertaken in the existing regimes. Thank you Madam Vice-President.

Vice-President: I thank the Distinguished Delegate from India for his statement. Now I invite the delegate from Japan to make his statement.

The Delegate of Japan: Thank you Madam Vice-President. Regarding the topic of the "Protection of the Atmosphere" led by the Special Rapporteur Dr. Shinya Mursae, Japan acknowledged the importance of the topic to find out the common legal principles arising from the existing treaties related to the environment.

It is commendable that Draft Guideline 3 which stipulates an obligation to protect the atmosphere was provisionally adopted at the ILC session in 2016, which is one of the most important outcomes under this topic. We appreciate that the Commission undertook analysis and precise discussion of the differentiated obligations related to trans boundary atmospheric pollution, as well as obligations related to global atmospheric degradation. It seems to be appropriate to discuss the said two areas of obligation together in addressing climate change.

Japan recalls that the 3rd Preambular Paragraph of Draft Guidelines states that "the protection of the atmosphere from atmospheric pollution and atmospheric degradation is a pressing concern of the international community as a whole". We note that in the last year's Sixth Committee of the UN General Assembly, there were discussions about the concept of "the common concern of humankind" in the context of the protection of the atmosphere. Taking into consideration the fact that the Paris Agreement in 2015 recalled this concept in its preamble paragraph, Japan considers it appropriate for the ILC to reconsider this paragraph in future sessions and to update the discussions on this concept. Protection of atmospheric environment is a serious issue particularly for Asia and Africa. I thus hope that AALCO Member States will contribute to the discussion at the Sixth Committee. We look forward to fruitful outcome at the ILC in this matter as a result of its professional work.

Regarding the topic of *"Jus Cogens",* Japan welcomes the opening of the discussion at the last year's ILC session, with the submission of the first report by the Special Rapporteur Dr. Dire Tladi, which introduced core elements of the concept of *jus cogens.*

During the deliberation in the Sixth Committee last year, there were intensive discussions regarding whether the Commission should present an illustrative list of norms that have already acquired the status of *jus cogens*. Japan is aware of the difficulty of identifying these norms which might result in giving an inferior status to other important norms of international law. In this respect, Japan hopes that the Commission will carefully examine this issue in future sessions. We understood that the second report prepared by the Special Rapporteur will be deliberated in the ongoing Sixty-ninth session of the ILC. This year's ILC report especially focuses on the criteria for *Jus Cogens*. It is desirable that the ILC analyse in detail the practice of this concept and proceed to the elucidation of its substantial character.

With regard to the topic of "Immunity of State Officials from Foreign Criminal Jurisdiction", at the ILC session last year, the Special Rapporteur, Dr. Concepcion Escobar, presented in Draft Article 7, three limitations and exceptions to which the immunity of state officials from foreign criminal jurisdiction does not apply. These limitations are : (1)certain international crimes, (2) territorial tort exception, and (3) corruption.

Japan is of the view that the Special Rapporteur's report does 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. Therefore, Japan hopes that the ILC discuss further these three limitations and exceptions. Japan also considers that the relationship and fundamental differences between immunity *ratione personae* and immunity *ratione materiae* are not sufficiently analyzed, thus hopes that the further discussion will be held at the ILC. The law of immunity is fundamental for equality of state

sovereignty and stable inter-state relationships. Therefore, Japan considers it necessary to deal with the issue of limitations and exceptions to immunity with prudence.

On the issue of *the Cooperation between ILC and AALCO*, we would like to state that in order to provide better chance for ILC to contribute to the promotion of the progressive development of international law and its codification, views from the international community particularly voices from Asia and Africa should be duly considered. In this respect, AALCO can play a role to suggest possible new topics to be dealt with by ILC. Japan wishes that a constructive interaction between these two important organs will be further strengthened.

Vice-President: I thank the Distinguished Delegate from Japan for his statement. Now I invite the delegate from the Islamic Republic of Iran to make his statement.

The Delegate of Islamic Republic of Iran: Madam Vice-President, my delegation would like to thank the Secretariat for its report on matters relating to the work of the International Law Commission at its Sixty-Eighth Session contained in document AALCO/56/NAIROBI/ 2017/SD/S1. As from the topics on the Agenda of the Commission during its Sixty-Eighth Session, as advised by the Secretariat, we will limit our remarks on three of them, namely, "Protection of the Atmosphere", "Jus Cogens" and "Immunity of State Officials from Foreign Criminal Jurisdiction."

Madam Vice-President, as regards 'Protection of the Atmosphere', my delegation would like to thank Professor Shinya Murase, the Special Rapporteur, for his work on the topic. While we are mandated to debate on the Sixty-Eighth Session of the International Law Commission, the fourth report has been prepared by the Special Rapporteur and is currently under consideration at the Sixty-Ninth Session.

As we have noted since the adoption of the topic by the Commission, the topic of protection of the atmosphere is fraught with difficulties as it is tightly interwoven with political, technical and scientific considerations. In this regard, we welcome 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 (i.e. as stated in the report, law of the sea, international trade and investment law and international human rights law) and further to focus on implementation, compliance and dispute settlement issues. This is especially relevant taking into account the entry into force of the Paris Agreement in November 2016.

The Special Rapporteur's task was not, from the outset, aimed at neither filling all the existing gaps in the legal framework regulating protection of the atmosphere, nor was it supposed to provide a descriptive list of the existing principles of international environmental law. While it seems that in the work done so far, attempts have been made to strike a balance to that effect, the final outcome needs to properly reflect such a balance.

Madam Vice-President, on the topic of '*Jus Cogens'*, we welcome the preparation of the Second report by Professor Dire Tladi, the Special Rapporteur of the topic. The definition of *jus cogens* as provided in article 53 of the 1969 Vienna Convention on the Law of Treaties (VCLT) is ambiguous and therefore determination of the criteria for identification of norms of *jus cogens*

remains a difficult task. Since the adoption of the Convention, courts and tribunals such as Inter-American Court of Human Rights, European Court of Human Rights and the International Court of Justice have confirmed the peremptory nature of these norms adding to the list, prepared by the Commission from the outset, other norms such as prohibition of torture, a prohibition which has recently received ICJ's seal of approval by its judgment on 20 July 2012 in the case concerning Belgium against Senegal. The Court has attempted to justify characterization of this norm of *jus cogens* in paragraph 99 of its judgment. In view of the Court, such a prohibition relies on extended international practice and *opinio juris* of States. To support its decision, the Court names a few international instruments containing this prohibition, its quasi-universal introduction in the domestic legislations of States and the fact that its violation is regularly denounced at national and international forums. While the Special Rapporteur, in his report, has made reference to this paragraph on several occasions, due consideration must be given to the reaction of the international community with respect to violation of a norm of *jus cogens*, and this needs to be included in the draft conclusions.

As stated by my delegation during the Sixth Committee deliberations, we do not deem it wise for the Commission to draw up a list of norms of *jus cogens*; such a list could remain indecisive and could be "modified only by a subsequent norm of general international law having the same character" to use the terms of article 53 of the Vienna Convention on the Law of Treaties. We believe 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 the Law of Treaties, namely acceptation and recognition of the norm by the international community of States as a whole, and its non-derogability.

In this regard, the view of the International Court of Justice is noteworthy which, in its advisory opinion on the legality of threat or use of nuclear weapons rendered on 8 July 1996, stressed that "the question whether a norm is part of the *jus cogens* relates to the legal character of the norm" (Para. 83). In our view, norms which ensure and consolidate the international public order do have, undoubtedly, such a character. On the other hand, on the non-derogability of the norms of *jus cogens*, one may draw on recent jurisprudence of the International Court of Justice, namely its judgment of 13 February 2012 in the case concerning jurisdictional immunities of States (Germany vs Italy – Greece intervening), wherein the Court underlines that "A *jus cogens* rule is one from which no derogation is permitted" (para. 95). Also, in its advisory opinion on nuclear weapons, the Court called "fundamental intransgressible norms" certain norms of international humanitarian law such as distinction and prohibition of unnecessary suffering (para. 79).

On draft conclusion 7, putting aside the point that no definition is given by the Special Rapporteur to the phrase "international community of States as a whole", it is stated that acceptance and recognition of norms of *jus cogens* by the community of States as a whole, as well as the attitude of States, is relevant. The Special Rapporteur seems to have ignored the relevance of "principal legal systems of the world", as a criterion often used in universal qualification of legal elements as referred to in article 9 of the Statute of the International Court of Justice and article 8 of the Statute of International Law Commission to ensure fair geographical distribution. Hence, 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*.

Lastly, we hope that the Special Rapporteur will cover the consequences of breach of a *jus cogens* norm, particularly, in light of article 41 of the ILC's Draft Articles on State Responsibility for Internationally Wrongful Acts. A good number of situations have been created by a serious breach within the meaning of article 40 of the Draft Articles and many States have attempted to refrain from rendering aid or assistance in maintaining such situations in terms of article 41 of the Draft.

Madam Vice-President, turning to the topic of "*Immunity of State officials from Foreign Criminal Jurisdiction'*, my delegation commends the Special Rapporteur, Ms. Concepción Escobar Hernández for 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. We also thank the Commission and in particular the drafting Committee for the provisional adoption of articles 2, subparagraph (f), and 6 and the commentaries to the draft articles.

My delegation is of the view 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. Therefore, our understanding of "acts performed in an official capacity" consists of all acts comprising of functions by the State officials in their official capacity. In this regard, we believe that 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.

Furthermore, regarding crimes in respect of which immunity does not apply, distinction needs to be made between "crimes of international law" and "international crimes"; 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 and may therefore be included in the list. To sum up our remarks on this topic, we continue to follow the work of the Commission and look forward to the Special Rapporteur's further reports.

Madam Vice-President, before concluding its remarks, my delegation deems it imperative to highlight the important role that AALCO Member States are expected to play in the work of the ILC. The ILC is a highly technical forum with a highly technical mandate, i.e. codification and progressive development of international law. A more active role by AALCO Member States therein requires introduction of the most qualified jurists to gain membership thereto and to act as Special Rapporteurs. In this connection, however, the current election process of ILC members, seems to need a serious review. With these words, I conclude my statement and hope AALCO will have a louder voice in the work of the ILC. Thank you Madam President.

Vice-President: I thank the Distinguished Delegate from Iran for his statement. Now I invite the delegate from the VietNam to make his statement.

The Delegate of Socialist Republic of VietNam: Madam Vice President, our delegation expresses our thanks to the Secretariat of AALCO for its comprehensive report on the topics of the International Law Commission discussed at its Sixty-Eighth session. Viet Nam highly

appreciates the Commission for its dedication to the progressive development and codification of international law. My delegation would like to make comments on three topics.

On the topic of the "*Protection of the atmosphere",* at the outset we wish to extend our appreciation to Mr. Shinya Murase for his third report, which focuses on the obligations of States to mitigate atmospheric degradation and the requirement of due diligence and environmental impact assessment. Protection of the atmosphere is a pressing concern of States and the international community as a whole. Therefore, Viet Nam welcomes the works of the Commission to tackle this contemporary issue.

Viet Nam, as a developing country, recognizes the need to pay regards to the consideration of equity, in which special conditions and needs of developing countries should be taken into account when discussing the draft text. Such consideration is consistent with other international instruments that deal with the protection of the environment, such as the 1972 Stockholm Declaration, the 1992 Rio Declaration, and the 2015 Paris Agreement.

My delegation also recognizes the important obligation to protect the atmosphere through the effective prevention, reduction, or control of atmospheric pollution and degradation as stated under Guideline 3. Moreover, we underline 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. We note that the effective protection of the atmosphere relies heavily upon scientific knowledge. Therefore, we welcome and encourage 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. Thus, we are pleased to see this view reflected in Guideline 8.

On the topic of '*Immunity of State officials from Foreign Criminal Jurisdiction'***,** my delegation extends our gratitude to the Special Rapporteur, Ms. Concepción Escobar Hernández, for her fifth report to the Commission on this issue. On this topic, my delegation would like to make two brief observations.

First, immunity of State officials from criminal jurisdiction originates from customary international law. Therefore it is our view that the codification of the rules in this matter needs to pay due regards to the principles of sovereign equality, non-intervention into the domestic affairs of States, as well as the maintenance of international peace and security, with an aim to ensuring the balance between the benefits of granting immunity to State officials and the need to address impunity. The drafting of the articles need to ensure the mentioned principles and reflect the codification of established norms.

Second, we believe that the exceptions to criminal jurisdiction warrant further debate. In the course of this study, it will be necessary to clarify the concept of "acts performed in an official capacity". It is ill-advised to attach the criminal nature of an act to the representative nature of such act, as in practice, the criminality of an act does not affect or determine whether an act is performed in an official capacity. Moreover, the view that international crimes should not be considered as acts performed in an official capacity should be carefully considered, and greater clarity should be given to the crimes that constitute "international crimes". We take note of the decision of the ICJ in the *Arrest Warrant* case, in which only serious international crimes are not

considered as acts performed in an official capacity. There is a distinction to be made between the concept of "international crimes" and "serious international crimes", where the former cover a broader spectrum of criminal acts.

Regarding the topic on *'Jus Cogens'*, my delegation would first like to thank Mr. Dire Tladi for his extensive work in delivering the first report on *Jus Cogens*. Peremptory norms play an important role in international law and is recognized under the 1969 Vienna Convention on the Law of Treaties as well as domestic legislations of many States. The Vietnamese Law on Treaties which has been adopted earlier this year also recognizes *Jus cogens* as a principle to be adhered to in the course of negotiating and entering into international treaties. However, to date, it remains unclear on the definition, constituents, and development of such norms. We therefore commend the efforts of the Commission in addressing these issues.

With regards to the draft conclusions, we take note and are concerned of the inconsistencies presented in paragraph 2 of draft conclusion 2 and paragraph 2 of draft conclusion 3. In particular, the former states that peremptory norms are the exception to rules of international law that may be modified, derogated from or abrogated by agreement of States (*jus dispositivum*), whereas according to the latter, *Jus cogens* is considered hierarchically superior to other norms of international law. This in our view causes confusions as to the relationship between the two types of norms in questions. Thus, we suggest that further study be undertaken in order to clarify this matter.

We also encourage further studies by the International Law Commission to clarify the existence of regional *Jus cogens* and the effect of persistent objection in regards to *Jus cogens*. Thank you very much for your attention.

Vice-President: Thank you VietNam. With that we come to the end of the statements on this agenda item of Half-Day Special Meeting on Selected Items on the Agenda of the International Law Commission.

The Meeting was thereafter adjourned.