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

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His Excellency Mr. Liu Zhenmin, Vice-Minister of Foreign Affairs of the People's Republic of China and the President of the Fifty-Fourth Session of AALCO in the Chair

Mr. President: Good Morning to you all. Dear Delegates, Colleagues, I welcome you all to this important Half-Day Special Meeting on the Selected Item on the Agenda of the International Law Commission. Let me start by acknowledging the presence of three distinguished members of the International Law Commission, namely Dr. Hussein Hassouna from Egypt, Prof. Shinya Murase from Japan and Mr. Narinder Singh from India. These three distinguished members of the ILC have been serving the Commission for years and have had a very good cooperation with AALCO. They are here representing the ILC and they will have their own presentations. We have to cover a lot of ground and let me give the floor to the Secretary-General of AALCO to make his introductory remarks on this agenda item. Mr. Secretary-General, you have the floor.

Prof. Dr. Rahmat Mohamad, the Secretary-General of AALCO: Thank you, Mr. President. Excellencies, Distinguished Delegates and Ladies and Gentlemen, at the outset, I would like to join H.E. the President in acknowledging the presence of three eminent persons of the ILC, Dr. Hussein Hassouna, Prof. Shinya Murase and Mr. Narinder Singh. It is an honour and privilege that we have their presence today to discuss the work of ILC. It is my pleasure to invite you all to the Special Half-Day Meeting on the topic "Selected Items of the International Law Commission" held as part of the deliberations at the Fifty-Fourth Annual Session of AALCO.

The ILC and AALCO share a longstanding and mutually beneficial relationship. One of the functions assigned to AALCO under its Statutes is to study the subjects which are under the consideration of the ILC and thereafter forward the views of its Member States to the Commission. Fulfillment of this mandate over the years has helped to forge closer relationship between the two organizations. It has also become customary for AALCO and the ILC to be represented during each other's sessions. Indeed, the need on the part of the Members of ILC, who play an active and constructive role in the work of the Commission, to be present at our Annual Sessions is critical. This is due to the fact that they bring with themselves a great deal of expertise and experience that could be utilized by our Member States.[1]

Briefly, the deliberations at the sixty-sixth session of the Commission focused on ***eight*** topics. These were: *Expulsion of aliens*; *the obligation to extradite or prosecute* (*aut dedere aut judicare*); *Protection of persons in the event of disasters*; *Immunity of State officials from foreign*

[1] In view of the importance that the agenda items of ILC hold for the Asian-African States, the Fiftieth Annual Session of AALCO held at Colombo, Sri Lanka in 2011 had mandated that the future Annual Sessions of AALCO should devote more time for deliberating on the agenda items relating to the work of ILC. Due to this mandate, a Half-Day Special Meeting on *"Selected Items on the Agenda of the International Law Commission"* has been held every year since 2011.

criminal jurisdiction; *Subsequent Agreements and Subsequent Practice in relation to the interpretation of treaties*; *Identification of Customary International Law*; *Protection of Environment in relation to armed conflicts*, and *Protection of Atmosphere.*

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

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

As regards the topic **"Subsequent Agreements and Subsequent Practice in relation to Treaty Interpretation",** its Special Rapporteur Mr. Georg Nolte presented the Second Report that covers the following aspects:

- The identification of subsequent agreements and subsequent practice (II.);
- Possible effects of subsequent agreements and subsequent practice in the interpretation of treaties (III.);
- The form and value of subsequent practice under article 31 (3) (b) (IV);
- The conditions for an "agreement" of the parties regarding the interpretation of a treaty under article 31 (3) (V);
- Decisions adopted within the framework of Conferences of State Parties (VI);
- And the possible scope for interpretation by subsequent agreements and subsequent practice (VII).

As regards the topic, "**Protection of the Environment in relation to Armed Conflicts",** the Preliminary Report of the Special Rapporteur, Ms. Marie G. Jacobsson was presented. Within the Report, the Special Rapporteur includes discussion on the purpose of the report, as well as of the scope, methodology and outcome of the topic, the use of terms, and the sources and others materials to be consulted. Additionally, the Special Rapporteur makes consideration of the

relationship with other topics addressed by the Commission and of environmental principles and concepts, human rights and the environment, as well as of the future programme of work.

As regards the topic, "**Identification of Customary International Law",** the Special Rapporteur Mr. Michael Wood, had presented his second Report. In this, he discusses the elements of the "two-element" approach to the creation of customary international law, i.e. the objective element, which deals with the general practice of States (State practice), and the subjective element, which the Special Rapporteur refers to as "acceptance as law" as an alternative term to the (in his words) more commonly used but often misunderstood term *opinio juris*. As an outcome of the Report, he suggested a few Draft Conclusions which incorporate his research into guidelines by which these two elements of customary international law may be identified and assessed. There is much to look forward to his Third Report (to be submitted in 2016) that will be on the effect of treaties on the formation or expression of customary international law.

Be that as it may, it needs to be underlined here that today's Special meeting would focus on three topics: *Immunity of State officials from foreign criminal jurisdiction; Expulsion of Aliens; and Protection of Atmosphere*.

As regards the topic, "**Immunity of State Officials from Foreign Criminal Jurisdiction"** the Special Rapporteur submitted his Third Report that marks the starting point for the consideration of the normative elements of immunity *ratione materiae*, analysing in particular the concept of an "official". The concept of an "official" is particularly relevant to the topic "Immunity of State officials from foreign criminal jurisdiction", because it determines the subjective scope of the topic.

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

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

Mr. President, I also wish to underline here specifically that the topic of "Identification of Customary International Law" has been a matter of great concern to developing countries. That

the voice of Asia and Africa was blocked out in the formation of international law traditionally is well-known. In order to make sure that this does not occur again in the context of ILC having taken it up on its agenda, the Secretariat of AALCO had proposed and got the nodding of the 53rd Annual Session to constitute an "Informal Expert Group on Customary International Law' that is chaired by Prof. Sufian Jusoh and consists of jurists from the Asian-African region who participate in their individual capacity[2].

It is pertinent to inform our distinguished delegates that this Informal Expert Group met for the second time on 24th March 2015 in Malaysia and discussed numerous issues flowing from the report of the AALCO Special Rapporteur Professor Sienho Yee. The viewpoints and comments emerged from this meeting formed a set of recommendations proposed by the Informal Expert Group. Member States are encouraged to make comments on this report which later will be duly transferred by the Secretariat to ILC for its consideration and reference.

With those words, let me welcome all the Panellists to this Special Meeting and look forward to an in-depth deliberations on these issues identified above.

Thank you.

The President: I thank the Secretary-General for his presentation on the work of the ILC. Before I give the floor to our distinguished panelist, I would like to appreciate the Secretary-General for his presentation. There has been very good tradition built over the years that the Secretary-General of AALCO makes an address before the ILC highlighting the viewpoints of AALCO Member States on various agenda items of ILC every year the Commission meets in Geneva. We have also invited the distinguished members of the ILC to the Annual Sessions of AALCO to present their views with us. This is a very good tradition and AALCO Member States should continue to support the Secretary-General for his representation of AALCO before the International Law Commission.

Second, I think our distinguished Members of ILC will speak today in their personal capacity and not as the representatives of ILC. But they are from our region, they have had good communication between AALCO and ILC and definitely they will share some of their insights with us.

Third, in view of the time constraint, we should combine the discussions on the topics of ILC with the report of the Informal Group on Customary International Law together. Delegations who are interested to make their statements, you are encouraged to combine your statements on both issues in one single statement. For this you need to be prepared.

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[2] Essentially the Expert Group is envisaged to perform two functions: firstly, it would conduct in-depth deliberations on the various aspects of the topic (along with the Member States of AALCO) with a view to identify the areas and practices where the developing countries could make contributions; secondly, the findings of these deliberations (in the form of the voice of Asia-Africa in relation to this topic) would be carried forward to the ILC with a view to assist the work of the Commission.

Now, on the agenda of the Commission there are eight topics, but due to time constraints it is difficult for us to cover all the eight topics from ILC. So today's discussions would focus on three selected items. They are expulsion of aliens, protection of atmosphere, and immunity of State officials. I encourage the Members of AALCO to focus on three topics. Of course if you have comments on other issues you are welcome to share them, but please be brief. With these words, let me first invite H.E. Dr. Hussien Hassouna , member of ILC from Egypt to make his presentation on the topic 'Expulsion of Aliens'. You have the floor.

Dr. Hussein Hassouna, Member of the International Law Commission: Excellencies, Distinguished Delegates, Ladies and Gentlemen, At the outset, I wish to express my thanks and appreciation to the government of the People's Republic of China for hosting the Fifty-Fourth Annual Session of AALCO and for the hospitality extended to all the participants in the meeting. We may all recall that China has always strongly supported the works of AALCO and has significantly contributed to its activities and development ever since it became a full-fledged member of the Organization in 1983. In addition, the People's Republic of China has been an active member of the UN International Law Commission and has played an important role in the progressive development of international law and its codification.

Mr. Chairman, I would also like to express my support and appreciation to Prof. Dr. Rahmat Mohamad, the competent and dynamic Secretary-General of AALCO, who has continuously worked towards promoting the role of the Organization and strengthening its cooperation with the UN International Law Commission. The topic Expulsion of Aliens has nowadays assumed a major importance in the relations of States. As a result of globalization, we have witnessed the migration of people from one country to another on a large scale. The spreading of conflicts has also led to the displacement of a huge number of populations. Many countries have adopted harsh laws on immigrations and others have often resorted to much criticized measures of expulsion of aliens. All this has raised serious issues of policy and law.

I just want to start with a short historical background of the topic. At its fifty-sixth session in 2004, the UN International Law Commission decided to include the topic in its programme of work and to appoint Mr. Maurice Kamto of Cameroon as the Special Rapporteur for the topic. From 2005 to 2014 the Commission received and considered nine reports by the Special Rapporteur. On 6 June 2014, the Commission adopted the entire set of 31 draft articles on second reading, and on 5 August 2014, the Commission decided in accordance with its Statute to recommend to the UN General Assembly the following:

(a) To take note of the draft articles on the expulsion of aliens in a resolution, to annex the articles to the resolution, and to encourage their widest possible dissemination.
(b) To consider, at the later stage, the elaboration of a Convention on the basis of the draft articles.

Let me briefly describe the general approach of the ILC on the draft articles. Although the expulsion of aliens is a sovereign right of the State it brings into play the rights of an alien subject to expulsion and the rights of the expelling State in relation to the State of destination of the person expelled. The subject matter thus does not fall outside international law. State practice on various aspects of the expulsion of aliens has been evolving at least since the nineteenth

century. Several international treaties also contain provisions concerning one or another aspect of this topic. The applicable international case-law has been accumulating since the mid-nineteenth century and has in fact facilitated the codification of various aspects of international law. This basis in case-law has recently been reinforced by a judgment of the International Court of Justice that clarifies the relevant law on various points. This is in the case of Ahmadou Sadio Diallo in Republic of Guinea against the Democratic Republic of the Congo, in 2010.

Nevertheless, the entire subject area does not have a foundation in customary international law or in the provisions of international conventions of a universal nature. On certain aspects, practice is still limited, although it does point to trends permitting some prudent developments of the rules of international law in this domain, this is why the present draft articles involve both the codification and the progressive development of fundamental rules on the expulsion of aliens.

I will try to give a short analysis of the Draft Articles now. The draft articles are divided into five parts. Part One deals with the general framework. Part Two with the cases of prohibited expulsion. Part Three with protection of the rights of aliens subject to expulsion. Part Four with procedural rules. Part Five with the legal consequences of expulsion.

Concerning the general framework, according to Article 1 delimiting their scope, the draft articles apply to the expulsion by a State of aliens present in its territory including both aliens lawfully present and those unlawfully present. However, they do not apply to aliens enjoying privileges and immunities under international law. Under Article 2, "expulsion" means a formal act or conduct attributable to a State by which an alien is compelled to leave the territory of that State. It does not include extradition to another State, surrender to an international criminal court or tribunal, or the non-admission of an alien to a State.

According to Article 3, a State has the right to expel an alien from its territory. This is an inherent right of the State, flowing from its sovereignty. However the exercise of this right is regulated by the present draft articles, without prejudice to other applicable rules of international law, in particular those relating to human rights. The specific mention of human rights is justified by the importance that respect for human rights assumes in the context of expulsion. Among the "other applicable rules of international law" to which a State's exercise of its right to expel aliens is subject, we may mention the prohibitions against arbitrariness, to abuse of rights and denial of justice. Other applicable rules also include rules in human rights instruments concerning derogation in times of emergency, for example where there is a public emergency threatening the life of the nation. Under Article 4, an alien may be expelled only in pursuance of a decision reached in accordance with law. That requirement is well established in international human rights law, both universal and regional. In its judgment of 30 November 2010 in the case concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), the International Court of Justice confirmed the requirement for conformity with law as a condition for the lawfulness of an expulsion under international law.

Part Two of the draft articles refers to cases of prohibited expulsion. Article 6 states that a State shall not expel a refugee lawfully in its territory save on grounds of national security or public order. It shall also not expel him or her, to a territory where his life or freedom would be threatened on account of race, religion, nationality, political opinion, unless he is a danger to the

security of the country in which he is. Article 7 states that a State shall not expel a stateless person lawfully in its territory save on grounds of national security or public order.

Article 8 states that a State shall not make its national an alien, by deprivation of nationality, for the sole purpose of expelling him or her. Article 9 states that the collective expulsion of aliens is prohibited. This is without prejudice to the rules of international law applicable to the expulsion of aliens in the event of an armed conflict involving the expelling State. Article 10 prohibits any form of disguised expulsion of an alien, such as supporting acts by persons intending to provoke his departure. Article 11 prohibits the expulsion of an alien for the purpose of confiscating his assets. Article 12 prohibits that a State resorts to the expulsion of an alien in order to circumvent an ongoing extradition procedure.

Part Three of the draft articles deals with the Protection of the Rights of Aliens subject to expulsion. Article 13 refers to the obligation to respect the human dignity and human rights of aliens subject to expulsion. Article 14 states that the expelling State shall respect the rights of the alien without discrimination of any kind on grounds such as race, sex, or religion. Article 15 states that vulnerable persons, like children or older persons shall be treated and protected with due regard for their vulnerabilities. Article 16 refers to life of an alien subject to expulsion. Article 17 states that the expelling State shall not subject the alien to torture or to cruel, inhuman or degrading treatment or punishment. Article 18 states that the expelling State shall respect the right to family life of an alien subject to expulsion. Article 19 states that the detention of an alien for the purpose of expulsion shall not be arbitrary nor punitive in nature. Article 20 states that the expelling State shall take appropriate measure to protect the property of the alien.

With regard to the protection of an alien subject to expulsion in relation to the State of destination, Article 21 states that the expelling State shall facilitate the voluntary departure of the alien, and give him a reasonable period of time to prepare for departure. Article 22 states that the alien shall be expelled to his State of nationality or any other State that has the obligation to receive him or is willing to accept him. Article 23 states that the alien shall not be expelled to a State where his life would be threatened. Article 24 states that the alien shall not be expelled to a State where he may be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Article 25 states that the transit State shall protect the human rights of an alien subject to expulsion.

Part Four of the draft articles deals with Specific Procedural Rules. Article 26 refers to the procedural rights of aliens subject to expulsion who enjoy *inter alia,* the right to receive notice of the expulsion decision, the right to challenge that decision, the right to seek consular assistance (the State must inform the alien of the right: ICJ in Mexican Nationals case 2004, and Ahmadou Sadio Diallo case 2010). Article 27 states that an appeal lodged by an alien lawfully present shall have a suspensive effect on the expulsion decision when there is a risk of irreversible harm. Article 28 refers to the right of an alien to international procedures for individual recourse.

Part Five of the draft articles deals with the Legal Consequences of Expulsion. Article 29 states that an alien lawfully present and expelled shall have the right to be readmitted to the expelling State if the expulsion was unlawful save where his return constitutes a threat to national security or public order. Article 30 provides for the international responsibility of the expelling State in

cases of unlawful expulsion. The question of separation for internationally wrongful acts related to expulsion was addressed by the ICJ in its judgment of 2010 in the Ahamdou Sadio Diallo case (compensation of the Democratic Republic of Congo to the Republic of Guinea). Article 31 states that the State of nationality of an alien subject to expulsion may exercise diplomatic protection in respect of that alien.

Let me briefly turn to the debate on the Draft Articles held at the UN General Assembly. The topic of "Expulsion of Aliens" was debated in the General Assembly Sixth Committee during its review of the ILC's Report in October 2014. While several delegations welcomed the text of the Draft Articles, many voiced concerns with specific provisions, and more broadly, with the progressive development of law that the ILC had seemed to undertake. Western States in particular claimed that the draft articles were not merely a codification of State practice, but went beyond currently applicable rules of international law. They also stated that the draft articles attempted to codify a set of rules in an area wherein States already had well-developed and long-standing regulations. They further claimed that the draft articles did not strike the proper balance between the protection of aliens and the State's prerogative responsibility and ability to control admission to its territory and enforce immigration laws. As a result, those States declared that they were unable to support the ILC's recommendation to the General Assembly. In absence of consensus among Member States on that issue, the adoption of a General Assembly Resolution on the subject was postponed to its next session in 2015.

Mr. Chairman, let me now briefly evaluate the General Assembly debates. The debate that took place on this topic in the Sixth Committee of the General Assembly reflected a divergence of views among the various delegations, although there was general agreement as to the major importance of the subject in the relations of states. It seems that those states who objected to the draft articles were mainly motivated by their concern that some aspects of those legal rules might affect their national policies and immigration laws, as well as their security regulations.

The ILC was well aware of these concerns when it formulated a number of articles containing derogations from the general rules on grounds of national security or public order. In fact, the Commission has endeavoured to prepare a set of draft articles that strike a balance between the sovereign rights of States and the rights of aliens subject to expulsion. This process involved both the codification of established State practice and the progressive development of fundamental rules on the expulsion of aliens. It was in conformity with the Statute of the ILC that provides in Article 1 that the ILC shall have for its object the promotion of the progressive development of international law and its codification. It is also worth noting that the draft articles on this topic were adopted by consensus in the Commission, thereby reflecting the agreement of all 34 independent expert members of the Commission and representing the different regional groups in the United Nations.

Aware of the complexity of the topic, the Commission has only recommended to the General Assembly to take note of the draft articles and to brief them to the attention of Governments and encourage their dissemination. It will be prerogative of the United Nations member states to decide at a later stage whether to adopt these draft articles as Guiding Principles on the subject or to proceed with the elaboration of an international convention on the basis of the articles.

It is my sincere hope that when the topic will once more be discussed at the seventy-second session of the General Assembly in November this year, a consensus will emerge on that subject, with the active participation of AALCO Member States.

I thank you Mr. Chairman.

The President: I thank Dr. Hussein Hassouna for his statement. Now I have the honour to invite Prof. Shinya Murase the Special Rapporteur on the topic of Protection of Atmosphere to deliver his presentation to us.

Prof. Shinya Murase, Member of the International Law Commission: Thank you, Mr. Chairman. Excellences, Distinguished Delegates, Ladies and Gentlemen, we have been very fortunate to have Prof. Dr. Rahmat Mohamad as AALCO's Secretary-General, we are all grateful for his leadership. The cooperation between AALCO and ILC has substantially improved in the last seven years with the tremendous efforts that the Secretary-General has made. We are very grateful to Dr. Mohamad.

Since I already spoke on my First Report at the AALCO session in Tehran last September, today, I will speak on my Second Report, in advance of my presentation at the International Law Commission (ILC) next month. I have asked the Secretariat to distribute my Second Report on the Protection of the Atmosphere (A/CN.4/681), which has been uploaded on the ILC website since last week. The draft guidelines that I have proposed have also been distributed, and I hope that everybody has a copy.

I have been teaching in Beijing since last September, in the course of my preparation of this Second Report, I was greatly assisted by the professors and graduate students of the Law School of China Youth University of Political Studies (CYU). I have greatly benefited from the Study Group on the 'Protection of the Atmosphere' that was so kindly set up at Peking University Law School for my work. I had the privilege to address the Chinese Academy of Social Sciences on this topic in November last year, and I was delighted to have received the enthusiastic support of the Academy's Forum of International Law. There is obviously strong interest in the protection of the atmosphere in China.

We had an extremely lively discussion on this topic at the Sixth Committee of the General Assembly last October. There were more than 28 States that commented on this topic at the Sixth Committee, including the representative of Asian and African States namely, Algeria, China, India, Indonesia, Japan, Malaysia, Islamic Republic of Iran, Republic of Korea, and Vietnam. I was particularly encouraged by the thoughtful and detailed statements made by Mr. Gharibi of Iran, Mr. Xu Hong of China, Mr. Bowoleksono of Indonesia and Mr. Wan Mohd Asnur Wan Jantan of Malaysia. I carefully reviewed all the statements made at the Sixth Committee, and based on the feedback that was received and further review and clarification over the past year, I have revised the draft guidelines in my Second Report.

I have submitted 5 draft guidelines this year and would like to explain these guidelines briefly. The first two guidelines are general guidelines addressing the definition and the scope of the topic.

Draft guidelines 1 on the use of terms:

(a) "Atmosphere" means the envelope of gases surrounding the Earth, within which the transport and dispersion of degrading substances occurs.

Based on some additional scientific research feedback and a desire to be clearer and more precise, I made a few changes to paragraph (a). This is a "working definition" for this particular project. It addresses two factors of the atmosphere, substantive and functional. The substantive definition of the atmosphere is that it is "the envelope of gases surrounding the Earth" and the functional definition refers to its "transport and dispersion of degrading substances".

In the Second Report, I have added two other definitional guidelines, one on "air pollution" and the other on "atmospheric degradation".

(b) "Air pollution" means the introduction by human activities, directly or indirectly, of substance or energy into the atmosphere resulting in deleterious effects on human life and health and the Earth's natural environment.

This definition focuses on the "introduction of substances into the atmosphere" and is in line with Article 1 of the Convention on Long-Range Transboundary Air Pollution (LATAP), which is widely referenced in relevant conventions and literature. In some cases, air pollution is defined broadly encompassing other forms of atmospheric degradation, but we will adopt a narrow definition in our draft guideline.

Some members of the ILC last year questioned the insertion of the word "energy" in the draft guideline. As I mentioned in my summation, I consider it important to refer to "energy", along with substances, in the definition of air pollution. It should be noted that the UNCLOS refers to "energy" when defining pollution in Article 1, paragraph 1(4). In light of the 2011 Fukushima nuclear plant disaster, I believe that we should not ignore the serious problem of radioactive emissions as well as the problems of heat and light introduced into the atmosphere, and therefore I consider the general reference to "energy" as necessary and appropriate. Let me come to Article 1 (c) that says:

(c) "Atmospheric degradation" includes air pollution, stratospheric ozone depletion, climate change and any other alterations of the atmospheric conditions resulting in significant adverse effects to human life and health and the Earth's natural environment.

As I explained a moment ago, we have adopted a narrow definition of air pollution in line with the existing conventions, that is, the introduction of substances and energy into the atmosphere.

Thus, taking the above limitation to the definition of "air pollution" into account, I propose to employ a broader concept of "atmospheric degradation" to cover air pollution and other alterations of atmospheric conditions such as climate change and ozone depletion in guideline 1(c).

Now, I would like to move on to draft guideline 2 on scope.

(a) The present draft guidelines address human activities that directly or indirectly introduce deleterious substances or energy into the atmosphere or alter the composition of the

atmosphere, and that have or are likely to have significant adverse effects on human life and health and the Earth's natural environment.

Paragraph (a) addresses the substantive scope of this project. First, it makes clear that this topic addresses "human activities", excluding the harm caused by natural phenomena such as volcanic eruptions and desert sands. The formulation of this paragraph is in line with the previous ILC Article on Prevention of Transboundary Harm.

(b) The present draft guidelines refer to the basic principles relating to the protection of the atmosphere as well as to their inter-relationship with other relevant fields of international law.

Paragraph (b) indicates the contents of the whole draft guidelines. I added the words "with other relevant fields of international law" after the word "inter-relationship".

(c) Nothing in the present draft guidelines is intended to affect the legal status of airspace under applicable international law.

Paragraph (c) is a saving clause regarding "airspace". As I have stressed repeatedly, airspace and atmosphere are two entirely different concepts in international law. While airspace is a static and area-based institution over which the State has "complete and exclusive sovereignty", the atmosphere is a dynamic and fluctuating substance that constantly moves around the Earth and across national boundaries. The latter is invisible, intangible and non-separable, rendering it unable to be subjected to State sovereignty, jurisdiction or control.

We had a lively discussion on "common concern" last year, in the Commission as well as at the Sixth Committee, on the basis of which I am presenting a new version as draft guideline 3, which reads as follows:

Draft guideline 3: Common concern of humankind

The atmosphere is a natural resource essential for sustaining life on Earth, human health and welfare, and aquatic and terrestrial ecosystem, and hence the degradation of the atmospheric condition is a common concern of humankind.

We had a lively discussion on the concept last year in the Commission as well as in the sixth Committee. On the basis of those discussions I present a new version of this concept of common concern. I would like to stress that the concept of common concern of humankind is well established in treaty practice. The 1992 UNFCCC that acknowledges that "change in the Earth's climate and its adverse effects are a common concern of humankind". Likewise the preamble to the 1992 Biodiversity Convention provides that "the conservation of biological diversity is a common concern of humankind". The 1994 Desertification Convention adopted a phrase similar to common concern in its preamble. These are among the conventions that enjoy universal acceptance, ratified by more than 195 States, in which virtually all States agreed that there was a strong need for international community's collective response to tackle those global problems.

I believe it justified to employ the notion of common concern specifically in the transboundary context as well, based on relevant contemporary treaty practice. The 2011 Stockholm Convention on Persistent Organic Pollutants (POPs), and the 2013 Minamata Convention on

Mercury provides for terms or ideas similar to common concern. The 2012 Gothenburg Protocol to the 1979 UNECE LRTAP Convention addresses the linkage between transboundary air pollution and climate change, thus warranting application of the concept of common concern both to transboundary and global issues. Common concern is no longer a mere soft-law concept: it is sufficiently well established as a hard-law institution for the protection of the atmosphere, as I have enumerated these issues in paragraphs 30 to 32 of my Second Report.

The principle of common concern does not create specific substantive obligations of States to protect the atmosphere. However, it certainly supplements the creation of two general obligations: one is the general obligation of States to protect the atmosphere, and the other the general obligation of States to cooperate with each other for its protection, which I will address next.

Draft guideline 4: General obligation of States to protect the atmosphere

States have the obligation to protect the atmosphere.

This draft guideline is in line with Article 192 of the UNCLOS, which provides that "States have the obligation to protect and preserve the marine environment". I submit that the same general obligation is applicable with regard to the protection of the atmosphere. This general obligation is characterized as an obligation *erga omnes,* and I discuss in detail the meaning and function of the term obligation *erga omnes* in paragraphs 41 to 51 of my Second Report.

Now, I would like to come to the final Draft guideline that also flows from the concept of common concern of humankind, that is, the principle of international cooperation.

Draft guideline 5: International cooperation

(a) States have the obligation to cooperate with each other and with relevant international organizations in good faith for the protection of the atmosphere.
(b) States are encouraged to cooperate in further enhancing scientific knowledge relating to the causes and impacts of atmospheric degradation. Cooperation could include exchange of information and joint monitoring.

As I mentioned, the work of the Commission on this topic seeks to establish a cooperative framework for atmospheric protection on the basis of common concern of humankind, instead of seeking to mold "shame and blame" matrices under a liability regime. International cooperation is the core of this project.

I have reviewed the treaty practice, global and regional, as well as previous ILC Articles, relating to international cooperation. I have also reviewed recent judicial decisions of the International Court of Justices, and focused on the 2010 *Pulp Mills* case between Argentina and Uruguay and the 2014 *Whaling in the Antarctic* case between Australia and Japan, with New Zealand intervening.

Finally, I touched on the principle of "good faith", which lies at the heart of the international law of cooperation. In this regard, the 1973 judgment of *Nuclear Tests* cases and the 1980 *WHO-Egypt* advisory opinion are particularly important.

Thus, in this Second Report, I have presented the revised general draft guidelines on the definition and scope of the project as well as three additional draft guidelines on the basic principles for the protection of the atmosphere. These three basic principles: common concern of humankind, general obligation of States, and international cooperation are fundamentally interconnected, forming a "trinity" for the protection of the atmosphere. It is my hope that they will be favourably considered by the Commission and the Sixth Committee later this year.

Although our term as members of the Commission will expire next year, I was asked by the Commission members to give a "future plan or work" on this topic beyond the current quinquennium. My Third Report in 2016 will deal with the remaining basic principles, *Sic utere tuo*, Sustainable development, Equity and Vulnerable States. My Fourth Report in 2017, if am re-elected to the Commission, will deal with "Prevention and Precaution". The Fifth Report in 2018 will consider "Inter-relationship" between the law of the atmosphere with other fields of international law such as the law of the sea, international trade law and human rights law. The Sixth and Final Report in 2019, if "I am still alive", will cover "Compliance and Dispute Settlement". This is the outline and thank you for your kind attention.

The President: I thank Prof. Shinya Murase for his statement on the topic of Protection of Atmosphere. Now, I have the honour to invite Mr. Narinder Singh to present his statements on Immunity of State Officials from Foreign Criminal Jurisdiction.

Mr. Narinder Singh, Member of the International Law Commission: Mr. President, I would like to join Ambassador Hussein Hassouna and Prof. Shinya Murase in thanking the Secretary-General Prof. Rahmat Mohamad for his contribution to the cooperation between AALCO and ILC and also for inviting us here for this Special Meeting on the work of ILC on selected topics.

Mr. President, the topic on which I have been asked to speak is 'Immunity of State Officials from Foreign Criminal Jurisdiction'. This topic was included in the work programme of ILC at its fifty-ninth session (2007) and the ILC decided to appoint Mr. Roman A. Kolodkin as its Special Rapporteur. The Special Rapporteur submitted three reports. The Commission received and considered the preliminary report at its sixtieth session (2008) and the second and third report at its sixty-third session (2011). The Commission was unable to consider the topic (due to lack of time) at its sixty-first session (2009) and its sixty-second session (2010).

The preliminary report briefly outlined the breadth of prior consideration, by the Commission and the Institute of International Law, of the question of immunity of State officials from foreign jurisdiction as well as the range and scope of issues proposed for consideration by the Commission, in addition to possible formulation of future instruments. The Commission held a debate on the basis of this report, which covered key legal questions to be considered when defining the scope of the topic, including the officials to be covered, the nature of acts to be covered and the question of possible exceptions.

The second report reviewed and presented the substantive issues concerning the scope of immunity of a State official from foreign criminal jurisdiction, while the third report addressed the procedural aspects focusing, in particular on questions concerning the timing of consideration

of immunity, its invocation and waiver. The debate revolved around, *inter alia*, issues relating to methodology, possible exceptions to immunity and questions of procedure.

According to Mr. Kolodkin, two questions needed to be addressed: firstly, is there an exception to immunity in respect of what are called grave crimes under international law? secondly, the question of the precise categories of persons apart from the well known troika (the Heads of States, the Heads of Governments and the Minister of Foreign Affairs), who would be considered to enjoy immunity *ratione personae*.

In that regard, the crux of the Report of the Special Rapporteur on this issue was that immunity of State officials from foreign criminal jurisdiction should be considered as the norm and that any exception thereto needed to be proved. In summarizing the main trends of the debate, he noted that there were two streams of thought that informed the entire debate on the topic and the challenge for the Commission, lay in striking a proper balance between these two schools of thought.

According to one view, sovereignty must be limited, and that one could not talk of absolute sovereignty or immunity when grave crimes are committed. The principle of non-impunity was a core principle, and that one could not speak of absolute immunity where grave crimes are committed even by high-ranking officials. According to another view, the principles of immunity, which was well-established in international law, including the international customary law, does not brook any infringement and that, it was critical in preserving the stability of international relations.

Diverse views informed the debate within the Commission on the question of possible exceptions to immunity. While some members agreed with the findings of the Special Rapporteur on this point, other members expressed the view that the Commission could not limit itself to the status quo and had to take into account relevant trends that had an impact on the concept of immunity, in particular developments in human rights law and international criminal law. According to them the assertion that immunity constituted the norm to which no exception existed was thus unsustainable. Views are also expressed that the principle of non-impunity for grave crimes under international law constitute a core value of the international community which needed to be considered while examining the question of immunity. The topic would thus be more appropriately addressed from the perspective of hierarchy of norms; or norms between which there existed some tension.

Some other members supported the Special Rapporteur's conclusions concerning exceptions to immunity. They nevertheless envisaged the possibility of some further analyses to elucidate possible limitations to immunity as part of the progressive development of international law. In this context, the view was expressed that in establishing any such limitations, immunity *ratione personae* must cease to exist only after the high-level officials no longer serve their term of office. In order to facilitate future discussions, it was suggested that a further analysis of the earlier work of the Commission in this area should be made, as well as a study on exceptions to immunity, focusing on State practice, distinguishing clearly between the *lex lata* and proposals *de lege ferenda*.

Commenting on the possible exceptions to immunity, some members contended considered that the rationale that peremptory norms of international law prevail over the principle of immunity had merit. In their view, the report did not provide a convincing analysis for the assertion that the different nature of the norms in play, procedural on the one hand and substantive on the other, prevented the application of hierarchy of norms; these aspects needed to be further analyzed in light of existing State practice.

The view that the commission of serious crimes under international law could not be considered as acts falling within the definition of official duties of a Head of State generated some support in the Commission and references were made to the Bouterse case and opinions expressed in the Pinochet case. It was noted that, if immunity was justified on the theory of preserving the honour and dignity of the State, then it was undercut when its officials committed grave crimes under international law. It was suggested that the Commission should identify the offences that could under no circumstances be considered as part of the official functions, referring to the crimes under the Rome Statute of the International Criminal Court as a useful starting point. The opinion was also expressed that in cases of universal jurisdiction, there were also grounds to argue that exemptions to immunity existed.

The Commission, at its sixty-fourth session (2012), appointed Ms. Concepción Escobar Hernández as Special Rapporteur to replace Mr. Kolodkin, who was no longer with the Commission. The Commission received and considered the preliminary report of the newly appointed Special Rapporteur at the same session (2012).

At the sixty-fifth session in 2013, the Commission had provisionally adopted six draft articles and they were presented following an analysis of: (a) the scope of the topic and of the draft articles; (b) the concepts of immunity and jurisdiction; (c) the difference between immunity *ratione personae* and immunity *ratione materiae*; and (d) identified the basic norms comprising the regime of immunity *ratione personae*. Following the debate in plenary, the Commission decided to refer the six draft articles to the Drafting Committee. Upon consideration of the report of the Drafting Committee, the Commission provisionally adopted draft articles 1, 3 and 4.

At the sixty-sixth session in 2014, the Commission had before it the Third Report of the Special Rapporteur, in which the Special Rapporteur undertook an analysis of the normative elements of immunity *ratione materiae,* focusing on those aspects related to the subjective element. In that context, the general concept of a "State Official" was examined in the report, and the substantive criteria that could be used to identify such persons were considered, especially in respect of those who may enjoy immunity *ratione materiae* from foreign criminal jurisdiction. The report further considered a linguistic point concerning the choice of the most suitable term for designating persons who enjoy immunity, given the terminological difficulties posed by the term "official" and its equivalents in the various languages, and suggested instead that "organ" be employed. Following an analysis of relevant national and international judicial practice, treaty practice and the previous work of the Commission, the Special Rapporteur proposed two draft articles and the subjective scope of immunity *ratione materiae*. It was envisaged that the material and temporal scope of immunity *ratione materiae* would be the subject of consideration in the Special Rapporteur's next report.

Coming to the draft articles which have been so far adopted by the Commission.

Article 1
Scope of the present draft articles

1. The present draft articles apply to the immunity of State Officials from the criminal jurisdiction of another State.
2. The present draft articles are without prejudice to the immunity from criminal jurisdiction enjoyed under special rules of international law, in particular by persons connected with diplomatic missions, consular posts, special missions, international organizations and military forces of a State.

Paragraph 1 covers the three elements defining the purpose of the draft articles, namely: (a) the persons enjoying immunity (State officials); (b) the type of jurisdiction affected by immunity? (criminal jurisdiction); and (c) the domain in which criminal jurisdiction operates (the criminal jurisdiction of another States). Paragraph 2 clarifies that the immunities under these draft articles do not affect immunities which are otherwise available under other rules of international law or other special regimes in particular persons connected with diplomatic missions, consular posts, special missions, international organizations and military forces of the State. As you are aware the privileges and immunities are dealt with by special Conventions such as the Vienna Conventions on Diplomatic Relations, Vienna Convention on Consular Relations, the Convention on Special Missions, the Convention on the Privileges and Immunities of UN and on Specialized Agencies, the Convention on Representation of States in their relations with International Organizations of a Universal Character and the Status of Forces Agreement which will deal with the immunities accorded to Military Personnel who are present in the territory of another state.

The Special Rapporteur in Article 2 had proposed a number of definitions. She had proposed defining the term criminal jurisdiction, immunity from foreign criminal jurisdiction, immunity *ratione personae* and immunity *ratione materaie*. However the ILC decided not to deal with the definitions at that stage. It was felt that as and when these terms occur in the specific draft articles the ILC would examine whether a definition was needed. Accordingly at the 2014 session, the Commission adopted a definition of officials. Before I come to this, I would also like to refer to the debates in the Commission on the question of those officials who should enjoy immunity.

Extensive reference was made to cases before international and national courts. It was recalled that in the Arrest Warrant Case the ICJ said that in international law it is firmly established that as also diplomatic and consular agents certain holders of high-ranking officials in the State such as the Head of State, Head of Government and Minister for Foreign Affairs enjoy immunity (both civil and criminal) from jurisdiction in other States. This Statement was later reiterated by the Court in the case concerning certain questions of mutual assistance in criminal matters. Both these judgments were extensively discussed in ILC especially with regard to the question whether the Minister for Foreign Affairs should be accorded immunity *ratione personae*. Most members stated that the Arrest Warrant case reflected the current status of international law and that the immunity from foreign criminal jurisdiction of the Minister for Foreign Affairs is recognized as a customary rule. In their view the basis for recognition of such immunity was the

special functions in international relations of the Minister of Foreign Affairs. Some Members felt that the Judgment was not a sufficient ground for concluding that a customary rule existed as the judgment did not contain a thorough analysis of the practice and that several judges had expressed opinions different from the majority view.

Another view which was expressed in the Commission was while the ICJ verdict did not disclose the existence of a customary rule, but since the courts judgment had not been opposed by States the absence of a customary rule did not prevent the Commission from including the Minister for Foreign Affairs among the persons enjoying immunity *ratione personae* as a matter of progressive development of international law.

The Commission also discussed the question whether other high-ranking officials apart from the troika could be included among those officials enjoying immunity *ratione personae*. Some Members supported inclusion of other high-ranking officials in Article 3 stating that the words such as used by the ICJ in the Arrest Warrant case should be interpreted to extent *ratione personae* immunity to high ranking officials other than the troika. In this regard reference was made to Ministers of Defense and Ministers of International Trade. Other Members felt that the words such as were used by the ICJ in the context of a specific dispute and should not be seen as widening the circle of persons enjoying such immunity. Attention was also drawn to the difficulty in drawing up a list due to differences from State to State in the designation and organizational structure and other details.

The Commission also referred to decisions of national courts but it found that these decisions were not conclusive as to which officials enjoyed immunity *ratione personae*. Some decisions favour immunity for officials such as Ministers for Defence or Ministers for International Trade. In other cases the Courts found that the persons did not enjoy immunity either because he was not a Head of State, Head of Government or the Minister of Foreign Affairs or because he did not belong to the narrow circle of officials who deserve such treatment. In view of this difficulty the ILC limited Article 3 to the Troika. However, this is without prejudice to the rules of immunity *ratione materaie* and the understanding that officials may enjoy immunity from foreign criminal jurisdiction under the rules of international law.

On the scope of immunity *ratione personae*, the Commission has adopted the text of Article 4. Under this article the immunity *ratione personae* applies only during the terms of office of the troika. It covers all acts whether it is in private or official capacity during or prior to the term in office. It seizes once the term of office comes to an end. However, the article also provides that immunity *ratione materiae* is not affected by the end of immunity *ratione personae*. Here again we can refer to the ICJ's view expressed in the Arrest Warrant Case that after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all the immunities according to international law in other States provided it has jurisdiction under international law. A court of one State may try a former Minister of a Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office as well as in respect of acts committed during that period of office in a private capacity. The same reasoning would apply to Heads of State and Heads of Government.

Coming to the next draft article adopted by the Commission, Article 5 deals with immunity *ratione personae* and it provides that:

> State Officials acting as such enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction.

In this connection the Commission also adopted the definition of the State official in Article 2 (b) as any individual who represents the State or who exercises State functions. It may be noted that these articles do not specify the level of the officials that is whether he is a high-ranking official or a junior official. It would cover also the high-ranking officials such as the Head of the State, Head of Government and Minister for Foreign Affairs. And it would also cover the junior officials. It was felt that it is not possible to draw up a list of individuals who could be considered as representing the State and that who could be considered as exercising State functions and that this would need to be identified on a case-by-case basis. However it was accepted that what was essential is that there be a clear link between the official and the State for whom the official acts. The limitation in the phrase acting as such is meant to indicate that immunity *ratione materiae* fully covers official acts. It does not extend to private acts. The category of acts which will be covered under immunity *ratione materiae* would be dealt with in future articles and exceptions to immunity are also proposed to be dealt with in future articles which are likely to be presented in the report of the Special Rapporteur later this year.

At the Sixth Committee session last year, many States had participated in the debate on this topic and have largely reflected the views which have also been reflected in the Commission. There have been differences on the list on the troika with some representatives wishing for a re-examination of the criteria for identifying other high-ranking officials noting that in the present day world it is not only Minister's of Foreign Affairs, but also other high-ranking officers who represent the State in the conduct of the foreign relations. At the same time concern has also been expressed on not expanding the list too much and keeping it manageable and also views have been expressed on various other issues which need to be taken into consideration by the Commission.

Mr. President, I would like to just highlight the importance of the topic as noted both in the Commission and in the Sixth Committee and to urge all Member States of AALCO to take this matter very seriously and to make sure that their views are presented to the Commission and the Sixth Committee so that they can be taken into consideration by the ILC in formulating its draft articles. I thank you, Mr. President.

The President: I thank Mr. Narinder Singh for his statement. Now, I invite Dr. Hussein Hassouna to give a brief report on the Report of the Informal Expert Group on Customary International Law.

Report on the Meeting of the Informal Group on Customary International Law by Dr. Hussein Hassouna:[3]

Thank you, Mr. Chairman. Let me just briefly mention the background of this topic. At its 64th Session in 2012, the ILC had decided to include the topic "Identification of Customary International Law" in its programme of work and appointed Mr. Michael Wood as the Special Rapporteur. In 2013, the ILC considered the first report of the Special Rapporteur and last year, in 2014, the Commission considered his second report including a number of draft conclusions. This year in May, next month, the Special Rapporteur will submit his third report. Yesterday a meeting was convened, a meeting of AALCO's Informal Expert Group on Customary International Law that had previously met at Malaysia last March under the chairmanship Prof. Sufian Jusoh as the Secretary-General had mentioned. I had the honour to chair the Informal Consultation on the Work of AALCO Expert Group on Customary International Law that took place yesterday. The meeting reached following conclusions:

1. The meeting took note of the Informal Expert Group recommendations available on the AALCO website and appreciated the sterling work of Prof. Yee who had been appointed as the Special Rapporteur of AALCO's Informal Expert Group on the subject in Tehran last year.
2. The meeting was of the view that more time should be given to AALCO Member States to analyse the report and make recommendations thereon.
3. The meeting was also of the view that AALCO should retain this issue on its agenda and have more consultation on the topic in order to have a more in depth input to this important topic of Customary International Law.
4. The meeting recommended that Member States send their comments on the recommendation made by the AALCO Informal Expert Group in an expeditious manner.
5. The meeting suggested that the Secretary General should refer to the AALCO Informal Expert Group Recommendations and Prof. Yee's report when addressing the ILC in Geneva later this year.

These were the conclusions reached at the meeting of the Informal Expert Group that took place yesterday. I believe that this topic presents a good opportunity for the Asian and African States to contribute in the formulation of rules on an important topic of international law that will become of universal application. It is an opportunity for us to reflect our interests and concerns on the various aspects of this topic. Thank you, Mr. Chairman.

The President: I thank Dr. Hussein Hassouna for his brief statement on the report on the Informal Expert Group on Customary International Law**.** Dear colleagues, we are nearing the tea break. Before we break, let me make a small point relating to the statements of Member States. Besides the statements on ILC we still have 8 statements to be made on the topic of Violent

[3] It is to be underlined that the Informal Expert Group has convened three meetings thus far. The first meeting on customary international law was held at the Fifty-Third Session of AALCO in Tehran, 2014. The second was held in March 2015 at the National University of Malaysia, and this report is the report of the third meeting, chaired by Dr. Hussein Hassouna, held in Beijing, China, in April 2015. Subsequent to the Annual Session, another meeting on the topic of customary international law was held in August 2015 at the National University of Malaysia.

Extremism and Terrorism. We need to complete the discussions on that issue as well before the lunch. Hence, please shorten your statement. Let's break for tea and we will resume our session at 11.15 AM. Thank you.

The President: Distinguished Delegates, before the break we had presentations made by the Distinguished Members of the ILC. Now, I would open the floor to the Member States to make their comments. First, I would like to invite the distinguished delegate from Japan. You have the floor.

The Delegate of Japan: Thank you, Mr. President. My delegation listened with great appreciation to the introductory remarks made by the Secretary-General and the detailed and very useful presentations made by the three distinguished panelists who are all very eminent members of the ILC. I would like to here discuss very briefly three points including some proposal and suggestions which could serve to strengthen the role of ILC and further cooperation between ILC and AALCO.

Firstly, I will talk about strengthening the role of ILC and further dialogue with ICJ. The International Law Commission is the main body with the role of promoting the progressive development of international law and its codification in the UN system and thereby it has assumed a critical role over the years. On the other hand, some Member States feel that the topics which ILC is discussing in recent years are not very useful for them. Hence, we need to discuss how the Commission could contribute more for us.

In order to make ILC more appealing to Member States, it is important to promote and strengthen an interaction between ILC and ICJ. These days when the governments are faced with some issues related to international law, the first thing they refer to is the judgments of ICJ and other international tribunals and thus they are critical references for us. In order to further develop international law, judgments by international tribunals require objective evaluation by professionals. As the body consisting of persons of recognized competence in international law, ILC can play a role as a "good critic" of ICJ. Even though there already exists dialogue between ICJ President and the ILC members, the Commission should seek further opportunities for such talks.

Secondly, I will speak about the topic Protection of the Atmosphere. Regarding the topic of "protection of the atmosphere", the second report written by the Special Rapporteur, Mr. Murase, will be deliberated in the Sixty-Seventh session. During the session on the Report of the International Law Commission in the Sixth Committee, last October, many Member States expressed their support for the decision of the Commission to discuss this topic as the protection of the atmospheric environment is a crucial issue of the international community. I understand that a keen discussion took place regarding the draft guidelines 3 which stipulates that the protection of the atmosphere is a common concern of humankind. The discussion contributed to further clarification of conventional norms in the protection of the atmosphere.

The ILC has a major role in the field of environmental protection and we recognise that the protection of the atmospheric environment requires coordinated action by the international community. In that sense, we strongly hope that the next deliberation by the ILC over the second

report will be constructive as the last session in accordance with the understanding. Protection of atmospheric environment is a very serious issue particularly for Asia and Africa, so I hope that AALCO Members continue to contribute to the discussion both in the ILC and the Sixth Committee.
Thirdly, on the Cooperation between ILC and AALCO. We welcome that, in January, the Permanent Observer of AALCO in New York, Dr. Roy Lee, organized the informal exchange of views on the development and making of international law among legal advisors of delegations to UN. I understand that participants of the meeting exchanged their views on issues to be resolved such as current situation of the Sixth Committee and its revitalization as well as cooperation with ILC. The Japanese delegation also attended the meeting and expressed our views on a method of work for the topic of the report of ILC.

In order to realize the progressive development of international law and its codification, views from the international community, particularly, voices from Asia and Africa should be properly reflected. In this sense, the initiative of AALCO by holding the meeting which dealt with the issue regarding the empowerment of ILC and the Sixth Committee certainly has significant importance. The delegation of Japan would like to express its commitment to continue our involvement in such discussions. Thank You.

The President: I thank the distinguished delegate from Japan. Now, I call upon the distinguished delegate from Thailand to make his statement.

The Delegate of Thailand: Mr. President, at the outset, my delegation would like to express its appreciation to the speakers for their presentations which have provided us with the overall pictures of the ILC issues under consideration. Also, we wish to thank AALCO for organizing this Special Half-Day Meeting on "Selected Items on the Agenda of the International Law Commission" which has provided AALCO members with useful updates on ILC ongoing work. Our thanks also go to the AALCO Secretariat for preparing a report of excellent quality on related matters.

My delegation wishes to express appreciation to the members of the ILC for their invaluable contribution to the codification and development of international law. Thailand is pleased to note the work of Ambassador Kriangsak Kittichaisaree, the ILC member from Thailand who chaired the Working Group on the topic "Obligation to Extradite or Prosecute" *(aut de dere aut judicare*). The final report of the Working Group could serve well as a useful set of guidelines for States in implementing the said obligation.

Mr. President, my delegation wishes to share its view on the work of the Commission on the issues of "Expulsion of Aliens", "Protection of Persons in the Event of Disasters", and "Immunity of State Officials from Foreign Criminal Jurisdiction."

Mr. President, on the topic "Expulsion of Aliens", the Thai delegation commends Mr. Maurice Kamto, Special Rapporteur for his outstanding contribution to the draft articles and congratulates the Commission for the completion of the second reading of the draft articles. My delegations shares the view that the draft articles well capture the principles of international law on sovereign rights of States as well as the rights of an alien subject to expulsion and the rights of the

expelling State in relation to the State of destination of the person expelled. Nevertheless, the articles do not entirely reflect universal practices, as State practices are still limited in some areas. The drat articles involve the progressive development of the rules of international law on this issue and those that relate extensively to the sovereign rights of States, which could be somewhat sensitive. In particular, not all the draft articles are consistent with Thailand's and several other Asian States' current State practices.

Mr. President, with regard to the topic "Protection of Persons in the Event of Disasters", my delegation would like to congratulate the Commission for the conclusion of the topic and the first reading of the draft articles. My delegation would like to touch upon the definition of the terms "external assistance' under subparagraph (d) of the draft Article 4 on "Use of Terms". Thailand views the term "external assistance" should be defined with great caution. In particular, the "other assisting actors" shall not include domestic actors offering disaster relief assistance or disaster risk reduction.

Also we would like to reiterate the draft Article 20 on "Relationship to Special or Other Rules of International Law" which clarifies the way in which draft articles should interact with certain rules of international law. The provision contains references to both "special rules" *(lex specialis*), which apply to the same subject matter of the draft articles and "other rules" which apply to the matter not directly concerned but would nonetheless apply in the situations covered by the draft articles. However, besides the provisions concerning the law of treaties and the rules on the responsibility of both States and international organizations exemplified in paragraph 5 of the commentary to the draft article, the "other rules" should also be illustrated.

Mr. President, allow me to turn to the topic of "Immunity of State Officials from Foreign Criminal Jurisdiction." As a State Party to the Vienna Convention on Diplomatic Relations of 1961 and the Vienna Convention on Consular Relations of 1963, Thailand grants immunity from criminal jurisdiction to persons entitled to such immunity under the respective Conventions. Thailand also accords immunity to persons covered by host country agreements between Thailand and intergovernmental organizations based in Thailand.

Apart from the obligations under the above-mentioned agreements, Thailand is not party to the Convention on Special Missions. Thailand, therefore, wishes to reserve its position on this topic until a later stage when we can determine whether the ILC's work archives the right balance between according immunity to State Officials from foreign criminal jurisdiction on one hand and ending impunity of those officials, on the other.

Furthermore, we wish to share some observations on this topic. With respect to persons enjoying immunity *ratione materiae*, the Commission should focus its work on identifying the term 'official' as such term has not yet been defined in international law but is defined differently under the domestic laws of different States. Hence, the Commission ought to take into due consideration the practice of States in their domestic laws. In this connection, my delegation would like to point out that it would be a challenge to draw up a list of all the offices who would be classified as officials for the purpose of draft articles. The persons covered by immunity *ratione materiae* can only be determined using identifying criteria which are applied on a case-by-case basis.

In this connection, my delegation is of the view that the immunity *ratione materiae* should not be extended to individuals or legal persons who act for a State under a contract with that government or agency as there is no adequate legal basis to extend the scope of immunity to non-State officials such as private contractors who are not in a position to exercise inherently governmental authority. It is our belief that any exception to immunity must not undermine the immunity of the head of a State whose constitutional role is merely ceremonial and who has no de facto authority to direct or influence any act or omission, which constitutes a core crime proscribed by international law. I thank you, Mr. President.

The President: I thank the distinguished delegate from Thailand. Now, I invite the distinguished delegate from China to make his statement.

The Delegate of the People's Republic of China: Thank you, Mr. President for giving me the floor. Mr. President, at this outset, our delegation would like to thank the Secretariat for organizing tis Special Half-Day Meeting on "Selected Items on the Agenda of the International Law Commission." We are also privileged to have the presence of the esteemed members of ILC for their illuminating presentations.

Mr. President, as an important institute for international law study within the UN system, the ILC plays an important role in the codification and progressive development of international law. Over the years, the AALCO Annual Session has considered items of the ILC and has maintained regular exchanges with the latter, as it helps rules of international law to reflect in a comprehensive and balanced manner the concerns of Asian-African countries. China supports these exchanges and will continue to work together with other AALCO members to enhance the voice and visibility of developing countries in the international law-making process through this organization and other international forums.

Mr. President, on the selected items, this delegation would like to make the following comments:

First, on "Expulsion of Aliens"; the 66th session of the ILC concluded the consideration of the item in 2014 by adopting 31 draft articles at second reading which had been submitted to the Sixth Committee of the UN General Assembly for consideration.

Our delegation is of the view that the draft articles of "Expulsion of Aliens" should strike a reasonable balance between the right of expulsion as an inherent sovereign right of a State and the basic human rights of aliens subject to expulsion. We appreciate the unremitting efforts made by the Commission and Mr. Kamto, the Special Rapporteur in this regard. At the same time, we still find that some draft articles remain imbalanced. Let me cite a few examples.

On draft Article 12 which provides that "a State shall not resort to the expulsion of an alien in order to circumvent an ongoing extradition procedure", this delegation is of the view that extradition and expulsion are useful means for inter-state cooperation to bring perpetrators of transnational crimes to justice. They have different functions and apply to different situations. Therefore which means should be adopted should be determined on the basis of practical needs for combatting transnational crimes in the specific circumstances of the case and in accordance

with domestic law. In addition, as State practice indicates, repatriation of foreign criminal suspects by expulsion is often availed in international cooperation of law enforcement.

On paragraph 2(b) of draft Article 19, which provides that "the extension of the duration of the detention may be decided upon only by a court or, subject to judicial review, by another competent authority." In practice, competent authorities deciding on the extension of the detention duration vary from State to State and "one-size-fits-all" approach may not work. It is up to each individual State to decide the means and procedures, being either judicial or administrative, for safeguarding the rights of expelled aliens.

On Paragraph 2 of draft Article 23 which provides that " a State that does not apply the death penalty shall not expel an alien to a State where the alien has been sentenced to the death penalty or where there is a real risk that he or she will be sentenced to death", this delegation would like to point out, while the draft article reflects the recognition of and respect for human rights of aliens to be expelled, we have to acknowledge the fact that there is no consensus on abolition of death penalty among States, nor does international law prohibit death penalty. Every State is entitled to opt for or against death penalty as judicial justice, level of economic development and historical and cultural backgrounds so require. When it comes to expulsion of aliens, each State is entitled to make its own decisions vis-à-vis death penalty.

On draft Article 24 which provides that " a State shall not expel an alien to a State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture or to cruel, inhuman or degrading treatment or punishment". This delegation would like to bring to attention the fact that fugitives tend to misuse the judicial review process of a foreign State or challenge from time to time, decisions of repatriation or expulsion by a competent authority as is detrimental to justice. It is also regrettable that there have been instances where inter-State judicial and law enforcement cooperations' including the expulsion of fugitives have been hindered by some in the pretense of human rights protection.

In general, the draft articles are of positive significance to enhancing the protection of human rights. However, some articles overemphasize individual rights. They lack the support of general State practice and exceed State obligation under treaty law, and are thus likely to result in hampering relevant international cooperation.

On "immunity of State officials from foreign criminal jurisdictions", the 66th Session of the ILC considered the third report submitted by the Special Rapporteur and adopted 2 draft articles. We support the ILC to codify relevant rules of international law on the basis of practice, while we believe that it is premature to develop new rules.

The ILC defines "State Official" as any individual who represents the State or who exercise State functions. On the whole, China believes it is a viable definition since it covers both the representative and functional characteristics of such officials. It must be emphasized that the representation by an official or a State or his exercise of State functions should be interpreted in a broad sense and on a case-by-case basis in accordance with the constitutional system, laws and regulations and the practical situation of his State.

On the scope of immunity, *ratione personae*, my delegation wants to reiterate that high-ranking officials taking part in international exchanges and exercising functions directly on behalf of States should also be accorded immunity *ratione personae* in addition to heads of State and government and foreign ministers.

On the exceptions to immunity of State officials, the Chinese delegation believes that since immunity of State officials is procedural in nature, it does not exempt them from substantive liabilities. These officials can still be held liable criminally without prejudice to the immunity from foreign criminal jurisdiction through measures such as prosecution by their own national courts, waiver of their immunity. Moreover, through the international community has identified crimes of genocide, ethnic cleansing and crime against humanity as serious international crimes, it has not developed rules of customary international law on disregarding immunity of State officials for such crimes.

On "protection of the atmosphere", the ILC considered the first report submitted by the Special Rapporteur but failed to reach agreement on the three Draft Guidelines. The Chinese delegation believes that protection of the atmosphere is a global issue and also a multi-faceted issue with political, legal and scientific dimensions. When incorporating this item into its work programme, the ILC indicated the complexity and sensitivity of the issues involved, and took a prudent approach by providing an understanding for the Rapporteur. We appreciate this approach and hope that the ILC will follow this understanding in its consideration of this item.

The Chinese delegation is of the view that since negotiations on climate change and ozone layer are at a crucial stage, the relevant work of the ILC should be carried out in a prudent and rigorous manner, with a view to complementing various political and legal negotiations, without creating a new forum or playing down existing treaty mechanisms. In particular, principles like equity and CBDR should be enshrined. And the development of guidelines should be based on common international practice and current laws.

I thank you, Mr. President.

The President: I thank you the distinguished delegate from China for his statement and now I invite the distinguished delegate from India to make his statement.

The Delegate of India: Thank you, Mr. President. Good Morning Mr. President, Colleagues and Distinguished Panelists, on behalf of my delegation, I would like to take this opportunity to thank all the panelists for their excellent presentations. I also congratulate the AALCO Secretariat for their brief study on this subject and thank the Secretary-General for introducing the agenda "Report on Matters relating to the Work of the International Law Commission at its Sixty-Sixth Session" especially referring to the "Identification of Customary International Law", "Protection of Environment in Relation to Armed Conflict", and the "Protection of the Atmosphere", among others. I would also like to thank you Mr. President, for encouraging us to make comments on any other areas of ILC work. I would like to make brief observations on "Customary International Law", "Protection of Environment in Relation to Armed Conflicts", and the "Protection of the Atmosphere".

Mr. President, on the topic of "Identification of Customary International Law", we would like to commend the Special Rapporteur, Sir Michael Wood for his second report, which contains eleven draft conclusions. It is well known that the customary international law is a formal source of international law. The ICJ is mandated to apply CIL to settle the disputes brought before it by the States. Article 38(1) (b) of the Statute of the ICJ describes customary international law as the State's practice in their international behavior as evidence of general practice 'accepted as law'. Thus, customary international law consists of 'settled practice' of States and the belief that it is binding. Thus it has objective and subjective elements (*opinio juris*).

While conventional law is both formal and material source of international law, customary international law is not considered to be material source. Therefore, unlike the treaty provisions it is not so easy to find out what the applicable customary international law is in a given case or situation; the amount of evidence that needs to be produced or examined and relative weight or importance to be given to the objective or subjective elements to identify or for formation of customary international law are tough calls. The challenge is compounded, if the persons who seek to apply customary international law are domestic lawyers, judges, courts or arbitral tribunals, who may not be trained or well versed in international law. And it is not easy even for those who have training and experience in international law to identify rules of customary international law in all cases. There is no readily available guidance or methods by which evidence of the existence or process of formation of customary international law rules could be appreciated and identified.

We would like to see that both elements the 'State practice' and '*opinio juris'* are given equal importance in this study. The practice of States from all regions should be taken into account. In this regard, the developing States, which do not publish digests of their practice, should be encouraged and assisted to submit their State practice, including their statements made at international and regional fora, and the case-law, etc.

Mr. President, with regard to the topic, "Protection of the environment in relation to armed conflicts", we thank the Special Rapporteur, Ms. Marie Jacobsson for her preliminary report. The Report provided an overview of the topic and examined the aspects relating to scope and methodology. It is our understanding that the Special Rapporteur will focus her work to clarify the rules and principles of international environmental law applicable in relation to armed conflict situations. Armed conflicts have often devastating effects on the environment. They affect the ecosystems directly–degradation of the natural environment, pollutions due to different military activities, illegal exploitation of natural resources–or indirectly–deforestation, massive exodus of refugees, etc.

Mr. President, environmental laws have witnessed a spectacular development during the last two decades as the urgency of the need for the solution of the environmental problem has become more and more apparent, both at the national and international levels. It is the duty of each State not to allow its territory to be used in such a manner as to injure another and this principle was laid down long back in the Trail Smelter Arbitration case. The Tribunal in that case held that, under international law, no State has the right to use or permit the use of its territory in such a manner as to cause injury to the territory of another State.

While dealing the topic, it will be relevant to see the existing international legal framework, including the areas of international humanitarian law, international human rights law, international refugee law, and international environmental law, as they provide legal obligations that either directly or indirectly have a bearing on the protection of the environment in relation to armed conflict.

Mr. President, we congratulate the Special Rapporteur, Prof. Shinya Murase, for his first report on the topic "Protection of the atmosphere". Professor Murase, we wish you a very long, active and productive life so that you keep guiding us. The Report addresses *inter alia* the general objective of the project, providing the rationale for work on the topic, delineating its general scope, identifying the relevant basic concepts and offering perspectives and approaches to be taken with respect to the subject. He has also presented three draft guidelines concerning (a) the definition of the term 'atmosphere'; (b) the scope of the draft guidelines; and (c) the legal status of the atmosphere.

Mr. President, considering the threats posed to the atmosphere, in particular, by air pollution, ozone depletion and climate change, the protection of the atmosphere is extremely important for humankind. In this context, there lies a general obligation for all the States to protect the atmosphere. We note with interest that Prof. Murase has dealt the topic by providing a historical sketch of atmosphere in international law through diverse sources and subsequently through the relevant judicial decisions rendered by the ICJ in Nuclear Tests Case, Gabcikovo - Nagymaros Case, Pulp Mills Case, etc.

The proposed three guidelines of the Special Rapporteur need an in depth analysis since they involve technical, scientific and legal issues. With regard to the concept of atmosphere as a common 'concern' of mankind, dealt in the Draft Guideline 3 on legal status of atmosphere, the Special Rapporteur may explore more legal reasoning and justification to propose such a concept for this topic, as the concept is highly debated and less accepted in other areas of international law.

While formulating the future guidelines, the Special Rapporteur may ensure that the interests of developing countries are protected and in case of any obligations 'the principle of common but differentiated responsibility' need to be considered and respected. He may also focus more on cooperative mechanisms to address issues of common concern, and this aspect may be given priority.

Mr. President, we look forward to having the next report of Prof. Shinya Murase in which we understand that the liability of States with respect to the protection of the atmosphere would be dealt with in detail. I thank you.

The President: I thank the distinguished delegate of India for his statement. Now, I invite the distinguished delegate from Iran to make his statement.

The Delegate of the Islamic Republic of Iran: 'In the name of God, the Compassionate, the Merciful', Mr. President, my delegation would like to express its appreciation for the useful explanations provided by the three panelists who are Members of the International Law

Commission on the topics under discussion by the International Law Commission. I should also thank the AALCO Secretariat for organizing this Special Half-Day Meeting on "Selected Items on the Agenda of the International Law Commission".

As from among the eight topics on the Agenda of the Commission during its 66th Session, specific attention is to be accorded to topics of critical concern to the developing countries and we will limit our remarks on the three of them, namely, "Identification of Customary International Law", "Protection of Environment in relation to Armed Conflict" and finally "Protection of Atmosphere."

Mr. President, with respect to the topic of "Identification of Customary International Law", as the Special Rapporteur, Sir Michael Wood underlined in his second report, solely methodological question of the identification of customary international law is dealt with and the hierarchy of sources of international law is not the issue. Thus, the exercise is not aimed at codifying rules for the formation of customary international law.

The question of adopting different approaches to the identification of rules of customary international law in different fields of international law has faced almost unanimous reactions by Member States at the Sixth Committee of the General Assembly. It has been suggested that, for instance, regarding international humanitarian law or international human rights law, *opinio juris* may suffice in constituting customary international law and it will not be necessary to identify the existence of practice by States. The Islamic Republic of Iran, like the majority of Member States supports the two-element approach which can be consistent with the jurisprudence of international bodies, contribute to the reinforcement of well-established norms and at the same time preclude fragmentation of international law.

We should further reiterate that in principle, the practice of States contributes to the creation of customary international law. So far as it reflects State practice, the practice of international organizations may on a subsidiary basis have a role in the identification of rules of customary international law. The UN General Assembly resolutions in ICJ's terms can in certain circumstances provide evidence for establishing the existence of a rule or the emergence of the *opinio juris*. To this end, it is necessary to look at the content and the conditions of the adoption of the resolution (legality of the Threat or use of Nuclear Weapons 254-255).

Also, as we have previously stated, the conduct of non-governmental organizations and individuals cannot be qualified as practice for the purpose of the formation or evidence of customary international law. Nevertheless, ICJ can rely on "the teaching of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of law". Here I am referring to Article 38 (1) (d) of the Statute of the International Court of Justice. Other individuals and non-governmental organizations can indeed play, by their actions an important role in the promotion and observance of international law.

As for the question raised by the Special Rapporteur regarding the burden of proof, it seems that the State claiming or denying the rule has the burden to prove it. And finally, the assertion of the Special Rapporteur that *"opinio juris*" is not synonymous with "consent" or "desire of States" but rather means "the belief that a given practice is followed because a right is being exercised or

an obligation is being complied with in accordance with international law" needs further elaboration.

Finally, we appreciate the work done by Mr. Sienho Yee, the Special Rapporteur of AALCO's Informal Expert Group on Customary International Law and share his view concerning "specially affected states" and the importance of inclusion of the concept of "persistent objector" in the work of the ILC. Like Mr. Sienho, we are of the conviction that "specially affected States" is not reserved for big and powerful States but applies to all States who are especially concerned with the subject matter under consideration and whose interests are specially affected by the rule under consideration. We hope that the Commission would consider the notions of "specially affected states' and "persistent objector" in his work on the topic.

Mr. President, turning to the topic of "Protection of Environment in relation to Armed Conflicts" and the preliminary report presented by the Special Rapporteur, Ms. Marie Jacobsson on its scope, we share the view of some of the members of the Commission that further elaboration of environmental obligations in armed conflicts might be warranted. We also believe that the study can provide an opportunity to fill the existing gaps in international humanitarian law concerning the protection of environment. An example thereof is the illustrative and not exhaustive list of vital infrastructure excluded from military targets in Article 56 of the 1977 first Protocol Additional to the Geneva Conventions. The exclusion of oil platforms and other oil production and storage facilities especially those built in the continental shelf has proven to run counter to the purpose of the drafters of the protocol to protect the environment; the conflicts inflicting considerable damage to such constructions and the consequent environmental damage since the adoption for the protocols and lack of legal remedy to that effect is indicative of this gap.

Moreover, the ceasing of special protection accorded to nuclear electrical generating stations in Article 56 (2) (b) has been repeatedly described as inappropriate given the dangerous nature of nuclear installations and the advances made to attain full prohibition at the international level including *inter alia* by adopting UN General Assembly Resolution A/RES/40/6 (dated 1 November 1985) condemning in the strongest terms "all military attacks on all nuclear installations dedicated to peaceful purposes" and the UN General Assembly Resolution 45/58 (dated 4 December 1990) on "prohibition of attacks on nuclear facilities" and IAEA General Conference Resolutions GC (XXVII)/407 (dated 9 November 1983) and GC (XXIX) RES/444 (dated 27 September 1985) on the "Protection of Nuclear Installations Devoted to Peaceful Purposes against Armed Attacks" and GC (XXXI)/RES/475 (dated 5 October 1987) on the "Protection of Nuclear Installations against Armed Attacks". The debate on the issue since 1985 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons and its evolution into a serious proposal to adopt a legally binding instrument to prohibit any military attacks on nuclear installations dedicated to peaceful purposes including in the final document of the 2010 Review Conference suggests that the lifting of special protection provided for in Article 56 (2) (b) could be described as outdated.

Furthermore, as already stated by some Member States during the Sixth Committee discussions and as the report suggests, the Commission needs to come up with a definition of the term "armed conflict" in order to facilitate the consideration of the work at hand. This is an appropriate approach on the condition that the Commission confines the definition of the term to

"international armed conflict' and considers it just a working definition. Expansion of the scope of the definition of armed conflict to include non-international armed conflict would seem to be problematic. The commission would have to consider the legal obligation of non-State actors, which may lead to expound upon a definition already fraught with ambiguities and disagreements. Such an endeavour would also entail further attempts to determine the threshold of non-international armed conflicts. Both of these require the modification of relevant provisions of international law of armed conflicts from the purpose of the work at hand.

Mr. President, I will now move to the issue of "Protection of the Atmosphere". This is a topic having close linkages with political, scientific and other considerations; this, however, does not mean that the importance of the legal issues surrounding the topic should be downgraded. In fact, the decision of the General Assembly to include the topic in the long-term program of work of the Commission is based on such an understanding. The task assigned to Mr. Murase, the Special Rapporteur, to that end is fraught with difficulties; therefore the approach adopted should be applied with caution and ample flexibility to meet the expected purposes. This is justified by the mere fact that the Commission's task, as stated in the report, consists in "identifying custom, whether established or emerging […] and identifying, rather than filling any gaps in the existing treaty regimes." It seems that the Commission is aware of the unique nature of the job. The question arises as to the end result of the task undertaken by the Special Rapporteur, while the task is not aimed at filling treaty gaps in international legal instruments applicable to State activities in the atmosphere. Mr. President, it seems that the concerns about the topic deserve more than merely pure research.

On the question of whether to include basic principles in the work of the ILC on the topic, sub-paragraph (b) of draft guideline (2), we are of the view that having resort to basic principle of international environmental law is inevitable and that examining rights and obligations of States regarding the protection of atmosphere is impossible without expounding upon principles such as *sic utere*, polluter pays, cooperation or precautionary approach.

In his first report, Mr. Murase, the Special Rapporteur on the topic raised the question of the legal status of the atmosphere which he considered rightly to be the prerequisite to the Commission's consideration of the subject. He favoured the concept "common concern of humankind." It seems that the normative content of the concept (of common concern of human kind) is still unclear and controversial. We agree that the protection of the atmosphere is a common concern of mankind. However, we share the view of some States that the precise legal implications of this new concept are difficult to define. We have already some clear idea about the consequence of the qualification of the sea-bed and its subsoil beyond the continental shelf as common heritage of mankind. I am referring to the advisory opinion of the ITLOS issued in 2011 regarding the obligation of States sponsoring persons and entities with respect to activities in the Area. The Tribunal refers to Article 48 of ILC Articles on State Responsibility by affirming that the responsibility of States to protect the environment of the Area creates *erga omnes* obligations. This morning Prof. Murase referred to this notion of *erga omnes* obligations. We can draw similar conclusion regarding the protection of atmosphere. Drawing analogies from the law of the sea, it was suggested that consideration should be given to dividing the atmosphere in zones based on the degrees of sovereignty and control exercised by the subjacent State.

In the end, we are aware of the difficulty of the task of the Special Rapporteur on this topic and we think that we have to take into account all the difficulties that Mr. Murase is facing on this issue. Thank you, Mr. President.

The President: I thank the distinguished delegate of Iran for his statement and now give the floor to the distinguished delegate from Myanmar to make his statement.

The Delegate of Myanmar: Mr. President, I thank you for giving me the floor. Firstly may I congratulate the panel of speakers for their very comprehensive and pertinent presentations. In humility may I make the following observations on the subjects that are being discussed today.

Firstly, on the "Protection of Atmosphere", I do agree fully with Professor Murase that airspace and atmosphere are entirely different. I draw an analogy from Air and Space Law. When Space Law was invented in the early 1960s there was a problem as regards the dividing line between outer space and air space. The air and space was divided by a line called the Karman line named after the German jurist Von Karman. The highest height an aeroplane was able to fly in those days was 21 miles from the face of the earth for this area. Air Services Agreement (ASA) are required and there are bilateral agreements concluded. Beyond that there is outer pace or *res nullius*. I wonder if it would be necessary to consider to protect the atmosphere in outer space now when space activities have greatly increased. Atmosphere is a volatile substance and States must have *bona fide* spirit/good faith and the opposite being *mala fide* in their activities. This is seen in an old case called Chorzow Factory case. But the Principles of International Law is the same. This was made a General Principle of law in accordance with Article 38 of the ICJ statute.

Secondly, in the "Expulsion of Aliens", a matter that was discussed earlier, I would like to draw reference to international economic law. As we all know in international economic law there are many standards and one of the Standards of International Economic Law happens to be Fair and Equitable Treatment. So, I just wonder this principle would be considered in considering this.

Thirdly, in the area of custom, we would like to humbly mention that the more complex an international issue is, the more complex the legal norm is. It requires more inclusiveness that means togetherness, cooperation and inclusiveness is absolutely vital. As a result of that in the matter of custom, as we all know, there are so many kinds of principles. Firstly, there is a traditional principle which is based on usage and the passage of time. Second there is the creation of Instant Customary Law based on *opinion juris sive necessitas* called Instant School. Third is the Liberal School based on articulation and agreement of States. All these are very complex schools of thought. My question is that would it not be possible that our brothers here AALCO and our experts from Asia and Africa should be more inclusive and have a more wider view.

And different angles of approach should be given for the benefit of the world community. Because Mr. President, I do remember a saying by one of my lawyer friends that "when there are two lawyers, there are three opinions." So as a result of that togetherness, inclusiveness and completeness are always essential. We might have different view with other but we need to respect the views of others and discuss to have a common ground for the benefit of the international community.

Thank You, Mr. President.

The President: I thank the distinguished delegate from Myanmar. Now, I give the floor to the distinguished delegate of Malaysia to deliver his statement.

The Delegate of Malaysia: Thank you, Mr. President. Malaysia would like to thank the AALCO Secretariat for preparing report on matters relating to the works of the ILC at its 66th session. We thank the eminent members of the ILC who are present with us today for the deliberations on the topics of Protection of Persons, Immunity of State Officials, Protection of Atmosphere and Customary International Law. We would focus our comments on the topic of Protection of Atmosphere and briefly on the works of the Informal Expert Group on CIL.

Mr. President, Malaysia appreciates the current work of the Special Rapporteur Prof. Shinya Murase on the important matter on Protection of Atmosphere. At the time of preparing our comments for this annual session we only had the benefits of scrutinizing Prof. Murase's first report. We had taken steps to discuss and consult with our relevant agencies and departments on his first report. We noted the draft second report. We truly appreciate having the hits in this regard. We noted the reformulation of draft guidelines 1-5 in Prof. Murase's second report. On the draft guideline 1 on use of terms we noted that whilst the first report proposed the definition of atmosphere to reflect the most effective layers of atmosphere that critically need to be protected i.e. troposphere and stratosphere and dispersion of substances that occur therein. But in the latest reformulation Prof. Murase has taken away the references to troposphere and stratosphere. We would definitely discuss again with our experts and scientists on this latest proposal and we look forward to engage with Prof. Murase on this very important reformulation. On draft guideline 2 on the scope of guidelines, Malaysia reiterates our concern regarding the specific type of human activities intended to be covered under the draft guidelines. This is to ensure that the activities proposed will not overlap with human activities covered under existing international regimes on environmental protection whilst at the same time in line with the ILC's understandings at its 65th session that this topic will not deal with specific substances or to fill the gaps in the existing treaty regime. We will follow closely Prof. Murase's detailed works on this very important concept.

On draft guideline 3, we noted the significant reformulation in his draft second report. It formally relates to legal status of the atmosphere, but now is changed to common concern of human kind. Malaysia notes the concept of common concerns as proposed applies to protection itself not concerning to the jurisdiction or territory of State to atmosphere. In this regard we reiterate our position that we have stated in previous AALCO session that further consideration needs to be devoted to the adequacy of the legal status of the atmosphere. Similarly, the concepts of air space, shared and common natural resources, common property, common heritage and common concern must be scrutinized further prior to determination of the legal status of atmosphere.

Malaysia would draw the special attention of Prof. Murase to the sovereignty, jurisdiction and rights of States toward maritime airspace as provided under UNCLOS in his reformulation of this particular draft guideline. Although we note Special Rapporteur's formulation of draft guideline 2(c) we are aware of that. Perhaps it would be clearer if certain fundamental

international law aspects are addressed. Taking into consideration other States' civil aviation and military rights with the view of avoiding duplication and inconsistency in terms of governance and regulatory regime.

Moving on to the topic of the customary international law we appreciate the brief introduction by Mr. Hassouna. We noted the report of the Informal Working Group and appreciate the work of Prof. Sufian and Prof. Yee on this very important topic. Due to the fact that we only received the report of the Informal Working Group on the final days before we depart for Beijing we would reserve our comments on the very detail, initial views in that report. We would further continue to engage with Informal Expert Group on this matter. But in the meantime we noted that the report of the deliberations on this item yesterday as read briefly by Mr. Hassouna earlier whereby among others it was proposed that this annual session accepts the recommendations of the Working Group and the report of the Working Group proposal to the ILC. If that is the position we had also look at the appendix to the report of the informal working group and we took note of that but due to time constraint we propose that the consideration of the proposal; particularly the appendix as attached to the Informal Working Group to be postponed to a more appropriate date in the future. But in the meantime we would continue to engage with the Expert Working Group. Thank you, Mr. President.

The President: I thank the distinguished delegate from Malaysia. Now I invite the distinguished delegate from Pakistan to make his statement.

The Delegate of Pakistan: Thank you, Mr. President. Pakistan would like to record our deep appreciation and offer compliments to the distinguished panelists in giving incisive presentations. May I also pay compliments to the Honorable Iranian Delegate's lucid comments which need serious consideration. I will not go on to make detailed comments I will confine myself to very brief contraventions due to paucity of time. Our detailed comments will be sent via e-mail to the Secretariat and copy to members whose visiting cards I have received.

As regards the issue of Aliens, I will point out a practical difficulty which an alien is exposed to and faces, when he is faced with expulsion. This is a question of legal and economic existence. I believe this issue needs to be addressed in the draft legislation. Other issues have been highlighted by the Honorable Delegate from China and Thailand and I need not repeat those. As for the matters relating to atmosphere, we need to identify climate and biological diversity which is brought about from the obnoxious emission from industry and deforestation. We need to further elaborate on these issues. On the question of immunity of State officials, I think we need to bring clarity and certainty as to who is entitled to immunity. We also need to give immunity to high ranking officials even when they leave office. This will encourage them in taking decisions when serving in their respective governments. But this should not continue after the person leaves office.

On the question of Customary International Law I have a suggestion that I need to make. May I suggest that AALCO set up a Permanent Sub-Committee which should compile and comment on various judgments, various treaties rendered in international tribunals by admissions and the national courts as well. They can cover topics such as sovereign immunity, environment, law of seas, trade law and various other aspects of international law. The Member States should be

encouraged to make contributions to this treasure trove which I would suggest entitle cases and material on customary international law. This will serve as a historical tool as well as a treatise in the area. Thank You.

The President: I thank the distinguished delegate from Pakistan for his statement. Dear colleagues we have exhausted the list of speakers from Member States. Now I invite the distinguished delegate from Russia, an Observer Delegate to make his statement.

The Observer Delegate of Russia: Thank you very much, Mr. President for this opportunity to address this session regarding the work of the International Law Commission. I would like first of all to thank the panelists for their insights into the work of the Commission. On behalf of my Delegation I would like to assure you that many of the views already expressed by the members of AALCO and also those reflected in the report of its Secretariat are quite close to the position of the Russian Federation.

I will start by addressing the topic of Customary International Law. First of all, I would like to support the views expressed in the paper prepared by the Special Rapporteur of AALCO and its Working Group on this topic. First of all, concerns the practice of States that may count and contribute in the formation of customary international law. In the view of our Delegation as well as that of the Special Rapporteur of AALCO it shouldn't be just any practice. It should be the practice in the area of the foreign relations. We also support the idea that due considerations should be given to the practice of specially concerned States and by this we mean the states with special interest in a particular rule. We are also of the view that rigorous criteria should be established by the Commission for a practice of States to qualify and pass the test of being customary international law. Apart from this concrete comments on particular conclusions of the Commission already drawn by the Commission and the Special Rapporteur, I would also like to draw the attention of the Member States of AALCO to some of the core issues that are currently on the remit of the Commissions consideration.

The Special Rapporteur of the Commission stated that he did not have an intention to address the issue of a hierarchy of different sources of international law. However in the view of our Delegation this issue could not be totally excluded from the work of the Commission. I would like to draw here just one example. For instance what happens if there is the practice of States that run counter to an existing treaty. May this practice eventually crystalize into the customary international law that would change the treaty or will the existence of a treaty preclude the formation of customary international law? Alternatively a special principle may be needed to be set up in the conclusions of the Commission for the creation of customary international law in this particular case. There is another related issue. What role generally recognized principles of international law plays in the formation of customary international law such as principle of good faith?. We also are looking forward as to how the Commission will deal with the number of issues that are announced for its future consideration. For instance, the role of practice of international organizations in the formation of customary international law. In the view of our Delegation, this practice, it is in respect of States in relation with the decisions of the international organizations that play crucial role in the formation of rules of customary international law and not the practice of international organizations per se**.**

We have also found that it is very important to set out rules related to the so called persistently objecting states and the influence of their behavior on the customary international law. In conclusion, we wish to underline that it would be advisable for the Commission to actually slow down the pace of its work so that all states have an opportunity to study the topic to present their views and those views can be taken into account. Now I would wish to just briefly address the topic of Immunity of States Officials from Foreign Criminal Jurisdiction. In the view of our Delegation the Commission has been successful so far in reflecting customary rules of international law existing in this area. I would just point out two things: First, it would be useful at an appropriate time in our view to go back to issue as to where the other high ranking officials apart from troika enjoy privileges and immunities based on their functions. It may be that Minister of Defense and the Head of Parliament are two positions that should be considered in this regard. Secondly, in the view of our Delegation there is currently no practice of States that would substantiate the idea that there are exceptions to the immunity of State officials for certain crimes. We believe that progressive development of law in this area would also not be useful and would even undermine the stability of international relations. Thank you, Mr. President for the opportunity to address this audience. Thank you.

President: I thank the Distinguished Delegate of Russia for her statement. I now invite Prof. Dr. Roy Lee the Permanent Observer of AALCO to the United Nations to deliver his statement. You have the floor, sir.

Dr. Roy Lee, Permanent Observer of AALCO to the United Nations: Thank you, Mr. President. Several Member States of AALCO have referred to the importance that ILC work has for them. They feel it should serve the purpose of interest of AALCO Members and AALCO Members should increase their participation in the work of ILC.

I think it is quite obvious from that statement that the key issue is to increase the Member States' contribution to the work of the ILC and yes, in practice they are two problems at two stages. One is at the formation stage in the ILC itself and then the second stage is when the work of the ILC or report come to the General Assembly at the decision stage whether the report should be adopted and what decision should be taken. Now there are factors affecting both stages and it is also quite obvious that even though the topics of the ILC are highly scientific and political and complicated legal issues but each of the topic has political implications. In this morning we have heard the three and it is quite obvious and particularly in the topic of Expulsions of the Aliens that depends upon one's national interest positions and that affects how you treat the subject matter.

One of the problems now is that the ILC requests members to make the contributions to their work and the Special Rapporteur relies on the contribution from Member States in order to prepare the report. I understand there is a lack of sufficient response to the ILC's request for various reasons that our Member States have not been able to do so and this means that in the formation stage your positions and your interest may not effectively reflected in the special report. Therefore there has been suggestions that Member States should be encouraged to contribute to the requests from the ILC not only on topics you are particularly interested but also on topics which you may not be interested which will affect you if you do not contribute to it.

I think here you have two examples if you look at among the eight topics of the ILC, it is the treaty practice where many of our countries have practice but they are not written down or have been recorded in a form that easily can be forwarded to for the consideration of the Special Rapporteur. The other example is the formation of customary international law where most of our Members have not participated during the period. We do have practice for the last 70 years for example but the question then is how to reflect our practice sufficiently in the so called formation of customary international law.

Now, I now move to second stage when the ILC has presented the report or has produced its final product then, it is considered by the Sixth Committee. Here the main problem is that the ILC report usually becomes available only at the beginning of September and then the Six Committee takes the report up in end of October or November. So there is only two months period for the Countries to review the report and it has been widely felt that there is not enough time to give adequate consideration to the ILC report. At moment the Headquarters of Members States have been considering various ways means to bridge this gap to deal with the problem. It seems very short time to consider the report of the ILC and therefore, States may not be ready to give there position on the products of the ILC and that affects weather or not the final product will reflect your position and your interest. Therefore, I thought it is desirable to point out these factors for Member States to consider how to increase their contribution to the ILC's report. This will be very important for your interests and to preserve your own position in the product. Thank you very much.

The President: I thank Dr. Roy Lee for his statement and one point I fully agree with him relates to the need to reflect our interest in ILC. Over the years I have been encouraging my colleagues from Treaty and Law Department of Chinese Foreign Ministry to be more active in submitting comments on draft articles of ILC and also to submit the information on practices to the ILC. This is important because normally the practices come from developed countries. We should be prepared to follow the advice of Prof. Lee in the coming years and be more active in providing information and comments to the ILC and to the Secretariat of the UN. This will make sure that our positions and views will be reflected in the codification process of the draft articles.

With these words let me take this opportunity to thank our three eminent members of ILC for their participation in our discussion this morning. I hope the members of ILC will remain active in their communications with AALCO Member States. I also encourage the Secretary-General of AALCO to be more active in the coming years to reflect the views of Asian-African States. Let's make sure that exchanges between ILC and AALCO becomes a regular practice in future. When we come back to the meeting after lunch, we will deal the eight statements on the topic of violent extremism and terrorism that are still pending. Possibly, we could complete these statements before the break around 3 or 3.30 and after that we will take up the issue of the report of regional arbitration centers. This afternoon is going to be very important for we need to cover all the pending agenda items, because for tomorrow morning we should have the last meeting of delegations. We need to wind up the proceedings by lunch tomorrow. So I am encouraging all the delegations to be engaged in consultation on draft resolutions and conclusions, so that we will be ready for the smooth adoption of all resolutions and reports. With these words let me adjourn the meeting for the morning and we shall be back at 2 P.M sharply.

The meeting was thereafter adjourned.