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ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION

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

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

A. BACKGROUND

1. The International Law Commission (hereinafter referred to as "ILC" or the "Commission") established by the United Nations General Assembly Resolution 174 (III) of 21st September 1947 is the principal organ under the United Nations system for the promotion of progressive development and codification of international law. The Commission held its Sixty-Eighth session from 2th May -10th June and 4th July-12th August 2016 at Geneva, Switzerland. The Secretariat of the Asian-African Legal Consultative Organization (AALCO) had requested the Commission to circulate the viewpoints of the Member States of AALCO on the agenda items of ILC as articulated at the Fifty-Fifth Annual Session of AALCO held at the Headquarters, New Delhi, India.

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

Mr. Mohammed Bello Adoke (Nigeria); **Mr. Ali Mohsen Fetais Al-Marri** (Qatar); **Mr. Lucius Caflisch** (Switzerland); **Mr. Enrique J.A. Candioti** (Argentina); **Mr. Pedro Comissário Afonso** (Mozambique); **Mr. Abdelrazeg El-Murtadi Suleiman Gouider** (Libya); **Ms. Concepción Escobar Hernández** (Spain); **Mr. Mathias Forteau** (France); **Mr. Juan Manuel Gómez-Robledo** (Mexico); **Mr. Hussein A. Hassouna** (Egypt); **Mr. Mahmoud D. Hmoud** (Jordan); **Mr. Huikang Huang** (China); **Ms. Marie G. Jacobsson** (Sweden); **Mr. Maurice Kamto** (Cameroon); **Mr. Kriangsak Kittichaisaree** (Thailand); **Mr. Roman A. Kolodkin** (Russian Federation); **Mr. Ahmed Laraba** (Algeria); **Mr. Donald M. McRae** (Canada); **Mr. Shinya Murase** (Japan); **Mr. Sean D. Murphy** (United States of America); **Mr. Bernd H. Niehaus** (Costa Rica); **Mr. Georg Nolte** (Germany); **Mr. Ki Gab Park** (Republic of Korea); **Mr. Chris Maina Peter** (United Republic of Tanzania); **Mr. Ernest Petrič** (Slovenia); **Mr. Gilberto VergneSaboia** (Brazil); **Mr. Narinder Singh** (India); **Mr. Pavel Šturma** (Czech Republic); **Mr. Dire D. Tladi** (South Africa); **Mr. Eduardo Valencia-Ospina** (Colombia); **Mr. Marcelo Vázquez-Bermúdez** (Ecuador); **Mr. Amos S. Wako** (Kenya); **Mr. Nugroho Wisnumurti** (Indonesia); **Mr. Michael Wood** (United Kingdom of Great Britain and Northern Ireland).

3. At the Sixty-Eighth Session of the International Law Commission, the following persons were elected: Chairman: **Mr. Pedro Comissario Afonso** (Mozambique); First Vice-Chairman: **Mr. Georg Nolte** (Germany); Second Vice-Chairman: **Mr. Gilberto Vergne Saboia** (Brazil); Rapporteur: **Mr. Ki Gab Park** (Republic of Korea); Chairman of the Drafting Committee: **Mr. Pavel Sturma** (Czech Republic).

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

- Protection of the atmosphere;
- Jus cogens;
- Immunity of State officials from foreign criminal jurisdiction;
- Protection of persons in the event of disaster;

- Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties;
- Protection of the environment in relation to armed conflicts;
- Crimes against humanity;
- Provisional application of treaties;
- Identification of customary international law;

5. As regards the topic "***Protection of the Atmosphere***", the Commission considered the third report on the protection of the atmosphere by the Special Rapporteur, (A/CN.4/692), Shinya Murase. Building upon the previous two reports, the third report of the Special Rapporteur analysed several key issues relevant to the topic, namely, the obligations of States to prevent atmospheric pollution and mitigate atmospheric degradation and the requirement of due diligence and environmental impact assessment. The report also explored questions concerning sustainable and equitable utilization of the atmosphere, as well as the legal limits on certain activities aimed at intentional modification of the atmosphere. Consequently, five draft guidelines were proposed on the obligation of States to protect the environment, environmental impact assessment, sustainable utilization of the atmosphere, equitable utilization of the atmosphere, and geoengineering, together with an additional preambular paragraph. Following the debate in the Commission, (which was preceded by a dialogue with scientists organized by the Special Rapporteur), the Commission decided to refer the five draft guidelines, together with the preambular paragraph, as contained in the Special Rapporteur's third report, to the Drafting Committee. Upon its consideration of the report of the Drafting Committee, the Commission provisionally adopted draft guidelines 3, 4, 5, 6 and 7 and a preambular paragraph, together with commentaries thereto.

6. As regards the topic "***Jus cogens",*** the Commission had before it the first report of the Special Rapporteur (A/CN.4/693), which addressed conceptual issues relating to peremptory norms (jus cogens), including their nature and definition, and traced the historical evolution of peremptory norms and, prior to that, the acceptance in international law of the elements central to the concept of peremptory norms of global international law. The report further raised a number of methodological issues on which the Commission was invited to comment, and reviewed the debates held in the Sixth Committee in 2014 and 2015. The Commission subsequently decided to refer draft conclusions 1 and 3, as contained in the report of the Special Rapporteur, to the Drafting Committee. The Commission subsequently took note of the interim report of the Chairperson of the Drafting Committee on draft conclusions 1 and 2 provisionally adopted by the Committee, which was submitted to the Commission for information.

7. As regards the topic ***"Immunity of State officials from foreign criminal jurisdiction***", the Commission had before it the fifth report of the Special Rapporteur (A/CN.4/701), which analysed the question of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction. Since at the time of its consideration the report was only available to the Commission in two of the six official languages of the United Nations, the debate in the Commission was commenced, involving members wishing to comment on the fifth report at the sixty-eighth session, and would be continued at the sixty-ninth session of the Commission. Upon

its consideration of the report of the Drafting Committee on work done previously and taken note of by the Commission during its sixty-seventh session (A/CN.4/L.865), the Commission provisionally adopted draft articles 2 (f) and 6, together with commentaries thereto.

8. As regards the topic, ***"Protection of persons in the event of disasters"***, the Commission had before it the eighth report of the Special Rapporteur (A/CN.4/697) surveying the comments made by States and international organizations, and other entities, on the draft articles on the protection of persons in the event of disasters adopted on first reading at the sixty-sixth session (2014) and making recommendations for consideration by the Commission during the second reading. The Commission also had before it the comments and observations received from Governments and international organizations (A/CN.4/696 and Add.1) on the draft articles adopted on first reading. The Commission subsequently adopted, on second reading, a draft preamble and 18 draft articles, together with commentaries thereto, on the protection of persons in the event of disaster.

9. As regards the topic "***Subsequent agreements and subsequent practice in relation to the interpretation of treaties",*** the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/694), which addressed the legal significance, for the purpose of interpretation and as forms of practice under a treaty, of pronouncements of expert bodies and of decisions of domestic courts. The report also discussed the structure and scope of the draft conclusions. As a result of its consideration of the topic at the present session, the Commission adopted on first reading a set of 13 draft conclusions, together with commentaries thereto, on subsequent agreements and subsequent practice in relation to the interpretation of treaties.

10. As regards the topic ***"Protection of the environment in relation to armed conflicts",*** the Commission had before it the third report of the Special Rapporteur (A/CN.4/700), which focused on identifying rules applicable in post-conflict situations, while also addressing some preventive issues to be undertaken in the pre-conflict phase. The report contained three draft principles on preventive measures, five draft principles concerning primarily the post-conflict phase and one draft principle on the rights of indigenous peoples. Following the debate in Plenary, the Commission decided to refer the draft principles, as contained in the report of the Special Rapporteur, to the Drafting Committee. The Commission subsequently received the report of the Drafting Committee and took note of draft principles 4, 6, 7, 8, 14, 15, 16, 17 and 18, provisionally adopted by the Drafting Committee. Furthermore, the Commission provisionally adopted the draft principles it had taken note of during its sixty-seventh session, which had been renumbered and revised for technical reasons by the Drafting Committee at the present session, together with commentaries thereto.

11. As regards the topic ***"Crimes against humanity"***, the Commission had before it the second report of the Special Rapporteur (A/CN.4/690), as well as the memorandum by the Secretariat providing information on existing treaty-based monitoring mechanisms. The second report addressed, inter alia, criminalization under national law, establishment of national jurisdiction, general investigation and cooperation for identifying alleged offenders, exercise of national jurisdiction when an alleged offender is present, *aut dedere aut judicare* and fair treatment of an alleged offender. Following the debate in Plenary, the Commission decided to

refer the draft articles proposed by the Special Rapporteur to the Drafting Committee. Upon consideration of the report of the Drafting Committee, the Commission provisionally adopted draft articles 5 to 10, together with commentaries thereto. The Commission also decided to refer to the Drafting Committee the question of the liability of legal persons. Following its consideration of a further report of the Drafting Committee (A/CN.4/L.873/Add.1), the Commission provisionally adopted paragraph 7 of draft article 5, together with the commentary thereto.

12. As regards the topic ***"Provisional application of treaties",*** the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/699 and Add.1), which continued the analysis of the relationship of provisional application to other provisions of the 1969 Vienna Convention and of the practice of international organizations with regard to provisional application. The report included a proposal for a draft guideline 10 on internal law and the observation of provisional application of all or part of a treaty. Following the debate in Plenary, the Commission decided to refer draft guideline 10, as contained in the fourth report of the Special Rapporteur, to the Drafting Committee. The Commission subsequently received the report of the Drafting Committee (A/CN.4/L.877), and took note of draft guidelines 1 to 4 and 6 to 9, provisionally adopted by the Drafting Committee during the sixty-seventh and sixty-eighth sessions. Draft guideline 5 on unilateral declarations had been kept in abeyance by the Drafting Committee to be returned to at a later stage.

13. As regards the topic ***"Identification of customary international law",*** the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/695 and Add.1), which contained, in particular, suggestions for the amendments of several draft conclusions in light of the comments by Governments. It also addressed ways and means to make the evidence of customary international law more readily available. In addition, the Commission had before it the memorandum by the Secretariat concerning the role of decisions of national courts in the case law of international courts and tribunals of a universal character for the purpose of the determination of customary international law (A/CN.4/691). 15. As a result of its consideration of the topic at the present session, the Commission adopted on first reading a set of 16 draft conclusions, together with commentaries thereto, on identification of customary international law. The Commission decided, in accordance with articles 16 to 21 of its Statute, to transmit the draft conclusions, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2018.

B. DELIBERATIONS AT THE FIFTY-FIFTH ANNUAL SESSION OF AALCO (HEADQUARTERS, NEW DELHI, 2016)

14. The **Secretary-General of AALCO Prof. Dr. Rahmat Mohamad** gave a brief account of the nine topics that had been deliberated at the Sixty-Seventh session of the Commission: Protection of the atmosphere; Crimes against humanity; Jus cogens; Protection of the environment in relation to armed conflicts; Immunity of State Officials from foreign criminal jurisdiction; Provisional application of treaties; Identification of customary international law; the Most-Favoured-Nation clause; and Subsequent agreements and subsequent practices in relation to the interpretation of treaties. Thereafter, he enumerated the three major topics that were to be the subject of deliberation for the day, namely: *Protection of the atmosphere; Crimes against*

humanity; and Jus cogens. He encouraged the delegations to present their views on other agenda items of the Commission as well. He also made reference to the work of the "Informal Expert Group on Customary International Law" (IEG) and stated that the IEG acted as a technical expert group on the topic of Identification of Customary International Law, and that the view points and comments emerged from its meetings formed a set of recommendations which have been sent to the Special Rapporteur of the Commission on the subject for his reference and consideration.

15. Dr. Roy Lee, Permanent Observer of AALCO to the UN, New York, made a statement as a panelist wherein he addressed the issues of "why" and "how" AALCO Member States could make best use of the work of the ILC. He pointed out the significant presence of the developing world in the ILC with the majority of the seats occupied by members from Asia, Africa, and Latin America. He noted that over time, as the number of codified international instruments has increased, the untapped area for the ILC to address has decreased and, additionally, the increase in the number of specialized branches of international law has reduced the scope of the ILC's work. He also pointed out the importance of States' responses to the requests for information by the Special Rapporteurs. In particular, Dr. Roy Lee focused on the importance of the work being done by the ILC on the topic of Customary International Law (CIL) as, inter alia, proving persistent objection is difficult to do practically, and therefore the ILC's work to shed light on these nuances would help States and practitioners of international law. The ILC had considered the topic of CIL at its first sessions and decided that the best way to handle CIL was to launch programs of publications of States practice and judgments, awards and decisions from international and regional judicial bodies as they may contain evidence of customary law. He also pointed out that the ILC, in its work on the law of treaties as one of the two major sources of international law, has devoted more than forty years to the core issues and is still continuing the practice of treaty interpretation, while the work on CIL is planned to be completed in four years. He was therefore of the opinion that this important topic may be better served by further study.

16. The **Delegate of Turkey**, who spoke on her own behalf, stated that the ILC has played, over the decades, a key role in the codification of international law, in particular the 1958 Geneva Conventions on the Law of the Sea, the Vienna Convention on the Law of Treaties and most recently the Non-navigational Uses of Waterways. The delegate was of the view that the international community has graduated from the era of codification into an era of implementation. The ILC has also adopted numerous soft law instruments.

17. On the significance of the work of the ILC, she pointed out that the ILC is held in high esteem as an authoritative body of international law experts and that its well-known and oft-cited Draft Articles on State Responsibility stood as one of the most evident example of how the work of ILC—while not engendering a binding instrument- remains extremely influential in shaping international law. Commenting on ILC's work on the topic of "Customary International Law", she stated that it is intended to be used as a practical source to assist practitioners, courts at the domestic and international levels and others seeking assistance in understanding this complex area of international law. She added that the work has taken the format of "Draft conclusions"—and not Draft articles for purposes of an international convention.

18. The **Delegate of Japan** first spoke on the issue of **'**Strengthening the Role of ILC and Promoting Dialogue with ICJ'. He stated that in the past decades, the International Law

Commission has greatly contributed to the progressive development of international law and its codification by developing draft articles on specific subjects. While taking note of the fact that the Commission has already achieved codification in the major fields of international law through its intensive deliberations over the years, he saw another emerging challenge which the Commission faced: to make ILC more appealing to the UN Member States in light of the current situation. He was of the view that it is important to promote and strengthen an interaction between ILC and ICJ, and that (given the fact that members of ILC frequently refer judgments of ICJ in their deliberation of each topic in the Commission), they are in the very good position to provide professional evaluations on particular elements of international law which the Court could point out. As the body consisting of persons of recognized competence in international law, ILC could play a role as a "critical observer" of ICJ. Even though both ILC and ICJ are independent bodies and they should not intervene in each other's work, the Commission should seek further opportunities for interaction with the Court, he added.

19. Commenting on the topic "Protection of the Atmosphere", he noted that during the deliberation on the Report of the Commission in the Sixth Committee of the 70th session of UNGA many Member States had expressed their support to the decision of the Commission to discuss the topic as a crucial issue of the international community. He also pointed out that plenty of support was given to the language used in the preambular part of the Draft Guidelines which said: "the protection of the atmosphere … is a pressing concern of the international community as a whole." Commenting further he said that in the modern industrial society, protection of the atmosphere ought to be carried out by cooperation among states and that obligating states to cooperate with each other and with relevant international organizations for the protection of the atmosphere is a necessary rule to be included into the guidelines.

20. On the topic of "crimes against humanity" he stated that Japan attaches great importance to ending impunity for the most serious crimes of concern to the international community as a whole. While acknowledging the importance of the on-going work to fill the legal gap of obligations of prevention and punishment of crimes against humanity, he added that Japan is of the view that the current work should avoid any legal conflicts with the obligations of states arising under the constituent instruments of international courts or tribunals, including the ICC. He was of the further view that to end impunity, coordinated actions by the international community are required.

21. On the cooperation between AALCO and the ILC, he stated that to provide better chance for ILC to contribute to the promotion of the progressive development of international law and its codification, views from the international community, particularly voices from Asia and Africa should be properly reflected and that his delegation welcomed the informal exchange of views among legal advisors of delegations to the UN that was organized by the Permanent Observer of AALCO to the UN on the role of ILC in the development and making of international law in January last year.

22. The **Delegate of Malaysia** first spoke on the topic "Protection of Atmosphere." He stated that the ILC has referred the Draft Guidelines 1,2,3 and 5 as contained in the Special Rapporteur's second report to the Drafting Committee and upon consideration of the report of the Drafting committee the Commission provisionally had adopted Draft Guidelines 1,2 and 5 and four preambular paragraphs considered from Draft Guideline 3 together with commentaries.

On the preambular paragraph, He averred that Malaysia shared the same view as the AALCO Secretariat that the Commission has rightly incorporated both in the preamble and Guideline 2 the understanding that the Draft Guidelines will not interfere with relevant political negotiations including those of climate change, ozone depletion and long range trans boundary pollution. Taking note of the fact that the fourth preambular paragraph reflects the 2013 understanding of the Commission when the topic was included in the programme of the ILC, he was of the view that the fourth preambular paragraph touched on scope of the guidelines and that Malaysia preferred that the fourth paragraph be relocated in Draft Guideline 2.

23. On the Draft Guideline 1 on the use of terms, he noted that the term atmosphere has been broadly defined as the envelope of gases surrounding the earth. Specific reference to the two layers of gases, i.e. troposphere and stratosphere and airborne substances as provided in the first report have been eliminated. Malaysia is of the view that the proposed definition should not by any means alter or narrow the existing scientific interpretation of the atmosphere. He reiterated that clarification has to be sought on the status of other elements in the atmosphere that are not covered by the proposed definition. Scientifically, atmosphere contains gases, clouds, particles of dust and other particles called aerosols.

24. He further noted that both paragraph b and c of the Draft Guideline 1 provide for the term "by human" to focus on human activity whether direct or indirect. He was of the view that addressing "by human" without specifying the act would be of broad scope. In this regard he reiterated his Country's previous intervention that Malaysia sought specific kind of human activities intended to be covered under the Draft Guidelines as to ensure that the activities proposed will not overlap with human activities covered under the existing international regime on environmental protection.

25. In relation to the scope of the Guidelines, Malaysia noted that the proposed Draft Guidelines deals with the protection of the atmosphere in two areas: atmospheric pollution and atmospheric degradation. Malaysia further notes that Draft Guideline 2 concerned only on anthropogenic process originating from human activities and not on natural phenomenon like volcanic eruption and meteorite collisions. In this regard, Malaysia is of the view that consultation with scientific and technical experts is crucial to the matter particularly to enable gaps to be filled with regard to anthropogenic causes and natural origins. In his view international cooperation could take a variety of forms and that paragraph 2 of Draft Guideline 5 stressed in particular the importance of cooperation in enhancing scientific knowledge relating to the causes and impacts of atmospheric pollution and atmospheric degradation. Paragraph 2 of Draft Guideline 5 also highlighted that cooperation could include the exchange of information and joint monitoring. Malaysia shared the same view with AALCO Secretariat that given the fact that wider range of activities could cause transboundary air pollution or global climate change obligating States to cooperate with each other and with relevant international organizations, further protection of atmosphere is a welcome rule to be included in the Draft Guidelines. Pursuant to that Malaysia reiterated to seek clarification on whether it is appropriate to highlight only exchange of information and joint monitoring as there are many other forms of cooperation that could be relevant such as technology transfer and capacity building.

26. On the topic "crimes against humanity", Malaysia recorded its appreciation to the Secretariat in selecting this topic for deliberation in this half day special meeting. Bearing in mind that there are already various multilateral treaties which addresses crimes against humanity such as the Rome Statute, Malaysia reiterated its concern that it is premature to conclude that the time is right for the adoption of a new international instrument on the issue of crimes against humanity.

27. He was of the view that Draft Article 3(1) of the proposed convention on the crimes against humanity substantially replicated Article 7(1) of the Rome Statute and that (based on the concept of complementarity), there may be necessity for the parties to the Rome Statute to enact legislations under the Rome Statute. In view that there are currently 124 State Parties to the Rome Statute, as far as criminalizing issue of the crimes against humanity, Malaysia remained unclear of any value added of Article 3(1) of the proposed convention. He was of the view that what need to be addressed is the reason behind the failure of the State Parties who has not done so in enacting such legislation. He went on to add that the drafting of the proposed convention should be pursued prudently to ensure that any further work on this matter should not overlap with the existing legal regime. He also highlighted his concern on the issue of the referral of the UN Security Council which, in his view, may be manipulated by political influence in the decision of the ICC. In this regard, Malaysia hoped that the concerns regarding the Rome Statute, in particular the role of the UN Security Council in the Rome Statute can be addressed in the proposed convention on crimes against humanity.

28. The Delegate of India first spoke on the topic "Protection of the atmosphere". While appreciating the Special Rapporteur Prof. Shinya Murase for his efforts and analysis of the Draft Guidelines submitted in his first report, he stated that the five Draft Guidelines prepared and submitted by the Special Rapporteur in his second report dealt with the use of terms, scope of the guidelines, common concern of humankind, general obligation of States to protect the atmosphere and, international cooperation. He agreed with the decision of the Commission to address the subject matter of draft guideline 3 (on common concern of humankind) in the preambular part, and the reasons given for that in the commentary. He was of the view that considering the threats posed to the atmosphere, in particular, by air pollution and ozone depletion, the protection of atmosphere is extremely important for the humankind and that it made it a general obligation of all States to protect the atmosphere. He was of the view that this general obligation is the subject matter of draft guideline 4 which required more study and analysis. The delegate noted with appreciation the future plan of work on the topic presented by the Special Rapporteur as reflected in paragraph 47 of the ILC Report.

29. On the topic 'Crimes against humanity', the delegate welcomed the first report of the Special Rapporteur, Professor Sean D Murphy which assessed potential benefits of developing a convention on crimes against humanity and dealt with certain aspects of the existing multilateral conventions that promote prevention, criminalization and inter-State cooperation in dealing with crimes. After examining various treaty regimes, the Special Rapporteur proposed draft articles on prevention and punishment of crimes against humanity and its definition. He was of the view that in view of the existing international legal regimes and mechanisms dealing with the subject matter, his delegation considered that it needed in-depth study and thorough discussion in the

Commission. The proposed obligations should not conflict with the existing treaty obligations and it should not duplicate the existing regimes.

30. While welcoming the decision of the Commission to include the topic *'Jus cogens'* and appoint Mr. Dire Tladi as the Special Rapporteur for the topic, he agreed with the view that "questions relating to sources lie at the heart of international law", and that it is now timely for the Commission continue its strong tradition of engaging with, *jus cogens*, by a comprehensive examination of the concept as a topic. He supported the legal issues identified on the topic, the nature of *jus cogens*; requirements for the identification of a norm as *jus cogens*; an illustrative list of norms which have achieved the status of jus cogens; consequences or effects of *jus cogens*.

31. The **Delegate of People's Republic of China** first spoke on the topic of "Crimes against humanity". He held that codification of draft articles should be based on a thorough review of the positions and practice of States, rather than primarily draw on the practice of international judicial institutions or adopt verbatim the provision of some international conventions, such as the definition of "crimes against humanity" and the relation between "crimes against humanity" and "in time of war". With regard to the list of specific crimes, full consideration should be given to differences among national legal systems. The Commission should also pay attention to the implementation of relevant provisions by these States whose domestic law has not defined the specific crimes such as "enforced disappearances". In the absence of legal basis and the practice of States, the Commission should give cautious consideration as to whether it is appropriate to impose upon States such obligations as that of cooperation with "other organizations" to prevent crimes against humanity, he added.

32. On the topic of "Protection of the Atmosphere", he believed that, the purpose and scope of this project should be further clarified, especially the boundaries between this topic and the relating questions such as trans-boundary air pollution, ozone depletion and climate change. In his view, some crucial terms, such as atmospheric pollution and atmospheric degradation, needed to be defined more clearly. He suggested that the Commission differentiate types of atmospheric pollution in working out relevant provisions instead of a "one-size-fits-all" approach. Adequate consideration should be given to the priorities of developing countries and their capacity building in addressing atmospheric pollution.

33. On the topic of "*Jus Cogens*", he was of the view that, due to lack of relevant state practice, it is yet premature to carry out a thorough study and that an in-depth study on *Jus cogens* will not be possible unless there is sufficient information on state practice. Although a few international conventions and several decisions of the International Court of Justice did mention *jus cogens*, they did not elaborate on the nature of *jus cogens*, nor can they serve as guidance for identification of such rules. Hence, in his view, the Commission should adopt a cautious approach in referencing the above practice.

34. The **Delegate of the Islamic Republic of Iran** first spoke on the topic of "Crimes Against Humanity". He was of the view that the idea of drafting a new convention on crimes against humanity by the Commission, due to many reasons, still needs serious consideration and that crimes against humanity as crimes under international law have been defined clearly in numerous international instruments since the World War II, the most important of which being

the Statute of the International Criminal Court (ICC). In his view, customary international law gives a clear understanding of crimes against humanity in international law. To him, review of the report of the Special Rapporteur and the proposed draft articles demonstrated that no new provisions in international law are to be codified or developed by the commission on this topic. In this respect, it was enough to consider the fact of the matter that virtually all the States that addressed the issue before the Sixth Committee maintained that the Commission should not adopt a definition on "crimes against humanity" that differed from article 7 of the Rome Statute.

35. At the time, many States have criminalized crimes against humanity in their national legislations by utilizing existing instruments on this crime. Moreover, under the principle of *Aut dedere aut judicare*, bilateral judicial assistance agreements and other international instruments referred to by the Special Rapporteur in the first report, there is sufficient legal basis as to the prevention and punishment of crimes against humanity. In this regard he noted that the solution to addressing the existing insufficiencies in the implementation of some provisions on crimes against humanity is not to prepare a new convention; rather, it would be more reasonable to seek the reasons and motives of non-implementation and to propose some methods to eliminate them. He went on to add that drafting a new convention on crimes against humanity risked undermining the legal regime under the existing instruments, in particular, the Rome Statute. Based on these reasonings, he came to the conclusion that consideration of a new convention on a topic of international law parallel to the existing instruments could not, per se, contribute to its strengthening, rather it might rather lead to fragmentation of international law and would not fill any legal lacunae in the life of the international community.

36. On the issue of "Protection of Atmosphere", he appreciated the work of the Special Rapporteur and noted that the Commission's work on protection of atmosphere is aimed at preventing future loopholes in the legal regime applicable to protection of atmosphere and that he believed that the Commission should not exclude from its study any sources of pollutants and substances detrimental to the atmosphere, in particular radioactive and nuclear emissions, due to their potential longstanding and transboundary risks. He was of the view that in Guideline 2, Paragraph 3, some specific substances such as black carbon, tropospheric ozone, and other dual-impact substances have been excluded from the scope of the guidelines and that a "without prejudice" clause is more helpful and appropriate than exclusion of a specific substance from the scope.

37. As regards the decision of the Commission to replace the phrase "common concern of mankind" with some paragraphs in the context of the preamble, he was of the view that this modification was an appropriate measure in order to include more legal concepts in the guidelines and believed that the phrase "common heritage of mankind" along with the "pressing concern of the international community" is relevant and helps properly refer to the atmosphere in legal terms. He added that Article 192 of the United Nations Convention on the Law of the Sea sets out the general obligation of States "to protect and preserve the marine environment" which could also be characterized as an obligation *erga omnes*. This approach has been highlighted by ITLOS in the case concerning Responsibilities and Obligations of States Sponsoring Persons and Entities With Respect to the Activities In the Area, in which the Court, referring to Article 48 of the ILC Articles on State Responsibility, indicated that "each State Party may also be entitled to claim compensation in light of the *erga omnes* character of the obligations relating to

preservation of the environment of the high seas and in the area". He believed that the same general obligation is applicable to the protection of the atmosphere.

38. On the issue of cooperation as one of the principles of modern international law applicable to protection of atmosphere he stated that the obligation to cooperate in international law is a vague and undefined legal concept and that any decision as to its extension to the legal regime applicable to the protection of atmosphere ought to be coupled with an in-depth study taking into account the technical aspects of the issue. In his view the same concern existed in relation to the principles of international environmental law, inter alia, sustainable development, and their application with regard to the topic. The second report merely makes reference to these principles without analyzing them in the context of the topic. The relationship between the protection of atmosphere and these concepts deserve consideration in the Commission's future work on the topic.

39. On the issue of "*Jus Cogens*", he welcomed the decision of the Commission to work on the topic and share the Special Rapporteur's contention that there is no controversy about the very existence of *jus cogens* and that on the other hand its contours, precise legal effects and qualifications need to be analyzed by the Commission. However, he was of the view that the Special Rapporteur would pay a special attention to the consequences of breach of a *jus cogens* norm, particularly, in light of article 41 of the ILC's Draft Articles on State Responsibility for Internationally Wrongful Acts. He was of the conviction that a good number of situations have been created by a serious breach within the meaning of article 40 of the Draft Articles and likewise efforts have been made by many states to render aid or assistance in maintaining such situations in terms of article 41 of the Draft: thus, there is enough practice. Constant illegitimate reference to threat or use of force by certain States is only one example thereof, he clarified.

40. The **Delegate of Republic of Korea** stated that his government's views regarding these three issues were fully expressed during the Sixth Committee of the UN General Assembly. While wondering how to envision furthering strengthen or enhance the interaction between the ILC and AALCO, he stated that his delegation would express itself clearly during the informal consultations. While echoing the views of Dr. Roy Lee, he pointed out a couple of issues. While recalling the work of ILC during 1940s, he pointed out that around half of the topics suggested at that time had been completed by the ILC. He was of the view that these days, treaties are not concluded as often as they were a few decades back and that this kind of lukewarm attitude of the international community had ramification in the work here too.

41. The **(Observer) Delegate of Vietnam**[1] recognized the contribution and significance of AALCO in facilitating discussions of topics that are most relevant to the interest of Asian and African countries as well as developing countries.

42. On the topic of **"Protection of the Atmosphere",** he appreciated the second report of the Special Rapporteur, Prof. Shinya Murase. He noted that Vietnam fully supported the codification of international rules regarding protection of the atmosphere and promoted the responsibility of all States in protecting this common concern for the benefits of our future generations. He also shared the view that the codification of the Guidelines should take into account the current treaty

[1] Viet Nam has officially become a Member of AALCO in 2017.

system as well as on-going negotiation on climate change, trans-boundary air pollution and the deplete of the ozone layer. On the 5 draft Guidelines proposed by Prof. Murase in his second report, he welcomed and actively supported the definition of new term "atmospheric degradation" because it broadly included all kinds of pollutions, such as air pollution, ozone depletion, climate change and any other alterations of the atmospheric conditions resulting in deleterious effects on human life and health and the Earth's natural environment. However, it should be clear with the exact scientific content and criteria to evaluate the degree of degradation, regional or global. He also viewed guidelines 3, 4 and 5 as positive contributions made on the part of Prof. Murase and expressed hope that the Special Rapporteur will continue to improve the linkages between the definition of "atmosphere", "Air pollution", "Atmospheric degradation", "common concern of humankind" and the obligation to protect the atmosphere. In his view, the next report should address the content of protection obligations so that States could understand what international law requires them to do.

43. On the topic of **"Jus cogens",** he welcomed the inclusion of this topic in the work of the International Law Commission and believed that the study undertaken by its Special Rapporteur, Prof. Dire D. Tladi of South Africa, will lead to meaningful outcomes. He also believed that discussion under this topic will greatly contribute to the development of international law. By definition, Article 53 of the Vienna Convention on the Law of Treaties clearly states that "a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". He was of the view that the consensus-based approach is still valid even today and the recognition of a *jus cogens* rule cannot be an academic exercise but base on solid State practices. He went on to add that his Country could not support any other approach that may lower the standard of *jus cogens*.

44. On the topic of "Crimes against humanity", he highly appreciated the work of the Commission to fill the gap in the existing legal framework. Being a victim of genocide act done by Khmer Rouge in 1970s, Vietnam welcomed a broad, clear and inclusive definition of "crimes against humanity". He took note of the definition proposed by the Special Rapporteur in conformity with Article 7 of the Rome Statute and observed that this definition may conflict with provisions of national laws regarding this crime. In this regard, he cited the example of Vietnam's Criminal Code which provides additional element of territorial magnitude or social-economic factor.

45. In the view of the delegate, a definition based on Article 7 is also flawed due to the terms 'widespread" and "systematic" and that the term "systematic" meant repetition of wrongdoing acts in long period while the prevention of crimes against humanity requires an immediate, prompt identification of crime and action. For example, in 1977-1979, the Khmer Rouge killed, tortured Cambodians and Vietnamese in widespread and inhuman manner for a long time and yet the world community had reacted slowly by the political reasons, he added.

II. PROTECTION OF THE ATMOSPHERE

A. BACKGROUND

1. At the Sixty-Third Session of the International Law Commission (2011), the Commission endorsed the inclusion of the topic "Protection of the atmosphere" in its long-term programme of work.

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

B. CONSIDERATION OF THE TOPIC AT THE SIXTY-EIGHTH SESSION OF THE COMMISSION (2016)

3. The Commission considered the Third Report on the Protection of the Atmosphere by the Special Rapporteur, Shinya Murase (Japan).[3] Based on that Report, the Commission adopted a preambular paragraph as well as five new draft guidelines—draft Guidelines 3, 4, 5, 6, and 7—with commentary.[4]

4. Draft Guideline 3[5] asserts that "States have the obligation to protect the atmosphere by exercising due diligence in taking appropriate measures, in accordance with applicable rules of international law, to prevent, reduce or control atmospheric pollution and atmospheric degradation." According to the commentary, this draft guideline is "central to the present draft guidelines" and from it flow draft Guidelines 4, 5, and 6. Draft Guideline 4[6] indicates that

[2] See A/68/10, para. 168.
[3] See International Law Commission, Third Report on the Protection of the Atmosphere, UN Doc. A/CN.4/692 (Feb. 25, 2016) (prepared by Special Rapporteur Shinya Murase).
[4] See Report of the International Law Commission on the Work of Its Sixty-Eighth Session, UN GAOR, 71st Sess., Supp. No. 10, at 2, para. 3, UN Doc. A/71/10 (Sept. 19, 2016) at 282, para. 93.
[5] Guideline 3
Obligation to protect the atmosphere
States have the obligation to protect the atmosphere by exercising due diligence in taking appropriate measures, in accordance with applicable rules of international law, to prevent, reduce or control atmospheric pollution and atmospheric degradation.
[6] Guideline 4
Environmental impact assessment

"States have the obligation to ensure that an environmental impact assessment is undertaken of proposed activities under their jurisdiction or control which are likely to cause significant adverse impact on the atmosphere in terms of atmospheric pollution or atmospheric degradation." Draft Guideline 5[7] provides that "utilization [of the atmosphere] should be undertaken in a sustainable manner," noting that "[s]ustainable utilization of the atmosphere includes the need to reconcile economic development with protection of the atmosphere." Draft Guideline 6[8] maintains that the "atmosphere should be utilized in an equitable and reasonable manner, taking into account the interests of present and future generations."

5. Draft Guideline 7[9] relates: "Activities aimed at intentional large-scale modification of the atmosphere should be conducted with prudence and caution, subject to any applicable rules of international law." By its terms, this guideline addresses both activities designed to use the atmosphere for beneficial purposes, such as weather modification to improve crops, and activities designed to improve the atmosphere itself, such as through removing carbon from the atmosphere and sequestering it in the soil or marine environment. The latter type of activity, sometimes referred to as "geo-engineering," involves new techniques that many regard as potentially harmful to the environment of the lithosphere.[10] Given that the draft guidelines might be viewed as authorizing such activities, the commentary to this draft guideline notes:

6. A number of members remained unpersuaded that there was a need for a draft guideline on this matter, which essentially remains controversial, and the discussion on it was evolving,

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States have the obligation to ensure that an environmental impact assessment is undertaken of proposed activities under their jurisdiction or control which are likely to cause significant adverse impact on the atmosphere in terms of atmospheric pollution or atmospheric degradation.

[7] Guideline 5

Sustainable utilization of the atmosphere

1. Given that the atmosphere is a natural resource with a limited assimilation capacity, its utilization should be undertaken in a sustainable manner.

2. Sustainable utilization of the atmosphere includes the need to reconcile economic development with protection of the atmosphere.

[8] Guideline 6

Equitable and reasonable utilization of the atmosphere

The atmosphere should be utilized in an equitable and reasonable manner, taking into account the interests of present and future generations.

[9] Guideline 7

Intentional large-scale modification of the atmosphere

Activities aimed at intentional large-scale modification of the atmosphere should be conducted with prudence and caution, subject to any applicable rules of international law.

[10] For example, in 2010, states parties to the Convention on Biological Diversity, meeting in Nagoya, Japan, decided that

no climate-related geo-engineering activities that may affect biodiversity take place, until there is an adequate scientific basis on which to justify such activities and appropriate consideration of the associated risks for the environment and biodiversity and associated social, economic and cultural impacts, with the exception of small scale scientific research studies that would be conducted in a controlled setting in accordance with Article 3 of the Convention, and only if they are justified by the need to gather specific scientific data and are subject to a thorough prior assessment of the potential impacts on the environment. Convention on Biological Diversity, Tenth Meeting of the Conference of the Parties, Decision X/33, Biodiversity and Climate Change, Doc. No. UNEP/CBD/COP/DEC/X/33, para. 8(w) (2010) (citation omitted), available at www.cbd.int/decisions/cop/?m=cop-10.

and is based on scant practice. Other members were of the view that the draft guideline could be enhanced during second reading.[11]

C. SUMMARY OF THE VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPIC AT THE UN GENERAL ASSEMBLY SIXTH COMMITTEE AT ITS SEVENTY FIRST SESSION HELD IN 2016[12]

7. In relation to the topic "Protection of the Atmosphere", *Many Delegations* voiced their support for the Commission's work and the work of the Special Rapporteur on this issue. It was generally felt that the work of both raised the visibility of the issue and highlighted the fact that the atmosphere's protection required coordinated actions by the international community

8. *One Delegation* sought, in the draft guidelines, clarification on the definition of "atmosphere", specifically on the status of elements of the atmosphere not covered by the proposed definition. He observed that the definition proposed by the Commission should not alter or narrow the existing scientific interpretation of the atmosphere and that in addition, technical and scientific experts should be consulted in framing a clear, comprehensive and acceptable definition of "atmospheric degradation". Clarification was also needed on the specific types of "human activities" to be covered under the draft guidelines to ensure there would be no overlap with "human activities" covered under the existing environmental regime on environmental protection. Regarding international cooperation, the delegation suggested that there were many forms of cooperation that could be relevant beyond the exchange of information and joint monitoring highlighted in the draft guidelines, such as technology transfer and capacity-building.

9. Commenting on the overall work of the Commission, *one Delegation* emphasized that the purpose and scope of the draft guidelines on the protection of the atmosphere should be further clarified in order to help ease States' concerns about the relationship between this project and the relevant existing political and legal regimes. In his view, in addition, some crucial terms needed to be defined more clearly, such as the need to further distinguish between atmospheric pollution and atmospheric degradation. He went on to add that some types of atmospheric pollution could cause deleterious effect only to specific countries or regions, while others could cause deleterious effect on the international community. The Commission should treat them differently in working out relevant provisions, and, in particular, should consider developing countries' priorities and their capacity-building in addressing atmospheric pollution, he added.

10. *One Delegation* noted that his Country valued the fact that the concept of "common concern of humankind" had been included as part of the draft guidelines' Preambular paragraphs and that the concept, which had been referred to in several related legal documents, such as the United Nations Framework Convention on Climate Change, had a significant legal value to the objectives in question. In his view, draft guideline 5, which stipulated an obligation of

[11] See Report of the International Law Commission on the Work of Its Sixty-Eighth Session, UN GAOR, 71st Sess., Supp. No. 10, at 2, para. 3, UN Doc. A/71/10 (Sept. 19, 2016), at 296.

[12] All the Statements that are mentioned here as having been made by the Member States of AALCO at the UN General Assembly Sixth Committee in 2016 are available from: https://www.un.org/press/en/2016/gal3535.doc.htm; https://www.un.org/press/en/2016/gal3531.doc.htm and https://www.un.org/press/en/2016/gal3529.doc.htm.

international cooperation, was one of the most important outcomes under that topic in the sixty-seventh session of the Commission. Obligating States to cooperate with each other and with relevant international organizations for the protection of the atmosphere was a necessary rule for inclusion in the guidelines, given the wide range of economic and other activities that could cause transboundary air pollution or global climate change, he added.

11. *One Delegation* stated that the Commission's work on this issue should include study on all sources of pollutants and substances detrimental to the atmosphere, in particular radioactive and nuclear emissions. Regarding the omission of specific substances in guideline 2, paragraph 3, so as not to interfere with ongoing negotiations among Member States, he was of the view that it would have been preferable to include a "without prejudice" clause. While stating that the replacement of the phrase "common concern of mankind" with some related paragraphs in the preamble was appropriate, he went on to add that the phrases "common heritage of mankind" and "pressing concern of the international community" properly referred to the atmosphere in legal terms. On the issue of cooperation, he noted that the obligation to cooperate was a vague and undefined legal concept. The development of an international legal regime on the protection of the atmosphere would be feasible only if due consideration were given to well-established concepts in the field, namely intra-and intergenerational equity, as well as the special needs and priorities of developing countries, he added.

12. *One Delegation* endorsed the Commission's decision to address the matter of draft guideline 3 (on the common concern of humankind) in the preamble. The Delegation was of the view that draft guideline 4, which addressed the obligation of States to protect the atmosphere, required further study and analysis. She went on to urge the Commission to continue to strengthen its research on relevant theories and practices relating to the topic and gradually clarify relevant guidelines.

13. *One Delegation* was of the view that the topic could not be properly discussed or developed in isolation from the scientific community, and in this regard, he commended the Special Rapporteur's initiative to organize a dialogue with six of the world's foremost atmospheric scientists. Underscoring the need to address the depletion of the atmosphere, he expressed approval for the newly adopted third paragraph of the preamble to the draft guidelines, which recognized that the protection of the atmosphere from transboundary atmospheric pollution and atmospheric degradation was a "pressing concern of the international community as a whole". He welcomed as well the Commission's emphasis on international cooperation under guideline 5.

14. *One Delegation* agreed with the Commission's approach to the topic so as not to interfere with political negotiations and without prejudice to existing international law principles, such as the polluter-pays principle, the precautionary principle and the principle of common but differentiated responsibility. In his view, the provisional adoption of draft guidelines, including a preamble, was a welcome step forward and so was in particular, the inclusion of cooperation in enhancing scientific knowledge relating to the causes and impacts of atmospheric pollution and atmospheric degradation. He encouraged the Commission to continue distilling existing international law principles relating to protection of the atmosphere to serve as an accessible,

understandable and coherent backdrop against which the political processes of creating new norms could take place more expediently.

15. *One Delegation* concurred with the statement on the first paragraph on the general obligation to cooperation. However, he was of the view that the second paragraph of guideline 5 presented some difficulty, as it singled out one form of cooperation at the expense of others. Singling out any form of cooperation could impair the discretion of States to cooperate in a most appropriate manner, he felt. He was of the view that the form of the project should be guidelines, rather than principles or guiding principles and that the latter term could connote some legal obligations on States, the very essence of which had been pre-empted by the Commission.

16. *One Delegation* welcomed the narrow definition of "atmospheric pollution", in line with existing treaty practice, and appreciated efforts to define "energy" for the purpose of further clarification. While he considered draft guideline 5, with its emphasis on international cooperation, as core to the entire set of draft guidelines, he expressed doubt about the expression "States have an obligation to cooperate", noting that "States shall cooperate" was more frequently used in other treaties.

17. *One Delegation* noted that she generally agreed to the text of the draft guidelines on the protection of the atmosphere and the Preambular paragraphs, adding that draft guideline 3 belonged to the preamble. She also voiced support of the proposal for the Commission to hold part of its future sessions in New York, pointing out that both the Commission and the New York missions would benefit.

D. COMMENTS AND OBSERVATIONS OF AALCO SECRETARIAT

18. The Secretariat of AALCO would like to express its appreciation to Prof. Shinya Murase, the Special Rapporteur on the topic "Protection of the Atmosphere" for his Third Report, which was considered by the Commission at its session in 2016. It also welcomes the adoption of the preambular paragraph as well as five new draft guidelines—draft Guidelines 3, 4, 5, 6, and 7—with commentary based on the report in the same session. The fact that the Commission seeks to provide guidelines that might assist the international community in addressing critical questions relating to transboundary and global protection of the atmosphere without interfering with relevant political negotiations or attempting to fill gaps, impose legal rules or principles on exiting treaty regimes needs to be welcomed.

19. The Secretariat of AALCO welcomes the Commission's decision to acknowledge, in the preamble to the draft guidelines, the importance of the atmosphere and its essential role for sustaining life on earth, human health and welfare, and ecosystems. It also expresses appreciation that the Commission had recognized the urgency and the global character of atmospheric protection by calling it, in the preamble, a "pressing concern for the international community as a whole". In that regard, one can say that the Special Rapporteur's initial recommendation to classify atmospheric protection as a "common concern of humankind" could be justified.

20. Draft Guideline 3, which asserts that "States have the obligation to protect the atmosphere by exercising due diligence in taking appropriate measures, in accordance with applicable rules of international law, to prevent, reduce or control atmospheric pollution and atmospheric degradation, is central to the present draft articles. In particular, draft guidelines 4, 5 and 6, below, flow from this guideline; these three draft guidelines seek to apply various principles of international environmental law to the specific situation of the protection of the atmosphere.

21. We also welcome, as well, the fact that draft guideline 5(a) underscores the obligation of States to cooperate for the protection of the atmosphere. Indeed, draft guideline 5, which is core to the entire set of draft guidelines, is an obligation already enshrined in Article 2, paragraph 1(b) of the Kyoto Protocol to the United Nations Framework Convention on Climate Change (UNFCCC). In this sense, it clearly adds legal value to the existing commitments. Obligating States to cooperate with each other and with relevant international organizations for the protection of the atmosphere was a necessary rule for inclusion in the guidelines, given the wide range of economic and other activities that could cause transboundary air pollution or global climate change.

22. Be that as it may, AALCO also stresses the need on the part of the Commission and the Special Rapporteur to continue to strengthen its research on relevant theories and practices relating to the topic and gradually clarify relevant guidelines in the years to come.

III. JUS COGENS

A. BACKGROUND

1. *Jus cogens*, whose meaning in Latin is "compelling law", is also known by the term "peremptory norm" of international law, and refers to those norms of international law from which no derogation is ever permitted. While the concept of *jus cogens* is rooted in theories of natural law, it was described typically for the first time in an international instrument in Articles 53 of the 1969 Vienna Convention on the Law of Treaties.[13] It has been said that the concept of *jus cogens* is based upon "the acceptance of fundamental and superior values within the system and in some respects is akin to the notion of public order or public policy in domestic legal order."[14] However, despite the fact that there exists a two-stage process for identifying *jus cogens* norms – "first, the establishment of the proposition as a rule of general international law and, secondly, the acceptance of that rule as a peremptory norm by the international law community of States as a whole"[15] – there is little definitive agreement on what the content of *jus cogens* norms are.

2. It was therefore suggested in 2014 by the International Law Commission's Working Group on the long-term work programme of the Commission that *jus cogens* be included in the work programme of the Commission, and subsequently, at its Sixty-Seventh session, in 2015, the International Law Commission decided to include the topic "*Jus cogens*" in its programme of work, and also to appoint Mr. Dire D. Tladi as Special Rapporteur for the topic.

3. This development is particularly relevant given the nature of the Commission's ongoing study and examination of topics related to the sources of international law, such as customary international law and subsequent agreements and subsequent practice in relation to treaty interpretation. The following part will therefore deal with the 2014 recommendation of the Working-Group on the long-term programme of work whose annex contained the proposal by Mr. Tladi, and upon the strength of which the topic was included in the Commission's programme of work.[16]

B. CONSIDERATION OF THE TOPIC AT THE SIXTY-EIGHTH SESSION OF THE COMMISSION (2016)

[13] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331
Article 53: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character"; See also Article 53 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.
[14] Malcolm Shaw, *International Law* 5th Ed. (Cambridge University Press, 2003), p. 117.
[15] *Id.*, at p. 118.
[16] A/69/10.

4. In a first report submitted for the Sixty-Eighth session,[17] the Special Rapporteur proposed three draft conclusions, two of which were referred to the Drafting Committee.[18] The Special Rapporteur indicated that his first report addressed mainly conceptual issues relating to peremptory norms (*jus cogens*), including their nature and definition. The report also traced the historical evolution of *jus cogens* and the acceptance in international law of the elements central to the concept of *jus cogens*. It further raised a number of methodological issues on which members of the Commission were invited to comment. Chapter two of the report reviewed the debates in the Sixth Committee in 2014 and 2015. It was recalled that most States expressed support for the Commission's topic.

5. As provisionally adopted within the Drafting Committee, draft Conclusion 1 states: "The present draft conclusions concern the identification and legal effects of peremptory norms of general international law (*jus cogens*)."[19] The Special Rapporteur also proposed two paragraphs for the other draft conclusion (originally designated as draft Conclusion 3) that were sent to the drafting committee. So far, the Drafting Committee has provisionally adopted just the first paragraph of that draft conclusion (now designated as draft Conclusion 2), which provides:

A peremptory norm of general international law (jus cogens) is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[20]

6. This language tracks the language of the second sentence of VCLT Article 53. The second paragraph of this draft conclusion proposed by the Special Rapporteur, which has not yet been adopted by the Drafting Committee, reads: "Norms of *jus cogens* protect the fundamental values of the international community, are hierarchically superior to other norms of international law and are universally applicable."[21] That language, which does not appear in the VCLT,

[17] See International Law Commission, First Report on Jus Cogens, UN Doc. A/CN.4/693 (Mar. 8, 2016) (prepared by Special Rapporteur Dire Tladi).

[18] See Report of the International Law Commission on the Work of Its Sixty-Eighth Session, UN GAOR, 71st Sess., Supp. No. 10, at 2, para. 3, UN Doc. A/71/10 (Sept. 19, 2016), at 297, para. 100.

[19] Draft conclusion 1

Scope

The present draft conclusions concern the way in which jus cogens rules are to be identified, and the legal consequences flowing from them.

[20] Draft conclusion 2

Modification, derogation and abrogation of rules of international law

1. Rules of international law may be modified, derogated from or abrogated by agreement of States to which the rule is applicable unless such modification, derogation or abrogation is prohibited by the rule in question (jus dispositivum). The modification, derogation and abrogation can take place through treaty, customary international law or other agreement.

2. An exception to the rule set forth in paragraph 1 is peremptory norms of general international law, which may only be modified, derogated from or abrogated by rules having the same character.

[21] Draft conclusion 3

General nature of jus cogens norms

1. Peremptory norms of international law (jus cogens) are those norms of general international law accepted and recognized by the international community of States as a whole as those from which no modification, derogation or abrogation is permitted.

2. Norms of jus cogens protect the fundamental values of the international community, are hierarchically superior to other norms of international law and are universally applicable.

elicited conflicting views within the Commission and the Drafting Committee.[22] According to the report of its chair, the Drafting Committee next year will consider "moving paragraph 2, or a further version thereof, into a separate draft conclusion or conclusions."[23]

7. The Special Rapporteur has indicated that a Second Report in 2017 could be dedicated to the rules for identifying of norms of *jus cogens*, including the question of the sources of *jus cogens*, "that is, whether *jus cogens* emanate from treaty law, customary international law, general principles of law or other sources."[24] Further, the Second Report "will also consider the relationship between *jus cogens* and non-derogation clauses in human rights treaties."[25] A third report in 2018 might consider the consequences of *jus cogens*, while a fourth report in 2019 could address miscellaneous issues.[26]

C. SUMMARY OF VIEWS EXPRESSED BY AALCO MEMBER STATES AT THE SEVENTY FIRST SESSION (2016) OF THE SIXTH COMMITTEE OF THE UN GENERAL ASSEMBLY[27]

8. The inclusion of the topic of *"Jus cogens",* on the agenda of the Commission was generally welcomed by *Many Delegations*. *One Delegation* also expressed his Country's reservations on the Commission's work on the topic.

9. *One Delegation* recalled the fact that his Country had reservations and objections on the concept which was expressed during the Vienna Convention negotiations. While pointing out that the inclusion of this concept was one of the reasons why his country did not want to become a party to the Vienna Convention, he stated that the Commission should adopt a prudent approach regarding that principle. He also recalled the fact that the Commission had previously considered addressing the issue and finally decided not to do so. In his view, there was doubt about its useful purpose at that stage, since practice was insufficient. He noted that it was premature on the part of ILC to have adopted the draft conclusions on the topic at this stage. The outcome of the work should remain an analysis and general overview of related conceptual issues, he added.

10. Regarding paragraph 39 of the Special Rapporteur's report, he pointed out the irrelevance of South Cyprus's contestation of the Treaty of Guarantee's validity on the basis of article 4 of

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[22] See Report of the International Law Commission on the Work of Its Sixty-Eighth Session, UN GAOR, 71st Sess., Supp. No. 10, at 2, para. 3, UN Doc. A/71/10 (Sept. 19, 2016), at 303, paras. 125–27.

[23] International Law Commission, Statement of the Chairman of the Drafting Committee, Mr. Pavel Šturma, "Jus Cogens," annex (Aug. 9, 2016), note 18, at 5.

[24] See International Law Commission, First Report on Jus Cogens, UN Doc. A/CN.4/693 (Mar. 8, 2016) (prepared by Special Rapporteur Dire Tladi) at 46, para 75.

[25] *Id.*

[26] *Id*. at 46, para. 76.

[27] All the Statements that are mentioned here as having been made by the Member States of AALCO at the UN General Assembly Sixth Committee in 2016 are available from: http://www.un.org/en/ga/sixth/71/ilc.shtml; https://www.un.org/press/en/2016/gal3535.doc.htm; https://www.un.org/press/en/2016/gal3531.doc.htm and https://www.un.org/press/en/2016/gal3529.doc.htm.

the Treaty being in violation of peremptory norms. He made it clear that the Treaty of Guarantees provisions, and its rights and obligations for the Guarantor Powers, could not be construed as an example of either confirming or violating peremptory norms or *jus cogens,* and that statements by individual States could not alter that fact. He stressed his disagreement with the appropriateness of the example itself and believed that section of the report required amendment.

11. *One Delegation* stated that his Country had been an early and active proponent of the notion of peremptory norms - *jus cogens* - in international law, and that given that Articles 53 and 64 of the Vienna Convention on the Law of Treaties dealt with the invalidating effect of *jus cogens,* the current work could perhaps be dealt further with the question of who determined whether there was a conflict with *jus cogens*. While she agreed with the precept that the Commission should avoid any outcome that could result in, or be interpreted as, a deviation from the Vienna Convention, she stressed that the scope of that topic extended beyond the law of treaties, and included other areas of international law, such as the responsibility of States for internationally wrongful acts.

12. *One Delegation* expressed appreciation for the work of the Commission on the issue. In his view, it was up to the Commission to take a global approach to jurisprudence with regard to that issue. He also voiced support for the Commission to take up two new topics, including "Settlement of international disputes to which international organizations are party" and the "Succession of States in respect of State responsibility." Those matters would help fill some gaps in international law.

13. *One Delegation* had a suggestion to make: the Commission collect and study State practices, given the difficulty in explaining the nature and identification of the principle. He advocated that a cautious approach must be adopted in referencing the limited practice of international agencies.

14. *One Delegation* had advocated the Commission to tread cautiously in its deliberations on the topic. He was of the view that even if a clear effect of a *jus cogens* violation by a State were regulated, it remained questionable if any entity was capable of enforcement, and how effectively enforcement could be put in place.

15. *One Delegation* stated that the legal status of the topic was well-founded under the Vienna Convention on the Law of Treaties and some other instruments. However, he was of the view that since its substantial elements were still unclear and there was little understanding shared among Member States, the Commission must prudently deliberate on the topic.

D. COMMENTS AND OBSERVATIONS OF THE AALCO SECRETARIAT

16. The Secretariat of AALCO would like to express its appreciation to the Special Rapporteur on this topic, Professor Dire Tladi, for the substantial amount of work and careful analysis he has devoted to this project. AALCO is of the firm view that the topic of *jus cogens* is of considerable intellectual interest and recognizes that a better understanding of the nature of *jus*

cogens might contribute to our understanding of other issues of international law. Accordingly, AALCO welcomes the First Report submitted by the Special Rapporteur which had proposed three draft conclusions, two of which were referred to the Drafting Committee.

17. As regards the materials on which the Commission should base its work, notwithstanding that the topic is of a more theoretical nature than might typically be the case, AALCO supports the approach succinctly outlined by the Special Rapporteur in paragraph 45 of his report, namely that 'What is important for the purposes of the Commission's work is whether *Jus cogens* finds support in the practice of States and jurisprudence of international and national courts. While the views expressed in the literature help to make sense of the practice, and may provide a framework for its systematization, it is State and judicial practice, especially the former, that should guide the work of the Commission.

18. AALCO is of the firm view that Articles 53 and 64 of the Vienna Convention on the Law of the Treaties ought to be central to the work of the Commission in this area. Hence, it is an imperative need on the part of the Commission to make sure that any definition of the concept of *Jus cogens* needs to be in line with these provisions and that the work of the Commission should avoid any outcome that could result in, or be interpreted as, a deviation from the Vienna Convention.

19. Regarding, future work, AALCO looks forward to the next report of the Special Rapporteur considering the sources of *Jus cogens* norms and the relationship between *Jus cogens* and non-derogation clauses in human rights treaties, with the consequences of *Jus cogens* norms forming the basis of the Third Report. The criteria for elevation and the manner of determining whether a *Jus cogens* norm is "accepted and recognized" as such "by the international community of States as a whole" are, in the view of AALCO, critical aspects of this topic.

IV. IMMUNITY OF STATE OFFICALS FROM FOREIGN CRIMINAL JURISDICTION

A. BACKGROUND

1. At its Fifty-Eighth session, in 2006, the Commission, on the basis of the recommendation of a Working Group on the long-term programme of work, identified the topic "Immunity of State officials from foreign criminal jurisdiction" for inclusion in its long-term programme of work.[28] At its Fifty-Ninth session, in 2007, the Commission decided to include the topic in its programme and appointed Mr. Roman A. Kolodkin as Special Rapporteur for the topic.[29]

2. At the Sixtieth session, in 2008, the Commission had before it the preliminary report of the Special Rapporteur as well as a memorandum of the Secretariat on the topic.[30] 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.[31] The Commission did not consider the topic at the Sixty-First session.

3. At its Sixty-Second session in 2010, the Commission was not in a position to consider the second report of the Special Rapporteur, which was submitted to the Secretariat.[32] At the Sixty-Third session in 2011, the Commission considered the Second and Third Reports of the Special Rapporteur. The Second Report reviewed and presented the substantive issues concerning and implicated by the scope of immunity of a State official from foreign criminal jurisdiction, while the Third Report addressed the procedural aspects, focusing, in particular on questions concerning the timing of consideration of immunity, its invocation and waiver. The debate revolved around, *inter alia*, issues relating to methodology, possible exceptions to immunity and questions of procedure.[33]

4. At the Sixty-Fourth session in 2012, the Commission appointed Ms. Concepción Escobar Hernández as Special Rapporteur to replace Mr. Roman Kolodkin, who was no longer a member of the Commission. The Commission had before it the Preliminary Report of the Special Rapporteur.[34]

5. At the Sixty-Fifth session in 2013[35], the Commission had before it the second report of the Special Rapporteur, in which, *inter alia*, six draft articles were presented, following an

[28] See *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 257
[29] See *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 375.
[30] See document A/CN.4/596 and Corr.1
[31] See *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), paras. 267–311.
[32] See *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 10* (A/65/10), para. 343.
[33] See *Official Records of the General Assembly, Sixty-sixth session, Supplement No. 10* (A/66/10), paras. 104–203.
[34] See document A/CN.4/654.
[35] See document A/CN.4/661

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.

6. At the Sixty-Sixth session in 2014, the Commission had before it the third report of the Special Rapporteur,[36] 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 relating to the general concept of "an official" for the purposes of the 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. The Commission decided to refer the draft articles to the Drafting Committee, and subsequently provisionally adopted draft articles 2 (e) and 5 on the basis of the report of the Drafting Committee, and commentaries thereto.

7. At the Sixty-Seventh session in 2015, the Commission had before it the fourth report of the Special Rapporteur[37], which was devoted to the consideration of the remaining aspects of the material scope of immunity *ratione materiae*, namely what constituted an "act performed in an official capacity", and its temporal scope. The report contained proposals for draft article 2, subparagraph (f), defining an "act performed in an official capacity" and draft article 6 on the scope of immunity *ratione materiae*. The Commission decided to refer the two draft articles to the Drafting Committee, and subsequently took note of draft articles 2, subparagraph (f), and 6, provisionally adopted by the Drafting Committee.

B. CONSIDERATION OF THE TOPIC AT THE SIXTY-EIGHTH SESSION OF THE COMMISSION (2016)

8. The Commission had before it the fifth report of the Special Rapporteur analyzing the question of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction (A/CN.4/701). The Commission considered the report at its 3328th to 3331st meetings, from 26 to 29 July 2016. At the time of its consideration, the report was available to the Commission only in two of the six official languages of the United Nations. Accordingly, the debate in the Commission was preliminary in nature, involving members wishing to speak on the topic, and would be continued at its sixty-ninth session.

[36] See document A/CN.4/673
[37] See document A/CN.4/686

9. The fifth report analyzed the question of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction. It addressed, in particular, the prior consideration by the Commission of the question of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction, offered an analysis of relevant practice, addressed some methodological and conceptual questions relating to limitations and exceptions, and considered instances in which the immunity of State officials from foreign criminal jurisdiction would not apply. It drew the conclusion that it had not been possible to determine, on the basis of practice, the existence of a customary rule that allowed for the application of limitations or exceptions in respect of immunity *ratione personae*, or to identify a trend in favour of such a rule. On the other hand, the report came to the conclusion that limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction did apply to State officials in the context of immunity *ratione materiae*. As a consequence of the analysis, the report contained a proposal for draft article 7 concerning "Crimes in respect of which immunity does not apply". The report also noted that the sixth report of the Special Rapporteur in 2017 would address the procedural aspects of immunity of State officials from foreign criminal jurisdiction.

10. In her introduction of the report, the Special Rapporteur recalled that the topic had been the subject of recurrent debate over the years in the Commission and in the Sixth Committee of the General Assembly, eliciting diverse, and often opposing views. The fifth report deals with limitations and exceptions to immunities after the Commission completed the consideration of all the normative elements of immunity *ratione personae* and immunity *ratione materiae.*

11. The Special Rapporteur stated that, in preparing the report, she had employed the same methodological approaches of previous reports, consisting of an analysis of judicial (domestic and international) and treaty practice, taking into account the prior work of the Commission, noting that the fifth report additionally contained an analysis of national legislation, as well as information received from Governments in response to questions posed by the Commission. The Special Rapporteur underlined that the fifth report, like the previous reports, had to be read and understood together with the prior reports on the topic, as these reports, constituted, a unitary whole.

12. Addressing the main substantive and methodological issues reflected in the fifth report, the Special Rapporteur stated that its aim was: (a) to analyze whether there existed situations in which the immunity of State officials from foreign criminal jurisdiction was without effect, even where such immunity was potentially applicable because all normative elements as addressed in draft articles provisionally adopted were present; and (b) to identify, if the answer to (a) were in the affirmative, the actual instances in which such immunity would be without effect, addressing in particular: (i) the limitations and exceptions to immunity; and (ii) the crimes in respect of which immunity did not apply.

13. The Special Rapporteur noted that the phrase "limitations and exceptions" reflected, in her view, a theoretical distinction that suggested that a "limitation" was intrinsic to the immunity regime itself, while an "exception" was extrinsic to it. The distinction had normative implications, as it had consequences for the systemic interpretation of immunity, suggested in the

report. The Special Rapporteur nevertheless stressed that the distinction between limitations and exceptions had no practical significance as each led to the same consequence, namely the non-application of the legal regime of the immunity of State officials from foreign criminal jurisdiction in the particular case. Accordingly, for the purposes of the present draft articles, "immunity shall not apply" had been used to cover both limitations and exceptions. Moreover, the report did not consider waiver of immunity to be a "limitation or an exception". Waiver of immunity produced the same effect as a limitation or an exception. However, this was not due to the existence of autonomous general rules, but rather to the exercise of the prerogative of the State of the official. Since waiver is procedural in nature, it will be examined in the sixth report, which will be devoted to the procedural aspects of immunity.

14. The report had also taken a broader perspective than merely considering international crimes. It also offered an analysis of certain other crimes, such as corruption, which is of great importance for the international community. Moreover, there were instances of State practice on non-application of immunity in circumstances based on the primacy of territorial sovereignty in the exercise of criminal jurisdiction by the forum State (akin to the "territorial tort exception" in relation to the jurisdictional immunity of the State).

15. The Special Rapporteur also underlined a number of considerations which had to be taken into account in the appreciation of the regime for the application of limitations and exceptions to immunity:

(a) Immunity and jurisdiction were inextricably linked. She described the former as an exception to the exercise of jurisdiction by the courts of the forum State. Although both were based on the sovereign equality of States, the exceptional character of immunity had to be taken into account when defining the possible existence of limitations and exceptions;

(b) The procedural nature of immunity meant that it did not absolve a State official from individual criminal responsibility. Accordingly, in a formal sense, immunity could not be equated to impunity. However, it was underscored that, under certain circumstances, immunity could result, in effect, in the impossibility of determining the individual criminal responsibility of a State official. It was such effect that had to be borne in mind when analyzing limitations and exceptions to immunity;

(c) The immunity of State officials from foreign criminal jurisdiction had a bearing on criminal proceedings intended to determine, as appropriate, the individual criminal responsibility of the author of certain crimes. Such immunity was different and distinguishable from State immunity, and was subject to a distinct legal regime, including with regard to limitations and exceptions to immunity;

(d) The horizontal application of immunity between States, the subject of the present topic, was distinct and separate from the vertical application of immunity before international criminal courts and tribunals. At the same time, however, the mere existence of international criminal courts and tribunals could not always be considered as an alternative mechanism for determining the criminal responsibility of State officials. Therefore, the existence

of international criminal tribunals cannot be considered as a foundation for the absence of exceptions.

16. In the treatment of relevant practice covered by the report, the Special Rapporteur underlined the relevance of such practice in identifying the limitations and exceptions to immunity. This was supplemented by a systemic approach to the interpretation of immunity and the limitations and exceptions thereto. Accordingly, although the practice was varied, it revealed a clear trend towards considering the commission of international crimes as a bar to the application of the immunity *ratione materiae* of State officials from foreign criminal jurisdiction. This was on the basis that: (a) such crimes were not considered official acts, or were an exception to immunity, owing to the serious nature of the crime; or (b) they undermined the values and principles recognized by the international community as a whole.

17. On the first point, it was noted that, even though national courts had sometimes recognized immunity from foreign criminal jurisdiction for international crimes, they had always done so in the context of immunity *ratione personae*, and only in exceptional circumstances was it in respect of immunity *ratione materiae*. Such practice, coupled with *opinio juris*, led to the conclusion that contemporary international law permitted limitations or exceptions to immunity *ratione materiae* from foreign criminal jurisdiction when international crimes were committed. Further, although there might be doubt as to the existence of a relevant general practice amounting to a custom, there was a clear trend that reflected an emerging custom.

18. On the question concerning "values and legal principles", the report had sought to address limitations and exceptions to immunity on the basis of a view of international law as a normative system of which the legal regime of immunity of State officials from foreign criminal jurisdiction formed part. In order to avert the negative effects occasioned by the application of an immunity regime, or the nullification of other components of the contemporary system of international law, it was underlined that such a systemic approach was necessary. This approach also informed the way in which the report addressed the relationship of immunity to other essential categories of contemporary international law, such as prohibitions against peremptory norms of international law (*jus cogens*), as well as to the attribution of a legal character to concepts of impunity and accountability, and to the fight against impunity, the right of access to justice, the right of victims to reparation, or the obligation of States to prosecute certain international crimes in a similar vein.

19. In the view of the Special Rapporteur such an approach, which better responded to concerns expressed by some States and members of the Commission in the debates over the years, was consistent with contemporary international law. It did not alter the basic foundations of international criminal law that had been gradually built since the last century, especially the principle of individual criminal responsibility for international crimes and the need to guarantee the existence of effective mechanisms for the fight against impunity for such crimes. At the same time, it took into account other important elements of international law, in particular the principle of sovereign equality of States. The Special Rapporteur also introduced the various elements of the proposed draft article 7. She drew the attention to the three categories of crimes concerning which immunity did not apply, the fact that limitations and exceptions applied only in respect of

immunity *ratione materiae*, and on the existence of two particular regimes considered *lex specialis*.

20. The Commission underlined that the debate at the current session was only the beginning of the debate and that the Commission would provide to the General Assembly a complete basis of its work on this report only after the debate is finalized at the sixty-ninth session. 194. At its 3329th meeting, on 27 July 2016, the Commission provisionally adopted draft articles 2, subparagraph (f), and 6, provisionally adopted by the Drafting Committee and taken note of by the Commission at its sixty-seventh session. They are as follows:

Article 2

Definitions

For the purposes of the present draft articles: [...] (f) an "act performed in an official capacity" means any act performed by a State official in the exercise of State authority;

Article 6

Scope of immunity *ratione materiae*

1. State officials enjoy immunity *ratione materiae* only with respect to acts performed in an official capacity.

2. Immunity ratione *materiae* with respect to acts performed in an official capacity continues to subsist after the individuals concerned have ceased to be State officials.

3. Individuals who enjoyed immunity ratione *personae* in accordance with draft article 4, whose term of office has come to an end, continue to enjoy immunity with respect to acts performed in an official capacity during such term of office.

At its 3345th to 3346th meetings, on 11 August 2016, the Commission adopted the commentaries to the aforementioned draft articles.

C. SUMMARY OF THE VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPIC AT THE UN GENERAL ASSEMBLY SIXTH COMMITTEE AT ITS SEVENTY-FIRST SESSION HELD IN 2016[38]

21. On the topic "Immunity of State Officials from Foreign Criminal Jurisdiction", *many delegations* expressed their appreciation to the Fifth Report of the Special Rapporteur. The delegates raised several concerns that illuminated the topic and stressed the importance of addressing impunity.

[38] All the Statements that are mentioned here as having been made by the Member States of AALCO at the UN General Assembly Sixth Committee in 2016 are available from: http://www.un.org/en/ga/sixth/71/ilc.shtml; https://www.un.org/press/en/2016/gal3535.doc.htm; https://www.un.org/press/en/2016/gal3531.doc.htm and https://www.un.org/press/en/2016/gal3529.doc.htm.

22. *One delegation* noted that the criminality of an act did not affect whether an act was performed in an official capacity. A distinction should be made between international crimes and serious international crimes.[39]

23. *Another delegation* pointed out that "Immunity of State officials from foreign criminal jurisdiction" was enshrined in international customary law and that fact was not controversial. Although there was no specific definition of "State officials" in draft article 2, it would be useful to have one for the purposes of those drafts. State officials should include all those who represented the State or who carried out work on behalf of the State and all those who occupy positions within the State. He underscored that the definition should not relate to how high in the hierarchy the State officials were. All action by persons representing Governments should be covered by immunity and the criminal nature of the function or act should not affect that.

24. *Another delegate* stated that his country supported the conclusion of the report that there was no exception in respect of immunity *ratione personae*. He did not support the three exceptions to immunity *ratione personae* posited by the Special Rapporteur, which were serious international crimes, crimes that caused harm to persons or property in the territory of the forum State, and crimes of corruption.[40]

25. On the issue of exceptions to immunity *ratione materiae*, another delegate noted he had previously expressed disagreement with the characterization by the previous Special Rapporteur of the "predominant view" that there were no exceptions to immunity *ratione materiae*. He welcomed the conclusion of the current Special Rapporteur that limitations and exceptions did apply to immunity *ratione materiae.* Concerning the relationship between immunity and responsibility, immunity could not be equated with impunity. The former served only as a procedural bar to criminal proceedings and did not absolve a State official of any individual criminal responsibility on a substantive level.[41]

26. *Another delegation* reminded that the delicate balance between maintaining stable international relations and protecting State equality, on the one hand, and fighting impunity and providing redress for victims, on the other, must be carefully addressed. She expressed her support for the approach of distinguishing *ratione materiae* and *ratione personae* scopes of immunity in the analysis. A clearer distinction between what the law was and what it should be, especially relating to different exceptions proposed in draft article 7, would help the Committee better understand that sensitive issue.[42]

27. *Another delegation* stated that the report did not provide sufficient evidence that the categories of certain international crimes, territorial tort exception and corruption were established categories where immunity did not apply. In-depth analysis on the relation between immunity *ratione personae* and immunity *rationae materiae* was necessary, as it was difficult to present coherent international norms on the topic without prior discussion. The law of immunity

[39] Id.
[40] http://www.un.org/press/en/2016/gal3532.doc.htm
[41] http://www.un.org/press/en/2016/gal3534.doc.htm
[42] http://www.un.org/press/en/2016/gal3535.doc.htm

was one of the fundamental principles of international law, and the international community must deal with the issue of its limitations and exceptions with caution.[43]

28. Another delegation said of draft 7 on "limitations and exceptions" that, given the normative implications of that phrase, he agreed with the methodology used by the Special Rapporteur. In addition, the inclusion of "crimes of corruption" referred to in paragraph 1 of subparagraph b) of that draft article must be supported by sufficient State practice. A determination should also be made as to whether those acts of corruption fell within the "acts performed in an official capacity" and therefore within the scope of immunity *ratione materiae*.[44]

29. Another delegation pointed out the discrepancies in the characterization of a particular act as a limitation, especially in the case of international crimes in each State. The proposed draft article 7(1) should be studied further, since there were differences on the definition of offences, in particular torture, enforced disappearances, corruption and crimes that caused harm to persons or property. Further study was also required on cooperation between States and international tribunals, he said, noting that cooperation between States and international organizations or tribunals also played a vital role in resolving criminal cases that involved two or more States.[45]

30. Another delegation noted that immunity of State officials while performing official acts was a direct consequence of the sovereign equality of States. His understanding of acts performed in an official capacity was that it included all acts performed by State officials in their official capacity, either in office, or once they had left office.

31. Another delegation said that the question of limitations and exceptions was legally complex and raised issues that were politically sensitive and important. The report had taken a broader perspective than merely considering international crimes. It also had offered an analysis of other crimes, such as corruption.

D. COMMENTS AND OBSERVATIONS OF AALCO SECRETARIAT

32. The Secretariat of AALCO has been cognizant of the practical significance of this topic. In this regard, the Secretariat welcomes the Special Rapporteur's fifth report for its rich, systematic and well-documented examples of State practice as reflected in treaties and domestic legislation, as well as in international and national case law. The analysis of practice shows the existence of a clear trend towards admitting certain limitations and exceptions to immunity. It was readily recognized that the subject matter, in particular the question of limitations and exceptions, was legally complex and raised issues that were politically highly sensitive and important for States. It was also recalled that disagreements within the Commission, and in the views among States, exist, with some members pointing out that the topic needed to be proceeded with prudently and cautiously.

33. Even though there was bound to be a divergence of views on the legal regime of immunity of State officials from foreign criminal jurisdiction and its nature, the report would

[43] Id.
[44] http://www.un.org/press/en/2016/gal3536.doc.htm
[45] Id.

have a significant impact on the understanding and treatment of such immunity and would assist States and other relevant actors in the elaboration of an immunity regime that took into account the various legal interests. However, the Secretariat does not fully agree with Special Rapporteur's gratuitous focus on "values and legal principles" of the international community in the context of study of state practice. Instead, the focus should have been on following strictly the process of identification of customary international law, supported by normative sources.

34. Further, it should be noted that the immunity of State officials from foreign criminal jurisdiction was rooted in State immunity, which reflected the principle par *in parem non habet imperium*. Any suggestion that norms of *jus cogens* or rules on combating serious international crimes conflicted with basic rights of States, was tantamount to subordinating the principle of sovereign equality of States, a cornerstone of inter-State relations, to other rules, and risked gradually eroding it. Finally, the Secretariat is looking forward to the sixth report of the Special Rapporteur address the procedural aspects of immunity of State officials from foreign criminal jurisdiction.

V. PROTECTION OF PERSONS IN THE EVENT OF DISASTERS

A. BACKGROUND

1. At its Fifty-Ninth Session (2007), the Commission decided to include the topic "Protection of Persons in the Event of Disasters" in its programme of work and to appoint Mr. Eduardo Valencia Ospina as Special Rapporteur for the topic.[46] In paragraph 7 of its resolution 62/66 of 6 December 2007, the General Assembly took note of the decision of the Commission to include the topic in its programme of work.

2. From its Sixtieth (2008) to Sixty-Sixth sessions (2014), the Commission considered the topic on the basis of seven successive reports submitted by the Special Rapporteur.[47] The Commission also had before it a memorandum by the Secretariat[48] and a set of written replies submitted by the Office for the Coordination of Humanitarian Affairs and the International Federation of Red Cross and Red Crescent Societies to the questions addressed to them by the Commission in 2008.

3. At its Sixty-Sixth session (2014), the Commission adopted, on first reading, a set of 21 draft articles on the protection of persons in the event of disasters, together with commentaries thereto.[49] It decided, in accordance with articles 16 to 21 of its statute, to transmit the draft articles, through the Secretary-General, to Governments, competent international organizations, the International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies for comments and observations. In 2015, it was not discussed at the Commission.

B. CONSIDERATION OF THE TOPIC AT THE SIXTY-EIGHTH SESSION OF THE COMMISSION (2016)

4. At the Sixty-Eighth Session, the Commission had before it the Eighth Report of the Special Rapporteur (A/CN.4/697), as well as comments and observations received from Governments, international organizations and other entities (A/CN.4/696 and Add.1).

5. During the Sixty-Eighth session, the Commission completed on second reading a full set of eighteen draft articles, with commentaries, on this topic.[50] To accompany the draft articles, the

[46] Yearbook … 2007, vol. II (Part Two), para. 375. At its fifty-eighth session (2006), the Commission endorsed the recommendation of the Planning Group to include, inter alia, the topic "Protection of persons in the event of disasters" in the long-term programme of work of the Commission. A brief syllabus on the topic, prepared by the secretariat, was annexed to the report of the Commission in 2006 (Yearbook … 2006, vol. II (Part Two), annex III). In its resolution 61/34 of 4 December 2006, the General Assembly took note of the inclusion of the topic in the long-term programme of work of the Commission.

[47] See A/CN.4/598 (preliminary report), A/CN.4/615 and Corr.1 (second report), A/CN.4/629 (third report), A/CN.4/643 and Corr.1 (fourth report), A/CN.4/652 (fifth report), A/CN.4/662 (sixth report) and A/CN.4/668 and Corr.1 and Add.1 (seventh report).

[48] A/CN.4/590 and Add.1 to 3.

[49] Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10 (A/69/10), paras. 55-56

[50] See Report of the International Law Commission on the Work of Its Sixty-Eighth Session, UN GAOR, 71st Sess., Supp. No. 10, at 2, para. 3, UN Doc. A/71/10 (Sept. 19, 2016), at 17–73, para. 49.

Commission adopted a preamble, containing a final clause that sets the tone for the draft articles by stressing the sovereignty of states, but at the same time reaffirming that with such sovereignty comes the "the primary role of the State affected by a disaster in providing disaster relief assistance." The draft articles then proceed to identify various duties for such states and for those entities in a position to assist them.

6. The Preamble notes the role of the General Assembly in encouraging the progressive development of international law and its codification in relation to disasters. The Commission's commentary to that clause indicates that it "serves, at the outset, to highlight the fact that the draft articles contain elements of both progressive development and codification of international law." Thereafter, however, the commentary does not distinguish between those elements that are progressive development and those that are codification, such that it remains unspecified as to what extent the draft articles are intended to restate customary international law or, instead, to advance the preferences of the Commission as to what the law should be.

7. Perhaps due to a belief that significant aspects of the draft articles represent progressive development of the law, the Commission recommended, in accordance with Article 23 of its Statute,[51] that the General Assembly elaborate a Convention on the basis of the draft articles. Whether the General Assembly will do so depends on many factors, including whether states (particularly states typically involved in transnational relief operations) are willing to assume or acknowledge the "duties" set forth in the draft articles. The written and oral comments received by the Commission from States based on the outcome of the first reading of the draft articles suggest various important concerns, not all of which were addressed by the Commission at the second reading.

8. For example, draft Article 7 on the "duty to cooperate" provides that "States shall, as appropriate, cooperate among themselves, with the United Nations, with the components of the Red Cross and Red Crescent Movement, and with other assisting actors."[52] After the first reading, many states expressed concern as to whether such a "duty to cooperate" existed under international law. For example, Greece noted that the use of mandatory language in the form of "shall" was not supported by state practice, a concern echoed by the Nordic states and Austria. The Russian Federation maintained that the duty in the draft article was not a well-established principle of international law. The United Kingdom viewed that recourse to "'rights' and 'duties' used in the draft articles" was at odds with the voluntary nature of the principle of cooperation. Whether the Commission's commentary ultimately helps to persuade states to accept or acknowledge such a duty remains to be seen. The commentary to draft Article 7 relies in part on provisions concerning general interstate cooperation, such as those contained in the UN Charter and in the General Assembly's 1970 Declaration on Friendly Relations, but those instruments do not speak directly to disaster relief operations or to cooperation with non-state actors. The commentary also relies on the General Assembly's 1991 resolution "Strengthening of the

[51] Statute of the International Law Commission, Art. 23, GA Res. 174 (II) (Nov. 21, 1947).

[52] Article 7

Duty to cooperate

In the application of the present draft articles, States shall, as appropriate, cooperate among themselves, with the United Nations, with the components of the Red Cross and Red Crescent Movement, and with other assisting actors.

Coordination of Humanitarian Emergency Assistance of the United Nations," but that resolution uses "should" rather than "shall" when speaking of such cooperation.

9. Likewise, draft Article 9, paragraph 1, advances a duty to reduce the risk of disasters: "Each State shall reduce the risk of disasters by taking appropriate measures, including through legislation and regulations, to prevent, mitigate, and prepare for disasters."[53] This language, too, elicited negative reactions from many States who disputed that international law obliges states to reduce the risk of disasters. For example, the Republic of Korea[54] (amongst many others) argued that there is no general obligation under international law to take measures to prevent, mitigate, and prepare for disasters, while Austria even asserted that this issue exceeded the Commission's mandate for work on this topic. Still other states, such as Australia and South Africa,[55] expressed concerns as to whether states had the capacity or resources to take such measures, leading the Russian Federation to propose that a qualifier of "within their capacity" be added. The Russian Federation also proposed that this draft article be framed instead as a recommendation, but the Commission chose not to do so.

10. Draft Article 10, paragraph 1, provides that the "affected State has the duty to ensure the protection of persons and provision of disaster relief assistance in its territory, or in territory under its jurisdiction or control."[56] The Commission's commentary asserts that this "duty" is premised on "the core principle of sovereignty," meaning that the state's entitlement to sovereignty carries with it certain obligations to persons within its territory. The commentary notes that the "Commission considered that the term 'duty' was more appropriate than the term 'responsibility,' which could be misunderstood given its use in other contexts." In this regard, it should be noted that the Commission had previously decided that the "responsibility to protect" (R2P) concept did not apply in the context of disaster relief. Yet, even so, not all states appear to agree that even such a "duty" exists; Russia maintained that, while a state has a general responsibility to take measures to ensure the protection of persons on its territory, it did not have a legal obligation to do so.

11. Draft Article 11 asserts that "[t]o the extent that a disaster manifestly exceeds its national response capacity, the affected State has the duty to seek assistance from, as appropriate, other States, the United Nations, and other potential assisting actors."[57] Here, too, numerous States

[53] Article 9
Reduction of the risk of disasters
1. Each State shall reduce the risk of disasters by taking appropriate measures, including through legislation and regulations, to prevent, mitigate, and prepare for disasters.
2. Disaster risk reduction measures include the conduct of risk assessments, the collection and dissemination of risk and past loss information, and the installation and operation of early warning systems.
[54] UN GAOR, 68th Sess., 24th mtg. at 14, para. 91, UN Doc. A/C.6/68/SR.24 (Nov. 20, 2013).
[55] UN GAOR, 68th Sess., 24th mtg. at 3, para. 15, UN Doc. A/C.6/68/SR.24 (Nov. 20, 2013).
[56] Article 10
Role of the affected State

1. The affected State has the duty to ensure the protection of persons and provision of disaster relief assistance in its territory, or in territory under its jurisdiction or control.
2. The affected State has the primary role in the direction, control, coordination and supervision of such relief assistance.

[57] Article 11
Duty of the affected State to seek external assistance

rejected the idea that there was a "duty" under international law for an affected state to seek assistance. For example, many States including Indonesia[58] and Malaysia,[59] all expressed the view that no such duty existed. Other states, including Austria, Poland, and Russia, queried as to what would be the consequences of a breach of this duty. China suggested that the Commission avoid the term "duty,"[60] and Iran suggested rephrasing the draft article to read that the affected state "should" seek assistance.[61] Even so, the text remained essentially unchanged on second reading.

12. Draft Article 13 provides in paragraph 1 that the "provision of external assistance requires the consent of the affected State," but paragraph 2 asserts that "[c]onsent to external assistance shall not be withheld arbitrarily."[62] Several States, in their comments to the Commission, rejected the idea of a legal obligation under customary international law not to withhold consent arbitrarily. Other states sought additional clarification on the meaning of "arbitrarily" and on who would determine if a state's decision to withhold aid was arbitrary. Still others worried that if the consent was withheld arbitrarily, then the draft article might be read as allowing other states to act without the affected state's consent, or at least to pass judgments upon the affected state. For such reasons, some states suggested that the draft article in some fashion be expressed as a political or moral recommendation. The text, however, remained unchanged on second reading. A further issue, unaddressed in this text, is whether disaster assistance can be provided in circumstances where the disaster has resulted in a collapse of the affected state's government, such that consent is not possible.

13. One important question not fully resolved by the text adopted at first reading concerned the relationship of these draft articles to other rules of international law, notably those that apply during an armed conflict. Treaties on the law of armed conflict contain numerous provisions that balance the rights and duties of a belligerent, in the specific situation of armed conflict, with respect to relief activities, including consignments of medical supplies, food and clothing, cooperation with national Red Cross and other societies, and treatment of relief personnel. Draft Article 18 announces in paragraph 1 that the "present draft articles are without prejudice to other applicable rules of international law" and in paragraph 2 that they "do not apply to the extent that the response to a disaster is governed by the rules of international humanitarian law."

To the extent that a disaster manifestly exceeds its national response capacity, the affected State has the duty to seek assistance from, as appropriate, other States, the United Nations, and other potential assisting actors.

[58] UN GAOR, 66th Sess., 24th mtg. at 13, para. 70, UN Doc. A/C.6/66/SR.24 (Dec. 1, 2011).

[59] Id. at 20, para. 114.

[60] UN GAOR, 68th Sess., 23d mtg. at 5, para. 25.

[61] UN GAOR, 66th Sess., 24th mtg. at 10, para. 50.

[62] Article 13

Consent of the affected State to external assistance

1. The provision of external assistance requires the consent of the affected State.

2. Consent to external assistance shall not be withheld arbitrarily.

3. When an offer of external assistance is made in accordance with the present draft articles, the affected State shall, whenever possible, make known its decision regarding the offer in a timely manner.

C. SUMMARY OF THE VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPICS AT THE UN GENERAL ASSEMBLY SIXTH COMMITTEE AT ITS SEVENTY FIRST SESSION HELD IN 2016[63]

14. *One Delegation* welcomed completion of the topic "Protection of persons in the event of disasters", and added that the draft articles consolidated existing rules of international law and constitute a useful guide for international cooperation on disaster risk reduction and response. He informed that his Country was working with other countries in Southeast Asia to respond jointly to disasters and reduce losses and that disaster relief must always be carried out according to rules of international human rights and international humanitarian laws.

15. *One Delegation* informed that the draft articles on "Protection of persons in the event of disasters" did not form a basis for the elaboration of a convention. In his view, the primary role of preventing and responding to disaster rested primarily on affected States and that it was the right of the affected State to accept or decline offers of assistance. Furthermore, there should be additional provisions to ensure that relief personnel who were guaranteed rights under the draft articles observed the rules and regulations of the host State, he added.

16. *One Delegation* emphasized that due to the earthquake and tsunami in his Country, his delegation was keenly interested in the topic. While noting that the sovereignty of the affected States must be respected, he went on to add that this should not be a barrier to humanitarian assistance.

17. *One Delegation* expressed the opinion that elaborating the draft articles on "Protection of persons in the event of disasters," into a legally binding framework would not be appropriate as natural disasters were impossible to predict, and hence flexibility was needed. He was of the view that the implementation of a convention would lead to protocols and procedures which could complicate the process of dispatching aid. The Delegation also sought clarification as to the application of draft article 11, now renumbered as draft article 14. That had addressed a situation where there was a Government in existence, and it was alleged that consent was being withheld arbitrarily in the face of manifest need for external assistance. She also sough clarification as to who was to decide on the seriousness of the situation requiring assistance, and who was to decide on whether there was an arbitrary refusal of consent. In relation to draft article 3 *bis*, now renumbered as draft article 4, she had reservations for the proposed provision stipulated in subparagraph (e), pertaining to the coverage of "relief personnel", that also include military personnel. In her view, armed presence in a State might be interpreted as an encroachment of the sovereignty of an independent State, in contravention with the international law principle of sovereignty of State. The affected State should have overall direction, control, coordination and supervision of assistance within its territory, she added.

[63] All the Statements that are mentioned here as having been made by the Member States of AALCO at the UN General Assembly Sixth Committee in 2016 are available from: http://www.un.org/en/ga/sixth/71/ilc.shtml; https://www.un.org/press/en/2016/gal3535.doc.htm; https://www.un.org/press/en/2016/gal3531.doc.htm and https://www.un.org/press/en/2016/gal3529.doc.htm.

18. *One Delegation* stated that the draft articles adopted by the Commission on "Protection of persons in the event of disasters" reflected a very careful balance between recognizing the principle of sovereignty and the attended primary role of the affected State, while also underlining the fundamental value of solidarity in international relations. The draft articles recognized that the reduction of risk of disasters should meet primarily the "needs" of the persons concerned, whilst fully respecting the rights of such persons. That approach was appropriate, instead of getting enmeshed in a futile "needs versus rights" debate he added.

19. *One Delegation* noted that due to the increasing severity of natural disasters, the work of the ILC would provide essential guidance for efficient humanitarian relief. While stating that the Commission had identified the need for a duty of State, he added that in cases where a disaster exceeded capacity to respond, the State should seek assistance. In his view, draft article 11 would improve the rights of persons in need during disasters, but it should be further refined for cases when a disaster manifestly exceeded a State's ability to respond. He also pointed out that the Commission should provide the States with more exact and detailed information concerning the process of deliberation on draft article changes. In this regard he cited draft articles 17, 18, and 19 that had been deleted or modified substantially. He expressed hope that the Commission would provide more information in the future.

20. *One Delegation* stated that his delegation was uncertain whether it was the right time to adopt the draft articles on "Protection of persons in the event of disasters" in the form of a treaty. International cooperation played a crucial role in managing disasters but the affected State had the exclusive right to assess the threshold of the disaster, he added. He recalled that humanitarian assistance should be provided on the basis of appeal by the affected State. Regarding article 7, the principles would have to be observed in parallel with the principles of respect for sovereignty. In his view, the core element of draft article 8 should be international cooperation between States, and its title should reflect that. He was of the further view that the obligation to cooperate in a situation of armed conflict could not extend to non-governmental organizations other than the International Committee of the Red Cross. He also noted that, in regards to article 13, international law, as it stood, did not recognize the duty of an affected State in a disaster to seek external assistance; its inclusion had raised concerns.

21. *One Delegation* noted that the adoption of the preamble and draft articles on "Protection of persons in case of disasters" was an important achievement and would strengthen discussion of that issue.

22. *One Delegation* welcomed the emphasis placed by the draft articles on human dignity, human rights, particularly the right to life, and humanitarian principles. Article 10 articulated the fundamental principle that the affected State had the primary role in the direction, control, coordination and supervision of disaster relief assistance. He was of the view that draft Articles 10, 11 and 13 taken together, recognized that a disaster could exceed, manifestly or otherwise, the affected State's capacity to respond. Creating a qualified consent regime for such a State, to be exercised in good faith, balanced the right to sovereignty with the obligation of the sovereign to protect human life and human rights during disasters, he added.

23. *One Delegation* noted that the draft articles on "Protection of persons in event of disasters" accorded primacy to the responsibility of affected States, and that the main reasons for undertaking international assistance was humanitarian.

24. *One Delegation* stated that the adjustments made on the draft articles regarding the rights and obligations of both affected States and assisting parties were improvements to the balance between the two sides and their respective rights and obligations. While noting that the draft was heavy on *lex ferenda*, he went on to add that although the provisions were improvements to the developments of the norms in international law governing disaster relief, they were far from becoming *lex lata*, and were not general State practice.

25. *One Delegation* noted that the three new draft articles adopted by the Commission should not represent codification of law, but could be used as guidelines. In her view, the request or consent of the receiving State should be required, as provided in paragraph d of draft article 4 and that the inclusion of both military and civilian personnel in paragraph e, however, to send such personnel, particularly military personnel, should require the consent of the receiving State. She also noted that a State struck by disaster might not be able to take care of its people, so the article requiring them to do so was troubling.

26. *One Delegation* stated that the draft was short on *lex lata*, but long on *lex ferenda*. He was of the view that some of the Articles lacked the support of solid-based general State practice and that (in addition), there were many regulations on the obligations of affected States, which exceeded the scope of existing laws and State practices that might affect State sovereignty. Pointing out that a State was not obligated to seek external assistance he felt that the inclusion in paragraph 1 of Article 12 of a State's "duty" to seek external assistance was unclear, as the legal connotations of the word "duty" were ambiguous. She was of the view that the word should not be used.

27. *One Delegation* reiterated that draft article 16 was only concerned with "offers" of assistance, not with the actual "provision" thereof and that an offer of assistance did not create for the affected State a corresponding obligation to accept it. However, she said she remained doubtful over the concept being expressed as a right. The interest of the international community in the protection of persons in the event of disasters was the principle of solidarity and cooperation. One option could be to do without draft article 16, it was added.

28. *One Delegation* stated that his country highly valued the draft articles as it contributed to the progressive development of international law in that area. While stating that the draft articles upheld the humanitarian principles and the principle of respect for the sovereignty of the affected State, he stressed that relief personnel should be granted certain legal status in order to facilitate their rescue and support operations. He viewed "positively" article 17, which stipulated the duty of affected States to take necessary measures to facilitate external assistance.

29. In the view of *One Delegation* the term "external assistance" defined in the newly introduced draft article 4, subparagraph (d) on "used of terms" should be treated with great caution. It was stressed that the "other assisting actors" in the provisions should not include any domestic actors who offered disaster relief assistance or disaster risk reduction.

30. *One Delegation* pointed out that, although the possession of a right gave the holder of that right an option to decide on whether to exercise it or not, the intention of the draft articles was to place a mandatory duty, responsibility or obligation on assisting States and other assisting actors to provide genuine assistance to the affected State when requested to do so.

C. COMMENTS AND OBSERVATIONS OF AALCO SECRETARIAT

31. The Secretariat of AALCO welcomes the completion of the work on the topic "Protection of persons in the event of disasters", and adds that the draft articles have consolidated existing rules of international law and constitute a useful guide for international cooperation on disaster risk reduction and response. AALCO is fully aware of the fact that the magnitude of such events regularly exceed the capability of individual States and that the draft articles adopted by the Commission fill a gap. In this regard AALCO feels that development of guidelines, rather than a legally binding instrument, would be more helpful and flexible in terms of enabling Governments to best incorporate those practices into their domestic systems. Furthermore achieving agreement with regard to a Convention on the issue might be difficult and the outcome might be unsatisfactory.

32. AALCO welcomes the emphasis placed by the draft articles on human dignity, human rights, particularly the right to life, and humanitarian principles. The draft articles adopted by the Commission on the topic reflect a very careful balance between recognizing the principle of sovereignty and the attended primary role of the affected State, while also underlining the fundamental value of solidarity in international relations. The draft articles recognize that the reduction of risk of disasters should meet primarily the "needs" of the persons concerned, whilst fully respecting the rights of such persons. This is manifested, for instance, in draft article 10 which articulates the fundamental principle that the affected State had the primary role in the direction, control, coordination and supervision of disaster relief assistance is to be welcomed. Yet there are few areas of concerns that need to be highlighted.

33. Draft Article 7 on the "duty to cooperate" provides that "States shall, as appropriate, cooperate among themselves, with the United Nations, with the components of the Red Cross and Red Crescent Movement, and with other assisting actors." As regards the word 'shall', it needs to be mentioned here the use of mandatory language in the form of "shall" is not supported by state practice. Indeed, recourse to "'rights' and 'duties' used in the draft articles" as such remain at odds with the voluntary nature of the principle of cooperation. True the commentary to draft Article 7 relies in part on provisions concerning general interstate cooperation, such as those contained in the UN Charter and in the General Assembly's 1970 Declaration on Friendly Relations. But it needs to be underlined here that these instruments do not speak directly to disaster relief operations or to cooperation with non-state actors. The commentary also relies on the General Assembly's 1991 resolution "Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations," but that resolution uses "should" rather than "shall" when speaking of such cooperation. Whether the Commission's commentary ultimately helps to persuade States to accept or acknowledge such a duty remains to be seen.

34. Likewise, draft Article 9, paragraph 1, advances a duty to reduce the risk of disasters: "Each State shall reduce the risk of disasters by taking appropriate measures, including through

legislation and regulations, to prevent, mitigate, and prepare for disasters." The acceptance of such a duty under international law is not accepted by many States. Hence, this formulation could be questioned on the ground whether international law does oblige States to reduce the risk of disasters; and even if the answer is in the affirmative, whether States have the capacity or resources to take such measures is a moot point.

35. Another provision that is of critical importance for the developing Countries is draft article 11 that concerns the duty of the affected State to seek external assistance. It asserts that: "[t]o the extent that a disaster manifestly exceeds its national response capacity, the affected State has the duty to seek assistance from, as appropriate, other States, the United Nations, and other potential assisting actors." Whether there exists a "duty" under international law for an affected state to seek assistance is a question that cannot be answered conclusively. This is because of the fact that many States have denied that any such duty is enshrined under international law. Furthermore, it also throws open other issues: *who* has the authority to decide whether a disaster could exceed, manifestly or otherwise, or indeed has exceeded the affected State's capacity to respond and *what* would be the consequences of a breach of this duty.

36. Another provision that is of vital consequence is draft article 13 that deals with the issue of 'consent' to be provided to the provision of external assistance. Draft Article 13 provides in paragraph 1 that the "provision of external assistance requires the consent of the affected State," but paragraph 2 asserts that "[c]onsent to external assistance shall not be withheld arbitrarily." This brings to the forefront few fundamental issues: Does a legal obligation exist under customary international law not to withhold consent arbitrarily?. Many States have been opposed to this idea. Moreover, what constitutes a valid and compelling reason for refusing consent to a humanitarian relief operation; and what would be an arbitrary or capricious one? are questions for which we do not have easy answers. Also who would determine if a state's decision to withhold aid was arbitrary? These are things that need to be further clarified.

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

A. BACKGROUND

1. The Commission, at its Sixtieth Session held in 2008 decided to include the topic "Treaties over time" in its programme of work and to establish a Study Group on the topic at its Sixty-First session. At its Sixty-First session held in 2009,[64] the Commission established the Study Group on Treaties over time, chaired by Mr. Georg Nolte. At that session, the Study Group focused its discussions on the identification of the issues to be covered, the working methods of the Study Group and the possible outcome of the Commission's work on the topic.[65]

2. From the Sixty-Second to the Sixty-Fourth session (2010-2012), the Study Group was reconstituted under the chairmanship of Mr. Georg Nolte. The Study Group examined three reports presented informally by the Chairman, which addressed, respectively, the relevant jurisprudence of the International Court of Justice and arbitral tribunals of *ad hoc* jurisdiction[66]; the jurisprudence under special regimes relating to subsequent agreements and subsequent practice[67];and subsequent agreements and subsequent practice of States outside judicial and quasi-judicial proceedings.[68]

3. At the Sixty-Fourth session held in 2012, the Commission, on the basis of a recommendation of the Study Group[69], decided (a) to change, with effect from its Sixty-Fifth session (2013), the format of the work on this topic as suggested by the Study Group; and (b) to appoint Mr. Georg Nolte as Special Rapporteur for the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties".[70]

4. At the Sixty-Fifth session held in 2013, the Commission considered the First Report of the Special Rapporteur (A/CN.4/660) and provisionally had adopted five draft conclusions. At the Sixty-Sixth session held in 2014, the Commission considered the Second Report of the Special Rapporteur (A/CN.4/671) and provisionally adopted five draft conclusions.

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[64]At its 2997th meeting, on 8 August 2008. See *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 353. For the syllabus of the topic, see *ibid.*, annex A. The General Assembly, in paragraph 6 of resolution 63/123 of 11 December 2008, took note of the decision.

[65]See *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), paras. 220-226.

[66]*Ibid.*,*Sixty-fifth Session, Supplement No. 10* (A/65/10), paras. 344-354; and *ibid.*,*Sixty-sixth Session, Supplement No. 10* (A/66/10), para. 337.

[67]*Ibid.*,*Sixty-sixth Session, Supplement No. 10* (A/66/10), paras. 338-341; and *Sixty-seventh Session, Supplement No. 10* (A/67/10), paras. 230-231.

[68]*Ibid.*,*Sixty-seventh Session, Supplement No. 10* (A/67/10), paras. 232-234. At the sixty-third session (2011), the Chairman of the Study Group presented nine preliminary conclusions, reformulated in the light of the discussions in the Study Group (*ibid., Sixty-sixth Session, Supplement No. 10* (A/66/10), para. 344). At the sixty-fourth session (2012), the Chairman presented the text of six additional preliminary conclusions, also reformulated in the light of the discussions in the Study Group (*ibid., Sixty-seventh Session, Supplement No. 10* (A/67/10), para. 240). The Study Group also discussed the format in which the further work on the topic should proceed and the possible outcome of the work. A number of suggestions were formulated by the Chairman and agreed upon by the Study Group (*ibid.*, paras. 235-239).

[69]*Ibid.*,*Sixty-seventh Session, Supplement No. 10* (A/67/10), paras. 226 and 239.

[70]*Ibid.*, para. 227.

5. At the Sixty-Seventh Session (2015), the Commission considered the third report of the Special Rapporteur (A/CN.4/683) and provisionally adopted one draft conclusion and the commentary thereto.

B. CONSIDERATION OF THE TOPIC AT THE SIXTY-EIGHTH SESSION OF THE COMMISSION (2016)

6. At the Sixty-Eighth Session, the Commission had before it the Fourth Report of the Special Rapporteur (A/CN.4/694), which addressed the legal significance, for the purpose of interpretation and as forms of practice under a treaty, of pronouncements of expert treaty bodies (chap. II) and of decisions of domestic courts (chap. III) and which proposed, respectively, draft conclusions 12 and 13 on those issues. It also discussed the structure and scope of the draft conclusions (chap. IV), proposed the inclusion of a new draft conclusion 1a, and suggested a revision to draft conclusion 4, paragraph 3 (chap. V).

7. At the Sixty-Eighth Session, the Commission first focused on the adoption of what was later numbered as draft Conclusion 13, based on a proposal in the Fourth Report of the Special Rapporteur. This draft conclusion, "Pronouncements of Expert Treaty Bodies," states:

> 1. For the purposes of these draft conclusions, an expert treaty body is a body consisting of experts serving in their personal capacity, which is established under a treaty and is not an organ of an international organization.
>
> 2. The relevance of a pronouncement of an expert treaty body for the interpretation of a treaty is subject to the applicable rules of the treaty.
>
> 3. A pronouncement of an expert treaty body may give rise to, or refer to, a subsequent agreement or subsequent practice by parties under article 31, paragraph 3, or other subsequent practice under article 32. Silence by a party shall not be presumed to constitute subsequent practice under article 31, paragraph 3 (b), accepting an interpretation of a treaty as expressed in a pronouncement of an expert treaty body.
>
> 4. This draft conclusion is without prejudice to the contribution that a pronouncement of an expert treaty body may otherwise make to the interpretation of a treaty.

It is worth noting here that Paragraph 3 is the core aspect of this draft conclusion. In its commentary to this paragraph, the Commission explains:

8. A pronouncement of an expert treaty body cannot as such constitute subsequent practice under article 31, paragraph 3 (b), since this provision requires a subsequent practice of the parties that establishes their agreement regarding the interpretation of the treaty. This has been confirmed, for example, by the reaction to a draft proposition of the Human Rights Committee according to which its own "general body of jurisprudence," or the acquiescence by States to that jurisprudence, would constitute subsequent practice under article 31, paragraph 3 (b). The proposition of the Human Rights Committee was:

"In relation to the general body of jurisprudence generated by the Committee, it may be considered that it constitutes 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' within the sense of article 31(3) (b) of the Vienna Convention on the Law of Treaties, or, alternatively, the acquiescence of States parties in those determinations constitutes such practice."

9. When this proposition was criticized by some States, the Committee did not pursue its proposal and adopted its general comment No. 33 without a reference to article 31, paragraph 3 (b). This confirms that pronouncements of expert treaty bodies cannot as such constitute subsequent practice under article 31, paragraph 3 (b).

10. Pronouncements of expert treaty bodies may, however, give rise to, or refer to, a subsequent agreement or a subsequent practice by the parties which establish their agreement regarding the interpretation of the treaty under article 31, paragraph 3 (a) or (b). This possibility has been recognized by States, by the Commission and also by the International Law Association and by a significant number of authors. There is indeed no reason why a subsequent agreement between the parties or subsequent practice that establishes the agreement of the parties themselves regarding the interpretation of a treaty could not arise from, or be referred to by, a pronouncement of an expert treaty body.

11. Whereas a pronouncement of an expert treaty body can, in principle, give rise to a subsequent agreement or a subsequent practice by the parties themselves under article 31, paragraph 3 (a) and (b), this result is not easily achieved in practice. Most treaties that establish expert treaty bodies at the universal level have many parties. It will often be difficult to establish that all parties have accepted, explicitly or implicitly, that a particular pronouncement of an expert treaty body expresses a particular interpretation of the treaty.

12. The commentary then proceeds to provide some examples illustrating this phenomenon and emphasizes why acceptance of a treaty interpretation should not be presumed from the silence by states parties after a pronouncement by an expert treaty body.

13. Paragraph 4 of draft Conclusion 13 indicates that the draft conclusion is "without prejudice to the contribution that a pronouncement of an expert treaty body may otherwise make to the interpretation of a treaty." The commentary explains that some members considered the pronouncements of expert treaty bodies as a form of practice that may contribute to the interpretation of a treaty, while others considered any such pronouncements were not "a form of practice" in the sense of the present topic.

14. Having completed work on draft Conclusion 13, the Commission then revisited all the draft conclusions and commentary so as to adopt them on first reading. The Commission now awaits comments from States and others, with a likely second reading in 2018.

C. SUMMARY OF THE VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPICS AT THE UN GENERAL ASSEMBLY SIXTH COMMITTEE AT ITS SEVENTY FIRST SESSION HELD IN 2016[71]

15. *One Delegation* referred to draft conclusion 13 and its accompanying commentary and stated that she agreed with the statement that "any possible legal effect of a pronouncement an expert treaty body depends, first and foremost, on the specific rules of the applicable treaty itself". The cornerstone of interpretation was the language of the treaty and, given the range of different treaty monitoring bodies with varying responsibilities, the effect and weight of pronouncements by such bodies must depend first on the provisions inscribed in their constituent documents, she added.

16. *One Delegation* was of the view that this topic should be considered for the purpose of treaty interpretation only. Subsequent agreements with a view to amending a treaty were subject to Article 39 of the Vienna Convention on the Law of Treaties, while the possibility of modifying treaties by subsequent practice of the parties had long been excluded from the Law of Treaties, it was added. He underscored that he did not recognize the possibility of modifying a treaty by subsequent agreement or conduct within the meaning of Article 31 of the Convention.

17. Commenting on the draft conclusions on the topic, *One Delegation* stated that he said that these draft conclusions clarified how to identify such agreements and practices and their role in the interpretation of treaties.

18. *One Delegation* acknowledged the active debate on the legal significance of the pronouncements made by the expert bodies. It was further stated that her agreement with draft conclusion 13, paragraph 3, based on the understanding that the pronouncements of the expert bodies, did not amount to subsequent practice, although they might give rise to a subsequent agreement or practice.

19. *One Delegation* noted that the draft conclusions restated the rules of treaty interpretation given in the 1969 Vienna Convention and as such, the draft conclusions could serve as useful guidance for international courts and tribunals, and also for State and non-State actors. Addressing draft conclusion 13 on the pronouncement of expert treaty bodies, he said while he appreciated its importance, caution should be exercised, taking into account the concerns addressed in the commentaries, in particular in paragraphs 1 through 3.

20. *One Delegation* noted that the draft conclusions on the topic would add clarity to the principles of treaty interpretation contained in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. On the pronouncements of treaty bodies, he welcomed the fact that the draft conclusions specifically provided for a presumption against silence as constituting acceptance of the pronouncement of an expert body as subsequent practice under the Vienna

[71] All the Statements that are mentioned here as having been made by the Member States of AALCO at the UN General Assembly Sixth Committee in 2016 are available from: http://www.un.org/en/ga/sixth/71/ilc.shtml; https://www.un.org/press/en/2016/gal3535.doc.htm; https://www.un.org/press/en/2016/gal3531.doc.htm and https://www.un.org/press/en/2016/gal3529.doc.htm.

Convention. Acceptance of an interpretation of a treaty as expressed in a pronouncement of an expert treaty body could not be lightly presumed, he added.

21. *One Delegation* stated that given the practical difficulties in applying Articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969, the work on the topic should give practical guidelines on the interpretation of treaties. In addition, underscoring that it was timely to deal with the matter of expert treaty bodies, he said that the text of draft conclusion 13 that replaced "reflect" with "refer to" was useful and he supported the modification of that text.

22. *One Delegation* stated that such agreements and practices in relation to the interpretation of treaties were understood to be confined within the framework of the Vienna Convention's Articles 31 and 32. He noted that he could not concur with the Rapporteur that a pronouncement of an expert treaty body could give rise or refer to a subsequent agreement or subsequent practice by parties under Article 31 (3) or more categorically under Article 32. While subsequent practice or agreement was understood to refer to actual practice or agreement of all the States Parties to a treaty, pronouncements of experts serving in their personal capacity could not be regarded as such, he added.

23. He also expressed the opinion that the work of the Commission should not exceed the limits of principles elaborated in Articles 31 to 33 of the 1969 Vienna Convention and that it should be consistent with the object and purpose of the 1969 Convention. With respect to the subsequent practice of parties to constituent instruments of international organizations, he said interpretation of the instrument should be the very intent of the parties to it. He was of the view that a proper interpretation of constituent instruments of international organizations should be coupled with consideration not only of the intention and will of negotiators of the original instrument but also of its actual practice and the intentions of all Member States to modify the original mandate.

24. *One Delegation* highlighted conclusion 2 on general rule and means of treaty interpretation. While stating that in practice there was an expansion in the interpretation of international conventions, he was of the view that, the expansion ran counter to the fundamental principles of international law. Such expansion did not serve international law and must be avoided at all costs, he went to add.

25. According to *One Delegation*, the interpretation of treaties should strictly follow Article 31 of the Vienna Convention on the Law of Treaties 1969, and that the draft conclusions should only play a supplementary role.

26. *One Delegation* reiterated her concern regarding the modifying effect of a subsequent agreement and subsequent practice in particular when it resulted in altering the provisions of the treaty or providing too broad interpretation of treaty provisions. The modification or amendment of a treaty should only be done in line with the provisions of the Vienna Convention, she underlined. Furthermore, she encouraged the Special Rapporteur to explore the applicability of the provisions of the Vienna Convention for the interpretation of treaties adopted within international organizations.

27. *One Delegation* made a reference to draft conclusion 11 and stated that particular attention needed to be given to the constituent instruments of international organizations. In his view, Article 5 of the Vienna Convention could act as a starting point for dealing with the interpretation of such instruments and that it was not always easy to identify whether States meeting in a plenary of an international organization were acting as members of that organization or as State parties to its constituent instruments. While expressing the view that the most important factor was the intention of the States concerned, he stated that with regard to an international organization's own practices, evaluation should be undertaken on a case-by-case basis.

D. COMMENTS AND OBSERVATIONS OF AALCO SECRETARIAT

28. The work of the Commission on the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", is to be welcomed. This is due to two reasons: one, the draft conclusions on the topic would add clarity to the principles of treaty interpretation as contained in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, 1969; two, the draft conclusions, as such, would provide useful guidance and assistance to States, international courts and tribunals, as well as to any other actors whose role is to interpret international treaties. Hence, AALCO expresses its appreciation to the Commission which discussed the Fourth Report of the Special Rapporteur, which addressed the legal significance, for the purpose of interpretation and as forms of practice under a treaty, of pronouncements of expert bodies and of decisions of domestic courts, in the 2016 Session.

29. AALCO welcomes the Commission's reaffirmation of the applicability of Articles 31 and 32 of the Vienna Convention that were constituent instruments of international organizations. Nonetheless, it is important to bear in mind that while decisions adopted within the framework of a Conference of States Parties might be a direct source of subsequent agreement or subsequent practice, it is debatable whether the practice of an international organization as such, as well as the pronouncements of expert treaty bodies, constitute, in or by itself, subsequent practice. As regards draft article 13 that deals with the legal significance of the pronouncements made by the expert treaty bodies for the purpose of interpretation and as forms of practice under a treaty, it can be mentioned that while those pronouncements might not be legally binding, they do carry importance and weightage. However caution should be exercised: whether the pronouncement of expert treaty bodies (which are manned by individuals who serve in their personal capacity) can constitute subsequent practice within the meaning of Article 31 paragraph 3 or more categorically under Article 32 of the Vienna Convention on the Law of Treaties? is a controversial question.

30. Whereas a pronouncement of an expert treaty body can, in principle, give rise to a subsequent agreement or a subsequent practice by the parties themselves under Article 31, paragraph 3 (a) and (b), this result is not easily achieved in practice. Most treaties that establish expert treaty bodies at the universal level have many parties. It will often be difficult to establish that all parties have accepted, explicitly or implicitly, that a particular pronouncement of an expert treaty body expresses a particular interpretation of the treaty. Be that as it may, AALCO welcomes the fact that the draft conclusions specifically provide for a presumption against silence as constituting acceptance of the pronouncement of an expert body as subsequent practice

under the Vienna Convention. Acceptance of an interpretation of a treaty as expressed in a pronouncement of an expert treaty body could not be lightly presumed.

VII. PROTECTION OF THE ENVIRONMENT IN RELATION TO ARMED CONFLICTS

A. BACKGROUND

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

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

3. The Commission, at its Sixty-Sixth session (2014), considered the preliminary report of the Special Rapporteur (A/CN.4/674 and Corr.1). At its Sixty-Seventh Session (2015), the Commission considered the Second Report of the Special Rapporteur (A/CN.4/685)1304 and took note of the draft introductory provisions and draft principles I-(x) to II-5, provisionally adopted by the Drafting Committee (A/CN.4/L.870).

B. CONSIDERATION OF THE TOPIC AT THE SIXTY-EIGHTH OF THE COMMISSION (2016)

4. At the Sixty-Eighth Session, the Commission had before it the Third Report of the Special Rapporteur (A/CN.4/700), which it considered. The Third Report did not attempt to undertake a comprehensive review of international law in general, but examined specific Conventions and legal issues that were of particular relevance to the topic. In her Third report, the Special Rapporteur focused on identifying rules of particular relevance to post-conflict situations, while also addressing some issues relating to preventive measures to be undertaken in the pre-conflict phase, as well as the particular situation of indigenous peoples (chapter II). The Special Rapporteur proposed three draft principles on preventive measures, five draft principles concerning the post-conflict phase and one draft principle on the rights of indigenous peoples, placed in Part Four of the draft principles. In her report, the Special Rapporteur also provided a brief analysis of the work conducted so far and made some suggestions for the future programme of work on the topic (chapter III).

5. To date, the Commission has adopted introductory commentary and eight draft principles with commentary on the following issues: scope (draft Principle 1); purpose (draft Principle 2); designation of protected zones (draft Principle 5); general protection of the natural environment during armed conflict (draft Principle 9); application of the law of armed conflict to the natural

environment (draft Principle 10); environmental considerations when applying the principle of proportionality and the rules on military necessity (draft Principle 11); prohibition on reprisals (draft Principle 12); and protected zones (draft Principle 13).

6. Further, the Drafting Committee has provisionally adopted nine additional draft principles on measures to enhance the protection of the environment (draft Principle 4);[72] protection of the environment of indigenous peoples (draft Principle 6);[73] agreements concerning the presence of military forces in relation to armed conflict (draft Principle 7);[74] peace operations (draft Principle 8);[75] peace processes (draft Principle 14);[76] post-armed conflict environmental assessments and remedial measures (draft Principle 15);[77] remnants of war (draft Principle 16);[78]

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[72] Draft principle 4

Measures to enhance the protection of the environment

1. States shall, pursuant to their obligations under international law, take effective legislative, administrative, judicial and other measures to enhance the protection of the environment in relation to armed conflict.

2. In addition, States should take further measures, as appropriate, to enhance the protection of the environment in relation to armed conflict. […]

[73] Draft principle 6

Protection of the environment of indigenous peoples

1. States should take appropriate measures, in the event of an armed conflict, to protect the environment of the territories that indigenous peoples inhabit.

2. After an armed conflict that has adversely affected the environment of the territories that indigenous peoples inhabit, States should undertake effective consultations and cooperation with the indigenous peoples concerned, through appropriate procedures and in particular through their own representative institutions, for the purpose of taking remedial measures.

[74] Draft principle 7

Agreements concerning the presence of military forces in relation to armed conflict

States and international organizations should, as appropriate, include provisions on environmental protection in agreements concerning the presence of military forces in relation to armed conflict. Such provisions may include preventive measures, impact assessments, restoration and clean-up measures.

[75] Draft principle 8

Peace operations

States and international organizations involved in peace operations in relation to armed conflict shall consider the impact of such operations on the environment and take appropriate measures to prevent, mitigate and remediate the negative environmental consequences thereof.

[76] Draft principle 14

Peace processes

1. Parties to an armed conflict should, as part of the peace process, including where appropriate in peace agreements, address matters relating to the restoration and protection of the environment damaged by the conflict.

2. Relevant international organizations should, where appropriate, play a facilitating role in this regard.

[77] Draft principle 15

Post-armed conflict environmental assessments and remedial measures

Cooperation among relevant actors, including international organizations, is encouraged with respect to post-armed conflict environmental assessments and remedial measures.

[78] Draft principle 16

Remnants of war

1. After an armed conflict, parties to the conflict shall seek to remove or render harmless toxic and hazardous remnants of war under their jurisdiction or control that are causing or risk causing damage to the environment. Such measures shall be taken subject to the applicable rules of international law.

2. The parties shall also endeavour to reach agreement, among themselves and, where appropriate, with other States and with international organizations, on technical and material assistance, including, in appropriate circumstances, the undertaking of joint operations to remove or render harmless such toxic and hazardous remnants of war.

3. Paragraphs 1 and 2 are without prejudice to any rights or obligations under international law to clear, remove, destroy or maintain minefields, mined areas, mines, booby-traps, explosive ordnance and other devices.

remnants of war at sea (draft Principle 17);[79] and sharing and granting access to information (draft Principle 18).[80] However, these draft principles and their commentary have not yet been adopted by the Commission.

7. Finally, the Special Rapporteur encouraged continued consultations with other entities, such as the International Committee of the Red Cross (ICRC), the United Nations Environment Programme (UNEP) and other relevant parts of the United Nations system and regional organizations, and pointed out that the Commission may find it useful to continue to receive information from States on national legislation and case law relevant to the topic.

C. SUMMARY OF THE VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPICS AT THE UN GENERAL ASSEMBLY SIXTH COMMITTEE AT ITS SEVENTY FIRST SESSION HELD IN 2016[81]

8. *One Delegation* stated that any relevant environmental treaties could co-exist with the law of armed conflict. He was of the view that having draft principles was appropriate and timely, and that they would raise the visibility of environmental impacts of armed conflicts. He was of the further view that cultural heritage, although part of the natural environment, was out of the scope of that topic, as its protection was extensively regulated through other international norms, including the United Nations Educational, Scientific and Cultural Organization (UNESCO) instruments and frameworks. She encouraged continued consultations with agencies directly involved in post-conflict situations, such as the International Committee of the Red Cross (ICRC) and the United Nations Environment Programme, in forming a coordinated response.

9. *One Delegation* expressed the view that in armed conflict the belligerent party who introduced harmful substances should search and destroy any remnants of war that it had used, and should also bear the responsibility to restore the environment. He expressed concerns over the inclusion of rights of indigenous peoples in draft principle 4 as it was of little relevance to the context of armed conflicts. In addition, as the definition of indigenous peoples was handled

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[79] Draft principle 17

Remnants of war at sea

States and relevant international organizations should cooperate to ensure that remnants of war at sea do not constitute a danger to the environment.

[80] Draft principle 18

Sharing and granting access to information

1. To facilitate remedial measures after an armed conflict, States and relevant international organizations shall share and grant access to relevant information in accordance with their obligations under international law.

2. Nothing in the present draft principle obliges a State or international organization to share or grant access to information vital to its national defence or security. Nevertheless, that State or international organization shall cooperate in good faith with a view to providing as much information as possible under the circumstances.

[81] All the Statements that are mentioned here as having been made by the Member States of AALCO at the UN General Assembly Sixth Committee in 2016 are available from: http://www.un.org/en/ga/sixth/71/ilc.shtml; https://www.un.org/press/en/2016/gal3535.doc.htm; https://www.un.org/press/en/2016/gal3531.doc.htm and https://www.un.org/press/en/2016/gal3529.doc.htm.

differently from State to State, their inclusion might cause more problems than those resolved, he added.

10. *Another Delegation* stated that the three temporal phases - pre-conflict, during conflict and post-conflict- were artificial and therefore, it would be hard to establish separate rules applying to them. In his view, the debate on whether there should be a distinction between "environment" and "natural environment" was self-defeating and that the work on the topic should not be overly prescriptive. In order to produce effective guidelines on such protection, necessary linkages must be drawn with established principles on rules of engagement, proportionality, necessity and reprisals, among other things, he added. Recognizing the fact that indigenous communities were particularly affected by, and had a significant role to play in, post-conflict remediation efforts, he asked for further analysis of the environmental consequences of armed conflict.

11. In the view of *One Delegation*, the topic included both international and non-international armed conflict and that it was difficult to identify principles that applied to both. While stating that the draft principles attempted to address post-conflict environmental protection management, he went on to add that nonetheless it had been difficult to define generally applicable rules on post-conflict measures.

12. *One Delegation* noted the appropriateness of the Special Rapporteur's approach, particularly with regard to the temporal basis of that topic. Concerning post-conflict obligations, he said his delegation looked forward to provisions on responsibility and rehabilitation on the part of those parties whose acts had caused or lead to damage to the environment. As a country with sad experience of an imposed war, he added that, his Country understood the importance of that subject.

13. *Another Delegation* felt that the Special Rapporteur's second report on the topic had provided valuable information, including analysis on practice of States and international organizations, legal cases and judgments, law applicable during armed conflicts and protected zones and areas. He also stated that his delegation looked forward to hearing commentaries by the Commission to the draft principles that would be considered at the next session.

14. In the view of *Another Delegation*, the most productive approach to this topic would be to focus on identifying how existing international humanitarian law related to the environment, rather than introducing principles of international environmental law or human rights law, which complicated the issue. Expressing agreement with the Special Rapporteur, she said it was not the Commission's task to revise the law of armed conflict. Touching on various aspects of the draft principles, she suggested that paragraph 2 of draft principles II-1 and draft principle II-4 be phrased in less absolute terms, noting that draft principles were not generally accepted as rules under international customary law. Non-binding draft guidelines could be the most appropriate outcome on the topic, she added.

D. COMMENTS AND OBSERVATIONS OF AALCO SECRETARIAT

15. The Secretariat of AALCO welcomes the work of the Commission on the topic "Protection of the Environment in Relation to Armed Conflicts" and the Third Report of the Special Rapporteur Marie Jacobsson that was discussed at the Commission in 2016. Bearing in mind the importance of this work in terms of increasing the visibility of the impact of armed conflicts on the environment, AALCO feels that the topic requires a comprehensive appreciation of the specificities of environmental law and its interplay with the laws of armed conflict. In this regard, we sincerely hope that the Special Rapporteur's three reports and the Commission's work would help States address this difficult and very contemporary legal challenge.

16. Draft principle 1 on the scope of the topic makes a three-fold division between three phases of the armed conflict: pre-conflict, during conflict and post-conflict. The appropriateness of the approach of the Special Rapporteur in this issue is not well-founded. It is impossible to draw clear limits between the three phases of the conflict and this will result in the following consequence: it is very complex to establish the law governing the third phase. That the Commission is not preparing a draft of a potentially binding instrument on the topic is also to be noted here. On this issue, AALCO looks forward to the provisions on responsibility and rehabilitation on the part of those parties whose acts had caused or lead to damage to the environment in the years to come.

17. Draft principle 6 governing the issue of the protection of the environment of indigenous peoples is an important provision. True, indigenous peoples have had, historically speaking, close relationship with the environment, and particularly indigenous communities are particularly affected by, and have a significant role to play in, post-conflict remediation efforts. However what is not so clear is the issue whether the link between the draft texts and the topic is close and sufficient enough to justify the link to indigenous peoples?. There is a need here for undertaking further analysis of the environmental consequences of armed conflict.

18. Draft principle 9 deals with an important issue, namely "general protection of the natural environment during armed conflict." But because it is not very clear, the Committee should examine to what extent general principles of environmental law are applicable in times of armed conflict and how they interact with the *jus in bello* rules. The Commission should also provide guidance on "widespread, long-term and severe damage" words occurring in draft principle 9, paragraph 2, as well as in Articles 35, paragraph 3, and 55, paragraph 1 of the 1977 Additional Protocol I [of the Geneva Convention of 1949 and relating to the Protection of Victims of International Armed Conflicts]. Draft principle 8 that deals with 'peace operations' might also require clarification of its scope, as the term "peace operations" is not defined in international law. Similarly, draft principle 14 on "peace processes" raises the problem of what peace means considering that formal peace agreements terminating armed conflicts hardly exist now.

19. Be that as it may, the draft principles on this topic adopted to date are at differing levels of completion, and the Commission will need to decide in 2017 how best to proceed given that the Special Rapporteur has not sought re-election to the Commission. Possibilities include appointing a new special rapporteur or establishing a working group, as was done in 2012 on the topic of *aut dedere aut judicare.*

VIII. CRIMES AGAINST HUMANITY

A. BACKGROUND

1. In international criminal jurisprudence, three core crimes have emerged—genocide, war crimes and crimes against humanity. War crimes have been codified by means of the "grave breaches" provisions of the 1949 Geneva Conventions and Protocol I. Genocide has been codified by means of the 1948 Genocide Convention. Yet no comparable treaty exists concerning crimes against humanity, even though the perpetration of such crimes remains an egregious phenomenon in numerous conflicts and crises worldwide.

2. The first international reference to the crime was found in the Hague Conventions. The "Martens Clause" of the 1899/1907 Hague Conventions made reference to the "laws of humanity and the ... dictates of public conscience" in the crafting of protections to persons in time of war. Later, the tribunals established at Nuremberg and Tokyo in the aftermath of the Second World War included as a component of their jurisdiction "crimes against humanity". The principles of international law recognized in the Nuremberg Charter were reaffirmed in 1946 by the General Assembly, which also directed the International Law Commission to "formulate" those principles. The Commission then studied and distilled the Nuremberg principles in 1950, defining crimes against humanity as: "murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime."

3. In 1993, the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) included "crimes against humanity" as part of its jurisdiction, as did the Statute for the International Criminal Tribunal for Rwanda in 1994. In 1996, the Commission defined "crimes against humanity" as part of its 1996 draft code of crimes against the peace and security of mankind, a formulation that would heavily influence the incorporation of the crime within the 1998 Rome Statute establishing the International Criminal Court (ICC).

4. The Rome Statute is the primary means of investigating this crime at the international level. However, the exercise of exploring the viability of an international convention on crimes against humanity was deemed to be a possibly useful endeavor by the International Law Commission for its purported utility in assisting the process of investigation and prosecution of crimes against humanity at the national level, thereby enhancing the complementarity of the ICC and domestic legal systems as well as promoting inter-State cooperation, which is not addressed by the Rome Statute.

5. The Commission, at its Sixty-Fifth Session (2013), therefore decided to include the topic "Crimes against humanity" in its long-term programme of work, and at its Sixty-Sixth Session (2014) included the topic on its current programme of work with Mr. Sean D. Murphy as its Special Rapporteur – a development which was taken note of by the UN General Assembly following debates within the Sixty-Ninth Session (2014) of the UNGA Sixth Committee.

6. At its sixty-seventh session in 2015, the Commission considered the first report of the Special Rapporteur,[82] which contained, inter alia, two draft articles relating respectively to the

[82] See document A/CN.4/680 and Corr.1.

prevention and punishment of crimes against humanity and to the definition of crimes against humanity. The Commission decided to refer the draft articles to the Drafting Committee and subsequently provisionally adopted draft articles 1 to 4, together with commentaries thereto.

B. CONSIDERATION OF THE TOPIC AT THE SIXTY-EIGHTH SESSION OF THE COMMISSION (2016)

7. At the sixty-eighth session, the Commission had before it the second report of the Special Rapporteur (A/CN.4/690), as well as the memorandum by the Secretariat providing information on existing treaty-based monitoring mechanisms that may be of relevance to the future work of the International Law Commission (A/CN.4/698), which were considered at its 3296th to 3301st meetings, from 11 to 19 May 2016.

8. In his second report, the Special Rapporteur addressed criminalization under national law; establishment of national jurisdiction; general investigation and cooperation for identifying alleged offenders; exercise of national jurisdiction when an alleged offender is present; *aut dedere aut judicare*; fair treatment of an alleged offender; and the future programme of work on the topic. The Special Rapporteur proposed six draft articles corresponding to the issues addressed in chapters I to VI, respectively.

9. Chapter I of the report addresses the obligation of a State to establish national laws that identify offences relating to crimes against humanity. An obligation of this kind typically exists in treaties addressing crimes and, in doing so, provides that the State's national criminal law shall establish criminal responsibility when the offender "commits" the act (sometimes referred to in national law as "direct" commission, "perpetration" of the act or being a "principal" in the commission of the act), attempts to commit the act, or participates in the act or attempt in some other way (sometimes referred to in national law by terms such "soliciting", "aiding" or "inciting" the act, or as the person being an "accessory" or "accomplice" to the act).

10. Further, relevant international instruments, as well as many national laws, provide that commanders and other superiors are criminally responsible for the acts of subordinates in certain circumstances. Such instruments and laws also provide that the fact that an offence was committed by a subordinate pursuant to an order of a superior is not, by itself, a ground for excluding criminal responsibility of the subordinate, and sometimes provide that no statute of limitations shall be applied for such offences.

11. Chapter II of the report addresses issues relating to the establishment of national jurisdiction so as to address such offences when they occur. To ensure that there is no safe haven for those who commit such crimes against humanity, this chapter identifies the various types of State jurisdiction that treaties addressing crimes typically require States parties to establish. Such jurisdiction normally must be established not just by the State where the offence is committed, but by other States as well, based on connections such as the nationality or presence of the alleged offender. These treaties also typically provide that, while they obligate a State to establish specific forms of jurisdiction, they do not exclude the establishment of other criminal jurisdiction by the State.

12. Chapter III of the report addresses the obligation of a State to investigate promptly and impartially whenever there is a reason to believe that a crime against humanity has occurred or is occurring in any territory under its jurisdiction or control. Some treaties addressing crimes have included an obligation to investigate whenever there are reasons to believe that the relevant crime has been committed in the State's territory, though many treaties have not done so. Ideally, a State that determines that such a crime has occurred or is occurring would notify other States if it is believed that their nationals are involved in the crime, thereby allowing those other States to investigate the matter also. In any event, if it is determined that a crime against humanity has occurred or is occurring, all States should cooperate, as appropriate, in an effort to identify and locate persons who have committed the offences relating to that crime.

13. Chapter IV of the report discusses the exercise of national jurisdiction over an alleged offender whenever he or she is present in a State's territory. Such an obligation typically exists in treaties addressing crimes and, in doing so, often addresses three requirements: that the State conduct a preliminary investigation; that the State, if necessary, take steps to ensure the availability of the alleged offender for criminal proceedings, extradition or surrender, which may require taking the individual into custody; and that the State notify other States having jurisdiction over the matter of the actions that the State has taken and whether it intends to submit the matter to its competent authorities for prosecution.

14. Chapter V of the report addresses the obligation to submit the alleged offender to prosecution or to extradite or surrender him or her to another State or competent international tribunal. Treaties addressing crimes typically contain such an *aut dedere aut judicare* obligation. Moreover, recent treaties have also acknowledged the possibility for the State to satisfy such an obligation by surrendering the alleged offender to an international criminal court or tribunal for the purpose of prosecution.

15. Chapter VI of this report discusses the obligation to accord "fair treatment" to an alleged offender at all stages of the proceedings against him or her, an obligation typically recognized in treaties addressing crimes. Such an obligation includes according a fair trial to the alleged offender. Furthermore, States, as always, are obligated more generally to protect the person's human rights, including during any period of detention. In the event that the alleged offender's nationality is not that of the State, the State is also obligated to permit the person to communicate and receive visits from a representative of his or her State.

16. At its 3301st meeting, on 19 May 2016, the Commission referred draft articles 5, 6, 7, 8, 9 and 10, as contained in the Special Rapporteur's second report, to the Drafting Committee. It also requested the Drafting Committee to consider the question of the criminal responsibility of legal persons on the basis of a concept paper to be prepared by the Special Rapporteur.

17. At its 3312th and 3325th meetings, on 9 June and 21 July 2016 respectively, the Commission considered two reports of the Drafting Committee and provisionally adopted draft articles 5 to 10. They are as follows:

Article 5
Criminalization under national law

1. Each State shall take the necessary measures to ensure that crimes against humanity constitute offences under its criminal law.

2. Each State shall take the necessary measures to ensure that the following acts are offences under its criminal law:

(a) committing a crime against humanity;
(b) attempting to commit such a crime; and
(c) ordering, soliciting, inducing, aiding, abetting or otherwise assisting in or contributing to the commission or attempted commission of such a crime.

3. Each State shall also take the necessary measures to ensure that the following are offences under its criminal law:

(a) a military commander or person effectively acting as a military commander shall be criminally responsible for crimes against humanity committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) that military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) that military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in subparagraph (a), a superior shall be criminally responsible for crimes against humanity committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) the superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) the crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) the superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

4. Each State shall take the necessary measures to ensure that, under its criminal law, the fact that an offence referred to in this draft article was committed pursuant to an order of a Government or

of a superior, whether military or civilian, is not a ground for excluding criminal responsibility of a subordinate.

5. Each State shall take the necessary measures to ensure that, under its criminal law, the offences referred to in this draft article shall not be subject to any statute of limitations.

6. Each State shall take the necessary measures to ensure that, under its criminal law, the offences referred to in this draft article shall be punishable by appropriate penalties that take into account their grave nature.

7. Subject to the provisions of its national law, each State shall take measures, where appropriate, to establish the liability of legal persons for the offences referred to in this draft article. Subject to the legal principles of the State, such liability of legal persons may be criminal, civil or administrative.

Article 6
Establishment of national jurisdiction

1. Each State shall take the necessary measures to establish its jurisdiction over the offences referred to in draft article 5 in the following cases:

(a) when the offence is committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

(b) when the alleged offender is a national of that State or, if that State considers it appropriate, a stateless person who is habitually resident in that State's territory;
(c) when the victim is a national of that State if that State considers it appropriate.

2. Each State shall also take the necessary measures to establish its jurisdiction over the offences referred to in draft article 5 in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite or surrender the person in accordance with the present draft articles.

3. The present draft articles do not exclude the exercise of any criminal jurisdiction established by a State in accordance with its national law.

Article 7
Investigation

Each State shall ensure that its competent authorities proceed to a prompt and impartial investigation whenever there is reasonable ground to believe that acts constituting crimes against humanity have been or are being committed in any territory under its jurisdiction.

Article 8
Preliminary measures when an alleged offender is present

At its 3341st meeting, on 9 August 2016, the Commission adopted the commentaries to the draft articles provisionally adopted at the current session 1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State in the territory under whose jurisdiction a person alleged to have committed any offence referred to in draft article 5 is present shall take the person into custody or take other legal measures to ensure his or her presence. The custody and other legal measures shall be as provided in the law of that State, but may be continued only for such time as is necessary to enable any criminal, extradition or surrender proceedings to be instituted.

2. Such State shall immediately make a preliminary inquiry into the facts.

3. When a State, pursuant to this draft article, has taken a person into custody, it shall immediately notify the States referred to in draft article 6, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his or her detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this draft article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

Article 9
Aut dedere aut judicare

The State in the territory under whose jurisdiction the alleged offender is present shall submit the case to its competent authorities for the purpose of prosecution, unless it extradites or surrenders the person to another State or competent international criminal tribunal. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.

Article 10
Fair treatment of the alleged offender

1. Any person against whom measures are being taken in connection with an offence referred to in draft article 5 shall be guaranteed at all stages of the proceedings fair treatment, including a fair trial, and full protection of his or her rights under applicable national and international law, including human rights law.

2. Any such person who is in prison, custody or detention in a State that is not of his or her nationality shall be entitled:

(a) to communicate without delay with the nearest appropriate representative of the State or States of which such person is a national or which is otherwise entitled to protect that person's rights or, if such person is a stateless person, of the State which, at that person's request, is willing to protect that person's rights;

(b) to be visited by a representative of that State or those States; and

(c) to be informed without delay of his or her rights under this paragraph.

3. The rights referred to in paragraph 2 shall be exercised in conformity with the laws and regulations of the State in the territory under whose jurisdiction the person is present, subject to the proviso that the said laws and regulations must enable full effect to be given to the purpose for which the rights accorded under paragraph 2 are intended.

At its 3341st meeting, on 9 August 2016, the Commission adopted the commentaries to the draft articles provisionally adopted at the current session

C. SUMMARY OF VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPIC AT THE UN GENERAL ASSEMBLY SIXTH COMMITTEE AT ITS SEVENTY-FIRST SESSION (2016)

18. *Many AALCO Member States* welcomed the second report of the Special on "Crimes against humanity" which addressed various critical actions to be taken by States, including the establishment and exercise of laws and national jurisdiction, investigation to identify offenders, and fair treatment. However, many Member States emphasized that this exercise must proceed with caution.

19. *One delegate* welcomed the Commission's efforts to develop a concrete set of norms on "Crimes against humanity." He stated that he fight against impunity required coordinated action by the international community.

20. *Another delegation* voiced their country's support for the drafting of a convention based on the draft articles on "Crimes against humanity" that would fill in the gaps currently existing in international human rights law and thereby address the issue of impunity. However, it was pointed out that while many of the provisions contained in draft articles 5 through 10 were modeled after those of the statutes of the International Criminal Court and similar bodies and were reflective of customary international law, the provision relating to the obligation to establish the liability of legal persons deviated from such norms. That was yet to gain wide acceptance in international law.

21. *Another delegate* pointed out that deliberation in the Sixth Committee in 2015 had made it apparent that Member States had not reached a wide consensus regarding the elaboration of a convention on "crimes against humanity". Noting that draft article 5 stipulated that States should legislate to list crimes against humanity as offences under their criminal codes, he stressed that, on national platforms, there should be "certain room for autonomy in decisions."[83]

22. Another delegate said that the reference in the Commission's reports to the language and the legacies of various international criminal courts must be taken with caution. Some of those courts had been established to subject countries defeated in war to the will of the victorious. Such politicization and bias did not have any place in the laws of the international community. In addition, some tribunals practiced a selective system of double standards and lacked legitimacy. As for the adoption of the language in the Rome Statute, while it might seem ideal, it was also controversial; it was a contractual treaty among some States who had agreed to enter into such a treaty. He also expressed concern about draft article 6 which created ambiguity

[83] http://www.un.org/press/en/2016/gal3532.doc.htm

and gave carte blanche to the practice of universal jurisdiction, expanding its scope in a unilateral manner.

23. Another delegate said that under his country's legal system, nine out of the eleven proposed crimes against humanity had been criminalized. There were also legal frameworks for the protection of witnesses and the National Commission on Human Rights was equipped with investigative powers. His Government would further study the draft articles and develop its views on them. In the light of the legal intricacies of the topic, he encouraged the Commission to continue to give the topic careful consideration.

D. COMMENTS AND OBSERVATIONS OF THE AALCO SECRETARIAT

24. "Crimes against humanity" is a universal phenomenon. Although these atrocities are often referred to as genocide, proving genocide is often legally difficult. In Cambodia, for instance, the Khmer Rouge generally killed, tortured, starved or worked individuals to death not because of their appurtenance to a particular racial, ethnic, religious or national group – the categories to which the Genocide Convention applies – but because of their political or social class. Although in the wake of the wars in the former Yugoslavia and the Rwandan genocide, ad hoc criminal tribunals were established, the international community could not agree upon the definition of crimes against humanity, leading to differing texts in the statutes of the ICTY and the ICTR. With the adoption of the Rome Statute in 1998, crimes against humanity were finally defined in an international treaty. However, The Rome Statute neither requires State Parties to adopt internal legislation on crimes against humanity nor provides a vehicle for inter-State cooperation. It has therefore become imperative that a comprehensive treaty on crimes against humanity should come into force to effectively address the gaps in the existing legal framework.

25. The prospective creation of a convention on crimes against humanity is an important concern to Asian-African States especially in light of the reservations that some States have towards ratification of the Rome Statute. The work of the Commission provides a possible alternative route for these States to be a part of the international regime on the prohibition of crimes against humanity without acceding to the jurisdiction of the ICC. Defining and prosecuting crimes against humanity is also critical to preventing the spread of violent extremism and the crimes committed by violent extremist groups, and therefore a convention that, *inter alia*, emphasizes inter-State cooperation would be of particular utility to States in the Asian and African regions.

26. In the context of widespread criticism against the priorities and operations of the ICC, parallel efforts to consolidate and harmonize important legal elements of international criminal law are laudable. However, the concerns voiced by delegates at the Sixth Committee in 2015 and 2016 are to be taken into account for critical reflection and the future work of the Special Rapporteur. These include concerns regarding definitions and listing of certain types of crimes, and the breadth of obligations imposed on States. Due to the diversity of legal systems and jurisprudence in the Asian and African regions it would be difficult to bring consensus and harmonize the definitions of certain crimes which may included in the draft articles of the Commission. While ancillary political problems with the ICC would be eliminated by the creation of a new instrument that closely reflects the Rome Statute, more fundamental questions

regarding the definitions of crimes and the implementation of protections against these crimes within domestic legal systems would not. Also, the inclusion of State responsibility for breaches in these obligations will also likely be a cause for States to give pause, as the application of this concept to the draft articles that will require further elaboration and explanation by the Special Rapporteur and Commission.

27. Despite these concerns, the work of the Commission in drafting articles relating to crimes against humanity has great potential. The work of the Special Rapporteur and the Commission aim at filling lacunae in the existing legal framework that prohibits crimes against humanity, particularly by promoting of domestic implementation of provisions and processes to prevent and punish the commission of these heinous crimes and by creating a transnational framework for inter-State cooperation and protection from crimes against humanity. This goal certainly has universal appeal and it is hoped that the international community will iron out the definitional issues and other critical legal concerns in their efforts to thwart heinous crimes against humanity.

IX. IDENTIFICATION OF CUSTOMARY INTERNATIONAL LAW

A. BACKGROUND

1. The Commission at its Sixty-Third Session, in 2011 decided to include the topic "Formation and evidence of customary international law" in its long-term programme of work, and at its Sixty-Fourth Session, in 2012, the Commission included the topic in its current programme of work, and appointed Mr. Michael Wood as the Special Rapporteur. After this at the Sixty-Fourth Session the Commission requested the UN Secretariat to prepare a study related to the topic. Thereafter the Commission held a debate in the plenary as well as informal consultations over the scope and methodology of the topic in the Sixty-Fifth Session in 2013, and changed the title of the topic to "Identification of customary international law". In 2014, at the Sixty-Sixth Session, the Commission considered the Special Rapporteur's Second Report, and confirmed its support for the "two-element" approach to the identification of customary international law ("CIL"). The two constituent elements of rules of customary international law were, namely: "a general practice" and "accepted as law" (*opinio juris*). Following a debate in Plenary during the Session, the 11 draft conclusions proposed in the Second Report were referred to the Drafting Committee, which provisionally adopted 8 of them.

2. In his Third Report, the Special Rapporteur endeavored to complete the set of draft conclusions that originated in the previous Second Report. The Report proposed additional paragraphs to three of the draft conclusions proposed in the Second Report (draft conclusion 3(4), 4(5) and 11) and five new draft conclusions (draft conclusions 12-16) relating to the relationship between the two constituent elements of customary international law, the role of inaction, the role of treaties and resolutions, judicial decisions and writings, the relevance of international organizations, as well as particular custom and the persistent objector. The Commission referred draft conclusions 3, 4 and 11 to 16 to the Drafting Committee. The Drafting Committee ultimately adopted the full set of draft conclusions 1 to 16 at the sixty-sixth and sixty-seventh sessions. The Commission, also, on debating the Third Report, besides re-iterating its support for the "two-element" approach, agreed that the outcome of the present topic, "Identification of Customary International Law", should be a set of practical conclusions with commentaries that would assist practitioners as well as others to identify rules of CIL. The Commission further requested the UN Secretariat to prepare a memorandum concerning the role of decisions of national courts in the case law of international courts and tribunals of a universal character for the purpose of the determination of CIL.

B. CONSIDERATION OF THE TOPIC AT THE SIXTY-EIGHTH SESSION OF THE COMMISSION (2016)

3. At its Sixty-Eighth Session the Commission had before it the Fourth Report of the Special Rapporteur (A/CN.4/695) and an Addendum to that Report (A/CN.4/695/Add.1) providing a bibliography on the topic. The Commission also had before it the memorandum by the UN Secretariat concerning the role of decisions of national courts in the case-law of international courts and tribunals of a universal character for the purpose of the determination of CIL (A/CN.4/691). The memorandum considers the *travaux préparatoires* of Article 38, paragraph 1, of the Statute of the International Court of Justice, and then proceeds to analyze the

case law of various international courts and tribunals (of a Universal Character), treating them as both a form of State practice or evidence of acceptance as law (*opinio juris*), and as a subsidiary means for determining the existence or content of CIL.

4. The Report in Section II has made an analysis of the Sixth Committee debates of 2015 especially pertaining to the valuable comments and suggestions that were made by the States and others with respect to the draft conclusions. In section III, the Special Rapporteur proposes some minor modifications to the texts provisionally adopted by the Drafting Committee. In the Section IV the Report discusses of the ways and means to make the evidence of customary international law more readily available, and finally in section V the Special Rapporteur makes suggestions on the future programme of work on the topic.

5. During the analysis of the Sixth Committee debates, as well as the other wide consultations that the Special Rapporteur has had on the draft conclusions provisionally adopted by the Drafting Committee, concerns raised ranged from issues regarding the nature of the conclusions, for instance regarding the use of the term "conclusion" as such, regarding making them (conclusions) more detailed, and certain comments on some specific conclusions, to more substantial comments about them pertaining to certain aspects of the conclusions that directly affect the identification of CIL. These substantial comments have been summarized herein-below.

6. One of the concerns raised was whether the wide array of the *potential types of evidence* of CIL as per State practice, referred to in the draft conclusions, might go on to suggest that CIL could be easily created or inferred. The Special Rapporteur was of the view that the reference to multiple forms of State practice only implied that States exercise their powers in various ways, and not that existence of rules of customary international law is to be lightly assumed. The test continues to be: "is there a general practice that is accepted as law?"

7. The other concern was that the draft conclusions do not reflect the "formation" or development of the rules of CIL, as had been suggested in the original title. The Special Rapporteur stated that the aim of the present study is to determine the existence and content of the concerned rules and not their development. Nevertheless the draft conclusion do refer to it in places, and the draft commentaries will also do so in the in the future. A related concern was with regards to the guidance provided by the draft conclusions as to whether at a given moment it may be said that a rule of CIL had emerged – as it was challenging to identify a precise moment when such a rule can be said to have emerged. The Special Rapporteur agreeing with the State view that creation of such a rule is not something that occurs at a particular moment, but instead is a culmination of an "intensive dialectic process" between different actors, stated that the draft conclusions provided guidance as to if at a given point of time, considering the existing evidence it may be said that the concerned rule at that point of time stands existent.

8. With regard to the process of assessment of evidence for the two constituent elements, 'State practice' and 'acceptance as law (*opinion juris*)', which is dealt with in draft Conclusion 3, based on the guidance provided in this regard by the States, the Special Rapporteur stated that the draft commentaries would clarify that the requirement of separate inquiries for each element

does not exclude the possibility that in some instances, same material may be used to ascertain both of them.

9. With regard to the concern raised about practice of international organizations also being indicative of the creation of a rule of CIL, the Special Rapporteur stuck to his earlier view that practice of international organizations may contribute to the creation or expression of such rules. He also stated that as international organizations vary greatly in their powers, membership and functions, in each case their practice must be appraised with caution. In relation to a related concern, he also noted the relevance of the conduct of other actors such as the ICRC, which may have an important role in the development and identification of CIL.

10. The Special Rapporteur, as per the suggestions given by the States with respect to issue of probative value given to inaction, stated that the draft commentary will seek to provide further clarification over the question of attributing probative value to inaction not to be done automatically, especially in situations where a State could not have been expected to know of a certain practice, or not having had reasonable time to respond.

11. In the case of concern over reduction of weight to be given to State practice where it varies – that it might result in disadvantage to the State concerned - the Special Rapporteur noted that Draft Conclusion 7 that corresponds to this issue, without taking any position on the internal order of any State, attempts to assess the State's practice as a whole, without attaching too much importance to the few uncertainties or contradictions.

12. With regards to the concern expressed by some delegations in respect of the inclusion of a draft conclusion on the "persistent objector rule" as having a potential effect of destabilizing CIL, the Special Rapporteur stated that like Draft Conclusion 15 the draft commentary too would emphasize upon the stringent requirements associated with the rule, for example, a State may not invoke an objection to escape from obligation if a rule has already come into existence, and it had not voiced its objection earlier. On a related concern over the requirement of an objection to an emerging rule to be repeated and maintained, the Special Rapporteur stated that the draft commentary is expected to make clear that an objection need not be constantly repeated, but must be re-stated as and when it is expected.

13. Lastly in this section with regards to the concern over the inclusion of "rules of particular customary international law" having the potential effect of fragmenting international law, the Special Rapporteur disputing the concern stated that rules of particular CIL do play a significant role in inter-State relations, and that the draft commentary is expected to clarify the nuances of such rules evolving over time into rules of general CIL.

14. In section III the Special Rapporteur proposes a few minor changes to the text of the draft conclusions that has been provisionally adopted by the Drafting Committee in 2014 and 2015. The suggested amendments are as follows:

a) In Draft Conclusion 3, the text has been amended to read, "Each of the two elements is to be separately ascertained", to clarify that the said conclusion refers to *each of the two constituent elements* of CIL[84].

b) In Draft Conclusion 4, small amendments have been suggested, namely replacing the words "formation or expression" with the words "expressive or creative", to indicate not only whose practice is primarily relevant for identification of CIL, but also role of such practice, thus providing clearer guidance, and also to better correspond to the title of the draft conclusion[85].

c) In Draft Conclusion 6, it has been suggested that the words "conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference" be deleted, as while such conduct may sometimes be relevant as State practice, in practice it is often more useful as evidence of acceptance as law (*opinion juris*) or lack thereof[86].

d) In Draft Conclusion 9, it has been suggested that the words "undertaken with" be replaced by the words "accompanied by", as the term "undertaken with" may be read to imply

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[84] **Draft conclusion 3**

Assessment of evidence for the two elements

[…]

2. Each **of the two** element**s** is to be separately ascertained. This requires an assessment of evidence for each element.

This amendment has been accepted by the Drafting Committee, and accordingly adopted by the Commission. The Report of the Drafting Committee (A/CN.4/L.872), and the final draft conclusions may be found at: <http://legal.un.org/docs/?symbol=A/CN.4/L.872>.

[85] **Draft conclusion 4**

Requirement of practice

1. The requirement, as a constituent element of customary international law, of a general practice **refers** ~~means that it is~~ primarily **to** the practice of States **as expressive, or creative,** ~~that contributes to the formation, or expression,~~ of rules of customary international law.

2. In certain cases, the practice of international organizations also contributes to the ~~formation, or~~ expression, **or creation,** of rules of customary international law.

3. Conduct of other actors is not practice that contributes to the ~~formation, or~~ expression, **or creation,** of rules of customary international law, but may be relevant when assessing the practice referred to in paragraphs 1 and 2.

These amendments have not been accepted by the Drafting Committee.

[86] **Draft conclusion 6**

Forms of practice

[…]

2. Forms of State practice include, but are not limited to: diplomatic acts and correspondence; ~~conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference;~~ conduct in connection with treaties; executive conduct, including operational conduct "on the ground"; legislative and administrative acts; and decisions of national courts.

[…]

This amendment has not been accepted by the Drafting Committee.

the legal opinion both of States carrying out the relevant practice as well as those in a position to react to it[87].

e) In Draft Conclusion 12 it has been suggested that the term "cannot" be replaced with the term "does not", as it would better reflect the factual nature of the statement, and would be better drafting. Further in paragraph 2, it is suggested the word "establishing" be replaced with the word "determining", for greater consistency within the draft conclusions as a whole. It is also suggested that the words "or contribute to its development", be deleted to better focus the draft conclusion on the identification of customary international law.[88]

15. In its section IV the Report talks about making the evidence of customary international law more readily available. The Special Rapporteur noted in this regard that practical challenges of access to evidence in order to ascertain the practice of States and their *opinio juris* have long been recognized. The Commission has the mandate to make the evidence of CIL more readily available under Article 24 of its Statute (1947), which also requires it to make a report of the relevant State practices and decisions of national and international courts on this matter to the General Assembly. It has been amongst the first items on the Commission's agenda. After following the topic through in its Sessions, the Commission observed in its 1950 Report to the General Assembly that "evidence of State practice is to be sought in a variety of materials", and then proceeded to list and survey "without any intended exclusion, certain rubrics" or types of evidence of CIL. As for the availability of such evidence the Commission has suggested "specific ways and means" for making such evidence more readily available, namely:

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[87] **Draft conclusion 9**
***Requirement of acceptance as law* (opinio juris)**

1. The requirement, as a constituent element of customary international law, that the general practice be accepted as law (*opinio juris*) means that the practice in question must be ~~undertaken with~~ **accompanied by** a sense of legal right or obligation.

[…]
This amendment has not been accepted by the Drafting Committee.

[88] **Draft conclusion 12**
Resolutions of international organizations and intergovernmental conferences

1. A resolution adopted by an international organization or at an intergovernmental conference ~~cannot~~ **does not**, of itself, create a rule of customary international law.
2. A resolution adopted by an international organization or at an intergovernmental conference may provide evidence for ~~establishing~~ **determining** the existence and content of a rule of customary international law~~, or contribute to its development~~.

[…]

These amendments has not been accepted by the Drafting Committee.

a) Wide and cost-effective distribution of international law publications by United Nations organs, and prompt publication of the texts registered with or filed and recorded by the Secretariat
b) Authorization by the Secretariat to prepare and distribute widely legal materials from States covering their practice, and also of international arbitral awards outlining significant developments
c) Publication of the digests of the reports of the International Court of Justice
d) Encouragement by General Assembly of publication by States of their digests of diplomatic correspondences and other materials relating to international law
e) Consideration by the General Assembly to have an international convention regarding general exchange of official publications relating to international law[89]

16. As per the Special Rapporteur most of these recommendations have been acted upon, resulting in an existing corpus of documents frequently consulted by international lawyers. These and other efforts of the Commission along with the growing intensity of international relations, as well as the zealous participation by the private, national and international institutes has made accessing published information much easier today. He quotes "what has been observed today is that observations of governments on drafts elaborated by the International Law Commission, the discussions in the Sixth Committee of the General Assembly, the statements of representatives of States in plenipotentiary codification conferences constitute evidence that is free of the ambiguities and inconsistencies characteristic of the patchwork of evidence of State practice"[90].

17. Nevertheless at the same time he also states that the expanded number of States and international organizations, the far greater volume of international intercourse, and the multiple formats of evidence pose greater challenges to a thorough enquiry into the practice and *opinio juris* of States. Such challenges are compounded by the absence of a common classification system to compare and contrast the practices of States and others. Therefore, despite the greater materials presently at hand, coverage of State practice continues to remain limited. Therefore, he recommends that the Commission should once more explore more ways and means to make evidence of customary international law more readily available. In this regard he suggests that the Secretariat be requested to provide an account of the evidence currently available by updating the "General survey of compilations and digests of evidence of customary international law" that formed part of its 1949 memorandum, including, if appropriate, its recommendations.

18. With regard to the future programme of work on this topic, the Special Rapporteur stated that after the expected completion of the first reading of the draft conclusions in the Sixty-Eighth Session, a second reading could take place in 2018. States and international organizations should be invited to send their written comments on the draft conclusions and commentaries to the Commission by the 31 January, 2018, latest. Meanwhile the deliberations on the ways and means for making the evidence of CIL more readily available could continue between the two Sessions, with a view to refining the output in this regard. Accordingly, he proposed that the

[89] *Yearbook of the International Law Commission* 1950, Vol. II, p. 368, para. 31.
[90] E. Jiménez de Aréchaga, "International Law in the Past Third of a Century", 159 *Recueil des Cours* (1978) 26 (quoting R.R. Baxter, "Treaties and Custom", 129 *Recueil des Cours* (1970) 36). See also Preuss, *supra* note 36, at 835 (suggesting at the time that given the lack of adequate documentation of much State practice, "[t]he development of a veritable *corpus juris gentium* is possible only under the guidance and direction of some such central agency as the International Law Commission, acting with the full cooperation of governments").

Commission's final outcome on this topic could consist of three components: a) a set of conclusions with commentaries, b) a further review of ways and means for making the evidence of customary international law more readily available, and c) bibliography, a draft of which has already been circulated between the Commission members at the sixty-eighth session (A/CN.4/695/Add.1).

C. SUMMARY OF THE VIEWS EXPRESSED BY AALCO MEMBER STATES AT THE UN GENERAL ASSEMBLY SIXTH COMMITTEE AT ITS SEVENTY FIRST SESSION HELD IN 2016[91]

19. *Some delegates* commented that in view of the increasing workload of international tribunals, the topic, "Identification of customary international law" had the potential to make a useful contribution as an important source of public international law. However, given that it touched on the question on the nature of international law itself, a prudent and balanced approach was necessary.

20. *One delegate* mentioned that State practice should be taken into account in determining the existence and content of the rules of CIL, and elements ascertaining the formation of such rules must be carefully evaluated.

21. *One delegate* was of the view that a more cautious approach might be required in light of the importance of the topic, which included controversial issues such as "persistent objector."

22. *Some delegates* welcomed the adoption of the draft texts. The topic was crucial to the progressive development of international law; a common consensus among Member States must be achieved.

23. *One delegate* was of the view that entities which were neither States nor international organizations could not contribute to the formation and expression of CIL as they did not meet the requirement of practice. The notion that the conduct of other actors "may be relevant" was rather ambiguous. *The delegate* further stated that it is an open question whether it should be included in draft guideline 4. A *few delegates* further stated in this regard, of Draft Conclusion 12, that resolutions adopted by international organizations could not in and of themselves create a rule of CIL. *One delegate* stated in this regard that in respect to Draft Conclusion 4, a high threshold should be set on the evidentiary value of international organization practice. Paragraph 2 should be drafted in a more cautious manner, using the phrase "may contribute" rather than "contributes". That term would also be more consistent with paragraphs 2 and 3 of Draft Conclusion 12.

24. *One delegate* with regard to the value of government legal opinions, while agreeing in principle that they do hold value, stated that it might be difficult to identify them, as many countries did not publish law officers' legal opinions.

25. On Draft Conclusion 11, on the significance of treaties, the *delegate* stated that all treaty provisions were not equally relevant as evidence of rules of customary international law. Only

[91] All statements made by Member States can be found at <http://www.un.org/press/en/content/sixth-committee>.

fundamental norm-creating treaty provisions could generate such rules. Strong opposition to a particular treaty could be a factor needing consideration while identifying CIL.

26. *The delegate* further noted that the international community must exercise caution in determining whether "inaction" could serve as evidence for *opinion juris* as that term could not simply be treated as "implied consent". In this regard for a rule of *customary international law* in the process of formation, he also questioned if the absence of objection from a State meant consent, adding that could not be determined without examining whether the State had knowledge of the rule involved.

27. Next, *the delegate* stated that the rule of "persistent objector" remained debatable as it constituted a constraint on the effect of customary international law, he said, asking the Sixth Committee whether there was a place for it in the draft.

28. Regarding specific set of concerns that were raised about the language in texts on identifying CIL, *one delegate* highlighting the importance of granting technical assistance to developing countries, underscored that the language used in such cases should not present an impediment.

29. *The delegate* further praised the inclusion of the "particular" in "particular customary international law". In a diverse world, different geographical regions had customary rules that were specific rather than general. He stated that the challenge of general practice accepted as *opinio juris* was the diversity of legal regimes throughout the world.

30. However, *one of the delegates* reiterated their concerns regarding the proposed Draft Conclusion 16, which addressed the fact that available international jurisprudence had largely dealt with the matter *obiter dicta* and in cases where the rule in question had not acquired the status of customary international law. Thus, it would be premature to develop a conclusion on the matter.

31. A *few delegates* extended support for the Commission's focus on two elements of general practice. It was important to underscore the relationship between the two constituent elements while also ensuring that each of the constituent elements be examined separately. *One of the delegates* also stated in this regard that while "acceptance as law", or *opinio juris*, might be considered as the "subjective element", it required a careful assessment, as forming a rule of CIL should not be lightly regarded as having occurred.

32. *One delegate* noted diversions in views of States regarding draft conclusions 6 and 10, he said that the Commission should address those concerns and consider the topic further to establish clear guidelines and criteria for determination of State practice and *opinio juris*.

33. *One of the delegates* noted the importance of the topic of "Identification of customary international law" for small States. *A few delegates* highlighted the importance of Draft Conclusion 15, which addressed the "persistent objector" principle. *One delegate* noted its importance for the preservation of the consensual nature of CIL. *Another delegate* stated that the

commentary now emphasized that the persistency of such objection should be assessed in a pragmatic manner.

34. *One delegate* stated in this regard that the work of the Commission done till now had not dealt with the temporal aspect of whether an objection could be maintained in the long run. She stated that in terms of State practice, there were numerous examples where States abandoned their initial objections in order to accept rules that were moving towards crystallization.

35. *One of the delegates* stated that the practice demonstrated by Member States was central to the identification of CIL. *The delegate* said that the decisions of international courts and tribunals and the writings of publicists remained subsidiary even as evidence of identification of custom, comparable to the stipulation in Article 38 of the Statute of International Court of Justice concerning sources of international law.

36. *One of the delegates* stated that they agreed with Draft Conclusion 8 that the relevant practice must be general or sufficiently widespread and representative as well as consistent. Though universal participation was not required, it was important for participating States to represent various geographical regions. They should be particularly involved in the relevant activity or have the opportunity or possibility of applying the rule.

37. *The delegate* also stated that supported Draft Conclusion 9 that the general practice should be accepted as law or that the practice in question be undertaken with a sense of legal right or obligation.

D. COMMENTS AND OBSERVATIONS OF AALCO SECRETARIAT

38. Reviewing the Commission's work on identification of CIL, the AALCO Secretariat at the outset reiterates the introductory words of the Commission's Chairman, Mr. Pedro Comissario Afonso, that "In a world where we are often looking at the past to foster the future in a sustainable and equitable manner," the Commission would continue to assist the General Assembly in the progressive development of international law and its codification[92]. The Secretariat commends the Special Rapporteur, Mr. Michael Wood's detailed work in the Fourth Report in laying down broadly the methodology for identifying customary international law, in the form of draft conclusions, and for his initiative and work on exploring more ways and means to make evidence of customary international law more readily available (a request to prepare a memorandum on the same has already been made by the Commission to the UN Secretariat). The Secretariat also commends the work of the Commission which established an open-ended working group, under the Chairmanship of Mr. Marcelo Vázquez-Bermudez, to assist the Special Rapporteur in the preparation of the draft commentaries to the draft conclusions, and consequently adopted on first reading a set of 16 draft conclusions, together with commentaries thereto.

[92] "As Sixth Committee Begins International Law Commission Report Review, Speakers Debate Codifying Draft Articles on Protection of Persons in Event of Disasters", (24 October, 2016), available at: <http://www.un.org/press/en/2016/gal3529.doc.htm>.

39. The Special Rapporteur in the Fourth Report substantially dealt with the concerns expressed by States in the 2015 UN General Assembly Sixth Committee debates, as well as during the wide consultations the Special Rapporteur had including with the Asian-African Legal Consultative Organization (AALCO) informal expert group on customary international law held in Bangi, Malaysia in August 2015. Concerns which are especially valuable to the Asian-African States were fairly dealt with by the Special Rapporteur.

40. Amongst these concerns were those related to the process of assessment of evidence for the two constituent elements, 'State practice' and 'acceptance as law (*opinion juris*)', which under Draft Conclusion 3 requires an assessment for each element. The Special Rapporteur clarified that this requirement did not exclude the possibility that in some instances, same material may be used to ascertain both of them. With regard to practice of international organizations as being indicative of creation of a rule of CIL, he stated that such practice may contribute to the creation or expression of such rules, however, such practice must be appraised cautiously. With regard to probative value given to inaction, he clarified that probative value would not be automatically granted to inaction, and especially in situations where a State could not have been expected to know of a certain practice, or not having had reasonable time to respond. With regard to the 'persistent objector' rule, he stated that the draft commentaries would emphasize on stringent requirements for the same, for example, a State may not invoke an objection to escape from obligation if a rule has already come into existence, and it had not voiced its objection earlier. He also stated that such an objection need not be constantly repeated, but must be re-stated as and when it is expected. He further gave importance to rules of particular CIL, as having the potential of evolving into rules of general CIL.

41. The Secretariat is hopeful that the draft commentaries, which have already been adopted by the Commission, will bring further clarifications to the draft conclusions, as suggested by the Special Rapporteur in the Report. The Secretariat further hopes that the memorandum of the UN Secretariat on ways and means for making the evidence of CIL more readily available reflects the suggestions made by the Special Rapporteur in his reports, as well as the concerns expressed by the States at the related Sixth Committee debates.

42. Lastly, the Secretariat urges its Member-States to put forward their informed comments and suggestions on the draft conclusions, which were adopted by the Commission in 2016, to the UN Secretary General by the January 1, 2018. The Secretariat also urges the Member States to respond to the questionnaire on "Ways and means for making the evidence of customary international law more readily available" by 1 May 2017. The Secretariat further encourages the Member-States to actively participate in the discussions over ways and means for making the evidence of customary international law more readily available, which are likely to continue till the time the draft conclusions are finalized and adopted by the Commission. The Member States are also advised to go through the draft bibliography that has been circulated by the Special Rapporteur, along with the Fourth Report, and make their valuable suggestions as to amendments therein, if any.

X. PROVISIONAL APPLICATION OF TREATIES

A. BACKGROUND

1. The Vienna Convention on the Law of Treaties, 1969 ("Vienna Convention"), in its Article 25 provides for the possibility of the application of treaties on a provisional basis. The provision originated when proposal for a clause recognizing the practice of the "*provisional entry into force*" of treaties, was made by Special Rapporteurs Gerald Fitzmaurice and Humphrey Waldock, during the consideration by the Commission of the Law of Treaties (Article 22 of the 1966 draft articles). The provision was amended at the Vienna Conference on the Law of Treaties, 1968, and substituted by "provisional application". It was finally adopted as such at the Second Session of the Vienna Conference in 1969, and renumbered as Article 25. At its Sixty-Fourth Session, held in 2012, the International Law Commission included the topic "provisional application of treaties" in its programme of work, and appointed Mr. Juan Manuel Gómez-Robledo as Special Rapporteur for the topic. At that Session the Commission had requested from the Secretariat a memorandum on the previous work undertaken by the Commission on the subject in the context of its work on the law of treaties, which was a starting point for the Commission's present work on the 'Provisional Application of Treaties'.

2. The First Report of the Special Rapporteur submitted at the 2013 Session of the Commission (A/CN.4/664) identified the issues that should be given further consideration in subsequent reports, and also determined the purposes and usefulness of the provisional application of treaties. It systematized some general aspects of the concept of the provisional application of treaties. Some of the contentious issues that were identified by the Report in the applicability of the "provisional application" clause, included a) State practice in the case of provisional application of treaties is neither uniform nor consistent, warranting an in-depth consideration of State practice, b) what would be the legal consequences of the violation of the obligations assumed through such provisional application, c) whether there are any procedural requirements for such provisional application, and d) what is the relationship between the Article 25 regime and other provisions of the Vienna Convention, as well as other rules of international law.

3. The Second Report of the Special Rapporteur (A/CN.4/675), submitted at the Sixty-Sixth session of the Commission provided a summary of the discussions on State Practice at the Sixth Committee of the UN General Assembly relating to provisional application of treaties, and a substantive analysis of the legal effects of the provisional application of treaties, including legal consequences of the breach of a treaty applied provisionally.

4. The Third Report of the Special Rapporteur (A/CN.4/687) submitted at the Sixty-Seventh Session (2015) of the Commission firstly continued the analysis of comments on State practice (at the Sixth Committee), and further firstly summarized the relationship of provisional application to other provisions of the 1969 Vienna Convention on the Law of Treaties (Vienna Convention) (articles 11, 18, 24, 26, and 27), and second, examined the provisional application of treaties in relation to international organizations (provisional application of treaties establishing international organizations or international regimes, provisional application of treaties negotiated within international organizations or at diplomatic conferences convened

under the auspices of international organizations and provisional application of treaties to which international organizations are party). The Report produced proposals for six draft guidelines on provisional application of treaties. These guidelines were referred to the Drafting Committee, which produced only an interim oral report on guidelines 1 to 3, as provisionally adopted by it.

5. The Fourth Report submitted for consideration at the Sixty-Eighth Session proposed Draft Guideline 10, which was submitted to the Drafting Committee by the Commission. The Commission has finally taken note of draft guidelines 1 to 4 and 6 to 9, as provisionally adopted by the Drafting Committee in its Report (A/CN.4/L.877), during the Sixty-Seventh and Sixty-Eighth Sessions. Draft Guideline 5 on unilateral declarations has been kept in abeyance to be returned to at a later stage.

B. CONSIDERATION OF THE TOPIC AT THE SIXTY-EIGHTH SESSION OF THE COMMISSION (2016)

6. At its Sixty-Eighth Session the Commission had before it the Fourth Report of the Special Rapporteur (A/CN.4/699) and an Addendum containing examples on recent European Union practice on provisional application of agreements with third States. The Fourth Report broadly picked up the work from where it had stopped in the Third Report. It continued with the analysis of State practice (comments of States at the 2015 Sixth Committee debates), and with analyzing the relationship of provisional application to other provisions of the Vienna Convention, as well as examining the issues pertaining to the question of provisional application in relation to international organizations. Therefore, a number of aspects of the discussions in the present Report are a continuation of the discussions of the previous Reports. Also, for most parts the Report has dealt with the topics in which the States expressed special interest during the debates in the Sixth Committee of the General Assembly at its Seventieth Session.

7. With regards to the relationship of provisional application with other provisions of the Vienna Convention, the present Report focused on a) the regime of reservations, b) invalidity of treaties, c) termination and suspension arising out of a breach, and d) cases of succession of States.

8. With regards to the reservation regime the Report analyzed whether the formulation of reservations is compatible with the regime governing the provisional application of a treaty, as both the Vienna Convention and the Guide to Practice on Reservations to Treaties are silent about the question of reservations in the context of the provisional application of a treaty. Noting and notwithstanding the absence of proof of any type of State practice in this regard, and after stating that it may be unnecessary to make an analysis in the abstract, the Special Rapporteur noted that in order to build a hypothesis of this nature it may be stated that nothing prevents the State, in principle, from effectively formulating reservations as from the time of its agreement to the provisional application of a treaty. He further states that under a similar hypothesis the general reservations regime, referred to in the Vienna Convention, would also be applicable *mutatis mutandis* to the provisional application regime, as has been suggested for the international responsibility regime.

9. On the question of invalidity of treaties, the Special Rapporteur after noting the observation made in the Third Report regarding the "provisional application in the context of Article 27 of the Vienna Convention" stated that provisional application would not be subordinated to the internal law of States. He stated that in the event of any substantive incompatibility, the situation would be governed by the primacy of international law, and in case of procedural violations falling under Article 46 of the Vienna Convention, such violations must be manifest and also concern a rule of fundamental importance. Concluding this point he stated that in respect of provisions of internal law concerning *competence to conclude treaties*, Article 46 refers to a *different aspect* from that of Article 27 of the Vienna Convention with regard to *observance of treaties* and *in no way conditions its application*.

10. On the question of termination and suspension of treaties arising out of a breach, the Special Rapporteur states that this aspect has not been dealt with in the "termination of provisional application clause" of Article 25 of the Vienna Convention, nor has this aspect been discussed in the previous Reports, and thus the topic was taken up for discussion. He stated that taking into account that provisional application of a treaty produces legal effects as if the treaty were actually in force, and that obligations arise therefrom which must be performed under the *pacta sunt servanda* principle, therefore, legal basis exists under which suspension or termination of a treaty may be sought, in accordance with the provisions of Article 60 of the Convention.

11. With regards to the clause of cases of succession of States the Special Rapporteur stated that as far as the legal effects of the provisional application of a treaty in response to a fundamental change in circumstances (such as a change in political system like succession) was concerned, Chapter XII of the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties* dealt exclusively with succession of States. Further, he stated that beyond these considerations, the most complete development of the treatment of provisional application of treaties in cases of succession of States is contained in the *1978 Vienna Convention on Succession of States in respect of Treaties*. Thereafter he went on to discuss the manner in which the relevant provisions of the 1978 Vienna Convention apply to the provisional application of both multilateral and bilateral treaties. He stated that the provisions of the 1978 Vienna Convention illustrate the practical utility of provisional application of treaties in enhancing legal certainty in situations of political instability within a State.

12. With regards to examining the relation of provisional application of treaties with the practice of international organizations, continuing the analysis of the Third Report, the present Report focused specifically on the *depositary functions* that may be carried out by international organizations (in the case of United Nations its role in the registration of treaties, in conformity with Article 102 of the Charter of the United Nations, was also analyzed). In this part he also focused on the practice of some selected international organizations, with regards to information like treaties to which an international organization is a party that provide for provisional application; treaties deposited with an international organization that provide for their provisional application; and treaties that are or have been applied provisionally by an international organization. The organizations whose practice was taken note of are: the Organization of American States (OAS) the European Union, the Council of Europe, the North Atlantic Treaty Organization (NATO) and the Economic Community of West African States (ECOWAS).

13. With regards to registration of treaties under UN, he noted that the practice till now has been to equate provisional application with entry into force, despite the Special Rapporteur having clarified the distinction between the two regimes in his First Report. On this basis, he stated that under the present situation the States themselves decide as to when a treaty applied provisionally has entered into force, on the basis of the criteria adopted by the Sixth Committee in the *Regulations on Registration and Publication of Treaties*.

14. In case of depositary functions with regards to provisional application treaties is concerned, he noted that despite the fact that primarily the Depositary's function cannot substantially affect the rights or obligations of parties, there has been a complex evolution of the depositary's work in the recent times.

15. The Special Rapporteur, without suggesting that the UN Secretariat Handbook constitutes an authoritative interpretation of the Vienna Convention, made a few observations over it. He stated that despite favorable views expressed in both the Commission and the General Assembly for a strict interpretation of Article 25 of the 1969 Vienna Convention, giving preference to agreements between the negotiating States and apparently not open to —but not excluding —the possibility that third States might decide to apply the treaty unilaterally and provisionally, the Secretariat *Handbook* describes a practice which is perhaps more extensive than might have been thought (allowing the States to apply the treaty unilaterally and provisionally, as per their convenience and wishes).

16. Lastly, the Special Rapporteur proposed a new Draft Guideline in continuation of the numbering of those already presented, without prejudice to the order in which the Drafting Committee decides to rearrange the draft guidelines. Draft Guideline 10 talks about a situation where a State undertook obligations by means of provisionally applying all or part of a treaty, and states that it may not afterwards invoke the provisions of its internal law as justification for non-compliance with such obligations[93].

C. SUMMARY OF THE VIEWS EXPRESSED BY AALCO MEMBER STATES AT THE UN GENERAL ASSEMBLY SIXTH COMMITTEE AT ITS SEVENTY FIRST SESSION HELD IN 2016[94]

17. *Many of the delegates* of AALCO Member States commended the work done by the Special Rapporteur till date on the topic of "Provisional application of treaties", and the Reports as well as draft guidelines prepared by him in this behalf.

18. *One delegate* noted that though their country's law did not allow for such provisional application, the Commission's study provided a useful source of information and guidance both for States that resorted to provisional application, as well as for those whose legislation did not

[93] **Draft guideline 10**
Internal law and the observation of provisional application of all or part of a treaty

A State that has consented to undertake obligations by means of the provisional application of all or part of a treaty may not invoke the provisions of its internal law as justification for non-compliance with such obligations. This rule shall be without prejudice to article 46 of the 1969 Vienna Convention.

[94] All statements made by Member States can be found at <http://www.un.org/press/en/content/sixth-committee>.

permit it. In this regard he also stated that it was not clear whether Draft Guideline 10 referred to the fact that a State may not invoke provisions of its internal law as justification for its failure to perform a treaty, or whether it concerned provisions of internal law regarding competence to agree to a treaty provisionally.

19. *One other delegate* stated with regard to Draft Guideline 10 that it might serve as a useful point of reference in the domestic application of a treaty. However, the guideline could be amended with reference to Articles 27 and 46 of the 1969 Vienna Convention on the Law of Treaties as much as possible.

20. *One delegate* while appreciating the engagement of the Special Rapporteur with the views of States, as well as his collaboration with the Treaty Section of the United Nations Office of Legal Affairs in verifying State practice, at the same time also stated that examples were needed to substantiate the conclusions supporting the draft guidelines provisionally adopted to date. *Some other delegates* expressed concerns in this regard stating that many States faced obstacles to provide the required information, mainly due to asymmetries among teams of international lawyers in different countries, he said. They stated that the scarcity of practice hindered the work of the Special Rapporteur in this area. In order to increase legitimacy in the development and codification of international law, it was extremely important that the international community did its best to ensure that all States participated in the discussions.

21. *One delegate* noted that there was a close link between the Vienna Convention and present issue of provisional application of treaties. Awaiting the next report, he stressed the importance of the commentaries and observations, adding that they should be reflected by the Special Rapporteur in his document.

22. *Some delegates* while concurring with the idea contained in Draft Guideline 8, stated that the extent of legal consequences arising out of a breach of obligation required further study.

23. *One delegate* stated that their domestic law did not provide for any express provisions that prohibited or allowed for the provisional application of treaties. He stated that the agreement for the provisional application of a treaty must either be expressly provided in the treaty or it might also be established by means of a separate agreement. A provision that enabled States to form a separate agreement should be provided explicitly in the main treaty itself. Further deliberation on that issue was necessary. If recourse to alternative sources should be in provisional application of treaties, the analysis of legal effect should be guided by the result of an unequivocal indication by the State that it would accept provisional application of a treaty, as expressed via a clear mode of consent.

24. *One delegate* noted that there was both connection and distinction between the principle of *pacta sunt servanda* and the provisional application of treaties, which could cause them to clash in practice. A solution should be based on balance between the provisional application of treaties and domestic law.

25. *One delegate* welcomed the decision to request the preparation of a memorandum in respect of treaties which provide for provisional application that had been registered in the last twenty years with the Secretary-General.

26. *One delegate* stated that it would be useful if a more in-depth analysis was done of the issue contained in Draft Guideline 7, and stated that a comparative analysis of conventional practice would assist in clarifying the matter.

27. *One delegate* stated with regard to Special Rapporteur's suggestion on the registration regulation revision, that it would not be appropriate to use the Vienna Convention as a sole reference, because not all Member States were party to it.

D. COMMENTS AND OBSERVATIONS OF AALCO SECRETARIAT

28. The Secretariat of AALCO commends the work of Special Rapporteur, Mr. Juan Manuel Gomez Robledo, for his remarkable work in the present Report on the flagged nuances related to the provisional application of treaties, addressing many of the concerns that had been raised during the previous discussions on this topic at the UN General Assembly Sixth Committee debates as well as other forums like AALCO. The Fourth Report broadly focused on methodology, reflecting the underlying question of whether the legal effects of provisional application were the same as those after the entry into force of the treaty.

29. In the study of the relationship of provisional application with other provisions of the Vienna Convention, the Special Rapporteur elaborated further on the "legal effects" of the treaties provisionally applied, as well as the *rights and obligation of States* who agree to apply treaties provisionally. For example, on the question of 'invalidity of treaties', he noted that provisional application would not be subordinated to the internal law of States. He further noted the difference in the applicability of Articles 46 and 27 of the Convention in this regard. Next, with respect to the issue of suspension and termination of treaties arising out of a breach, he stated that as provisional application produces legal effects as if the treaty was actually in force, and that obligations arise therefrom which must be performed under the *pacta sunt servanda* principle, therefore, legal basis exists under which suspension or termination of a treaty may be sought, in accordance with the provisions of Article 60 of the Convention. In line with these clarifications provided, the Special Rapporteur has proposed Draft Guideline 10, as per which where a State undertook obligations by means of provisionally applying all or part of a treaty, it may not afterwards invoke the provisions of its internal law as justification for non-compliance with such obligations. Thus, the Report has made progress in the direction of better defining the State obligations in case of provisional application of treaties, as also making them more stringent.

30. Within the discussion relating to the relation of provisional application with the practice of international organizations, the Special Rapporteur discussed the difference in "processes" for treaties that had been provisionally applied, and those which had entered into force. Speaking about the practice of registration of Treaties under the UN and drawing out the difference between treaties provisionally applied and those that have entered into force in this regard, he

stated that the practice has been to equate provisional application with entry into force, despite the Special Rapporteur having clarified the distinction between the two regimes in his First Report.

31. Though the Secretariat broadly agrees with the issue of legal effect of provisional application of treaties as is articulated in the proposed Draft Guideline 10, it nevertheless points out that there needs to be more clarification with respect to the exact implications of the said Guideline. For example, how the dynamics would play as to the relationship between Articles 27 and 46 in this regard, is yet not very clear. This dynamic has not been made very clear even in the present Fourth Report of the Special Rapporteur.

32. Even though the Special Rapporteur mentions in the present Report that legal basis exists under which suspension or termination of a treaty provisionally applied may be sought, in accordance with the provisions of Article 60 of the Convention, in case of breach of the provisionally applied treaty, nevertheless, the "international responsibility" that such breach would entail, as mentioned under Draft Guideline 8, has not been elaborated upon. In the opinion of the Secretariat this issue is a complicated one and merits further consideration of the Commission.

33. Also, in spite of the clarifications provided in the present Report regarding the "legal effects" of provisional application of treaties, the Secretariat maintains that more elaboration on this point is required, especially with regards to whether at all times and under all situations the legal effects produced by provisional application would be the same as if the treaty were actually in force.

34. The Secretariat urges Member States to continue to provide to the Commission information regarding their practice pertaining to provisional application of treaties, including domestic legislation pertaining thereto, with examples, in particular in relation to:

1. the decision to provisionally apply a treaty;
2. the termination of such provisional application; and
3. the legal effects of provisional application.[95]

35. The Secretariat recalls the attention of Member States once again in this regard that the scarcity of the availability of State practice has hindered the work of the Special Rapporteur in this respect.

[95] *Chapter III: Specific Issues on which Comments would be of Particular Interest to the Commission*, available at: <http://legal.un.org/docs/?path=../ilc/reports/2015/english/chp3.pdf&lang=EFSRAC>. See generally, <http://legal.un.org/ilc/sessions/68/>.

ANNEX I

SECRETARIAT'S DRAFT
AALCO/RES/DFT/56/SP 1
5 MAY 2017

THE HALF-DAY SPECIAL MEETING ON "SELECTED ITEMS ON THE AGENDA OF THE INTERNATIONAL LAW COMMISSION"

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

Having considered the Secretariat Document No. AALCO/56/NAIROBI/2017/SD/SP 1,

Having heard with appreciation the introductory statement of the Secretary-General and the views expressed by the Member States during the Half-Day Special Meeting on "Selected Items on the Agenda of the International Law Commission" held on 4 May 2017 at Nairobi,

Having followed with great interest the deliberations on the item reflecting the views of Member States on the work of the International Law Commission (ILC),

Recognizing the significant contributions of the ILC to the codification and progressive development of international law,

1. **Recommends** Member States to continue to contribute to the work of ILC, in particular by communicating their comments and observations regarding issues identified by the ILC on various topics currently on its agenda to the Commission;

2. **Requests** the Secretary-General to bring to the attention of the ILC the views expressed by Member States during the Fifty-Sixth Annual Session of AALCO on the Commission's agenda;

3. **Also requests** the Secretary-General to continue convening AALCO-ILC meetings in future; and,

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