REPORT OF THE WORKSHOP ON

"SELECTED ITEMS BEFORE THE INTERNATIONAL LAW COMMISSION"

29th & 30th November 2013, Senate Room, Universiti Kebangsaan Malaysia (UKM), Bangi-Putrajaya, Malaysia

A two-day Workshop on "Selected Items before the International Law Commission (ILC)" was organized by the Faculty of Law, Universiti Kebangsaan Malaysia (UKM) with the cooperation of the Secretariat of the Asian–African Legal Consultative Organization (AALCO) and was held on 29th and 30th November 2013 at the Senate Room, UKM, in Bangi-Putrajaya, Malaysia. The participants of this workshop included Representatives from the Member States of AALCO, distinguished Members of the International Law Commission (ILC), Faculty Members and students of the UKM, Malaysia, members of the Secretariat of AALCO, and international law practitioners from the Attorney-General's Chamber, Malaysia and others. The Workshop had been divided into seven sessions (five Working Sessions and an Inaugural and a Concluding Session).

Inaugural Session (9.00 – 10.00 AM)

At the Inaugural Session an address was made by **Prof. Datuk Aishah Hj. Bidin**, the Dean of the Faculty of Law, UKM, Malaysia. While welcoming all the Panelists, Special Guests and the participants to the Workshop, Prof. Datuk Aishah Hj. Bidin expressed her special appreciation for the Secretary-General of AALCO Prof. Dr. Rahmat Mohamad for agreeing to co-host the workshop on a topic that holds immense significance not only for the developing countries but also for

the students and faculty members of the Faculty of Law, UKM. She had expressed optimism that, under the guidance of the distinguished Panelists some of whom were Members of the ILC, the workshop would witness high-level deliberations that would in turn be beneficial for the participants in general and students of the University, in particular.

The Welcome address was delivered by **Prof. Dr. Rahmat Mohamad**, the Secretary-General of AALCO. While extending a warm welcome to the distinguished Members of the ILC, other Special Guests, Invited Panelists and students, he stated that by convening of this two-day workshop on the selected agenda items of the ILC jointly by the AALCO and the UKM, Malaysia clearly manifested the importance that AALCO has been attaching to the agenda items of the ILC. While expressing appreciation to Prof. Datuk Aishah Hj. Bidin, the Dean of Faculty of Law, UKM for agreeing to co-host the event, he underlined the need to bring about greater visibility to the work of the ILC which is the pre-eminent body of the United Nations General Assmebly bestowed with the codification and progressive development of international law amongst the Asian-African States and the research community of these regions. He also added that the significance of AALCO's engagement with the work of ILC could be understood from the fact that it has been made a statutory duty for AALCO to study and discuss the agenda items of the ILC and to report the views of the Asian-African States to the ILC with an intend to reflect their viewpoints on those topics in the work of the ILC.

While appreciating the presence of the Members of ILC (both current and former), he expressed the view that their presence could enhance the deliberations of the workshop to a significant end and that all of them could and do play a very critical role in providing viewpoints of the developing countries on the work of ILC. He expressed the hope that Members of ILC from the Asian-African region have got a very critical role to play in influencing the course of the work of ILC on various issues and that AALCO would continue to support them in that regard. He assured UKM, Malaysia and all the distinguished participants of the workshop that AALCO would continue to host Seminars, Inter-Sessional Meetings and Workshops in future as well on the work of ILC with a view to better understand the issues on the agenda of ILC and also to channelize the view points of developing

countries to reflect the same at the ILC. He wished the workshop fruitful deliberations.

At the Inaugural Session, the Vice-Chancellor of the Universiti Kebangsaan, Malaysia **YBhg. Prof. Tan Sri Dato' Seri Dr. Sharifah Hapsah binti Syed Hasan Shahabudin.,** delivered a brief speech. While appreciating the efforts of Prof. Dr. Rahmat Mohamad in co-hosting the two day workshop on Selected Items before the ILC, she noted that the topics of the workshop were of great significance for the developing states including Malaysia, and that more such academic endeavours should be conducted in future. In that regard, Madam Vice-Chancellor expressed the University's willingness to collaborate with the Secretariat of AALCO in any such future endeavoursd. She also stated that the students of the University ould be very much benefitted by the presence of Members of the ILC at the workshop and it was a great opportunity for them to know more about the structure and functioning of the ILC. Finally Madam Vice-Chancellor wished all the participants of the workshop a successful deliberation.

The Officiating Speech at the Session was delivered by the Chief Guest **Hon'ble Dato' Sri Idrus Harun,** the Solicitor-General of Malaysia. Terming the convening of the workshop as timely, he pointed out that international law has come to exercise serious impact on various aspects of domestic law and that hence; there was a need for international lawyers to keep themselves abreast of the impact. In his view the convening of the workshop would contribute to such a project and that it would also be very useful for international law practitioners and the student community. While noting that there is a need to use bodies such as the International Law Commission, he stated that the Members of the ILC from the Asian-African region have an important task of propagating the ideas and inputs of the developing world at the ILC and various other forums where law-making takes place. On the topics chosen for the workshop he stated that all of them were very important for the developing countries and expressed hope that it would greatly enhance the quality of the deliberations.

First Working Session (10.30 – 12.30 PM)
THE INTERNATIONAL LAW COMMISSION AND ITS RELATIONSHIP WITH AALCO

Chairperson: Prof. Dr. Myint Zan,
Faculty of Law, Multimedia University, Malaysia

Speaker: **Prof. Dr. Rahmat Mohamad, Secretary-General, AALCO**
Topic: **The International Law Commission and its Relationship with AALCO**

At this Working Session, there were two speakers and two panelists for discussions and comments. The speakers were H.E. Prof. Dr. Rahmat Mohamad, Secretary-General of AALCO and Prof. Dr. Chia-Jui Cheng, Secretary-General of the Curatorium, Asian Xiamen Academy of International Law. The first Speaker, Prof. Mohamad dealt briefly with the functions and objectives of the AALCO which was established in 1956. Their counterpart being ILC, was a very important body established under the auspices of the United Nations.

Immediately after the historic Bandung Conference in 1955, there was a consensus among newly-independent States or third world countries to establish AALCO in 1956. During that time, the founding members of the then Committee realised that they should invite the African countries also as the counterpart of this organization. Being an intergovernmental organization, the Objectives of AALCO was to comprise of members from the Asian and African countries, which served as an advisory organ of Jurists to its Member States and acted as the collective voice of the Asian-African States at international legal forum. Unlike the ASEAN or African Union, this Organization is not a political entity, but is rather a regional-legal consultative organization.

It was substantiated that International Law was Eurocentric in approach, because it evolved over 300 years ago when the influence and practices of European states were predominant. In order to have platform for third world countries in codification and progressive development of international law, the newly independent states sought to establish AALCO. Only after the UN was established, there emerged a hope for the newly independent States to join hands in shaping the

perspectives of International Law and to become part of international community particularly in the international law-making process.

With regard to the background of the ILC, it was stated that the Commission set the direction of international law. There are 34 elected members in the ILC who come out with new developments in the field of international law and works towards codification and progressive development of international law, which are then considered by the UN General Assembly for adoption. The speaker stated that AALCO was the only organization that served the objective for both the continents of Asia and Africa. So when it was established in 1956, it was thought that one of its functions would be to follow the work of ILC because they wanted to have a platform/forum/common stand/ taking common position as newly independent States of Asia and Africa.

Vide Article 1(d) of the Statutes of AALCO, the AALCO Secretariat was mandated by its Member States to work in close cooperation with the ILC. AALCO considers the agenda items of ILC which were topics of relevance to its member States and that are of common legal concern to both the continents. Thus, the topics selected for the Workshop were contemporary agenda items and ongoing which were deliberated by the members of ILC and would remain significant in the coming years. Such agenda items include: Protection of Persons in the Event of Disasters and Immunity of State Officials from Foreign Criminal Jurisdiction. Whereas, the 2 new topics proposed to be deliberated were Formation and Evidence of Customary International Law and Protection of Atmosphere. AALCO and ILC meet annually and represent each other at their respective annual session which has over the years become customary. This is significant as they receive views from the developing countries.

The roles of Special Rapporteurs are very important as far as the ongoing work was concerned. Currently, there were 10 members of the ILC who belong to the Asian-African region and previously there have been Special Rapporteurs appointed on important topics such as Succession of States in respect of matters other than treaties; Diplomatic Protection; Expulsion of Aliens; Draft Code of Crimes against the Peace and Security of Mankind (Part II); Shared Natural Resources; and Most-favoured Nation clause (Part II)

Emphasizing on solidifying the Relationship between both the Organizations, Special meeting on 'Making AALCO's Participation in the Work of the International Law Commission more Effective and Meaningful' was held in Tanzania in 2010. Prof. Mohamad stated that every year there would be special meetings with all the members of ILC in Geneva and member States were informed about what AALCO Memebr States considers important regarding certain topics or the topics that were deliberated at the ILC.

By way of conclusion, the speaker hoped that they would like to see more young officers for attachment and internship programme at ILC which would be useful to assist members of ILC coming from Asia and Africa as they lack human resources. Further, it could also be considered that Universities should also depute their faculty and students to assist members of ILC especially in coming up with the complex and crucial issues that were so imperative. The speaker also pointed out that the lack of human and also financial resources, which he feels, that Universities could ably assist them in providing all these resources.

Speaker 2: **Prof. Dr. Chia-Jui Cheng, Secretary-General of the Curatorium, Asian Xiamen Academy of International Law**

Topic: **A Critical Analysis of the Work of the Commission**

The Second speaker to this Working Session was Prof. Dr. Chia-Jui Cheng, Secretary-General of the Curatorium, Asian Xiamen Academy of International Law. The Speaker made a presentation on "A Critical Analysis of the Work of the Commission". The speaker clarified the concept and function of the Progressive Development and Codification of International Law. He elaborated the content of Article 15 of the Statute of the International Law Commission that relates with the both these concepts. The speaker stated that the new concept of international law, distinguishes between the general part of international law (*lex generali*) and special part of international (*lex specialis*). The reason for this division is due to increasing number of law making bodies within the framework of 15 UN specializations and other inter-governmental organization. At the current development of international law, the

United Nations has played a crucial function to formulate various aspect of law.

The speaker highlighted major contribution of the ILC on Codification and Progressive Development of International Law. Among the achievements one of them was the Draft Articles that have gone on to serve as the basis for major multilateral conventions, which constitute juridical landmarks in the related fields. These draft articles have lead to the adoption of multilateral convention relating to the sources of international law; such as in the domain of international diplomatic relations; the issues of the law of the sea; and several others.

The speaker addressed the issue and the shortcomings of the ILC in the formation of positive international law. He said that the draft articles of the Commission lack consistency with the Article 55 of the UN Charter in the field of economic, social, health, cultural and educational rights and obligations of the States. The ILC confronts with the nature of titles to be given which are yet to play a formulating law, international humanitarian law, international economic law etc. There is no clear definition of progressive development in relation to the specific task of international law. In that regard, one can detect a certain lack of enthusiasm within the Commission for the matters referred to it by the General Assembly by way of special assignment, particularly those with a high political content (Sir Ian Sinclair). The ILC was more concerned with the codification than the progressive development of the law.

Besides the shortcoming of ILC, the speaker emphasized on the fragmentation of international law, with special reference to the interpretation of general international law and special international law. Among the main points addressed were the implication of globalization that has caused the lacunae in various legal regimes regulating a particular phenomenon of national society. Beyond this, the speaker put forward the problems between general and special law, prior and subsequent law and laws at universal, regional, and local levels.

Regarding the criteria for selection of new topics by the ILC, the speaker stressed that there is no comprehensive code in the selection of new topic. Different approaches are used to select new topics. The first approach can be seen in the UK study group, wherein they identify several topics for consideration involving some aspect such as

responsibilities of international organization, economic sanction, remedies etc. The second approach is to restudy topic listed in the agenda of the ILC. He said that selection of a topic is political rather than the criteria of being a new problem. In this case, developed countries exert more dominance in comparison to developing countries.

On the future prospects, the speaker suggested that AALCO should discuss more on the topic of social aspect such as migrant worker, trafficking in women and children, corruption, etc. Among the new topic that suggested by the speaker to ILC and international lawyers are: (i) the concept and the meaning of rights of self-defence, (ii) to elaborate on the principles of non-intervention in domestic matter, (iii) issue on the law of the sea like freedom of navigation, freedom of deep sea research, EEZ etc; (iv) non-recognition of new states, and (v) examination of the principles of territoriality and universality. The speaker expressed hope that the Asian and Africa states will play a positive role in the formulation of law in the international society.

Panelist 1: **Tuan Mohd. Radzi Harun, Head of International Affairs Division, Attorney General Chambers of Malaysia**

Topic: **ILC, AALCO and the Chambers of the Attorney General of Malaysia**

The Presentation began with the need to understand the role and work of the ILC. The idea to establish ILC was mooted during the second session of the Sixth Committee of the General Assembly on 21 November 1947 via the adoption of resolution 174 (II) of the General Assembly (*see resolution as appended*). The Objective of ILC is to promote the progressive development of international law in the area which has not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States, for example, Reservations to treaties etc. It was also mandated to codify rules of international law in fields where there already had been extensive State practice, precedent and doctrine such as Law of treaties, law of the sea, nationality including statelessness, state responsibility, etc.

It was mentioned that the ILC has worked almost exclusively in the field of public international law, and has hardly ventured into the field of private international law, except incidentally and in the course of work on subjects of public international law - unlikely that the Commission would be called upon to do so having regard to the work of bodies such as UNCITRAL and the Hague Conference on Private International Law. The Commission has worked extensively in the field of international criminal law including: (i) formulation of the Nuremberg principles; (ii) consideration of the question of international criminal jurisdiction at its 1st session (1949) and culminating in the completion of the draft Statute for an International Criminal Court at its (46th session, 1994); and (iii) the draft Code of Crimes against the Peace and Security of Mankind at its (48th session, 1996). The panellist provided a list of current programme of work undertaken by the ILC.

The Panelists said that ILC requires inputs from States on their practices in relation to the topics which ILC is working on. The ILC Statute contained provisions designed to give Governments an opportunity to make their views known at every stage of the Commission's work. At the outset of its work, the ILC is required: (i) to circulate a questionnaire to Governments, inviting them to supply data and information relevant to items included in its plan of work for progressive development (Article 16 (c)); or (ii) to address to Governments a detailed request to furnish the texts of laws, decrees, judicial decisions, treaties, diplomatic correspondence and other documents relevant to the topic being studied for codification (Article 19, paragraph 2). ILC was also required to invite/request Governments to submit comments on the ILC's document containing the initial draft as well as appropriate explanations, supporting material and information supplied by Governments (Article 16 (g) to (h) and Article 21). Finally, ILC was required to take into consideration such comments while preparing the final draft and explanatory report (Articles 16 (i) and 22).

On AALCO's relationship with the ILC and UN in general, it was mentioned that the work of ILC has been discussed during Annual Sessions of AALCO under the agenda "Selected items on the Agenda of ILC"- AALCO is mandated under Article 1 of the AALCO Statute, which mandates AALCO to examine subjects that are under consideration by the ILC and to forward the views of AALCO to the ILC; and to consider

the reports of the Commission and to make recommendations thereon, wherever necessary to the Member States. AALCO has maintained a close working relationship with the UN through Office of the Permanent Observer of AALCO at New York, which focusses on collaborations to hold talks/seminars between ILC Members and AALCO member countries in the sidelines of UNGA. Also worth noting was that AALCO began organising open seminar/talks to include non-AALCO member countries on topics of interest, not just on ILC topics. The Eminent Persons Group initiative – established as a forum of experts to discuss current legal issues of importance to the AALCO community. Few achievements in that regard were also highlighted.

The Panelist then narrated the involvement of Attorney-General's Chambers in the Work of ILC, which involved forming Working Groups to study the topics in ILC programme of work, that features:

(i) extensive research,
(ii) team work discussions,
(iii) analysis of comments presented by other countries and prevailing practices/areas of concern or objection, inter-Division collaboration,
(iv) Ministry/State consultations on specialised areas
(v) Preparation and submission of Malaysia's written comments requested by the ILC.
(vi) Comments also made in Malaysia's statements delivered during the 6th Committee, UNGA debates on ILC's Annual Reports.
(vii) Involvement in negotiations on resolutions passed by the General Assembly concerning outcome/direction of ILC topics or topics emanating from the ILC.
(viii) Direct collaboration with ILC Members for example, seminar featuring Prof. Chusei Yamada on his draft Articles on Transboundary Aquifers (concluded ILC work).
(ix) Exposure to/participation in consultations with ILC Members through external events organized by AALCO and other International Organizations such as the ICRC (Disaster Management – related work on Protection of Persons in the Event of disasters topics) – experts drawn from ILC membership to participate in such organized events.

General Perceptions on the ILC's Working Methods were discussed. The query was raised as to whether there is sufficient exposure/accessibility of ILC work by Governments and main stakeholders, accessibility to the work of ILC, and so on. In order to manage the topics of ILC, it was suggested that the pace of progress must be properly managed taking into account importance and relevance of topics to the international community. ILC's inclusion of new topics in programme of work – must consider importance and necessity. The Commission should not overburden existing workload given voluminous work/studies not yet concluded. ILC's restricted resources – Note increasing pressure for all UN organs to cut down on budget and expenses in the current economy. How has this affected the work by ILC members and its time lines for work completion? In event of cut-backs, ILC has to prioritise topics and maximise work efficiency. Note, over the years some States have suggested that the ILC should hold its sessions in New York instead of Geneva as this would enable the respective Permanent Missions of UN Member States a more closer and consistent contact with the ILC throughout the year. It was substantiated that ILC had held all of its sessions in Geneva, except for its first session, which was held in New York in 1949, whereas Article 12 of the ILC Statute initially provided that the ILC would meet at the Headquarters of the United Nations, while recognizing the right of the Commission to hold meetings at other places after consultation with the Secretary-General. On that note, ILC preferred Geneva to New York because of its atmosphere and law library which were more favourable for conducting the studies to the body of legal experts and because its location simplified arrangements for its sessions by the Secretariat. In 1955, the General Assembly, acting on the recommendation of the ILC, amended Article 12 of the Statute to provide for the ILC to meet at the European Office of the United Nations at Geneva. In introducing the practice of split sessions, the ILC has considered holding the second part of its split sessions in New York, towards the middle of the quinquennium, in order to enhance the relationship between the ILC and the General Assembly and its Sixth Committee. However, that has not been materialised yet.

Panelist 2: **Dr. Sufian Jusoh, Senior Fellow, Faculty of Law, UKM**

Topic: **The Work of the ILC in the Context of International Trade and Investment Issues**

The speaker discussed about the work of ILC within the context of International Trade and Investment Issues. A narrative of the past, present and future initiatives taken were given out. Four main problems were addressed: regionalism, *Lex specialis,* advance of multilayered governance, and conflict of norms. Among the important aspect emphasized by the speaker was the juxtaposition of ILC work in international trade issues. In relation to conflict of norms, the areas of conflict were biotechnology trade, EC Biotech, and ILC Study group criticism of EC Biotech panel. With regard to good faith, it was stated that good faith shall be interpreted and Korean government's procurement, nullification and impairment of benefits in non-violation claim and this could be regarded as *pacta sunt servanda*. The speaker related to Fragmentation of international law as pioneered by Martii Koskenniemi, who conducted a detailed study on "Fragmentation of IL: Difficulties Arising from the Diversification and Expansion of International Law, ILC".

The speaker said that there was a proposal to review the framework, which was necessary to internationalize and institutionalize the international law framework. He explained this issue with the standards of liability as discussed at the Ad Hoc Working Group on Liability and Redress at the Meetings of Cartagena Protocol on Biosafety. Besides these, the speaker also highlighted on the investment issues.

Second Working Session (2.30 – 4.00 PM)
FORMATION AND EVIDENCE OF CUSTOMARY INTERNATIONAL LAW

Chairperson: Dr. Matthew Albert Witbrodt, Lecturer, UMK, Malaysia

Speaker: **Prof. Dr. Rahmat Mohamad, Secretary-General, AALCO**

Topic: **Formation and Evidence of Customary International Law in Developing Countries**

The first presentation at this Session was made by the Secretary-General of AALCO, Prof. Dr. Rahmat Mohamad who spoke at length about the topic of customary law and its significance for the developing world in general and Asian-African States in particular. He had stated that although customary law stood included in all accounts of the sources of international law, both the method of its formation and its relationship with other accepted sources of international law have been debated vigorously and that since the 1970s, a wide range scholarship has emerged arguing against a strict adherence to state practice and *opinio juris* in determining customary international law and advocating instead a more relaxed interpretive approach.

While noting that the activities of states take myriad forms, he pointed out that a number of issues in this regard that remained to be clarified. This, in his view, included: which of the various complex and often subtle forms of activity by states are relevant to the generation of custom? How widely accepted must a practice be to qualify as a norm of general customary international law? He was also of the opinion that the ICJ has never provided detailed guidance on this issue but has referred simply to "general acceptance" or "extensive" state practice as necessary. He had highlighted the main issues identified by the ILC on this topic and the opinion of the Special Rapporteur Sir. Michael Wood as revealed in his first report on the topic. He also highlighted the salient features of the speech that the Special Rapporteur Sir. Michael Wood had delivered at the Fifty-Second Annual Session of AALCO held at New Delhi, from 9-12 September 2013. He also made a brief reference to the comments of AALCO Member States expressed at the Fifty-Second Annual Session of AALCO. Thereafter he went on to present a brief Summary of the Discussions held at the ILC's 65th Session 2013.

Charting out the future role of AALCO on this new topic of ILC, he had mentioned that the Secretariat of AALCO would soon create a 'Working Group' on the issue of Customary International law (CIL) under his Chairmanship and with its members drawn from the legal luminaries across Asia and Africa, with a view to identify the main issues on the topic and to find out the future areas of research that this Working Group would be embarking on in future. He was of the firm view that in order for the work of ILC to reflect the viewpoints of the developing countries a number of concerns needs to be addressed. This included : the need to take into account the role of resolutions of

international institutions (especially when adopted by an overwhelming majority) that in his view must be given weightage as evidence of *opinio juris*; the need to explore the methodology of the various ways (if any) through which CIL could arise from state practice and *opinion juris* of a discrete and limited number of states [regional, subregional, local or bilateral – "individualized" rules of customary international law]; given the undemocratic way in which customary law was dealt by a handful of States in the past; the need to address the issue of democratic deficit in the formation of custom and to make the creation of custom a broad-based enterprise.

Panelist 1: **Prof. Dr. Rohimi Shapie, Professor of International Law, UKM, Malaysia**
Topic: **Commentary on the Speech given by Prof. Rahmat Mohamad**

The second presentation in this session was made by **Prof. Dr. Rohimi Shapie**, Professor of International Law at the UKM, Malaysia. He had highlighted the main points raised by the previous speaker and also added a number of his own take on the subject matter. While referring to Article 38 (1) (b) of the Statute of the International Court of Justice (ICJ), he pointed out that the two elements for the creation of customary law, namely the state practice and the opinion juris have been infested with many critical problems as regards the various ways through which customary law could be created. While highlighting that we have not come up with any tool kit as regards identification of customary law, he mentioned that ILC in its work should give maximum attention to this important issue.

While highlighting the need to refer to decisions of the tribunals such as the ICTY and the ICTR as well as the ICJ, he mentioned that though these should be welcomed, these are basically reflective of the opinion/ official positions of the developed states and that the opinion of the developing world is not adequately taken into account. Similarly he also cautioned against taking into account the scholarly work for deciding the existence or non-existence of customary international law. In this regard, he was of the opinion that most often it was the opinion/work of the Western international law jurists that is taken into account. He added that that was why the work of AALCO was very commendable for it reflected the viewpoints of the Asian-African legal community.

While referring to the past hegemonic ways in which custom had been formed, he stated that the developing countries should be allowed to play an important role in the formation and evidence of customary law in the years to come. In this regard he stressed the valuable contributions that institutions such as AALCO could make in this enterprise by channeling the views of the developing countries of Asia and Africa on various issues of customary law. He also expressed his desire that AALCO and UKM, Malaysia should continue to host this kind of important workshops in future too with a view to identify the major issues on the topics found in the agenda of ILC.

Panelist 2: **Mr. S. Pandiaraj, Senior Legal Officer, AALCO**

Topic: **Identification of Customary International Law: Some Reflections on the Legality of the Resolutions Adopted by the General Assembly of the United Nations**

The third presentation was made by Mr. Pandiaraj, Senior Legal Officer at the Secretariat of AALCO whose presentation focused on one aspect of the formation and evidence of customary international law, namely the legality of the resolutions adopted by the UN General Assembly and the circumstances under which they could reflect customary law. While noting that the emergence of the international organizations as a subject of international law has been (in essence) a post- Second World War phenomenon, he had brought home the importance of the universal organization such as the United Nations for the development of international law within the matrix of the power (or lack of power) of the UNGA under the UN Charter scheme of things to make international law.

While making the argument that (despite the original intentions of the framers of the UN Charter), there have been many instances in which UNGA Resolutions have considerably contributed to the formation of customary international law in one or another way, he went on to prove this argument by reference (only) to its resolutions on the principle of Permanent Sovereignty over Natural Resources (PSNR). While stating that PSNR is one of the pre-eminent principles of

international economic law, he highlighted the evolution of the principle within the forum of UNGA in its historical trajectory involving Western colonialism. While stating that the principle of PSNR builds on traditional state prerogatives such as territorial sovereignty and sovereign equality of states he clarified that this principle embodies the 'right of States and peoples to possess, use and freely dispose of their natural wealth and resources'.

While referring to the UN Declaration on the PSNR that was adopted in 1962 by way of UNGA Resolution 1803 (with the voting of 87 (for) to 2 (against) with 12 abstentions) he underlined that the basic tenets of PSNR as flowing from the UN Declaration. In his view, the most important point related to the adoption of this Declaration in the context of the theme of his presentation relates to the fact that this Declaration on PSNR proposed to lay down new legal foundations for the exploration and exploitation of natural resources under international law. It was indeed a classical example of a law-making resolution of the General Assembly. He also went on to argue that the principle of PSNR constituted a norm of customary international law having been incorporated in so many treaties including the ICCPR, ICESCR, UNCLOS, Convention on Biological Diversity etc.

Day 2 - 30 November 2013

Third Working Session (9.00 – 10.30 AM)
PROTECTION OF ATMOSPHERE

Chairperson: Prof. Dr. Rahmat Mohamad,
Secretary-General, AALCO

Speaker: **Prof Shinya Murase, ILC Member**
Topic: **Protection of the Atmosphere**

Prof. Shinya Murase was the speaker on the topic "Protection of Atmosphere". He listed the criteria for selection of topics at ILC, which are (i) Practical feasibility test: whether there is need of certain topics by the international community, (ii) Technical Feasibility- Ripeness in State Practice, and (iii) Political Feasibility, which menas there were no resistance by states in accepting the proposed topic. On challenges faced

by ILC, he said there were two angles, which is to address from the perspective of codification that has been expanding to new areas of topics for example, International criminal law. The other issue was to shift from traditional topics to reflect new developments and pressing concerns of the international community.

On protection of atmosphere, there was lack of coordination, which the ILC has to take effort to consider this within the framework of international law through integrative approach that transcends specific regimes. He believes that the topic satisfies the entire three feasibility test. There is a great need for the topic by the international community because there is enough evidence of State practice, with a holistic approach.

The speaker stated that he envisages a comprehensive framework of protection of the atmosphere. Therefore, the issue begins with the definition of atmosphere. The atmosphere's 80% belong to Stratosphere, 20% to the troposphere and the upper atmosphere and space is excluded. There is a need to address this issue because of continuous degradation of the atmosphere. Due to introduction of pollutants into the two spaces, chemical reaction may cause ozone depletion, which filters harmful substances. The changes in the two spaces will cause climate change especially through the emission of various harmful gases into the atmosphere. Thus, the atmosphere needs to be treated as a single unit for protection purposes and codification. The existing conventions relevant to the topic remain patchwork of instruments with many loopholes. There is not much sense in differentiation between domestic and global damage and the link between atmospheric pollution and climate change. The speaker explained the principles through various cases including the *Trail Smelter case.*

Prof. Murase was concerned with establishing draft guidelines and in his first report, has dealt in three-fold, by defining atmospheric pollution, scope of the guidelines, and the legal status of the 'atmosphere'. He was hopeful that after completing the report in 2015, he will deal with other works for the project.

Panelist 1: Prof. Datuk Aishah Bidin, Dean of the Law Faculty, UKM

Topic: Malaysian experience on the works relating to the protection of the atmosphere

The panelist shared her experience in the field of protection of atmosphere since 2011. Prof. Aishah Bidin said that she was involved in reviewing energy law with stakeholders in Malaysia. They addressed the effects of renewable energy like the nuclear energy on the atmosphere. The team came out with draft of regulations; however, the challenge was in convincing the various government agencies on the significance of these regulations. Also, as an ICell member, she had the obligation to advise the Attorney-General of Malaysia including on climate change matters.

Prof. Bidin briefly pointed out the laws and regulations on protection of atmosphere. Firstly, there is a right to clean air and environment. Secondly, the International Unit of SUHAKAM, explains the possibility of ratification of new legal instruments and the challenge exist in working with all the different agencies and their bureaucratic attitude. However ratification was not only sufficient but what was needed is the real commitment of all members and stakeholders to implement their obligations.

Few concerns were raised regarding the topic protection of atmosphere and was stated by the Special Rapporteur that it would not deal with political issues; however, at the end of the day, the political will was the important aspect. The development of new theme and new frontiers on the role of the ILC, next agenda was on the protection of the atmosphere wherein such challenges has to be addressed by Malaysia and has to face issues in relation to implementation of instruments pertaining especially to nuclear energy. The panellist emphasised the role of UKM as a research university in playing strategic role towards assisting other stakeholders. There are many centres of excellence in Malaysia which works tirelessly on protection of the environment, within the Malaysian government. The panelist agreed with Prof. Murase that in terms of new trend, there should be better moves to look into new areas. Countries with different cultures, political orientation, etc, may find it difficult to undertake commitments. However, the fact that there is room for consultation with experts and scientific institutions under the ILC Statute was something which was very welcoming. It was also worthwhile to give a thought on the best ways to

convince and get the commitments of Government agencies and stakeholders. There were various other concerns in Islamic countries such as promoting human rights. In Malaysia, the reservations of treaty provisions for fear of infringing Syariah may not be of the same concern as in other Arab countries, however, they were still learning on how to reconcile the differences between countries and the different schools of thought between NGOs, civil societies and ulama.

The next issue was on specific case study in the sense of the challenges of the member states in ratifying the particular convention on nuclear energy. The nuclear conventions, which among others, addressing the transportation of nuclear and its possible major effects, despite ratifying, the question remains as to how to incorporate the provisions into domestic law, the implementation of technicalities of giving notice, etc. On that note, the panelist stated the relevance of UKM in assisting and promoting issues on protection of the atmosphere by reiterating on conducting research as it has an earth centre to build up and enhance capacity building on climate change, ecosystem, etc. Being a transboundary research institute consisting of cross-disciplinary stakeholders, apart from that UKM has entered into agreements with research centres on environment, economic, sustainability. Another one is Langkawi research centre (on eco tourism) which conducts active research and projects in the area. Thus it was very important for ILC when building up new themes to get important feedback from these stakeholders and the works of the ILC would have ultimate effects on the general public.

Panelist 2: **Shannu Narayan, Legal Officer, AALCO**
Topic: **Atmosphere as a Common Concern of Mankind: Principles & Jurisprudence**

The Panelist discussed on the defining the legal status of the concept of atmosphere. The significance of the atmosphere in the contemporary times was a real phenomenon because it was a common concern of mankind, which could be categorised as air space, natural resource, common heritage or common concern of human kind. At least three subjects have been discussed on environment by the ILC itself in the recent past, which are: (i) protection of persons in the event of disasters, and (ii) protection of environment during armed conflict, and (iii) protection of atmosphere.

The emission of gasses into atmosphere, including stratosphere and troposphere has been on the rise and the disasters out of such emission would not be able to be handled by human. The panelist quoted the Dissenting Opinion by Judge Weeramantry in the International Court of Justice's Advisory Opinion on the Legality of Nuclear Weapons case (8 July 1996), where he opines that there would be a collapse of the whole atmosphere as there is a limit to which the planet could take these pollutions.

The protection of environment has been listed as a Chapter under Agenda 21 of UNCED adopted in Rio in 1992, however, it does not define and provide what is to be done to protect the atmosphere. UN Framework Convention on Climate Change was later put forward. The causes of environmental degradation have been due to emission of harmful gasses into the atmosphere, ozone depletion and the impacts they have on climate change. In terms of climate change, adoption of the 2nd phase commitment in Kyoto Protocol was a key challenge. The panelist stated that due to inter linkage between many different instruments on the protection of the atmosphere; the general principles of international environmental law on obligations of States are relevant. The basic principles of international environmental law applicable in relation to protection of atmosphere are: (i) General obligations of States to protect the atmosphere, (ii) Principle of No-Harm, (iii) Principle of *sic utere tuo ut alienum non laedas* to be applicable to the activities under the "Jurisdiction or Control" of a State, (iv) Duty to Cooperate, (v) Principle of Equity, (vi) Principle of Sustainable Development, (vi) Common but Differentiated Responsibility and Respective capabilities, and (vii) Prevention obligation.

The States have an obligation while exploiting the natural resources in one's own State, not to cause harm to its neighbour's territory. This principle was discussed in *Trail Smelter case* (it is also an erga omnes principle and later Customary International Law). The whole idea of transboundary pollution, as reflected in the Nuclear Test case evolved to form base to environmental law principles as applicable in protection of atmosphere. The principle of cooperation and good neighbourliness extended to the concept of principle of development relating to environmental issues, the principle of equity that requires the preservation of resources for future generations, sustainability and

equitable use of natural resources and the concept of integration of these concerns. The principle of sustainable development as enshrined in *Gabcikovo-Nagymaros case* and earlier emphasized in the *Legality of Nuclear Weapons* case, stated that in order to ensure economic, social and political development, States must comply with sustainable use of its resources, so that the earth is preserved for future generation. The principle of common but differentiated responsibility, arising out of the 1972 of Stockholm Declarations also requires the developing countries to be given technical assistance in developing and using the resources. It emanates from the arguments that those countries who have not contributed to environmental hazards must not face curtailment in their rights to develop and those polluting are the ones who should be paying for their ecological footprints. Precautionary principle is all about prevention of all undesirable disasters- this should prevail over the precautionary principle.

Fourth Working Session (11.00 – 12.30 PM)
PROTECTION OF PERSONS IN THE EVENT OF DISASTERS

Chairperson: Dr. Rohaida Nordin,
Senior Lecturer, Faculty of Law, UKM

Speaker: **Dr. Hussein Hassouna, ILC Member, Egypt**
Topic: **Protection of Persons in the Event of Disasters**

The Fourth Session was chaired by Dr. Rohaida Nordin, Senior Lecturer at the Faculty of Law in UKM. In introducing the topic Dr. Nordin commented on the importance of this topic throughout the world, in general, and in the Asian-African region, in particular, in light of recent natural disasters. Dr. Nordin also provided a brief introduction to the general scope of the topic as well as some of the issues which would be under discussion during the session.

The main speaker in this session was Dr. Hussein Hassouna the ILC Member from Egypt. Dr. Hassouna began by speaking on the importance of the workshop as an affirmation of the contribution of AALCO to the codification and progressive development of international law. He then briefly history elucidated on the history of the selected

topic before the ILC. Dr. Hassouna stated that topic had been included as one of the selected items before the international law in 2007. The topic was then adopted by consensus by members of the Commission.

Dr. Hassouna also gave a brief explanation of the Special Rapporteur's report on the selected item. At the ILC's 60th session, the Special Rapporteur submitted a report on the evolution of the principles pertaining to the protection of persons as well as efforts made towards the codification and development of the law in that area. At the 61st Session an analysis had been made of the topic in relation to the definition of the 'disaster', and the consideration of the basic duty to cooperate was undertaken. At the 62nd Session the views of the States on the work undertaken by the Commission as well as their opinions regarding the responsibilities of the affected States were also examined.

Dr. Hassouna noted that the definition of 'disaster' explained under Article 3 of the draft articles. He also briefly explained the related articles i.e. Draft Article 6-12. With regard to the role of States under draft Article 9, Dr. Hassouna explained the divergent opinions regarding the speed with which an affected State must respond to a disaster.

On the issue of the Responsibility to Protect, Dr. Hassouna touched upon the debate concerting the right of any State to provide assistance if the affected State did not meet its obligation to respond to a disaster or accept necessary aid. According to a UN report in 2008, Member States had agreed to this position but with relation to specific crimes and violations such as genocide, war crimes, ethnic cleansing and crimes against humanity.

Dr. Hassouna also stated that cooperation plays an important role in the disaster relief. This point has been addressed in the several UN resolution, conventions, treatises and agreements. He then explained the duty to reduce the risk of disasters, which is articulated under Draft Article 16. Dr. Hassouna also highlighted the necessity of including a discussion on climate change when addressing the prevention and mitigation of disasters. He also stated that many arguments cover the reduction of disaster risk but that State does not react positively until the disaster occurred. Finally, Dr. Hassouna noted the need to regulate the international community's approach and response to disasters

occurring in the Asian-African region with a strong focus on the principles of solidarity and cooperation.

Dr. Hassouna also spoke about the role of academic institutions and relation to the work of ILC. He suggested that the work of academics should not remain confined to theoretical debating and but rather should shift focus to more practical matters concerning the ILC topics. To this effect, Dr. Hassouna noted that UKM can make its own contribution by:

1. Proposing candidates to the international law conference held annually
2. Proposing Malaysian representatives to ILC as future candidates
3. Begin proposing studies on future topics that may be considered by ILC. For example, working towards defining "crimes against humanity"

Dr. Hassouna also stated that AALCO would be the ideal organization to guide academicians. He noted that there was a need to to regulate a comprehensive legal framework and that AALCO is ideally placed as an organization to make an impact in this area.

Panelist 1: **Dr. Hassan Soleimani, Deputy Secretary-General, AALCO**
Topic: **Protection of Persons in the Event of Disasters: An Asian-African Perspective**

The first panelist of the Session was Dr. Hassan Soleimani, Deputy Secretary General of AALCO. Dr. Soleimani started out by tracing the background and historical context of the topic before the ILC and its development from 2007 to 2013. Dr. Soleimani stated that draft articles on the protection of persons in the event of disaster is both based on, and is meant to fill the lacunae within, the existing spectrum of international legal principles and provisions which may be applicable in the context of disasters. These include principles from areas such as humanitarian law, human rights law, refugee law, etc.

Dr. Soleimani also emphasized that the core legal concern with the ILC Draft Articles relates to, as the Special Rapporteur, Mr. Eduardo Valencia-Ospina, put it, the "tension created between underlying the

link between protection and the principle of respect for territorial sovereignty and the non-interference in the internal affairs of the affected State." On the one hand there is the need to protect affected persons who are victims of natural disasters, but on the other hand there is the fundamental principle of respect for the sovereignty and territorial integrity of the State within which those victims reside. The "poles of tension" are particularly highlighted in the debates on Draft Articles 10, 11 and 12.

Dr. Solemani then spoke about the AALCO member States' concerns by noting that the general view of Asian-African States that can be gleaned from the statements made by AALCO member States is that they are supportive of the draft articles but continue to hold reservations about the extent of the obligations imposed on affected States, particularly regarding the obligation to seek and accept external assistance and the classification of this obligation as a legal duty. They choose to have a strong focus on cooperation between States rather than legal obligation to accept assistance.

In conclusion, Dr. Soleimani stated that finding the right balance between human rights and humanitarian concerns and the respect for State sovereignty and non-interference are of the utmost importance. There is certainly a need to put into place a mechanism for the victims to receive aid in case of disasters when their own country may not be able to provide the necessary aid. However, care must be taken to ensure that this mechanism does not violate the most fundamental principles of international law.

Panelist 2: **Prof. Dr. Mohd. Hisham Kamal, Associate Professor, Ahmad Ibrahim Kulliyyah of Laws, International Islamic University Malaysia**

Topic: **Comments on Dr. Hussein Hassouna's "Protection of Persons in the Event of Disasters"**

The second panelist for the session was Prof. Dr. Mohd. Hisham Kamal, Associate Professor, Ahmad Ibrahim Kulliyyah of Laws, International Islamic University Malaysia. Prof. Dr. Kamal started by providing explanations for core principles related to the issue of protection of

persons during disasters. He noted that under Article 6 of the Draft Articles, immunity is a cornerstone for the protection of persons. He also stated that impartiality is extremely important in order to prevent persons from being distinguished and ensuring a speedy and unbiased response. Dr. Kamal also touched on the importance of the principle of human dignity in rescue efforts and the need to ensure that the aid and assistance that is offered to persons in the event of a disaster is consistent with their needs and is not degrading in any way.

Dr. Kamal also explained that Draft Article 9 is based on the very important and well-established principles of Sovereignty and Non-intervention. Sovereignty allows States to make executive decisions with regards to aid and relief efforts on their own territory and also to decide when it is appropriate and necessary to seek assistance from another State or the international community. Dr. Kamal emphasized the importance of these principles in relation to the discussions and the drafting of any statute pertaining to the protection of persons in the event of disaster. He also mentioned that the affected State is the one with primary responsibility to provide aid to the affected people in the event of a disaster and that as per Article 10, the consent of the affected State is necessary in order for other States to provide assistance.

However, Dr. Kamal also posited that the terms of responsibility provided by the draft Articles were not clear and needed to be elucidated and clarified further. Dr Kamal also noted that the term 'primary responsibility' means it's not only the responsibility of the affected States but also international community to assist in relief efforts and that the word 'primary' shows that it is not the exclusive responsibility of the affected State(s).

Fifth Working Session (2.00 – 3.30 PM)
IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

Chairperson: Dr. Sufian Jusoh,
Senior Fellow, Faculty of Law, UKM

Speaker: Mr. Narinder Singh, Secretary-General, Indian Society of International Law, India and Member of ILC from India

Topic: Immunity of State Officials from Foreign Criminal Jurisdiction

In this Session that focused on the topic "Immunity of State Officials from Foreign Criminal Jurisdiction", the main presentation was made by **Mr. Narinder Singh**, a Member of ILC from India. Commenting on the topic "Immunity of State Officials from Foreign Criminal Jurisdiction" he stressed that this topic holds great practical significance and is also very important for all developing states and the Member States of AALCO in particular. This in an area where conventions have been adopted – like the Vienna Convention on Diplomatic Relations, Convention on Special Missions on Privileges and Immunities, Convention on Jurisdictional Immunity of States and Property, pertaining to immunity of civil jurisdiction, he added. While portraying the disagreement existing on the topic at ILC, he stated that a number of Members have highlighted the importance of the need to address serious crimes and on that basis they have advocated a very restrictive application of immunity given to higher State officials. However other Members have emphasized the importance of immunity to ensure the independent exercise of their functions by the State officials, to protect them from frivolous complaints and harassment, as well as consistent State practice to justify the continuation of immunities.

He stated that the ILC has agreed that the Troika, that is the Head of State, Head of Government and the Foreign Minister enjoy full immunity that is they enjoy immunities both for personal acts and official acts. The Commission by including a savings clause in respect of other conventions, such as those on diplomatic and consular relations and special missions, etc., has also recognized that immunities may apply to officials other than the troika, he added. While stating that some Members of the ILC still continue to question the personal immunity granted to the Ministers of Foreign Affairs on the ground that there is a need to restrict immunity and that full immunity should apply only to Heads of State and Heads of Government, he clarified that other members including himself preferred a wider circle of high officials based on their functions to be given immunity especially in the present day world, where the conduct of foreign affairs, unlike traditionally is

not limited to Ministries of Foreign Affairs and may involve a wide range of State departments.

Outlining the present position of ILC in relation to the topic, he mentioned that – there Article 6 draft articles being proposed on the scope, definitions of the different types of immunity, subjective and temporal scopes of rationae personae and rationae materiae and that the Commission finally had adopted 3 draft articles. While stating that this is a topic which is of great importance to all the Member States of AALCO, he noted that we should be looking forward to further developments in the further reports which the Special Rapporteur would be coming up with on the more complex issues regarding the definition of official acts and the immunity ratione materiae which will happen in subsequent years. In his view, we also need to deal with the very sensitive issue of the possible exceptions to immunity, for example in the context of the core crimes of international concern.

Panelist 1: **Mr. Feng Qinghu, Deputy Secretary-General, AALCO**
Topic: **Knitting a World Wide Web of Accountability – Restricting State Officials' Immunity**

The first panelist was made by **Mr. Feng Qinghu,** Deputy Secretary-General of AALCO who focused on a number of issues that included: State official's immunity and its significance, culture of accountability and its significance; ICC experience and developing countries and a summary. While highlighting the rationale for the existence of the immunity, he stated that it was based on the legal maxim *par in parem non habet jurisdictionem* that dictated and guaranteed all kinds of immunities. With regard to the specific contents of the Immunity of State Officials from Foreign Criminal Jurisdiction, he was of the view that states' current practice and positions are widely diverse.

He also explained briefly the exceptions to the principle of immunity and the need to give them. While referring to Article 27 (2) of the Rome Statute he stated that immunities or special procedural rules which may attach to the official capacity of a person whether under national or international law shall not bar the Court from its jurisdiction over such persons. While noting that almost all these procedural rules of

jurisdiction exist in the form of Conventional international law he wondered whether there existed any rule of customary law dictating the automatic renouncement of State officials' immunity either from a foreign court or from an international tribunal except for the rule of waiver of immunity. In this regard he also brought attention to the opinion of the ICJ given in the Arrest Warrant Case.

Turning finally to the concerns raised by the Asian-African States in relation to functioning of ICC and its overwhelming focus on African States, he clearly heighted the factual situation of the cases that are currently before the ICC and how jurisdiction was triggered in each one of them. He went on to highlight some of the concerns of Asian-African states in this regard that included: worries of interference from foreign countries in its internal affairs; loss of sovereign immunity for the current king or monarch thus the direct conflict with its Constitution; huge burden of necessary implementing legislation required by the Rome Statute; possible negative impact on domestic judicial system; lack of capacity especially relevant personnel and resources; the financial burden and the worry about the political role of the UN Security Council in referring cases to ICC.

Panelist 2: **Dr. Rohaida Nordin, Senior Lecturer, Faculty of Law, UKM**

Topic: **Immunity of State Officials from Foreign Criminal Jurisdiction**

The second panelist while appreciating the viability of immunity from foreign criminal jurisdiction to a State official under international law, affirmed that the state officials are required to abide by the general obligation to respect the laws of the foreign host state and would be held responsible in the case of breach of that law. The presentation focussed on (i) The Draft Articles and concerns from the Malaysian context (specifically on Draft Article 1, 3 and 4); and (ii) The judicial decisions in Malaysia on the issue of State Officials Immunity from Foreign Criminal Jurisdiction.

Under Draft Article 1, the use of the term "official" had to be subject to further consideration, as it has to be noted that the term "Official" was used on a provisional basis until a decision on

terminology has been taken by the Commission. The present draft articles were without prejudice to the immunity from criminal jurisdiction enjoyed under special rules of international law, in particular by persons connected with diplomatic missions, consular posts, special missions, international organizations and military forces of a State. The panelist stated that there was no necessity to re-examine previously codified areas as they are settled areas of law, and should therefore be dealt with separately. The scope of immunity *rationae personae* had to be extended beyond Troika to include other high-ranking officials also, other than the Head of State, Head of Government and Minister for Foreign Affairs, etc.

The panelist highlighted the next issue which was to ascertain who those high-ranking officials were who enjoyed immunity. For example, in the Malaysian context the definition should include sovereign rulers who act as Heads of State. In Malaysia, the Head of State was the King who was known as Yang diPertuan Agong (YDPA) and the Head of Government was the Prime Minister. Apart from the King, the Federal Constitution of Malaysia also recognizes other State Rulers to be accorded immunity from criminal and civil actions. According to Article 181(2) of the Federal Constitution of Malaysia, no proceedings whatsoever shall be brought in any court against the Ruler of a State in his personal capacity except in the Special Court. The same applies for the King whereby Article 32(1) of the Federal Constitution of Malaysia provides that the King shall not be liable to any proceedings whatsoever in any court except in the Special Court.

On the third issue on the scope of immunity and the possible exceptions, it has been a settled principle in international law that there should be no immunity for the international crimes of genocide, war crimes, crimes against humanity and crime of aggression. Perhaps, further limitations to the immunity also should include for crime of international concern such as piracy, drug trafficking, trafficking in persons, corruption, money laundering as well as sabotage, kidnapping and murder by foreign secret service agents. The panelist hoped that the ILC could discuss and arrive at acceptable understanding to establish the relationship between immunity and impunity for the perpetration of heinous crimes in international law, for example: torture and genocide.

The panellist explained the position of Personal Jurisdiction under the Rome Statute. It was covered under Article 25 of the Rome Statute. The jurisdiction applied irrespective of the official capacity of the person being prosecuted, as the ICC does not recognise immunities, such as Head of State immunity, under national or international laws, according to Article 25(4). While the ICC exercised jurisdiction over such persons, Article 25(4) emphasised that States continue to have responsibility for the prosecution of persons guilty of international crimes.

Dr. Rohaida cited few judicial decisions in Malaysia on the topic. In Malaysia, the choice of either absolute theory or the restrictive principles was compounded by the provisions of Section 3 of the Civil Law Act 1956 through 2 conflicting decisions. With regard to customary international law, its application by the Malaysian courts would be through the medium of English common law. This was because the Malaysian legal system does not provide for direct application of customary international law by Malaysian courts. The Federal Constitution defines "law" to include, "written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law…" (Federal Constitution Article 160). Customary international law may become the law of Malaysia through the common law as it includes English common law by virtue of Section 3 of the Civil Law Act 1956. Thus, in general, for any customary international law that has been accepted by the UK courts as common law, the issue is whether such customary international law binds the Malaysian courts by virtue of Section 3.

The first case was *Village Holdings Sdn. Bhd. v Her Majesty the Queen in Right of Canada*.[1] She said that Judge Shankar, in 1988, relied on a rule of common law that was based on customary international law. In that case, Judge Shankar ruled that as far as a foreign sovereign was concerned, the court was bound under Section 3 of the Civil Law Act to adhere to a pure absolute doctrine of State immunity. This clearly demonstrated the fact that a Malaysian court relied on English common law that was declaratory of the customary international law principle of absolute immunity that was established before 7 April 1956.

[1] (1988) 2 MLJ 656.

The second case was decided in 1990 by the Malaysian Supreme Court, in the case of *Commonwealth of Australia v Midford (Malaysia) Sdn. Bhd.* It was affirmed that the application in Malaysia on the restrictive theory of state immunity even beyond the cut-off date of 7 April 1956.[2] Therefore, any customary international law established after 7 April 1956 may also be applied by Malaysian courts even though it was persuasive in nature. Judge Gunn Chit Tuan ruled that:

> *Section 3 of the Civil Law Act only requires any court in West Malaysia to apply the common law and the rules of equity as administered in England on the 7th April 1956. That does not mean that the common law and rules of equity as applied in this country must remain static and do not develop…*

The Panelist concluded that the practice of the Malaysian courts in the case of immunity of State Official, the position was inconsistent. In *Village Holding*'s case, the court had adopted the absolute approach as part of customary international law but only through the medium of English common law through the Civil Law Act, while in *Midford (Malaysia),* the Malaysian court has applied restrictive immunity. The Malaysian court also decided in that case that any customary international law established even after the cut-off date of 7 April 1956 may also be applied by Malaysian courts as Malaysian common law.

Concluding Session (3.30 – 5.00 PM)

The Two-Day Workshop on the "Selected Items before the International Law Commission (ILC)" held on 29 and 30 November 2013 was successfully convened with the whole-hearted support of National University of Malaysia (UKM). The Concluding session was chaired by Prof. Dr. Rahmat Mohamad, Secretary-General of AALCO and Prof. Datuk Aishah Hj. Bidin, the Dean of UKM. Vote of thanks was proposed by Dr. Hassan Soleimani, Deputy Secretary-General of AALCO. At this session, a proposal to convene a Working Group to study the topic on "Formation and Evidence of Customary International Law" jointly with AALCO and UKM was affirmed. This proposal was well appreciated by the faculty members of the UKM as well as AALCO Secretariat

[2] (1990) 1 CLJ 878.

considering the growing significance of this topic for the Asian-African States. Further, the members of the ILC also appreciated the efforts of AALCO to bring together the members of the ILC from Asian and African region to deliberate upon these agenda items. Prof. Dr. Chia-Jui Cheng, Secretary-General of the Curatorium, Asian Xiamen Academy of International Law, also mooted the idea of providing scholarships to promote research in the field of international law for students of UKM as well as looked forward for future collaboration. The Secretary-General of AALCO and Dean of the Faculty of Law, UKM agreed to work together towards contributing for the topic through the research in the Working Group.