Address by H. E. Prof. Dr. Rahmat Mohamad, Secretary-General, AALCO on: "Selected Items on the Agenda of the International Law Commission" to be Delivered at the Sixty-Fifth Session of the International Law Commission on 9th July 2013

Mr. Chairman,

Distinguished Members of the ILC,

Ladies and Gentlemen,

It is a privilege for me as the Secretary-General of AALCO to meet with the Commission and to deliver my address at this august body. That the role of ILC is indeed indispensable in the efforts of the United Nations towards progressive development and codification of international law is too well-known and I feel much honoured to be invited to address such a distinguished gathering.

The founders of the Asian-African Legal Consultative Organization (AALCO), alive as they were to the contributions that ILC could make to the progressive development and codification of international law, gave a statutory role to AALCO in relation to the Commission. Accordingly, one of the Functions assigned to AALCO under its Statutes is to study the subjects which are under the consideration of the ILC and thereafter forward the views of its Member States to the Commission. Fulfillment of this mandate over the years has helped to forge closer relationship between the two organizations. It has also become customary for AALCO and the ILC to be represented during each other's sessions. Indeed, the need on the part of the Members of ILC, who play an active and constructive role in the work of the Commission, to be present at our Annual Sessions is critical. This is due to the fact that they bring with themselves a great deal of expertise and experience that could be utilized by our Member States.

In view of the importance that the agenda items of ILC hold for the Asian-African States, the Annual Sessions of AALCO spend considerable time in discussing them. It is exactly for this reason that the Fifty-Second Annual Session of AALCO which is scheduled to take place in New Delhi in September 2013 later this year, we have arranged for a Half-Day Special Meeting on "Some Selected Items on the Agenda of the International Law Commission".

Even as I mention this, I need to underline here the fact that generally speaking, the Sessions of ILC precede the Annual Sessions of AALCO. However, the forthcoming Fifty-Second Annual Session of AALCO would be convened after ILC Session is over. Hence, the inputs/opinion of AALCO Member States on all the agenda items of ILC's 65th Session are not available as of now. Hence, what I am going to do in this address is to try to reflect the views of our Member States on the basis of their views that they have aired in other international fora, on three important topics of concern to them, namely

- Immunity of State Officials from Foreign Criminal Jurisdiction
- Protection of persons in the Event of Disaster; and the
- Formation and Evidence of Customary International Law

Immunity of State Officials from Foreign Criminal Jurisdiction

From an international law perspective, the immunity of a state official from criminal jurisdiction is based on the principle of sovereign equality of states. The effective conduct of a state's foreign relations is inherent in the preserving of its sovereignty. They constitute an integral whole in providing the rationale for the according of jurisdictional immunities to state officials. The legal basis of the immunity of State Officials is found in both treaty law as well as customary international law. While the immunity provided to State Officials has been a long-standing aspect of international law, the question whether immunity of State Officials should prevail over the duty to prosecute and punish individuals responsible for international crimes has presented considerable difficulties of late. Hence, the ILC's embarkation on the study of the immunity of State Officials from foreign criminal jurisdiction is particularly timely.

The Special Rapporteur ***Ms. Concepción Escobar Hernández*** has clearly identified (in her second Report submitted in 2013) that the topic of the immunity of State officials from foreign criminal jurisdiction must be approached from the perspective of both *lex lata* and *lex ferenda*, in other words, of both codification and progressive development. While agreeing with this view, AALCO however wants to add that in the course of its work on this topic, the Commission should clearly indicate to States those elements which the Commission considers statements of *lex lata*, and those which the Commission considers statements of *lex ferenda*. It is important to do this in the reports of the Commission while work on this topic is in progress, as well as in its final form. This is due to the reason that doing so would allow States to respond more precisely to the Commission's work.

On the *scope of the topic and draft articles*, building on the work of former rapporteur, Mr. Roman Kolodkin, Ms. Hernández has extensively dealt with the scope of the topic and the draft articles, with an understanding that the draft articles deal only with criminal jurisdiction, not civil or administrative jurisdiction; the draft articles deal only with immunity from foreign criminal jurisdiction, i.e., jurisdiction exercised by a State other than the State of nationality of the concerned official.

Immunity *rationae materiae*, or functional immunity (immunity for official acts committed as part of one's duties while in office), has traditionally been granted to all state officials. High-ranking officials of the so-called "troika" –the incumbent Heads of State and Government and Ministers for Foreign Affairs – have also traditionally been granted immunity *rationae personae*, immunity for personal acts committed during the official's term in office. The dual concepts of *rationae material* as well as *rationae personae* are of particular importance given the focus on these concepts in the preliminary and second reports of the Special Rapporteur. The discussions concerning the distinction and scope of immunities proffered by these concepts and their modification through expansion and narrowing of these immunities through codification are sure to be a continually pressing issue as the session of the ILC progresses.

The Special Rapporteur also rightly points out that the focus on *foreign* jurisdiction as the immunity granted under domestic law and immunity granted under international law do not necessarily have the same nature, function and purpose. She is of the view that immunity before international criminal courts is sufficiently delimited and clarified by the international instruments that established and regulate the functioning of those courts. AALCO is of the view that the Special Rapporteur has also clearly identified that both diplomatic and consular immunities and the immunity of international organizations have been the subject of considerable normative development in treaty and customary law, and that it would be unnecessary for the Commission to reconsider these well-established regimes.

Regarding *the distinction between immunity rationae personae* and *immunity rationae materiae*, Ms. Hernández, has suggested that it would be necessary to define the two types of immunity in general terms as a frame of reference for their further consideration. The reason for this, as noted by her, is that despite the fact that the distinction between immunity *rationae personae* and immunity *rationae materiae*, or "personal immunity" and "functional immunity", has been discussed and generally accepted in doctrine, the normative elements of each of these types of immunity must be determined in order to establish the legal regime, including procedural approaches, applicable to it. While agreeing with this position, AALCO wants to point out that in any determination regarding the scope of persons to be covered for immunity, this distinction (which is widely accepted in doctrine and reflected in judicial practice) retains a vital relevance.

In discussing the subjective scope of immunity *rationae personae*, the Special Rapporteur elaborates on both the stricter interpretation and the broader interpretation. As is well known, while the former conferred this immunity on the so-called *Troika* –Heads of State, Heads of Government and Ministers for Foreign Affairs, the latter seeks to extend the scope of immunity to "other senior State officials", in addition to the troika, who play a role in international affairs as a result of their functions under their domestic law, and who represent their State abroad even in highly specific areas. The absence of well-established and the presence of inconsistent state practice clearly points to the need on the part of

her to adopt a restrictive approach. Furthermore while drawing attention to the fact that the ICJ itself has not expanded the scope of immunity *rationae personae* as seen in the decision in the *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* case, she rightly comes to the conclusion that it is impossible to find cogent arguments in favour of extending immunity *ratione personae* to non-*Troika* officials. Accordingly, she concludes that immunity *rationae personae* cannot be extended to State Officials other than the *Troika*[1].

AALCO is of the view that without a strong basis of necessity and state practice, coupled with compelling reasons, immunity *rationae personae* should not be abruptly extended beyond the troika. The Commission needs to be cautious in adopting a liberal approach that would extend the boundaries of exception.

Protection of Persons in the Event of Disasters

On behalf of the AALCO Member States, I would like to appreciate the Special Rapporteur Eduardo Valencia-Ospina, for presenting the Sixth Report on Protection of Persons in the Event of Disaster. The report highlights the "prevention" as a principle of international law, which should be the basis of disaster aversion programmes. While tracing the historical development of concept of disaster risk reduction, special emphasis was laid on five specific goals, including "disseminating existing and new information related to measures for the assessment, prediction, prevention and mitigation of natural disasters".

The obligation of States in relation to one another and the international community in the pre-disaster phase is enshrined in the *duty to cooperate* in disaster preparedness, prevention and mitigation. The obligation to prevent transboundary harm alongside the primary obligation to prevent harm to one's own population, property and the environment generally, is significant approach while applying prevention obligation. Prevention, mitigation and preparedness have long been part of the discussion relating to natural disaster reduction and

[1] Second Report of the Special Rapporteur on the Immunity of State Officials from Foreign Criminal Jurisdiction A/CN.4/661, page 22.

more recently to that on disaster risk reduction. Preparedness, which is an integral part of disaster or emergency management, has been characterized as the organization and management of resources and responsibilities for addressing all aspects of emergencies, in particular preparedness, response and initial recovery steps.

Effectively the report states that mitigation and preparedness are manifestations of overarching principle of prevention because it implies taking of measures prior to the onset of a disaster, which lies at the heart of international law. In that regard, the Charter of the United Nations has so enshrined it in declaring that the first purpose of the United Nations is "to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace".

Mr. Chairman,
The argument of concept of prevention has been derived from human rights law and environmental law, wherein reference is made to due diligence principle and precautionary principle in international environmental law, which has been well supported by excerpts from major decisions of International Court of Justice including *Legality of the Threat or Use of Nuclear Weapons case* and the *Gabčíkovo-Nagymaros Project* and certain other decisions by other courts.

There is a comprehensive report on the bilateral instruments, multilateral instruments and regional instruments on disaster risk reduction and its management which form part of the broad spectrum of international cooperation during disaster and prevention of disaster. On the regional instruments, for the Asia-Pacific region, ASEAN Agreement on Disaster Management and Emergency Response is important as it focuses on three primary categories of disaster risk reduction obligations: risk identification and monitoring; prevention and mitigation; and disaster preparedness. Further, Africa Regional Strategy for Disaster Risk Reduction which was adopted in 2004 has also been mentioned.

Under the present report, two draft articles have been proposed. Draft Article 16 on duty to prevent and Draft Article 5 *ter* on Cooperation for Disaster Risk Reduction. Draft Article on duty to prevent requires States to undertake measures

to reduce the risk of disasters by adopting appropriate measures to ensure that responsibilities and accountability mechanisms are defined and institutional arrangements be established, in order to prevent, mitigate and prepare for such disasters. The measures include the conduct of multi-hazard risk assessments, the collection and dissemination of loss and risk information and the installation and operation of early warning systems.

On legislative measures to be adopted to prevent disaster and risk reduction, many of the AALCO Member States have either national legislations or guidelines. Further, on institutional mechanisms too, certain regulatory bodies have been established at national level to address prevention, preparedness and mitigation of disaster and disaster risk reduction.

Though prevention is the definitive concept in international law and possible measure to reduce the disaster risk, yet pre-disaster preparedness even at the presence of national legislations and authorities would be very limited. Moreover, funding for the disaster management also remains a challenge for the developing countries. It would be more relevant to deal with technology transfer in terms of addressing post-disaster relief and rescue operations within the country. This comes with a caveat that AALCO member States are of the view that duty to offer assistance, previously discussed in the fifth report on this subject, shall be not compulsory but voluntary and should respect the principle of non-intervention in the internal affairs of the state by assistance offering state. AALCO Member States have been very diligently following the work on this subject and I look forward for more comments and country positions on the Sixth Report of the Special Rapporteur on this subject.

Formation and Evidence of Customary International Law

The question of sources of international law lies at the heart of international law. Customary International Law, (CIL) notwithstanding the great increase in the number and scope of treaties, remains an important source of international law[2]. Customary international law is normally said to have two elements.

[2] An understanding of custom is critical to an understanding of international law at least for two reasons; Firstly, there remain important areas of international relations governed primarily by customary rules. Secondly, even in areas where one or more treaties exist, CIL often plays an important role.

First, there is an objective element consisting of sufficient state practice ("general practice" under the ICJ definition).

Second, there is a subjective element, known as *opinion juris*, which requires that the practice be accepted as law or followed from a sense of legal obligation.

The nature and the relative importance of custom's constituent elements are contentious. This is because there is no clear-cut rule proposed in the international jurisprudence or in the international legal doctrine of how much consent or how much consistent state practice are necessary for the formation of customary law. Furthermore, there has been a long-standing debate over whether Consistent State Practice a*nd Opinio Juris* are the only building blocks of customary international law continue even today.

Hence, custom as a source of international law poses a number of challenges and articulating a coherent theory of custom has been a difficult exercise because the traditional and modern approaches to custom appear to be opposed, with traditional custom emphasizing state practice and modern custom emphasizing *opinion juris.* One reason for the difficulty of identifying the formation and change of custom is the radical decentralization of the international system. States are both legislators and subjects of international law, which explains why D'Amato argues that every breach of a customary law contains the seed for a new legality. Whether one accepts his opinion or not, the fact remains that the formation and evidence of customary law has got plenty of things that need clear articulation and clarity.

Hence AALCO commends the ILC for taking up this important topic and appointing Sir. Michael Wood as the Special Rapporteur for this topic[3]. In the

[3]At its sixty-fourth session in 2012, the International Law Commission decided to include the topic "Formation and evidence of customary international law" in its programme of work, on the basis of the recommendation of the Working Group on the long-term programme of work.

view of AALCO, there are a number of issues that need to be dealt with by the Commission. These include;

Firstly, the identification of State practice. What counts as "State practice"? Acts and omissions, verbal and physical acts. How may States change their position on a rule of international law?

Secondly, the nature, function and identification of *opiniojurissivenecessitatis*.

Thirdly, relationship between the two elements: State practice and *opiniojurissivenecessitatis*, and their respective roles in the identification of customary international law.

Fourthly, how new rules of customary international law emerge; how unilateral measures by States may lead to the development of new rules; criteria for assessing whether deviations from a customary rule have given rise to a change in customary law; potential role of silence/acquiescence.

Fifthly, the role of "specially affected States".

Sixthly, the time element, and the density of practice; "instant" customary international law.

Seventhly, whether the criteria for the identification of a rule of customary law may vary depending on the nature of the rule or the field to which it belongs.

Eighthly, The "persistent objector" theory.

Ninthly, treaties and the formation of customary international law; treaties as possible evidence of customary international law; the "mutual influence"/interdependence between treaties and customary international law.

Tenthly, resolutions of organs of international organizations, including the General Assembly of the United Nations, and international conferences, and the formation of customary international law; their significance as possible evidence of customary international law.

AALCO, an Organization consisting as it is of developing countries, welcomes the inclusion of this topic on the agenda of ILC. It is of the considered view that the determination of the existence of customary international rules and the knowledge of the process leading to such existence require knowledge of the

manifestations of international practice. Closely connected with the question of the basis of customary international law is the question of which facts are to be ascertained empirically in order to determine that a customary international rule has come into existence. A key aspect of this question is whether these practices are produced by the will of the international community in general or of particular states. AALCO is of the considered view that the diverse practices obtaining in different states from different forms of civilizations should be taken into account in judging a principle / rule to be of customary nature. Furthermore it also needs to be realized here that as subjects of international law, intergovernmental organizations participate in the customary process in the same manner as States. Hence, it is of utmost importance for the Commission to be alive to the possibility of international organizations facilitating the creation of state practice that can, in future crystallize into customary law.

Ladies and Gentlemen,

AALCO, as always, has been an important advocate of the work of the Commission and would be continuing to follow the important work of ILC as regards the progressive development and codification of international law. Let me assure you that AALCO would continue to cooperate with it with a view to influence its work with the help of our Member States in future.

I thank you.