

**X. VERBATIM RECORD OF THE SPECIAL HALF-DAY MEETING ON
“SELECTED ITEMS ON THE AGENDA OF THE INTERNATIONAL LAW
COMMISSION”, HELD ON WEDNESDAY, 19 MAY 2016 AT 09:30 AM.**

His Excellency Dr. V.D. Sharma, Joint Secretary, Legal and Treaties Division, Ministry of External Affairs, India and the President of the Fifty-Fifth Session of AALCO is the Chair

President: Good morning. This part of the Session is devoted to the work related to the International Law Commission. As international lawyers, we are familiar with the mandate and work of the ILC. The ILC is mandated to codify international law, study the existing international law positions to come up with draft articles and recommendations to the UN General Assembly for its consideration. The importance of keeping in touch with the developments at the ILC cannot be overstated. That is why in the programme of our Organization we have some selected items in the agenda of the ILC for our consideration. Today, we are fortunate to have with us Dr. Roy Lee, the Permanent Observer of AALCO to the United Nations in New York. He is active in organizing dialogues on different areas of international law and is keenly interested in the work of the ILC. I am sure we will immensely benefit from his insights on the items we are going to discuss today. Let us begin this part with a brief introductory statement on the topic by the Secretary-General of AALCO. Sir, you have the floor.

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

Though it is customary for the Half-Day Special Meetings of AALCO on the agenda items of ILC to be addressed by the Members of ILC as panelists, this year remains an exception. The reasons are twofold: the election of the members of the Commission for a five year term beginning on 1st January 2017 is scheduled to be held later this year; and also, the annual session of the Commission is scheduled to be held from 2nd May to 10th June and from 4th July to 12th August 2016. Both of these facts have resulted in the non-representation of ILC members at this meeting. However, this gives the distinguished delegates from the Member States more time to deliberate the agenda items that are the

primary focus of this meeting. The three major topics that will be the subject of deliberations today are: *Protection of the atmosphere*; *Crimes against humanity* and *Jus cogens*. Of course, the Member States are also encouraged to present their views on other agenda items of the Commission as well.

With these initial remarks, let me move on to give a bird's-eye view of the way how the various topics of ILC were deliberated and what progress were made on them at the Sixty-Seventh session of the Commission held in 2015. Briefly, the deliberations at the Sixty-Seventh session of the Commission focused on nine topics. These were: 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 Practice in relation to the Interpretation of Treaties.

As regards the topic, “Protection of Atmosphere”, the Commission had before it the Second Report of the Special Rapporteur, Prof. Shinya Murase. The report provided a further analysis of the draft guidelines submitted in his first report. The second Report consequently presented a set of revised draft guidelines relating to the (a) use of terms; (b) the scope of the draft guidelines; and (c) the common concern of humankind. Further, additional draft guidelines were presented on (a) the general obligation of States to protect the atmosphere and (b) international cooperation. Following its debate on the report, the Commission decided to refer draft guidelines 1, 2, 3 and 5, as contained in the Special Rapporteur’s Second Report, to the Drafting Committee, with the understanding that draft guideline 3 be considered in the context of a possible preamble. Upon consideration of the report of the Drafting Committee (A/CN.4/L.851), the Commission provisionally adopted draft guidelines 1, 2 and 5 and four preambular paragraphs, together with commentaries thereto.

In their deliberations on this topic, the Member States of AALCO could focus on few areas of critical importance: draft guideline 3 on the concept “the common concern of mankind”, the legal consequences of which remains unclear; draft guideline 5 on the scope of international cooperation and the need (on the part of the ILC) to spell out the special needs and priorities of developing countries in addressing atmospheric pollution.

As regards the topic “Crimes against Humanity”, the Commission considered the first report of the Special Rapporteur Mr. Sean D. Murphy. In his first report, the Special Rapporteur, after assessing the potential benefits of developing a convention on crimes against humanity (section II), provided a general background synopsis with respect to crimes against humanity (section III) and addressed some aspects of the existing multilateral conventions that promote prevention, criminalization and inter-State cooperation with respect to crimes (section IV). Furthermore, the Special Rapporteur examined the general obligation that existed in various treaty regimes for States to prevent and punish such crimes (section V) and the definition of “crimes against humanity” for the purpose of the topic (section VI). The report also contained information as to the future programme of work on the topic (section VII). The Special

Rapporteur proposed two draft articles (relating respectively to the prevention and punishment of crimes against humanity and to the definition of crimes against humanity) corresponding to the issues addressed in sections V and VI, respectively, which were referred to the Drafting Committee. Upon consideration of the report of the Drafting Committee the Commission provisionally adopted draft articles 1 to 4, together with commentaries thereto.

In their deliberations on this topic, the Member States of AALCO could focus on the following area of critical importance: one of the key elements of the draft articles proposed by the Special Rapporteur and adopted by the Commission deals with the obligations of States to prevent Crimes Against Humanity. This relatively unique proposal is definitely one that merits the attention and discussion of Member States.

As regards “*Jus cogens*”, in 2014 the Commission’s Working Group on the Long-Term Programme of Work submitted a recommendation by Mr. Dire D. Tladi to the Commission to include the topic of *jus cogens* on the Commission’s current Work Programme. This recommendation was accepted by the Commission in 2015 and Mr. Tladi was appointed Special Rapporteur for the topic.

As noted in the proposal for the topic, the Commission could make a useful contribution to the progressive development and codification of international law by analysing the state of international law on *jus cogens* and providing an authoritative statement of the nature of *jus cogens*, the requirements for characterising a norm as *jus cogens* and the consequences or effects of *jus cogens*. The Commission could also provide an illustrative list of existing *jus cogens* norms. The consideration of the topic by the Commission could, therefore, focus on the following elements: (a) the nature of *jus cogens*; (b) requirements for the identification of a norm as *jus cogens*; (c) an illustrative list of norms which have achieved the status of *jus cogens*; (d) consequences or effects of *jus cogens*. The topic has also been included on the Commission’s Provisional Agenda for its Sixty-Eight Session (2016) where the Commission will in all likelihood consider the First Report of the Special Rapporteur.

In their deliberations on this topic, the Member States of AALCO could focus on the following area: the Special Rapporteur has stated that his First Report, which will be submitted and considered by the Commission in 2016, will focus on *inter alia* the past work of the ILC in addressing the question of *jus cogens*, as well as *jus cogens* in judicial decisions. Member States could direct their attention to these aspects.

As regards the topic “Protection of the Environment in Relation to Armed Conflicts”, the Commission had before it the Second Report of the Special Rapporteur Ms. Marie Jacobsson. This report *inter alia*, identified and examined existing rules of armed conflict directly relevant to the protection of the environment in relation to armed conflict. The report contained five draft principles and three draft preambular paragraphs relating to the scope and purpose of the draft principles as well as use of terms. Following the debate in Plenary, the Commission decided to refer the draft preambular paragraphs and the draft principles, as contained in the report of the Special Rapporteur, to the Drafting

Committee, with the understanding that the provision on use of terms was referred for the purpose of facilitating discussions and was to be left pending by the Drafting Committee. The Commission subsequently received the report of the Drafting Committee and took note of the draft introductory provisions and draft principles I-(x) to II-5, provisionally adopted by the Drafting Committee.

As regards the topic “Immunity of State Officials from Foreign Criminal Jurisdiction”, the Commission had before it the Fourth Report of the Special Rapporteur Ms. Concepción Escobar Hernández. Since the report of the last year addressed the subjective scope of immunity *ratione materiae*, the fourth report was devoted to the consideration of the remaining material scope namely what constituted an “act performed in an official capacity”, and its temporal scope. This 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 report of the Commission for this year reflects the debate of the Commission on these two draft articles presented by the Special Rapporteur. Following the debate, the Commission decided to refer the two draft articles to the Drafting Committee. The Commission subsequently received the report of the Drafting Committee, and took note of draft articles 2, subparagraph (f), and 6, provisionally adopted by the Drafting Committee. The Commission is expected to adopt these articles together with commentaries next year. Also in next year, the Commission will deal with the question of limitations and exception. It would appreciate being provided by States with information on their legislation and practice, in particular judicial practice, related to limits and exceptions to the immunity of State officials from foreign criminal jurisdiction.

As regards the topic “Provisional Application of Treaties”, the Commission had before it the Third Report of the Special Rapporteur Mr. Juan Manuel Gómez-Robledo. This report considered the relationship of provisional application to other provisions of the Vienna Convention on the Law of Treaties of 1969, and the question of provisional application with regard to international organizations. The Commission also had before it a memorandum (A/CN.4/676), prepared by the Secretariat, on provisional application under the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986. The Commission referred six draft guidelines, proposed by the Special Rapporteur, to the Drafting Committee. The Commission subsequently received an interim oral report, presented by the Chairman of the Drafting Committee, on draft guidelines 1 to 3, provisionally adopted by the Drafting Committee, and which was presented to the Commission for information only. It is expected that the Drafting Committee will continue its consideration of the draft guidelines at the current session in 2016.

In addition, the Commission indicated that it would appreciate being provided by States with information on their practice concerning the provisional application of treaties, including domestic legislation pertaining thereto, with examples, in particular in relation to:

- the decision to provisionally apply a treaty;

- the termination of such provisional application; and
- the legal effects of provisional application.

As regards the topic “Identification of Customary International Law”, the Commission had before it the Third Report of the Special Rapporteur Mr. Michael Wood. The report contained, *inter alia*, additional paragraphs to three of the draft conclusions proposed in the second report and five new draft conclusions relating respectively 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 report of the Commission for this year reflects the debate of the Commission on the third report.

The Commission referred the draft conclusions contained in the Third Report of the Special Rapporteur to the Drafting Committee. The Drafting Committee examined the two draft conclusions on acceptance as law (*opinio juris*) as contained in the Second Report by the Special Rapporteur and left pending from last year, as well as those presented in his Third Report this year. The Drafting Committee provisionally adopted, in total, 16 draft conclusions on the identification of customary international law structured in seven parts. The Introductory Part One contains one draft conclusion on scope. Part Two, with two draft conclusions, sets out the basic approach to the identification of customary international law, consisting of an inquiry into the two constituent elements, and the assessment of evidence in that respect. Part Three, with five draft conclusions, and Four, containing two draft conclusions, address the basic approach by explaining further the two constituent elements, namely a general practice and accepted as law (*opinio juris*). Part Five then addresses, in four draft conclusions, the significance of certain materials for the identification of customary international law. Finally, Parts Six and Seven, each containing one draft conclusion, address, respectively, the persistent objector and particular customary international law.

Further to the presentation of the report of the Drafting Committee, the Commission took note of the 16 draft conclusions contained therein. It is anticipated that the Commission will, at its next session, consider the provisional adoption of the draft conclusions as well as the commentaries thereto.

As regards the topic “The Most-Favoured-Nation Clause”, the Commission received and welcomed with appreciation the final report on the work of the Study Group on the Most-Favoured-Nation clause and endorsed the summary conclusions of the Study Group. The final report considers developments in the law and practice since the adoption of the Commission’s 1978 draft articles on MFN clauses with commentaries but does not propose any revision of those draft articles. The final report discusses, in particular, whether an MFN clause in a treaty may be invoked by an investor to obtain a more favorable dispute resolution provision existing in a comparator treaty (i.e., a different treaty between the host state and a third state) and, in that regard, analyzes case law since the *Maffezini v. Spain* award in 2000. The Commission also highlighted that the interpretative techniques reviewed in the report of the Study Group are designed to assist

in the interpretation and application of MFN provisions. The Commission commended the final report to the attention of the General Assembly, and encouraged its widest possible dissemination. The Commission thus concluded its consideration of the topic.

As regards the topic “Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties”, the Commission had before it the Third Report of the Special Rapporteur, which offered an analysis of the role of subsequent agreements and subsequent practice in relation to treaties that are the constituent instruments of international organizations and which proposed draft conclusion 11 on the issue. In particular, after addressing Article 5 of the Vienna Convention on the Law of Treaties (Treaties constituting international organizations and treaties adopted within an international organization), the Third Report turned to questions related to the application of the rules of the Vienna Convention on treaty interpretation to constituent instruments of international organizations. It also dealt with several issues relating to subsequent agreements under article 31, paragraph 3 (a) and (b), as well as article 32 of the Vienna Convention on the Law of Treaties, as a means of interpretation of constituent instruments of international organizations. The Commission considered the report and decided to refer draft conclusion 11 on constituent instruments of international organizations, as presented by the Special Rapporteur, to the Drafting Committee. Subsequently, the Commission received the report of the Drafting Committee and provisionally adopted draft conclusion 11.

Excellencies, Allow me to say a few words on the work of AALCO in relation to ILC during my tenure. In my term as the Secretary-General of AALCO the relationship between AALCO and ILC has improved in four ways:

First, in view of the importance that the agenda items of ILC hold for the Asian-African States, the Fiftieth Annual Session of AALCO held at Colombo, Sri Lanka in 2011 had mandated that the future Annual Sessions of AALCO should devote more time for deliberating on the agenda items relating to the work of ILC. Due to this mandate, a Half-Day Special Meeting on “Selected Items on the Agenda of the International Law Commission” has been held every year since 2012. At these meetings, we have been able to get the Members and Special Rapporteurs of the ILC to participate as Panelists. This intellectual exercise has benefited the Member States of AALCO a great deal in terms of enriching their knowledge and understanding on the topics that are on the agenda of the ILC.

Secondly, at my initiative, issues relating to ILC have been given increasing visibility in our website. The website of AALCO contains a separate section on the ILC issues having information on the various meetings that AALCO has held on various issues of ILC. It also incorporates within itself comments made by the Secretariat on new topics introduced into the agenda of the ILC.

Third, I have tried successfully to convene more and more Inter-Sessional Meetings on Selected Topics of ILC in recent years. For example, due to the immense importance that the topic of CIL holds for the Member States of AALCO, we had established an

“Informal Expert Group on Customary International Law” (IEG) at the recommendation of AALCO Eminent Persons Group (EPG) in 2014. It acted as a technical expert group on the Identification of Customary International Law, and the viewpoints and comments emerged from its meetings formed a set of recommendations proposed by the Informal Expert Group. As mandated by the resolution adopted on the ILC, the Secretariat of AALCO has sent the conclusions of the IEG to the Special Rapporteur of the Commission on the subject Mr. Michael Wood for his consideration and reference. The active participation of many of the Member States in the meetings of Informal Expert Group bears testimony to the success of this initiative. Even in relation to other topics on the agenda of ILC, a same process could be followed if it is mandated by the Member States of AALCO.

Fourth, I have also tried to bring to the attention of the Member States of AALCO in the Sixth Committee of the UN General Assembly issues relating to ILC. For example, as part of the AALCO Legal Advisors’ meeting that we convene in New York every year, we have had a separate meeting solely focusing on ILC issues in recent years. It has given opportunity for the legal advisers of AALCO Member States to have a detailed exchange of views on the contemporary topics of international law and also to have an interaction with the Members of the International Law Commission (ILC) on some of the important topics forming part of its agenda.

Now that my tenure comes to an end I wish to extend my wholehearted thanks to the Members of the Commission (especially, Dr. Hussein Hassouna, Prof. Shinya Murase, Dr. Rohan Perera, Mr. Narinder Singh et al,) with whom both AALCO and I have shared a cordial relationship over the years. Needless to add, their presence in our meetings have been enriching for the Member States of AALCO.

Mr. President, I also take this opportunity to introduce the next speaker Dr. Roy S. Lee who is the Permanent Observer of AALCO to the United Nations at New York and a person with vast experience in relation not only to the ILC issues, but international law in general too. I sincerely hope that he will enlighten us on some of the key topics that are on the agenda of the Commission.

I thank you Mr. President.

President: Thank you, Excellency, for that brief introduction. Now I request Dr. Roy Lee to enlighten us about ILC topics.

Dr. Roy S. Lee, Permanent Observer of AALCO to the United Nations, New York: Mr. President, I thank you for the introduction. You yourself have involved with the UN Headquarters in New York for many years in the work of the ILC and the Sixth Committee. In this presentation, I would like to focus on how to make best use of the work of the ILC. First, we should recognize that the ILC is an expert body that is elected to represent major legal systems of the world. This year we are again going to elect new members of the Commission. The Asian-African group will together have at least about 17 seats— eight for Asia and eight for African States and then one routine seat. If you

add six or seven Latin American experts in the Commission, the developing countries have a significant influence on the work of the ILC. The ILC itself has made some very important contributions. If you look at all core matters of international law, they indeed reflect the contributions of the ILC. For example, the consular and diplomatic laws are mostly the product from the ILC. The 1958 Law of the Sea Conventions and Law of Treaties are also products of the ILC. I should also mention the Convention on Watercourse which are critically important to many Member States. So you will see that more than twenty five international instruments are the products from the ILC.

Turning to the second aspect, many of the delegates have told me that many topics in the list of the ILC do not evince much interest. There are at least three reasons for this. Firstly, most of the important subjects in international law have already been codified and it had become more and more difficult to identify areas which require codification. Secondly, special branches have emerged dealing with various subjects of international law and they are deemed to be dealt more appropriately outside the ILC. This goes true for international criminal law and environmental conventions too. This development has greatly reduced the scope of the ILC. The third and perhaps the most important reason is the lack of attention to the work of the ILC. For example, this year there were over a dozen of specific requests from the ILC and there are not many responses from the Member States and this makes their job harder.

Now why should we pay more attention to the work of the ILC? Let me use an example to illustrate this issues involved. On the topic of customary international law, at present, we have a Special Rapporteur and about 15 draft conclusions have been adopted by the Drafting Committees. The work is expected to be complete next year. This topic—“Identification of Customary International Law” is an extremely important subject matter and AALCO itself has convened an expert group to go into these issues. As you know customary international law and treaty law are the two principal sources of international law. But they are quite different. Treaties are subject to negotiation, are written down and are binding only on State Parties. Customary international law, on the other hand, is binding on all States. The question is who identifies that a custom is indeed a custom in international law.

Now the ILC decided that they will complete this subject next year. Some have commented that the ILC has not spent enough time on this subject matter. Let me explain we should pay attention to the draft conclusions put forward by the ILC. For example, for those who believe that Article 2 of the UN Charter provide for the non-use of force principle and Article 51 which defines the conditions for self defense may wish to ask—would this draft conclusions constitute a potential challenge to this basic principles. Because as you know, some States hold the view that according to customary international law, there exists the right to preemptive strike. Therefore it is a challenge to the written law in the UN Charter. So I leave it to you to think about it—whether the adoption of the draft conclusions on customary international law can be used to challenge existing written law.

The Secretary-General had also mentioned that one of the elements mentioned in Sir Michael Wood's draft is "persistent objector", which constitutes an exception to customary international law. If a State persistently objects to an evolving custom, then it is not binding on that State. Academically, it is a very sound inclusion. But the question is in practice how often do we object to certain events with a view to prevent the emergence of a customary international law. So in practice it is very difficult to insist on persistent objections. This is an example of why we should pay attention to the work of the ILC. Therefore, we should pay more attention to their work and make use of the Commission in a better way. Mr. President, thank you very much.

President: I thank Dr. Roy Lee for his guiding comments. He has touched many core issues dealt by the ILC. Given that international law is ever evolving, the Commission will always remain relevant. Turkey is the first Member State to take the floor. I invite the distinguished delegate of Turkey for their statement.

The Delegate of Turkey: Mr. President, Vice-President, Secretary-General, Dr. Lee and Distinguished Delegates, I would like to take this opportunity to share some personal thoughts on the relationship of AALCO and the ILC. The mandate of the International Law Commission has two pillars: one is to promote the progressive development of international law and second its codification. Over the decades the ILC has played a 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. And, the current agenda of the ILC includes Crimes against Humanity which is prepared in the form of Draft Articles for a possible international convention. However, there is a sense in the international community that we have graduated from the era of codification into phase looking more to implementation. There has also been a profusion of soft law instruments.

For this reason, some have questioned as to whether the ILC continues to have relevance, especially as many codifications have taken place outside of the ILC such as the recent Paris Agreement. But I firmly believe that this is not the case at all. Quite to the contrary the ILC continues to be extremely relevant – but as in all undertakings it is healthy to reflect.

The ILC is held in high esteem as an authoritative body of international law experts. The well-known and oft-cited Draft Articles on State Responsibility stands 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. The current on-going work of the ILC on Customary International Law, which is not for codification purposes, 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. It has adopted the format of "Draft conclusions"—and not Draft articles for purposes of an international convention. However, the term "conclusion" implies a definitive final statement.

Given the authoritative standing that the ILC holds it is clear that once adopted the Conclusions on the Identification of Customary International Law will become a source in and of itself. While the work of the ILC may be focused less on codification per se, there is no question that its work will continue to have authoritative force, whether as “conclusions”, “principle” or “articles”. Why is this important for AALCO? AALCO represents 47 States from the Asian and African regions. And this does not even reflect the full scale of countries from these two regions. The question is to what degree we have been able to contribute and actually influence the progressive development of international law and its codification. The Law of the Sea has been one area where AALCO has shaped international law, the EEZ being a case exemplar. But what has been the influence of AALCO in the ILC?

There are nine subjects in the current agenda of the ILC. Two of these have Special Rapporteurs from AALCO Member States: Protection of the Atmosphere and *Jus cogens*, the latter being a very recent addition. Over the history since of ILC – since 1949 I have calculated a total of 9 Special Rapporteurs were from AALCO Member States. I may have missed one or two but still this is a relatively small representation given the area and population that AALCO Member States represent.

Secretary General, Rahmat Mohamad’s work over the past 8 years to increase the profile and influence of AALCO within the ILC cannot be underestimated; it is to be commended and continued. The establishment of the Legal Experts Working Group on different areas of international law provides AALCO with a base to provide input. For example the Expert Group work on Customary International Law and the meeting held last August, which I attended, was important and with actual tangible outcomes. The most recent report of the Special Rapporteur as published this past March, made direct reference to AALCO comments and has taken them into account. This demonstrates the influence that AALCO can have within the ILC and ultimately in shaping the progressive development of international law.

But there is clearly much more we can and should be doing not only in contributing to the preparation of reports but also in defining the agenda of the ILC. While I realize that AALCO is composed of States that may have divergent views on substantive issues of international law, however, this should not preclude AALCO from identifying key questions of international law that could benefit from the work of the ILC, propose and support it being included on the agenda.

As an aspiring member to the ILC together with my colleagues I believe we must promote diversity of views within the ILC to reflect the reality of international law being truly international and not purely Euro-centric. There should be a balance between the different systems. I look forward to your comments and contributions. Thank you, Mr. President.

President: Thank you, distinguished representative of Turkey. Now I would like to invite the distinguished delegate of Japan.

The Delegate of Japan: Thank you, Mr. President. First, I would like to thank the Secretary-General for the introduction of the issue and Dr. Lee for the presentation. I would like to share a couple points related to this issue.

First, Strengthening the Role of ILC and Promoting Dialogue with ICJ. During 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, I see another emerging challenge which the Commission faces: to make ILC more appealing to the UN Member States in light of the current situation. To that end, it is important to promote and strengthen an interaction between ILC and ICJ. 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 points out.

As the body consisting of persons of recognized competence in international law, ILC can 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.

Now one comment on the protection of the atmosphere. Regarding the topic of the “protection of the atmosphere”, it is understood that the third report prepared by the Special Rapporteur Mr. Murase will be deliberated in the on-going Sixty-eighth session.

During the deliberation on the Report of the International Law Commission in the Sixth Committee of the 70th session of UNGA last October, many Member States expressed their support for the decision of the Commission to discuss the topic as a crucial issue of the international community. In particular, a large number of supports were given to the language appeared in the preambular part of the Draft Guidelines that “the protection of the atmosphere … is a pressing concern of the international community as a whole.” At the same time, I understand that a keen discussion took place regarding the Draft Guidelines proposed by the Special Rapporteur on the general obligation of States to protect the atmosphere.

It is commendable that the Commission provisionally adopted the Draft Guideline 5 regarding international cooperation in relation to protection of the atmosphere. In the modern industrial society, protection of the atmosphere ought to be carried out by cooperation among states. Thus, 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. Protection of atmospheric environment is a serious issue particularly for Asia and Africa. I thus hope that AALCO Member States will contribute to the discussion both at ILC and the Sixth Committee.

As for the topic of “crimes against humanity” which is currently discussed at the International Law Commission (ILC), I acknowledge the importance of the on-going work to fill the legal gap of obligations of prevention and punishment of crimes against

humanity, as Japan attaches great importance to ending impunity for the most serious crimes of concern to the international community as a whole. 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, and we take note that the current work is carried out while taking that point into consideration. In order to end impunity, coordinated actions by the international community are required. I am thus looking forward to further discussion at the ILC and the Sixth Committee. I also hope that AALCO Member States will contribute to such discussion.

Lastly, I would like to touch upon the cooperation between AALCO and the ILC. In order to provide better chance for ILC to contribute to the promotion of the progressive development of international law and its codification, views from the international community, particularly voices from Asia and Africa should be properly reflected. In this sense, the Japanese delegation welcomes that the informal exchange of views among legal advisors of delegations to the UN 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. The Sixth Committee is a main body of providing ideas of the UN Member States to ILC, and thereby, an appropriate interaction among legal advisors in New York initiated by AALCO is highly appreciated. Mr. President, I thank you.

President: I thank the distinguished delegate of Japan for his comments. Now I invite Malaysia for their statement. You have the floor, Malaysia.

The Delegate of Malaysia: Thank you, Mr. President. Firstly, on behalf of my delegation, I would like to thank the Secretary General and the Secretariat for the Organization of this Annual Session. I also thank Dr. Lee for his insightful comments. We also would like to use this occasion to thank Prof. Murase for his second report on the “Protection of Atmosphere.”

Mr. President, in this regard Malaysia notes 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 adopted Draft Guidelines 1,2 and 5 and four preambular paragraphs considered from Draft Guideline 3 together with commentaries.

Mr. President, in relation to the preambular paragraph, Malaysia shares 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. Malaysia takes note that the fourth preambular paragraph reflects the 2013 understanding of the Commission when the topic was included in the programme of the ILC. On this note, Malaysia is of the view that the fourth preambular paragraph touches on scope of the guidelines. In this regard, Malaysia prefers that the fourth paragraph be relocated in Draft Guideline 2.

Mr. President, with reference to the Draft Guideline 1 on the use of terms, Malaysia notes 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. Malaysia reiterates 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.

Malaysia further notes 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. Malaysia is of the view that addressing “by human” without specifying the act would be of broad scope. Hence Malaysia would like to reiterate our previous intervention that Malaysia seeks 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.

Mr. President, in relation to the scope of the Guidelines, Malaysia notes 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.

Mr. President, Malaysia understands that international cooperation could take a variety of forms and notes that paragraph 2 of Draft Guideline 5 stresses 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 highlights that cooperation could include the exchange of information and joint monitoring. Malaysia shares 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 reiterates 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.

With regard to “crimes against humanity”, Mr. President, Malaysia records its appreciation to the Secretariat in selecting this topic for deliberation in this half day special meeting. It is settled that this meeting has become a platform for Member States to articulate their views on proposed conventions on crimes against humanity. Bearing in mind that there are already various multilateral treaties which addresses crimes against

humanity such as the Rome Statute, Malaysia wishes to reiterates 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.

Mr. President, at this juncture, Draft Article 3(1) of the proposed convention on the crimes against humanity substantially replicates Article 7(1) of the Rome Statute. In this regard, based on the concept of complementarity, there may be necessity for the parties to the Rome Statute to enact legislations under the Rome Statute, failure of which, they may be deemed as unwilling or unable. In view that there are currently 124 State Parties to the Rome Statute, as far as criminalizing issue of the crimes against humanity, Malaysia remains unclear of any value added of Article 3(1) of the proposed convention. Instead what need to be addressed is the reason behind the failure of the State Parties who has not done so in enacting such legislation. In this regard, Malaysia is of the view 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.

Mr. President, additionally, Malaysia wishes to highlight its concern on the issue of the referral of the UN Security Council which may be manipulated by political influence in the decision of the ICC. In this regard, Malaysia hopes 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.

Mr. President, finally, Malaysia wishes to reiterates its recommendation to the ILC to focus on drafting guidelines or sample of articles relating to the crimes against humanity to be adopted or to be used as guidance for States in developing legislation on crimes against humanity. Thank you, Mr. President.

President: I thank the distinguished delegate of Malaysia for his statement. Now I invite India for their statement.

The Delegate of India: Thank you Chair. On behalf of my delegation, I take this opportunity to thank all the panelists for their presentations. I also congratulate the AALCO Secretariat for their brief study on this subject and thank the Secretary-General/Deputy Secretary-General for introducing the agenda item. Taking into consideration the discussion on the work of the Commission, we propose to make some general comments on the topics which are identified for deliberations today.

Mr Chair, On the topic “Protection of the atmosphere”, we appreciate the Special Rapporteur, Prof. Shinya Murase for his efforts and analysis of the Draft Guidelines submitted in his first report and providing revision thereof. It is noted with appreciation that he could organize dialogue with scientists on the topic during the current session.

The five Draft Guidelines prepared and submitted by the Special Rapporteur in his second report deal with the use of terms, scope of the guidelines, common concern of humankind, general obligation of States to protect the atmosphere and, international cooperation. We agree 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.

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 so it becomes a general obligation of all States to protect the atmosphere. This general obligation is the subject matter of draft guideline 4 which requires more study and analysis. In this context, we appreciate the wisdom of Prof. Murase for having requested to defer consideration of that draft guideline by the Drafting Committee. It will provide more time for detailed and in-depth study and analysis of the subject matter of the guideline, namely, the States' obligation to protect atmosphere.

The Commission has, following the report of the Drafting Committee, provisionally adopted draft guidelines 1, 2 and 5. India notes with appreciation the future plan of work on the topic presented by the Special Rapporteur as reflected in paragraph 47 of the ILC Report. In this context, we would like the Commission to continue to strengthen its research on relevant theories and practices in a rigorous manner, and gradually clarify relevant guidelines.

Mr. Chairman, on the topic 'Crimes against humanity', we welcome the first report of the Special Rapporteur, Professor Sean D Murphy. The report 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. After referring these draft articles to the Drafting Committee, the Commission provisionally adopted four draft articles on the scope; general obligation; definition of crimes against humanity; and obligation of prevention. In view of the existing international legal regimes and mechanisms dealing with the subject matter, we consider 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.

Mr. Chairman, With regard to Chapter XII of the ILC Report, we welcome the decision of the Commission to include in its programme of work the new topic '*Jus cogens*' and appointment of Mr. Dire Tladi as the Special Rapporteur for the topic. We agree with the view that "questions relating to sources lie at the heart of international law", and for the reasons explained in the Annex, we agree 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.

We support 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*. *Jus cogens*, being peremptory norm of general international law, the aspects thereof to be chosen for

study, would be of interest for all. With these observations, I thank the Chair for giving us this opportunity. Thank you.

President: I thank the distinguished delegate of India for his comments. Now I invite China for their statement. You have the floor, Sir.

The Delegate of People's Republic of China: Mr. President, Vice President, Mr. Secretary General, Dr. Roy Lee, the Chinese delegation would like to join the previous distinguished delegates to thank AALCO for organizing this special meeting, thank the secretariat for the report regarding ILC and especially thank Mr. Secretary General for your efforts to prompt exchanges between AALCO and ILC. We would also like to thank Dr. Lee for your very thoughtful presentation.

Mr. President, The 68th session of the ILC is being held for nearly 3 weeks. The reports of many topics are not available yet. The Chinese delegation will briefly reiterate and highlight a few key points on three topics, taking into consideration the discussion on the report of the ILC on the work of its 67th session at the Six Committee of UN General Assembly last November.

With respect to the topic of “Crimes against humanity”, the Chinese delegation holds 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.

With respect to the topic of “protection of the atmosphere”, the Chinese delegation believes 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. Some crucial terms, such as atmospheric pollution and atmospheric degradation, need to be defined more clearly. We suggest 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.

With respect to the topic of “*jus cogens*”, the Commission has included this item on its program of work and will start its discussion this year. The Chinese delegation is of the view that, due to lack of relevant state practice, it is yet premature to carry out a thorough study. 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. The Commission should adopt a cautious approach in referencing the above practice.

Mr. President, This year will be the last year of the current term of the Commission. China congratulates the Commission on its fruitful progress achieved in the past five years, and hopes the Commission will achieve its goal of work for this term. Thirteen members of the 34 current members the Commission are from the Members of AALCO. Their work helps the Commission perform its mandate from a balanced perspective. The Chinese delegation expresses appreciation for their contribution.

Just as Mr. Secretary General said, there are active interactions between AALCO and the ILC. Over the years, the AALCO Annual Session has considered items of the ILC and has maintained regular exchanges with the latter. We hope AALCO will further strengthen its communication and cooperation with the Commission, reflect the positions and concerns of Asian African countries, and contribute to the comprehensive and balanced development of international rule of law. Thank you, Mr. President.

President: I thank the distinguished delegate of China for his comments. Now I invite Iran for their statement.

The Delegate of the Islamic Republic of Iran: “In the name of God, the Compassionate, the Merciful”, Mr. President, Prof. Rahmat Mohamad, Secretary – General, Excellencies, Distinguished Delegates, Ladies and Gentlemen,

My delegation would like to express its appreciation for the lucid presentations provided by the panelists of this Session on the topics under discussion by the International Law Commission. I should also thank the AALCO Secretariat for the comprehensive report on the topic and for organizing this Special Half-day Meeting on “Selected Items on the Agenda of the International Law Commission”.

As from the topics on the Agenda of the Commission during its Sixty-Seventh Session, as advised by the Secretariat, we will limit our remarks on the three of them, namely, “Crimes against Humanity”, “Protection of Atmosphere” and “*Jus cogens*”.

Mr. President, The Islamic Republic of Iran is 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. First of all, 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). Furthermore, customary international law gives a clear understanding of crimes against humanity in international law.

Review of the report of the Special Rapporteur and the proposed draft articles demonstrate that no new provisions in international law are to be codified or developed by the commission on this topic. In this respect, it is 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 differs from article 7 of the Rome Statute.

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, my delegation would like to note 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. It is worth noting that drafting a new convention on crimes against humanity risks undermining the legal regime under the existing instruments, in particular, the Rome Statute.

From the abovementioned, one may conclude that consideration of a new convention on a topic of international law parallel to the existing instruments cannot, *per se*, contribute to its strengthening, it may rather lead to fragmentation of international law and would not fill any legal lacunae in the life of the international community.

Mr. President, Turning to the issue of "Protection of Atmosphere", my delegation would like to begin with appreciation to considerable efforts made by Mr. Murase, the Special Rapporteur in preparation of the second report on this item. The Commission's work on protection of atmosphere is aimed at preventing future loopholes in the legal regime applicable to protection of atmosphere. Therefore, we believe 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.

Similarly, 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. While this is done so as not to interfere with the results of the ongoing negotiations, we are of a view that a “without prejudice” clause is more helpful and appropriate than exclusion of a specific substance from the scope.

As regards the decision of the Commission to replace the phrase “common concern of mankind” with some paragraphs in the context of the preamble, we consider this modification as an appropriate measure in order to include more legal concepts in the guidelines. Furthermore, the atmosphere is the Earth's largest single and one of the most important natural resources, (as it was listed as a natural resource by former United Nations Committee on Natural Resources, as well as the 1972 Stockholm Declaration on

the Human Environment and in the 1982 World Charter of Nature), therefore, we believe 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.

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, indicates 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”. We believe that the same general obligation is applicable to the protection of the atmosphere.

On the issue of cooperation as one of the principles of modern international law applicable to protection of atmosphere, it is worth noting that the obligation to cooperate in international law is a vague and undefined legal concept; thus, 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. The same concern exists 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.

Mr. President, Last but not least, on the issue of *jus cogens*, we welcome 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.

We wish, however, 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. We are 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.

The same approach has been taken 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. The International Court of Justice has likewise reiterated the obligation of non-recognition of situations created as the result of an *obligation erga omnes*, a priori

jus cogens, in several cases including in its advisory opinion on "the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory", whereby all the States are requested not to recognize the situation arising out of an illegal act of an *erga omnes* character. We express our regret that the illegal situation created by the Israeli regime still persists despite the clarity of the issue from the legal perspective.

In sum, due to the fact that the International Law Commission has been cautious in determining the nature and instances of *jus cogens*, we share the views expressed by some delegations during the Sixth Committee deliberations that the Commission should approach the issue with ample prudence. Thank you Mr. President.

President: Thank you, distinguished delegate of Iran. Now I invite Republic of Korea. You have the floor, Sir.

The Delegate of Republic of Korea: Thank you, Mr. President for giving me the floor. I shall be very brief. I will make three points. First, our government's views regarding these issues were fully expressed during the Sixth Committee of the UN General Assembly. So I will not repeat them. Second, my delegation intends to make active participation in informal consultation regarding this issue. In particular, how we can envision how to further strengthen or enhance the interaction between the ILC and AALCO. So my delegation will express itself clearly during the informal consultations. Further, I would like to echo what Dr Lee suggested. To a large extent, I share his views. At the same time, I want to point out a couple of issues. If I recall correctly during 1940s, the ILC conducted a survey in connection with its work. Around half of the topics suggested at that time were completed by the ILC. Some of the issues were political in nature. That is why they were reluctant. These days, treaties are not concluded as often as it did a few decades back. This kind of lukewarm attitude of the international community has ramification in the work here too. We have to be more proactive in the work of the ILC through Sixth Committee and other avenues like AALCO. Mr. President, Thank you very much.

President: I thank the distinguished delegate of Republic of Korea. Republic of Korea is the last Member States in the list. If no other Member States wishes to take the floor, I invite the observer delegation of Vietnam to express their views.

The Delegate of Vietnam: Mr. President, Secretary-General and distinguished Delegates, It is the first time the delegation of Vietnam takes the floor at the 55th Annual Session of AALCO, let me start by thanking the Government of India for hosting this important event and for its hospitality towards all AALCO delegations as well as observers. I am pleased to inform the conference that Vietnam is expediting its internal process to join AALCO before this September.

Indeed, Vietnam recognizes the contribution and significance of this Organization in facilitating discussion of topics most relevant to the interest of Asian and African countries as well as developing countries. We believe the Annual Session of AALCO is an important platform for its Members and Observers to exchange views and work towards a common understanding on various matters.

In addition, we also look forward to various training and seminar programs organized by AALCO as part of its capacity building initiatives. These activities will surely benefit its participants and enhance knowledge and capabilities of AALCO members to take an more active role in the works of the International Law Commission and the Sixth Committee of the United Nations General Assembly.

Mr. President, distinguished delegates, With regard to the topics to be discussed at the 68th session of the International Law Commission, our delegation would like to provide some comments as follows:

On the topic of “Protection of the Atmosphere”, we take note with high appreciation the second report by the Special Rapporteur, Prof. Shinya Murase of Japan. In general, Vietnam fully supports the codification of international rules regarding protection of the atmosphere and promotes the responsibility of all States in protecting this common concern for the benefits of our future generations. We also share the view that the codification of the Guidelines should take into account the current treaty system as well as on-going negotiation on climate change, trans-boundary air pollution and the deplete of the ozone layer.

With regards to the 5 draft Guidelines proposed by Prof. Murase in his second report, we welcome and actively support the definition of new term “atmospheric degradation” because it broadly includes 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.

We also view guidelines 3,4 and 5 are positive contributions by Prof. Murase in this topic. However, we hope 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. More specifically, the next report should address the content of protection obligations so that States could understand what international law requires them to do.

On the topic of “*Jus cogens*”, we would like to emphasize that we welcome the inclusion of this topic in the work of the International Law Commission and believe that the study undertaken by its Special Rapporteur, Prof. Dire D. Tladi of South Africa, will lead to meaningful outcomes. We also believe 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”. Indeed, the consensus-based approach is still valid until today and the recognition of a *jus cogens* rule cannot be an academic exercise but base on solid State

practices. With this in mind, we could not support any other approach that may lower the standard of *jus cogens*. Having said that, we encourage AALCO to facilitate the collection of State practices from Asian-African countries.

On the topic of “Crimes against humanity”, we take note of the second report by the Commission’s Special Rapporteur, Prof. Sean D. Murphy. We highly appreciate 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 welcomes a broad; clear and inclusive definition of “crimes against humanity”. We take note of the definition proposed by the Special Rapporteur in conformity with Article 7 of the Rome Status. However, we observe that this definition may conflict with provisions of national laws regarding this crime, for example, Vietnam’s Criminal Code which provides additional element of territorial magnitude or social-economic factor.

Indeed, a definition based on Article 7 is also flawed due to the terms ‘widespread’ and ‘systematic’. The term “systematic” means 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 but the world community had reacted slowly by the political reasons. The Khmer Rouge had even maintained its seat at UN for long time.

Having said that, we encourage the Special Rapporteur to continue development of the draft Articles with a view to enhancing cooperation between States by facilitating mutual legal assistance in criminal matters.

To conclude, Mr. President, Vietnam welcomes and fully support the work done by the International Law Commission and stands ready to cooperate with AALCO Members to build a common understanding that represents the interest of all Asian-African countries as well as developing countries.

I thank you, Mr. President, for your kind attention.

President: I thank distinguished delegate of Vietnam for his statement. Distinguished colleagues, with this we have come to the conclusion of our deliberations on ILC topics.