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

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Mrs. Agimba Christine Anyango, the Deputy Solicitor General of Kenya and the Vice President of the Fifty Third Session of AALCO is the Chair

Vice President: Welcome to the Special Half Day Meeting on "Selected Items on the Agenda of the International Law Commission." We are very pleased to have with us members of ILC. I shall invite Prof. Rahmat Mohamad, Secretary General, AALCO for his introductory remarks.

Dr. Rahmat Mohamad, Secretary-General of AALCO: Madam Vice President, Prof. Shinya Murase, Member of the ILC, Dr. Hussein Hassouna, Member of the ILC**,** Dr. Rohan Perera, Former Member of the ILC, Dr. Djamchid Momtaz, Former Member of ILC, 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 of the International Law Commission" held as part of the deliberations at the Fifty-Third Annual Session of AALCO held at Tehran. The ILC and AALCO share a longstanding and mutually beneficial relationship. AALCO attaches the greatest importance to its traditional and longstanding relationship with the Commission. 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[20].

Briefly, the deliberations at the sixty-sixth session of the Commission focused on ***eight*** topics. These were: *Expulsion of aliens*; *the obligation to extradite or prosecute* (*aut dedere aut judicare*); *Protection of persons in the event of disasters*; *Immunity of State officials from foreign criminal jurisdiction*; *Subsequent Agreements and Subsequent Practice in relation to the interpretation of treaties*; *Identification of Customary International Law* ; *Protection of Environment in relation to armed conflicts* ; *Protection of Atmosphere.*

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

Summary of the Work of ILC at its 66th Session on its Agenda items

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

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

As regards the topic, **"Subsequent Agreements and Subsequent Practice in relation to Treaty Interpretation",** the Special Rapporteur on the topic Mr. Georg Nolte presented the Second Report on subsequent agreements and subsequent practice in relation to the interpretation of treaties that covers the following aspects of the topic:
The identification of subsequent agreements and subsequent practice (II.);

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

As regards the topic, "**Protection of the Environment in relation to Armed Conflicts",** the focus of the brief is the Preliminary Report of the Special Rapporteur, Ms. Marie G. Jacobsson, which was presented at the Sixty-Sixth Session of the International Law Commission. Within the Report, the Special Rapporteur includes discussion on the purpose of the report, as well as

of the scope, methodology and outcome of the topic, the use of terms, and the sources and others materials to be consulted. Additionally, the Special Rapporteur makes consideration of the relationship with other topics addressed by the Commission and of Environmental principles and concepts, human rights and the environment, as well as of the future programme of work.

As regards the topic, "**Identification of Customary International Law",** the Special Rapporteur Sir Michael Wood, had presented his second Report. In the Second Report, he discusses in detail the elements of the "two-element" approach to customary international law, i.e. the objective element, which deals with the general practice of States (State practice), and the subjective element, which the Special Rapporteur refers to as "acceptance as law" as an alternative term to the more commonly used but often misunderstood term *opinion juris*. As an outcome of the Report, he suggested Draft Conclusions which incorporate his research into guidelines by which these two elements of customary international law may be identified and assessed.

Be that as it may it needs to be underlined here that today's Special meeting would focus on three topics:

- Immunity of State officials from foreign criminal jurisdiction
- Protection of persons in the event of disasters
- Protection of Atmosphere

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

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

As regards the topic, **"Protection of Atmosphere"**, the Special Rapporteur Mr. Shinya Murase submitted his First Report on this topic. The report lays down three draft guidelines on 'definition of atmosphere' (draft Article 1), 'scope of the guidelines' (draft Article 2), and 'legal status of the atmosphere' (draft Article 3). In preparing this report, he has provided thorough background of the topic, such as its historical development and the sources of law relevant to it, as well as attempted to explain the rationale of the topic and the basic approaches,

objectives and scope of the project. The report elaborates on the background for this topic containing the evolution of protection of atmosphere in international law, sources in terms of treaty practice, jurisprudence of international courts and tribunals, and customary international law.

I also wish to underline here specifically that the topic of "Identification of Customary International Law" has been a matter of great concern to developing countries. That the voice of Asia and Africa was simply missing in the formation of international law traditionally is well-known. In order to make sure that this does not occur again in the context of ILC having taken it up on its agenda, the Secretariat of AALCO had decided to constitute a 'Working Group' on the topic that consists of eminent jurists from the Asian-African region who are nominated by their respective Governments.

It can be recalled that this Working Group met on the first day of the Session (15th September) and discussed numerous issues. Essentially the Working Group is envisaged to perform two functions: firstly, it would conduct in-depth deliberations on the various aspects of the topic (along with the Member States of AALCO) with a view to identify the areas and practices where the developing countries could make contributions; secondly, the findings of these deliberations (in the form of the voice of Asia-Africa in relation to this topic) would be carried forward to the ILC with a view to assist the work of the Commission.

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

Thank you.

Vice President: Thank you very much, Secretary General for the remarks. May I now invite Ambassador Kirrill Gevorgian, Chairman of the International Law Commission, to make his presentation.

Ambassador Kirrill Gevorgian, Chairman, International Law Commission: Madam Chair, Excellencies, Distinguished delegates, First of all, I would like to extend my appreciation to the Asian African Legal Consultative Organization, its President and the Secretary-General, Dr. Mohamed for inviting me as the chairman of the current session of the international Law commission to participate in the working of this august body. I would also like to express my deep appreciation for the hospitality of the host Country - The Islamic Republic of Iran.

As you know, the cooperation between the ILC and AALCO has a long-standing tradition. It was launched within a year of AALCO's establishment at the ninth session of the Commission in 1957. Since that time the Commission has benefited immensely from different forms of cooperation with AALCO and its member states. The Commission has welcomed the visits of Secretary-Generals of the Organization at its sessions. Chairs of the ILC participated in the work of the annual session of AALCO. Eminent lawyers from AALCO countries have become members of the Commission and contributed significantly to its achievements. AALCO's discussions on the topics under consideration of the commission facilitated its work.

It was a great pleasure to receive Secretary-General Dr. Rahmat Mohmad at the recently concluded sixty-sixth Session of the ILC. The commission is most grateful for his insights into the vision of the organization and its members on the topics on the current program of the ILC.

Distinguished Colleagues, Now I would like to give you a brief overview of the work of the recent session of the commission that I had the privilege of chairing. My colleagues and fellow members of the Commission, Dr. Murase and Amb. Hassouna, will address in more detail the two important topics on the current agenda of the commission: the **"Protection of the atmosphere"** and the **"Protection of the persons in the event of disasters".**

These two topics are at quiet different stages of consideration. During the past session the commission has just started its work on the **"Protection of the atmosphere"** by deliberating on the first report of Prof. Murase. On the topic of the **"Protection of persons in the event of disaster"** 21 draft articles with commentaries were adopted by the commission, on first reading. I would not go into the substance of these topics, since my colleague will. I would like to draw to your attention to the fact that to further the work of the commission on both themes, information and opinions are of states are highly necessary. The commission formulated the questions and I hope Member States of AALCO will help the commission in this regard. Turning to the other topics on the agenda of the Commission I would, first of all, address those that have been completed during the past session. Apart from the **"Protection of in the event of disaster"** that I have just mentioned, it is **"Expulsion of aliens"** and the **"Obligation to extradite or prosecute (*aut dedere aut judicare*)"**. As you may notice, all these three topics bear on the individual in his relations with the state in different situations: as a subject of expulsion, as a person requiring protection in disaster and as a potential perpetrator or victim of international crimes, necessitating intentional cooperation.

I know that AALCO having given its own remarkable contribution to the questions concerning refugees and displacement has been interested in the topic, over the years, **"the expulsion of aliens"**. This year, the Commission, adopted, on second reading, a set of 31 draft articles with commentaries, on this topic. The commission decided to recommend that the General Assembly to take note of the draft articles in a resolution, to which the articles would be annexed and encourage their widest possible dissemination. It also recommend the assembly consider, at a later stage, the elaboration of a convention on the basis of the draft articles. The commission dedicated ten years of its work to this highly relevant, and in my personal opinion achieved the right balance between the rights of states and aliens in the text of the draft articles, now the destiny of the articles are in the hands of the states. I am convinced that AALCO could play a vital role in this regard.

The commission has concluded its work on another topic, **"The obligation to extradite or prosecute (*aut dedere aut judicare)*"** with the adoption of its report on the matter. In this report the commission sought to address the issues that were of interest to states as expressed sixth committee, namely (a) the customary international law status of obligation; (b) gaps in the existing conventional regime; (c) the transfer of a suspect to an international or special court or tribunal as a potential alternative to extradition or prosecution; and (d) the relationship between the obligation of and *erga omnes* and *jus cogens* norms. The report did not aim at resolving these highly controversial issues but rather at stating faithfully the "state of affairs" in these

areas. The commission hopes that the report could serve as a useful guide to States in dealing with issues concerning the obligations.

Distinguished colleagues, There are a number of topics on the ILC's agenda that are currently in the middle of hot discussions. First of all, I would address the topic of special interest to AALCO, as we were informed by Dr. Mohamed –"Identification of Customary International Law".

During the last session, the special Rapporteur on this topic, Sir Michael wood, decided to challenge the Commission by addressing, in his second report, both constituent elements and of rules of customary international law, namely "a general practice" and "accepted as law" and suggested adopting eleven draft conclusions in this regard.

I think that the Commission has honorably coped with the challenge. All eleven draft conclusions were considered by the commission and sent to the drafting committee. The commission agreed with the special Rapporteur, despite certain opinions to the contrary expressed by the Academia (or *Opinio Juris*) that both elements - "a general practice" and "accepted as law" are indeed necessary for the rule of customary international law to emerge. The drafting committee formulated certain criteria of these two elements, including rules on attribution of practice and its weight, depending on its consistency. The issue of who may produce the relevant practice and *opino juris* was debated.

The Commission also started looking into the role of international organizations in the process of formation of customary international law. Next year the Special Rapporteur will address this important and complex issue. The challenging questions of the role of treaties and conferences in the formation of customary international law will be dealt with as well along with interrelationship between treaties and customary law. The Commission continues to keep a good pace on another topic on its agenda-subsequent practice in relation to interpretation of treaties. Since Dr. Mohamad dealt with this area substantially, I will move on.

The material and temporal scopes of such immunity will be considered next year. The question of what constitutes official act is crucial for further work in this topic. Accordingly, the Commission expects the assistance of states with providing of information on domestic law and practice. The Commission continues to work on the topic-"the Provisional Application of Treaties". In his Second report, the Special Rapporteur presents a substantive analysis of the legal effects of the provisional application of treaties. The Commission has also reiterated its request to states to provide information on their practices including domestic legislation.

The Commission's work on the topic "Protection of Environment in Relation to Armed Conflicts" is in its preliminary stages. Finally, through its study group, the Commission began considering its Draft Final Report on the topic "Most Favored Nation Clause". It is envisaged that a revised Draft Final Report be presented for discussion by next year. Let me inform you that the Commission decided to include a new topic in its programme of work, "Crimes against Humanity" and appointed Mr. Sean D. Murphy as Special Rapporteur. The Commission has also requested states to provide information on their domestic law on practice related to the crimes against humanity. The Commission also included the topic "Jus Cogens" in its long

term programme of work. Let me conclude my statement by assuring you on behalf of the Commission of its continued interest in the work of AALCO and views of its Member States. I convey to you all the best wishes of the Commission for a successful and fruitful session of AALCO this year.

Thank you.

Vice President: Thank you so much, Ambassador Gevorgian for highlighting the work of ILC. Let me now invite Ambassador Dr. Hussein Hassouna, Member of the International Law Commission to speak on the topic "Protection of Persons in the Event of Disaster".

Dr. Hussein Hassouna, Member of the International Law Commission (ILC) : Excellencies, Distinguished Delegates, Ladies and Gentlemen, At the outset, I wish to express my thanks and appreciation to the Government of the Islamic Republic of Iran for hosting the Fifty-Third Annual Session of AALCO and for the hospitality extended to all the participants in the meeting. We all recall that Iran has always strongly supported the work of AALCO has hosted its annual meetings a number of times and played an important role in the activities of its Secretariat. In addition, Iran has, for a number of years, been an active member of the International Law Commission and the contribution of Professor Momtaz, the former Chairman of the Commission, in the field of international law, has been widely recognized.

I would also like to express my support and appreciation to Professor Dr. Rahmat Mohammad, the competent and dynamic Secretary General of AALCO, who honors the ILC with a working visit every year, and who has significantly contributed to strengthening the cooperation between AALCO and the ILC.

Furthermore, I wish to acknowledge the important contribution of AALCO to the codification and progressive development of international law through its continued support of the work of the Commission, namely by following its debates, submitting its views and suggestions, organizing meetings of experts and academics on various topics before the Commission etc.. AALCO has worked over the years in order to ensure adequate reflection of Asian-African concerns in the Commission's work. It has also urged its members to respond in a timely manner to the questionnaires sent to them by the Commission. I, strongly believe that at a time where international law is facing paramount challenges in today's world, it is paramount importance for AALCO members to be actively involved in the formation of rules of international law that reflect their interests and concerns.

Introduction

The topic "Protection of Persons in the Event of Disasters" is one of the most important items on the agenda of the International Law Commission. It is subject of universal concern with a predominant Asian dimension. It is demonstrated by the human suffering resulting from disasters occurring all over the world floods in Pakistan, India, Japan, China, Indonesia, Iran to mention a few recent examples. In the face of that challenge, there is an urgent need to regulate the international community's approach and response to these dramatic situations, in accordance with the principles of solidarity and cooperation.

As a result of its consideration of the topic at the last session, the Commission adopted on first reading a set of 21 draft articles, together with commentaries thereto.

These draft Articles refer to the following main issues: the scope and purpose of the articles. The definition of a disaster. The duty of States to cooperate in various forms, the humanitarian principles applicable in disaster response, humanity, neutrality and impartiality, on the basis of non-discrimination, the obligation to respect human dignity and human rights, the primary role of the affected State in ensuring protection and providing disaster relief and assistance, the duty of the affected State to seek assistance, and the requirement of its consent to such external assistance, the right of those responding to disasters to offer assistance to the affected State, the facilitation of external assistance and the termination of personal and their equipment and goods and the relationship of the draft articles with special or other rules of international law.

Definition of Disasters

In renaming the topic "Protection of persons" in 2008, the Commission had clearly intended to give its treatment a markedly human rights perspective. However, a protection regime often extended to the protection of property and the environment. The Commission's response to rapporteur's request for guidance was in Art.3: a disaster was an event that caused harm not only to individuals, but also to property and the environment. No distinction was drawn between various kinds of disasters (natural, human made, sudden creeping) or their diverse causes. Therefore, he did not propose separate legal regimes for different types of disaster.

Overall Approach of the ILC

The ILC draft fills a legal lacuna by concentrating on the basic principles that inform the rights and duties of States and other actors in the event of a disaster and will undoubtedly provide legal support for the more detailed operational guidelines under which non-State actors, in particular the IFRCS acts (International Federation of Red Cross and Red Crescent Societies).

The overall approach of the Commission in dealing with the subject has been to striking the proper balance between the need to protect the persons affected by disasters and the respect for the principle of State sovereignty and non-interference. In order to fulfill that goal, humanitarian assistance to the persons in need should always remain neutral and objective and never become politicized. In addition, it should be based on solidarity and cooperation between all different actors. In fact, the ILC's emphasis on rights and duties is grounded on the principle of cooperation, enshrined in draft articles 5, 5 bis and 5 ter. Moreover, the draft extends to the response and disaster risk reduction phases of the disaster cycle, but does not enter into the post-disaster phase insofar as it leads into development.

Turning now to the humanitarian principles in disaster response, they are included in draft Art.7, namely humanity, neutrality and impartiality, on the basis of non-discrimination. These principles find wide application in international humanitarian law and are referred to in many international instruments dealing with disaster situations including regional ones like the 2009

African Union Convention for the protection and Assistance of Internally Displaced Persons in Africa.

The principle of human dignity included in draft Art. 5 provides the ultimate foundation of human rights law. It is referred to in the UN Charter, all universal human rights Charter on Human Rights as well as the African and European charters to Human Rights.

Concerning the role and responsibility of the effected State towards the persons within its territory included in draft Article 12. In that regard, respect for the principles of sovereignty and non-intervention is paramount. UN General Assembly Resolution 46/182 on the strengthening of the coordination of humanitarian emergency assistance of the UN clearly stipulates that humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal by that country.

As to the primary responsibility of the affected State for providing aid and protection to the victims of a disaster under draft Article 12, it is a well recognized principle in international and regional legal instruments. It assumes, according to Art. 9 the primary role of that State in controlling, facilitating, coordinating and overseeing relief operations on its territory. This would also imply its responsibility in carrying out that role vis a vis the victims of the disaster. The affected State may however, receive external assistance with its consent, on the basis of cooperation with outside actors. And according to Draft Art. 12, it has the duty to seek assistance from States or international organizations only, whenever a disaster exceeds its national response capacity.

Draft Article 14 stipulates that the consent to external assistance by the affected State should not be withheld "arbitrarily". And the Commission laid down certain guidelines for where consent could or could not be considered arbitrary.

Draft Article 16 concerns the right of third parties including States, international organizations or non-governmental organizations to offer assistance. It serves to acknowledge the legitimate interest of the international community to protect persons in the event of a disaster. The offer of assistance is an expression of solidarity, based on the principles of humanity, neutrality, impartiality and non-discrimination. There thus, exists a complementarity between the primary responsibility of the affected State and the right of non-affected States to offer assistance.

With regard to the issue as to whether a State's duty to cooperate with the affected State in disaster relief matters, includes a duty on States to provide assistance when requested by the affected State, an analysis of the international practice confirms that there is currently no such legal duty and that the provision of assistance from one State to another upon the latter's request is premised on the voluntary character of the action of the assisting State. However, although there is no duty to provide assistance upon request, there may exist a duty to give due consideration to requests for assistance from an affected State.

On the Issue of the Responsibility to Protect

The view was expressed during the ILC debate that the Special Rapporteur's proposals had not adequately taken into account the concept of the "responsibility to protect". However, even if the responsibility to protect were to be recognized in the context of protection and assistance of persons in the event of disasters, its implications would be unclear. This position was subsequently separately taken by the UN Secretary General who, in his 2008 report on implementing the responsibility to protect had indicated that "the responsibility to protect applies, until Member States decide otherwise, only to the four specified crimes and violations: genocide, war crimes, ethnic cleansing and crimes against humanity. To try to extend it to cover other calamities, such as HIV/AIDS, climate change or the response to natural disasters would undermine the 2005 consensus and stretch the concept beyond recognition or operational utility". The Commission has subsequently endorsed this position both during its debate at its 61st session (2209) and that held at the 63rd session (2011).

The Duty of Cooperation: Draft Article 8

Seen from the larger perspective of public international law to be legally and practically effective the duty to cooperate, the provision of disaster relief had to strike a balance between different aspects. First, such a duty could not intrude into the sovereignty of the affected State. Second, the duty concerning the assisting States relates to their humanitarian conduct. Third, the duty had to be relevant and limited to disaster relief assistance by encompassing the various specific elements that normally make up cooperation on the matter. It thus, covered a great diversity of technical and scientific activities.

Assisting actors are required to provide assistance in compliance with the national law of the affected State (Draft Art. 15). However, the right to condition the provision of assistance on compliance with national law is not absolute. The affected State has a duty to facilitate the provision of prompt and effective assistance, under its sovereign obligations to its population. States have an obligation to examine whether the applicability of certain provisions of national law must be waived in the event of a disaster (visa & entry requirements, custom requirements, granting privileges and immunities, freedom of movement…) (Draft Art.17).

The duty of cooperation further implies the duty of the affected State and that of the assisting actors to consult each other with a view to determining the duration of the period of assistance. (Draft Art. 19).

Cooperation plays a central role in disaster relief. It has been addressed to specific terms in various UN resolutions, multilateral conventions, regional and bilateral agreements. In that context, UN General Assembly Res. 57/150 encourages the strengthening of cooperation among States at the regional and sub-regional levels in the field of disaster preparedness and response. In the Middle East, an Arab League Summit meeting in Algeria in March 2005 called for the creation of a mechanism of coordination and cooperation between the Arab governments and intergovernmental and non-governmental organizations. Agreement between the League member States was reached in 2007 on the establishment of that mechanism and the adoption of a program for implementation at both the national and regional level./ It was based on cooperation in disaster control over three phases: preparedness, response and recovery.

Prevention, Mitigation and Preparedness

Art.1: Duty to reduce the risk of disasters:

The international community has recognized during the last decades the fundamental importance of the prevention of disasters i.e. of risk reduction; the office of the UN Coordinator for disaster relief was created in 1971. In 1987, the UN General Assembly recognized in its resolution 42/169 the UN responsibility to promote international cooperation in the study of natural disasters and to coordinate relief and measures of preparation and prevention and decided to proclaim the 1990s as "International Decade for the Prevention of Natural Disasters."

In the field of protection of persons in the event of disaster, the existence of an international legal obligation of prevention of damages is recognized by human rights law and by environmental law.

Many Multilateral and bilateral agreements cover the reduction of disaster risks—The ASEAN Agreement on Disaster Management and Emergency Response, and the Africa Regional Strategy for Disaster Risk Reduction. But pre-disaster preparedness remains very limited and funding remains a challenge. In many national legislations and policies, States have acknowledged their obligation to take preventive measures.

Art.1 includes the obligation of States to reduce the risk of disasters by taking appropriate measures, through legislation and regulations, to prevent, mitigate and prepare for disasters. These measures include the conduct of risk assessments, the collection and dissemination of risk information and the operation of early warning systems.

Draft article 10 extends the general duty to cooperate to the pre-disaster phase.

With regard to the protection of relief personnel and their equipment and goods referred to in draft Art.18 discussed at the last session of ILC. The need to extend that protection derives from the possibility of a breakdown of law and order in the affected State during the outbreak of a disaster. The obligation of the affected State in draft Art.18 is to take measures to ensure that protection is consistent with other provisions of universal, regional and bilateral treaties dealing with natural or human made disasters. As stated in the Special Rapporteur's seventh report, there is a requirement of consent by the State to the presence of external relief actors on its territory. The relief personnel, equipment and goods mentioned in the draft article should therefore be limited to those who obtained the consent of the affected State. As a general rule however, assisting States must always abide by the principle enshrined in the UN General Assembly Resolution 46/182 of 1991 which stipulates that "humanity, neutrality and impartiality", are the key principles underlying the provision of humanitarian assistance.

Art.7 on humanitarian principles states that response to disasters shall be in accordance with those principles without prejudice.

On the relationship of the Draft Articles with Special or Other Rules of International Law

Draft Art. 20 concerns matters related to disaster situations not regulated by the present draft articles" on special rules such as regional or bilateral treaties. That provision pre-supposes that rules of international law shall be the governing rules during disaster situations. Thus, the law of treaties, rules on responsibility of States and international organizations, rules of customary international law, the general principles of international law relating to the respect for sovereignty, territorial integrity and political independence of the affected State, shall always be observed and applied.

In relation to the Charter of the United Nations, a draft article was proposed by the Special Rapporteur stipulating that the draft articles are "without prejudice to the Charter of the United Nations". The majority of the ILC members considered the need for such separate provision redundant. This is because the precedence of the obligations under the UN Charter is universally recognized and expressly mentioned in Article 103 of the Charter itself, and need not to be repeated each time an instrument refers to an obligation under international law. Should the draft articles later be adopted as a convention, the preamble of this convention could include a reference to the provisions of the UN Charter as is often the case

Concerns of the AALCO members - Final form of the draft articles – Completion of work

Concerns expressed by AALCO States on the question of sovereignty and consent of affected State to external assistance:I like to place the following clarifications:

(1) (Art.4) Use of terms -- assisting State, other assisting actors: providing assistance to that State at its request or with its consent.

(2) Art. 12: Role of affected State: The affected State, by virtue of its sovereignty, has the duty to ensure protection of persons and provision of disaster relief; and has the primary role in coordination.

(3) Art. 14: Consent of the affected State to external assistance. The provision of external assistance requires the consent of the affected State.

(4) Art.15: Conditions on the provision of external assistance. The affected state may place conditions on the provision of external assistance in accordance with the draft articles, applicable rules of international law, and the national law of the affected State.

(5) Non-governmental organizations: In seventh report of Special Rapporteur: relevant non-governmental organizations mean any organization working impartially and with strictly humanitarian motives, and are engaged in the provision of disaster relief assistance.

Article in use of terms: A relevant non-governmental organization providing assistance to affected State at its request or with its consent. In the final analysis, the whole draft articles are based on the principles of solidarity and cooperation.

Finally, I hope that those clarifications will dispel most concerns relating to the issues of consent of the affected State and its sovereignty.

Art.18: Protection of Relief Personnel and their Equipment and Goods.

As a result of its consideration of the topic, the Commission adopted on first reading a set of 21 draft articles, together with commentaries thereto. The commission the decided to transmit the draft articles, through the Secretary - General of the UN, to Governments, competent international organizations, the International Committee of the Red Crescent Societies for comments and observations with the request that they be submitted to the Secretary-General by 1 January 2016. In my view, the support of AALCO's Member States to the ILC draft articles, with their comments and observations, will be essential for the successful completion of the ILC work on the subject by the end of the Commission's current mandate in 2016.

I request AALCO Member States to reflect and prepare their comments. In my view, the support of AALCO Member States to the ILC Draft Articles will be essential for the successful completion of the ILC work.

Thank you.

Vice President: Thank you, Sir for that elaborate discussion on the topic. I will now invite Prof. Murase to make his presentation on the topic "Protection of Atmosphere".

Prof. Shinya Murase: Distinguished delegates, it is my great pleasure to speak to you on the ILC agenda item on the Protection of the Atmosphere. Since this is a new topic that started only this year, I would first like to explain how this topic came about.

As you are well aware, the ILC has established certain criteria for topic selection. A new topic should pass three feasibility tests: first, the practical feasibility, that is, whether the topic meets the need of the international community as a whole; second, whether it satisfies technical feasibility in terms of sufficient State practice; and third, whether the topic is politically acceptable. The ILC also reminded that it should not restrict itself to traditional topics, but should consider those topics on new developments of international law that are a pressing concern of the international community as a whole.

The topic on the Protection of the Atmosphere satisfies these criteria. Nobody objects that, in view of the deteriorating conditions of the atmosphere, it is a pressing concern of the whole world; hence there is a practical need to address the topic. There are sufficient State Practice and jurisprudence of International Courts and tribunals, which satisfy the technical feasibility. While there are a number of relevant conventions on trans-boundary air pollution, ozone depletion and climate change, they are largely a patchwork of conventions whose scope of application is limited to specific regions and specific issue areas. There is, however, a growing awareness of "One atmosphere" that the atmospheric problems should be treated in a comprehensive manner. This slide shows where problems occur in the atmosphere. 80% of air exists in the troposphere (up to 15 km above the surface of the earth) and 20% in the

stratosphere (up to 50 km). There is virtually no air above these two layers. Naturally, we are not concerned with outer space.

So, this topic was considered first by the Working Group on the Long-term Programme of Work since 2009, which adopted the topic as ILC's long-term programme of work in 2011 and also by the plenary of the ILC that year. After a series of informal consultations since 2012, the topic was finally adopted in 2013 with certain conditions. The topic will not interfere with political process of negotiations, it will not deal with specific polluting substances; it will not be concerned with outer space, and finally, the final product will be draft guidelines rather than draft articles.

Thus, I submitted my First Report (A/CN.4/667), in which I discussed first the rationale of the topic and the approaches to be employed to deal with the topic. I then made a brief historical review of the development of international law on the atmosphere. I began with the famous passage of Justinian Institute of the 6th century which provided that "by the law of nature, the *air* was one of the things "common to all". I also referred to the Sharia law of the 8th century, which placed importance of the air as the element which is "indispensable for the perpetuation and preservation of life." In November last year, a symposium was organized by AALCO at the National University of Malaysia, where I learned something of the Sharia law. I am proud that this is probably the ILC's first special Rapporteur's report that has ever referred to the Sharia law.

The most important point in understanding this topic is to differentiate between the airspace and the atmosphere. The airspace is an area-based notion. Above your territory is your territorial airspace, for which you claim exclusive sovereignty. The atmosphere, or air, is a fluctuating, dynamic and intangible substance that is moving around all the time. When State 'A' complains air pollution coming from its neighbouring State 'B', State 'A' complains the polluted air but she never complains it as a violation of its territorial airspace. Thus, the atmosphere should be understood as a totally different notion from that of the airspace in international law.

In my first Report, I also summarized the relevant judicial decisions by international courts and tribunals, starting from the famous Trial Smelter arbitration and the ICJ Nuclear Tests cases. At the end of the Report, I proposed three draft guidelines, which I will explain in a moment.

The Commission discussed the topic on the basis of my First Report in May and June at this year's session. First, there was a debate on the interpretation of the 2013 Understanding. There were a few members who criticized the special Rapporteur that he did not comply with the conditions set forth in the Understanding. On the other hand, there were members who asserted that the Understanding was a "disgrace" for the Commission and that it should be abolished. The majority of the members supported my "liberal" interpretation of the Understanding that the Special Rapporteur should be permitted to "refer to" some of the controversial principles such as the "common but differentiated responsibilities" (CBDR) although he may not "deal with" those principles, and also that he should be permitted to "identify" the gaps in the existing treaty regimes, even though he may not "fill" those gaps.

On the substantive aspects of the debate, they focused on the draft guidelines proposed by the Special Rapporteur; first on the definition of the atmosphere, the second on the scope of the guidelines and third, on the legal status of the atmosphere. The majority of the members were in favour of sending these draft guidelines to the Drafting Committee, but I decided not to ask to send them to the Drafting Committee this year but instead wait for next year to send them with certain reformulation.

The Draft Guidelines give a working definition of the atmosphere which means "a layer of gases surrounding the earth in the troposphere and stratosphere". The definition also refers to the functional aspect of the atmosphere that "transports" pollutant substances.

Some members questioned whether it was necessary to refer to "troposphere and stratosphere" in the definition and whether upper spheres (mesosphere and thermosphere) might be included. My response was that it would not make sense to refer to those upper spheres, because there was no air there.

Some members wanted to have a dialogue with scientists, and so, I have arranged the scientists and experts of UNEP, WMO and UNECE to come to the Commission at the beginning of the session next year for a dialogue with our members.

The Draft Guideline 2 concerns the scope of the project. First, we are concerned with only the anthropogenic activities, that is, human activities, that cause atmospheric problems, and we are not concerned with those caused by natural phenomena such as volcanic eruptions or meteorites. We are concerned only with "significant adverse effects" of such activities.

Second, the draft guidelines will contain basic principles on the protection of the atmosphere and its inter-relationships. Third, the saving clause on the distinction between airspace and atmosphere, which I inserted in Guideline 3 in the First Report, will be moved to paragraph 3 of the scope guideline in my Second Report next year.

The Draft Guideline 3 on the legal status of the atmosphere provoked a heated debate, with a lot of constructive criticisms as well as support. I am going to reformulate this guideline next year. At the end of my First Report, I briefly outlined the plan of work. I only have two more years before the end of the current quinquennial; this plan is based on the premise that I will be re-elected, with your support, for the next quinquennial, beyond 2017.

The content of my second Report will be what you see in this slide: Draft general guidelines 1 and 2 will be the reproduction of the guidelines proposed in the First report. Then comes the basic principles, which refer to the basic obligation of States to protect the atmosphere, and protection of the atmosphere as a "common concern of humankind." This notion of common concern is to be the basis for international cooperation.
The Third Report to be submitted in 2016 will be devoted to the basic principles of international environmental law, namely, *sic utere tuo* principle, prevention and precaution, sustainable development, equity and special circumstances and vulnerability.

In my Fourth report in 2017, it provided that I am still a member of the Commission and Special Rapporteur, that I will deal with the issue of interrelationship, which will include law of the sea, international trade law and human rights law, among others. In the Fifth and Final Report in 2018, it provided that if I am still alive then, I will deal with the questions on compliance and dispute settlement.

In conclusion, Madam Chair, I would like to stress that it is very important for AALCO member States to make their views known at the Sixth Committee of the UN General Assembly next month. The ILC and AALCO have their common objective, which is to transform the European centric "traditional" international law into a system that is also fair to Asia and Africa. I personally regret to see that the delegates from Western and other States are extremely diligent and make detailed statements at the Sixth Committee, whereas we don't see comparable contribution from Asian and African States. Thus, at the end of the day, international law remains as West-dominated system, which I regret very much. I therefore urge the distinguished delegates to speak at the Sixth Committee next month as much as possible, hopefully in support of the topic on the protection of the atmosphere, which would certainly help advance this topic forward at the ILC.

Thank you for your kind attention.

Vice President: Thank you, Prof. Murase for sharing your views on this very interesting topic. Now it is time to receive comments from Member States. I first invite the distinguished delegate from Thailand for his comments.

The Delegate of Thailand: Madam Vice President, Mr. Secretary-General, Excellencies, Distinguished Delegates, At the outset, my delegation would like to express its appreciation to the speakers for their presentations which have provided us with the overall picture of the ILC issues under consideration. Also, we wish to thank AALCO for organizing this Special Half-day Meeting on "Selected Items on the Agenda of the International Law Commission" and to thank AALCO Secretariat for preparing a report of excellent quality in related matters. We would also like to congratulate the ILC on the success of the "Working Group" on "Identification of customary international law" held yesterday. We would also be pleased to see the working group to formulate AALCO comments to the ILC on this very important issue, which would enhance, in concrete manner AALCO contributions to the process of codification and progressive development of international law. Our appreciation also goes to members of the Commission for their invaluable contributions to the development of international law. In particular, Thailand is proud to see Ambassador Kriangsak Kittichaisaree, member of the International Law Commission, from Thailand and Chairman of the ILC working Group on the topic "Obligation to extradite or prosecute (*aut dedre aut judicare*)", has guided the ILC's deliberation on that topic to a successful conclusion this year, which should serve as a most useful set of guidelines for States in implementing the said obligation. Thailand would also like to reconfirm our commitment to cooperate with the ILC and AALCO in their long standing task of codification and progressive development of international law.

Thailand, would like to give some comments on current work of the commission on immunity of state officials from foreign criminal jurisdiction, and protection of persons in the event of disaster.

Immunity of State Officials from Foreign Criminal Jurisdiction

Mr. President, Allow me to begin with the topic "Immunity of State officials from Foreign Criminal Jurisdiction"

Regarding the substance of the topic, we should like to begin by presenting a clear picture of Thai domestic Law which might have several characteristics common with the relevant national legislations of other States. As a State Party to the Vienna Convention on Diplomatic Relations of 1961 and the Vienna Convention on Consular Relations 1963, Thailand grants immunity from Criminal jurisdiction to persons entitled to such Immunity under the respective conventions. Thailand also accords immunity to persons covered by host country agreements between Thailand and intergovernmental organization based in Thailand.

Beyond those agreements, Thai courts have no experience in dealing with the immunity of foreign state officials from Thailand's criminal jurisdiction. Thailand is not a State Party to the Convention on Special Missions either. Therefore, Thailand wishes to reserve our position on the ILC's work on this topic until a later stage when we can determine whether the ILC's work achieves the right balance between according immunity to State Officials from foreign criminal jurisdictions on the one hand, and ending impunity of those officials on the other hand.

With respect to persons enjoying immunity *ratione materiae*, the Commission should not focus its work on identifying who is an "official", as such a term has not yet been defined by international law, but is defined differently under domestic laws of different states. Therefore the Commission ought to take into due consideration the practice of states and their domestic law. In connection to this, my delegation would like to point out that, it would be impossible to draw up a list of all offices or post holders who could be classified as "officials" that all states would agree on. The persons covered by immunity *ratione materiae* can only be determined using "identifying criteria" which are applied on a case-by-case basis.

In connection to this, my delegation is of the view that the immunity *ratione materia* should not be extended to individual or legal persons who act for the state under a contract with their governments or agencies, as there is on sound legal basis to extend the scope of the immunity to non-officials such as private contractors who are not in a position to exercise "inherent government authority".

My delegation wishes to emphasize that international law must recognize the immunity granted by the domestic law of the state to government agents or law enforcement officials for their acts undertaken to maintain law and order but without intent to commit human rights violations.

Finally, any exception to immunity which the commission will consider in the future sessions must not undermine the immunity of the head of state whose constitutional role is merely

ceremonial and who has no *de facto* authority to direct or influence an act or omission which constitutes a core crime proscribed by international law from which immunity is not allowed.

Protection of persons in the Event of Natural disasters

Mr. President, Allow me to turn to the topic "Protection of Persons in the event of Disaster", my delegation would like to commend the conclusion by the ILC of the first reading of the draft articles which would guide affected states, assisting states and other actors on how to take appropriate measures prior to, during, and after the event of a disaster.

My delegation would like to register that the term "external assistance" defined in sub-paragraph (d) of the newly introduced draft article 4 on the "use of terms" should be defined with great caution. Therefore, it should be noted that the "other assisting actors" in the provisions shall not include any domestic actors who offer disaster relief assistance or disaster risk reduction.

Lastly, I wish to touch upon the draft Article 20 on the "Relationship to Special or Other Rules of Law" which clarifies the way in which the draft articles should interact with certain rules of international law. The provision contains the reference to both "special rules" (*lex specialist*) applied to the same subject matter of the draft articles and "other rules" applied to the matter not directly concerned but would nonetheless apply in situations covered by draft articles. However, besides the provisions concerns the law of treaties and the rules on responsibility of both States and international organizations exemplified in paragraph 5 of the commentary to the draft article, the "other rules" should also be illustrated.

Thank you, Madam Vice President.

Vice President: Thank you, Sir. Allow me to invite the distinguished delegate from Japan to make the observations.

The Delegate of Japan: Thank you Madam Vice President. My delegation would like to join the previous speakers in appreciating the presents of three prominent ILC members.

1. Law of transboundary aquifers

Madam Vice President, first, my delegation wishes to bring to attention of the honorable delegates the question of Law of transboundary aquifers.

It is to be recalled that in the intervention of our delegation at the last AALCO annual session, we asked for your kind support on the draft resolution prepared by the government of Japan, and later introduced in the discussion of the Sixth Committee under the agenda of "the law of transboundary aquifers", the topic on which the late Ambassador Yamada had worked as a special rapporteur for drafting articles.

We are pleased to report that, as a result of the negotiation which took place in the Sixth Committee last fall, the UN General Assembly adopted the resolution commending to the attention of member states the draft articles on the law of transboundary aquifers annexed to that resolution as guidance for bilateral or regional agreements for the proper management of transboundary aquifers (A/RES/68/118).

This resolution is a moderate but a great step towards strengthening the rule of law in the field of water management through recommending utilization of the draft articles. As a facilitator of the negotiation on that subject, the Government of Japan appreciates greatly the support rendered from the AALCO member states.

Proper management of water resource has been, and will be the important agenda for the international community, and we hope that the members of AALCO make use of these draft articles in line with the purpose of the resolution.

2. Protection of the atmosphere

Secondly, on the question of Protection of the atmosphere, in the sixty sixth session of the ILC, the topic of "protection of the atmosphere" was deliberated based on the first report submitted by the Special Rapporteur, Mr. Murase.

The first report overviews historical development of international law in relation to the protection of atmospheric environment, and introduces related modern international norms including soft law. The overall study shows the significance of this topic as a contemporary agenda for humankind. I understand that many members of the ILC shared this point.

The ILC has a major role in the field of environmental protection, and we recognize that the protection of atmospheric environment requires coordinated action by the international community. In that sense, the start of deliberation by the ILC for studying comprehensive legal structure in this particular field is highly valuable.

At the same time, it is important for the ILC to undertake its discussion based on the understanding which was settled last year. The Special Rapporteur drafted his first report carefully taking this point into account. International law in this field is very complicated and mixed with hard and soft law. Although sorting out these rules and notions is quite meaningful, the work should be continued through careful deliberation.

As the protection of atmospheric environment is a very serious issue, particularly for Asia and Africa, I hope that AALCO members continue to contribute to the discussion both in the ILC and the Sixth Committee.

3. Cooperation between the ILC and AALCO

Lastly, I would like to refer to the question of cooperation between the ILC and AALCO. In order for the 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 its work. In that sense, the role of AALCO is of great importance.

There could be several approaches for delivering our message such as comments from governments toward special rapporteurs in response to requests from the Commission or statements made in the Six Committee.

Since the ILC places high regards on the debate in the Six Committee, active participation in the work of the Committee by the AALCO members is particularly commended.

Last year, during the debate of that Committee, the Government of Japan proposed establishing a mechanism reflecting more the needs from member states in the process of topic selection of the ILC. This year, the ILC decided to update the list of future topics, which is welcomed as it will enhance further the transparency in the topic selection process.
Thank you.

Vice President: Thank you very much, Japan. May I now invite the distinguished delegate from India to make their comments.

The Delegate of India: Thank you, Chair. I thank all the panelists for their presentations during the half-day special meeting on this important agenda item. I also thank the Secretary General/Deputy Secretary-General for introducing this agenda item. Also, I congratulate the AALCO Secretariat for their brief study on this subject.

On the topic, "Immunity of State Officials from Foreign Criminal Jurisdiction" we appreciate the progress made thus far in the ILC. In the current session, the Commission considered the third report of the Special Rapporteur Ms. Concepcion Escobar Hernandez (Spain) in which, draft article 2 (e) on the definition of 'State official' and draft article 5, on the 'beneficiaries of immunity *ratione materiae'* were considered by the Commission and adopted provisionally.

The Special Rapporteur analyzed the concept of 'State Official' through relevant national and international judicial practice, treaty practice and the subjective scope of immunity *ratione materiae.* The material and temporal scope of immunity *ratione materiae* would be considered in the Special Rapporteur's next report.

We consider the acts by officials on behalf of a State to be the acts of that State itself and should be attributed to that State. The Appeal Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the Prosecutor V. Tihomir Blaskic case

(1997), pointed out that "such officials are mere instruments of a State and their official action can only be attributed to the State". In other words, State officials should not suffer the consequences of decisions/ acts which are not attributable to them personally.

We agree that the State Officials, viz., Heads of State, Heads of Government and the Foreign Ministers, so called *Troika,* are entitled to immunity from criminal jurisdiction of foreign States.

With regard to extending immunity to officials beyond *Troika,* we consider that, the same criteria may be applied for few other high ranking officials especially, Ministers of Defense and Ministers of International Trade. They could also be considered as the State Officials deserving immunity from the criminal jurisdiction of foreign States given their increased involvement in international affairs and representing their States in international meetings relevant to their areas.

Further, the subject of the topic is based on the principle of sovereign equality of States and also concerning friendly relations between States in their international relations. The codification of rules in this area is far less than developed. Therefore, the work on the topic may take the form of draft articles to be presented to the UNGA. This could help fill the gap in the immunity law.

With regard to the topic "Identification of Customary International Law", the Commission had considered the second Report of the Special Rapporteur Sir Michael Wood which contained eleven draft conclusions.

The Report also covered the central questions concerning the approach to the identification of rules of "general" customary international law, in particular the two constituent elements (these elements -. being a "general practice" and "accepted as law" — commonly referred to as "state practice" and *"opinio juris"* respectively). We are generally in agreement with the approach that the Special Rapporteur has adopted in this Report.

The draft has been divided into four parts, namely: introduction; two constituent elements; and a general practice accepted as law. We understand that the Special Rapporteur will focus in his next Report on the relationship between treaty and customs, role of International Organizations and whether they may have an influence on customs as well as regional, special and bilateral customs and their relationship to CIL, if any.

While we welcome the Special Rapporteur's methodology in identifying the State practice, primarily relying on the International Court of Justice (ICJ) decisions including the separate and dissenting opinions. However, the Special Rapporteur may not leave out other tribunals decisions also for identifying the customary international law. It may be noted that in the *Arrest Warrant* case of the ICJ, the Court ruled that the Minister of Foreign Affairs enjoys *rationae persone* immunity for the reason that the Foreign Affairs Minister has plenary competence in international relations. This was questioned by many States initially but later it had been agreed by them. The response of the Court certainly helps us to understand the identification of CIL.

It is well known that the customary international law (CIL) is a formal source of international law. The ICJ is mandated to apply CIL to settle the disputes brought before it by the States. Article 38.(1) (b) of the ICJ Statute describes CIL "as evidence of general practice accepted as law". CIL consists of "settled practice" of States and the belief that it is binding. Thus, it has objective and subjective/mental elements (opinio juris).

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

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

At the same time, we urge the Commission to exercise utmost caution in taking into account the arguments and positions advanced by the States before international adjudicative bodies and, should not be detached from or devoid of the context in which they were made.

On the topic "Provisional application of treaties" the Commission has considered the second report of the Special Rapporteur, Mr. Juan Manuel Gomez-Robledo. The Report sought to provide a substantive analysis of the legal effects of the provisional application of treaties, in the light of domestic practice, given the fact that States, intended to do so based, upon their domestic conditions. The debate revealed broad agreement that the basic premise underlying the treaty in question, the rights and obligations of a State which had decided to provisionally apply the treaty, or parts thereof, were the same as if the treaty were in force for that State.

We have taken note of Special Rapporteur's characterization of the decision to provisionally apply a treaty as a unilateral act. It may be noted that such a view could not be reconciled with Article 25 of the 1969 Vienna Convention, which specifically envisaged provisional application being undertaken on the basis of agreement between States and as an exercise of the free will of States.

We also welcome the Special Rapporteur's intention in exploring the possibility of contracting States acquiescing to the provisional application by a third State even when a treaty did not expressly provide for provisional application, as well as undertaking a study of the practice of treaty depositories.

Since the provisional application is a sort of formal application, it would be relevant if the study addresses legal implications of provisional application and relations between the State parties to it, including the extent of international responsibility incurred by a State vis-a-vis other State parties for violation of an obligation under a provisionally applied treaty.

We agree with the idea that the present study should be in the form of conclusion or guidelines with commentaries for the guidance of States.

With these observations, I thank the Chair for providing this opportunity.

Vice President: Thank you, India. May I invite the distinguished delegate of the Islamic Republic of Iran to present their comments.

The Delegate of the Islamic Republic of Iran: "In the name of God, the Compassionate, the Merciful"

Madam Vice President, My delegation would like to express its appreciation for the enlightening presentations on the issues under consideration by the ILC. I should also thank the AALCO secretariat for organizing this Special Half-day Meeting on "Selected Items on the Agenda of the International Law Commission". We would like to make a few comments in this regard.

Fortunately, this year the advanced copy of the ILC report has been released a few days before the annual session. This gives us the opportunity to have an exchange of views before the UN General Assembly session. It may be useful for the preparation of our intervention on the subject during the Sixth Committee's debates. There were eight topics on the Agenda of the Commission during its 66th Session. We will limit our remarks on two of them, namely, "Protection of Persons in the Event of Disasters" and "Protection of the Atmosphere".

The successful conclusion of the first reading of the draft articles on "Protection of Persons in the Event of Disasters" is commendable. However, some of the articles deserve special attention. Article 8 of the draft articles concerns the duty of the State affected by the disaster to cooperate. We have some difficulty to understand why the affected State must cooperate with the ICRC and the relevant non-governmental organizations. The commentary explains that a reference to ICRC is included as a consequence of the fact that the draft article may also apply in complex emergencies involving armed conflict. In our view, there is a contradiction between this commentary and article 21 of the draft articles concerning the relation to international humanitarian law. This provision stipulates that "the present draft article do not apply to situations to which the rules of international humanitarian law are applicable". Even if we accept the explanation given by the Special Rapporteur, Mr. Valencia Ospina, the obligation to cooperate in situations of armed conflict cannot in our view extend to non-governmental organizations other than the ICRC.

By the same token, article 13 of the draft on the duty of the affected State to seek external assistance raises some difficulties. This provision obliges the affected State to seek assistance among the States, UN and relevant nongovernmental organizations. It has been opposed by some members of the Commission who are of the view that international law, as it currently stands, does not recognize such a duty.

We support the view expressed by the Special Rapporteur to include in the draft a provision regarding the relationship to the Charter of the UN. Such a provision drafted in the light of article 103 of the Charter will be useful to the extent that it will highlight the cardinal role played by some principles enshrined in the Charter, namely, the principles of sovereignty and territorial integrity of the affected State already acknowledged in the draft. Such a reference can be found in the ASEAN Agreement on Disaster Management and Emergency Response. This inclusion would reaffirm furthermore the leading role to be played by the UN in disaster management.

The issue of "Protection of the Atmosphere" is tightly linked with political, technical and scientific considerations. This, however, does not mean that the importance of the legal issues surrounding the topic should be downgraded. In fact, the decision of the General Assembly to include the topic in the long-term program of the work of the Commission is based on such an understanding.

The task assigned to Mr. Murase, the Special Rapporteur, to that end is fraught with difficulties; therefore, the approach adopted should be applied with caution and ample flexibility to meet the expected purposes. This is justified by the mere fact that the Commission's task, as stated, in the report, consists in *[I quote] "identifying* custom, whether established or emerging, [...] and identifying, rather than filling, any gaps in the existing treaty regime [end *of the quote]*. It seems that the Commission is aware of the unique nature of the job. The question arises as to the end result of the task undertaken by the Special Rapporteur. While the task is not aimed at filling treaty gaps in international legal instruments applicable to state activities in the atmosphere, it seems that the concerns about the topic deserve more than merely pure research.

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

In his first report, Mr. Murase, the Special Rapporteur on the topic raised the question of the legal status of the atmosphere which he considered rightly to be the prerequisite to the Commission's consideration of the subject. He favored the concept "common concern of humankind". It seems that the normative content of the concept is still unclear and controversial.

We agree that the protection of the atmosphere is a common concern of mankind; however, the question that can be raised at this juncture is what would be the legal implication of this new concept. We have already some clear idea about the consequence of the qualification of the sea-bed and its subsoil beyond the continental shelf as common heritage of mankind. I am referring to the advisory Opinion of the ITLOS issued in 2011 regarding the obligation of States sponsoring persons and entities with respect to activities in the Area. The Tribunal refers to article 48 of ILC articles on State Responsibility by affirming that the responsibility of States to protect the environment of the Area creates *erga omnes* obligations. We can draw a similar conclusion regarding the protection of the atmosphere. Drawing analogies from the law of the sea, it was suggested that consideration should be given to dividing the atmosphere in zones based on the degrees of sovereignty and control exercised by the subjacent State.

In the end, we acknowledge the difficulty of the task of the Special Rapporteur to the scarcity of State practice, which has led him to rely, in the preparation of his report, mostly on the views of non-governmental organizations and scholars.

I thank you.

Vice President: Thank you, distinguished delegate of Islamic Republic of Iran. May I invite the distinguished delegate of Malaysia to present their comments.

The Delegate of Malaysia: Thank you Madam Chair. Excellencies, Distinguished delegates, my delegation firstly joins other delegations in thanking the Secretary general on his comprehensive report on ILC.

1. Immunity of State Officials from Foreign Criminal Jurisdiction

Madam Chair, Malaysia notes that the Third Report of the Special Rapporteur for the topic was considered at the Commission's Sixty Sixth session. Malaysia is particularly interested in the matter as the Special Rapporteur has proposed two (2) draft articles which capture the key issues pertaining to the immunity of State officials from foreign criminal jurisdiction.

Malaysia has been studying and closely following the development of the subject since the inclusion of the topic at the Commission's Fifty Eighth Session in 2006. At the Sixth Committee of the Sixty Third Session of the United Nations General Assembly, New York in 2008, Malaysia made intervention as regards to its stand on the Preliminary Report prepared by the previous Special Rapporteur, Mr. Roman Kolodkin. In this regard, Malaysia would like to reiterates its position at the Sixth Committee in 2008 that the topic should focus on the immunities accorded under international law, in particular customary international law and not under domestic law. There is also no necessity to re-examine previously codified areas such as the immunities of diplomatic agents, consular officials, members of special missions and representatives of States to international organizations, these categories of persons should be excluded from any definition of "State officials" for the purpose of this study.

Malaysia welcomes the proposed draft Articles and will continue to conduct an in-depth study of the draft Articles. Meanwhile, Malaysia notes that draft Article 2 (e) deals with definition of the State officials to be immune from the criminal jurisdiction. It was drafted to set clear the individuals who are considered to perform official acts in the context of the immunity from foreign criminal jurisdiction. Malaysia fully supports the establishment of such parameters as it would set clear the individuals who enjoy the immunity.

Malaysia has previously raised issue as who are the "State officials" that enjoy immunity.
As regard to Article 2 (e), Malaysia views that the definition of "State officials" is broad enough to cover any individual who represents the State or who exercises the State's function. With the proposed definition, Malaysia is of the view that all "State officials" including those who are employed on contract basis would be covered under such definition when they undertake the official acts.
However, Malaysia is of the view that since the Commission will exclude previously codified areas such as the immunities of diplomatic agents, consular officials, members of special missions and representatives of states to international organizations, these categories of persons should be excluded from the definition of "State officials".

Madam Chair, Malaysia further notes the adoption of draft Article 5 by the Drafting Committee which provides the State officials who enjoy "Immunity ratione materiae". However, it should be highlighted that the definition of "Immunity ratione materiae" which was defined in the previous draft article has been deleted and there was no reason given for such deletion. Malaysia is of the view that the definition of the terms "Immunity ratione materiae" is imperative to determine in which circumstances would State officials be granted immunity from foreign criminal jurisdiction.

In this regard, Malaysia agrees with the view by the Special Rapporteur in its report that the basic characteristic of "Immunity ratione materiae" can be identified as being granted to all State officials, granted in respect of acts that can be characterized as "acts performed in an official capacity", and is not time limited since "Immunity ratione materiae" continued even after the person who enjoys such immunity is no longer an official. Malaysia further takes note that the concept of an "act performed in an official capacity', the temporal scope of the immunity and the exception to immunity from foreign criminal jurisdiction will be addressed in the next report.

Protection of Atmosphere

Madam Chair, Malaysia would like to thank the AALCO Secretariat for preparing the report on matters relating to the work of the International Law Commission at its Sixty-sixth Session particularly on the topic of "Protection of the Atmosphere" ("the Report"). Malaysia notes that during the Sixty-sixth Session, the Special Rapporteur for the topic on Protection of the Atmosphere, Mr. Shinya Murase, had submitted his report entitled "First Report on the Protection of the Atmosphere" ("First Report"). Malaysia further notes that the expected outcome of the work of the Special Rapporteur will be a set of draft guidelines ("the Project") which will not seek to impose legal rules and legal principles on current treaty regimes.

Madam Chair, Malaysia observes that the First Report lays down three draft guidelines, firstly, on "Definition of the Atmosphere" (draft Article 1), secondly, on "Scope of the Guidelines" (draft Article 2) and thirdly, on "Legal Status of the Atmosphere" (draft Article 3). In relation to the "Definition of Atmosphere", Malaysia is of the view that there is a need to consult the scientific experts in framing a clear, comprehensive and acceptable definition of the atmosphere by all parties.

Whilst, on the "Scope of the Guidelines", Malaysia notes the Special Rapporteur's proposal for the draft guidelines to address "human activities" that directly and indirectly introduce deleterious substances and energy into the atmosphere. In this regard, Malaysia wishes to seek clarification on the specific type of "human activities" intended to be covered under the draft guidelines, as to ensure that the activities propose will not overlap with "human activities" covers under the existing international regime on environmental protection. Further, Malaysia is not familiar with the term "deleterious substances" as proposed in the First Report. Hence, Malaysia wishes to seek further explanation from the Special Rapporteur on the usage of the terms "deleterious substances" as well as the term "energy", particularly, on the differences of these terms with the common terms such as "hazardous substances" "pollutants" and "waste".

Madam Chair, On the "Legal Status of the Atmosphere", Malaysia is of the view that further consideration needs to be devoted to the adequacy of the legal status of the atmosphere. Analysis of five concepts highlighted in the First Report that is the airspace, shared or common natural resources, common property, common heritage and common concern is necessary, prior to determination of the legal status of the atmosphere. Given the highly technical nature of the topic, Malaysia is currently studying on the draft guidelines as it is foreseen consultation with the relevant agencies and technical expertise would be crucial to the matter.

Madam Chair, Last but not least, Malaysia recognizes that the issues on protection of atmosphere are a global and an imminent threat to the future of humanity and the Earth's survival, and therefore looks forward to subsequent work on this topic and any other proposals from AALCO Member States.Thank you, Madam Chair.

Vice President: Thank you so much, Malaysia. I invite Syria to make their comments.

The Delegate of Syria[21]: Mr. President, Respected Members of the ILC, Distinguished Delegates, this session reminds us of the importance of the need for the interactive process between the AALCO and ILC. We benefited greatly from their presence among us, I am confident that they will have the opportunity to listen the comments of delegations of AALCO through the work of the Sixth Committee.

Firstly, I urge that we must take full advantage of the presence of Dr. Hassouna and Prof. Murase. On what was said by Professor Morase, I agree with him that there is western domination on the system of international law and on its items. What this actually requires is better awareness and cooperation by developing countries in Asia and Africa in particular, in efforts to contribute in the development of international law on the part of these two continents.

[21] This statement was delivered in Arabic. This is an unofficial translation made by the Secretariat.

As regards Dr. Hassouna's presentation, we greatly benefited from his report. Therein you deliberated on protection of persons in the event of disaster which is a major cause of concern for some of the AALCO Member States. The extent of Responsibility to Protect vis a vis national sovereignty in such humanitarian situations is a moot question.

Overall, these earlier points to regulate the delivery of humanitarian aid raises an important question –does ILC work for codification of law or the progressive development of the law?

There are detailed observations made by colleagues from the delegations of India, Iran, Malaysia, and also Japan. I think these were important observations. However, I do not agree with some of the observations of the distinguished delegate of India and Iran.

Thank you.

Vice President: Thank you, Syria for those comments. The distinguished delegate from Republic of Korea, you now have the floor.

The Delegate of Republic of Korea: Thank you, Madam President. My delegation would like to express its high appreciation to the Secretary General for having invited eminent ILC Members. My delegation also expresses its gratitude to the ILC Members for their explanation on the ILC's works on topics which drove attention of the Asian and African states. I would like to make a brief comment on the process of identification of customary international law in the context of AALCO.

We recommend ILC to collect extensive relevant reference, academic research, national jurisprudence and other documents not only from European countries but also from other parts of the world, especially from Asian and African regions. The Asian and African states have a strong willingness to play a leading role in the formation of new rules of international law. For this, the Asian-African states must accumulate consistent practices such as state practices should be conveyed to the ILC in due process. For helping this process, it is also desirable for the AALCO Secretariat to provide relevant reference regarding the practices of the Member States of AALCO as much as possible. Thank you.

Vice President: Thank you so much, Sir. I invite Pakistan to make their comments.

The Delegate of Pakistan: Thank you very much, Madam Vice President. I am terribly conscious of the fact that His Excellency the Ambassador of Japan must be anxious to see us arrive on time. So I would not make any statement and confine myself to join the observations made and concerns raised by the distinguished delegate of India.

Vice President: Thank you so much, Sir. I invite People's Republic of China to make their comments.

The Delegate of the People's Republic of China: Than you Madam Chair. Excellencies, Distinguished Delegates, as an important research institute for international law under the UN system, the ILC has played an important role in the codification and

progressive development of international law, contributing significantly to the development rule of law at the international level.

Over the years, the AALCO and the ILC have maintained a mechanism of regular communication, through which they have exchanged views on issues of mutual interest and concern, and jointly promote international law in a way that is more reflective of the demands of developing countries in Asia and Africa. This work has been further strengthened since Dr. Rahmat Mohammad took office as Secretary-General of the AALCO. We appreciate his effort. The Chinese side will continue to work along with other AALCO members in Asia and Africa to exert a positive and effective influence on the development of international rule of law, and safeguard and increase the institutional right of developing countries through the AALCO and other international forums.

Madam Chair, now I would like to briefly talk about China's position on the key topics of the ILC 66th session. On the "immunity of state officials from foreign criminal jurisdictions", Ms. Hernandez, the Special Rapporteur on the topic, submitted her third report which mainly discussed the definition of state officials and the use of terminology, and proposed two draft articles. The report was adopted by the 1LC. We affirm the overall thinking of the Special Rapporteur that is to set down general principles of immunity first, and then discuss exceptions to immunity on that basis. On this topic, the ILC needs to focus its attention on the summary and codification of state practices and relevant rules of customary international law, so as to form international law standards that are based on international consensus and can be applied uniformly. Since it is difficult to find a proper solution to the relationship between immunity and impunity for the time being, we suggest that the ILC shelve this problem, rather than rush to develop relevant rules. On the definition of "state officials", the three standards presented by the Special Rapporteur, i.e., having a connection with the state acting internationally as a representative of the state or performing official functions both internationally and domestically, or exercising elements of governmental authority, are by and large feasible in our opinion. We believe that the final version of the definition adopted by the ILC, i.e., any person who represents the state or exercises state functions, is too broad and needs to be further studied.

On the "identification of customary international law", Sir Michael Wood, the Special Rapportuer on the topic, submitted his second report. We believe it necessary to have uniform criteria of the identification, which means the criteria should not differ from one branch of international law to another or from one group of audiences to another. Research on the topic needs to clarify the relationship between customary international law on the one hand and treaties and general principles of law on the other. State practice may take diverse forms, as it includes both physical actions, and policy statements of the state. In principle, there should be no pre-determined hierarchy among them. Any practice, as long as it is widespread and consistent in nature, can be seen as a practice that can serve as an evidence of the customary international law. As for whether inaction can be seen as an evidence of the customary international law, we believe it should be judged on a case by case basis. For example, once inaction constitutes acquiescence

to a right or obligation, it can be seen as a practice. We believe that the ILC should draft a guidebook that contains uniform and clear-cut principles to guide practitioners of international law in identifying and applying customary international law.

On the obligation to "extradite or prosecute", the ILC adopted the final report and concluded this topic. We appreciate the hard work of the working group on this topic. The Chinese side believes it necessary to discuss the obligation to "extradite or prosecute" regarding serious international crimes such as genocide, crimes against humanity and war crimes. The ILC research shows that the obligation to extradite or prosecute" is still mainly a treaty obligation, and that whether it can be seen as a rule of customary international law is still uncertain. We agree with this conclusion. We will exercise judicial sovereignty, fight international crimes and engage in international cooperation under the guidance of the relevant principles.

Thank you.

Vice President: Thank you, Sir. If there are no comments from Member States I consider this session closed.

The session was thereafter adjourned.