AALCO/NOTES&COMMENTS/UNGA/67/2012
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ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION

NOTES AND COMMENTS ON SELECTED ITEMS BEFORE THE SIXTY-SEVENTH SESSION OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS

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1. MATTERS RELATING TO THE WORK OF THE INTERNATIONAL LAW COMMISSION (ILC)

I. BACKGROUND

1. One of the statutory functions assigned to the Asian-African Legal Consultative Organization (AALCO), since its foundation in 1956, was the examination of questions that were under consideration by the International Law Commission (ILC) and to forward the views of the Organization to the ILC and to consider the reports of the Commission and to make recommendations thereon, wherever necessary, to the Member States as provided under Article 1 (d) of the Statutes of AALCO.[1]

2. The ILC, which was set up in 1948 by the UN General Assembly for the purpose of promoting the progressive development and codification of international law, had a large number of topics included in its work programme embracing a variety of issues. It was considered important to place before that body the Asian-African view point so that such views could be taken into account in the course of deliberations of the Commission which would ultimately lead to the codification and progressive development of international law.

3. It is one of the basic functions of the AALCO to co-ordinate the view point of the Asian and African States on important issues of international law. The recommendations of the AALCO are, therefore, treated with considerable respect in the legal councils of the world in the matter of progressive development and codification of international law. It cannot be doubted that recommendations of a Group of nations, expressed through a regional forum, would inspire respect in international legal rules.

4. Fulfillment of the mandate set forth in the Statue has enabled the AALCO to forge a close relationship between the two organizations. It has also become customary for AALCO and the ILC to be represented during each other's sessions.

5. It may be recalled that the AALCO had in its fifty-six years of work has examined the questions that were under consideration of the ILC. To further, consolidate the AALCO's work programnme on that matter, and to ensure that there was optimal utilization of the limited resources and time available a thematic debate entitled "Making AALCO's Participation in the Work of International Law Commission More Effective and Meaningful" took place at the Forty-Ninth Annual Session of AALCO, held in Dar es Salaam, United Republic of Tanzania. A facilitative background paper assisted the Member States in their deliberations.[2]

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[1] Revised and Adopted at the Forty-Third Annual Session held in Bali, Indonesia in 2004.

[2] AALCO, "Making AALCO's Participation in the work of International Law Commission more Effective and more Meaningful", (Forty-Ninth Annual Session, Dar es Salaam, Tanzania), available on AALCO's website: http://www.aalco.int. The Background Paper demonstrated firstly, the progress of work in AALCO while examining the question that were under the consideration of the ILC; secondly, highlighted the interest of Member States as to the topics being considered by the ILC; thirdly, consolidated the suggestions and observations made by the AALCO Member States concerning the methodology of examination by the AALCO on ILC related topics, since the first Annual Session in 1957; and fourthly, compiled the list of Members and Special Rapporteurs from the Afro-Asian region in the International Law Commission.

6. These Notes and Comments contains firstly,

(i) Verbatim Record of the Special Half-Day Meeting on "Selected Items on the Agenda of the International Law Commission" deliberated during the Fifty-First Annual Session of AALCO, held in Abuja, Federal Republic of Nigeria on 20th June 2012; and

(ii) Report on the Matters Relating to the work of the International Law Commission at its Sixty-Fourth Session.

The statement delivered by Prof. Dr. Rahmat Mohamad, Secretary-General, AALCO to the Sixty-Fourth Session of the Commission on 25 July 2012 is also annexed.

II. VERBATIM RECORD OF THE SPECIAL HALF-DAY MEETING ON "SELECTED ITEMS ON THE AGENDA OF THE INTERNATIONAL LAW COMMISSION" DELIBERATED DURING THE FIFTY-FIRST ANNUAL SESSION OF AALCO, HELD IN ABUJA, FEDERAL REPUBLIC OF NIGERIA (20th JUNE 2012)

Background

1. The Fifty-First Annual Session of the Asian-African Legal Consultative Organization (AALCO) was held in Abuja, Federal Republic of Nigeria from 18th to 22nd July, 2012. The Twenty-Six Member States of the Asian-African Legal Consultative Organization (the AALCO) which participated in the Fifty-First Annual Session (hereinafter "the Session") included: Arab Republic of Egypt, People's Republic of China, Ghana, India, Republic of Indonesia, Republic of Iraq, Islamic Republic of Iran, Japan, Republic of Kenya, Democratic People's Republic of Korea, Republic of Korea, State of Kuwait, Malaysia, Myanmar, Nepal, Nigeria, Pakistan, Palestine, Kingdom of Saudi Arabia, Republic of South Africa, Democratic Socialist Republic of Sri Lanka, Syria, United Republic of Tanzania, Thailand, Uganda and Republic of Yemen.

2. Representatives from the following non-Member States, namely, Morocco and Russian Federation were admitted to participate as Observers. Similarly, Representatives of the following International Organizations viz., International Committee of the Red Cross (ICRC), International Tribunal for the Law of the Sea (ITLOS), and United Nations Office for Drugs and Crime (UNODC) also took part in the Session as Observers.

3. H.E. Mohammed Bello Adoke SAN, Attorney General of the Federation and the Minister of Justice of the Federal Republic of Nigeria inaugurated the Session. Mr. Adoke was unanimously elected as the President of the Fifty-First Annual Session of AALCO, and Mr. U Thiha Han, Director, Ministry of Foreign Affairs of the Union of Myanmar was elected as Mr. Vice-President of the Fifty-First Annual Session. The deliberations on the Special Half-Day Meeting on "Selected items on the Agenda of the International Law Commission" took place on 20th June, 2012, with Mr. Vice-President of the Session in the Chair. The Verbatim Records of the deliberations on that agenda item reads as follows.

His Excellency Mr. U Thiha Han, Vice-President of the Fifty-First Annual Session of AALCO in the Chair.

4. Mr. Vice-President: I now invite the Secretary-General to present his introductory remarks for this Special Half-day Meeting on report on Selected Items on the Agenda of the International Law Commission.

5. Prof. Dr. Rahmat Mohamad, Secretary-General of AALCO: Dr. A. Rohan Perera, Former Member of ILC, Democratic Socialist Republic of Sri Lanka; Prof. Dr. Momtaz, Former Member of ILC from Islamic Republic of Iran;

6. Excellencies, Distinguished Delegates, Ladies and Gentlemen; May I invite you all to the Special Half-Day Meeting on the topic "Selected Items on the Agenda of the International Law

Commission". It may be recalled that the founders of the AALCO thought it is imperative for the Organization to have close cooperation with the ILC with a view to providing the work of the ILC inputs from the Asian-African States. With this objective in mind, Article 1 (d) of the Statutes of AALCO mandates AALCO to consider the matters relating to the work of the ILC at its annual sessions. It has now become customary that a Representative of ILC addresses the Annual Session of AALCO, on the progress of work in the ILC, while the Secretary-General of AALCO addresses the ILC Session reporting on the common minimum consensus that emerges from the deliberations on the ILC topics at an Annual Session. Henceforth, I had the opportunity to briefly summarize the deliberations that took place at Fiftieth Annual Session of AALCO, held in Colombo, Sri Lanka last year during the Sixty-third session of the Commission. The Secretariat had also prepared the verbatim record of the deliberations on the agenda items of ILC that took place during the Fiftieth Annual Session of AALCO and the same was circulated at the Sixty-third session of the Commission.

7. AALCO organizes the AALCO-ILC Joint Meetings along the sidelines of the Legal Adviser's Meeting of AALCO Member States in New York in October/November. On 31 October 2011, AALCO-ILC Meeting was held. The Meeting was chaired by Mr. Maurice Kamto, the then Chairman of the ILC. The three topics that were deliberated during the meeting were: firstly, Expulsion of Aliens; secondly, Responsibility of International Organizations; and thirdly, Protection of Persons in the Event of Disasters. These topics were presented by the respective Special Rapporteurs and Member of the ILC – Mr. Maurice Kamto, Mr. Giorgio Gaja, and Mr. Eduardo Valencia-Ospina. The discussants for the meeting were Mr. Mahmoud D. Hmoud and Dr. A. Rohan Perera, Members of the ILC. I would like to acknowledge and extend my gratitude to Dr. Roy S. Lee, Permanent Observer of the AALCO in New York, for efficiently coordinating and convening the AALCO-ILC Joint Meeting and for his contribution towards substantial matters of the meeting. He is also a member of the AALCO-Eminent Persons Group (EPG) wherein he has made few very concrete suggestions to improvise the Organizational and Substantial matters of AALCO.

8. Mr. Vice-President, the Fiftieth Annual Session of AALCO mandated that the Annual Sessions of AALCO should devote more time for deliberating on the agenda item relating to the work of ILC. Accordingly, this Half-Day Special Meeting was scheduled during this Session for deliberation on certain pertinent agenda items of the Commission. As I had mentioned earlier, this Special Half-Day Meeting is tilted "Selected Items on the Agenda of the International Law Commission". The distinguished panelist for this meeting is Dr. A. Rohan Perera, former Member of the International Law Commission from Sri Lanka. I thank him for taking time off his busy schedule for briefing us on the agenda items that we would be discussing in a short while. The topics for deliberation at this Half-Day Special Meeting are (i) "Protection of Persons in the Event of Disasters", and (ii) "Immunity of State Officials from Foreign Criminal Jurisdiction".

9. The report prepared by the AALCO Secretariat contained in AALCO/51/ABUJA/2012/SD/S 1, briefly discusses the matters relating the work of ILC at its Sixty-Third Session. The agenda items dealt during the Sixty-Third session of the ILC were: Reservations to treaties, Responsibility of International Organizations, Effects of armed conflicts on treaties, Immunity of State officials from foreign criminal jurisdiction, Expulsion of aliens,

Protection of persons in the event of disasters, The obligation to extradite or prosecute (*aut dedere aut judicare*), Treaties over time, and Most-Favoured-Nation clause.

10. Mr. Vice-President, recently, the first part of the Sixty-Fourth session of the Commission was convened from 7 May to 1 June 2012 in UN European Headquarters in Geneva. The agenda item that was taken up during its first part was "Expulsion of Aliens" by the Special Rapporteur Mr. Maurice Kamto. The Sepcial Rapporteur presented the Eighth Report on the topic which included (i) comments by Member States, (ii) European Union, (iii) specific comments on draft articles, and (iv) specific comments on several methodological issues. The text of the draft articles from 1 to 32 were provisionally adopted at the first reading by the drafting committee at the Sixty-Fourth session.

11. At the Sixty-Third session of the ILC held in 2011 a brief summary of which has been reported by the Secretariat in its Report, the following progress was made.

12. On three important topics, namely, Reservations to Treaties, Responsibility of International Organizations, and Effects of Armed Conflict on Treaties, considerable work has been completed. On "*Reservation to Treaties*", the Commission adopted the Guide to Practice on Reservations to Treaties which comprises an introduction, the text of the guidelines with commentaries thereto, as well as an annex on the reservations dialogue. On the topic "*Responsibility of International Organizations*", the Commission adopted, on second reading, a set of 67 draft articles, together with Commentaries. With regard to the topic "*Effects of Armed Conflicts on Treaties*", the Commission adopted, on second reading, a set of 18 draft articles and an annex (containing an indicative list of treaties the subject matter of which involves an implication that they continue in operation, in whole or in part, during armed conflict), together with commentaries. On these three topics, the substantial progress made was appreciated. Further, in accordance with article 23 of the Statute of ILC, the adopted Draft Articles and Guidelines were recommended to the UN General Assembly to take note of the draft articles in a resolution and to annex them to the resolution. Further to consider, at a later stage, the elaboration of a Convention on the basis of those draft articles.

13. Mr. Vice-President, on the topic "*Immunity of State Officials from Foreign Criminal Jurisdiction*", the Commission considered the second and third reports of the Special Rapporteur. The second report reviewed and presented the substantive issues concerning and implicated by the scope of immunity of a State official from foreign criminal jurisdiction, while the third report addressed the procedural aspects, focusing, in particular on questions concerning the timing of consideration of immunity, its invocation and waiver. The debate revolved around, *inter alia*, issues relating to methodology, possible exceptions to immunity and questions of procedure.

14. The Commission deliberated upon the addendum 2 to the sixth report and the seventh report of the Special Rapporteur on the topic "*Expulsion of Aliens*". Addendum 2 to the sixth report completed the consideration of the expulsion proceedings (including the implementation of the expulsion decision, appeals against the expulsion decision, the determination of the State of destination and the protection of human rights in the transit State) and also considered the legal consequences of expulsion (notably the protection of the property rights and similar interests of aliens subject to expulsion, the question of the existence of a right of return in the

case of unlawful expulsion, and the responsibility of the expelling State as a result of an unlawful expulsion, including the question of diplomatic protection). Following a debate in plenary, the Commission referred seven draft articles on these issues to the Drafting Committee, as well as a draft article on "Expulsion in connection with extradition" as revised by the Special Rapporteur during the sixty-second session held in 2010. The seventh report provided an account of recent developments in relation to the topic and also proposed a restructured summary of the draft articles.

15. Mr. Vice-President, in relation to the topic "*Protection of Persons in the Event of Disasters*", the Commission had before it the fourth report of the Special Rapporteur that dealt with the (i) responsibility of the affected State to seek assistance where its national response capacity is exceeded, (ii) duty of the affected State not to arbitrarily withhold its consent to external assistance, and (iii) right to offer assistance in the international community. Following a debate in plenary, the Commission decided to refer draft articles 10 to 12, as proposed by the Special Rapporteur, to the Drafting Committee.

16. Concerning the topic "*The Obligation to Extradite or Prosecute (aut dedere aut judicare)*", the Commission considered the fourth report of the Special Rapporteur addressing the question of sources of the obligation to extradite or prosecute, focusing on treaties and custom, and concerning which three draft articles were proposed.

17. On the topic "*Treaties Over Time*", the Commission reconstituted the Study Group on Treaties over time, which continued its work on the aspects of the topic relating to subsequent agreements and practice. The Study Group first completed its consideration of the introductory report by its Chairman on the relevant jurisprudence of the International Court of Justice and of arbitral tribunals of *ad hoc* jurisdiction, by examining the section of the report which addressed the question of possible modifications of a treaty by subsequent agreements and practice as well as the relation of subsequent agreements and practice to formal amendment procedures. The Study Group then began its consideration of the second report by its Chairman on the jurisprudence under special regimes relating to subsequent agreements and practice, by focusing on certain conclusions contained therein. In the light of the discussions, the Chairman of the Study Group reformulated the text of nine preliminary conclusions relating to a number of issues such as reliance by adjudicatory bodies on the general rule of treaty interpretation, different approaches to treaty interpretation, and various aspects concerning subsequent agreements and practice as a means of treaty interpretation.

18. Regarding the topic "*The Most-favoured-nation clause*", the Commission reconstituted the Study Group on the Most-Favoured-Nation clause. The Study Group held a wide-ranging discussion, on the basis of the working paper on the Interpretation and Application of MFN Clauses in Investment Agreements and a framework of questions prepared to provide an overview of issues that may need to be considered in the context of the overall work of the Study Group, while also taking into account other developments, including recent arbitral decisions. The Study Group also set out a programme of work for the future.

19. Mr. Vice-President, pursuant to the mandate received by the Fiftieth Annual Session of AALCO held in Colombo, Sri Lanka, in 2011, an Inter-Sessional Meeting of Legal Experts to

Discuss Matters relating to the ILC was held in April this year at AALCO Headquarters, New Delhi. The report of the Inter-Sessional Meeting is annexed to the Secretariat report on this agenda item from page no. 62 to 106. The Lead Discussants for the Inter-Sessional Meeting were Dr. A. Rohan Perera, who is with us today, and Prof. Shinya Murase, Member of the ILC from Japan. It was an honour for me to deliver welcome remarks on behalf of AALCO and to give a detailed presentation on "Appraisal of the Present and Future work of the ILC".

20. Dr. A. Rohan Perera, was the Lead Discussant on two important Agenda Items of the ILC; (i) Protection of Persons in the Event of Disasters; and (ii) Immunity of State Officials from Foreign Criminal Jurisdiction. The detailed presentation on these two Agenda Items of the ILC was followed by question and answer session and deliberations. Prof. Shinya Murase, Member of the ILC from Japan made presentations on Proposed New Topics of the ILC which were on (i) Protection of the Atmosphere, (ii) The Fair and Equitable Treatment Standard in International Investment Law; and (iii) Other New Topics on the Long-Term programme of work of the ILC. Exchange of views and observations of Member States followed after the presentation. Dr. Xu Jie the Deputy Secretary-General of AALCO proposed a vote of thanks on behalf of the AALCO Secretariat for legal experts who attended the Inter-Sessional Meeting. 17 Member States of AALCO participated at the Meeting. I take this opportunity to thank Amb. Dr. Kriangsak Kittichaisaree, Member of ILC from Thailand, for his valuable comments on the topics discussed during the Inter-Sessional Meeting.

21. Mr. Vice-President, few major suggestions that evolved out of the Legal Experts Meeting with regard to the proposed new topics were to focus on whether there was a need for the Commission to work on those proposed topics. Also, if there were any topic which a Member State considers as contemporary and relevant, it should put forward during this meeting and the Secretariat would forward such comments to the Commission at its second part of the Sixty-fourth session which will begin next month.

22. I look forward for a very comprehensive debates and suggestions on the topics for this meeting and on the proposed new topics. Thank you.

23. Mr. Vice-President: Thank you. Now I request Dr. Rohan Perera, Former Member of the ILC to present his views on the topics.

24. Dr. A. Rohan Perera, Former Member of the ILC from Sri Lanka: Thank you Mr. Vice-President. The two topics: (i) Protection of Persons in the Event of Disasters, and (ii) Immunity of State Officials from Foreign Criminal Jurisdiction which have entered into such a decisive phase of consideration of these topics before the International Law Commission. They also figured prominently at the joint AALCO-ILC Meeting both in New York and in New Delhi as referred to by the Secretary-General. The responses from Member States of Asia and Africa to questions seeking comments from Member States which is referred to in the ILC Report would be of particular benefits because the State practice in respect of these two areas plays a critical role in future fashioning and formulation of draft articles.

25. So my first presentation is on the topic "Protection of Persons in the Event of Disasters". From the time this topic was introduced, the Special Rapporteur, Mr. Eduardo Valencia-Ospina

placed emphasis on certain tensions surrounding the core principles underlying the topic. I quote, "the tensions underlying the link between protection and the principle of respect for territorial sovereignty and the non-interference in the internal affairs of the affected State." The question of protection of affected persons within the State, victims of natural disasters on the one hand and the fundamental principle of respect for sovereignty and territorial integrity of States which fall within both Customary International Law and Art.2 (7) of the UN Charter.

26. The "poles of tension" as referred to by the Special Rapporteur between sovereignty and the notion of protection, became manifest and sharply underlined the debate, on the cluster of three Draft Articles 10, 11 and 12, both within the deliberations of the Commission and in the Sixth Committee, during the annual consideration of the ILC Report at the United Nations General Assembly Session last year.

27. Draft Article 10 of Protection of Persons in the Event of Disasters, addresses the particular situation in which a disaster exceeds a State's national response capacity. The Article stipulates that in such circumstances, the affected State has the duty to seek assistance, from among others, States, the United Nations, other competent inter-governmental organizations, and relevant non-governmental organizations. The Special Rapporteur explained that the Draft Article "affirms the central position of obligations owed by States towards persons within their borders". If a State determines that the disaster situation exceeds the national capacity, they have a duty to seek that assistance, which is the pith and substance of Draft Article 10.

28. The Special Rapporteur pointed out that the duty expounded in Draft Article 10, is a specification of the content of Draft Article 5 and 9. It was also recalled that Draft Article 9 (1) stipulates that an affected State by virtue of its sovereignty has the duty to ensure the protection of persons and the provision of disaster relief and assistance on its territory. Draft Article 5 affirms that the duty to cooperate is incumbent upon not only potentially assisting States, but also the affected State, where such cooperation is appropriate.

29. Accordingly, the Special Rapporteur considered that such cooperation is both appropriate and required to the extent that an affected State's national capacity is exceeded. In these circumstances it was pointed out that seeking assistance is additionally an element of the fulfillment of an affected State's primary responsibility under International Human Rights Instruments and Customary International law.

30. The cluster of Articles 10-12, given the underlying tensions between the principles of State sovereignty and protection, was the subject of sharp divergence of views among the members of the Commission. Some members were opposed to the idea that affected States are under or should be placed under a legal duty to seek external assistance in cases of disasters. Draft Article 11 creates a "qualified consent regime" in respect of disaster relief operations. Paragraph 1 reflects the core principle that implementation of international relief assistance is contingent upon the consent of the affected State. Paragraph II however stipulates that consent to external assistance shall not be withheld arbitrarily and paragraph III places a duty on the affected State to make its decision regarding an offer of assistance known, wherever possible. The need to develop criteria to determine the arbitrariness or otherwise of a decision to refuse consent was also discussed and several principles were adduced, for reflection as guidelines in

the Commentary. One, the Commission considers that withholding consent to external assistance is not arbitrary where a State is capable of providing, and willing to provide, an adequate and effective response to a disaster on the basis of its own resources. Two, withholding consent to assistance from one external source is not arbitrary if an affected State has accepted appropriate and sufficient assistance from elsewhere. Three, withholding of consent is not arbitrary if the relevant offer is not extended in accordance with the present draft articles. Humanitarian assistance must take place in accordance with principles of humanity, neutrality and impartiality, and on the basis of non-discrimination. Conversely, where an offer of assistance is made in accordance with the draft articles and no alternate sources of assistance are available; there would be a strong inference that a decision to withhold consent would be arbitrary.

31. Now, on the right to offer assistance on the part of other States of the international community was also the subject of sharp debate and the Special Rapporteur stated that it served to acknowledge the legitimate interest of the international community to protect persons in the event of a disaster. It was also recalled that the provision of assistance was subject to the consent of the affected State. Accordingly, the offer of assistance could not, in principle, be subject to the acceptance by the affected State of conditions that represented a limitation on its sovereignty. It was also stated that offers of assistance from the international community were typically extended as part of international cooperation as opposed to an assertion of rights. It was recalled that, in many cases, the mere expression of solidarity was equally important as offers of assistance. It was suggested that the right of the international community to offer assistance could be combined with an encouragement by the Commission to actually make such offers of assistance on the basis of the principles of cooperation and international solidarity.

32. The Special Rapporteur explained that the Draft Article 12 sought to reflect the general proposition that offers of assistance should not be viewed as interference in the internal affairs of the affected State, subject to the condition that the assistance offered did not affect the sovereignty of the affected State as well as its primary role in the direction, control, coordination and supervision of such relief and assistance.

33. However, some members were strongly of the view that the provision avoids a reference to ‘legal rights’ since such offers of assistance from the international community were typically extended as part of international co-operation and solidarity as opposed to the assertion of ‘rights’. It was recalled in this context that in many instances, the mere expression of solidarity was equally important as offers of assistance. In this regard, reference was made to Article 2 (7) of the UN Charter, which in the view of these members limited the ability of the international community to offer assistance.

34. The middle ground which seemed to surface from these range of views was that the ‘right’ of an affected State to seek international assistance was complimented by the duty on third States and Organization to ‘consider’ such requests, and not necessarily a duty to accede to them. It was further emphasized that, the right to the international community to offer assistance could be combined with an encouragement to the international community to make such offers of assistance on the basis of the Principle of International Cooperation and Solidarity.

35. The Drafting Committee was unable to conclude consideration of Draft Article 12 due to lack of time. The discussion on these vital issues pertaining to the balancing of sovereignty and protection will therefore resume at the forthcoming session. It is important, therefore, that the Member States of Asia and Africa make their views known on them in a timely manner, in order to ensure an acceptable outcome.

36. The debate in the Sixth Committee on the cluster of Draft Articles 10-12, during the consideration of the ILC Report, reflected very much the range of diverse views, which characterized the discussion of these Articles in the Commission. It is also noteworthy, that on certain aspects there was a broad convergence of views across the geographical and political divide.

37. Thus, for instance, the United Kingdom, in expressing their position on the overall approach to the Draft Articles, emphasized;

> "The codification or progressive development of comprehensive and detailed rules is likely to be unsuitable for the topic and… the development of non-binding guidelines and a framework of principles for States and others engaged in disaster relief is more likely to be of practical value and to enjoy widespread support and acceptance…"

38. A further dimension of the practical aspects of disaster relief assistance and the problems posed by what is referred to as "inappropriate assistance" was highlighted in the IFRC intervention during the Sixth Committee debate.

39. Mr. Vice-President: Thank you. Now, I suggest Dr. Rohan Perera to continue with the presentation on the next topic, which would be followed by comments by Prof. Momtaz.

40. Dr. A. Rohan Perera, Former Member of the ILC from Sri Lanka: Now we move on to the second topic the all important topic of Immunity of State Officials from Foreign Criminal Jurisdiction, a matter which has engaged the attention of international community in recent times. At the outset let me clarify that here we are speaking about immunity of state officials from foreign criminal jurisdiction and not international criminal jurisdiction. The question of Domestic Courts or National Courts asserting jurisdiction in respect of foreign Heads of States. And we are not talking about the jurisdiction of the international criminal court or international criminal jurisdiction. The debate of the International Law Commission on the topic of immunity of state officials from foreign criminal jurisdiction is centered around three principal issues. 1) The general orientation of the topic, 2) The scope of immunity and 3) the question whether or not there were exceptions to immunity with regard to grave crimes committed under international law. Let me say that the consideration of this topic on the part of ILC for the past few years has been of a preliminary nature and no draft articles have yet been drafted, given the fundamental issues that have been involved in terms of both the legal and political sensitivities that surround this topic. It was decided at the end of the last Session that the current Session when it reconvenes in July a Working Group would be constituted first to examine and decide on the general orientation of the topic before getting into draft articles. Secondly, the Special Rapporteur on this topic Mr. Roman A. Kolodkin is no longer a member of the International Law Commission. He has done valuable work by way of preparing Three Reports on this topic.

41. So first of all we come to the general orientation of the topic. In his introduction to the Second Report, the Special Rapporteur emphasized on the importance of looking at the actual state of affairs as the starting point for the Commission's work on the topic immunity of state officials and he explained that it was from the perspective of Lex Lata or the law as it exists presently that he had proceeded to prepare his Reports. From this perspective, the Special Rapporteur was of the view that immunity of state official from foreign criminal jurisdiction was the established norm and any exceptions to immunity would have to be proven or established. That is the starting premise of the Special Rapporteur. This position of the Special Rapporteur on the general orientation of the topic led to an intense discussion as to the perspective from which the Commission should approach the topic i.e., whether it formulates draft Articles from the Lex Lata perspective. It was pointed out that the Commission should proceed with caution in order to achieve an acceptable balance between the need to establish stability in international relations and the need to avoid impunity for grave crimes under international law. In this regard, it was pointed out that even if one chose to adopt the approach of the Special Rapporteur who had analyzed the issue from a strict *lex lata* perspective, the interpretation given to the relevant state practice and judicial decisions relating to this topic could plausibly lead one to different conclusions as to the existing law. It was also felt that the end product of this exercise should have practical utility for the international community of States. The discussions on this topic led to the conclusion that the Commission should establish a Working Group to discuss this issue of orientation and then to proceed with this topic.

42. The Sixth Committee debates on this issue of general orientation of the topic several Delegates underlined the need to adopt a cautious approach and in this regard for instance I can quote the Representative of the United Kingdom who had stated that: "it is essential that the Commission keeps clearly in mind the distinction between its task of codifying the *lex lata* and making proposals for the progressive development of *lex ferenda*. Given the very practical importance of the Commission's work on this topic we urge the Commission to ensure that this distinction is made clear throughout their work and that any proposals they make for the *lex ferenda* by way of draft articles for a future Convention are thought through with rigour and vigour that has informed the work to date". Several other delegates also argued to take a cautious approach on this issue, particularly when you are getting into the progressive development given the sensitivities involved.

43. Thus the Sixth Committee debates reflects an approach which in principle endorses Special Rapporteur's position of treating the *lex lata* perspective as a starting point. According to another view the assertion that immunity constituted the norm to which no exception existed was thus unsustainable. In this context it was pointed out that the question of how to situate the rule on immunity in the overall legal context was central to the debate. This argument has strongly emphasized the superior interest of the international community as a whole in relation to certain grave crimes under international law. Therefore, instead of addressing the issue, in terms of rules and exceptions with immunity being the rule, it seemed according to them more accurate to examine the issue from the perspective of responsibility of the states and its representatives in those situations that "shocked the conscience of mankind" and to consider whether any exceptions thereto in the form of immunity may exist. The Special Rapporteur therefore emphasised that to juxtapose immunity and combating impunity was incorrect. Combating

impunity had wider context involving variety of interventions in international law including the establishment of international criminal jurisdiction by way of international courts and so on.

44. The Special Rapporteur emphasized that immunity from criminal jurisdiction and immunity from criminal responsibility were separate concepts by way of decisions of International Courts and so on. Immunity and foreign criminal jurisdiction was the issue to be tackled. The question of State Responsibility for wrongful conduct are provided with remedies in International Law by way of international tribunals, diplomatic procedures. Here we are dealing with the jurisdiction of Domestic courts. In response to the contention of the hierarchy of norms whereby jus cogens prevailed over immunities the Special Rapporteur contended that jus cogens rules which prohibit or criminalize certain acts are substantive in nature and cannot overturn the procedural rule such as one concerning immunity. The Special Rapporteur's point that jus cogens rule belongs to the sphere of substantive rules and immunity the procedural rules. And therefore one can argue that they belong to two different characters, one substantive and the other procedural. You cannot say that one prevails over the other and this has been recently upheld by the International Court of Justice in its case concerning Germany Vs Italy. The ICJ held that there cannot be a conflict between rules which are substantive in nature and rules on immunity which are procedural in nature. The Special Rapporteur was also at pains to point out that the question of International Criminal Jurisdiction was entirely one that was to be separated and needed to be distinguished from the concept of foreign criminal jurisdiction. In his view the Rome statute of the ICC was unlikely to be relevant in respect of foreign criminal jurisdiction. This is something very important. We all know that the Rome Statute expressly precludes immunity being invoked even in respect of Heads of States. So once states voluntarily accept that obligation, and waive immunity before an international court or tribunal it has no application where it concerns the jurisdiction of domestic courts over foreign Heads of States. The Special Rapporteur was at pains to point out that we are dealing with the question of state responsibility. State Responsibility for wrongful conduct has other remedies, the diplomatic procedures, the international procedures, the international tribunals. What is emphasized here is that one state is enjoying immunity from the jurisdiction of another state, the domestic court of other states. This was an issue pointed out by the Special Rapporteur. With this I come to the end of my presentation and I thank you Vice-President.

45. Mr. Vice-President: Thank you Dr. Rohan Perera. Now I invite Prof. Djamchid Momtaz, former member of the ILC from Islamic Republic of Iran to make his comments on those two topics.

46. Prof. Djamchid Momtaz, Former Member of the ILC from Islamic Republic of Iran: I want to thank the Secretary-General for asking me to participate in this Special Meeting at the last moment and that is the reason why I have no written prepared text before me and if you will allow me I will act as Discussant and I will react to the very important comments made by my good friend, Dr. Rohan Perera, former Member of the International Law Commission on some topics discussed in the ILC. As this year we do not have sitting ILC Member and we don't have the exact picture regarding the first part of the Sixty-fourth session of the ILC this year. I agree with my good friend Perera that the question of codification and progressive development of international law is very important subject for the Members of our Organization and I want to draw the particular attention of the distinguished delegates that in AALCO's Statutes there is a

clear reference to the role of AALCO in codification and progressive development of international law and I think we have to do our best to respond to the queries of the ILC to answer to the questions raised by the Special Rapporteur of the Commission and then the Special Rapporteur would incorporate them in his works.

47. I want to give an example of participation of our Members in this process. One of the topic dealt by the International Law Commission is the topic "obligation to extradite or prosecute (*aut dedere aut judicare*)" and one very important question raised by the Special Rapporteur on this subject by Mr. Galicki was whether the practice of State regarding the question of obligation to extradite or prosecute is based on a treaty obligation or an obligation based on customary international law. It is a very important and difficult question. We cannot say without any doubt that in this case the State's have an obligation beyond the obligation based on treaty obligation. Mr. Galicki was working on that and I am sure that the person who is in charge of this subject would have exactly the same question.

48. If you allow me Mr. Vice-President, I am going to have some comments on the two very important topics raised by my good friend, Dr. Perera. We start with the topic Protection of Persons in the Event of Disasters. Of course, the question regarding the real nature of sovereignty of States in the territory which has both rights and obligations and it is of no doubt that the States has obligation to seek assistance in case of natural disaster. But the question that I want to raise and has not been raised by Prof. Perera, it is not the question of right to offer assistance, but do the States have the duty to offer assistance. This question has not been considered by the Commission too especially the right of States to offer assistance. I would like to raise this question to Dr. Perera that the scope of the obligation on the State in whose territory the disaster has taken place. In that regard, the scope of obligation is restricted to the relation of the State's (where the disaster has occurred) to other States. Such an obligation was, however, limited only to the subjects of international law, excluding non-governmental organizations that are not subject of international law.

49. Regarding the second important topic on the agenda of the International Law Commission that is, "Immunity of State Officials from Foreign Criminal Jurisdiction", I think we have to make a very important distinction and avoid any confusion between this subject and subject of accountability of state officials. I want to stress that the question of accountability of state officials has been dealt with in some very important text and the most important one is the Statute of International Criminal Court and of course everybody knows that Article 27 of this Statute does not give immunity to any Head of State, Ministry of Foreign Affairs, and any other high-ranking officials of the State.

50. I agree with the question of distinction made between lex *lata* and lex *ferenda.* I remember that the former Special Rapporteur on this subject had expressed a note of caution that we have to focus on codifying the existing customary practice of States in international law as it exists and to invite the attention to the fact that practice of States on these matter. I want to raise a last question regarding the decision of the International Court of Justice (ICJ) on the dispute between Germany and Italy. Dr. Perera referred to this case and I have a question to him and I hope that he is in a position to answer that. I want to know if the ICJ, in insisting in this decision on immunity of States before national jurisdiction or tribunals referred only to the acts

committed by armed forces of a state outside its territorial jurisdiction or the decision of the court of all the *Acta jure imperii* of States and does not make distinction between acts committed by the armed forces that is the better example I can say of *Acta jure imperii*. That decision of the ICJ insisted once more on the jurisdictional immunity of States before national tribunals. I think I will stop there and once more I want members of this august assembly to respond to the issues raised by the International Law Commission through the questionnaires of the Special Rapporteurs. Thank you very much Mr. Vice-President.

51. Mr. Vice-President: Thank you very much Prof. Momtaz. I think that these two subjects discussed that were certainly need extensive debate for the reasons that Dr. Rohan Perera has raised. I will now call upon People's Republic of China for their statement.

52. The **Delegate of People's Republic of China:** Mr. Vice-President and Distinguished Delegates, the Chinese delegation would like to thank the AALCO for organizing this special meeting on selected items of the International Law Commission. We would also like to thank the Speakers for their extensive comments on the important topics on the agenda of the Commission.

53. Mr. Vice-President, the International Law Commission was set up to codify and gradually develop international law. The Chinese delegation believes that while pursuing academic quality to fulfill its aforementioned mandate, the Commission should also give due attention to whether its outcome is practical and what is the expectation of the international community. It is well recognized that codification and development of international law shall accord with the interest, of the international community, including Asian and African countries. At present, half of the members of the Commission are from Asian and African countries, and we believe that their participation will help reflect the views of Asian and African countries in the codification and development of international law.

54. Mr. Vice-President, with regard to the ongoing work of the Commission, the Chinese delegation would like to make two comments.

55. Firstly, on expulsion of aliens. China is of the view that expulsion of aliens, as a sovereign act of state, shall comply with the requirements of applicable treaties and domestic law. In this sense, it is desirable for the Commission to focus on codifying existing rules of international law, and in doing so, the Commission should give full consideration to the diverse domestic law and practice of various states, so as to leave ample room for country-specific policies and approaches.

56. Secondly, on protection of persons in the event of disasters. As Chinese representative commented during last 6th Committee Session of the UN General Assembly, the Chinese delegation made comments that some of the draft articles failed to strike a balance between the interests of the affected state and those of the international community. It is our view that in the relationship between the affected state and assisting states, we shall give more weight to international cooperation, than their respective rights and duties. To identify as a duty of the affected state to seek external assistance will bring in a lot of problems. To begin with, there is no such a duty or obligation under customary international law or international treaties. And even if such a duty existed, there is no clear picture of its content and consequence. We have

noted that many other states have shared their concerns on this point. We hope that the Commission will address the concerns and deal with this issue properly.

57. Mr. Vice-President, China always supports close cooperation between the AALCO and the Commission. In our view, such cooperation will not only benefit the development of the two organizations, but also facilitate the communication between Member States of the AALCO and the Commission. We hope that the AALCO continues to provide us such opportunity in the future.

58. Mr. Vice-President, this year marks the beginning of a new five-year term of the Commission. The Chinese delegation would like to take this opportunity to wish the Commission greater success in its new term. Thank you, Mr. President.

59. Mr. Vice-President: Thank you very much. I will now call upon the delegate from Indonesia.

60. The **Delegate of Indonesia:** Mr. Vice-President and *Distinguished Delegates,* our delegation would like to thank the eminent speakers for their presentations. First, please allow me to take this opportunity to thank all the AALCO Members for the supports on the re-election of Mr. Nugroho Wisnumurti in November 2011, as the ILC Member for the term of 2012-2016. Indonesia would like to reiterate its commitment to cooperate with ILC and AALCO in our efforts to overcome various legal issues of common interests.

61. Mr. Vice-President, *Distinguished Delegates, w*ith respect to the substantive aspects including the issue relating to the scope of immunity ratione personae which was the subject of Immunity of State Officials from Foreign Criminal Jurisdiction debate in the 63rd Session of ILC, Indonesia delegation would like to reiterate the views that personal immunity should be limited to the 'basic threesome' or Head of State, Head of Government and Minister of Foreign Affairs. Our delegation disagrees to the extension of the "threesome" to include other senior officials.

62. Our delegation is also of the view that only State can legally invoke the immunity of its officials, whether it relates to the 'basic threesome' who has personal immunity (*ratione personae*) or other officials who have functional immunity (*ratione materie*). Thus, it is only when immunity being invoked or declared by the official's State that invoking immunity, has legal consequences.

63. On the topic of Expulsion of Aliens, Our delegation is of the view that it is important to recognize the need to achieve a balance between the right of the State where an alien resides to expel the alien, and the human rights and dignity of the alien subjected to forceful implementation of an expulsion decision, including during his or her travel to the State of destination in accordance with the law and international law.

64. It is necessary to include consequential provisions regarding the protection of the human rights of the person subject to expulsion, as have been proposed by the Special Rapporteur in the 63rd Session of ILC. Such provisions provide that the rules that apply in the expelling State for

protection of the human rights of aliens subject to expulsion, shall also apply mutatis mutandis in the transit State.

65. Come to the topic of the Protection of Persons in the Event of Disasters, regarding to the issue of the responsibility of the affected State to seek assistance where its national response capacity is exceeded, our delegation is of the view that humanitarian assistance should be undertaken solely with the consent of the affected country, and with the outmost respect for the core principles such as sovereignty, territorial integrity, national unity and non-intervention in the domestic affairs of States. The need for the appropriate balance between those principles and duty of protection were not accurately reflected in the draft articles of the topic.

66. Imposing such responsibility on the affected State, will undermine the principles of sovereignty, non-intervention and the requirement of consent of the affected State, and thus the requirement of balance between those core principles and the responsibility of the affected State to protect persons affected by the disaster is not met. It will also be inconsistent with the right of the affected State not to give consent to external assistance. We should not undermine the actual State Practice in dealing with major disasters in different parts of the world, where the States affected by disasters had always shown their promptness to team up with the international community.

67. Furthermore, imposing such obligation even at the stage where the disaster exceeds its national response capacities, will undermine its legitimate right to make its own judgment on whether or not it needs external assistance, and an obligation will also expose the affected State to possible external pressure that could be driven by motives unrelated to humanitarian consideration. Our delegation agrees that it is essential to include definite measures on to what extend that 'exceed its national response capacities' shall apply.

68. As on the 'right to offer assistance', our delegation is of the view that subject to sovereignty and the consent of the affected State, any non-affected State could provide assistance to that affected State at any time that it considers as appropriate. I thank you.

69. Mr. Vice-President: Thank you very much. May I now call upon delegate from Japan.

70. The **Delegate of Japan:** Mr. Vice-President, my delegation is grateful to a concise but comprehensive presentation of Dr. A. Rohan Perera and Prof. Djamchid Momtaz, former Members of the International Law Commission, on the two agenda items namely Protection of Persons in the Event of Disasters and Immunity of State Officials from Foreign Criminal Jurisdiction. I would like to make comments on the current and future work of the ILC and on the role of the AALCO vis-à-vis the ILC.

71. First of all, Japan would like to welcome new members of the ILC from the Asian and African regions who were elected in the elections last November. Two new members from Asia (from Thailand and the Republic of Korea) and four new members from Africa (from Algeria, Tanzania, Libya and South Africa) were elected to the ILC. Japan wishes that those new members will make valuable inputs into the work of the ILC and collaborate constructively with other members of the ILC from Asia and Africa and other regions. At the same time, it should be

borne in mind that, once they are elected, all the members of the ILC are expected to attend the Commission throughout its session from April or May to June and from July to August every year and to contribute to the work of the Commission. This is essential for more various views, especially from the Asian and African regions, to be reflected in the draft articles, guidelines or studies of each topic before the ILC.

72. Codification of customary international law is an important function of the United Nations. It is often difficult to ascertain precisely what customary rules are and there also exist differences of interpretation of such rules among States. Furthermore there exist many lacunae in customary international law. In order to remove such ambiguity and to establish common understanding of customary international law, the UN has undertaken codification so far on many subjects on the basis of the works done by the UN International Law Commission. AALCO has made important contributions to the works by the ILC by providing valuable views of its Member States. The codification works by the ILC must be followed up by the UN General Assembly in order to give effect to the ILC's works. And for that, States must take initiative. In this context, there are two subjects which Japan plans to take up at the forthcoming session of the UN General Assembly. One is the Draft Articles on the Law of Transboundary Aquifers and another is the UN Convention on Jurisdictional Immunities of States and Their Property. First, I would like to refer to the Draft Articles on the Law of Transboundary Aquifers.

73. Fresh water is an indispensable life supporting resource for humankind and there is no alternative resource to replace it. 97% of readily accessible fresh water is located underground in aquifers. The groundwater is now the most extracted single raw material with the result of critical over-exploitation and pollution. In order to provide a legal framework for the proper management of groundwater resources, the ILC formulated a set of 19 draft articles on the Law of Transbounary Aquifers in 2008, which were based on the texts drafted by Ambassador Chusei Yamada, Special Rapporteur on this topic. Following the adoption of the draft articles by the ILC, the UN General Assembly received the draft articles favourably and took note of the draft articles in its Resolution 63/124, which was adopted by consensus. Last year, the UN General Assembly adopted Resolution 66/104, which encouraged the International Hydrological Programme of the UNESCO to offer further scientific and technical assistance to the States concerned. From 4 to 7 June, the International Hydrological Programme of the UNESCO held the 20th session of the IHP Intergovernmental Council in Paris and adopted a resolution which requested the UNESCO-IHP to support its Member States in promoting studies in regard to transboundary aquifers in the framework of the existing IHP's initiative and to continue studies on transboundary aquifers and assist interested Member States in their studies of transboundary aquifers resources management including by promoting capacity building and awareness raising activities on existing instruments and discussions. This resolution was supported by Pakistan, Malaysia, Kuwait, Sudan, Kenya as well as Japan.

74. On the other hand, Resolution 66/104 of the UN General Assembly further encouraged the State concerned to make appropriate bilateral or regional arrangements for the proper management of their transboundary aquifers, taking into account the provisions of the draft articles and decided to examine the question of the form that might be given to them in its sixty-eighth session in 2013. One possible form which could be given to the draft articles is to adopt them as a universal treaty at a diplomatic conference. Another possible form is to adopt the draft

articles as a declaration, like the UN General Assembly Resolution of 1962 (XVIII), which was titled "Declaration of Legal Principles Governing the activities of States in the Exploration and Use of Outer Space". Towards the session of the UN General Assembly next year, I would like to urge Member States of the AALCO to consider this matter seriously. Japan wishes to consult with you as to how we can best proceed on this matter.

75. Mr. Vice-President, now I would like to turn to the UN Convention on Jurisdictional Immunities of States and Their Property. As the delegation of Japan mentioned in the Annual Meeting of the AALCO last year, this important convention is a product of combined efforts of the ILC's hard work and difficult negotiations at the UN General Assembly which took so many years to culminate into its final form with Japan and other AALCO member states having made various contribution in that process. Japan believes that setting and clarifying the rules concerning jurisdictional immunities of states is an important factor in ensuring stable inter-state relations. At present, only thirteen States are parties to this convention, but those parties include some AALCO Member States, such as Iran, Saudi Arabia, Lebanon and Japan, as well as some other States, such as France, Spain, Sweden and Austria. In accordance with Article 30 of the Convention, this convention will enter into force only after the ratification by at least 30 States, and it might still take at least several more years before the 30th State ratifies this convention. Japan would like to expedite this ratification process as the coming into force of the convention would significantly contribute to securing justice and order as well as to settling disputes among States on the question of jurisdictional immunity. Japan would like to reiterate its sincere hope that Member States of the AALCO will consider early ratification of the convention. In this connection, Japan stands ready to render its assistance to, or exchange views with, other AALCO Member States which indicate their interests in or have been considering the ratification of this convention.

76. Mr. Vice-President, with regard to the current work of the ILC, the ILC finally adopted a set of draft guidelines on reservations to treaties in its 63rd session last year after the consideration of the topic for 18 years since 1994 and the General Assembly decided that the consideration of the draft guidelines shall be continued at its sixty-seventh session this year. Japan submitted its comments on the draft guidelines on reservations to treaties to the Secretariat of the ILC last year. Japan wishes that Member States of the AALCO study the draft guidelines carefully in light of their respective practice and express their positions in the debate on the topic in the Sixth Committee of the UN General Assembly this autumn.

77. Mr. Vice-President, I would like to turn now on to the proposal by Professor Shinya Murase, the Japanese member of the ILC, on "the protection of the atmosphere" as a possible future topic for the ILC. Last year, Resolution 66/98 of the UN General Assembly took note of the inclusion of all five new topics proposed by the ILC, including this topic, in the long-term programme of work of the ILC. The current session of the ILC has been considering whether or not it should proceed to work on this topic. Japan is convinced that this proposal would provide a good opportunity to ensure coherence among rules in this field, thus avoiding the fragmentation of international law. Japan wishes that the ILC decides to commence working on this topic in its current session.

78. Mr. Vice-President, with regard to the selection of new topics for the ILC, Japan would like to refer to the argument put forward by an academic that for a topic to be selected, the following three criteria must be satisfied: the first is the *practical* consideration, i.e. whether there is any pressing need for the topic in the international community as a whole; the second is *technical* feasibility, i.e. whether the topic is "ripe" enough in light of relevant State practice and literature; and the third is *political* feasibility, i.e. whether dealing with the proposed topic is likely to receive broad support from States. In addition to "Protection of the Atmosphere", four new topics have been proposed by members of the ILC, namely, "Formation and Evidence of Customary International Law" (proposed by Mr. Wood), "Provisional Application of Treaties" (proposed by Mr. Gaja), "Protection of the Environment in relation to Armed Conflicts" (proposed by Ms. Jacobsson) and "The Fair and Equitable Treatment Standard in International Investment Law" (proposed by Mr. Vasciannie). It may be advisable that when States consider whether a topic should be embarked on by the ILC, they should examine it in light of the three criteria just mentioned.

79. Mr. Vice-President, lastly I would like to reiterate, once again, the proposal for the future work of the AALCO in relation to the ILC which our delegation has made at the annual meetings of the AALCO in recent years. It is well known that the AALCO was established with the aim to have the views of Asian and African countries reflected in the work of the ILC, i.e. in the progressive development and codification of international law. It is therefore of critical importance to make substantive contributions from the Asian and African perspective to the work of the ILC. From this point of view, the delegation of Japan has proposed that the AALCO Secretariat should make questionnaires of concrete questions relevant to each topic of the ILC, for example, "immunity of State officials from foreign criminal jurisdiction" or "expulsion of aliens", and request the Member States of the AALCO to provide their answers to the questionnaires to the Secretariat. The AALCO Secretariat will then compile those answers and submit them to the Secretariat of the ILC. For this project to succeed, Member States of the AALCO need to cooperate with the Secretariat of the AALCO by submitting relevant information on their state and regional practices. The information provided by the AALCO to the ILC will be duly considered by the members of the ILC, including Special Rapporteurs on specific topics, who will analyse the state and regional practices provided and reflect them when drafting and elaborating draft articles on each topic. This exercise will gradually but certainly affect the formation and substance of customary international law in the international community. Japan believes that the implementation of this proposal may reactivate the work of the AALCO vis-à-vis the ILC and will bring tremendous benefits for Asian and African States from a long-term perspective. Thank you very much.

80. Mr. Vice-President: Thank you. May I now call upon representative of Islamic Republic of Iran.

81. The **Delegate of Islamic Republic of Iran:** In the name of God, the Compassionate, the Merciful. At the beginning, I would like to express my sincere appreciations to the Secretariat of AALCO for preparing the informative report of the selective items on the agenda on International Law Commission. My delegation has found the report as a useful and informative document which touches upon such a matter of high significance. My delegation would like to

thank Dr. A Rohan Perera and Prof. Djamchid Momtaz for their presentation and views on few topics on the agenda of the Commission.

82. Mr. Vice-President, my delegation would like to make some comments on the Expulsion of Aliens, Protection of Persons in the event of Disasters and Immunity of States Officials from Foreign Criminal Jurisdiction.

83. Mr. Vice-President, my Delegation appreciates the efforts of Mr. Maurice Kamto, the Special Rapporteur, for the second addendum to his sixth report as well as his seventh report on the topic.

84. One can hardly contradict the State's right to expel aliens living on its territory if they pose a threat to its national security or public order. Every State has the right to determine, according to its national laws the components of these two concepts. It would, therefore, be pointless to try to enumerate the grounds that could be invoked by a State to justify the expulsion of aliens.

85. Once decided, expulsion shall be conducted in a manner that the fundamental human rights would be fully respected. The expulsion must be made with due respect for fundamental human rights of the deportees. They must be protected against any inhuman and degrading treatment. This applies even during the detention of aliens awaiting deportation. In all cases, the property rights of deportees should, as well, be respected and guaranteed by the authorities of the host State.

86. My delegation doubts the advisability of formulating any provision on appeals against an expulsion decision. We agree with the Special Rapporteur that there is no need for an additional draft article on this question since there is no clue as to the existence of sufficient State practice to that effect. Many national laws do not provide for such a possibility. There are serious doubts as to the existence of customary rules on the matter. It cannot be recognized in favor of the expulsion of an alien unlawfully in the territory a right to return to the territory of the expelling State since it would imply the recognition of an acquired right of residence, something which is totally unknown to the practice of States.

87. Regarding the final form of the draft articles, we take the liberty to express doubts about the possibility of elaborating a convention on the basis of the draft articles. It would be more appropriate and feasible to write the guidelines for States to guide State practice in this area.

88. I now turn to the item two, "Protection of Persons in the Event of Disasters".

89. Mr. Vice-President, my delegation expresses its appreciation to Mr. Eduardo Valencia-Ospina, the Special Rapporteur, for his fourth report on the topic.

90. Turning to the content of the proposed draft articles, I should start by a note of caution regarding the progressive development of a rule which does not enjoy sufficient State practice. I should also underline the importance of taking into account by the Commission of the views and concerns expressed during the sessions of the Sixth Committee by the member States.

91. Mr. Vice-President, we cannot question the dual nature of the sovereignty, which entails both rights and obligations. The State affected by a natural disaster certainly has the duty to take all measures at its disposal to provide assistance to its nationals and other persons living in its territory who have fallen victim to the disaster. However, this duty could not be disproportionally broadened as rising to a legal obligation to seek external assistance. Indeed, international law does not impose such obligation on the affected State. It would be far from any established or even from any relatively emerging practice, let alone any existing customary rule, to presume such an obligation. Therefore, the draft articles could not be worded in an imperative language. In other words, the affected State is entitled to seek external assistance should it be unable to provide necessary assistance to the victims.

92. Therefore, it would be more appropriate, in the light of the existing State practice, to indicate in draft article 10 that the States which is unable to assist the victims "should" seek assistance from other States and international organizations, instead of "an obligation" to ask for such assistance.

93. Certainly, there is little doubt as to the obligation of the State affected by natural disasters to cooperate with other States and international organizations, instead of an "obligation" to ask for such assistance.

94. The obligation to cooperate does not oblige the State affected by natural disaster to accept relief; the provision of humanitarian aid by other States and international organizations remains subject to the consent of the latter. Once granted, the affected States shall retain, in accordance with its domestic laws, the right to direct, control, supervise and coordinate the assistance provided in its territory. Moreover, the humanitarian assistance should be provided in accordance with the principles of humanity, neutrality and impartiality. All practices and principles identified by the Red Cross and Red Crescent Movement and which have in turn been referred to by the International Court of Justice, in the 1986 Nicaragua Case, and reaffirmed by the UN General Assembly resolutions 46/182 of 19 December 1991 and 45/100 of 14 December 1990, should be applied in good faith.

95. Immunity of State Officials from Foreign Criminal Jurisdiction: the subject of "Immunity of State Officials from Foreign Criminal Jurisdiction" is of critical importance in external relations of States. We share the note of caution expressed by the Special Rapporteur that the International Law Commission should focus on codifying the existing rules of international law in this area rather than engaging in an exercise for progressive development. The Commission is expected to take sovereignty and its ensuing components, principally immunity of State Officials, as its departure point and avoid confusing its subject with the subject of accountability of States officials.

96. The principle of immunity of the "troika" (Head of State, Head of Government and Minister of Foreign Affairs) which is well established and recognized beyond any doubt in customary international law is the key guarantor of stability in international relations and the effective tool for the smooth exercise of prerogatives of the State.

97. The international law grants to the three categories of State officials absolute immunity ratione personae, from foreign criminal jurisdiction. It covers both acts performed in their official capacity and their private acts, during the period they hold office. This immunity shall cease to apply to their private acts as soon as they leave office. They shall continue to enjoy immunity for acts performed in their official capacity without time limit, as those acts are deemed to be acts of State. That is the approach taken by the Institute of International Law in its 2009 resolution on the Immunity from Jurisdiction of the State and of Persons who Act on behalf of the State in case of International Crimes. Thank you.

98. Mr. Vice-President: Thank you. May I now call upon Malaysia.

99. The **Delegate of Malaysia:** Thank you Mr. Vice President, His Excellency the Secretary-General, Distinguished Former Members of ILC, Ladies and Gentlemen, my delegation expresses our gratitude to Dr. Rohan and Dr. Momtaz for their elucidation and sharing their thoughts on the topics of Immunity of State Officials from Foreign Criminal Jurisdiction and Protection of Persons in the Event of Disasters.

100. Mr. Vice-President, regarding the topic of Immunity of State Officials from Foreign Criminal Jurisdiction, Malaysia noted the policy question posted by the ILC as summarized in paragraph 19 of the AALCO Secretariat Paper i.e. AALCO/51/ABUJA/2012/SD/S 1, should the ILC seek to set out existing rules of international law or should the ILC embark on an exercise of progressive development. Malaysia is of the view that the ILC ought to work at determining the existing basis of such immunity, scope and approach to immunity of State Officials. At the same time we are of the view that the ILC should determine the application of rules deriving from international law before embarking on progressive development of law.

101. In considering the application of immunity *ratione materiae*, Malaysia is of the view that *ultra vires* and illegal conduct should not be automatically considered as private acts of the state officials as such proposition could lead to States absolving from responsibility by claiming that the criminal acts were performed in the private capacity of their officials.

102. Malaysia is of the view that immunity *ratione personae* should not extend to acts which were performed by official in private capacity, prior to taking his office. Such acts will not impede him from carrying out his duties.

103. Malaysia is currently not in favour of extending the immunity to other categories other than the troika of Heads of State, Heads of Governments and Ministers of Foreign Affairs as it appears settled that immunity *ratione personae* is applicable only to these set of leaders. Strong legal basis must be shown to support the extension of this type of immunity to other than troika. Malaysia looks forward to further deliberation on this fundamental issue.

104. Malaysia supports the view of immunity of State officials from foreign criminal jurisdiction should, in principle be considered at early stage of the judicial proceedings, or earlier still, at the pre-trial stage to prevent a violation of the obligations arising from immunity by the State exercising.

105. Malaysia is of the view that invocation of immunity should be dealt with on a case-by-case basis and that States should not be restricted to choosing one method over the other nor should invocation be construed as admission of responsibility or states liability for any criminally unlawful acts.

106. Malaysia believes that the waiver of immunity should be express in nature and it determined by the States and not the official, but the official can/should notify at earliest stage to alert the state exercising jurisdiction. As for waiver of immunity for the troika, the power to waive such immunity should rest with the State.

107. Further, in determining the application of existing rules of international law, the ILC must address clearly the approach and outcome of its work vis-a-vis the international criminal tribunals particularly the International Criminal Court.

108. Mr. Vice-President, in the development of the draft articles on the Protection of Persons in the Event of Disasters, Malaysia strongly feels that full consideration is to be given to the principle of the sovereignty of States under international law, including the related concepts of consent of States and the rights of States to refuse external interference in its internal affairs and into its territory. A balance must be reached between respecting the sovereignty of the affected State and its sovereign rights to refuse external interference from foreign entities with the rights of its population to receive humanitarian assistance in the event of disasters. We remained engaged with the ILC and would update the ILC with our comments on this topic.

109. For disaster relief to be effective, the seeking of assistance in the event of disasters would need to be mutually supported by a corresponding responsibility to assist. Consideration must be given to a State's resources and capabilities as well as its domestic priorities and national interests.

110. Malaysia strongly feels that the imposition of a legal duty on States to render assistance when sought will be onerous one and could be deemed an unacceptable interference in a State's sovereign decision-making. States should be permitted to response to requests for assistance in all manners that it deems fit. All States, whether providing, seeking or accepting assistance should be allowed to freely interact and coordinate the need for, type and manner of assistance.

111. Malaysia proposes that the AALCO Secretariat initiate contact with ASEAN Secretariat on the mechanisms of disaster management and emergency response under the auspices of ASEAN Agreement on Disaster Management and Emergency Response (AADMER), the outcome of that contact should be disseminated to the AALCO Member States in order to provide a practical example of regional initiative in disaster management and emergency response. Principle in the AADMER could provide guide in regional practice in dealing with disaster management.

112. Mr. Vice-President, in relation to the topic of Expulsion of Aliens, Malaysia takes note of the Special Rapporteur's responses to the issues raised by Malaysia in the 6th Committee of the 66th Session of the UN General Assembly. Malaysia endorses the Special Rapporteur's views

that it is premature at this stage to decide on the final form of the work of the ILC on this topic particularly when there are many issues that need clarification and consideration.

113. Mr. Vice-President, Malaysia commends the selection of these three topics for deliberation, particularly as the ILC has expressed their interest to receive comments on specific issues on these topics. Malaysia agrees on the importance of providing input to the ILC. Malaysia notes that out of 34 ILC members, 17 of them are from Asia-African region. The question is how we make full use of this. It is unfortunate that although ILC is not sitting at the moment, but the existing ILC members were unable to attend this annual session. Malaysia is of the view that their guidance on the ongoing topics in the ILC is very pertinent. Accordingly, Malaysia proposes that AALCO Secretariat to arrange for an interaction session e.g., tele-conference between the ILC members and Member States. Thank you.

114. Mr. Vice-President: I thank the distinguished delegate of Malaysia. I give the floor to the distinguished representative of Republic of Korea.

115. The **Delegate of Republic of Korea:** Thank You for this Special Meeting on the issues of Protection of Persons in the Event of Disasters and Immunity of State Officials from Foreign Criminal Jurisdiction. Firstly, the protection of people or human beings in the event of natural disasters is closely related to human rights but at the same time it also relates to the principle of non-intervention in the domestic decision of other States. Generally, a country in which persons live or stay is responsible for giving protection of persons who are affected by natural disasters. However, if that country is unable or unwilling to help those people, other country's assistance of protection to those peoples who are affected or in need, in case the government of that country refuses to accept that assistance that country would be faced with a pressing situation where it must consider the human rights of the victims within the country or vice-versa.

116. In this regard, the Government of the Republic of Korea enacted last year a law on Emergency Services of all. This law states that in providing services in foreign countries, the Korean government should consider the request made by the affected foreign governments and closely cooperate in humanitarian reliefs in time of natural disasters in order to give protection of human beings to consider providing assistance including the well-being and protection of human beings. In our view, international organizations cannot just narrow the differences of decisions of the governments of that country concerned and the human rights of the persons concerned affected by the disasters.

117. With regard to the issue of "Immunity of State Officials from Foreign Criminal Jurisdiction"; I would like to mention at this early stage three points to be considered in codification of immunity of state officials from foreign criminal jurisdiction.

118. First, the codification on this matter should be based on *lex lata* rather than *lex ferenda* and in conformity with the prior case laws of International Court of Justice, which are, "the Arrest Warrant Case, DR Congo vs. Belgium, 2002)" and "the Certain Questions of Mutual Assistance, Djibouti vs. France, 2008)".

119. Second, I'd like to point out that we have well-established state practices regarding Diplomatic Immunity and Privileges, and these should be respected.

120. Third, despite these, it is also desirable to consider the provision of the Rome Statute, Article 27, that official capacity as a government official shall in no case exempt the person from the criminal responsibility under the Rome Statute. Thank you.

121. Mr. Vice-President: I thank the distinguished delegate of Republic of Korea. I give the floor to the distinguished representative from Saudi Arabia.

122. The **Delegate of Kingdom of Saudi Arabia**[3]**:** Thank your Mr. Vice-President. I thank and extend my appreciation to Dr. Perera on legal analysis regarding topic which he presented this morning. With regard to Protection of Persons in the Event of Natural Disasters, our country takes interest in draft articles for extending assistance in case of disaster. The Kingdom is a pioneer country in lending assistance to countries who face disasters. It has provided assistance to the affected States in case of floods, earthquakes and drought. In this regard, the basic problem is not in the nature of assistance, but in how to provide assistance during disaster.

123. Mr. Vice President, I have a question to Dr. Perera on this area about the important draft articles on the role of international organizations involved in providing assistance. I hope Dr. Perera would shed more light on that. Thank you Mr. Vice President.

124. Mr. Vice-President: I thank the distinguished delegate from Saudi Arabia. I now give the floor to the distinguished representative of Kuwait.

125. The **Delegate of State of Kuwait**[4]**:** Thank you Mr. Vice-President. I thank and appreciate Dr. Rohan Perera and Prof. Momtaz on providing their views on the important topics of ILC. I would give very short remarks regarding the topic expulsion of aliens. Kuwait has respect for workers human rights which should be taken into consideration. Kuwait takes interest and care in applying such standards. This issue is very substantive which Member States of AALCO should take into consideration if any State is applying these standards or not. With regard to ICC, perhaps the main reason for establishing that international organization with an international character is to act in accordance with justice and equality whereas the UNSC is not capable to do so. Unfortunately there has been lack in promulgation of some rules. There are some shortcomings in implementation of treaties and agreements. No action has been taken against Israeli criminals whereas even when Sudan is not party to the ICC action has been taken against them. Therefore, action is not taken on equal basis and the issue of immunity needs more coordinated approach in ILC.

126. A question to Dr. Perera what are the reservations that come out of decision of ICC about the immunity of Heads of States. Of course we take that into consideration. Heads of States should be given immunity. What is the legal value to give immunity to Heads of States, what is the extend of credibility of ICC in condemning and chasing the Heads of States which have not

[3] Statement delivered in Arabic. The Official translation from the translator's version.
[4] Statement delivered in Arabic. The Official translation from the translator's version.

ratified the ICC. What is the recommendary message we may give to countries which are putting obstacles before such organization.

127. Mr. Vice-President: I thank the distinguished speakers and delegates for insightful presentations and now I give the floor to Dr. Rohan Perera for responding to the questions posed by some of the delegates.

128. Dr. A. Rohan Perera: Firstly, the distinguished representative of Saudi Arabia raised the question of the role of domestic organizations in the context of providing relief and assistance to victims of disasters. The structure of the draft articles is that in terms of Article 9;

> "The affected State, by virtue of its sovereignty, has the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory."

129. So, by virtue of its sovereign attributes, as far as domestic entities are concerned any assistance rendered by such entity would be within the sovereign jurisdiction of that State and indeed the draft article recognizes that the affected State has the primary role in the direction, control, coordination and supervision of such relief and assistance. That is a matter within your sovereign territory.

130. The article that we were looking at was Article 10, which speaks of duty to seek assistance from external entities where the scale of the disaster exceeds the national capacity. This Article seeks to impose a duty to seek international assistance from among other States, United Nations, other competent intergovernmental organizations and relevant non-governmental organizations as appropriate. So with that structure, we are looking at Article 9 with regard to role of affected State and Article 10 where the national capacity has exceeded and the affected State is obliged to seek assistance. I hope that I have answered the question that was raised.

131. The distinguished representative of Kuwait raised the question of the absolute immunity enjoyed by the Head of State or government and raised a question of where a Head of State is not expected to commit an international crime. Here the rationale is that, as I mentioned, as far as the Rome Statute is concerned - Article 27 - clearly amounts to waiver of immunity in respect of such categories of persons. What the draft articles of the ILC is dealing with is the exercise of jurisdiction by domestic courts of foreign States. There the problem that arises is the conflict with the principle of sovereign equality. If a foreign Head of State while being in office is summoned before a foreign court of law that will lead to a situation of international tension of disrupting stability of stable international relations and so on. So the rationale is that in such situations, there are other remedies that are available once that person has given up office. As far as the jurisdiction of International Criminal Court is concerned you cannot plead the fact that you are a serving Head of State. By virtue of being party to the Statute you have expressly waived the immunity. Different factors come into frame where national courts of foreign State begins to exercise jurisdiction over serving Heads of State and that would impact the stability of international relations. So that is the approach as far as the ILC Draft Articles are concerned.

132. Number of delegations referred to the work of "expulsion of aliens" which we did not discuss today due to lack of time. But as a matter of information I might just mention draft

Article 27 which clearly is being presented as a matter of progressive development. The text of draft articles 1-32 were provisionally adopted last month in the first segment of the sixty-fourth session of the ILC and that is contained in the document A/CN.4/L.797. It is very important that these articles receive attention of Member States of AALCO. The first reading is complete. ILC has sought the views of the Member States particularly on the question of right of appeal. These articles proceed on the basis of persons in lawful presence and unlawful presence. It seeks to strike a balance between sovereignty and State's right of expulsion and human rights obligations of the State. I might just mention to draft article 27 which clearly being presented as a matter of progressive development. "Suspensive effect of an appeal against an expulsion decision": "An appeal lodged by an alien subject to expulsion who is lawfully present in the territory of the expelling State shall have a suspensive effect on the expulsion decision." Now this was a matter of considerable comment both within the Commission and the Sixth Committee. The draft article says that an appeal can have suspensive effect on the expulsion decision. Now what effect does this have on the speedy disposal of expulsion procedures? What is the impact on the right of expulsion as a sovereign attribute? Is it supported by state practice, by case-laws etc., these are questions that ILC has raised and this is awaiting response from Member States. So draft articles 27 as approved by the Drafting Committee last month should receive your particular attention.

133. There is also draft article 29, "readmission to the expelling State". It recognizes right of readmission where "if it is established by a competent authority that the expulsion was unlawful, except in cases which would constitute a threat to national security and public order. There are areas which reflect a movement towards progressive development and on which comments from Member States on State Practice would be most welcome. These are the areas where a movement towards progressive development and these are areas on which comments from Member States on state practice are most welcome. I can give a copy of this document to the Secretariat for perusal of AALCO Member States and both the Sixth Committee as well as communication with International Law Commission would be most timely. Thank you very much Mr. Vice-President.

134. Mr. Vice-President: Thank you very much Dr. Rohan Perera. I know that representative of India has asked for floor and before I do that I shall ask Prof. Djamchid Momtaz to reply to certain questions posed to him and after that the representative of India would make a statement.

135. Prof. Djamchid Momtaz: Thank you Mr. Vice-President for giving me the floor. Although there is no question from the floor that was directly addressed to me, I want to react to the comments made by the distinguished delegate from Kuwait regarding the position of the UN Security Council regarding fight against impunity. I want to remind that several times the Security Council insists to the fact that fight against impunity is a very important question. First of all in the resolution adopted by the Security Council in 1993 by which the Security Council created an Ad Hoc tribunal on Yugoslavia. In its Preambular paragraph the Security Council says it clearly that impunity is a threat to peace and international security. I want to add to that the reports prepared by the Security Council on the protection of civilian during armed conflict is that the Security Council is very aware that impunity without any doubt a threat against peace and international security. If sometimes, the Security Council is not in a position to refer a case to the ICC, the principle obstructs, without doubt is a political one. Thank you very much.

136. Mr. Vice-President: Now I give the floor to distinguished delegate from India.

137. The **Delegate of India:** Thank you Mr. Vice-President. I thank Dr. Rohan Perera and Prof. Momtaz for an insightful presentation and a very comprehensive report on the very important topics of ILC. My delegation is particularly pleased to hear that the Commission reconstituted a Working Group on MFN clause. We feel that it is very pertinent to countries and the future topic would be "fair and Equal Treatment in the Investment Agreements. My delegation is of the view that these topics are very important in the ongoing investment particularly the recent arbitration decision and the evolving jurisprudence in this issue. India has signed more than eighty investment agreements and the issue of MFN and the topic of fair and equitable treatment in investment agreements is very important to us. Of late, States are experiencing that their regulatory space is limited by the application of the arbitration decisions and how to balance the protection extended to the investor on the one hand and the regulatory space that is to be maintained by the host State on the other hand is a very important issue and we appreciate the Commission for taking this topic.

138. On the topic "protection of persons in the event of disasters", my delegation appreciates the report presented by Dr. Rohan Perera and we take note of the draft articles submitted by the Special Rapporteur. On the issue of 'immunity of State Officials from Foreign Criminal Jurisdiction, we share the general view that the work on the immunity of State officials should consider only foreign criminal jurisdiction. Questions relating to immunity with respect to international criminal tribunal and domestic courts should be excluded. The source of immunity must not be international comity but international law. Therefore, we agree with the view that the proposal of the Special Rapporteur that the timings for raising immunity in criminal proceedings should be considered either at the initial stage or pre-trial stage of the proceedings. In this regard, it is appropriate that the Commission may study in-detail the implications of not considering of immunity at the early stage of criminal proceedings. On considering the immunity ratione personae beyond Troika, we are in favour of an independent, clear criterion in establishing such practice for that need for enhanced cooperation among States concerned in matter s relating of immunity of State officials is required. With regard to immunity, we share the view that the right to waive immunity of officials vest in the State and not in the official list. Delegate from Japan raised the concern regarding the UN Convention on Jurisdictional Immunities of States and Their Property. This is a Convention that concerns all of us very directly. So the Convention was drafted after long discussion, in-depth negotiations at the International Law Commission and at the Sixth Committee. I join Japanese delegation in urging all Member States of AALCO to ratify or accede to this Convention so that it enters into force without much delay. I would like to add that India has already signed the Convention and is in the process of enacting legislation and as soon as that process is over, we would be in a position to ratify that. I thank you very much.

139. Mr. President: Thank you. We now break up lunch and we meet at 2'clock for the evening session on Law of the Sea.

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

A. BACKGROUND

1. The International Law Commission (hereinafter referred to as "ILC" or the "Commission") established by the United Nations General Assembly Resolution 174 (III) of 21st September 1947 is the principal organ under the United Nations system for the promotion of progressive development and codification of international law. The Commission held its Sixty-fourth session from 7 May to 1 June and 2 July to 3 August 2012 at Geneva.

2. The Commission consists of the following members:

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

4. The Commission elected **Mr. Lucius Caflisch (Switzerland)** as Chairman of the Sixty-fourth session of the ILC.

5. The Secretary-General of the Asian-African Legal Consultative Organization (AALCO), Prof. Dr. Rahmat Mohamad, addressed the Commission on 25 July 2012. He briefed the Commission on the recent and forthcoming activities of AALCO. An exchange of views followed.

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

(i) Expulsion of aliens
(ii) Protection of persons in the event of disasters
(iii) Immunity of State officials from foreign criminal jurisdiction
(iv) Provisional application treaties
(v) Formation and evidence of customary international law
(vi) Obligation to extradite or prosecute (*aut dedere aut judicare*)
(vii) Treaties Over Time
(viii) The Most-Favoured-Nation clause

7. On the topic *"Expulsion of aliens",* the Commission had before it the eighth report of the Special Rapporteur (A/CN.4/651), which provided an overview of comments made by States and by the European Union on the topic during the debate on the report of the International Law Commission that had taken place in the Sixth Committee at the sixty-sixth session of the General Assembly. The eighth report also contained a number of final observations by the Special Rapporteur, including on the form of the outcome of the Commission's work on the topic.

8. As a result of its consideration of the topic at the present session, the Commission adopted on first reading a set of 32 draft articles (A/CN.4/L.797), together with commentaries thereto, on the expulsion of aliens. The Commission decided, in accordance with articles 16 to 21 of its Statute, to transmit the draft articles, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2014.

9. In relation to the topic *"Protection of persons in the event of disasters",* the Commission had before it the fifth report of the Special Rapporteur (A/CN.4/652), providing an elaboration on the duty to cooperate, as well as a consideration of the conditions for the provision of assistance, and of the termination of assistance. Following a debate in plenary, the Commission decided to refer draft articles A, 13 and 14, as proposed by the Special Rapporteur, to the Drafting Committee.

10. The Commission subsequently took note of five draft articles provisionally adopted by the Drafting Committee, relating to forms of cooperation, offers of assistance, conditions on the provision of external assistance, facilitation of external assistance and the termination of external assistance, respectively (A/CN.4/L.812).

11. With regard to the topic *"Immunity of State Officials from foreign criminal jurisdiction",* the Commission appointed Ms. Concepción Escobar Hernández as Special Rapporteur. The Commission considered the preliminary report (A/CN.4/654) of the Special Rapporteur, which provided an overview of the work of the previous Special Rapporteur, as well as the debate on the topic in the Commission and in the Sixth Committee of the General Assembly; addressed the issues to be considered during the present quinquennium, focusing in particular on the distinction and the relationship between, and basis for, immunity *ratione materiae* and immunity *ratione personae*, the distinction and the relationship between the international responsibility of the State and the international responsibility of individuals and their implications for immunity, the scope of immunity *ratione personae* and immunity *ratione materiae*, and the procedural issues related to immunity; and gave an outline of the work plan. The debate revolved around, inter alia, the methodological and substantive issues highlighted by the Special Rapporteur in the preliminary report.

12. The Commission decided to include two new topics; namely, (i) "*Provisional application of treaties"* and (ii) *"Formation and evidence of customary international law"*. In that regard, the Commission appointed Mr. Juan Manuel Gómez-Robledo and Mr. Michael Wood as Special Rapporteur to these two topics respectively. On "*Provisional application of treaties"* the Special Rapporteur presented to the Commission an oral report on the informal consultations that he had chaired with a view to initiating an informal dialogue with members of the Commission on a

number of issues that could be relevant for the consideration of this topic. Aspects addressed in the informal consultations included, inter alia, the scope of the topic, the methodology, the possible outcome of the Commission's work as well as a number of substantive issues relating to the topic.

13. In relation to the topic, *"Formation and evidence of customary international law*", during the second part of the session, the Commission had before it a Note by the Special Rapporteur (A/CN.4/653), which aimed at stimulating an initial debate and which addressed the possible scope of the topic, terminological issues, questions of methodology as well as a number of specific points that could be dealt with in considering the topic. The debate revolved around, inter alia, the scope of the topic as well as the methodological and substantive issues highlighted by the Special Rapporteur in his Note.

14. On the topic, *"Obligation to extradite or prosecute (aut dedere aut judicare)", t*he Commission established a Working Group to make a general assessment of the topic as a whole, focusing on questions concerning its viability and steps to be taken in moving forward, against the background of the debate on the topic in the Sixth Committee of the General Assembly. The Working Group requested its Chairman to prepare a working paper, to be considered at the sixty-fifth session of the Commission, reviewing the various perspectives in relation to the topic in light of the judgment of the International Court of Justice of 20 July 2012, any further developments, as well as comments made in the Working Group and the debate in the Sixth Committee.

15. With regard to the topic, *"Treaties over time",* the Commission reconstituted the Study Group on Treaties over time, which continued its work on the aspects of the topic relating to subsequent agreements and subsequent practice. The Study Group completed its consideration of the second report by its Chairman on the jurisprudence under special regimes relating to subsequent agreements and subsequent practice, by examining some remaining preliminary conclusions contained in that report. In the light of the discussions in the Study Group, the Chairman reformulated the text of six additional preliminary conclusions by the Chairman of the Study Group on the following issues: subsequent practice as reflecting a position regarding the interpretation of a treaty; specificity of subsequent practice; the degree of active participation in a practice and silence; effects of contradictory subsequent practice; subsequent agreement or practice and formal amendment or interpretation procedures; and subsequent practice and possible modification of a treaty. The Study Group also considered the third report by its Chairman on subsequent agreements and subsequent practice of States outside judicial and quasi-judicial proceedings. Furthermore, the Study Group discussed the modalities of the Commission's work on the topic, and recommended that the Commission change the format of that work and appoint a Special Rapporteur. The Commission decided:

(a) to change, with effect from its sixty-fifth session (2013), the format of the work on the topic as suggested by the Study Group; and

(b) to appoint Mr. Georg Nolte as Special Rapporteur for the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties".

16. On the topic *"The Most-Favoured-Nation clause",* the Commission reconstituted the Study Group on the Most-Favoured-Nation clause, which continued to have a discussion concerning factors which appeared to influence investment tribunals in interpreting MFN clauses, on the basis, inter alia, of working papers concerning Interpretation and Application of MFN Clauses in Investment Agreements and the Effect of the Mixed Nature of Investment Tribunals on the Application of MFN Clauses to Procedural Provisions. The Study Group also considered elements of the outline of its future report.

B. SPECIFIC ISSUES ON WHICH COMMENTS WOULD BE OF PARTICULAR INTEREST TO THE COMMISSION

i. Immunity of State officials from foreign criminal jurisdiction

The Commission requested States to provide information on their national law and practice on the following questions:

(a) Does the distinction between immunity *ratione personae* and immunity *ratione materiae* result in different legal consequences and, if so, how are they treated differently?
(b) What criteria are used in identifying the persons covered by immunity *ratione personae*?

ii. Formation and evidence of customary international law

The Commission requested States to provide information on their practice relating to the formation of customary international law and the types of evidence suitable for establishing such law in a given situation, as set out in:

(a) official statements before legislatures, courts and international organizations; and
(b) decisions of national, regional and subregional courts.

IV. EXPULSION OF ALIENS

A. BACKGROUND

1. At its fifty-sixth session (2004), the Commission decided to include the topic "Expulsion of aliens" in its programme of work and to appoint Mr. Maurice Kamto as Special Rapporteur for the topic[5]. The General Assembly, in paragraph 5 of resolution 59/41 of 2 December 2004, endorsed the decision of the Commission to include the topic in its agenda.

2. At its fifty-seventh session (2005), the Commission considered the preliminary report of the Special Rapporteur (A/CN.4/554)[6] wherein he had outlined his understanding of the subject and sought the opinion of the Commission on a few methodological issues to guide his future work. The Report was considered by the Commission at its fifty-seventh session, and it endorsed most of Special Rapporteur's choices and his draft work plan annexed to the preliminary report.

3. At its fifty-eighth session (2006), the Commission had before it the second report of the Special Rapporteur (A/CN.4/573 and Corr.1) and a study prepared by the Secretariat (A/CN.4/565 and Corr.1). The Commission decided to consider the second report at its next session, in 2007[7]. At its fifty-ninth session (2007), the Commission considered the second and third reports of the Special Rapporteur (A/CN.4/573 and Corr.1 and A/CN.4/581) and referred to the Drafting Committee draft articles 1 and 2, as revised by the Special Rapporteur[8], and draft articles 3 to 7[9].

4. At its sixtieth session (2008), the Commission considered the fourth report of the Special Rapporteur (A/CN.4/594) and decided to establish a working group, chaired by Mr. Donald M. McRae, in order to consider the issues raised by the expulsion of persons having dual or multiple nationality and by denationalization in relation to expulsion. During the same session, the Commission approved the working group's conclusions and requested the Drafting Committee to take them into consideration in its work[10].

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[5] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 364. The Commission at its fiftieth session (1998) took note of the report of the Planning Group identifying, *inter alia*, the topic "Expulsion of aliens" for possible inclusion in the Commission's long-term programme of work (*ibid.*, *Fifty-third Session, Supplement No. 10* (A/53/10), para. 554) and at its fifty-second session (2000) it confirmed that decision (*ibid.*, *Fifty-fifth Session, Supplement No. 10* (A/55/10), para. 729). A brief syllabus describing the possible overall structure of, and approach to, the topic was annexed to that year's report of the Commission (*ibid.*, annex). In paragraph 8 of resolution 55/152 of 12 December 2000, the General Assembly took note of the inclusion of the topic in the long-term programme of work.

[6] Ibid., Sixtieth Session, Supplement No. 10 (A/60/10), paras. 242–274.

[7] Ibid., Sixty-first Session, Supplement No. 10 (A/61/10), para. 252.

[8] Ibid., Sixty-second Session, Supplement No. 10 (A/62/10), footnotes 401 and 402.

[9] *Ibid.*, footnotes 396 to 400.

[10] The conclusions were as follows: (1) the commentary to the draft articles should indicate that, for the purposes of the draft articles, the principle of non-expulsion of nationals applies also to persons who have legally acquired one or several other nationalities; and (2) the commentary should include wording to make it clear that States should not use denationalization as a means of circumventing their obligations under the principle of the non-expulsion of nationals; *ibid.*, paragraph 171.

5. At its sixty-first session (2009), the Commission considered the fifth report of the Special Rapporteur (A/CN.4/611 and Corr.1). At the Commission's request, the Special Rapporteur then presented a new version of the draft articles on protection of the human rights of persons who have been or are being expelled, revised and restructured in the light of the plenary debate (A/CN.4/617). He also submitted a new draft workplan with a view to restructuring the draft articles (A/CN.4/618). The Commission decided to postpone its consideration of the revised draft articles to its sixty-second session[11].

6. At its sixty-second session (2010), the Commission considered the draft articles on protection of the human rights of persons who have been or are being expelled, as revised and restructured by the Special Rapporteur (A/CN.4/617), together with the sixth report of the Special Rapporteur (A/CN.4/625 and Add.1). It referred to the Drafting Committee revised draft articles 8 to 15 on protection of the human rights of persons who have been or are being expelled[12]; draft articles A and 9 as contained in the sixth report of the Special Rapporteur (A/CN.4/625); draft articles B1 and C1, as contained in the first addendum to the sixth report (A/CN.4/625/Add.1); as well as draft articles B and A1, as revised by the Special Rapporteur during the sixty-second session.

7. At the sixty-third session in 2011, the Commission had before it addendum 2 to the sixth report of the Special Rapporteur, which completed the consideration of the expulsion proceedings and considered the legal consequences of expulsion, as well as his seventh report, which provided an account of recent developments in relation to the topic and proposed a restructured summary of the draft articles. The Commission also had before it comments and information received thus far from Governments[13]. It decided to refer to the Drafting Committee[14] draft articles D1, E1, G1, H1, I1 and J1 as contained in addendum 2 to the sixth report of the Special Rapporteur; draft article F1, also contained in the same addendum, as revised by the Special Rapporteur during the session; and draft article 8 on "Expulsion in connection with extradition" as revised by the Special Rapporteur during the sixty-second session in 2010. The Commission also decided to refer to the Drafting Committee the restructured summary of the draft articles as contained in the seventh report of the Special Rapporteur.

B. CONSIDERATION OF THE TOPIC AT THE SIXTY-FOURTH SESSION OF THE ILC

8. At the sixty-fourth Session held in 2012, the Commission had before it the eighth report of the Special Rapporteur (A/CN.4/651), which provided an overview of comments made by States and by the European Union on the topic during the debate on the report of the International Law Commission that had taken place in the Sixth Committee at the sixty-sixth session of the General Assembly. The eighth report also contained a number of final

[11] Ibid., Sixty-fourth Session No. 10 (A/64/10), para. 91.
[12] Ibid., Sixty-fifth Session, Supplement No. 10 (A/65/10), footnotes 1244 to 1251.
[13] Documents A/CN.4/604, and A/CN.4/628 and Add.1. (see Analytical Guide)
[14] See *Official Records of the General Assembly, Sixty-sixth session, Supplement No. 10* (A/66/10), para. 212

observations by the Special Rapporteur, including on the form of the outcome of the Commission's work on the topic.

9. As a result of its consideration of the topic at the present session, the Commission adopted on first reading a set of 32 draft articles (A/CN.4/L.797), together with commentaries thereto, on the expulsion of aliens. The Commission decided, in accordance with articles 16 to 21 of its Statute, to transmit the draft articles, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2014.

10. It may be recalled that the work of the Drafting Committee on the draft articles on the expulsion of aliens, had began in 2007 and was completed at the present session. During the previous sessions, the Drafting Committee had decided that the draft articles which had been provisionally worked out thus far would remain in the Drafting Committee until the completion of its work on the topic. The various draft articles on the expulsion of aliens were referred by the Commission to the Drafting Committee at successive sessions. At the current session, the Drafting Committee held twelve meetings on the draft articles on the expulsion of aliens. It first considered a number of proposals formulated by the Special Rapporteur in the light of comments and suggestions made by States on certain draft articles as they had been referred to the Drafting Committee. Thereafter, the Committee addressed a number of issues that remained pending, and finally proceeded to a review of the whole set of draft articles.

11. In the ensuing pages, the salient features of the Eighth Report of the Special Rapporteur is presented. This is flowed by a brief commentary on the draft articles adopted by the Commission on the subject matter. Finally the implications flowing from these articles are presented in the form of Comments and Observations of the Secretariat of AALCO.

1. Salient Features of the Eighth Report:

12. It may be recalled that many States had identified a discrepancy between the Commission’s progress on the topic of the expulsion of aliens and the related information submitted to the Sixth Committee during its consideration of the Commission’s annual report to the General Assembly on its work. Accordingly the Eighth report of the Rapporteur sought to dispel the misunderstandings created by the aforementioned discrepancy, respond to the comments that were doubtless prompted by insufficient clarification of the methodology followed in the treatment of the topic, and consider to what extent some of the suggestions that have not already been incorporated following the discussion in the Committee could be taken into account. To that end, the report considered first the comments made by States (sect. II) and then those of the European Union (sect. III), followed by a few final observations (sect. IV).

13. Most of the States that expressed their views on protecting the human rights of aliens subject to expulsion in the transit State (draft article F1) referred either to the bilateral agreements that they conclude with the transit State or, in a few cases, to their domestic law in addition to bilateral cooperation agreements with the transit State. The Special Rapporteur considered that neither these bilateral agreements nor domestic law can contradict the relevant rules of international human rights law, from which aliens subject to expulsion must also benefit.

14. But, as some members of the Commission rightly noted during the discussion of draft article F1, and as the representative of Malaysia also noted in the Sixth Committee, the transit State "should be obliged only to observe and implement its own domestic laws and other international rules governing the human rights of aliens arising from instruments to which it was a party".

15. On the right of return to the expelling State (draft article H1), the Special Rapporteur showed, in the second addendum to his sixth report, that several States, including Belarus, Germany, Malaysia, Malta and the Netherlands, recognized the right of an unlawfully expelled alien to return to the expelling State. However, these countries' laws on this matter vary: some of them place restrictions on the right of return; others make it contingent on the prior possession of a re-entry permit that would be revoked by the expulsion order; while still others require that the expulsion order be annulled owing to a particularly grave or clear error.

16. As the Special Rapporteur wrote in his seventh report, the two draft articles on, respectively, the responsibility of States for internationally wrongful acts and diplomatic protection are therefore quite appropriate for inclusion in the draft articles on the expulsion of aliens. The Special Rapporteur welcomed the comments and suggestions made by States in relation to specific draft articles. He believed that the Commission might adopt some proposals when it finalizes the draft articles on first reading. Where applicable, he will endeavour to formulate such proposals.

17. Some States have felt that the topic of the expulsion of aliens was not suitable for codification or that the final outcome of the Commission's work on the topic should, at most, take the form of "fundamental guiding principles, standards and guidelines" or "guidelines or guiding principles" rather than "draft articles". Some States expressed similar views during the discussion in the Sixth Committee of the General Assembly; such opinions were also expressed within the Commission itself. This indeed represents a thorny question.

18. However, since this topic appears to be a source of concern for some States, the Special Rapporteur was convinced that, once the drafting of the draft articles and the commentaries thereto is completed, the consistency and soundness of the work will become more evident than at present and some of the concerns regarding the topic will be allayed. He therefore hoped that at the appropriate time, the Commission would transmit the outcome of its work to the General Assembly as draft articles so that the Assembly can take an informed decision on their final form.

2. An Overview of the Draft Articles on Expulsion of Aliens

19. It may be recalled that at the sixty-fourth session of ILC the entire set of draft articles on the Expulsion of Aliens was provisionally adopted by the Drafting Committee. At the current session, the Drafting Committee held twelve meetings on the draft articles on the expulsion of aliens. It first considered a number of proposals formulated by the Special Rapporteur in the light of comments and suggestions made by States on certain draft articles as they had been referred to the Drafting Committee. Thereafter, the Committee addressed a number of issues that remained pending, and finally proceeded to adopt the whole set of draft articles.

20. In this part of the Report, the most important features of the draft articles are analyzed to ascertain their salient features. The entire set of draft articles adopted has been divided into five parts. We would he highlighting the most important provisions of each Part in order. However, the entire set of draft articles are found in the Annex to this Report.

21. **Part One**, which is entitled ***"General provisions",*** comprises draft articles 1 to 5.

Draft article 1 which is entitled *'Scope*[15]*'* states that the present draft articles apply to the expulsion, by a State, of aliens who are lawfully or unlawfully present in its territory. The phrase "lawfully or unlawfully present" was introduced in order to signal that the draft articles deal with a broad range of aliens who may be in the territory of the expelling State, irrespective of the legality of their presence. In retaining this formulation, the Drafting Committee was mindful of the fact that, since the inception of the work on this topic, the general view in the Commission had been that the topic should include both aliens lawfully present and aliens unlawfully present in the territory of the expelling State. That being said, it should be noted from the outset that not all the provisions of the draft articles equally apply to aliens lawfully and unlawfully present, or treat these two categories of aliens in the same manner.

22. Draft article 2 which is entitled *'Use of the terms*[16]*'*, provides a definition of two terms that are used throughout the draft articles. The term 'expulsion" is defined as a formal act, or conduct consisting of an action or omission, attributable to a State, by which an alien is compelled to leave the territory of that State.

23. The Drafting Committee found it appropriate to state clearly that the formal act or conduct possibly amounting to expulsion must be attributable to a State, and that the conduct may consist of "an action or omission". These qualifications are in line with the wording retained in the Commission's articles on the responsibility of States for internationally wrongful acts and on the responsibility of international organizations. Furthermore, the Drafting Committee considered it necessary to specify that the notion of expulsion does not cover the extradition of an alien to another State, the surrender of an alien to an international criminal court or tribunal, or the non-admission of an alien, other than a refugee, to a State; hence, the addition of a clause to that effect in subparagraph (*a*) of draft article 2. It should be recalled that the exclusion of these issues from the scope of the draft articles appears to have found broad support both in the Commission and among States.

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[15] **Draft article 1: Scope**

1. The present draft articles apply to the expulsion by a State of aliens who are lawfully or unlawfully present in its territory.

2. The present draft articles do not apply to aliens enjoying privileges and immunities under international law.

[16] **Draft article 2: Use of terms**

For the purposes of the present draft articles:

(a) "expulsion" means a formal act, or conduct consisting of an action or omission, attributable to a State, by which an alien is compelled to leave the territory of that State; it does not include extradition to another State, surrender to an international criminal court or tribunal, or the non-admission of an alien, other than a refugee, to a State;

(b) "alien" means an individual who does not have the nationality of the State in whose territory that individual is present.

24. Subparagraph (*b*) of draft article 2 provides a definition of the term "alien" as "an individual who does not have the nationality of the State in whose territory the individual is present". This formulation corresponds to that proposed by the Special Rapporteur, except for the replacement of the term "person" by "individual" in order to make it clear that only natural persons are covered by the draft articles.

25. Draft article 3 is entitled *"Right of expulsion"*[17]. This provision begins with the enunciation of the right of a State to expel an alien from its territory, followed by an indication according to which the expulsion shall be in accordance with the present draft articles and other applicable rules of international law, in particular those relating to human rights. A point of critical importance here is the fact that the current formulation avoids the reference to "fundamental principles of international law", which had been viewed by several members of the Commission as too restrictive, and refers instead to "the present draft articles and other applicable rules of international law". A specific mention of human rights was included in this draft article because of their particular relevance in the context of expulsion.

26. Draft article 4, entitled "*Requirement for conformity with law"*[18], corresponds, except for some minor changes, to the text originally proposed by the Special Rapporteur in addendum 1 to his sixth report (A/CN.4/625/Add.1), which had received broad support in the Commission during the debate in 2011. The requirement that expulsion shall occur only in pursuance of a decision reached in accordance with law is stated in Article 13 of the International Covenant on Civil and Political Rights (ICCPR) in relation to the expulsion of an alien who is lawfully present in the territory of the expelling State. That said, the Drafting Committee decided to delete the term "lawfully", which appeared in the Special Rapporteur's text. The majority of the members of the Committee were of the view that the requirement for conformity with law corresponds to a well established rule of international law which applies to any expulsion measure, irrespective of the lawfulness of the presence of the alien in the territory of the expelling State.

27. Draft article 5, which is entitled "*Grounds for expulsion*", enunciates the essential requirement – which was emphasized by various members of the Commission – that an expulsion decision shall state the ground on which it is based (Paragraph 1). Apart from recognizing that national security and public order were common grounds for the expulsion of aliens, it goes on to add that only those grounds that are provided for by law may be relied upon by a State in expelling aliens (Paragraph 4). A specific mention of national security and public order was nevertheless retained in the text, given the particular relevance of these grounds in relation to the expulsion of aliens. Paragraph 3 sets out general criteria for the assessment by the expelling State of the ground for expulsion, whatever that ground may be. Paragraph 4 simply indicates that a State shall not expel an alien on a ground that is contrary to international law.

[17] **Draft article 3: Right of Expulsion**
A State has the right to expel an alien from its territory. Expulsion shall be in accordance with the present draft articles and other applicable rules of international law, in particular those relating to human rights.

[18] **Draft article 4 : Requirement for conformity with law**
An alien may be expelled only in pursuance of a decision reached in accordance with law.

28. **Part Two,** entitled ***"Cases of prohibited expulsion"*** consists of draft articles 6 to 13.

Draft article 6, which is entitled *"Prohibition of the expulsion of refugees*"[19], lists out a number of prohibitions on the expulsion of refugees. Paragraph 1 reproduces faithfully the text of Article 32, paragraph 1, of the 1951 Convention, while replacing the words "the contracting States" by the words "a State". This paragraph, which applies only to those refugees who are lawfully present in the territory of the expelling State, limits the grounds for the expulsion of such refugees to national security or public order.

29. Furthermore, pursuant to a preference that had been expressed by several members of the Commission, the reference to "terrorism" as a separate ground for the expulsion of a refugee, which appeared in brackets in the text originally proposed by the Special Rapporteur, was deleted from the draft article. The same is true concerning a previous reference to an additional ground for the expulsion of a refugee, namely "if the person, having been convicted by a final judgment of a particularly serious crime or offence, constitutes a danger to the community of that State"; this phrase was deleted because it does not appear in Article 32, paragraph 1, of the 1951 Convention, but in its Article 33, the content of which is reproduced in paragraph 3 of draft article 6. It was proposed that the commentary indicate that the terms "refugees lawfully present" in the territory of the State mean refugees who have been granted refugee status in that State.

30. The Drafting Committee had a long discussion on paragraph 2 of draft article 6. This paragraph, which finds no equivalent in the 1951 Convention, was proposed by the Special Rapporteur on the basis of judicial pronouncements and doctrinal opinions. It purports to extend the applicability of paragraph 1 to any refugee who, albeit unlawfully present in the territory of the receiving State, has applied for recognition of refugee status, while such application is pending. Paragraph 3 of draft article 6, dealing with *non-refoulement*, combines paragraphs 1 and 2 of Article 33 of the 1951 Convention. The text follows that of the 1951 Refugee Convention, except for the addition of the words "to a State" in the second line, in order to cover all cases of expulsion and not only the situation of "*refoulement*" *stricto sensu*.

31. The draft article 7, which is entitled "*Prohibition of the expulsion of stateless persons*[20]*"* and consists of a single paragraph simply states that a state shall not expel a stateless person lawfully in its territory save on the grounds of national security. As in draft article 6 concerning refugees, the reference to "terrorism" as a possible ground for the expulsion of a stateless person, which appeared in brackets in the text proposed by the Special Rapporteur, was deleted in order

[19] **Draft article 6: Prohibition of the expulsion of refugees**
1. A State shall not expel a refugee lawfully in its territory saves on grounds of national security or public order.
2. Paragraph 1 shall also apply to any refugee unlawfully present in the territory of the State, who has applied for recognition of refugee status, while such application is pending.
3. A State shall not expel or return (*refouler*) a refugee in any manner whatsoever to a State or to the frontiers of territories where the person's life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion, unless there are reasonable grounds for regarding the person as a danger to the security of the country in which he or she is, or if the person, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

[20] **Draft article 7: Prohibition of the expulsion of stateless persons**
A State shall not expel a stateless person lawfully in its territory saves on grounds of national security or public order.

to take into account a preference expressed by several members of the Commission. Moreover, as for the case of refugees, the Drafting Committee decided to delete the reference to an additional ground for the expulsion of a stateless person, which appeared in the text originally proposed by the Special Rapporteur and which was not mentioned in Article 31, paragraph 1, of the 1954 Convention, namely "if the person, having been convicted by a final judgment of a particularly serious crime or offence, constitutes a danger to the community of that State".

32. Draft article 10 which is entitled *"Prohibition of collective expulsion"*[21], addresses only the collective element of the expulsion and does not replicate the general elements of the definition of expulsion contained in draft article 2(*a*). Hence, collective expulsion is defined in paragraph 1 of draft article 10 as the "expulsion of aliens as a group".

33. Paragraph 2, which states the prohibition of collective expulsion, corresponds to the first sentence of paragraph 1 of the text originally proposed by the Special Rapporteur. This prohibition is to be read in conjunction with paragraph 3 of the draft article. Paragraph 3 is based on the formulation contained in the second sentence that appeared in paragraph 1 of the text initially proposed by the Special Rapporteur. It indicates that a State may expel concomitantly the members of a group of aliens, provided that the expulsion takes place after and on the basis of a reasonable and objective examination of the particular case of each individual member of the group. Paragraph 4 contains a "without prejudice" clause referring to the case of armed conflict.

34. Draft article 11 is entitled *"Prohibition of disguised expulsion*"[22], Paragraph 1 of draft article 11, which states the prohibition of any form of disguised expulsion, corresponds to the text originally proposed by the Special Rapporteur in his sixth report. Paragraph 2, which is also based on the text proposed by the Special Rapporteur, makes it clear that this provision refers only to situations in which the forcible departure is the intended result of actions or omissions of the State concerned and towards that end, the Drafting Committee decided to replace, at the end of paragraph 2, the words "with a view to provoking the departure" by the more explicit formulation "with the intention of provoking the departure". However, contrary to the text originally proposed by the Special Rapporteur, in which only acts of the *citizens* of the expelling State were mentioned, the draft article provisionally adopted by the Drafting Committee refers, in more general terms, to "acts committed by its nationals or other persons".

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[21] **Draft article 10: Prohibition of collective expulsion**

1. For the purposes of the present draft articles, collective expulsion means expulsion of aliens as a group.
2. The collective expulsion of aliens, including migrant workers and members of their family, is prohibited.
3. A State may expel concomitantly the members of a group of aliens, provided that the expulsion takes place after and on the basis of a reasonable and objective examination of the particular case of each individual member of the group.
4. The present draft article is without prejudice to the rules of international law applicable to the expulsion of aliens in the event of an armed conflict involving the expelling State.

[22] **Draft article 11: Prohibition of disguised expulsion**

1. Any form of disguised expulsion of an alien is prohibited.
2. For the purposes of these draft articles, disguised expulsion means the forcible departure of an alien from a State resulting indirectly from actions or omissions of the State, including situations where the State supports or tolerates acts committed by its nationals or other persons, with the intention of provoking the departure of aliens from its territory.

35. **Part Three,** entitled *"**Protection of the rights of aliens subject to expulsion"*** consists of twelve provisions starting from draft articles 14 to 25. Draft article 14, which is entitled *"Obligation to respect the human dignity and human rights of aliens subject to expulsion"*[23], states that all aliens subject to expulsion shall be treated with humanity and with respect for the inherent dignity of the human person at all stages of the expulsion process (Paragraph 1). However, the general reference to the "dignity of the person", which was contained in the text proposed by the Special Rapporteur, was replaced by a more specific reference to "the inherent dignity of the human person", a phrase which was taken from Article 10 of the ICCPR, addressing the situation of persons deprived of their liberty. The wording retained by the Drafting Committee is intended to make it clear that the dignity referred to in this draft article is to be understood as an attribute that is inherent to every human person, as opposed to a subjective notion of dignity, the determination of which might depend on the preferences or sensitivity of a particular person.

36. The text of paragraph 2 of draft article 14, which recalls that aliens subject to expulsion are entitled to respect for their human rights, largely corresponds to the text of the revised draft article 8 proposed by the Special Rapporteur.

37. Draft article 18 is entitled *"Prohibition of torture or cruel, inhuman or degrading treatment or punishment"*[24]. The reference to "torture or to inhuman or degrading treatment" was replaced by a more complete reference to "torture or to cruel, inhuman or degrading treatment or punishment" in this article.

38. Moreover, since no agreement could be reached on the appropriateness of the notions such as "territory", "jurisdiction" or "control" in the draft article, the Drafting Committee opted for omitting any such reference in the text of the draft article, while noting that the element of territory was already covered under the definition of "expulsion" contained in draft article 2(*a*). It was felt, in particular, that the question of acts that would be committed outside the territory of the expelling State in relation to the expulsion of an alien could be better addressed, as necessary, in the commentary.

39. The wordings of draft article 23 entitled *"Obligation not to expel an alien to a State where his or her life or freedom would be threatened"*[25], were chosen by the Drafting Committee

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[23] **Draft article 14: Obligation to respect the human dignity and human rights of aliens subject to expulsion**
1. All aliens subject to expulsion shall be treated with humanity and with respect for the inherent dignity of the human person at all stages of the expulsion process.
2. They are entitled to respect for their human rights, including those set out in the present draft articles.

[24] **Draft article 18: Prohibition of torture or cruel, inhuman or degrading treatment or Punishment**
The expelling State shall not subject an alien subject to expulsion to torture or to cruel, inhuman or degrading treatment or punishment.

[25] **Draft article 23: Obligation not to expel an alien to a State where his or her life or freedom would be threatened**
1. No alien shall be expelled to a State where his or her life or freedom would be threatened on grounds such as race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, birth or other status, or any other ground impermissible under international law.
2. A State that does not apply the death penalty shall not expel an alien to a State where the life of that alien would be threatened with the death penalty, unless it has previously obtained an assurance that the death penalty will not be imposed or, if already imposed, will not be carried out

in order to make it clear that this provision enunciates an obligation not to expel to certain States. The phrase "where his life or freedom would be threatened" has been taken from Article 33 of the 1951 Refugee Convention which embodies the prohibition of *refoulement,* and has replaced the original proposal of the Special Rapporteur which referred to a State "where his or her right to life or personal liberty is in danger of being violated".

40. In its paragraph 1, draft article 23 states the prohibition to expel a person to a State where his or her life or freedom would be threatened on any of the grounds that are mentioned in draft article 15, which deals with the obligation not to discriminate. Such grounds include those listed in Article 2, paragraph 1, of the ICCPR with the addition of the ground of "ethnic origin" and "any other ground impermissible under international law".

41. Paragraph 2 of draft article 23 addresses the situation in which the life of an alien subject to expulsion would be threatened with the death penalty in the State of destination. The Drafting Committee modified the wording of paragraph 2 in order to render the obligation set forth therein applicable to "a State that does not apply" the death penalty.

42. Draft article 24 is entitled: *"Obligation not to expel an alien to a State where he or she may be subjected to torture or to cruel, inhuman or degrading treatment or punishment*[26]*".* In adopting this provision, the Drafting Committee made a number of modifications in the text proposed by Rapporteur and adopted a version that would hang together well with the essence of Article 3 of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

43. Thus, the Committee replaced the reference to torture and inhuman or degrading treatment, which appeared in the text proposed by the Special Rapporteur, by a more complete reference to "torture or […] cruel, inhuman or degrading treatment or punishment". Also, the words "where there is a real risk that he or she would be subjected to" were replaced by the phrase "where there are substantial grounds to believe that he or she would be in danger of being subjected to". Furthermore, the words "to another country" were replaced by the words "to a State" and, in order to ensure consistency with other draft articles stating a prohibition, the words "may not" were replaced, in the English text, by "shall not" at the beginning of the article.

44. **Part Four,** which is entitled "***Specific procedural rules"*** comprises of three draft articles from 26 to 28.

Draft article 26 is entitled *"Procedural rights of aliens subject to expulsion"*[27]. The Drafting Committee considered thoroughly the question of the procedural rights of aliens subject to expulsion. Following an extensive discussion on the general approach to be followed with regard

[26] **Draft article 24: Obligation not to expel an alien to a State where he or she may be subjected to torture or to cruel, inhuman or degrading treatment or punishment**
A State shall not expel an alien to a State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture or to cruel, inhuman or degrading treatment or punishment.

[27] **Draft article 26: Procedural rights of aliens subject to expulsion**
1. An alien subject to expulsion enjoys the following procedural rights:
(a) the right to receive notice of the expulsion decision;
(b) the right to challenge the expulsion decision;

to the enunciation of procedural rights, the majority of the members of the Drafting Committee favored the inclusion, in paragraph 1 of the draft article, of a single list of procedural rights that apply – with the possible exception envisaged in paragraph 4 with regard to aliens who have been unlawfully present for less than six months – both to aliens lawfully present and to aliens unlawfully present in the territory of the expelling State.

45. The procedural rights stated in paragraph 1 are the following: (*a*) the right to receive notice of the expulsion decision; (*b*) the right to challenge the expulsion decision; (*c*) the right to be heard by a competent authority; (*d*) the right of access to effective remedies to challenge the expulsion decision; (*e*) the right to be represented before the competent authority; and (*f*) the right to have the free assistance of an interpreter if the alien cannot understand or speak the language used by the competent authority.

46. Draft article 27 is entitled *"Suspensive effect of an appeal against an expulsion decision"*[28]. It will be recalled that the Special Rapporteur had originally refrained from proposing a draft article dealing with this matter, as he considered that State practice had not sufficiently converged to warrant the formulation, if only as progressive development, of such a provision.

47. During the plenary debate in 2011, some members of the Commission shared the view of the Special Rapporteur that no general rule of international law required the expelling State to provide a right of appeal against an expulsion decision with suspensive effect. According to other members, the Commission should formulate a draft article, if only as part of progressive development, contemplating the suspensive effect of an appeal against an expulsion decision, provided that there was no conflict with compelling reasons of national security.

48. In an attempt to respond to some of these concerns, the Special Rapporteur presented to the Drafting Committee, as an exercise of progressive development, a new draft article dealing with the suspensive effect of an appeal against an expulsion decision. In that draft article, a distinction was made between the situation of aliens lawfully present in the territory of the expelling State and the situation of aliens unlawfully present. According to that proposal, the suspensive effect would have been recognized to an appeal lodged by an alien lawfully present in the territory of the expelling State, and possibly also by an alien unlawfully present who met some additional requirements such as a minimum duration of his or her presence in the territory

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(c) the right to be heard by a competent authority;
(d) the right of access to effective remedies to challenge the expulsion decision;
(e) the right to be represented before the competent authority; and
(f) the right to have the free assistance of an interpreter if he or she cannot
understand or speak the language used by the competent authority.
2. The rights listed in paragraph 1 are without prejudice to other procedural rights or guarantees provided by law.
3. An alien subject to expulsion has the right to seek consular assistance. The expelling State shall not impede the exercise of this right or the provision of consular assistance.
4. The procedural rights provided for in this article are without prejudice to the application of any legislation of the expelling State concerning the expulsion of aliens who have been unlawfully present in its territory for less than six months.

[28] **Draft article 27: Suspensive effect of an appeal against an expulsion decision**
An appeal lodged by an alien subject to expulsion who is lawfully present in the territory of the expelling State shall have a suspensive effect on the expulsion decision.

of the expelling State or a minimum degree of social integration in that State. After a prolonged discussion, the Committee opted for a draft article recognizing the suspensive effect only to an appeal lodged by an alien lawfully present in the territory of the expelling State.

49. Let us now turn to **Part Five** of the draft articles, which are entitled ***"Legal consequences of expulsion"*** and comprises draft articles 29 to 32. Draft article 29 is entitled *"Readmission to the expelling State"*[29]. It should be recalled that the draft article initially proposed by the Special Rapporteur, which was entitled "Right of return to the expelling State", gave rise to some concerns during the debate in the Commission in 2011. In particular, several members were of the view that the draft article was too broad as it recognized a right of return in the event of unlawful expulsion, irrespective of the lawfulness or unlawfulness of the alien's presence in the territory of the expelling State, and of the reason for which the expulsion was to be regarded as unlawful.

50. The Drafting Committee worked on the basis of a revised text presented by the Special Rapporteur in response to concerns raised during the plenary debate on the original draft article. In this regard, the Special Rapporteur proposed that the scope of the draft article be narrowed down so as to limit the right of return in case of unlawful expulsion to those aliens who were lawfully present in the territory of the expelling State. Also, in view of the fact that some States had questioned the existence of any automatic right of return to the expelling State, the Special Rapporteur proposed to the Drafting Committee that the term *"readmission"* be used instead of *"return".*

51. Following a lengthy discussion, the Drafting Committee retained a formulation which it considered to be sufficiently cautious in that it covers only aliens lawfully present in the territory of the expelling State and recognizes a right to readmission to the expelling State only if it is established by a competent authority that the expulsion was unlawful, and save where the return of the alien constitutes a threat to national security or public order, or where the alien otherwise no longer fulfils the conditions for admission under the law of the expelling State. That being said, the Committee formulated this draft article as an exercise of *progressive development* rather than an attempt to *codify* existing rules.

52. The term "unlawful expulsion", contained in the draft article, covers any expulsion in violation of a rule of international law. However, that term should also be understood in the light of the principle stated in Article 13 of the ICCPR and reiterated in draft article 4, according to which an alien may be expelled only in pursuance of a decision reached in accordance with law, *i.e.*, primarily, the internal law of the expelling State.

53. The recognition of a right to readmission according to draft article 29 is limited to those situations in which the unlawful character of the expulsion has been the subject of a binding

[29] **Draft article 29: Readmission to the expelling State**

1. An alien lawfully present in the territory of a State, who is expelled by that State, shall have the right to be readmitted to the expelling State if it is established by a competent authority that the expulsion was unlawful, save where his or her return constitutes a threat to national security or public order, or where the alien otherwise no longer fulfils the conditions for admission under the law of the expelling State.

2. In no case may the earlier unlawful expulsion decision be used to prevent the alien from being readmitted.

determination, either by the authorities of the expelling State or by an international body, such as a court or a tribunal, which is competent to do so. Furthermore, the formulation retained by the Drafting Committee covers also those situations where the unlawful expulsion did not occur through the adoption of a formal decision – a scenario which is addressed in draft article 11 on the prohibition of disguised expulsion.

54. Draft article 29 should not be read as conferring on determinations made by international bodies effects other than those that are provided for in the instruments by which such bodies were established. It only recognizes, as a matter of progressive development, an independent right of the alien to be readmitted as a result of the determination of the unlawful character of his or her expulsion by a competent authority, be it internal or international.

55. As indicated clearly in the draft article, the expelling State would retain the *right to deny readmission* where the return of the alien would constitute a threat to national security or public order, and also in those situations where the alien would no longer fulfill the conditions for admission under the law of the expelling State.

56. Draft article 31 is entitled *"Responsibility of States in cases of unlawful expulsion"*[30]. The text of the draft article as provisionally adopted by the Drafting Committee indicates that the international responsibility of the expelling State is engaged in the event of an expulsion in violation of international obligations. As stated in the draft article, such obligations may exist under the present draft articles or any other rules of international law.

C. SUMMARY OF THE VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPIC IN THE SIXTH (LEGAL) COMMITTEE OF THE UN GENERAL ASSEMBLY AT ITS SIXTY-SIXTH SESSION (2011)

57. The representatives of several States spoke on the topic of the expulsion of aliens during the Sixth Committee's discussion of the report of the International Law Commission at the sixty-sixth session of the General Assembly. Most of the comments concerned the draft articles proposed by the Special Rapporteur in the second addendum to his sixth report[31]. Some statements, however, concerned the recurring issues of the feasibility of the topic, the methodology followed by the Special Rapporteur and the final form of the Commission's work on the topic.

58. The Delegate of **Republic of Korea** observed that in accordance with the principle of sovereign equality, all States had the right to expel aliens who violated domestic regulations or damaged national interests. It was essential, however, to balance that sovereignty with measures to ensure that the human rights of aliens subject to expulsion were not violated, he added. Explaining his Country's position, he pointed out that appeals against an expulsion decision had suspensive effect in the Republic of Korea pursuant to an immigration control law governing expulsion. As a high contracting party to the Convention relating to the Status of Refugees,

[30] **Draft article 31: Responsibility of States in cases of unlawful expulsion**
The expulsion of an alien in violation of international obligations under the present draft articles or any other rule of international law engages the international responsibility of the expelling State.

[31] A/CN.4/625/Add.2.

moreover, it was bound by the non-refoulement principle which imposed prohibitions to expel or return a refugee in any manner whatsoever to the frontiers of territories where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion.

59. The Delegate of **Pakistan** stated that his Government would report at a later date on its practices with respect to the suspensive effects of remedies and on the possibility of distinguishing between aliens lawfully or unlawfully present in the territory of the expelling State, as requested in paragraphs 40 and 42 of the Commission's report.

60. The Delegate of **India** pointed out with regard to that draft article that pertained to 'Expulsion in connection with extradition' that his delegation had reservations regarding that provision. Explaining it, he stated that although both expulsion and extradition led to a person leaving the territory of one State for another, the legal basis for and the laws governing the process and the procedure involved were altogether different, and one could not be used as an alternate for the other.

61. The Delegate of **Thailand** stated that the right to challenge an expulsion decision under draft article C1 (Procedural rights of aliens facing expulsion), as contained in the sixth report of the Special Rapporteur on the topic (A/CN.4/625/Add.1), was applicable only to aliens who were lawfully in the territory of the expelling State. Concerning revised draft article D1 (Return to the receiving State of the alien being expelled), he was of the view that the illustrative reference to the rules of air travel in paragraph 2 was vague and unhelpful, particularly as no reference was made to travel by sea or land, which were also frequently used channels for the expulsion of aliens. Further, the word "possible" should preferably be replaced by "feasible" or "practical" in order to take account of the capability and means of the expelling State.

62. In his view, with regard to draft article G1 (Protecting the property of aliens facing expulsion), the application of paragraph 1 could be problematic when it came to making an objective assessment of the intention of the expelling State. His delegation therefore proposed an amendment of the wording to read: "The expulsion of an alien for the sole purpose of unlawfully confiscating his or her assets is prohibited." It also favoured the proposed exception of cases where a court had found, after a fair trial, that certain property had been acquired illegally. In paragraph 2, the term "to the extent possible" should either be further elaborated or replaced by the phrase "in accordance with the domestic law of the expelling State".

63. In draft article H1 (Right of return to the expelling State), it would be preferable to replace "right of return" with "right of readmission", as the word "return" was more appropriately used in cases where a person was expelled from his or her own country. Furthermore, the term "mistaken grounds" had no legal basis; the grounds in question were either attributable to an error of fact or law, or were legally unjustifiable.

64. As regards draft article 8 (Expulsion in connection with extradition) , he was of the view that this was perhaps misplaced in the current set of draft articles. In order to address the relation between extradition and expulsion of aliens, a provision to the effect that the draft articles were without prejudice to international legal obligations regarding extradition among the States

concerned should be added to the text of the draft article, he added. While stating that the draft articles should not apply to aliens whose status was regulated by special norms, such as international refugee law, he clarified (with regard to the final product) that his delegation favoured the development of draft guidelines or guiding principles rather than a set of draft articles.

65. The Delegate of **Malaysia** at the outset stated that her Delegation would in due course submit its response to the specific issues raised in paragraphs 40 to 42 of the Commission's report (A/66/10). On draft article D1 (Return to the receiving State of the alien being expelled), she was of the view that codification of the duty or extent of the obligation imposed on States to encourage the voluntary departure of an alien being expelled was unnecessary, in that the expulsion decision concerned would have legal force. The alien would therefore be required to comply with that decision unless it was overturned or altered. The formulation of paragraph 1 of the draft article was, moreover, so broad that it was impossible to determine the extent of the duty imposed upon States to encourage compliance with an expulsion decision. Further, the mandatory duty imposed upon States through the use of the term "shall" implied that such a duty must first be discharged by States before an expulsion decision was brought into effect, thereby placing an unnecessary burden on States, she added.

66. Explaining her Country's position, she pointed out that under Malaysian law, the current practice was that an alien unlawfully present on Malaysian territory could be detained in custody while arrangements for his or her removal by order of the Director General were being made. No specific period of notice for the purpose of departure preparations was required in the case of an alien subject to removal, whose detention was nonetheless at the discretion of the Government. In practice, therefore, aliens being expelled might be afforded the time needed to prepare for their departure from Malaysia. Taking into account such State practices, a reasonable time frame for compliance with an expulsion order might accordingly be put in place, rather than the appropriate notice provided for in draft article D1, paragraph 3, he noted.

67. As to draft article E1 (State of destination of expelled aliens), the current formulation of paragraph 2, which listed options for expulsion destinations in cases where the State of nationality of the alien being expelled had not been identified, was unacceptable to her delegation because, under Malaysia's immigration laws, such an alien could be returned only to his or her place of embarkation or country of birth or citizenship. In any event, not only would it be difficult to foresee whether the destination selected by the expelling state for deportation would expose the deportee to prosecution and punishment; it would also impose an undue additional burden and duty on the expelling state and encroach on its right to exercise its powers in accordance with domestic laws, she added.

68. Concerning the revised version of draft article F1 (Protecting the human rights of aliens subject to expulsion in the transit State), her delegation's position was that rules applicable in the expelling State to protection of the human rights of aliens subject to expulsion should not apply in the transit State, which should be obliged only to observe and implement its own domestic laws and other international rules governing the human rights of aliens arising from instruments to which it was a party. Hence, the formulation of the draft article should be reconsidered,

bearing in mind that the specific legal framework required for the return of aliens utilizing transit points would be better addressed at the bilateral or multilateral levels, she explained.

69. As to draft article G1 (Protecting the property of aliens facing expulsion), she was of the view that while the right to property was guaranteed under Malaysia's Federal Constitution in conformity with the relevant international standards, she noted that the property of aliens should be protected without prejudice to the rights of the expelling State to take any necessary action under its criminal laws to seize or forfeit properties forming the proceeds of crimes. She also supported the view that paragraph 1 of the draft article was *lex ferenda* and did not reflect existing State practice, which in the case of Malaysia did not entail confiscation measures against expelled aliens.

70. Concerning draft article I1 (The responsibility of States in cases of unlawful expulsion), she was of the view that the proposal that the legal consequences of an unlawful expulsion should be governed by the general regime of the responsibility of States for internationally wrongful acts necessitated further deliberation once that regime had been identified and could be clearly incorporated into the proposed formulation. As for the proposal to make it clear that a State could be held responsible under draft article I1 only for violating a rule of international law, which was supported by her delegation, a more cautious approach should be adopted by conducting an in-depth analysis of the formulation of the text with a view to enhancing understanding of the application of the regime of State responsibility in relation to the draft article.

71. On draft article 8 (Prohibition of extradition disguised as expulsion), as contained in the sixth report of the Special Rapporteur (A/CN.4/625), the decision as to whether to exercise deportation or extradition must remain the sole prerogative of a sovereign State. The wording of the draft article should therefore be re-evaluated with the aim of ensuring a clear distinction between disguised extradition and a genuine act of deportation. Given the complexity of the issue, present laws and principles of extradition and immigration were well established and sufficient to cater to the protection of the rights of aliens, she reasoned.

72. The Delegate of **Japan** stated that, in view of the debate on the issue of the return to the receiving State of the alien being expelled and the available remedies against an expulsion decision, the Commission should study State practice, international instruments and the relevant jurisprudence that exist in this area, and should respond to the criticism that the topic was not ripe for codification.

73. The Delegate of **Arab Republic of Egypt** stated that, States, in exercising their right to expel aliens, must respect the fundamental principles of international law and human rights norms. But he was of the view that States have been increasingly failing to do so. In this regard, he drew attention to the international counter-terrorism efforts and the need to confront rising clandestine immigration and refugee flows. Expulsion, particularly collective expulsion, should not be practical without objective reasons grounded in established international legal principles and it should not be on the basis of discrimination against the citizens of another State or against a specific religion, culture or race, he added. His Government complied with the provisions of the 1951 Geneva Convention relating to the Status of Refugees and coordinated with the Office

of the United Nations High Commissioner for Refugees when taking steps to expel refugees from its territory, he clarified.

74. The Delegate of **Sri Lanka** observed that the topic of the expulsion of aliens fell essentially within the sovereign domain of States and was therefore governed by domestic law, although States had to exercise the rights related thereto in accordance with international law. In formulating its draft articles, the Commission should elaborate basic standards and guarantees that were grounded in State practice, leaving certain latitude for national policies. Although the Special Rapporteur had, by and large, maintained that balance in his reports, there were still some concerns about an alien's right of return to the expelling State. In that connection, it was important to distinguish between the lawful and unlawful presence of such aliens. He agreed that no general rule of international law required the expelling State to provide a right of appeal against an expulsion decision with suspensive effect; to do so would hamper the effective exercise of the right of expulsion and encroach on the sovereign domain of States, he added.

75. The Delegate of **Islamic Republic of Iran** stated that a State had not only the right to expel aliens on its territory who posed a threat to its national security or public order but also the right to determine the components of those two concepts on the basis of its national laws and the prevailing circumstances. In his view, therefore, it would be a pointless exercise to enumerate the grounds that a State might invoke to justify the expulsion of aliens. Expulsion must be conducted with due respect for the fundamental human rights of the person being expelled, who must be protected against any inhuman and degrading treatment, including during pre-expulsion detention. The property rights of all persons subject to expulsion must also be respected and guaranteed by the authorities of the expelling State, he added.

76. As regards the right of appeal against the expulsion orders of the aliens, he was of the view that notwithstanding the doubtful advisability of formulating a provision on appeals against an expulsion decision, an additional draft article on the matter was redundant in any event, given the lack of information on existing State practice. Many national laws made no provision for such appeals, and there was serious doubt about the existence of customary rules in that area. The right of return to the expelling State could not be recognized in the case of aliens who had been on its territory unlawfully prior to the expulsion decision, as it would imply recognition of an acquired right of residence, concerning which State practice was unknown, he added. Lastly, he was of the opinion that the development of guidelines on the expulsion of aliens was a more appropriate and feasible proposition than the elaboration of a convention on the basis of the draft articles.

D. COMMENTS AND OBSERVATIONS OF THE AALCO SECRETARIAT

77. The Asian-African Legal Consultative Organization (AALCO) at the outset pays its glowing tribute to the Special Rapporteur of the topic Mr. Maurice Kamto, whose mastery of the subject, guidance, diligence and cooperation greatly facilitated the work of the Drafting Committee. It also extends its gratitude to the members of the Drafting Committee for their active participation and valuable contributions that led to the successful adoption of the draft articles which were adopted at the first segment of the sixty-fourth session of the Commission that took place in 2012.

78. These draft articles, the first reading of which is complete, proceed on the basis of persons in lawful and unlawful presence. They seek to strike an appropriate balance between States' discretion to control the entry of aliens into their territory (Sovereignty) and their international law obligations, particularly in the field of human rights that they have to comply with before expelling aliens. It is very important that these articles receive the critical attention of Member States of AALCO for they do contain some grey areas that the Commission needs to address in the further stages of its work. This becomes all the more important in view of the fact that some provisions of the draft articles go beyond codification and engage in progressive development of the law on the subject.

79. Be that as it may, one can identify a number of issues/ concerns emanating from the draft articles that deserve to be highlighted.

80. *Firstly*, it needs to be remembered here that the right of States to expel aliens has never been in doubt. States are generally recognized as possessing the power to expel aliens. The draft articles clearly recognize this truism. For instance, draft article 3 confers on States the right to expel an alien from its territory and makes this right (rightly so) contingent on the state concerned taking into consideration the draft articles and other applicable rules of international law, particularly the human rights law. Hence, expulsion of aliens, a matter that has traditionally been part of the sovereign domain of States, has come to recognize and incorporate the decisive influence of relevant international law obtaining in this area.

81. *Secondly*, the draft articles also clearly recognize the right of every State to expel aliens living on its territory if they posed a threat to its national security or public order [draft article 5, (Paragraph 2)]. The fact that the draft articles have not come out with a list of grounds only on the basis of which States could expel aliens, is indeed welcome. This is because it would be pointless to try to list the grounds that could be invoked by a State to justify the expulsion of aliens. The draft articles have also recognized perhaps the two most important limitations that exist on the sovereign right of the State to expel aliens, namely, collective expulsion and disguised expulsion.

82. *Thirdly*, with regard to draft article 13 that deals with the prohibition of extradition disguised as expulsion, it needs to be reiterated here that extradition of an alien to a requesting state should be conceded when all conditions for expulsion are met and the expulsion itself does not contravene international or domestic law. Given the ever-increasing complexity and sophistication of transnational crimes, States should be encouraged to identify flexible, practical and effective means of cooperation.

83. *Fourthly*, reference may be made to draft article 27 that deals with the suspensive effect of an appeal against an expulsion decision. According to this article an appeal (lodged by an alien subject to expulsion) can have *suspensive* effect on the expulsion decision. This creates a number of issues; For instance, what effects does this provision would have on the speedy disposal of expulsion procedures? What is its impact on the right of expulsion as a sovereign attribute? Is this provision supported by state practice, including decisions of domestic jurisdiction? Most importantly, whether any general rule of international law requires the expelling States to provide a right of appeal against an expulsion decision with suspensive

effect? The answers to these questions are not clear, and Member States of AALCO could provide vital inputs, as regards their state practice, to the Commission on this issue. This has immense potential in guiding the future work of the Commission to a significant extent.

84. *Fifthly*, there is a provision embodied in draft article 29 that deals with the 'readmission to the expelling State' which holds immense significance and interest for the Member States of AALCO. This provision recognizes the right of readmission (of aliens) where "if it is established by a competent authority that the expulsion was unlawful, except where for reasons of threat to national security or public order. This is an area characterized by lack of adequate state practice. For instance, not many States have national laws that do confer on aliens subject to expulsion, a right of appeal against that decision. Given this fact, it is almost impossible to draw a legal basis for this under customary international law. Furthermore, how far the right of return to the expelling State could be recognized in the case of aliens who had been on its territory unlawfully prior to the expulsion decision requires clarification. This is because, potentially speaking, readmission could imply the recognition of an acquired right of residence on the part of aliens, an area, again characterized by absence of state practice. For these reason, the comments of the Member States of AALCO as regards their state practice in this area would be of particular importance to the Commission in dealing with this subject in the years to come.

V. PROTECTION OF PERSONS IN THE EVENT OF DISASTERS

A. BACKGROUND

1. At the fifty-ninth session of the International Law Commission (2007), it was decided to include the topic "Protection of Persons in the Event of Disasters" in its programme of work and Mr. Eduardo Valencia-Ospina (Colombia) was appointed as Special Rapporteur. At the same session, the Commission requested the Secretariat to prepare a background study on the topic, initially limited to natural disasters. At the sixtieth session (2008), the Commission had before it the preliminary report of the Special Rapporteur[32] that traced the evolution of the protection of persons in the event of disasters, identified the sources of the law on the topic, previous efforts towards codification and development of the law in the area, and a broad outline on various aspects of the general scope with a view to identifying the main legal questions to be covered.

2. At its sixty-first session (2009), the Commission considered the second report of the Special Rapporteur[33] analysing the scope of the topic *ratione materiae*, *ratione personae* and *ratione temporis*, and issues relating to the definition of "disaster" for purposes of the topic, as well as undertaking a consideration of the basic duty to cooperate. The report further contained proposals for draft articles 1 (Scope), 2 (Definition of disaster) and 3 (Duty to cooperate). The Commission also referred the draft articles 1 to 3 to the Drafting Committee, on the understanding that if no agreement was possible on draft article 3, it could be referred back to the Plenary with a view to establishing a Working Group to discuss the draft article. Later, the Commission received the report of the Drafting Committee and took note of draft articles 1 to 5, as provisionally adopted by the Drafting Committee.

3. At its sixty-second session (2010), the Commission had before it the third report of the Special Rapporteur[34], providing an overview of the views of States on the work undertaken by the Commission thus far, a consideration of the principles that inspire the protection of persons in the event of disasters, in its aspect related to persons in need of protection, and a consideration of the question of the responsibility of the affected State. There were proposals for the following three further draft articles: draft articles 6 (Humanitarian principles in disaster response), 7 (Human dignity) and 8 (Primary responsibility of the affected State). The Commission provisionally adopted draft articles 1 to 5, and took note of draft articles 6 to 9, as provisionally adopted by the Drafting Committee.

4. At the sixty-third session (2011), the Commission had before it the fourth report of the Special Rapporteur[35], dealing with the responsibility of the affected State to seek assistance where its national response capacity is exceeded, the duty of the affected State not to arbitrarily withhold its consent to external assistance, and the right to offer assistance in the international community. The Commission decided to refer draft articles 10 to 12, as proposed by the Special Rapporteur in his fourth report, to the Drafting Committee. The Commission provisionally adopted six draft articles, together with commentaries.

[32] A/CN.4/598.
[33] A/CN.4/615 and Corr.1.
[34] A/CN.4/629.
[35] A/CN.4/643 and Corr.1.

B. CONSIDERATION OF THE TOPIC AT THE SIXTY-FOURTH SESSION OF THE ILC

5. At the Sixty-Fourth session of the Commission, it took note of five draft articles as provisionally adopted by the Drafting Committee that related to forms of cooperation (Draft Article 5 *bis*)[36], offers of assistance (Draft Article 12)[37], conditions on the provision of external assistance (Draft Article 13)[38], facilitation of external assistance (Draft Article 14)[39], and Termination of external assistance (Draft Article 15)[40].

6. The fifth report of the Special Rapporteur addresses the following draft articles. The overview of the comments made by States and International Organizations on the "right to offer assistance (proposed draft article 12)" is the following. Right to offer assistance:

- should be viewed as complementary to the primary responsibility of the affected State and as an expression of solidarity and cooperation and not as interference in its internal affairs.
- right of assisting actors was merely to "offer", not to "provide", assistance and the affected State remained, in line with the principle of sovereignty and notwithstanding draft articles 10 and 11, free to accept in whole or in part any offers of assistance from States and non-State actors, whether made unilaterally or in answer to an appeal.
- the duty of the affected State to give consideration to offers of assistance, rather than as a legal right.

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[36] **Article 5 *bis* - Forms of cooperation:** For the purposes of the present draft articles, cooperation includes humanitarian assistance, coordination of international relief actions and communications, and making available relief personnel, relief equipment and supplies, and scientific, medical and technical resources….

[37] **Article 12 - Offers of assistance:** In responding to disasters, States, the United Nations, and other competent intergovernmental organizations have the right to offer assistance to the affected State.
Relevant non-governmental organizations may also offer assistance to the affected State.

[38] **Article 13 - Conditions on the provision of external assistance:** The affected State may place conditions on the provision of external assistance. Such conditions shall be in accordance with the present draft articles, applicable rules of international law, and the national law of the affected State. Conditions shall take into account the identified needs of the persons affected by disasters and the quality of the assistance. When formulating conditions, the affected State shall indicate the scope and type of assistance sought.

[39] **Article 14 - Facilitation of external assistance:** 1. The affected State shall take the necessary measures, within its national law, to facilitate the prompt and effective provision of external assistance regarding, in particular:

(a) civilian and military relief personnel, in fields such as privileges and immunities, visa and entry requirements, work permits, and freedom of movement; and

(b) goods and equipment, in fields such as customs requirements and tariffs, taxation, transport, and disposal thereof.

2. The affected State shall ensure that its relevant legislation and regulations are readily accessible, to facilitate compliance with national law.

[40] **Article 15 - Termination of external assistance:** The affected State and the assisting State, and as appropriate other assisting actors, shall consult with respect to the termination of external assistance and the modalities of termination. The affected State, the assisting State, or other assisting actors wishing to terminate shall provide appropriate notification.

- it was appropriate to consider whether all of the actors mentioned in the text should be placed on the same juridical footing, since only subjects of international law were entitled to exercise the right to offer assistance.

Draft Article 13: Conditions on the provision of external assistance

7. Draft article 13 speaks of placing conditions on provision of external assistance, which ought to be in compliance with rules of international law and the national law of the affected state. There shall be identification of needs of persons affected by disasters and the quality of assistance. In that regard, the right of the affected State to impose conditions for the delivery of assistance is qualified by an obligation that such conditions comply with international and national laws as well as treaty obligations. Although an affected State may impose conditions, including the retention of control over the provision of assistance and requirements that any assistance comply with specific national laws, such conditions may not abrogate otherwise existing duties under national and international law. Further, such conditions may not contravene the provisions of any treaties, conventions or instruments to which the affected State is a party.

8. The Special Rapporteur has cited various multilateral treaties that include a provision requiring compliance with national law. For example Article 4 (8) of the Tampere Convention, Article 13 (2) of the ASEAN Agreement on Disaster Management and Emergency Response, 2005; Paragraph 5 of annex to the General Assembly resolution 46/182, etc,. This is a clear statement that the affected State should be able to condition the provision of assistance on compliance with its national law. Further, the Commission relied on certain principles stating that they should not be construed in a limiting fashion, as only those explicitly enshrined in international agreements, but rather as "obligations applicable on States by way of customary international law, (including) assertions of best practices". Therefore, obligations of State under international law pertaining, inter alia, to the environment and sustainable development may also serve to circumscribe the conditions an affected State may impose for the provision of assistance. Where the national laws of an affected State provide protections in excess of international standards and the affected State has not agreed to waive such additional protections in order to facilitate the delivery of assistance, assisting States must comply with the national laws of the affected State.

9. The core humanitarian obligations as charted out in paragraph 2 of the Guiding principles found in the annex to General Assembly resolution 48/182, "…humanitarian assistance must be provided in accordance with the principles of humanity, neutrality and impartiality". In a nutshell, these obligations are: (i) principle of humanity, (ii) neutrality, and (iii) impartiality.

10. The principle of humanity was initially developed in humanitarian law, but has since been recognized as applying in both war and peace. For example, the *Corfu Channel* case, the International Court of Justice found that the obligations incumbent on State authorities were based "on certain general and well recognized principles, namely: elementary considerations of humanity, more exacting in peace than in war".[41] This principle of humanity is extended to the context of disaster relief by virtue of (i) the Guidelines on the Use of Military and Civil Defence

[41] Corfu Channel case (United Kingdom of Great Britain and Northern Ireland v. Albania), Judgment of 9 April 1949, I.C.J. Reports 1949, p. 22.

Assets in Disaster Relief (Oslo Guidelines)[42] and (ii) the Mohonk Criteria for Humanitarian Assistance in Complex Emergencies: Task Force on Ethical and Legal Issues in Humanitarian Assistance"[43], (Mohonk Criteria), which affirm that "human suffering must be addressed wherever it is found". Humanity as a fundamental principle States that assisting actors and their personnel should abide by the law of the affected State and applicable international law, coordinate with domestic authorities, and respect the human dignity of disaster affected persons at all times". The principle of humanity, therefore, requires that affected States, in imposing conditions for the provision of aid, do so only in ways that respect the human dignity of those affected.

11. The principle of neutrality as described by the Red Cross and Red Crescent Movement as the notion that "humanitarian assistance should be provided without engaging in hostilities or taking sides in controversies of a political, religious, or ideological nature". The Special Rapporteur , in his third report noted that "the affected State must respect the humanitarian nature of the response activities and 'refrain from subjecting it to conditions that divest it of its material and ideological neutrality'".[44] Therefore, conditions set by affected States on the acceptance of aid must be neither "either partisan or political acts nor substitutes for them".[45]

12. The principle of impartiality includes non-discrimination. The doctrine says that aid must be provided without discriminating in terms of ethnic origin, gender, nationality, political opinions, race or religion. Further, relief of the suffering of individuals must be guided solely by their needs and priority which must be given to the most urgent cases of distress. This principle finds place in all human rights instruments take into account the principle of non-discrimination and reference must be made to Article 1 (3) of the Charter of the United Nations that seeks international cooperation for solving international problems to the needy without any distinction as to race, sex, language, or religion.

13. The present report of the Special Rapporteur focused also on the issue of human rights of the affected victims, the need for reconstruction and sustainable development, and the fulfillment of obligations under national laws. At the instance of disaster, existing human rights obligations under human rights law do not cease and it implicates numerous human rights, such as the rights to food and water and the right to adequate housing. The affected State may not impose restrictions on assistance that will violate or infringe upon those rights. Moreover, a State's obligations to vulnerable or disadvantaged groups, such as women, children, people with disabilities and indigenous or minority cultural groups, continue to apply in a disaster situation. In fact, during disaster situations, states are imposed with additional duties to ensure the safety of vulnerable populations. Also, the Hyogo Framework for Action 2005-2015[46], underscores the importance of human rights considerations in the disaster-planning process, urging States to adopt "a gender perspective" in disaster risk management and to take into account "cultural diversity, age, and vulnerable groups" in disaster risk reduction. To the extent that humanitarian

[42] Oslo Guidelines, as revised on 27 November 2006, para. 54; available from www.ifrc.org/idrl.
[43] Reprinted in *Human Rights Quarterly*, vol. 17, No. 1 (1995), pp. 192-198
[44] A/CN.4/629.
[45] Ibid para 28.
[46] Hyogo Framework for Action 2005-2015: Building the Resilience of Nations and Communities to Disasters (A/CONF.206/6 and Corr.1), chap. I, resolution 2.

assistance contributes to disaster planning and risk management, affected States must condition acceptance on the assurance that the aid will provide adequately for vulnerable groups.

Draft Article 14: Facilitation of external assistance

14. Draft article 14, suggests that when an affected State does accept an offer of assistance, it retains a measure of control over the duration for which that assistance will be provided, and assisting actors are correspondingly obliged to leave the territory of the affected State upon request. Both the countries are duty-bound to cooperate as per draft article 5, and the context of termination of the assistance is no exception. Citing the provisions from the article 6 (1) of the Tampere Convention, the report explained that termination of assistance has been addressed in many ways. That article reads thus; "The requesting State Party or the assisting State Party may, at any time, terminate telecommunication assistance received or provided … by providing notification in writing. Upon such notification, the States Parties involved shall consult with each other to provide for the proper and expeditious conclusion of the assistance." Few instruments allow the affected State to request the termination of assistance, after which both parties shall consult with each other to that effect.

C. COMMENTS AND OBSERVATIONS OF AALCO SECRETARIAT

15. Five Draft articles have been provisionally adopted by the Drafting Committee of the Commission. Taking into account the concerns of member States in terms of respecting absolute sovereignty of states within its territory along with adherence to the principle of non-intervention in the internal affairs of affected state, few elements have been given due consideration under Draft Article 13. The said draft article states that such conditions shall be in accordance with the existing draft articles, applicable rules of international law, and the national law of the affected State. Further, conditions shall take into account the identified needs of the persons affected by disasters and the quality of the assistance. However, when formulating conditions, the affected State shall indicate the scope and type of assistance sought.

16. Besides these conditions favouring the affected State, the affected State has been vested with certain duties while seeking external assistance. In order to facilitate the prompt and effective provision of external assistance, the affected State shall grant the civilian and military relief personnel, in fields such as privileges and immunities, visa and entry requirements, work permits, and freedom of movement, etc,. It shall also grant in compliance with legal provisions, goods and equipment, in fields such as customs requirements and tariffs, taxation, transport, and disposal thereof. It has also been considered that the affected State shall ensure that its relevant legislation and regulations could be readily accessible, to facilitate compliance with national law.

17. These are few developments on which Member States of AALCO could reflect upon and raise their concerns. The provision with respect to termination of assistance is a welcome measure because the provision clearly seeks to formulate the modalities of termination of assistance in consultation with both parties and provide the assisting state with adequate notification period.

VI. ANNEX

TEXT OF THE STATEMENT DELIVERED BY PROF. DR. RAHMAT MOHAMAD, SECRETARY-GENERAL OF THE ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION (AALCO) AT THE SIXTY-FOURTH SESSION OF THE INTERNATIONAL LAW COMMISSION (25 JULY 2012, GENEVA)

Mr. Lucius Caflisch, the Chairman of the International Law Commission, Distinguished Members of the Commission,

It is my privilege and honour as the Secretary-General of the Asian-African Legal Consultative Organization (AALCO), to address the second part of the Sixty-Fourth Session of the International Law Commission (ILC or Commission) being held in Geneva from 2 July to 3 August 2012. Since this is the first time that I address this newly constituted ILC, I extend my warm congratulations to all of you on your election/reelection and wish you the very best in the important task of progressive development and codification of international law.

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.

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 Session of AALCO should devote more time for deliberating on the agenda item relating to the work of ILC. In view of this, a Half-Day Special Meeting on *"Selected Items on the Agenda of the International Law Commission"* was convened at the recently held Fifty-First Annual Session of AALCO at Abuja, Federal Republic of Nigeria from 18 to 22 June, 2012. The topics for deliberation at this Half-Day Special Meeting were (i) "**Protection of Persons in the Event of Disasters"**, and (ii) "**Immunity of State Officials from Foreign Criminal Jurisdiction"**. The distinguished Panelist for both the topics was Dr. A. Rohan Perera, former Member of the International Law Commission from Sri Lanka. This was followed by the comments of Prof. Djamchid Momtaz , former member of ILC from the Islamic Republic of Iran who shared some of his thoughts on the above-mentioned topics in his capacity as the Discussant.

In the following pages, I would like to give a brief overview of the Half-Day Special Meeting highlighting the essence of it.

Dr. A. Rohan Perera, former Member of the ILC from Sri Lanka presented a paper on "Protection of Persons in the Event of Disasters". He observed that the question of protection of affected persons within the State, victims of natural disasters on the one hand and the fundamental principle of respect for sovereignty and territorial integrity on the other hand, both falls under the customary international law and under the Charter of United Nations under Article 2 (7).

The cluster of Articles 10-12, given the underlying tensions between the principles of State sovereignty and protection, was the subject of sharp divergence of views especially in relation to the idea that affected States are under or should be placed under a legal duty to seek external assistance in cases of disasters. Firstly, the Commission considered that withholding consent to external assistance was not arbitrary where a State was capable of providing, and willing to provide, an adequate and effective response to a disaster on the basis of its own resources. Secondly, withholding consent to assistance from one external source was not arbitrary if an affected State had accepted appropriate and sufficient assistance from elsewhere. Thirdly, withholding of consent was not arbitrary if the relevant offer was not extended in accordance with the present draft articles. It was also observed that humanitarian assistance must take place in accordance with principles of humanity, neutrality and impartiality, and on the basis of non-discrimination. Conversely, where an offer of assistance was made in accordance with the draft articles and no alternate sources of assistance were available there would be a strong inference that a decision to withhold consent would be arbitrary.

Concurring with the views of Special Rapporteur with respect to Draft Article 12 on the right to offer assistance, he said that the provision of assistance was subject to the consent of the affected State. Accordingly, the offer of assistance could not, in principle, be subject to the acceptance by the affected State of conditions that represented a limitation on its sovereignty. It was also stated that offers of assistance from the international community were typically extended as part of international cooperation as opposed to an assertion of rights. The middle ground which seemed to surface from these range of views was that the 'right' of an affected State to seek international assistance was complimented by the duty on third States and Organization to 'consider' such requests, and not necessarily a duty to accede to them. It was further emphasized that, the right to the international community to offer assistance could be combined with an encouragement to the international community to make such offers of assistance on the basis of the Principle of International Cooperation and Solidarity.

Dr. A. Rohan Perera had also presented a paper on the topic "Immunity of State Officials from Foreign Criminal Jurisdiction". While pointing out that the debate in the ILC on this topic centered around three principal issues, namely (i) the general orientation of the topic; (ii) the scope of immunity; and (iii) the question whether or not there were exceptions to immunity with regard to grave crimes under international law, he also informed that the consideration of this topic by ILC for the past few years has been of a preliminary nature and that no draft articles had so far been drafted.

Regarding the *General Orientation* of the topic, he brought attention to creation of a Working Group at the current Session as decided by the outcome of the discussions held in the

Commission last year, to examine and discuss the general orientation of the topic, before the adoption of draft articles.

While highlighting the views of the States as revealed in the Sixth Committee debates on the topic, he stated that it reflected an approach which in principle endorsed the Special Rapporteur's position of treating the *lex lata* perspective as the starting point. However, it nevertheless underlined the need that having codified and identified the gaps, the Commission should proceed to the next stage, the d*e lege ferenda* perspective. He was of the view that this is the challenging task before the Working Group and that the viewpoints of the Asian-African States on this approach would be of immense value to the Commission in determining the future direction of this topic, he added.

With regard to the *Scope of Immunity* that dealt with the question as to which officials are to be covered under the topic, he noted that there was a broad degree of consensus within the Commission in the light of State practice and recent judicial decisions that Heads of State, Heads of Government and Ministers of Foreign Affairs who constituted the so called ―Troika of State officials enjoyed personal immunity *rationae personae*. In the light of the foregoing discussion, Dr. Rohan Perera observed that it was with regard to the other categories of State Officials outside the 'Troika' that the Commission was required to move into unsettled territory. The challenge before the Commission was to strike a delicate balance between the need to expand, albeit cautiously, the different categories of state officials to be granted jurisdictional immunities―*rationae personae*, in the light of contemporary developments in international relations on the one hand, and the need to avoid the risk of a liberal expansion of such categories, which could be conducive to an environment of impunity under the cover of immunity, on the other, he clarified.

Regarding the *Question of Exceptions to Immunity* of a State Official from Foreign Criminal Jurisdiction, Dr. Rohan Perera drew attention to the observations of the Special Rapporteur that in the case of immunity *rationae personae*, the predominant view seemed to be that such immunity was absolute and covered acts performed both in an official capacity or personal capacity and committed both while in office and prior thereto and that no exceptions thereto could be considered. The Special Rapporteur was of the opinion that the question of exceptions could only be pertinent with regard to immunity *ratione materiae* concerning acts performed in an official capacity, in the context of crimes under international law. He also drew attention to the opinion of the Special Rapporteur that the issue of exceptions to immunity fell within the sphere of progressive development of international law. Dr. Rohan Perera, however, was of the view that these issues raised serious concerns including the potentiality of the politically motivated prosecutions, trials in absentia and evidentiary problems as a result of lack of cooperation of the State concerned. Hence, he cautioned the Commission against drafting provisions *de lege ferenda* and recommended that it should restrict itself to codifying existing law.

Dr. Rohan Perera highlighted the recent judgment of the International Court of Justice (ICJ) delivered in the *"Jurisdictional Immunities of States case"* **(**Germany Vs Italy - 3rd February 2012) and stated that it had clear implications for the ongoing work on the question of immunity of State officials from foreign criminal jurisdiction. In this case the ICJ upheld that there could

not be a conflict between rules which are substantive in nature and rules on immunity which are procedural in nature, he clarified.

Prof. Djamchid Momtaz, Former Member of the ILC from Islamic Republic of Iran was the Lead Discussant for the topics discussed at the Special Half-Day Meeting. He reiterated the need for effective participation by Member States to the questions posed by the Commission, he cited the topic "obligation to extradite or prosecute (*aut dedere aut judicare*)". Wherein the Special Rapporteur raised a question as to whether the practice of State regarding the question of obligation to extradite or prosecute was based on a treaty obligation or an obligation based on customary international law.

Commenting on the topic Protection of Persons in the Event of Disasters, he posed a question whether States have the duty to offer assistance. Another important issue was that the scope of the obligation on the State in whose territory the disaster has taken place was, however, limited only to the subjects of international law, excluding non-governmental organizations that were not subject of international law.

On the topic "Immunity of State Officials from Foreign Criminal Jurisdiction", Prof. Momtaz said that distinction needs to be made between this subject and subject of accountability of state officials. The question of accountability of state officials has been dealt with in some very important texts and the most important one was the Statute of International Criminal Court and Article 27 of the Statute does not give immunity to any Head of State, Ministry of Foreign Affairs, and any other high-ranking officials of the State.

Agreeing with the question of distinction between *lex lata* and lex *ferenda,* he stressed with a note of caution that it should focus on codifying the existing customary practice of States in international law as it exists. Regarding the decision of the International Court of Justice (ICJ) on the dispute between Germany and Italy, he said that the decision of the ICJ insisted once more on the jurisdictional immunity of States before national tribunals.

In the ensuing deliberations the delegations from **People's Republic of China, Indonesia, Japan, Islamic Republic of Iran, Malaysia, Republic of Korea, Kingdom of Saudi Arabia, State of Kuwait, and India** made their statements. I would like to highlight some of the important points that the delegations had made during the deliberations:

Firstly, in view of the fact that half of the Members of the Commission are from the Asian-African States, a number of Delegations expressed hope that their active participation in the Commission will help reflect the views/aspirations of the Asian-African States in the progressive development and codification of international law in a substantial manner. It was also stated that the new Members of the ILC would make valuable inputs into the work of the ILC and collaborate constructively with other Members of the ILC from the Asian–African region and other regions. In this regard, it was also proposed that AALCO Secretariat should arrange for an Interaction Session, via, tele-conference between the Members of ILC and its Member States.

Secondly, with regard to the follow-up of the work of ILC, one delegation observed that the codification works of ILC must be followed up by the UN General Assembly to give effect to the

ILC's works. In this regard, he pointed out that his delegation would be taking up two subjects at the forthcoming session of the UN General Assembly. One is the Draft Articles on the Law of Transboundary Aquifers and another is the UN Convention on Jurisdictional Immunities of States and Their Property. As regards the introduction of new topics on the agenda of the ILC, the Delegation agreed with the three-fold criteria propounded by an academic that included; ***practical*** consideration; ***technical*** feasibility, and ***political*** feasibility of the topic proposed to be included. In his view, new topics could be introduced into the agenda of ILC provided they satisfy these three parameters. The Delegation also expressed the view that, in view of the co-existence of various rules in the field of environmental law and with a view to avoid the phenomenon of the fragmentation of international law, the Commission should take up the topic of *"Protection of the Atmosphere"* in its agenda during the current Session itself.

Thirdly, with regard to the topic of 'Protection of Persons in the Event of Disasters', it was observed by many Delegations that humanitarian assistance should be undertaken solely with the consent of the affected country, and with utmost respect for the core principles of international law such as sovereignty, territorial integrity, national unity and non-intervention in the domestic affairs of States. One Delegation also proposed that AALCO Secretariat could initiate contact with ASEAN Secretariat on the mechanisms of disaster management and emergency response under the auspices of ASEAN Agreement on Disaster Management and Emergency Response (AADMER) and that the outcome of that contact should be disseminated to the AALCO Member States to provide a practical example of regional initiative in disaster management and emergency response.

Fourthly, with regard to the topic of 'Immunity of State Officials from Foreign Criminal Jurisdiction', a number of States felt that the work of ILC should focus only on *lex lata*, i.e, codifying the existing rules of international law as opposed to embarking on an exercise of progressive development.

Mr. Chairman,
Due to time constraints, I have only touched upon a few important points made by the Panelists and the Delegations at the Fifty-First Annual Session of AALCO. However, I would like to bring to your kind notice that at the recently held Fifty-First Annual Session, I, as the Secretary-General of AALCO, was unanimously re-appointed as the Secretary-General for a further four year tenure starting from 2012 to 2016. Let me assure you that AALCO would continue to actively cooperate with the ILC with a view to bringing the voice of Asia and Africa to bear on the work of ILC and to contribute substantially towards the work of the Commission. I thank you all for giving me a patient hearing.

2. OCEANS AND THE LAW OF THE SEA

I. INTRODUCTION

1. The item "Oceans and the Law of the Sea" has been on the agenda of the United Nations General Assembly, since its Thirty-seventh Session, when the United Nations Convention on the Law of the Sea (hereinafter the UNCLOS or Convention), was adopted on 30 April 1982 by an overwhelming majority of States. The Convention was opened for signature on 10 December 1982 in Montego Bay, Jamaica and entered into force on 16 November 1994. With 162 parties to UNCLOS, as on 21 July 2011, it is fast approaching the goal of universal acceptance. In this period, it has also been widely recognized as setting out the legal framework within which all activities in the oceans and seas must be carried out and is considered to be of strategic importance and the basis for national and regional cooperation in the marine sector. The UN General Assembly reaffirmed this significance during its Sixty-Sixth Session by adopting two resolutions relating to the law of the sea and ocean affairs. The Assembly also requested the Secretary-General to present at the Sixty-Seventh Session his annual comprehensive report on the developments and issues relating to oceans and the law of the sea.

2. The relevant developments in relation to this topic, since the conclusion of Sixty-Sixth Session include: Twenty-Ninth Sessions of the Commission on the Limits of the Continental Shelf (19 March to 27 April 2012, New York); Eighteenth Session of the International Seabed Authority (16 to 27 July, Kingston, Jamaica) and the Twenty-Second Meeting of States Parties to the Law of the Sea Convention (4 to 11 June 2012, New York) and the Thirteenth Meeting of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea (hereinafter ICP-12 or the Consultative Process) that took place at the UN headquarters in New York from 29 May – 1 June 2012; and Summary of Deliberations on the agenda item half –day special meeting on "Responses to Piracy: International Legal Challenges'' held at that the Fifty-First Annual Session of AALCO (18-22 June 2012, Abuja, Nigeria). This report presents a brief overview of all these developments.

II. CONSIDERATION OF THE TOPIC BY THE UN GENERAL ASSEMBLY AT ITS SIXTY-SIXTH SESSION (13 SEPTEMBER, 2011)

3. The UN General Assembly during its Sixty-sixth Session held on 13 September 2011 considered the agenda item on "Oceans and the Law of the Sea'' and adopted two resolutions, namely: Oceans and the law of the sea, and Sustainable fisheries, including through the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks and related instruments.

4. *Oceans and the Law of the Sea*[47]: The Assembly adopted its 41-page resolution on oceans and the law of the sea by emphasising the universal and unified character of the UN Convention on the Law of the Sea and further reaffirming that the Convention sets out the legal framework according to which all activities in the oceans and seas must be carried out.

[47] A/RES/66/231.Adopted by 134 votes to 1 with 6 abstention on 24 December 2011

5. The Assembly further reiterated the essential need for cooperation to ensure that all States especially developing countries are able to implement the UN Convention on the Law of the Sea and to benefit from the sustainable development of the oceans and seas as well as to participate fully in global and regional forums dealing with oceans and law of the sea issues.

6. The importance of marine science was highlighted as it is important for eradicating poverty, contributing to food security, conserving the world's marine environment and resources and promoting sustainable development of the oceans and seas.

7. The Assembly also called upon States that have not yet done so to become parties to the **Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation** and the **Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf** and invites States to consider becoming parties to the **2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety Maritime Navigation** and the **Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf**.

8. The Assembly pointed out the importance of the implementation of **Part XII of the Convention** in order to protect and preserve the marine environment and its living marine resources against pollution and physical degradation. All States were urged to cooperate and take measures consistent with the Convention directly or through competent international organisation for the protection and preservation of the marine environment.

9. The Ad Hoc Open-ended Informal Working Group recommends initiating a process of studying issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction. Some of the issues are:

a) The implementation of existing instruments,

b) The possible development of a multilateral agreement under the UN Convention on the Law of the Sea,

c) Questions on the sharing of benefits, measures such as area-based management tools, capacity-building and the transfer of marine technology.

10. The 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks and related instruments[48]: The Assembly urged States to eliminate barriers to trade in fish and fisheries products which are not consistent with their rights and obligations under the World Trade Organisation agreements, taking into account the importance of the trade in fish and fisheries products.

11. The Assembly also called upon all states to implement the **1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea**

[48] A/RES/66/68.Adopted without a vote on 6 December 2011.

of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks and invited States to assist developing States in enhancing their participation in regional fisheries for straddling fish stocks and highly migratory fish stocks.

12. A deep concern was expressed by the Assembly over continued incidental mortality in fishing operations of marine species while recognising the efforts made by States to reduce incidental mortality as a result of by-catch.

III. STATUS OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (UNCLOS) AND ITS IMPLEMENTING AGREEMENTS

13. It may be recalled that one of the AALCO Member States, Thailand had become State Party to the UNCLOS in 2011. In addition to Thailand, the UNCLOS as on 21 July 2011 had 162 Parties, of which 40 States are AALCO Member States.[49] This represents considerable progress towards universality since the entry into force of the Convention on 16 November 1994, one year after the deposit of the sixtieth instrument of ratification, when there were 69 States Parties.

14. The Agreement relating to the Implementation of Part XI of the UNCLOS was adopted on 28 July 1994 and has entered into force on 28 July 1996. As regards the status of this Agreement, as on 21 July 2011, there were 141 parties to it, of which 32 States are AALCO Member States.[50]

15. The Agreement for the Implementation of the Provisions of the UNCLOS Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, was adopted on 4 August 1995 and has been signed by 59 States and as on 21 July 2011 ratified by 78 States, of which 13 are AALCO Member States. The Agreement came into force from 11 December 2001 after receiving the requisite 30 ratifications or accessions.[51]

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[49] UNCLOS, 1982 has near universal adherence from the AALCO member states. The AALCO Member States Parties to the UNCLOS are: Bahrain, Bangladesh, Botswana, Brunei Darussalam, Cameroon, PR China, Cyprus, AR Egypt, Gambia, Ghana, India, Indonesia, Iraq, Japan, Jordan, Kenya, State of Kuwait, Lebanon, Malaysia, Mauritius, Mongolia, Myanmar, Nepal, Nigeria, Sultanate of Oman, Pakistan, State of Qatar, Republic of Korea, Saudi Arabia, Senegal, Sierra Leone, Singapore, Somalia, South Africa, Sri Lanka, Sudan, Thailand, Uganda, United Republic of Tanzania and Republic of Yemen. Out of forty-seven Member States only seven states, namely, Democratic Peoples' Republic of Korea, Islamic Republic of Iran, Libyan Arab Jamahiriya, State of Palestine, Syrian Arab Republic, Turkey and United Arab Emirates are not Parties to the UNCLOS. For details see: "Table Recapitulating the Status of the Convention and of the Related Agreements, as at 21 July 2011", available on the website: http://www.un.org/Depts/los/reference_files/ status2010.pdf.

[50] The AALCO Members who have ratified the Agreement include: Bangladesh, Botswana, Brunei Darussalam, Cameroon, PR China, Cyprus, India, Indonesia, Japan, Jordan, Kenya, State of Kuwait, Lebanon, Malaysia, Mauritius, Mongolia, Myanmar, Nepal, Nigeria, Sultanate of Oman, Pakistan, State of Qatar, Republic of Korea, Saudi Arabia, Senegal, Sierra Leone, Singapore, South Africa, Sri Lanka, Thailand, Uganda and the United Republic of Tanzania. *Ibid.*

[51] The AALCO Member States Parties to the Straddling Stocks Agreement are: Cyprus, India, Indonesia, Islamic Republic of Iran, Japan, Kenya, Mauritius, Nigeria, Sultanate of Oman, Republic of Korea, Senegal, South Africa and Sri Lanka. AALCO Member States signatories to this Agreement include: Bangladesh, PR China, AR Egypt, Pakistan, and Uganda. *Ibid*.

IV. TWENTY-NINTH SESSION OF THE COMMISSION ON THE LIMITS OF CONTINENTAL SHELF (19 MARCH TO 27 APRIL 2012, UN HEADQUARTERS, NEW YORK)

16. The Commission on the Limits of the Continental Shelf (CLCS) held its twenty-ninth Session at United Nations Headquarters from 19 March to 27 April 2012. The plenary part of the session was held from 9 to 20 April and the commission proceeded with the technical examination of submissions at the Geographic Information System (GIS) laboratories of the Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs of the Secretariat.

17. At its twenty-ninth Session, the Commission made consideration of the revised submission made by Barbados. Apart from that, the Commission also considered submission made by the following States Parties to the UNCLOS:

a) Japan
b) France in respect of the areas of French Antilles and the Kerguelen Islands
c) Uruguay
d) Philippines in respect of the Benham Rise Region
e) Cook Islands in respect of the Manihiki Plateau

18. The Commission also received formal presentation of the submissions made by 2 States namely:

a) Guyana
b) Mexico in respect of the eastern polygon in the Gulf of Mexico

19. Apart from that, the Commission considered the agenda of "Mechanism to seek advice on matters of interpretation of certain provisions of the Convention other than those contained in its article 76 and annex II as well as in the Statement of Understanding adopted on 29 August 1980'' in the light of its deliberations at the twenty–eighth session. It decided not to pursue this issue any further as the proposal was withdrawn.

V. EIGHTEENTH SESSION OF THE INTERNATIONAL SEABED AUTHORITY (16 - 27 JULY 2012, KINGSTON, JAMAICA)

20. The Eighteenth Session of the International Seabed Authority (ISBA) took place from 16 to 27 July 2012 at its seat in Kingston, Jamaica.[52] Mr. Milan J.N. Meetarbhan (Mauritius) acted as the Assembly President and he was congratulated for his solid stewardship of the session. The Regional group Chairmen took the floor to voice support for the election of Secretary-General Odunton for a second term in office.

21. *New Regulations:* During this Session, a new set of international regulations to govern exploration of resources of the deep seabed and ocean floor beyond the limits of national jurisdiction was adopted. The new rules are entitled **"Regulations on prospecting and exploration for cobalt-rich ferromanganese crusts in the Area''** and represent the third set of

[52] "Seabed Assembly Ends Productive Eighteenth Session of Authority'' , International Seabed Authority Press Release,SB/18/16, 27 July 2012.

regulations produced by the Authority with the aim to protect and develop deep ocean riches as the common heritage of mankind.

22. The Authority's Council adopted the 44 articles and 4 annexes of the **Regulations on prospecting and exploration for cobalt-rich ferromanganese crusts in the Area** after a compromise was reached on outstanding issues which are:

a) The size and configuration of areas allocated for exploration
b) The linked issues of the schedule of relinquishment
c) Fees

23. *The Legal and Technical Commission*: It has been requested by the Council to address the consideration of amendments to the Regulations on Prospecting and Exploration of polymetallic nodules in the Area.

24. The Commission presented a report by its Chairman Russell Howorth which covered the following matters:

a) Applications for approval of plans of work for exploration
b) The annual reports of contractors
c) The periodic review of implementation of plans of work for exploration for polymetallic nodules
d) Training programme for the Authority and developing States
e) Environmental implication of activities in the Area
f) Proposal of Amendments to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area

25. **The Environmental Management Plan for the Clarion-Clipperton Zone** which was formulated by the Legal and Technical Commission had been adopted by The Council. The plan called for the establishment of nine areas of environmental interest to protect the biodiversity and ecosystem structure, and functioning of the zone form the impact of seabed mining. It was recommended that the plan should be implemented for an initial three-year period and it should be applied in a flexible manner to allow improvement as more scientific technical and environmental baseline data are available.

VI. TWENTY-SECOND MEETING OF THE STATES PARTIES TO THE UN CONVENTION ON THE LAW OF THE SEA (4 TO 11 JUNE 2012, UN HEADQUARTERS, NEW YORK)

26. The twenty-second Meeting of State Parties to the UN Convention on the Law of the Sea was held at UN Headquarters from 4 to 11 June 2012. The meeting elected Isabelle F.Picco (Monaco) as President.

27. The Agenda of the meeting included the following matters:

a) Report of the Credentials Committee
b) Election of 21 members of the Commission on the Limits of the Continental Shelf

c) Commemoration of the thirtieth anniversary of the UN Convention on the Law of the Sea

d) Consideration of budgetary matters of the International Tribunal for the Law of the Sea

e) Report of the International Tribunal for the Law of the Sea to the Meeting of States Parties for 2011.

28. *Report of the International Tribunal for the Law of the Sea*: The President of the Tribunal, Judge Shunji Yanai noted a marked increase in the judicial activities of the Tribunal in 2011. The tribunal had handled four cases involving a wide-ranging spectrum of matters. The Tribunal had sought to establish and meet exacting schedules with a view to conducting its judicial procedures in a cost-effective and timely manner.

29. On 14 March 2012, the Tribunal had delivered its judgment in its first maritime delimitation case, namely **Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal**. The dispute concerns with the delimitation of the maritime boundary with respect to the territorial sea, the exclusive economic zone and the continental shelf. Proceedings in the case were instituted before the Tribunal on 14 December 2009 and in its judgment, the Tribunal had to address a number of issues raised by the Parties including[53]:

a) The claim made by Bangladesh that the delimitation of territorial sea had already been agreed on by the Parties in 1974

b) The delimitation of the exclusive economic zone and continental shelf within 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

c) Request of Bangladesh that the continental shelf beyond 200 nautical miles limit be delimited.

d) Whether the Tribunal could exercise its jurisdiction in respect of the delimitation of the continental shelf beyond 200 nautical miles.

30. The Meeting was further informed that the case of **M/V Louisa-Saint Vincent and the Grenadines v. Kingdom of Spain** was scheduled to take place in October 2012 and the judgment was expected to be delivered in the second quarter of 2013.The President informed the Meeting that on 4 July 2011, a new case had been submitted to the Tribunal, **Case No.19 (M/V Virginia G-Panama/Guinea Bissau)**.

31. The President also remarked that the Seabed Disputes Chamber's advisory opinion in the case of **Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Areas** had been well received within the framework of the Authority.

32. The Meeting was informed about the internship programme which was one of the initiatives made by the Tribunal to promote the dissemination of knowledge about the Convention and its dispute settlement procedures.

[53] ''Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the bay of Bengal'', International Tribunal for the Law of the Sea Press Release, ITLOS/Press 175, 14 March 2012. The full text of the judgement is available on the website of the Tribunal.

33. *The Report of the Secretary-General:* The report which was made under Article 319 of the United Nations Convention on the Law of the Sea had been considered by the Meeting. The significance of marine renewable energies as an important tool for economic and social development was highlighted. Attention was drawn to the need of promoting capacity-building to ensure compliance with the relevant guidelines of the International Maritime Organisation and the International Labour Organisation on the treatment of seafarers in case of accidents at sea and to enable States to maintain efficient search and rescue services pursuant to Article 98 of the Convention.

34. In relation to coordination and cooperation, some delegations observed that UN-Oceans should not work on matters concerning which Member States had divergent views. In their view, the Meeting of States Parties should limit itself to the consideration of financial and administrative matters relating to the Tribunal, the Authority and the Commission. An opposite view was expressed by noting that the Meeting of States Parties had the mandate to discuss all issues pertaining to the interpretation and implementation of the Convention.

VII. OCEANS AND LAW OF THE SEA: REPORT OF THE SECRETARY-GENERAL OF THE UNITED NATIONS FOR THE SIXTY-SIXTH SESSION OF THE UN GENERAL ASSEMBLY

35. The Report of the UN Secretary-General on Oceans and Law of the Sea examines meticulously the recent activities of the United Nations and other relevant international organisations including the scientific, technical, economic, legal, environmental and socio-economic aspects of the conservation and sustainable use of marine biodiversity beyond areas of national jurisdiction. The report also addresses fishing activities and developments related to marine living resources as well as the pollutions caused by shipping activities. It presents information on the new uses such as ocean fertilisation, carbon sequestration, renewable energy, submarine cables, tourism and aquaculture.

36. Apart from that, it further lays down the possible options and approaches to promote international cooperation and coordination. The report provides the key issues and questions which can be examined for further studies. It admits that the significant knowledge and information gaps still exist though efforts and initiatives have been made to increase knowledge of marine biodiversity beyond areas of national jurisdiction.

37. The report concludes that the importance of marine biodiversity including that beyond areas of national jurisdiction cannot be overstated as this issue is essential for global food security, healthy functioning marine ecosystems, economic prosperity and sustainable livelihoods. It recognises the work of various global and regional organisations and entities which take steps towards the conservation and sustainable use of marine biodiversity beyond areas of national jurisdiction. Since there are cumulative impacts of human uses and human-induced environmental changes on vital marine ecosystems, the report highlights that the efforts for the conservation and sustainable use of marine biodiversity must match the scale and magnitude of the challenges that it faces.

VIII. THIRTEENTH MEETING OF THE UNITED NATIONS OPEN-ENDED INFORMAL CONSULTATIVE PROCESS ON OCEANS AND LAW OF THE SEA (29 MAY TO 1 JUNE 2012, UN HEADQUARTERS, NEW YORK)

38. The Thirteenth Meeting of the UN Open-ended Informal Consultative Process on Oceans and the Law of the Sea took place from 29 May to 1 June 2012 at UN Headquarters in New York. The meeting was co-chaired by H.E. Amb. Don MacKay (New Zealand) and H. E. Amb. Milan Jaya Meetarbhan (Mauritius). The Meeting focused its discussion on the topic entitled "Marine renewable energies''.

39. A call was made for States to decide and plan their marine renewable energies development goals bearing in mind the rights and obligations of States under the Convention. At the same time, the importance of assessing and studying the impacts of marine renewable energies, including the impact on the marine environment, was stressed by several delegations.

40. The discussions in the Panel were structured around three segments:

a) Marine renewable energies: types, uses and role in sustainable development
b) Ongoing or planned marine renewable energies projects/work at the global and regional levels
c) Opportunities and challenges in the development of marine renewable energies

41. It was noted that marine renewable energies should feature prominently in the discussions and outcome of the United Nations Conference on Sustainable Development (Rio+20 Conference) and the importance of the topic for developing countries was particularly emphasised.

42. *Marine renewable energies: types, uses and role in sustainable development:* Several delegations stated that the scope of the concept of marine renewable energies should be clarified. It was indicated that the Meeting would take a broad approach to the topic and consider both renewable energies that are derived from the oceans and those sources of energy that are located directly in the oceans.

43. A particular attention was drawn to the advances in the offshore wind power market in the past two decades and the promises of tidal range technologies. Some delegations highlighted the desirability of adopting measures and regulations for the protection of the marine environment in the promotion of marine renewable energies. The Meeting also recognised the importance of lowering operational costs to facilitate the development of relevant technologies.

44. The potential role of the International Renewable Energy Agency (IRENA) was highlighted and a panelist indicated that IRENA currently had a limited role with regard to marine renewable energies. It was noted that the International Energy Agency (IEA) which was cooperating with IRENA was more actively engaged in marine renewable energies.

45. *Ongoing or planned marine renewable energies projects/work at the global and regional levels:* Delegations emphasised the significant potential of marine renewable energies to contribute to energy needs, improve economic well-being and reduce greenhouse gas emissions.

The importance of cooperation and coordination in sharing best practices and in technology transfer as well as research and development was also emphasised as well.

46. Many delegations provided information on policies or legislation relevant to marine renewable energy, and on the planned and ongoing marine renewable energy projects in their respective countries. A number of regional initiatives was highlighted, including:

a) **The Waiheke Declaration** which was adopted by the leaders of the Pacific Islands Forum

b) **The Intergovernmental Oceanographic Commission/Subcommission for the Western Pacific on the Status of Marine Renewable Energy Technology Development in Western Pacific**

c) **The Barbados Declaration on Achieving Sustainable Energy for All in Small Island Developing States** was adopted by the leaders of the Alliance of Small Island States.

47. Some delegations enquired about the possible location of marine renewable energy installations in areas beyond national jurisdiction. Questions were raised over the ownership and the transmission of energy to land-based facilities from areas beyond national jurisdiction as well as the appropriate forum for the resolution of possible jurisdictional issues. These issues were suggested to be addressed at the international level.

48. *Opportunities and challenges in the development of marine renewable energies including for cooperation and coordination:* Promoting international cooperation among developed countries within regional and international organisations and between developed and developing countries was highlighted.

49. Several delegations drew attention to projects for technology transfer and capacity-building, and they also noted the possibilities for technology transfer and the exchange of knowledge in the context of the United Nations Framework Convention on Climate Change.

50. The importance of governmental policies and financial support in encouraging investments in marine renewable energies was underscored by some delegations. The Governments should support site assessment and site access for nascent technologies and the costs of marine renewable energies should be lowered to make them an attractive alternative to fossil fuels.

51. It was noted that investing in new technologies was generally limited to States with the financial means to accept the risks associated with technologies and sources of energies that were not yet commercially viable. Another challenge is that the development of marine renewable energy production would require a structured process for the allocation of ocean space.

52. Some delegations suggested that the participation and interaction of Member States in meetings and decision-making processes of UN Oceans should be improved and the work of the mechanism should be made more transparent. They recalled the request to UN-Oceans to submit the draft terms of reference for its work to be considered by the General Assembly at its sixty-seventh session.

53. A proposal was made and supported by several delegations for the fourteenth meeting of the Informal Consultative Process to carry out an in-depth review of the ocean-related outcomes of the Rio+20 Conference and how those outcomes would impact and benefit international coordination and cooperation.

IX. SUMMARY OF DELIBERATIONS ON THE AGENDA ITEM AT THE HALF-DAY SPECIAL MEETING ON "RESPONSES TO PIRACY: INTERNATIONAL LEGAL CHALLENGES'' HELD AT THE FIFTY-FIRST ANNUAL SESSION OF AALCO (ABUJA, NIGERIA 18-22 JUNE 2012)

54. **Dr. Xu Jie, Deputy Secretary-General of AALCO** while drawing attention to the 30th Anniversary of the UN Convention on the Law of the Sea (UNCLOS, 1982) that is being celebrated this year, highlighted three main contributions of AALCO towards the creation of the international law of the sea as embodied in UNCLOS 1982.With regard to the piracy issue, he further remarked that there are three main areas that needed to be strengthened substantively:

> *First*, States should, among other measures, consider enacting adequate national legislation to criminalize all acts of piracy and armed robbery at sea as well as providing for effective and modern procedural laws that are indispensable for the suppression of piracy.
>
> *Second*, at the international level, States should try to reinforce the international legal framework by removing any flaws that are found in it. They should also work towards strengthening international cooperation so that the numerous complexities involved in different national systems could be overcome.
>
> *Third*, the root causes of piracy such as political instability, lack of economic development needed to be addressed adequately.

55. **Judge Albert J. Hoffmann, Vice-President of the International Tribunal for the Law of the Sea (ITLOS)** pointed out the figures published by the International Maritime Organization (IMO) and the International Maritime Bureau (IMB), in which the number of acts of piracy and armed robbery at sea has reached alarming levels, not only seriously affecting international trade and maritime navigation but also resulting in loss of life and livelihood of seafarers. The panelist noted that universal jurisdiction applied only in the case of crimes under customary international law, in respect of which all states have the right to prosecute. In his view, the existing rules for the suppression of piracy have proven to be inadequate to respond to modern-day attacks on shipping and threats to maritime navigation and security. One of the major deficiencies is that the definition of piracy is too narrow in its scope and lacked clarity. However, serious efforts have been made by a number of institutions and bodies to combat

piracy and while dwelling on the possible solutions that could be found to combat piracy, he made reference to a number of short-term measures that needed to be taken such as regional cooperation, enactment of domestic legislation and criminalizing acts of piracy, armed robbery and related crimes at sea, an effective criminal justice system and as regards Somalia, he emphasized real and meaningful efforts have to be taken towards state-building, and reconstruction.

56. **Ms. Mariam Sissoko, the Country Representative of the United Nations Office on Drugs and Crimes (UNODC)** focused on the role of her Organization in combating piracy. She stated that the mandates of UNODC are embodied in several Conventions, particularly, the three international drug control conventions (1961, 1971 and 1988); the UN Convention against Corruption; the UN Convention against transnational Organized Crime and the UN Global Counter-Terrorism strategy. Through its Counter-Piracy programme launched in 2009, UNODC provided substantial support to countries of the region in their efforts to bring suspected pirates captured off the coast of Somalia to justice, she added. UNODC also has started implementing the Piracy Prisoner Transfer Programme that was endorsed by the UNSC in its Resolution 2012 adopted in 2011. As regards the potential role that UNODC could play in this regard, she stated that his Organization stood ready to assist the countries of the Gulf of Guinea both at the national and regional level. The Organization would also be ready to assist other countries upon their request, to develop maritime security strategies and enhance national legal frameworks.

57. **Commodore Austin Owhkhor-Chuku of the Federal Republic of Nigeria,** pointed out that the aim of his presentation was to examine acts of piracy within the Gulf of Guinea. He mentioned that the Gulf has both global and regional importance particularly as a major trade and shipping route. A reference was made to the Report of the UN International Maritime Organization and stated that the year 2011 had witnessed sixty four incidents. Apart from piracy, a number of other atrocities also are committed in the region that included: Illegal oil bunkering, Hostage-taking, Drug trafficking, Human trafficking, Terrorism and militancy, Poaching, Smuggling in contrabands, Gun running and environmental degradation. He further offered a number of recommendations such as a comprehensive and united action by the states within the region against pirates, terrorists, militants and their sponsors or patrons; the establishment of a Maritime Development Bank which would ensure the availability of capital to undertake innovative research programmes, technology and logistics acquisition and the development of maritime awareness curriculum in schools, employment generation strategy by the respective regional governments and others.

58. **H.E. Amb. Y. Ishigaki, the Leader of Delegation of Japan** stated that piracy has in recent times, re-emerged as one of major issues facing the world and Japan had been actively participating in the international efforts to combat piracy. He further outlined the international anti-piracy laws as well as the various international and regional anti-piracy efforts to coordinate the actions of States. He also brought attention to some of the political challenges confronting the fight against piracy and the need to address the issue of impunity. He further informed that Japan had enacted Law on Punishment of and Measures against Acts of Piracy in July 2009, which was one of the first comprehensive piracy legislation in the world after the entry into force of the UNCLOS and his country had contributed 14.6 million US dollars to the IMO, which is to be utilized for establishment of a training center in Djibouti. On top of that another 3.5 million

US dollars had been funded to the trust fund to support prosecution of pirates and Japan had also invited coast-guard officials from Yemen, Oman, Kenya, Djibouti and Tanzania for training in Japan.

59. **Mr. Mathew Egbadon, Secretary/Legal Adviser at the Nigerian Maritime Administration & Safety Agency (NMASA), Federal Republic of Nigeria** stated that Piracy and Armed robbery at Sea has threatened vital sea lanes of communication, disrupted commerce, encouraged political aggression and insurgency and in the process constricted socio-economic development. With regard to Piracy in West Africa (Gulf of Guinea), he explained this in terms of numbers by pointing out the fact that the IMO had confirmed that 21 of the reported attacks in 2011 occurred off the coast of Benin, 14 off the coast of Nigeria, 7 off the Coast of Togo, 4 off the coasts of the Democratic Republic of Congo, the Republic of Congo and Guinea, 2 off the coast of Ghana and 1 off the coast of Angola and Cote D'Ivoire. He was of the view that those incidents of piracy should be viewed against the background of the Gulf of Guinea as a region with abundant energy resources and a significant market for imported goods. He portrayed the measures adopted by Nigeria to combat this menace, including the Support of the Regional Maritime Rescue Coordinating Centre, Maritime Domain Awareness Initiatives; Implementation of Long Range Identification and Tracking of Ships (LRIT); Collaboration with Private Sector to Procure Boats (PPP) and Collaboration of Relevant Sub-Regional Bodies.

60. The **Delegation of Indonesia** stated that maritime security should be seen in a comprehensive manner since there are various kinds of crimes committed at sea. In this regard, he stated that Indonesia declined to adopt a selective approach only to focus on the issue of piracy and armed robbery. In the perspective of archipelagic states, the compelling issues for Indonesia, in his view, was the eradication of smuggling of goods and illegal, unreported and unregulated fishing, transnational crimes, i.e. people smuggling and trafficking in persons, small armed smuggling as well as illicit trafficking of drugs and psychotropic substance. Furthermore, Indonesia took a stand that the definition of piracy should be differentiated with that of armed robbery against ship and towards this end the Delegate stated that the approach taken by the Secretariat of AALCO in terms of unifying the definitions of both crimes was against international law. While stating that the Indonesian government is also supporting the effort to combat piracy that occurs off the coast of Somalia and Gulf of Aden, he observed that such concerted efforts could also be followed by legal efforts to deliberate the legal theories to find answers to the problem of piracy.

61. The **Delegation of Kenya** pointed out that the acts of piracy have continued to adversely affect fishing, tourism and shipping industries in East Africa and that this has significantly contributed to the increase of cost of goods and services in the East African region. The delegate welcomed the efforts made by the international community to combat piracy and appreciated the steps taken by the International Maritime Organisation (IMO) in seeking to combat piracy off the coast of Somalia and in the Gulf of Aden. The delegate highlighted the fact that Kenya and together with other States in the region, have taken steps to prosecute, or incarcerate in a third state after prosecution elsewhere, pirates and facilitators or financiers consistent with applicable international human rights law. However, challenges of capacity such as prison facilities were noted by the delegation and thus he urged all States and international organizations to further enhance international efforts in this regard.

62. The **Delegation of Thailand** affirmed the determination of Thailand, as an active member of the international community, to ensure that world's economic and social resources such as the seas and the oceans are well protected. Given the fact that these vast resources do provide livelihoods to so many, the need to protect them was stressed by him. The ratification of UNCLOS 1982 by Thailand on May 14, 2011 reflected his country's determination to protect them, he added. He stated that Thailand has actively participated in several regional and international fora on maritime security, namely ASEAN Maritime Forum (AMF), the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP), International Maritime Organization (IMO), and the Contact Group on Piracy off the Coast of Somalia (CGPCS). As regards the cooperation needed to fight piracy, he observed that Thailand's policy regarding the issues surrounding piracy has always been to promote stability, security and prosperity across our regions through co-operation in all areas under various regional frameworks as well as expeditiously resolving issues of our concerns through peaceful mean based on treaties and laws.

63. The **Delegation of Tanzania** commended AALCO for its continued commitment in addressing issues related to peace and security before reiterating their position that these acts of piracy have adversely affected trade, tourism and shipping industries and impacted on the economies of all countries surrounding the Horn of Africa. The importance of considering and implementing measures at international level to repress piracy was highlighted and he noted that it is also important to ensure timely prosecution of detainee's suspected of piracy and criminal activities in the high seas. The delegation also expressed the urgency of establishing robust law enforcement mechanisms and functional judicial and prosecutorial systems to deal with piracy. They further summoned the spirit of revisiting UNCLOS so as to make it better serve the mankind. The delegate affirmed their Government's commitment towards working in cooperation with the international community to fight piracy for the interest of its people and of maritime security.

64. The **Delegation of Malaysia** noted that the incidents of piracy, especially in the Gulf of Aden and Indian Ocean have greatly affected the safety and security of navigation as well as the international shipping community as a whole. Commenting on his Country's anti-piracy efforts, he pointed out that Malaysia is still in the process of prosecuting the seven Somali pirates captured by the Malaysian Armed Forces on 20 January 2011 off the coast of Oman in Malaysia and also in the process of reinforcing its anti-piracy legislative framework with reference to the UNCLOS, SUA Convention and SUA Protocol regimes. The delegation expressed his appreciation on the willingness of AALCO Secretariat to develop a model legislation that could be used by its Member States as mentioned in the report entitled "The Law of the Sea – Responses to Piracy: International Legal Challenges" and the delegation was of the view that the AALCO Secretariat could use the draft guidelines submitted by the CMI and the documents submitted at the ninety-eighth session of the Legal Committee of the IMO as a guide. The delegation manifested their hope that the model legislation on piracy and other maritime security offences to be prepared by AALCO Secretariat could be completed and distributed for the consideration of all Member States in due time.

65. The **Delegation of Sri Lanka** considered piracy to be a grave security problem that demanded both collective and individual responses of all nations in the international community. While informing that Sri Lanka ratified the UN Convention on the Law of the Sea (UNCLOS) on 19 July 1994, he stated that Sri Lanka has taken steps to develop a national maritime policy to tackle the various aspects of piracy and to strengthen its coast guard service and other maritime related security arrangements. In this regard, he also informed that Sri Lanka had adopted legislation by way of Act No 09. of 2001 that criminalizes maritime piracy as serious offence and provides for piracy to be a cognizable and non-bailable offence. The Act addressed offences of Taking of property from Ship, boarding a Ship without lawful authority, Retention, possession, transportation of pirated ship and property, Forfeiture, Use of force, weapons or intimidation while committing an offence, he clarified.

66. The **Delegation of Saudi Arabia** expressed his Country's support for the international community's efforts to combat piracy and expressed his country's commitment to promote further coordination among the regional states in combating piracy. The delegation stressed that the Arab States of the Red Sea are considering measures to combat piracy in the Gulf of Aden and the Red Sea and had asked the respected participants about the legal status of prosecution of pirates by invoking the national criminal laws in the states which are yet to promulgate a special law on piracy.

67. The **Delegation of Ghana** commended the AALCO Secretariat for the preparation of a very detailed and comprehensive paper on the topic and agreed with the view held by the Secretariat that UNCLOS while not ratified by all countries, represents the best evidence of international law relating to the maritime regime and is binding on all nations as customary international law. The delegation further suggested that it would be of great assistance if AALCO would explore the possibility of a legislative drafting workshop on anti-piracy legislation in order to assist Member States on the subject matter. The delegation also highlighted that the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention) does not expressly cover the crime of piracy and even where the offences created by the SUA Convention overlap with the crime of "piracy", as a treaty, the SUA Convention is only binding on its Sate Parties. He was of the opinion that AALCO may wish to encourage State Parties of UNCLOS to become parties to the SUA Convention and States should also be consistently reminded of the importance of the peace and stability they enjoy in their own countries. The delegation urged States to do their best to maintain peace as modern day piracy is the result of poverty and lack of effective government machinery.

68. The **Delegation of People's Republic of China** appreciated the work done by the Secretariat in preparing an in-depth and thorough report on relevant international legal issues and affirmed his country's commitment to work with all parties in promoting the peace process in Somalia and help Somalia to launch its reconstruction efforts. The delegation supported international efforts to strengthen judicial mechanism against piracy and expressed their belief that such mechanism should be based on the respect for sovereignty and enhanced judicial capacity of the coastal States, and should take into full consideration of the practical circumstances of the coastal States as well as States carrying out escort operations. The delegation further pointed out that the Chinese Government has always worked to enhance

international cooperation on piracy and ensure the safety of navigation. While countries are continuing to consider all possible domestic measures, they were of the opinion that there is a necessity to explore solutions within the framework of international law including UNCLOS and relevant UNSC relevant resolutions, and which also requires the joint effort and wisdom of the international community. The delegation expressed their willingness to exchange views with Asian-African countries on piracy and suggested that AALCO may continue its study in depth on relevant legal issues, and explore useful and effective solution so as to contribute to the establishment and preservation of a harmonious order at sea.

69. The **Delegation of India** welcomed the Code of Practice for the Investigation of the Crime of Piracy and Armed Robbery against Ships adopted by 22nd Assembly of the International Maritime Organization (IMO). While expressing her Country's support towards the efforts of IMO aimed at promoting regional cooperation to address this problem, she informed that India had taken an active part in many meetings and seminars organized by the IMO on the implementation of its guidelines on preventing piracy-related activities. She also observed that India is one of the Countries seriously affected by the menace of piracy and that her navy and coast guard have apprehended several suspected pirates during the course of conducting anti-piracy operations off its Western coast. Given the increasing incidence of piracy within India's Exclusive Economic Zone (EEZ), she pointed out that India is actively working towards adopting a domestic anti-piracy legislation with a view to provide the necessary legal framework that would enable the Indian Government to prosecute those charged with piracy-related offences.

70. The **Delegation of Republic of Korea** portrayed the efforts taken by Republic of Korea in fight against piracy on multilateral and bilateral level. Explaining this, he observed that one way was through the participation of Republic of Korea in the Contact Group on Piracy off the Coast of Somalia, which was established under the UN Security Council Resolution 1851. He also added that his Country is closely following up on discussions in the Second Working Group which focuses on the legal aspects of the piracy matter with a view to build mutual legal assistance system to prosecute and punish pirates. The delegation also pointed out that his Country is willing to share their legal experience and information in implementing criminal jurisdiction over pirates with other AALCO Member States. He was of the considered opinion that AALCO could provide a unique forum for addressing piracy issue and capacity-building programmes on legislation and implementation of law against piracy, in collaboration with AALCO Member States and UN organizations.

71. The **Delegation of Republic of Yemen** while expressing high appreciation to the Secretariat of AALCO for their report on "The Law of the sea-Response to piracy: International Legal Challenges'', pointed out the need to protect and preserve the marine environment, biodiversity, species and resources. While stating that Yemen is a Party to the UNCLOS, he pointed out that Yemen has a very long coastal line which begins from the boundaries with Saudi Arabia, in the Red Sea and ends at the boundaries with the Sultanate of Oman in the Arab sea, in addition to the coasts of Sapotra Island and other Yemeni islands. These coasts stretch upto more than 25,000 kilometers, he added. Commenting on his Country's anti-piracy efforts, he stated that as a matter of fact Yemen is unable to combat and prevent piracy even within its territorial waters as there are no specially trained marine forces which are qualified and armed with very

modern weapons to face challenges. While stressing the importance of capacity-building in this regard, he noted that Yemen is also willing to enact a law on piracy and other marine crimes and will need technical assistance to draft and pass such a law. He also requested for all kinds of assistance from the regional and international community towards assisting his country in combating and preventing piracy.

X. COMMENTS AND OBSERVATIONS OF THE AALCO SECRETARIAT

72. Almost thirty years ago on December 10, 1982, in Montego Bay, Jamaica, 159 countries signed the United Nations Convention on the Law of the Sea (UNCLOS). This year, 2012, marks the 30th anniversary of the opening for signature of the UNCLOS which embodies the international law governing the rights and responsibilities of nations—big as well as small, rich or poor, coastal and landlocked—in their use of the world's oceans. As an international legal framework that enshrines the norms that determine the rights of States over maritime areas and contains important mechanisms for the peaceful settlement of disputes on matters relating to the oceans, the UNCLOS enjoys almost universal acceptance and has got 162 Parties to it.

73. The UNCLOS represents a new 'Constitution for Oceans'. It had not only created a new international legal order for oceans but was in fact one of the milestones in the establishment of the New International Economic Order. Besides codifying some of the existing rules and norms of customary international law relating to the law of the sea, the UNCLOS had also introduced new legal concepts, regimes and addressed existing challenges at that time. Indeed UNCLOS has been recognized as the pre-eminent source for the international law of the sea by States, International Court of Justice (ICJ), International Tribunal for the Law of the Sea (ITLOS) and other judicial and arbitral bodies dealing with marine-related issues.

74. The Asian-African Legal Consultative Organization (AALCO) is pleased to recall its significant contribution to the negotiations at the Third United Nations Conference for the Law of the Sea. The meetings of the AALCO from 1970 to 1982, though conducted outside of UNCLOS III, are acknowledged to have had an important influence on the outcome of UNCLOS III and on the UNCLOS 1982. The concept of Exclusive Economic Zone, which is an integral part of the UNCLOS regime, was, as was aptly put by one of its former Secretary-General, born in the cradle of AALCO.

75. Ever since the agenda item on the 'Law of the Sea' was taken up by AALCO at the initiative of Indonesia, and particularly so since the entry into force of UNCLOS, the Work Programme of AALCO has been oriented towards assisting its Member States on various matters emanating from UNCLOS. As the process of establishment of institutions envisaged under the UNCLOS began, the AALCO Secretariat has been preparing studies and monitoring the developments that have occurred in various institutions operating under the Convention. For instance, AALCO has been regularly reporting the progress of work under the International Sea Bed Authority (ISA), the International Tribunal for Law of the Sea (ITLOS), the Commission on the Limits of the Continental Shelf (CLCS), the Meeting of States Parties to the UNCLOS and other related developments to its Member States. It would continue to do so in future as well.

76. The broad support that UNCLOS continues to enjoy and its positive impact on the peaceful use of the oceans and its resources is indeed a matter of great satisfaction for all. However, there might still emerge many challenges in future for the worlds' oceans driven by the use of its vast resources, increasing pressure from rapid technological development and increased scientific research and concern for the marine environment. One can hope that all these concerns would be addressed within the framework of UNCLOS.

77. The importance of marine life in the high seas for, among other things, maintaining the health of seas closer to shorelines, was indeed brought home by the Rio +20 that took place in June 2012. Though obligations in relation to environment and conservation are provided for in UNCLOS, the Rio Declaration adopted at the end of Rio +20, expressed concerns about the health of our oceans and called for sustainable development of our marine resources. It has also stressed the importance of the conservation, sustainable management and equitable sharing of marine and ocean resources. As the international community gets ready to begin mining operations on the sea bed of a nature and on a scale never before witnessed, let us renew our pledge to adopt necessary measures to ensure effective protection of the marine environment from the potential effects of activities being conducted, in terms of the Convention for the benefit of mankind.

78. The Secretariat of AALCO takes this opportunity to encourage its Member States towards exploring and strengthening ways of intra-cooperation between and among AALCO Member States in the fields of marine environment protection, renewable ocean energy exploration and uses, anti-piracy activities and others. The need to cooperate with each other in the management of our oceans and seas can hardly be exaggerated in the light of the various challenges that have cropped up in recent years.

3. MEASURES TO ELIMINATE INTERNATIONAL TERRORISM

I. INTRODUCTION

A. Background

1. Terrorism poses one of the major international security threats. It is a threat that undermines peace, security, and human rights. It is a scourge that threatened all nations, developed and developing, and all people rich and poor. Its perpetrators are believed to come from all walks of life, all religions, all creeds, and all cultures. Many nations across the globe have encountered with both domestic and international forms of terrorism. Terrorist's motivations, financing and support mechanisms, methods of attack, and choice of target are constantly evolving, thus adding to the complexity of an effective strategy to encounter it. Multilateral efforts must adjust to match the breadth and reach of terrorist threats as it continues to evolve. [54]

2. The Charter of the United Nations sets out the purposes of the Organization, which include the maintenance of international peace and security, to take collective measures to prevent threats to peace and suppress aggression and to promote human rights and economic development. As an assault on the principles of law and order, human rights and the peaceful settlement of disputes, terrorism runs counter to the principles and purposes that define the United Nations. The United Nations has been taking concrete steps to address the threat of terrorism, helping Member States to counter this scourge.

3. The present international framework to counter terrorism comprises mainly of instruments that deal with certain specific acts of terrorism, known as "Sectoral Conventions".[55]

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[54] Presentation by Dr Jonathan Lucas, Representative Regional Offices for Southern Africa UNODC , made at the 2nd half day special meeting on "International Cooperation Encountering Terrorism" held on 4th July 2007 at the 46th Session of the Asian African Legal Consultative Organization (Cape town, South Africa)

[55] These conventions are: 1. Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Tokyo on 14 September 1963 (entered into force on 4 December 1969). 2. Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970 (entered into force on 14 October 1971). 3. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971 (entered into force on 26 January 1973). 4. Convention on the Prevention and punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973; entered into force on 20 February 1977). 5. International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979 (entered into force on 3 June 1983). 6. Convention on the physical Protection of Nuclear Material; signed at Vienna on 3 march 1980 (entered into force on 8 February 1987). 7. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 24 February 1988 (entered into force on 6 August 1989). 8. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, signed at Rome on 10 March 1988 (entered into force on 1 March 1992). 9. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, signed at Rome on 10 March 1988 (entered into force on 1 March 1992). 10. Convention on the Marking of Plastic Explosives for the Purpose of Detection, signed at Montreal on 1 March 1991 (entered into force on 21 June 1998). 11. International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997 (entered into force on 23 May 2001). 12. International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on 9 December 1999 (entered into force on 10

However, this has not replaced the need for a comprehensive convention that deals with the issue and the United Nations and the International Community has been working towards this end.

4. Apart from the above stated 13 Sectoral Conventions there are other Regional Conventions formulated at the initiative of various regional organizations to counter the menace of terrorism at the regional levels. This process was started almost at the same time as it was started by the United Nations. The OAS was in the forefront in this regard and its anti terrorism Convention was adopted in 1971. This was followed by the Council of Europe, South Asian Association for Regional Cooperation (SAARC), League of Arab States, Organization of Islamic Conference, Organization of African Unity (OAU), and the Commonwealth of Independent States.[56]

5. The adoption of the Declaration on "Measures to Eliminate International Terrorism" by the General Assembly at its 49th Session on 9th December 1994[57] along with a declaration supplementing the same at the 51st Session in 1996[58] establishing an ad hoc committee gave impetus to the active consideration of the issues involved to arrive at such a comprehensive framework. Initially, the committee was mandated to elaborate conventions on suppression of terrorist bombings and nuclear terrorism and pursuant to its work a convention was adopted by the General Assembly in 1997 relating to terrorist Bombings.[59] Upon the initiation of the General Assembly at it's 53rd Session, the committee initiated work on legal responses to combat funding of terrorism, which then resulted in the adoption of the Convention for the Suppression of Financing of Terrorism on 9th December 1999.[60] The matters concerning elaboration of an International Convention for the Suppression of Acts of Nuclear Terrorism was extensively in the subsequent meetings of the Ad Hoc Committee and its Working Group and the UN General Assembly adopted the Convention on 13 April 2005.[61] The mandate of the committee to address means of further developing a comprehensive legal framework of convention dealing with international terrorism continues to be renewed and revised on an annual basis by the General Assembly in its resolutions on the topic of measures to eliminate international terrorism.

6. At its 53rd Session, the General Assembly decided that the negotiations on the draft Comprehensive Convention on International Terrorism based on the draft circulated by India

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April 2002). 13. International Convention for the Suppression of Acts of Nuclear Terrorism, adopted by the UN General Assembly on 13 April 2005

[56] These Conventions are: 1. OAS Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and related Extortion that are of International Significance, concluded at Washington, D.C. on 2 February 1971; 2. European Convention on the Suppression of terrorism concluded at Strasbourg on 27 January 1977; 3. SAARC Regional Convention on Suppression of Terrorism, signed at Kathmandu on 4 November 1987; 4. Arab Convention on the Suppression of Terrorism, signed at a meeting held at the General Secretariat of the League of Arab States in Cairo on 22 April 1998; 5. Treaty on Cooperation among States Members of the Commonwealth of Independent States in Combating Terrorism, done at Minsk on 4 June 1999; 6. Convention of the Organization of the Islamic Conference on Combating International Terrorism, adopted at Ouagadougou on 1 July 1999; 7. OAU Convention on the Prevention and Combating of terrorism, adopted at Algiers on 14 July 1999.

[57] A/RES/49/60

[58] A/RES/51/210.

[59] International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly at its 52nd Session on 15 December 1997 (A/RES/52/164.)

[60] A/RES/54/109.

[61] adopted by the General Assembly in resolution 59/290

earlier at the 51st Session in 1996, would commence in the Ad Hoc Committee at its meeting in September 2000. In addition, it would also take up the question of convening a high level conference under the auspices of the United Nations to address these issues. Pursuant to that mandate, a Working Group of the Sixth Committee in its meeting held from 25th September to 6th October 2000 considered the draft Comprehensive Convention on International Terrorism as proposed by India. Since then the matter has been under active consideration of the Ad Hoc Committee and the Sixth Committee of the UN General Assembly.

7. In addition to the General Assembly, the Security Council has also been engaged in framing legal responses to combat and curb acts of terrorism. On 28 September 2001, vide resolution 1373 (2001), the Security Council established the Counter Terrorism Committee (CTC), which consists of all the 15 Members of the Security Council with the mandate to monitor the implementation of its anti terrorism efforts. The Committee monitors the implementation of resolution 1373 (2001) by all States and tries to increase the capability of States to fight terrorism. The CTC is charged with ensuring every State's compliance with Council requirements to halt terrorist activity, and with identifying weakness in state's capabilities to do so. For States with deficiencies in legislation, funds, or personnel, the CTC is supposed to help them remedy their deficiencies and upgrade their capacity. However, where the Committee concludes that the deficiencies are in political will, it will leave it to the Security Council to decide what measures to take to bring such determinedly non-compliant States into compliance with the 1373 mandates.

8. Seeking to revitalize the Committee's work, in 2004 the Security Council adopted resolution 1535, creating the Counter-Terrorism Committee Executive Directorate (CTED) to provide the CTC with expert advice on all areas covered by resolution 1373.[62] CTED was established also with the aim of facilitating technical assistance to countries, as well as promoting closer cooperation and coordination both within the UN system of organizations and among regional and intergovernmental bodies. During the September 2005 World Summit at the United Nations, the Security Council – meeting at the level of Heads of States or Government for just the third time in its history – adopted resolution 1624 concerning incitement to commit acts of terrorism. The resolution also stressed the obligations of countries to comply with international human rights law.

9. The item entitled "International Terrorism" was placed on the agenda of the AALCO's Fortieth Session held in New Delhi from 20-24 June 2001, upon a reference made by the Government of India. It was felt that consideration of this item at AALCO would be useful and relevant in the context of the on-going negotiations in the Ad Hoc Committee of the United Nations on elaboration of the comprehensive convention on international terrorism.

10. It is pertinent to recall that during the Forty-First Annual Session of AALCO held in Abuja, Nigeria in 2002, a comprehensive Special Meeting on "Human Rights and Combating Terrorism" was organized by AALCO with the assistance of Office of the High Commissioner for Human Rights (OHCHR).

[62] The Security Council extended the mandate of the CTED vide resolution 1963 (2010) (20 December 2010)

11. The successive sessions directed the Secretariat to monitor and report on the progress in the Ad Hoc Committee of negotiations related to the drafting of a comprehensive international convention to combat terrorism; and requested the Secretariat to carry out, an in-depth study on this topic. The Centre for Research and Training (CRT) has brought *A Preliminary Study on the Concept of International Terrorism* in the Year 2006.

12. The present report seeks to highlight the developments that have taken place after the 65th Session of the General Assembly of the United Nations. It refers to: (i) Developments in the Ad Hoc Committee on International terrorism; (ii) Developments in the Counter Terrorism Committee (CTC); (iii) Deliberations on the Comprehensive Convention on International terrorism at the Sixth Committee of the UN General Assembly at its Sixty-Sixth Session; (iv) Consideration at the Sixty-Sixth Session of the United Nations General Assembly; (v) Summary of Deliberations during the Half-day Special Meeting on "International Terrorism" which was held in conjunction with the Fifty-First Annual Session of AALCO, Abuja, Federal Republic of Nigeria (18-22 June 2012) and (vi) Comments and Observations of the AALCO Secretariat.

II. DEVELOPMENTS IN THE AD HOC COMMITTEE ON INTERNATIONAL TERRORISM

13. The fifteenth session of the Ad Hoc Committee established by the General Assembly in its resolution 51/210 of 17 December 1996 was convened in accordance with paragraph 24 of Assembly resolution 65/34. The Committee met at the United Nations Headquarters from 11 to 15 April 2011. The Ad Hoc Committee held two plenary meetings: the 47th on 11 April and the 48th on 15 April 2011.

14. At its 47th meeting, on 11 April 2011, the Committee adopted its agenda.[63]On the basis of past practice, it was decided that the Members of the Bureau of the Committee at the previous session, to the extent of their availability, would continue to serve in their respective capacities. The committee had before it, for discussion, along with the recent developments, the report of its fourteenth session and the report of the working group of the 6th Committee of the 65th Session of the General Assembly. The latter contained texts of the preamble and Articles 1,2 and 4 to 27 of the proposed Comprehensive Convention on Terrorism, prepared by the friends of the chair incorporating the various texts contained in Annexes I, II and III to the report of the ad Hoc Committee established by the General Assembly Resolution 51/210.[64] A list of written proposals relating to the outstanding issues surrounding the proposed draft convention was also available before the committee.[65] Based on these the committee decided to continue with its discussions in informal consultations and informal contacts.

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[63] A/AC.252/L.20

[64] Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996 (A/57/37) (11 February 2002)

[65] A/65/37 and A/C.6/65/L.10. See also the reports of the Ad Hoc Committee on its sixth to thirteenth sessions (A/57/37 and Corr.1; A/58/37; A/59/37; A/60/37; A/61/37; A/62/37; A/63/37; and A/64/37). See also the reports of the Working Group established at the fifty-fifth to sixtieth sessions of the General Assembly (A/C.6/55/L.2, A/C.6/56/L.9, A/C.6/57/L.9, A/C.6/58/L.10, A/C.6/59/L.10 and A/C.6/60/L.6). The summaries of the oral reports of the Chair of the Working Group established at the sixty-first, sixty-second, sixty-third and sixty-fourth sessions are contained in documents A/C.6/61/SR.21, A/C.6/62/SR.16, A/C.6/63/SR.14 and A/C.6/64/SR.14.

15. Discussions on the question of convening a high-level conference under the auspices of the United Nations to formulate a joint organized response of the international community to terrorism in all its forms and manifestations were held on 12 April 2011.[66] At the discussions, the sponsor delegation of Egypt reiterated its proposal made in 1999 to convene an international conference under the auspicious of the United Nations to formulate a joint organized response of the international community. It was recalled that the proposal had been supported by the Non-Aligned Movement, the Organization of the Islamic Conference, The African Union and the League of Arab States. It was stressed that the issue was to be discussed on its own merits and though not mutually exclusive, must not be linked to the discussions on the draft comprehensive convention. Some delegations expressed support to this view. However, some other felt that the question is to be considered after the completion of the negotiation on the draft convention as it would enable an opportunity for stock taking including identifying needs and available resources for assistance in the implementation of the convention.

16. At the 48th Meeting on 15th April, the Coordinator of the draft convention made a statement briefing the delegations on the informal contacts held during the session. It was decided to recommend that the Sixth Committee, at the sixty-sixth session of the General Assembly, establish a working group with a view to finalize the draft comprehensive convention on international terrorism and continue to discuss the item included in its agenda by Assembly resolution 54/110 concerning the question of convening a high-level conference under the auspices of the United Nations. The Ad Hoc Committee will not meet in 2012 and will be reconvened only in 2013.[67]

A. General Discussions

17. Further informal consultations regarding the draft comprehensive convention were held on 12 April 2011 and informal discussions were held on 12 and 13 April 2011.[68] In statements made at these sessions and also at the 48th meeting of the Committee, the delegations, some drawing attention to particular incidents condemned all terrorists attacks, regardless of their motivations. It was further stressed that all measures taken to counter terrorist activities must be in conformity with international law, particularly the Charter of the United Nations, human rights law, humanitarian law and refugee law. It was also pointed out that terrorism is not be associated with any particular religion, culture, nationality, race, civilization or ethnic group and that those attributions should not be used neither for the commission of terrorist acts nor for the adoption of measures to counter terrorism. Some states emphasized that terrorism must not be equated with the legitimate struggles of people who under colonial domination or alien occupation pursue national liberation or self determination. Noting that terrorism was a multifaceted phenomenon, the need for coordinated and comprehensive counter terrorism strategies was called for. The delegations expressed their support to the United Nations Global Counter Terrorism Strategy and called for it full realization and transparent implementation by the Member States. The

[66] An informal summary of those discussions, prepared by the Chair, appears in annex I (sect. C) of A/66/37
[67] General Assembly Resolution 66/105 (13 January 2012), para 25.
[68] An informal summary of those discussions held between 11 – 13th April,2011, prepared by the chair is available in Sec. A and B of Annex 1 to A/66/37. The informal summary is only for the purposes of reference and is not a record of discussion.

delegations also stressed on the importance of full implementation of international counter terrorism instruments and drew further attention to the recommendations of the Twelfth United Nations Conference on Crime Prevention and Criminal Justice which was held at Salvador, Brazil in 2010. Some of the delegations highlighted the need for assistance to States in capacity building and information sharing in the field of combating terrorism. The delegations also expressed concern over the interrelationship between illegal trade in arms and drugs, human trafficking and money laundering with terrorist funding and also over the challenges raised by the phenomenon of suicide bombings. Welcoming the approach taken by the Security Council in Resolution 1904 (2009) to apply the obligation to freeze funds and assets to the payment of ransoms to terrorists, some of the delegations expressed the view that States should ban the payment of ransoms to terrorists. Some of the delegations expressed their support the proposal made by Saudi Arabia to establish and international centre under the auspicious of the United Nations to combat terrorism.

B. Discussions on the Draft Comprehensive Convention on International Terrorism

18. Comments on the draft comprehensive convention on international terrorism were made during the informal consultations held on 11 and 12 April 2011 as well as during the 48th meeting of the Ad Hoc Committee.

19. Reiterating their commitment to the principle of concluding work on the adoption of the draft comprehensive convention by consensus, the delegations expressing their regret on the lack of such consensus, called on Member States to show utmost flexibility and a constructive spirit in the negotiations. Some delegations underlined the need for a more open, transparent and inclusive negotiation process and in this regard a suggestion was made to revisit the methods by which the committee was working. Delegations stressed the importance of arriving at a definition of terrorism that provides a clear distinction between acts of terrorism covered by the convention and the legitimate struggles of peoples in exercise of their right to self-determination or in pursuit of national liberation. Some delegations reiterated their view that the convention must address and cover terrorism in all its forms and manifestations including State terrorism, and acts of armed forces not regulated by international humanitarian law. These delegations expressed the view that the suggested definition of terrorism presently incorporated in draft Article 2 to the convention may have to be revisited in this light.

20. While some delegations reiterated their preference for the proposal relating to draft article 3 (former draft article 18) of the Organization of the Islamic Conference in 2002[69] which they considered to have better addressed their concerns and was still viable, they remained willing to continue to consider the proposal presented by the Coordinator in 2007.[70] The point was also made that all groups had still not been able to endorse the 2007 proposal, and this was interpreted as constituting a serious challenge. The view was also expressed that the problems surrounding draft article 3 were substantive in nature and would not be resolved through the mere repackaging of the current texts.

[69] A/57/37, annex IV.
[70] A/62/37

21. Some delegations also stated that the 2007 proposal was a step in the right direction and called for development along those lines. In their view, the 2007 proposal preserved the other international legal regimes and that it constituted a legally sound compromise position that took into account the concerns raised by several delegations. Some delegations also expressed caution against revisiting those draft articles which enjoyed general agreement. Some delegations also expressed support for the idea of addressing certain outstanding issues in an accompanying resolution as a way to move the process forward and suggested that work on such a text should commence as soon as possible.

22. Some delegations, notwithstanding their preference for the text proposed by the former coordinator in 2002, which according to them reflects the language of the existing legal framework, expressed their willingness to consider the 2007 proposal without modifications if it would bring the negotiations to a successful completion. It was also reiterated that any compromise text had to be based on the principle that no cause or grievance could justify terrorism in any form and that activities of the military forces of a State, which were already governed by other legal regimes, should not be covered by the draft convention. Some delegations also urged those States who were not in a position to endorse the 2007 proposal to clarify their concerns so that they could be better addressed and to propose any alternate language.

23. On 12 April, 2011, the Coordinator Maria Telalian (Greece), noted that the negotiations that have lasted over the past decade has made good progress on some important aspects including the compilation of the draft articles at the previous session of the working group of the Sixth Committee. That text, according to her, represents the current stage of negotiations and would facilitate further discussions and inform decisions on the outstanding issues. The coordinator also noted that the 2007 proposal did not met with any open objection from any delegation so far and urged delegation to consider whether it would serve as a basis for compromise. Further, delegations were also strongly discouraged from attempting to pick and choose elements from the proposal, which would affect the overall balance and integrity of the text. Recalling the main concerns raised by the delegations, i.e. (a) the right of peoples to self-determination under international law; (b) the activities of armed forces in armed conflict; and (c) the activities of military forces of a State in peacetime, also taking into account related concerns about State terrorism, the Coordinator noted that these issues have been addressed by the 2007 proposal by taking into account the existing international legal framework and that the draft convention is not aimed at rewriting or rectifying any perceived flaw in other fields of law. Stressing that the convention was a law enforcement instrument dealing with individual criminal responsibility, it was also noted that it also deals with obligations of states which according to her tracked the provisions of General Assembly resolution 2625 (XXV)[71] The coordinator also said that the convention must reflect the principle that prohibits the indiscriminate use of force and that civilians under no circumstances can be legitimate targets of the use of force.

III. DEVELOPMENTS IN THE COUNTER TERRORISM COMMITTEE (CTC)

[71] Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations.

24. A Special meeting of the CTC commemorating the adoption of the Security Council Resolution 1373(2001) and the establishment on the committee took place on 18 September 2011 at New York. pursuant to the request of the Security Council in its resolution 1963 (2010), the Executive Directorate of the CTC (CTED)[72] had conducted a study updating the 2009 survey on the strengths and weaknesses the Members States have in implementing resolution 1624 (2005). The report of the said study was released on that occasion.[73] The report provides an assessment of the implementation of resolution 1373 (2001) in the Asian, African, Latin American, European and North American regions and sub-regions and draws conclusions about progress in the implementation of the resolution in the key thematic areas, namely: Legislation, Counter Financing of Terrorism, Law Enforcement, Border Control, International Cooperation and Human Rights. The Report also provides recommendations for practical ways to implement the resolution with regard to each thematic area and each region. The report notes that positive developments are evident with increasing number of States demonstrating increased political commitment to international cooperation by signing and ratifying international instruments, criminalization of terrorists acts in their domestic jurisdictions and adoption of measures to cut terrorists funding and preventive border security. Nevertheless, it was seen that terrorism remains high in many parts of the world with the terrorist networks altering their operational methods and engagement in arms and narcotics smuggling and kidnapping for ransom as sources of revenue. Varying governmental stability was also found to be a fact that allows terrorists to operate without State interference. The use of modern Communication and Information technology for recruitment, raising and transfer of funds and organization across international borders was noted with alarm. The report noted that responses to the issue must be both legal and must rest on social policy that addresses the factors that lead to terrorist activities, promotes development, dialogue between civilizations, social integration and human rights.

25. For the African region, the report recommended the adoption of more precise standards in line with the international instruments for determining criminal behavior, better coordination amongst law enforcement agencies both at national, regional and international levels particularly at the operational level and judicial oversight of the same and improvements on border control measures. The report also noted the need for more financial inclusion and establishment and operation of financial intelligence units and review of non-profit sector to ensure that they are not being used for terrorist finance. The CTED called for more regional cooperation at the operational level. As regards the Asian Region, the report noted that some of the States are yet to enact legislations that are fully in line with international standards, specially that which relates to criminalization of terrorist financing. The CTED noted the need for more coordinated and consorted action towards border control and the gaps in institutional capacities and limited resources that render prioritizing counter terrorism initiatives difficult. Though the progress at efforts to prevent money laundering and other terrorist financing regimes were noted, greater regional cooperation was called for at the interactive sessions[74], the participants noted that though significant progress has been made since the establishment of the committee in evolving legal frameworks over a spectrum of areas of concerns and implementing them, terrorism

[72] The Current mandate of the CTED is governed by Security Council Resolution1963 (2010) (2O December 2010)
[73] S/2011/463 (17th August 2011)
[74] **Rapporteurs' summaries of the** Special meeting of the CTC commemorating the adoption of the Security Council Resolution 1373(2001) and establishment of the committee, available at:
< http://www.un.org/en/sc/ctc/specialmeetings/2011/docs/rapporteurs_summary.pdf>

continues to be a serious threat and remained particularly attractive to marginalized groups and individuals. Noting that terrorist groups have taken recourse of innovative communication technology and novel means to raise funds, the participants called for attention on these issues. Some of the participants called for a more cooperation between the General Assembly and the Security Council and called for a more integrated response from the United Nations Organization. Noting that terrorist organizations operated all over the world, some participants called for a broader approach based on partnerships and open, transparent interaction. Some participants felt that though resolution 1373 (2001) had recognized human rights in an asylum and refugee context, the need for anti-terrorism measures to be consistent with international law, particularly human rights law required greater emphasis. Some participants also called for streamlining of the committees work, ensuring greater cooperation with the other Organs of the United Nations. Participants also stated the need to bestow attention on the need to focus increasingly on countering incitement and radicalization and to address the issue of recruitment through the internet. The need for efforts to address new threats such as links with transnational organized crime, nuclear terrorism and cyber terrorism was also noted. Some of the participants noted the need for greater attention on capacity building and the role that non-governmental organizations and representatives of the media can play towards this end.

26. The Committee further noted the close relation between terrorism and transnational organized crime including trafficking of illicit drugs, money-laundering, illegal arms trafficking, and illegal movement of nuclear, chemical, biological and other potentially deadly materials and resolved to monitor and assist to ensure the full implementation of resolution 1373 (2001), with the support of CTED and to continue to focus on ways and means to address identified gaps in the implementation of the resolution in cooperation with international, regional and sub regional organizations by strengthening its role in facilitating technical assistance aimed at providing full implementation of the resolution.[75]

IV. DELIBERATIONS ON THE COMPREHENSIVE CONVENTION ON INTERNATIONAL TERRORISM AT THE SIXTH COMMITTEE OF THE UNITED NATIONS GENERAL ASSEMBLY AT ITS SIXTY-SIXTH SESSION

27. Pursuant to its resolution 65/34 of 6 December 2010, the topic "Measures to eliminate international terrorism" was included in the provisional agenda of the sixty-sixth session of the General Assembly. At its 2nd plenary meeting, on 16 September 2011, the General Assembly, on the recommendation of the General Committee, decided to include the item in its agenda and to allocate it to the Sixth Committee. The Sixth Committee considered the item at its 1st, 2nd, 3rd, 4th, 28th, 29th and 30th meetings, on 3 and 4 October and on 4, 9 and 11 November 2011. The views of the representatives who spoke during the Committee's consideration of the item are reflected in A/C.6/66/SR.1-4 and 28-30.

28. At its first meeting, the committee established a working group to carry out the mandate of the Ad Hoc Committee. At the same meeting Mr. Rohan Perera (Sri Lanka) was elected as the chair of the working group. The Working Group held four meetings, on 17 and 19 October and

[75] Outcome Document for the special meeting of the Counter-Terrorism Committee commemorating the adoption of Security Council resolution 1373 (2001) and the establishment of the Committee, available at:
< http://www.un.org/en/sc/ctc/docs/2011/2011-09-28-specialmtg-outcome.pdf>

on 1 November. It also held informal consultations on 17 and 19 October. The report of the Ad Hoc Committee[76] was also considered. At the 28th meeting on 4th November, the committee heard an oral report by the chair of the working group on its work and on the results of the informal consultations held during the session on 17th and 19th October.[77] The committee recommended to the General Assembly the draft resolution to be adopted along with a recommendation to establish a working group at the 67th Session to finalize the draft Comprehensive Convention on International Terrorism and to include the topic in the provisional agenda for the 67th Session.[78]

V. CONSIDERATION AT THE SIXTY-SIXTH SESSION OF THE UNITED NATIONS GENERAL ASSEMBLY

29. At the 66th Session of the General Assembly of the United Nations, resolutions impacting the formulation of a legal regime to combat terrorism were adopted. At the Session, the General Assembly had also considered the report of the Secretary General on "measures to eliminate international terrorism".[79] In his report, the Secretary General discussed the information he received from States and from international organizations on the measures adopted to combat terrorism. Further, the current status of international instruments relating to suppression of terrorism was also discussed.

30. On 12th January 2012, the General Assembly adopted resolution 66/50 on "measures to prevent terrorists from acquiring weapons of mass destruction". Noting the linkage between weapons of mass destruction and terrorism, the international community was called upon to support international efforts to prevent terrorists from acquiring weapons of mass destruction and appealed to Member States to accede to and ratify the Convention for Suppression of Acts of Nuclear Terrorism. The Assembly also mandated the Secretary-General to compile a report on measures taken by international organizations on issues relating to the linkage between the fight against terrorism and the proliferation of weapons of mass destruction and to seek the views of Member States on the issue and to include the subject matter in the provisional agenda for the 67th session.

31. Adopting resolution 66/105,[80] the Assembly reaffirmed its commitment to Global Counter Terrorism strategy (adopted in 2006) and its previous declarations on the subject. Affirming the need to develop combating measures in conformity with international law, particularly humanitarian and refugee laws, the need for international cooperation, both among States and international organizations was stressed. The resolution called upon States to implement the Strategy and also enhance the implementation of the relevant legal instruments and to intensify the exchange of facts relating to terrorism. It was decided that that the Sixth Committee, at the sixty-seventh session of the General Assembly, will establish a working group with a view to finalizing the draft comprehensive convention on international terrorism and continuing to discuss the item included in its agenda by Assembly resolution 54/110 concerning

[76] A/C.6/66/SR.1
[77] A/C.6/66/SR.28
[78] A/66/478 (15 November 2011)
[79] A/66/96 (24 June 2011)
[80] A/RES/66/105 (13 January 2012)

the question of convening a high-level conference under the auspices of the United Nations. It was also decided to reconvene the Ad Hoc Committee in 2013, as appropriate, on dates to be decided at the sixty-seventh session of the General Assembly, in order to, on an expedited basis, continue to elaborate the draft comprehensive convention on international terrorism and continue to discuss the item included in its agenda by Assembly resolution 54/110 concerning the question of convening a high-level conference under the auspices of the United Nations. The assembly also resolved to include in it's provisional agenda for the 67th Session, the item "measures to eliminate international terrorism".

VI. SUMMARY OF DELIBERATIONS DURING THE HALF-DAY SPECIAL MEETING ON "INTERNATIONAL TERRORISM" WHICH WAS HELD IN CONJUNCTION WITH THE FIFTY-FIRST ANNUAL SESSION OF AALCO, ABUJA, FEDERAL REPUBLIC OF NIGERIA (18-22 JUNE 2012)

32. **Dr. Hassan Soleimani, Deputy Secretary-General** in his introductory statement highlighted the issues to be discussed in this Special Meeting as: (i) Challenges before the Ad Hoc Committee on International terrorism; (ii) International legal cooperation in criminal matters against terrorism; and (iii) countering financing of international terrorism. The Government of India while referring this topic to AALCO maintained that consideration of this item at AALCO would turn out to be relevant in the context of the ongoing negotiations in the Ad Hoc Committee on elaboration of the Comprehensive Convention on International Terrorism.

33. The Ad Hoc Committee at its 48th meeting on the 15th of April 2011 focused on the definition of terrorism, without which certain areas of law seem to be lacking and have not resulted in effective implementation to combat terror. The definition must include under its ambit the various rules and principles of international law that safeguards human rights and dignity as well as fundamental freedoms. The framing of such a definition would only be possible with the experts of both the field as well as the Member states. Realizing that terrorism was a multi challenging phenomenon, the need for a comprehensive counter terrorism strategies, was also proposed. The UN Secretary-General H.E. Ban Ki Moon on the 3rd of June 2012 highlighted 4 key areas that the nations need to work on for tackling terror i.e., a) Tackling conditions favorable to the spread of terrorism, b) prevention of terrorism, c) strengthening up the States capacity to counter terrorism and d) promotion of inter community engagements.

34. The DSG further added that a special meeting of the Counter Terrorism Committee (CTC) took place on 18th September 2011 at New York which noted the compatible relation between terrorism and transnational organized crime including trafficking of illegal drugs, money laundering, illegal arms trafficking and resolved to monitor and assist to ensure the full implementation of Resolution 1373 (2001), with the support of CTED and to continue to focus on means to address the identified gaps and loopholes in the implementation of the resolution in cooperation with international, regional and sub-regional organizations by strengthening its role in providing technical assistance aimed at providing full implementation of the resolution. At the 66th session of the General Assembly of the UN, resolutions that would impact the formation of a legal regime to combat terrorism were adopted. At this session, the General Assembly had also considered the report of the Secretary General on measures to eliminate international terrorism.

35. **Dr. Rohan Perera, the Chairman of the UN Ad-Hoc Committee on Measures to Eliminate International Terrorism**, at the outset gave a brief introduction as to how the issue of terrorism was dealt with, first by the League of Nations and then, by the United Nations. He was of the view that the current initiatives undertaken under the aegis of the United Nations had been at two levels; firstly, the norm-creating role of the General Assembly, Specialized Agencies and its Ad-Hoc bodies, such as the Ad-hoc Committee on Measures to Eliminate International Terrorism, through which specific Conventions are adopted and secondly, the measures adopted by way of enforcement action by the Security Council under Chapter VII of the UN Charter. He stated that the primary thrust of his presentation would be on the first aspect, namely the norm-creating process in the UN Ad-Hoc Committee on Terrorism. This was because of his close association with this process as the Chairperson of the Committee, he clarified.

36. Explaining the definitional problems that have been plaguing the efforts to find a definition for terrorism, he remarked that at the core of this problem was the demarcation between 'terrorists' and freedom 'fighters'. In his view, the dilemma confronting the UN initiatives could be summarized in the slogan: '*one man's freedom fighter is another man's terrorist'.* He held the view that due to this problem, the UN has adopted what is known as the 'Sectoral Approach' that involved criminalizing specific criminal acts. He also added that a number of Conventions had been adopted based on this 'Sectoral Approach' on various subjects such as unlawful acts against aircraft, safety of maritime navigation, hostage staking, terroristic financing and others. He was of the opinion that these Conventions had a common architecture in that they obliged State Parties to criminalize under their domestic laws, the specific acts covered under the Convention; to establish their jurisdiction over these acts and the fundamental obligation to 'Extradite or Prosecute'.

37. While narrating the rationale for a Comprehensive Convention on Terrorism, he mentioned that it was mandated by the UNGA as a means of developing a comprehensive legal framework of Conventions dealing with international terrorism. The objective of the Convention, in his view, was to provide comprehensive coverage to terrorist crimes not covered under the existing Conventions and to adopt enhanced measures of cooperation and assistance between States. As regards the definition of terrorism contained in the draft text, he pointed out that the draft text proposed by the sponsor State India contained an operational definition of the term and that it covered specific criminal acts such as unlawful and intentional causing of death or serious bodily injury to any person, serious damage to public or private property when these acts are committed with a terrorist intent.

38. The Delegations of the Organization of the Islamic Conference (OIC) on the other hand, opted for a generic definition of the term and sought to have a clear distinction between acts of terrorism, and those acts committed in the course of exercising the right of self-determination. This was opposed by European States who favored an operational definition, he added. In the light of these divergent approaches to the Comprehensive Convention, the challenge before the Committee was to take the focus away from the definitional issues and to address the specific concerns that have arisen in the context of the scope of application of the Convention. In view of these problems, the Committee had decided to follow a practical approach and that the negotiations are now proceeding on the basis of a compromise package known as a 'Choice of Law' provision that carves out the scope of application of the Convention rather than going

down the politically sensitive path of attempting to draw distinction between acts of terrorism and an armed struggle for national liberation, he clarified. In his view, the key elements of the comprehensive package were as follows;

- Activities of 'armed forces', during an armed conflict as those terms are understood under international humanitarian law, are not governed by the Convention;
- Activities undertaken by the military forces of a State, in the exercise of their official duties, in as much as they are governed by other rules of international law, are not governed by the Convention.

39. The latter provision, sought to address the concerns of the Western States that official activities of State military forces, outside the context of an 'armed conflict' should not be governed by the Convention as other rules of international law, viz., principles of state responsibility would apply in such situations. Hence, he was of the opinion that the basic approach and rationale of the "compromise package' was the recognition of the fact that the comprehensive convention is not comprehensive in the absolute sense of the term, but that it would operate alongside other applicable legal regimes and sought to preserve the integrity of such other laws. Citing an example, he made reference to an element of the package that specifically provided that "this Convention is without prejudice to the Rules of International law, applicable in armed conflicts, in particular those rules applicable to acts lawful under International humanitarian law'. The gist of this provision was summarized by him thus: the Convention would not criminalize, what is not prohibited under IHL. He was of the opinion that the fact that all delegations are now prepared to negotiate on the basis of the approach in the Co-ordinator's text was a positive step that needed to be underlined.

40. **Mr. Peter Terkaa Akper, SAN, Senior Special Assistant to the Attorney General of the Federation and Minister of Justice, Federal Republic of Nigeria** made a succinct presentation on the topic **Legal Response to Terrorism in Nigeria: Issues and Challenges in his introductory remarks said that the** subject matter is relatively novel to us in Nigeria and that our legal response can reasonably be adjudged to be at its infant stage, when compared to other jurisdictions like South Africa and the United Kingdom.

41. He mentioned that until, recently terrorism or the threat of terrorism was a negligible phenomenon in Nigeria. President Goodluck Ebele Jonathan, GCFR recently reiterated this position in his Democracy Day Address where he stated that *"... terrorism, a new menace, is totally alien to our way of life and culture; it has reared its head and is posing serious challenge"*[81] Thereafter, he enumerated some instances of acts of terrorism that had occurred in Nigeria. The spate of bombings in the country however started on 1st October 2010 when terrorist struck near the eagle square where the independence activities were taking place in Abuja. Since then, other bombing incidents were recorded in Jos, Bayelsa and Lagos.

42. He added that the Boko Haram sect had also added another dimension to the bombings as they routinely attacked Police stations, churches and Schools. But, the most profound of their terrorist activities was the UN House bombings in Abuja which attracted international condemnation. This, coupled with the Mutallab's attempted bombing of Delta Airline in

[81] See Democracy Day Address by His Excellency, Dr. Goodluck Ebele Jonathan, GCFR Tuesday, 29th May 2012.

December 2009, brought Nigeria to the global discourse on international terrorism. Although, acts of terrorism had been on the increase in the country, Nigeria did not have a comprehensive legislation on terrorism before June, 2011. This was despite the fact that Nigeria had ratified more than ten out of the 16 United Nations Terrorism Conventions.

43. He highlighted that the Nigerian Government's counter terrorism strategy was to confront all those threatening the nation's collective peace and security and bring the perpetrators to Justice. To give effect to that strategy, government responded to the menace of terrorism by taking steps to enact the Anti-terrorism legislation which had been in the works for about 5 years. The collective resolve of the government came to fruition with the enactment by the National Assembly of the Terrorism (Prevention) Act, 2011. In his presentation, Mr. Akper examined the legal regime that had been put in place to combat terrorism in Nigeria, the extent to which it complied with global standards and offered suitable recommendations where necessary to address growing terrorism threats in Nigeria.

44. In a brief overview he outlined the objectives of the Terrorism (Prevention) Act 2011 (TPA 2011) as "to provide for the prevention, prohibition and combating of acts of terrorism, the financing of terrorism in Nigeria and for the effective implementation of the Convention on the Prevention and Combating of terrorism and the Convention on the Suppression of the Financing or Terrorism".[82] TPA was divided into eight major parts, which included namely: (i)provision of acts of terrorism and related offences; (ii) prohibition of terrorist funding and seizure of terrorist property; (iii) provision of cooperation to other countries through mutual legal assistance and seizure of terrorist assets; (iv) provision of cooperation to other countries through extradition of suspects linked to terrorism; (v)investigative powers; (vi)prosecution; (vii)power to register or refuse registration of charities, and (viii)miscellaneous powers. Thereafter, he gave the salient features of the pertinent provisions enlisted in the Act.

45. One of the important features of the TPA was that in recognition of the effect of international terrorism, the TPA had empowered the President on the recommendation of the National Security Adviser or the Inspector General of Police to declare a person to be a suspected international terrorist. The person so declared must be involved or has been involved in the commission, preparation or instigation of acts of international terrorism, is a member of, or belongs to or has links to an international terrorist group, or recognised as such under the Act or listed as a person involved in terrorist acts in any resolution of the United Nation's Security Council, or any instrument of the African Union and the Economic Community of West African States (ECOWAS).[83]

46. He highlighted that In view of the transnational nature and dimension that terrorism had assumed, Part III of the TPA 2011 contained provisions relating to mutual assistance and extradition as part of Nigeria's international obligations and to further international cooperation with other countries in the investigation and prosecution of criminal matters.

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82 See Explanatory Memorandum to TPA 2011

83 See section 9 (1) (2) TPA 2011. The Act defines "acts of international terrorism" to mean an act of terrorism involving; a non citizen, a person possessing dual citizenship or a groups or individuals whose terrorist activities are foreign based or directed by the countries or groups outside Nigeria or whose activities transcend national boundaries.

47. In his appraisal of the Terrorism (Prevention) Act, 2011, **Mr. Akper** alluded to the relative infancy of the TPA and the counter terrorism measures contained in it. He said that it may be unrealistic to objectively assess its efficacy in combating the menace of terrorism in Nigeria, as the Act was barely one year in existence and many of the accompanying regulations to give effect to the Act were just being gazetted. The Attorney General had recently issued the Terrorism Prevention (Freezing of International Terrorists Funds and Other Related Measures) Regulations, 2011 in relation to freezing and forfeiture measures as well as proscription measures for terrorist groups provided under Section 9 on international terrorists in accordance with FATF Special Recommendation 3 and the United Nations Security Council Resolutions 1269 (1999) and Resolution 1373 (2001). [84]

48. He was also aware that a lot of work needs to be done in terms of providing the requisite policy and regulatory frameworks and advice to support various measures in the law and to assist the implementing institutions and the financial and non-financial institutions that are required to submit suspicious transaction reports to the Nigerian Financial Intelligence Unit. There was also the need for financial regulatory institutions to understand the TPA and to develop further guidance for its sector.

49. Towards this end, he said that the office of the Attorney General of the Federation was working on additional regulations that would underpin the various aspects of the TPA related to Charities, Immigration, Aviation, prosecution guidelines, investigation guidelines and the development of proscription list which would be forwarded to the banks on a monthly basis. The effective implementation of this law called for a pragmatic and proactive approach and the development of a national strategy to ensure that each agency, financial sector regulators, reporting entities, prosecution and investigation officials understood their remits and were able to secure convictions in a manner that respects and guarantees constitutional rights.

50. Further, a proactive strategy that responds to the need for community based organizations (CBOs) to be actors in the prevention of terrorist activities in their communities, towns and cities needed to be developed to make the terrorism prevention efforts effective. Also central to the terrorism prevention efforts was the need for a comprehensive witness protection programme that would encourage voluntary provision of intelligence and information needed to combat terrorism.

51. Equally important was the need for proper coordination of their counter terrorism efforts. The TPA appeared to have placed heavy responsibilities on the NSA, IGP and the Attorney General of the Federation with respect to the administration of the Act. This meant that these state officials must work closely and cooperatively to prevent duplication of efforts that may militate against effective implementation of the Act. Given the large number of institutions (financial and non- financial) whose inputs were required for the proper implementation of the Act, the need for a properly coordinated counter-terrorism strategy could not be overemphasized. It was important for all relevant institutions to understand the strategy and collectively align their efforts to ensure success.

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[84] Made pursuant to sections 9 (6) and 39 TPA 2011 and gazetted on 30th September 2011

52. He also observed that despite the commendable efforts made to adopt internationally recommended standards and practices in the TPA 2011, the TPA still fell short of FAFT standards and the United Nations Convention on the Suppression of Terrorism in some critical areas. This called for a comprehensive review of the TPA to bring it in conformity with international standards set by FATF and the UN Convention on the Suppression of Terrorism. For instance, the provisions of the TPA had been adjudged to be grossly inadequate to combat terrorism in line with international best practices. Furthermore, some of the provisions of the TPA did not align with or were in direct conflict with provisions of earlier legislations such as the Economic and Financial crimes Commission (Establishment) Act, 2004 and the National security Agencies Act, 2004.

53. To cure these defects, the Federal Ministry of Justice embarked on the drafting of a new Bill known as "A Bill for an Act to Repeal the Terrorism (Prevention) Act, 2011 and Re-enact the Terrorism (Prohibition) Act, 2012. During the review period, comments were received from relevant Nigerian Agencies involved in the implementation of TPA 2011 and other international agencies such as the United Nations Office of drugs and Crime (UNODC), the United States Department of Justice and the United Kingdom High Commission, the UK Home Office and FATF Secretariat.

54. The new Bill, he added, took on board most of the provisions of TPA 2011 and further improved on some of the provisions on the TPA. The highlights of the new Bill included: (i)the empowering of the ONSA and State Security Service to serve as the lead agency and central coordinating agency in the investigation and intelligence gathering on terrorism; (ii)the prescription of life imprisonment for all acts of terrorism; (iii)the number of terrorist offences have been increased from 13 in TPA 26 under the new Bill to include all offences prescribed by international conventions; (iv)the obligation on the part of airlines, commercial carriers and tour operators and travel agents not to aid and abet, facilitate and promote terrorist activities and obligation to notify its clients accordingly; (v)re-affirmation of the Attorney General's power to institute and undertake criminal proceedings against any person in respect of the offences committed under the Act or any law relating to acts of terrorism; (vi)the re-affirmation of the Jurisdiction of the Federal High Court to try terrorism offences and power to refuse any application for stay of proceedings in respect of any criminal matter brought under the Act until judgment is delivered, and (v) the provision for the establishment of Victims Trust Fund to be managed by a Trust Fund Board.

55. In his concluding remarks, Mr. Akper said that Nigeria's experience with terrorism was relatively new. The legal regime that had been put in place to tackle terrorism in Nigeria was also new and undergoing review to bring it in conformity with internationally recommended standards and practices. Despite some of the identified short comings, Nigeria had made commendable efforts to domesticate international standards relating to the strengthening of counter-terrorism strategies. However, its implementation had not been long enough for its efficacy to be tested. But, until the review process was completed and enacted into law, the extant legal regime on terrorism is the TPA 2011. It was therefore important for institutions and agencies charged with the implementation of the law to rise up to the challenge of implementing the legislation.

56. Finally, he said that it was worth appreciation that the task of combating domestic and international terrorism in Nigeria should not be left to Nigeria alone. It must be the collective responsibility of all. It was in this connection that Nigeria would benefit from knowledge sharing and the rich experiences of other Asian and African countries in the global fight against terrorism.

57. In the ensuing deliberations the delegations from **People's Republic of China, Myanmar, Democratic Socialist Republic of Sri Lanka, Republic of Indonesia, Islamic Republic of Iran, India, Uganda, Japan, Republic of Korea, Malaysia, State of Kuwait, State of Palestine, Iraq and the Observer Delegation of the International Committee of Red Cross (ICRC)** made their statements. The Delegations of the **Democratic People's Republic of Korea** and **Republic of Yemen** gave their written statements for reflection in the final record of the Session.

58. The Delegate from the **People's Republic of China** addressed the resurgence of terrorism across the world and the growing use of the internet, social media and sophisticated technologies in the commission of terrorist acts. The delegate also affirmed China's commitment to fighting terrorism in all its forms while asserting that, "the fight against terrorism should be carried out in strict accordance with the purposes and principles of the Charter of the United Nations and other recognized norms of international law." The delegate also stressed on the need to respect sovereignty, the abandonment of "double standards", as well as the need for international cooperation under the umbrella of the UN.

59. In addressing China's efforts to improve the counter-terrorism legal framework, the delegate mentioned the Standing Committee of National People's Congress of China adopting the Decision on Issues Related to the Strengthening of Counter-terrorism Work in October 2011. China has also joined various anti-terror conventions of the UN including ratification of the International Convention for the Suppression of Acts of Nuclear Terrorism in November 2010.

60. China has been constructively participating in the elaboration of a comprehensive counter-terrorism convention within UN framework as well as being actively involved in the discussions under the Global Counter-Terrorism Forum. As part of the Shanghai Cooperation Organization, it had helped pass the Resolution on the Cooperative Programme on Fighting Terrorism, Separatism and Extremism for 2013-2015. The delegate also stated that, "Bilaterally, China had signed anti-terrorism agreements with Pakistan, Kazakhstan, Kyrgyzstan and others respectively, and held relevant consultations with countries such as Japan, India, Russia and the Republic of Korea."

61. The Delegate from **Myanmar** stated that Myanmar firmly believed that terrorism was one of the most serious challenges facing the international community and was deeply concerned with the increase of terrorism, in various regions, motivated by intolerance and extremism. It was also Myanmar's belief that prevention and suppression of terrorism could only happen through increased cooperation and full implementation of international conventions.

62. Myanmar had acceded or ratified 12 conventions and had 9 domestic laws on the subject. To adopt domestic legal effect to those conventions, Myanmar's legislative draftsmen were

drafting a General Anti-Terrorism Law. Myanmar had also reported to the Counter Terrorism Committee pursuant to paragraph 6 of Resolution 1373(2001) and had a sincere desire to cooperate with CTC for the interests of the international community. Myanmar was also an active participant within the framework of ASEAN and signatory to the ASEAN Counter-Terrorism Treaty of 2009.

63. In conclusion she stated that Myanmar had acceded to the UN Convention against Transnational Organized Crime and its two protocols in 2004, passed the Anti-Trafficking in Persons law in 2005, and the Control of Money Laundering Law in 2002 which was in accordance with international standards and Financial Action Task Force (FATF) 40 Recommendations and 8 Special Recommendations. The Mutual Legal Assistance in Criminal Matters Law was also passed in 2004.

64. The **Delegate of the Democratic Socialist Republic of Sri Lanka** stated that international terrorism was considered to be one of the most important issues; he remarked that Sri-Lanka's experience related to eradicating terrorism was a long and hard one. While drawing attention to the remarks made by His Excellency Mahinda Rajapakse, during the Fiftieth Annual Session held in Colombo last year, he recalled that their Hon'ble President had stressed on the need and importance of exercising continued vigilance at the international level and stated that the ability to resort to both domestic law and international law as a source of protection, were vitally important. Considering the paramount importance of this issue in a global context and especially in an Asian- African context, Sri-Lanka urged all Member States to exert all efforts to take necessary action against terrorism including addressing issues of terrorist financing, he added.

65. The **Delegate of the Republic of Indonesia** believed that regional and national measures should be in concert with global efforts. Cooperation under UN framework and the establishment of the CCIT were significant steps. Indonesia would also continue to utilize and enhance cooperation under the UN Global Counter-Terrorism Strategy (UNGCTS) which focuses on four key areas of action; tackling conditions conducive to spreading terrorism, preventing and combating terrorism, building States' capacity to counter terrorism, and ensuring respect for human rights. Indonesia also believes it is necessary to give more attention to the implementation of UNGCTS.

66. At regional level, Indonesia had adopted an ASEAN Convention on Counter-terrorism to strengthen cooperation and capacity building among ASEAN member countries. At national level, Indonesia had enacted a national Law on Counter Terrorism and had established the National Anti-Terrorism Agency. The critical need to suppress the financing of terrorism led to establishment of national Law on Preventing and Combating Money Laundering, and Law on the Electronic Information and Transaction. Indonesia also cooperates with *Financial Action Task Force* (FATF) in implementing the FATF standards, particularly the 40+9 *Recommendations.*

67. He stressed that Indonesia viewed that it was necessary to have broad and long-term strategies that make use of soft power, and to address the root causes or conditions conducive of terrorism. In this regard, it is necessary to build a culture of dialogue, education and inter-community engagements.

68. Indonesia also underlined the importance of putting de-radicalization programs at the forefront of counter terrorism strategy. Activities such as promoting network among the moderates, disrupting radical networks, fostering mosques and pesantrens/madrassas, directing extremists to leave their violent tactics behind and pursue their objectives through democratic process, may have a significant impact. It was also necessary to overcome the conditions conducive to the spreading of terrorism, such as prolonged conflicts, defects in the rule of law, violation of human rights, the lack of good governments and discrimination on ethnicity, nation and religion.

69. The Delegate also maintained that all efforts to eradicate terrorism must be in conformity with democratic principles. All measures against terrorism must be consistent with the rule of law and a deep and abiding respect for human rights and in accordance with international law.

70. The **Delegate from the Islamic Republic of Iran** stated that international terrorism is a continuing threat to international peace and security and that despite all efforts, much work remains to be done in order to uproot the menace. The delegate also stated that terrorism has been manipulated for political leverage and for geopolitical interests and warned against this "sinister functional approach" as well as "State terrorism."

71. The delegate asserted that the Islamic Republic of Iran has long been a target of terrorism with Iranian scientists falling victim to a "vicious campaign to deprive Iran of its legal and legitimate right to use nuclear energy for peaceful purposes." In this light it is Iran's belief that resorting to indiscriminate violence and acts of terrorism by anyone is unjustifiable. The delegate also reasserted the need for cooperation and organization under the ambit of the UN.

72. The delegate concluded by saying that terrorism cannot be eradicated until its root causes and conditions conducive to its spread are identified and removed and also that a consensual definition of terrorism, one which would distinguish between terrorism and legitimate struggles, would strengthen international cooperation and prevent ambiguities from occurring and being abused.

73. The **Delegate of India** said that international terrorism was an ongoing challenge and India continued to believe that it should be condemned in all its forms and manifestations as it was a criminal and unjustifiable act under legal, political, ethical, philosophical and religious aspects. The UNGA had established a legal framework for countering terrorism comprising of 13 multilateral legal instruments to which India was a party. She said that India also intended to become a party to the counter terrorism task force under the FATF and share information on money laundering and terrorist financing with other members of FATF. She hoped that the UN instruments on international terrorism would be able to delineate the issue of official impunity.

74. The **Delegate of Uganda** stated that in Uganda terrorist were viewed as cowards, he recounted the July 2010 Kampala terrorist attacks which were suicide bombings carried out against crowds watching a screening of 2010 FIFA World Cup Final match during the World Cup at two locations in Kampala, Uganda, on 11 July, 2010. The attacks left 74 dead and 70 injured. He maintained that it was a reprehensible act and he supported the position of the Sri

Lankan delegation and emphasized the need for bilateral arrangements as far as possible to counter terrorism. He said equally important was the extradition of such suspects, and in this regard bilateral extradition agreements would prove useful. He also underlined the difficulties in complying with the "48 hour rule". In addition he also maintained that countries were experiencing difficulties in domesticating the ICC procedures into national legislations, he gave the example of death penalty which existed in Uganda and its absence in the Rome Statute. Fortunately, the Supreme Court of Uganda gave a ruling which said that it was not compulsory to have compulsory death penalty.

75. The **Delegate of Japan** expressed the view that international cooperation was called for to share information on terrorists, to make rules and standards on counter-terrorism measures, to assist capacity-building on anti-terrorist measures and also to look into the root causes of terrorism. Japan has focused on three fronts: (1) to strengthen national counter-terrorism measures, (2) to promote further a wide-range of international cooperation, (3) to assist the developing countries to improve capacity to cope with terrorism.

76. He maintained that Japan also attaches great importance to the CCIT and has been actively participating in G8, UN, FATF (Financial Action Task Force), APG (Asia-Pacific Group on Money Laundering) frameworks to build cooperative networks including developing countries.

77. The **Delegate of the Republic of Korea** stated that his Government had ratified or acceded to 12 terrorism-related international conventions and signed the Convention for Suppression of Acts of Nuclear Terrorism in 2005. Republic of Korea had also been faithfully implementing all the relevant Resolutions of the United Nations Security Council on terrorism including, inter alia, Resolution 66/50 on "Measures to prevent terrorists from acquiring Weapons of Mass Destruction" and the United Nations Global Counter Terrorism Strategy, and is also closely cooperating with the Counter-Terrorism Committee in implementing UNSC Resolution 1373 and strongly supports the adoption of the Draft Comprehensive Convention on International Terrorism.

78. The **Delegate of the State of Kuwait**[85] maintained that undoubtedly international terrorism was one of the greatest evils of the present times, where unfortunately innocent people lost their lives, according to him there was need for the international community to cooperate not only for eradicating it but also to make efforts towards reducing the effects of the tragedy. The delegate reiterated that in many UN Meetings, the delegation of Kuwait had called for a world strategy for fighting this menace, which did not target any nationality in particular and specifically a clear definition of the term itself. He recounted the measures taken by the Arab League with regard to the mentioned concerns which had been tabled at the UNGA in 1983. The State of Kuwait had its own laws to punish terrorism and terrorists; however it was working on a comprehensive legislation on money laundering, combating trafficking and confiscation of all such money and property. Another important matter under discussion was the implementation of such legislation.

[85] Statement was delivered in Arabic. Unofficial translation from interpreter's version.

79. The **Delegate of Malaysia** noted that the issues for focused deliberation revolved around UN's unresolved issues relating to "measures to eliminate terrorism", particularly on the draft Comprehensive Convention on International Terrorism (draft CCIT), and that Malaysia's position pertaining to these issues had been sufficiently elaborated upon during the Sixth Committee and the Ad-Hoc Committee meetings at the United Nations. However, Malaysia reiterated that despite this stalemate States should not halt their efforts in combating terrorism, particularly by using their own sovereign powers through domestic legal frameworks to cover grey areas not covered by international instruments.

80. While stating the need for international cooperation through bilateral, multilateral or regional means, Malaysia mentioned the negotiation and deliberation among like-minded ASEAN counties on the Treaty on Mutual Legal Assistance in Criminal Matters and is of the view that a similar instrument may be valuable to Asian-African countries. To this end, Malaysia looks forward to the constitution of the open-ended Committee of Experts as per Resolution AALCO/RES/49/S8 passed at AALCO's Forty-Ninth Annual Session.

81. In response to the report by the CTED, which noted several States had not enacted legislation criminalizing terrorist financing, Malaysia pointed out Chapter VIA of the Penal Code and the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 as the legal frameworks dealing this. While referring to statements by the Hon'ble Attorney-General of Uganda regarding the "48-hours rule", Malaysia stated that the drafting of the Security Offence (Special Measures) Act 2012 was a means to balance "the responsibility of the State to ensure peace and security with the rights of the accused person to fair trial and due process of law." This Act would only allow detention for purposes investigation but not detention without trial. The provision for detention for a period of 30 days would also be reviewed every 5 years and a Special Review Committee, would review implementation of the law every sixth months.

82. The **Delegate of the State of Palestine**[86] stated that international terrorism should be condemned in the strongest words by one and all. Besides this, international cooperation to fight terrorism was a must because terrorist acts primarily targeted innocent civilians. He said that innocent Palestinians had been targeted by Israeli's since 1967 and in fact Israel followed the policy of State sponsored terrorism. He urged AALCO to raise its voice against Israel for its criminal acts and demanded the creation of a neutral international force which could be deployed to protect Palestinian civilians from such attacks. Thereafter, he explained the difference between resistance and terrorism.

83. The **Delegate of the Republic of Iraq**[87] also unequivocally condemned terrorism and reiterated that the International Convention propounded by the Arab League in 2011 was a good document that defined "terrorism". He urged the AALCO to draft a convention on the subject, based on the existing UN Conventions and the Arab League Convention; this document could facilitate both extradition of the suspects as well as reinforce measures to combat terrorism.

[86] Statement was delivered in Arabic. Unofficial translation from interpreter's version.
[87] Statement was delivered in Arabic. Unofficial translation from interpreter's version

84. The **Delegate of the Kingdom of Saudi Arabia**[88] reiterated the stance taken by them in the United Nations General Assembly, that it was necessary to constitute an international centre for combating terrorism. He said that shortly Saudi Arabia would have legislation on the subject. As and when the same was ready they would inform AALCO Secretariat about it.

85. The **Observer from the International Committee of Red Cross** (ICRC) stated that ICRC was concerned that some measures taken by states and international organizations to suppress or prevent terrorism have the potential to impede or restrict humanitarian action by prohibiting the provision of "support" or "services to" groups or individuals designated as "terrorist". Anti-terrorism financing legislation/resolutions which do not exempt humanitarian aid will have a stifling effect on humanitarian operations.

86. Criminalization of humanitarian action may also run counter to neutrality and impartiality, which are Fundamental Principles of the Red Cross and Red Crescent movement. ICRC and others cannot be neutral if forced to only provide aid to persons on one side of an armed conflict. Potential criminalization of humanitarian engagement with organize armed groups designated as "terrorist" may be said to reflect a non-acceptance of the notion of neutral, independent and impartial humanitarian aid.

87. The **Delegate of the Democratic People's Republic of Korea** reiterated his Government's opposition to terrorism while citing the US embassy attacks in 1998 and other events where DPRK has clearly stated its stand. Practical steps taken by DPRK in combating international terrorism include becoming party to various multilateral treaties including "International Convention against the Taking of Hostages" and "Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents" as well as submitting reports on implementation of anti-terrorism resolutions to the UN many times.

88. The delegate stated that "US intervention in sovereign states under the pretext of 'war on terrorism' is an encroachment on the sovereign rights and territorial integrity of the states and a flagrant violation of universally accepted principles of international law on the relationship between states", and went on to say that military invasion of Iraq and Afghanistan and civilian killings in Pakistan were examples of "state terrorism".

89. The delegate concluded by stating that the elimination of this kind of "state terrorism" should be stipulated in the draft CCIT and that DPRK would continue to cooperate for the early conclusion of the said Convention.

90. The **Delegate of the Republic of Yemen** stated that his Government was party to almost all international and regional agreements on terrorism and will continue to accede to the remaining, as terrorism was a very real threat to the Republic of Yemen. Terrorist organizations such as Al Qaeda and Anssar Alsharia continue to have a presence, supported and financed by former president Ali Abdolla Saleh and his associates. Terrorist attacks such as the suicide bombing on May 21, 2012 resulted in over 100 soldiers killed and wounded. As part of the

[88] Statement was delivered in Arabic. Unofficial translation from interpreter's version.

initiative to combat terrorism, armed forces have reoccupied cities such as Zingbar and are fighting terrorists in other areas such as Mareb.

91. The delegate called upon all states and not simply AALCO members to provide assistance to the Yemen government in combating terrorism and coordinating international and regional efforts as terrorism threatens the Gulf, Middle East and whole world.

92. Yemen also believed that it is of urgent necessity to agree on the definition of terrorism. Yemen believes it would be better to substitute the article of definition with an article which only states the elements of definition as it would be easier to agree on the elements of terrorism and hence resolve any controversy.

VII. COMMENTS AND OBSERVATIONS OF THE AALCO SECRETARIAT

93. Terrorist activities, whether they are committed by individuals, groups, non-State entities or in any other form poses a threat to both international peace and security and to human life and dignity of human beings and needs to be checked by all possible means. Any attempts to link or justify terrorism to any particular religion, race, culture or ethnic origin must be discouraged and rejected.

94. While evolving measures to counter international terrorism, both legal and administrative, it is essential that the same is in conformity with international law, including human rights law, humanitarian law and refugee law. In this context, it is also important to note that counter terrorism initiatives cannot be permitted to be used as a pretext for interfering in the domestic affairs and such measures must respect the sovereignty and territorial integrity of States under all circumstances.

95. The United Nations has an indispensible role to play in any action against terrorism as the cooperation of the international community is vital to win the fight against terrorism. Being a vital issue of global relevance since no State is immune from the effects of terrorism, greater cooperation and coordination amongst all the UN Member States is essential to combat the threat. In this direction, Member States of AALCO may consider ratifying/acceding to the existing international counter terrorism conventions, including the 1997 International Convention for the Suppression of Terrorist Bombings; 1999 International Convention for the Suppression of the Financing of Terrorism; and 2005 International Convention for the Suppression of Acts of Nuclear Terrorism. The report of the CTED on the implementation of resolution 1624 (2005) of the Security Council highlights the areas on which attention needs to be bestowed and Member States may adopt measures towards that end. Apart from this, national implementation and enforcement mechanisms, including legislations are crucial in the fight against terrorism. Further, mutual legal assistance in counter-terrorism and criminal matters are of much significance.

96. As a result of negotiations spanning over nearly a decade under the auspicious of the United Nations, the international community has managed to increasingly come closer to adopting a comprehensive convention on terrorism.

97. Way back in 1974, Late Richard Baxter, Professor of Law at Harvard and Judge of the International Court of Justice had said "We have cause to regret that a legal concept of "terrorism" was ever inflicted upon us. The term is imprecise; it is ambiguous; and above all, it serves no operative legal purpose". This observation has stood the test of time. The term "terrorism" is imprecise, it is ambiguous, and furthermore, serves no operative legal purpose. But above all, the hard school of experience has shown, it has constituted, and continues to constitute, a major barrier to efforts to combat the criminal acts often loosely described as "terrorism"[89].

98. Also all these years of negotiations in various fora have clearly shown that arriving at a consensus on the definition of terrorism is in itself a major task. Though a number of versions and multiple concerns are being voiced, there appears to be growing consensus on a universally acceptable definition. The definition needs to take in to account the factors that lead to terrorism and must confirm to international law that protects basic human rights and fundamental freedoms. Framing of such a definition can be possible with the help of both the experts in the field and Member States. The proposal made by the coordinator of the Ad Hoc Committee on International Terrorism in 2007 has so far not met with any open objection from the delegations. Member States are encouraged to clarify their position and concerns regarding the 2007 proposal so as to enable its consideration and to propose any alternate language. AALCO Member States can contribute more usefully by working together in the on-going negotiations on the "Draft Comprehensive Convention on International Terrorism", particularly as regards finding an acceptable definition of "terrorism".

99. The AALCO Secretariat could explore the possibility of jointly convening a seminar or joint programme with other international organizations, especially the United Nations Office on Drugs and Crimes (UNODC), or Member States of AALCO on dealing with the legal aspects of combating terrorism.

[89] Chapter 19 "Challenges of the "new terrorism" by John. F. Murphy, page 281-282, published in Routlage Handbook of International Law, Edited by David Armstrong first published in the Taylor and Francis e-Library 2008.

4. REPORT ON THE INTERNATIONAL CRIMINAL COURT

I. INTRODUCTION

1. July 2012 marked the 10th anniversary of the Rome Statute[90], the legal basis for the establishment of the International Criminal Court (ICC). The ICC is the first permanent, treaty-based, international court established to end impunity for perpetrators of crimes against humanity such as genocide and war crimes. The Court's seat is in The Hague, Netherlands. 121 countries have ratified or acceded the Rome Statute as of June 2012[91], out of these 33 are African States and 18 are Asia-Pacific States. Ten years ago the ICC became operational and so far 15 cases have been brought to court, six of which are at trial stage. ICC judges have indicted 28 people and proceedings against 23 of them are currently ongoing. The prosecutor's office is currently investigating in Uganda, DRC, CAR, Darfur (Sudan), Kenya, Libya and Côte d'Ivoire. Preliminary examinations have also started in Afghanistan, Colombia, Georgia, Honduras, Nigeria, Guinea and the Republic of Korea.

2. After ten years of its establishment, on 14 March 2012, Trial Chamber I of the International Criminal Court (ICC) decided unanimously that Thomas Lubanga Dyilo is guilty, as a co-perpetrator, of the war crimes of conscripting and enlisting children under the age of 15 and using them to participate actively in hostilities from 1 September 2002 to 13 August 2003. It is the first verdict issued by an ICC Trial Chamber. At present, 14 other cases are before the Court, three of which are at the final stage of trial.

3. The present war crimes of enlisting and conscripting children under the age of 15 and using them to participate actively in hostilities were committed in the context of an internal armed conflict that took place in the Ituri (the Democratic Republic of the Congo) and involved the *Force patriotique pour la libération du Congo* (Patriotic Force for the Liberation of the Congo) (FPLC), led by Thomas Lubanga Dyilo, against the *Armée Populaire Congolaise* and other militias, including the Force de résistance patriotique en Ituri. A common plan was agreed by Mr Lubanga Dyilo and his co-perpetrators to build an army for the purpose of establishing and maintaining political and military control over Ituri. This resulted in boys and girls under the age of 15 being conscripted and enlisted, and used to participate actively in hostilities.

4. Mr Lubanga Dyilo was the President of the *Union des patriotes* congolais (Union of Congolese Patriots) (UPC), the Commander-in-Chief of its military wing, the FPLC, and its political leader. He exercised an overall coordinating role regarding the activities of the UPC/FPLC and he actively supported recruitment initiatives, for instance by giving speeches to the local population and the recruits. Furthermore, he personally used children below the age of 15 amongst his bodyguards and he regularly saw guards of other UPC/FPLC staff members who were below the age of 15. The Chamber, comprising Judge Adrian Fulford (presiding judge), Judge Elizabeth Odio Benito and Judge René Blattmann, found that the evidence presented by

[90] Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by proces-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002.
[91] www.icc-cpi/Menus/ASP/States+parties

the Prosecutor establishes beyond reasonable doubt that Mr Lubanga Dyilo's contribution was essential to the common plan.

5. The President of the Assembly of States Parties to the Rome Statute, Ambassador Tiina Intelmann (Estonia) welcomed the rendering of the verdict of Trial Chamber I in the above mentioned case and stated that "this verdict, which completes the trial phase of the first-ever case before the International Criminal Court, demonstrates that the ICC works: the system set up by the Rome Statute to bring an end to impunity for the worst crimes under international law is an operational reality. We have left the age of impunity behind us and entered the age of accountability".

6. The creation of the Rome Statute in July 1998 was an extraordinary movement. In the development of international criminal justice, the Rome Statute was the first fundamental milestone. The first Review Conference held in Kampala, Uganda from 31 May to 11 June 2010, and the amendments of the Rome Statute are the second milestone in the progress of international criminal justice. The existence of the ICC and the activities of the Prosecutor and the Court create a legal and political incentive that cannot be underestimated. Even though the Court has faced a lot of challenges from various actors that have sometimes made the Court's operations difficult and though everyone is not fully satisfied with all the areas that it seeks to encompass, the ICC surely represents a strong manifestation for the conviction that perpetrators of grave crimes can also be held responsible at an international level. It is certainly not easy to point to a particular instance where the Court's mere existence has prevented the perpetration of severe crimes, but the attention that the Court receives at the international level, even (or in particular) by its critics and opponents seems to suggest that committing a grave international crime and/or getting away with it has become somewhat more difficult.

7. The Asian-African Legal Consultative Organization (AALCO) has followed the developments relating to the establishment of the International Criminal Court since 1996. The topic has been keenly deliberated upon during the Annual Sessions. With the aim of disseminating information regarding the activities and developments in the functioning of the Court it has held many seminars and workshops on various aspects of ICC.

8. It is pertinent to mention here that AALCO has always believed that cooperation with other international organizations is a very effective tool of promoting and conducting research on any topic. AALCO and the ICC had signed a Memorandum of Understanding on 5th February 2008, one of the objectives of which is to facilitate the convening of seminars and workshops for the benefit of Member States.

9. The present Report seeks to highlight the developments that have taken place after the 66th Session of the General Assembly of the United Nations. The Report refers to: ICC President's Report to the 66th Session UN General Assembly; Tenth Session of the Assembly of States Parties; issues to be discussed at the forthcoming Eleventh Session of the Assembly of States Parties (ASP); Summary of the Deliberations on the agenda item held during the Fifty-First Annual Session of AALCO (Abuja, Federal Republic of Nigeria 18-22 June 2012); and finally AALCO Secretariat Comments.

II. ICC PRESIDENT'S REPORT TO THE SIXTY-SIXTH SESSION OF THE UNITED NATIONS GENERAL ASSEMBLY: 19 AUGUST 2011

10. The Seventh Annual report[92] of the ICC governing the period 1 August 2010 to 31 July 2011 was submitted to the United Nations, in accordance with Article 6 of the Relationship Agreement between the International Criminal Court and the United Nations. The report covers the main developments and activities of the Court and other developments relevant to the relationship between the Court and the UN since the last report.

11. In carrying out its functions, the Court relies on the cooperation of States, international organizations and civil society in accordance with the Rome Statute and international agreements concluded by the Court. Areas where the Court requires cooperation from States include analysis, investigations, the arrest and surrender of accused persons, asset tracking and freezing, victim and witness protection, provisional release, the enforcement of sentences and the execution of the Court's decisions and orders.

12. The Court is independent from, but has close historical, legal and operational ties to, the United Nations. The relationship between the Court and the United Nations is governed by the relevant provisions of the Rome Statute and by the Relationship Agreement and other subsidiary agreements.

A. Judicial Proceedings

13. During the reporting period, the Court continued to be seized of the five situations already opened: the situations in Uganda; The Democratic Republic of Congo; The Central African Republic; Darfur, Sudan; and Kenya in March 2011, the Prosecutor opened a sixth investigation into the situation in Libiyan Arab Jamahiriya following a referral by Security Council Resolution 1970 (2011) adopted on 26 February 2011. The prosecutor has also requested authorization from the Pre-Trial Chamber to open investigations into a seventh situation, in Côte d'Ivoire. In relation to each of the six investigations judicial proceedings have also taken place, resulting in 13 cases involving 26 persons, all accused to have committed crimes that fall within the jurisdiction of the Court. Out of these, 1 person has been official declared to be dead and proceedings as against him have been terminated. The judicial developments during the reporting period and till January 2012 are:

Situation in the Democratic Republic of the Congo

14. In this situation, four cases have been brought before the court. The accused Thomas Lubanga Dyilo, Germain Katanga and Mathieu Ngudjolo Chui and the suspect Callixte Mbarushimana are currently in the custody of the ICC. The suspect Bosco Ntaganda remains at large.

15. The trial in the case of Thomas Lubanga started in 2009 and after a series of appeals and orders of stay by both the Trial and Appeal Chambers, the trial has been completed. Closing oral statements was scheduled to take place on 25 and 26 August 2011.

[92] A/66/309

16. The trial of Germain Katanga and Mathieu Ngudjolo started in November 2009. The presentation of live evidence by the prosecution concluded in December 2010. The first defendant, Mr. Katanga, presented his case between 24 March 2011 and 12 July 2011. The defense case of Mr. Ngudjolo is scheduled to commence on 15 August 2011. A total of 366 victims are participating through their legal representatives, 2 having testified at trial.

17. In the case of Callixte Mbarushimana, on 15 July 2010, the prosecution filed the document containing the charges and list of evidence. The charges contain 13 counts of war crimes and crimes against humanity. The confirmation of charges hearing in the case took place from 16 to 21 September 2011. On 16 December 2011, Pre-Trial Chamber I decided by Majority to decline to confirm the charges against Mr. Mbarushimana and to release him from the custody of the Court, on the completion of the necessary arrangements.

Situation in Central African Republic

18. The situation reached the Court pursuant to a reference by the Central African Republic in 2004. In the only case in this situation, ***The Prosecutor v. Jean-Pierre Bemba Gombo,*** the trial commenced on 22 November 2010 before the Trial Chamber.To date, 1,619 victims have been admitted to participate in the trial proceedings through their legal representatives. As on 31 July 2011, the prosecution had presented 25 of its 40 planned witnesses.

Situation in Darfur, Sudan

19. There are four cases involved in this situation, namely, *The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*; *The Prosecutor v. Omar Hassan Ahmad Al Bashir*; *The Prosecutor v. Bahar Idriss Abu Garda*; and *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*.

20. Warrants of arrest have been issued by Pre-Trial Chamber I for Messrs Harun, Kushayb and Al Bashir. The three suspects remain at large. Pursuant to the summons issued, Mr. Abu Garda had voluntarily appeared before the chamber in 2009. In February, 2010, after the hearing of confirmation of charges, the pre trial chamber declined to confirm the charges and Mr. Garda is no longer in the custody of the ICC. Pursuant to the summons, Mr. Banda and Mr. Jerbo had also appeared voluntarily in 2010. On March 7, 2011, the Pre-Trial Chamber decided to confirm the charges of war crimes brought against them and committed them to trial. Mr. Bashir remains at large and in May 2011, the Pre- Trial Chamber issued a decision informing the State Parties to the Rome Statute of Mr. Bashir's visit to Djibouti, in order for them to take any action that may be appropriate. A total of 12 victims have been admitted to participate in this case through their legal representatives.

21. Abdallah Banda Abakaer Nourain is alleged to be the Commander-in-Chief of the Justice and Equality Movement and Mohammed Jerbo Jamus is alleged to be the former Chief-of-Staff of the Sudan Liberation Army-Unity. On 7 March 2011, Pre-Trial Chamber I confirmed three charges of war crimes against these persons. On 16 May 2011, the parties filed a joint

submission stating that the accused would contest only certain specified issues at their trial. The agreement reached by the parties would shorten the trial by focusing on only those issues that are contested between the parties, This is expected to promote an efficient and cost-effective trial while preserving the rights of victims to participate in the proceedings and protecting the rights of the accused persons to a fair and expeditious trial. As on 31 May 2011, a total of 89 victims had been authorized to participate through their legal representatives in the proceedings. The date of the commencement of trial will be set in due course.

Situation in the Republic of Kenya

22. Pursuant to the permission granted by the Pre-Trial Chamber, the Prosecutor initiated investigations *propio motu* into the situation in Kenya. Following summonses to appear issued on 8 March 2011, six Kenyan citizens voluntarily appeared before Pre-Trial Chamber II on 7 and 8 April 2011. The confirmation of charges hearing in the case *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* were held from 1 to 8 September 2011. The confirmation of charges hearing in the case *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* took place from 21 September to 5 October 2011.

23. On 31 March 2011, the Government of Kenya filed an application challenging the admissibility of the case before the Court. Pre-Trial Chamber II rejected the application on 30 May 2011, holding that the application did not provide concrete evidence of ongoing national proceedings with respect to the persons subject of the proceedings at the Court. The Government's appeal against the decision is pending before the Appeals Chamber.

Situation in Libya

24. The OTP commenced investigation into the situation in Libiya pursuant to Security Council Resolution 1970 (2011), by which the situation was referred to the Prosecutor.On 27 June 2011, Pre-Trial Chamber I issued warrants of arrest against Libyan leader Muammar Mohammed Abu Minyar Gaddafi, his son Saif Al-Islam Gaddafi, Libyan Government Spokesman, and Abdullah Al-Senussi, Director of Military Intelligence, for two counts of crimes against humanity. The Pre-Trial Chamber found that there was reasonable grounds to believe that Muammar Gaddafi, in coordination with his inner circle, conceived and orchestrated a plan to deter and quell, by all means, civilian demonstrations against the regime.

Situation in Uganda

25. The case *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* is currently being heard by the Pre-Trial Chamber. Five warrants of arrest have been issued against the five top members of the Lords Resistance Army. Following the confirmation of death of Mr. Lukwiya, the proceedings against him have been terminated. The remaining suspects are yet to be arrested and remain at large. The Office of the Prosecutor continued to gather information on crimes allegedly committed by the Lord's Resistance Army (LRA) and to promote action to implement warrants against the top LRA leadership, carrying out three missions to three countries in relation to the situation in Uganda. As part of its policy of positive

complementarity, the Office has provided assistance to Ugandan authorities to investigate and prosecute individuals.

Situation in Côte d'Ivoire

26. Côte d'Ivoire is not a party to the Rome Statute and had accepted the jurisdiction of the Court in 2003, which was reconfirmed by the Countries' Presidency in 2011. The Pre-Trial Chamber granted the Prosecutor authorization to open investigations *propia motu* in the situation. On 23 November 2011, the Pre-Trial Chamber issued warrant of arrest in the case of *Laurent Gbagbo for four counts of crimes against humanity. The arrest warrant was unsealed on 30 November 2011 when the suspect was transferred to the ICC detention centre. On 5 December 2011, the Pre Trial Chamber held an initial appearance hearing and set the date for the hearing of confirmation of charges to start on 18 June 2012.*

Outstanding Warrants of Arrest

27. At the time of the submission of the present report, 12 warrants of arrest were pending:

(a) Uganda: Mr. Joseph Kony, Mr. Vincent Otti, Mr. Okot Odhiambo and Mr. Dominic Ongwen, outstanding since 2005;
(b) Democratic Republic of the Congo: Mr. Bosco Ntaganda, outstanding since 2006;
(c) Darfur, Sudan: Mr. Ahmad Harun and Mr. Ali Kushayb, outstanding since 2007 and, in the case of Mr. Omar Al Bashir, two warrants outstanding since 2009 and 2010;
(d) Libyan Arab Jamahiriya: Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, outstanding since 27 June 2011.

28. The Court has issued requests for cooperation in the arrest and surrender of each of these individuals and notified these requests to the relevant States. In respect of the situations in Darfur, Sudan, and the Libyan Arab Jamahiriya, all parties, including the respective States, are obliged to cooperate fully with the Court and the Prosecutor pursuant to Security Council resolutions 1593 (2005) and 1970 (2011), respectively.

B. Preliminary examinations

29. The Office continued preliminary examinations in Afghanistan, Colombia, Georgia, Guinea and Palestine. The Office made public the fact that it had initiated preliminary examinations of situations in Honduras, Nigeria and the Republic of Korea. On 23 June 2011, the Prosecutor requested authorization from the Pre-Trial Chamber to commence an investigation into the situation in Côte d'Ivoire.

30. It is important to note that in connection with the declaration lodged by the Palestinian National Authority under article 12, paragraph 3, of the Rome Statute on 22 January 2009 accepting the jurisdiction of the Court, the Office continued to examine whether the declaration met the statutory requirements. As the International Criminal Court was a court of last resort, the Office of the Prosecutor also considered whether there were national proceedings in relation to

alleged crimes, relating to the admissibility of the cases potentially arising from the situation. In total, the Office received 400 communications on crimes allegedly committed in Palestine.

31. The Palestinian National Authority requested the right to be heard on the fulfilment of the statutory requirements for opening an investigation, including on the issue as to whether Palestine qualifies as a "State" for the purpose of article 12, paragraph 3, of the Statute. The Office considered that a fair process required that the Palestinian National Authority as well as other interested parties have the opportunity to be heard. The Office therefore ensured due process to all parties involved. Representatives of the Palestinian National Authority presented arguments by oral and written submissions. The final public briefing would be presented soon.

32. In July 2011, the Office provided updated information to the Office of the United Nations High Commissioner for Human Rights pursuant to its request on steps taken by the Office of the Prosecutor with regard to the Palestinian declaration.

33. The Prosecutor met with various stakeholders, including representatives of the Palestinian National Authority, the secretariat of the League of Arab States and a number of Palestinian and Israeli NGOs to discuss the jurisdiction of the Court.

C. Conclusion

34. The Court was busier during the reporting period than ever before, with the number of suspects or accused persons increasing from 15 to 25. A third trial started before the Court, presentation of evidence was concluded in one trial, charges were confirmed against two accused and seven new persons appeared before the judges pursuant to an arrest warrant or a summons to appear. The Prosecutor opened a sixth investigation and requested authorization of the Pre-Trial Chamber to open a seventh investigation.

35. Five new States acceded to or ratified the Rome Statute, bringing the total number of States parties to 116. The United Nations continued to provide important support and assistance to the Court. Enhancing the complementarity of the Court and national jurisdictions is a crucial task in the global struggle against impunity, and the United Nations and its specialized agencies play a major role in this respect, in cooperation with the Court and other relevant actors.

36. As the importance attached to the Court's work and the relevance of the Rome Statute on the international scene grows, great challenges remain.

37. The increased casework, and the referral of a new situation by the Security Council, has added pressure on the resources available to the Court. Arrest warrants are outstanding against a total of 11 suspects and the cooperation of States in bringing these persons to justice continues to be a key condition for the effective implementation of the Court's mandate.

III. ASSEMBLY OF STATES PARTIES OF THE ICC

38. Part 11 of the Rome Statute provides for the Assembly of States Parties (ASP), which is the management oversight and legislative body of the International Criminal Court. It comprises

of representatives of the States that have ratified and has acceded to the Rome Statute. Each State Party is represented by a representative who is proposed to the Credential Committee by the Head of the State of the Government or the Minister of Foreign Affairs. Each State Party has one vote, however every effort must be taken to reach decisions by consensus and votes are taken only in the absence of that. Other States, which have either signed the Statute or signed the Final Act of the Rome Diplomatic Conference, may sit in the Assembly as Observers. The Bureau of Assembly of States Parties consisting of a President, two Vice Presidents and 18 members are elected by the Assembly for a term of three years. The election is based on the principles of equitable geographic distribution and adequate representation of the principal legal systems of the world. The Assembly is responsible for the adoption of the normative texts, the budget and the election of the Judges and of the Prosecutor and the Deputy Prosecutor. It meets at least once in a year.

A. The Tenth Session of Assembly of States Parties (ASP X)

39. The tenth session of the ASP was held at New York from 12 to 21 December, 2011. The Assembly adopted six resolutions: on cooperation, amendment to the rule 4 of the Rules of Procedure and Evidence, reparations, permanent premises, the "omnibus" resolution and the 2012 budget. The Assembly elected Fatou Bensouda (The Gambia) to be the next ICC prosecutor for a nine-year term beginning on 16 June 2012. Six new judges were elected in 16 rounds, representing a third of the Court's full slate of 18 judges. Tiina Intelmann (Estonia) was elected as the new ASP president for a three-year term. Markus Börlin (Switzerland) and Ken Kanda (Ghana) were elected as vice-presidents. The Assembly also elected the 18 members of the ASP Bureau - the ASP's executive committee - for three-year terms.

40. The general debates of the ASP were held on 14 and 15 December, 2011. The Representatives of the Member States, Non Governmental Organizations and an observer mission from the United States of America participated in the General Debates. 11 Member States who are members of AALCO participated in the debate.

41. The representative of **Botswana** described the ICC to be the only hope for redress for the numerous victims of atrocities which are committed by callous regimes all over the world. The accession to the court was necessary as the victims of heinous crimes have a right to protection even where the perpetrator of the crime is a State and to dispel the notion that governments and their leaders can do as they please. The ICC was described as the only effective International check against unbridled abuses if the states are unable or unwilling to do so themselves. Describing the limitations of the Court's jurisdiction over non state parties as undermining its ability to pursue justice in all situations, the ASP was called upon to address this matter with urgency. The Member States were also called upon to publicly defend the credibility and integrity of the Court. About the perception that the ICC unfairly targets African States, it was pointed out that human rights abuse and mass atrocities are prevalent in the region and that in majority of the situations, African Governments themselves have invited the intervention of the Court. The need for political will and the moral courage to bring the guilty to accountability was also called for. Noting that actions from the UNSC are heavily dependent on political configurations, the need for cooperation between Member States to work the Rome Statute was also called for.

42. The representative from **Bangladesh** noted that the uneven responses to atrocious acts around the world would be minimized in the long run with a larger number of cases being dealt with in an objective and fair manner by the Court. The representative of **Ghana** appealed to the States Parties to show support for the principle of responsibility to protect, adopted by the World Leaders at the 2005 summit of the UN General Assembly as the preventive side of the Rome Statute system. He described the principle and the Rome Statute to be complementary in nature. The representative of **Japan** noted that adding more politically sensitive crimes to the Rome Statute may undermine its very effectiveness and the quest towards universality. Highlighting the concerns over the legal ambiguities created as a result of the political compromise on the crime of aggression, the delegate called for a quite dialogue among interested parties to narrow the gaps. Further efforts to discuss future amendments over both substantive and procedural issues in the Working Group on amendments were also called for. Emphasizing on the need for the best efforts at national prosecution, assistance to developing and post conflict countries to build an effective criminal justice system was called for as it meaningfully promotes the principle of complementarity. The representative from **Jordan** highlighted the need to do away with the system of 'reciprocal arrangements' to ensure that the most competent persons get elected to the Court.

43. The representative from **Kenya** pointed out that the burden of ensuring fairness and legitimacy to the Court is presently disproportionally placed on the Office of The Prosecutor and that the other organs of the Court – the Presidency of the Court, the Judicial divisions and the Registrar must carry an equitable burden and responsibility in legitimizing and giving popular credibility to the ICC. The delegation also called on those members of the UNSC who are not States Parties to the Rome Statute to do the same so that they are also bound by the same principles over which they wish to adjudicate and pronounce themselves with the UNSC. This is imperative to prevent impunity and high handedness at the international level by selective and prejudicial application of the Rome Statute, especially by non-signatory actors. Regarding the engagement of the ICC with the African region, the delegation called for making a clear distinction in approaching situations in non-functional democracies with functional ones, albeit with weak and evolving political and judicial institutions. It was also pointed out that in the face of competition for power in complex political scenarios, the sourcing, collection analysis and use of evidence must be rigorous and must represent the full spectrum of forces at play. State evidence, should receive equal credence to all other evidence brought to bear on the prosecution as well as the adjudication.

44. The representative of **Nigeria** highlighted the importance of strengthening the public information and outreach activities of the court as essential in promoting understanding of the international criminal justice process. The delegation also called for sustained attention of the Court to victims, survivors and affected communities to ensure healing and reconciliation. The representative of **Uganda** also emphasized on the need for paying more attention to framing outreach programs to improve the visibility and global acceptance of the Court.

45. Taking note of the report prepared by the court on the issue of cooperation[93], the ASP adopted a resolution[94] emphasizing the importance of cooperation with the court, especially in

[93] ICC-ASP/10/40.

the execution of warrants and acknowledged this to be a matter of fundamental importance that affects the efficiency and the working of the Court. Further emphasizing the need for States parties to cooperate with the court in areas such as preserving and providing evidence, sharing of information and protection of victims and witnesses, the member states were called upon to consider the strengthening of cooperation with the Court by way of agreements and arrangements with the court or such other means. The ASP also urged the States Parties to adopt such legislative and other measures to fulfill their obligations under the Rome Statute. The ASP also requested the bureau to establish a facilitation of the ASP for cooperation, to consult with States Parties, the Court and NGOs as well as other interested States and relevant organizations to further strengthen cooperation with the court.

46. Reparations to the victims are a critical component of the Rome Statute. However there are no fixed principles yet for the determination of the extent and scope of any damage, loss and injury to, or in respect of, victims. Noting that this can result in practical inconsistency and unequal treatment of the victims, the ASP requested the court for the establishment of such principles relating to reparations accordance with article 75, paragraph 1, based on which the Court may issue individual orders for reparations. The ASP also noted that liability for reparations is exclusively based on the individual criminal responsibility and hence under no circumstances shall States be ordered to utilize their properties or assets, including the assessed contributions of the States parties towards funding reparations, including in those situations where the individual holds or has held an official position. The ASP also emphasized on the importance of identifying and freezing the assets of the convicted persons for the purposes of funding reparations and the Court was called upon to take all measures for that purpose. The need for cooperation and information sharing between States towards that end was also stressed. The ASP also resolved that as adjudication of individual criminal liability is the mandate of the court, evidence concerning reparations may also be taken during the trial hearings so as to avoid delays and ensure streamlining of the judicial phase of the reparation proceedings.[95]

47. At the 9th plenary meeting on 21st December, 2011, the ASP, by Consensus adopted the resolution[96] on "**Strengthening the International Criminal Court and the Assembly of States Parties".** Considering the report of the Bureau on potential Assembly procedures relating to non-cooperation,[97] the ASP resolved to adopt the procedures annexed to resolution ICC-ASP/10/Res.5 as "Assembly Procedures Relating to Non-Cooperation" .The ASP also called on Member States and non-Member States to be parties to the Agreement on the Privileges and Immunities of the International Criminal Court as a matter of priority and to incorporate the same into their national legislations. The ASP also noted the need for improvement in the victim participation system to ensure its sustainability and effectiveness. Further, States, intergovernmental organizations, individuals, corporations and other entities were called upon to voluntarily contribute to the Trust Fund for victims in view of the imminently possible reparations. It was also resolved to continue and strengthen effective domestic implementation of the Statute so as to enhance the capacity of national jurisdictions with international recognized fair trial standards, pursuant to the principle of complementarity. The ASP also recognized

[94] ICC-ASP/10/Res.5
[95] ICC-ASP/10/Res.3
[96] ICC-ASP/10/Res.5
[97] ICC-ASP/10/37

importance of a fully operational Independent Oversight Mechanism, in accordance with ICC-ASP/8/Res.1 and ICC-ASP/9/Res.5, to the efficient and effective operation of the Court. Taking note of the report[98] of the Bureau on this subject, it was decided to continue discussions with a view for the Bureau to submit, to the eleventh session of the Assembly, a comprehensive proposal that would make possible the full operationalization of the Independent Oversight Mechanism. The development of an anti- retaliation/whistleblower policy was also invited. Welcoming the Bureau report on the Working Group on Amendments,[99] the Working Group was requested to continue its consideration of amendment proposals and of its own procedural rules or guidelines, and submit a report for the consideration of the Assembly at its eleventh session.

48. As part of the ASP X, on 19 December 2011, a side event was also organized on the topic "Universality of the Rome Statute and implementing legislation: developments and resources", in furtherance of the Plan of Action adopted by the ASP.[100] The presidency of the Court, addressing the session, highlighted the need to step up the efforts to achieve universality for which fresh thinking and a more robust and more strategic approach was necessary. Noting that it is sheer lack of knowledge about the benefits of ratification that is one of the main obstacles to universality, the President noted that increasing ratifications in the Asian region and the events following the 'Arab Spring' highlights the importance of ratification and grants momentum to that direction. While obstacles to ratification or accession are often due to lack of political will, it was noted that the obstacles in terms of implementing legislation are more often resource related – which highlights the need for capacity building and assistance in implementation. Representing the Commonwealth Secretariat its Director of Legal and Constitutional Affairs drew attention to the model law on the implementation of the Rome Statute, which he described to be an invaluable tool for Member States. Attention was also drawn to the fact that despite increasing number of ratifications, implementing legislations have not been enacted in most of these States. Being a Treaty that requires specific incorporation, the lack of such legislation was pointed out to be striking at the very effectiveness of the Treaty.

49. The Eleventh Session of the Assembly of States Parties is tentatively scheduled to be held from 14 – 22 November 2012 at The Hague, The Netherlands.

IV. SUMMARY OF THE DELIBERATIONS ON THE AGENDA ITEM HELD DURING THE FIFTY-FIRST ANNUAL SESSION OF AALCO (ABUJA, FEDERAL REPUBLIC OF NIGERIA 18-22 JUNE 2012

50. **Prof. Dr. Rahmat Mohamad, Secretary- General (SG)** introduced the agenda item "International Criminal Court: Recent Developments". He went on to talk about the circumstances surrounding the establishment of the ICC and its mandate to dispense justice without undermining peace processes. The SG while noting the operational reality of the ICC mentioned the first verdict of the Trial Chamber I, which held Thomas Lubango Dyilo guilty of war crimes.

[98] ICC-ASP/10/27.
[99] ICC-ASP/10/32.
[100] ICC-ASP/5/Res.3 (1 December 2006)

51. Further, the SG enlisted the issues for deliberation at the Fifty-First Annual Session. He then addressed the significant role of the ICC in the International Criminal Justice system by discussing the core features that enhance its achievements. The SG firstly spoke about the expansive territorial and subject- matter jurisdiction of the ICC, proceeding to the principle of complementarity under the Rome Statute. Another feature of the ICC discussed was the relationship between the UN and the ICC, forged by the Relationship Agreement of 2004, and progressively evolving through cooperation requests. The SG also spoke about the victim outreach efforts undertaken by the ICC, including ordering reparations for victims and the establishment of a Trust Fund to assist victims.

52. The SG mentioned how the ICC practices the principle of individual responsibility in order to neutralize the major players in the perpetration of serious crimes.

53. He mentioned that far from being an obstacle to peace, the ICC creates conditions conducive to reconciliation and negotiation processes by focusing international attention towards these horrific crimes so as to help bring the belligerents to the negotiating table and help to marginalize those who bear the greatest responsibility for serious crimes and exclude them from the negotiating frame.

54. The SG stated that merely ratifying the Rome Statute was not enough and genuine commitment to the Court required the adoption of necessary implementing legislation. He also mentioned that the principle of complementarity needs to be further strengthened. He stated that the ICC has regrettably evoked lesser participation from Asian states.

55. The SG finally, went on to discuss the issues concerning the relationship between non-party States and the Rome Statute, broadly divided into questions of jurisdiction of the Court and cooperation with the Court. Some concerns raised by non- State parties were regarding the immunities of Heads of States particularly if it is a Monarch as well as the cost entailing membership to the ICC. The SG said that the other major challenges before the ICC are mainly universality, sustainability and complementarity. He concluded by stating that in order to achieve universality, sustainable efforts should be taken to iron out the misconceptions surrounding the Rome Statute and thereby accommodate the non-States parties in to the system.

56. **The Delegate of the Republic of Indonesia** reiterated support to the global efforts to end any form of impunity for crimes against humanity, war crimes and the crime of aggression and supported the International Criminal Court since its inception. In her view, the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation. The establishment of the Court was the reflection of global cooperation of all nations regardless of their political, economic, social and cultural differences. Therefore, universal participation of all States should become the spear point of the Court.

57. She also maintained that the International Criminal Court as the first and only permanent tribunal dealing with the most serious crimes was expected to deliberate equal justice and promote impartiality. For this reason, Indonesia supported the adoption of the Rome Statute and the establishment of the International Criminal Court. In light of this, accession of the Rome

Statute remained a priority in Indonesia's National Plan of Action on Human Rights for 2011-2014. With a view, the Government of the Republic of Indonesia had also taken several important steps to build and develop both normative and institutional infrastructures. It had also enacted law concerning Human Rights and Human Rights Law.

58. Towards this end, the Delegate said that several principles of the Rome Statute had been recognized within Indonesia's national legislations related to human rights. Reflecting a firm stand against impunity, the national human rights court had the authorization to prosecute criminals of genocide and crimes against humanity, along with the recognition of non-retroactive principle.

59. Furthermore, she also highlighted the two important principles contained in Article 1 and Article 11 of the Rome Statute regarding the principle of non-retroactive effect and the principle of complementary. In relation to the principle of complementary, Indonesia re-emphasized the importance of Paragraph 10 of the Preamble and Article 17 of the Statute. The concept of "inability' and 'unwillingness' should not serve easily as pretext to provide continuous preference to ICC intervention. The principle was one of the corner stones of the architecture of the Rome Statute.

60. Therefore, she believed that the effective implementation of the principle of non-retroactive and complementary was the key to the success of the ICC in further promoting criminal prosecution related to human rights violations and would increase the universality of the Rome Statute. In this respect, the prosecution of human rights violations should be the primary role of the national court.

61. The Delegate also stressed upon the importance of Article 17 on the principle of inadmissibility and believed that the effective implementation of this principle would increase the universality of the Rome Statute. Bearing in mind also that those principles were closely related to a country's sovereignty, it was important to see how the principles could be sustained and further strengthened, notably in honouring the supremacy and integrity of a sovereign country.

62. **The Delegate of Japan** said that 2012 marked the tenth anniversary of the International Criminal Court since the entry into force of the Rome Statute on 1 July 2002. It was surprising for many that such an important treaty as the Rome Statute entered into force with the ratification by more than 60 States only four years after it had been adopted in July 1998 and till date 121 States were parties to the Rome Statute, including 33 States from Africa and 18 States from the Asia-Pacific. Last year three States from the Asia-Pacific, namely, the Philippines, the Maldives and Vanuatu, and two States from Africa, namely, Tunisia and Cape Verde, joined the Rome Statute. Japan welcomed those five new members which had joined their serious efforts towards the fight against impunity and the establishment of the rule of law in the international community.

63. Besides that above facts 2012 also marked a turning point for some other reasons as well. The first reason being, that the major actors inside the Court and the Assembly of States Parties had changed. First, the former President of the Assembly of States Parties, Ambassador Christian Wenaweser of Lichtenstein, was succeeded by the newly elected President, Ambassador Tiina

Intelmann of Estonia. Second, six new judges, including Judge Miriam Defensor-Santiago of the Philippines and Judge Chile Eboe-Osuji of Nigeria, were elected in December last year and took office in March. Third, the composition of the Presidency of the Court also changed in March, with President Sang-Hyun Song of South Korea being re-elected, Judge Sanji Mmasenono Monageng of Botswana elected to the First Vice-President and Judge Cuno Tarfusser of Italy elected to the Second Vice-President. Fourth, the incumbent Prosecutor, Mr. Luis Moreno-Ocampo of Argentina, completed his nine-year term and Ms. Fatou Bensouda of Gambia, who was Deputy Prosecutor so far, took office as the new Prosecutor just last Friday. Being a staunch supporter of the ICC, Japan looked forward to working with the new teams of the Court and the Assembly.

64. According to the Delegate, the second reason why this year marked a turning point for the ICC was that in March this year, the Trial Chamber of the Court rendered its first judgment on the Thomas Lubanga Dyilo case, convicting the accused of charges on conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities in the context of an internal armed conflict in the Democratic Republic of the Congo. Japan praised the ICC for having fulfilled its role in refusing the impunity of the most serious crimes of concern to the international community as a whole and in preventing the recurrence of such crimes. However, it must be borne in mind that the same Trial Chamber of the Court will render its sentence against the accused in due course and then a decision on reparations to the victims of the crimes of which the accused was convicted. After all these procedures were completed, the accused may appeal to the Appeals Chamber. Thus, this case remained to be seen.

65. He mentioned that presently, the ICC had seven situations and fifteen cases before it. Two new situations in Libya and Cote d'Ivoire had been referred to the ICC and had posed significant challenges for the Court, such as the heavy financial burden on States Parties. Presently the international community was concerned with the situation in Syria, with some countries suggesting possible referral by the Security Council to the ICC. In light of the current situations surrounding the ICC, the future direction of the Court had to be carefully envisioned and defined.

66. He also highlighted that Japan attached great importance to the activities of the ICC as the only permanent judicial organ for international criminal justice, and expected that the ICC would continue to fulfil its role by prosecuting and punishing the most serious crimes in accordance with the Rome Statute. Securing the future of the ICC depended primarily upon whether universality could be achieved. According to the Delegate, as the number of States Parties increased, there would be fewer safe havens for perpetrators of the most serious crimes, and preventive effects would be enhanced. In conclusion he requested more AALCO members to consider ratifying the Rome Statute with a view to join the common efforts to fight against the most serious crimes of concern to the international community as a whole.

67. The **Delegate of the People's Republic of China** said that his Government supported an independent, impartial, effective and universally recognized international criminal court, and hoped that it would promote world peace and judicial justice by punishing the most serious international crimes.

68. He mentioned that 2012 marked the 10th anniversary of entry into force of the Rome Statute and the founding of the International Criminal Court (ICC). During the past 10 years, China had closely followed the Court's activities. It hoped that the ICC would win the trust and support of the international community through its concrete work.

69. He said that while it was true that the ICC had made some progress since its establishment. It had become an important international judicial organ, and influenced the development of international criminal law. At the same time, some activities of the Court caused controversy in the international community, and even affected process of peace and stability in certain regions. States parties to the Rome Statute, including some from Asia and Africa, were questioning the Court's impartiality and believed that the court had been selective in its exercise of jurisdiction. Furthermore, many Asian countries were not yet parties to the Rome Statute, besides some African countries had been reconsidering their cooperation with the ICC, these facts revealed a lack of trust in the Court among Asian and African countries.

70. He also noted that the Court was now at a critical stage of its development. Looking back and forward, China, as many others did, have one important question in mind: Where to go, ICC?

71. In order to come up to the expectations of the international community it was important that the ICC should make extraordinary efforts to abandon prejudice, refrain from being politically interfered, keep in mind the principle of complementarity, impartiality as well, and win confidence, trust and support of state parties of both developed and developing countries. The Delegate was glad to note that as of date in the court, Asian and African judges, claimed a big part of the whole judges of the court. The Delegate expected and believed that with the cultural and legal traditions they represented, they would make further contributions to the work of ICC. He also believed that through communication and cooperation, countries from Asia and Africa, could play a unique role in promoting the positive development of the Court, and contribute to international peace and justice. In conclusion he said that the Chinese delegation was ready to work towards this end.

72. The **Delegate of Malaysia** expressed appreciation to the AALCO Secretariat for its report which brought Member States up-to-date with the most recent developments of the ICC. She congratulated Ms. Fatou Bensouda on her appointment as the Prosecutor of the ICC by the 10th Assembly of State Parties of the Rome Statute of ICC in New York on 12 December 2011. In the same vein she also expressed sincerest gratitude to the outgoing prosecutor, Mr. Luis Moreno-Ocampo.

73. The Delegate hoped that Ms. Fatou Bensouda, as the new Prosecutor, would exercise the powers conferred upon her impartially, with due respect to the customary and currently acceptable notions of international law and domestic legal proceedings. As an independent separate organ of the ICC, the Office of the Prosecutor had vast powers. With regard to this, Malaysia highlighted the importance of impartiality and universality by the Prosecutor in dealing with situations or internalizing information that came to the Office of the Prosecutor. Any

perception of bias must be avoided, for bias is not only actual, but may also be imputed or apparent.

74. In light of the situation in Palestine, she noted that on 3 April 2012, the Office of the Prosecutor had announced of its incompetence to decide on the issue of recognising Palestine as a "state" for purposes of Article 12 (3) of the Rome Statute. The Office of the Prosecutor viewed that this issue should be referred to the relevant bodies of the United Nations or the Assembly of State Parties to make that legal determination. This decision indirectly implied that Palestine does not have the power to make such a declaration because it did not fulfil the requirements of statehood. Malaysia was of the view that the OTP should first and foremost took into account the basis of the establishment of the ICC, that is to punish serious crimes of international concern instead of technical requirements. In order for impunity to not go unpunished, the Office of the Prosecutor should have examined whether there existed serious crimes of international concern as claimed by Palestine i.e. a consideration of substantive issues. If there were, then the declaration by the Palestinians should not have been rejected *ab initio*.

75. On the issue of interpretation and implementation of the principle of Complementarity by the ICC and the Prosecutor, Malaysia reiterated its concern that Member States were required to give effect to the principle by enhancing the capability of national jurisdiction to exercise jurisdiction over serious violations of international law or international crimes committed on their territory. A view that was mooted recently was "positive complementarity" which came with "technical assistance and capacity building" from the Office of the Prosecutor, such as supplying judges and prosecutors to assist national courts. Malaysia was of the perspective that such assistance implied indirect interference from the ICC into the domestic courts and may subject Member States to political pressure to comply with the ICC's standards in the name of eliminating impunity gap between national and international courts. This concept clearly differed from the original Complementarity scheme.

76. The Delegate was further of the view that the principle of Complementarity should be applicable even in situations of Security Council referrals. She recalled that the principle of Complementarity under the Rome Statute recognized that States had the first responsibility and right to prosecute international crimes. Articles 17 and 19 of the Rome Statute did not indicate any exception to such referral. In determining the issue of admissibility vis-a-vis cases originating from a Security Council referral, the ICC needs to be clear in its principles, practice and jurisprudence, and to demonstrate that its decision on the case's admissibility is free from any political influence. According to Malaysia's observation, in some cases, the discretion of the Prosecutor did not adhere to the principle of complementarity as States were not given the priority to take action in addressing atrocities.

77. The commitment to end the impunity of serious crimes of international concern by becoming a State Party to the Rome Statute could not materialize by the simple act of depositing the instrument of accession or ratification. In light of this, Malaysia wished to emphasize on the need to have a suitable legal framework in place which would adequately address the legal concerns highlighted.

78. Lastly, Malaysia was firmly committed to ending impunity and will continue to support in principle the ideals and purpose of the ICC towards that end.

79. The **Delegate of the Republic of Korea** maintained the ICC was established to end the culture of impunity for serious crimes and for the protection of human rights, towards this end the Rome Statute of the ICC was central to international criminal justice and protection of human rights. He was grateful to the AALCO Secretariat for its various initiatives on this topic. He also wished that more Member States of AALCO could accede to the Rome Statute of the ICC. He said that his Government had provided voluntary contribution to the ICC besides this The President of the ICC Judge Song was a Korean national. His country was ready to support the ICC in order to ensure an end to the culture of impunity for the most serious crimes.

80. The **Delegate of the Kingdom of Saudi Arabia** stated that the activities of the ICC were of interest to them since arrest warrants were issued against the Sudanese President on the other hand Israeli criminals were let off scot free by the ICC. He maintained that this was a clear illustration of political considerations in matters relating to the Court. He posed a question to the Secretary-General whether it was possible for AALCO to reflect the concerns of its Member States to the ICC specially the role of the Security Council.

V. COMMENTS AND OBSERVATIONS OF THE AALCO SECRETARIAT

81. The first conviction at the International Criminal Court in the tenth year of its functioning is a good time to take stock of how well an institution that was designed to counter war crimes and crimes against humanity around the world has performed so far. The guilty verdict on the democratic republic of Congo rebel warlord, Thomas Lubanga, for conscripting children under 15 is a welcome sign that individuals can be brought to justice for grave violations of human rights even if "their" governments lack the will or capacity to prosecute them.

82. The ICC has a mandate to probe atrocities and prosecute individuals up and down the official chain of command in 120 countries that have ratified the Rome Statute. Despite its global mandate, however, all prosecution cases in its ten year history come from Africa: Uganda, the DCR, Sudan, the Central African republic, Kenya, Libya and Cote d' Ivoire. The silence of the Court on the territory of some state-parties needs explanation. There are some grave violations in other territories which the ICC chooses to ignore. In January 2009, after suffering heavy Israeli bombing in civilian areas in Gaza, the Palestinian National Authority lodged a declaration with the ICC under a provision of the Court's statute allowing states voluntarily to accept its jurisdiction.

83. Despite hundreds of civilian deaths and a UN report which spoke of Israeli war crimes. Unfortunately, on 7 April 2012, the Prosecutor of the ICC has stalled the bid by the Palestinian Authority for an investigation into Israel's conduct during the Gaza war of 2008 because Palestine does not have the required legal status of an internationally recognized independent State. "The office (of the prosecutor) has assessed that it is for the relevant bodies at the UN or the Assembly of State Parties to make a legal determination whether Palestine qualifies as a state for the purpose of acceding to the Rome Statute", the Prosecutor's office said in a statement. The statement however also said that the court's reach was not based on a principle of universal

jurisdiction and it could open investigations only if asked to do so by either the UN Security Council or by a recognized State. Many Human Rights groups criticized the decision and it was said that "This dangerous decision opens the ICC to accusations of political bias and is inconsistent with the independence of the ICC". "It also breaches the Rome Statute which clearly states that such matters should be considered by the institution's judges,[101]" Such willful disregard of its mandate only ends up undermining the credibility of a court that is potentially one of the most noteworthy product of international law in the 21st century.

84. The establishment of the International Criminal Court capped the efforts of the international community to enforce the applicability of international humanitarian law, and advance the cause of justice and the rule of law on a universal scale. Today the Court is an independent, fully functional Organization, based in The Hague. One of the pillars of the Rome Statute is the principle of complementarity. Thus, there is the fundamental principle that persons who committed the most serious crimes underlined in the Rome Statute would, first of all, be punished by a national court in the State Party itself, and if this can be done there is no obligation to hand over a suspect to the ICC. In other words the ICC is the Court of last resort.

85. In order to carry out its functions effectively the Court has to cooperate with both the United Nations and other International Organizations as well as with States. The significance of the Rome Statute is building a network of cooperation between the States Parties and the ICC, in order to ensure that there is no safe haven anywhere in the world for persons who committed serious crimes such as war crimes, crimes against humanity and genocide. As Judge Saiga of the ICC[102] said "Setting up a network in the international community for preventing these suspects from going unpunished will serve as the greatest deterrent for these horrendous crimes".

86. The drafters of the Rome Statute planned the first Review Conference as the first opportunity to consider amendments. They were of the view that seven years of the functional Court operations should enable States to make informed decisions on whether changes to the Rome Statute were needed.

87. In June 2010 and at the very beginning of the Review Conference, the international community had already answered that question: the Rome Statute was a very substantial treaty, which equipped the Court with all the tools necessary to carry out its mandate, and there was no need for significant changes to the treaty.

88. The discussions on amendments during the Conference focused on issues mandated by the Rome Conference itself. No proposals for institutional changes were tabled and the fundamentals principles, on which the Rome Statute was based, were firmly supported.

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[101] Marek Marczynski, Head of Amnesty International's International Justice campaign. AFP. Available at http://www.google.com/hostednews/afp/article/ALeqM5hFJ8u4_AtgkP2Kpy_BXg_ETV7N-g?docId=CNG.117b9d2e24e98f4d9cc4a11a230c357d.221, accessed on 8 April 2012.

[102] Inaugural address of Judge Saiga of the ICC "The ICC Today: Activities and Challenges" delivered at the seminar on International Criminal Court: Emerging Issues and Future Challenges", jointly organized by AALCO and the Government of Japan, held in New Delhi on 18th March 2009.

89. During the Conference many speakers expressed the view that impunity implied achieving universality of the Rome Statute, however, there was still a long way to go before the Rome Statute becomes a truly universal instrument as it was not an easy process.

90. At the same time, it should be remembered that ratifying the Statute was far from being enough. A genuine commitment to the Court required the adoption of necessary implementing legislation. The outcome of the Review Conference has clearly demonstrated that the principle of complementarity would remain as one of the pillars for the effective functioning of the Court, and to be used as the Court of last resort. This principle needs to be further strengthened.

91. In this regard, it is pertinent to mention that despite, the repeated calls from the Secretary-General of the United Nations for universalization of the Rome Statute; it has evoked lesser participation particularly from the Asian States. Towards addressing this issue the AALCO has held a series of Seminars and Expert Group Meetings over the past three years, so that Member States can table and discuss their concerns regarding the functioning of the ICC.

92. It may be noted that as of 1 July 2012, 121 countries have ratified the Rome Statute, as a result there are approximately 83 non-Party States among them three Permanent Members of the Security Council (United States, Russian Federation and the People's Republic of China) and several other large and influential States including India, Indonesia, Malaysia, Turkey, Arab Republic of Egypt, Pakistan and the Islamic Republic of Iran.

93. Generally speaking the situation of non-party States is governed by article 34 of the V*ienna Convention on the Law of Treaties*, which states that: "A treaty does not create either obligations or rights for a third State without its consent." Nevertheless, significant legal issues arise concerning the relationship between non-party States and the *Rome Statute.* These issues, can be broadly divided into questions of jurisdiction of the Court and cooperation with the Court. Besides, some non-State Parties have expressed concern regarding the immunities of Heads of States particularly if it is a Monarch. Some other States are also apprehensive of the cost that would entail in becoming a Party i.e. the annual contribution to the ICC, which would be an additional burden on their economies.

94. The referral of the situation in the Darfur region of Sudan by the United Nations Security Council vide its resolution 1593 (31 March 2005) to the Prosecutor of the ICC, despite Sudan being a non-Party to the Rome Statute of the ICC has unfurled a chain of events that brings out various aspects in the pursuit of international criminal justice. The proceedings in the case are on the one hand, hailed by the supporters of the ICC as "victory for international law", on the other hand, there is a strong view that sees it as setting a "dangerous precedent". This issue basically revolves around Head of State immunity[103], a traditional rule of international law, may prevent the Court from prosecuting the Head of State. While Heads of State in office do not enjoy functional (*rationae materiae*) immunity for their actions because international crimes cannot be official acts, they may enjoy personal (*rationae personae*) immunity, which covers all acts performed by the Head of State, during or prior to his assumption of office.[104] The Statutes of

[103] Bashir's Immunity, by Jake Hirsch-Allen, 15 December 2008

[104] Functional immunity is also referred to as substantive immunity, personal immunity has been refered to as temporal immunity and the Latin terms for both are frequently employed. I will use the more common English terms

international criminal courts and their decisions explicitly reject such immunity but a Head of State has never been arrested for international crimes while in power. The International Court of Justice (ICJ) has enforced the personal immunity of acting senior officials in national cases for international crimes but the Court has not definitively answered whether functional immunity would protect a Head of State tried by an international court with jurisdiction over that official.[105]

95. The Court is also, however, treaty based, and as such it only binds States party to its Statute. The Rome Statute itself is not clear on whether immunity applies. While Article 27[106] at first suggests all immunities are lifted, Article 98 indicates that officials of non-States Parties to the Statute can rely on personal immunity. The crux of this question is therefore whether inter-State immunity obligations are binding despite the UNSC referral and Article 27 of the Rome Statute. While Article 27 represents the move away from traditional State sovereignty and Head of State immunity, Article 98 is evidence of the Statute's drafters' necessary concessions to power politics and a State-centric international system.

96. The other major challenges before the ICC are mainly universality, sustainability and complementarity. In order to achieve the universality of membership of the Rome Statute, it should be recognized that each country has its own legal culture and ratification of the Statute that which has different political implications on the home front of each State. Therefore, sustainable efforts should be taken on the part of international community to iron out the differences, misconceptions revolving around the Rome Statute of the ICC and thereby

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personal and functional immunity throughout. While functional immunities would otherwise persist indefinitely, personal immunities are forfeited once the official leaves office. Bassiouni, M. Cherif, Introduction to International Criminal Law (Ardsley, NY:: Transnational Publishers, 2003) [Bassiouni], at 72; Gaeta, Paola, "Official Capacity and Immunities" in Paola Gaeta Antonio Cassese, John R.W.D. Jones ed., The Rome Statute of the ICC: A Commentary, Vol. 1 (New York: Oxford UP, 2002) 975 (Gaeta) at 977.

[105] *Case Concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium). International Court of Justice. 14 February 2002 [Arrest Warrants Case].

[106] Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9, art. 67(d) [*Rome Statute*].

Article 27: Irrelevance of official capacity

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Article 98: Cooperation with respect to waiver of immunity and consent to surrender

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

accommodate the non-States parties in to the system to attain the universality of the international criminal justice system.

97. Regarding the Principle of Complementarity, generally, the AALCO Member States are of the opinion that the role of the ICC, in accordance with the Rome Statute, shall be complementary to the national criminal jurisdiction. Investigation and prosecution of serious international crimes should in the first place be handled by national judicial systems rather than by the ICC. It is vital to understand the role and the effectiveness of the Court, but its actual character would be further clarified through its application.

98. International justice is complementary to national justice, and the international community must contribute more to positive complementarity and to filling the impunity gap. As the International Criminal Court operates on the basis of the principle of complementarity, it should also contribute to the development of national capacities to handle international crimes. States parties to the Rome Statute have recognized the desirability of assisting each other in strengthening domestic capacity. The United Nations should further enhance its support to Member States in reinforcing or developing their capacity in that regard. Success in those efforts requires coordination and coherence that effectively links international criminal justice to support for the development of the rule of law in appropriate countries.

99. These concerns of the States shed light over their individual and collective concerns, and though repeated calls for universalization have been made by the Secretary-General of the United Nations, ultimately ratifying the Rome Statute depends on the sovereign decision of the States.

5. SUSTAINABLE DEVELOPMENT: PROTECTION OF GLOBAL CLIMATE FOR PRESENT AND FUTURE GENERATIONS OF MANKIND

I. INTRODUCTION

1. Climate Change has emerged as one of the biggest environmental challenges of our times. It is one of the major priorities of international community to address this issue and carve out the mechanisms through which it could be mitigated. One of the themes for consideration at the Sixty-seventh Session of the UN General Assembly is "Sustainable Development: Protection of Global Climate for Present and Future Generations of Mankind". The political momentum generated to combat the problem of climate change, in the past years attained a new dimension with the adoption of the Bali Road Map, by the United Nations Climate Conference, in December 2007. Series of negotiations, from Bali, Copenhagen, Cancun, Bangkok, Bonn etc., have been reiterating on the need to address the climate change issues by deriving at the second commitment periods post Kyoto Protocol. With the imminent expiry of the Kyoto Protocol, the attention of the international community is now firmly focused on finding an equitable solution for the period beyond 2012.

2. The United Nations Framework Convention on Climate Change (UNFCCC), 1992 and its Kyoto Protocol of 1997 contains the response of international community to meet the challenges posed by the threat of climate change. The UNFCCC was concluded on 9 May 1992 and opened for signature at the United Nations Conference on Environment and Development (UNCED) in June 1992. It entered into force on 21 March 1994 and having attained ratification by 195 State Parties Convention, it has reached universality. The Kyoto Protocol (KP) entered into force on 16 February 2005 and currently there were 193 countries and 1 regional economic integration organization (the EEC) that have deposited instruments of ratification, accession, approval or acceptance. The total percentage of Annex I Parties emissions is 63.7 %. However, the largest contributor to the global greenhouse gas emissions, the United States of America, remains outside the Kyoto Protocol.

3. This Secretariat Report gives an overview of the (i) Bonn Climate Change Conference (14 to 25 May 2012, Bonn, Germany), (ii) Bangkok Climate Change Conference (30 August to 5 September 2012, Bangkok, Thailand) and (iii) Consideration of the Climate Change Issues at the Fifty-First Annual Session of AALCO (18 to 22 June 2012, Abuja, Nigeria). Finally, it brings forth some general comments on the issue.

II. UNITED NATIONS CLIMATE CHANGE CONFERENCE (14 – 25 MAY 2012, BONN, GERMANY)

4. The United Nations Climate Change Conference was held in Bonn, Germany from 14 to 25 May 2012. The conference included the 36th sessions of the Subsidiary Body for Implementation (SBI) and the Subsidiary Body for Scientific and Technological Advice (SBSTA). It also included the 15th session of the *Ad Hoc* Working Group on Long-term Cooperative Action under the United Nations Framework Convention on Climate Change (AWG-LCA), the 17th session of the *Ad Hoc* Working Group on Further Commitments for

Annex I Parties under the Kyoto Protocol (AWG-KP) and the first session of the *Ad Hoc* Working Group on the Durban Platform for Enhanced Action (ADP).

5. The First session of the Ad Hoc Working Group on the Durban Platform for Enhanced Action (ADP), witnessed deliberations on the implementation of Durban Package. On behalf of the Group of 77 and China (G-77/China), it was stated that the ADP's outcome must be in line with the objective, principles and provisions of the Convention and emphasized the importance of progress under the AWG-KP and AWG-LCA. The delegate said the ADP's work plan must be based on Decision 1/ CP.17 (Establishment of an *Ad Hoc* Working Group on the Durban Platform for Enhanced Action), equity, common but differentiated responsibilities and the relevant provisions of the Convention.

6. The representative of the Least Developed Countries (LDCs), highlighted that the ADP's mandate provided an opportunity to enhance the mitigation ambition and to adopt a new protocol under the Convention applicable to all, taking into consideration equity and common but differentiated responsibilities. It was suggested to identify deliverables for each Conference of the Parties (COP) in the context of a three-year programme that would allow incorporating inputs from, *inter alia*, the IPCC's Fifth Assessment Report. Further, the work of the ADP must not be seen as an opportunity to postpone action, and stressed the importance of the second commitment period under the Kyoto Protocol.

7. Speaking on behalf of the Alliance of Small Island States (AOSIS), the representative expressed hope that the ADP would demonstrate a "sober, serious and determined sense of urgency and ambition." The representative called for a mitigation work plan that made strides in closing the recognized mitigation ambition gap. The representative of the African Group said the ADP should result in a strengthened multilateral, rule-based climate change regime, emphasizing the need for significant scaling up of developed country mitigation ambition. The representative of the Arab Group, stressed that negotiations under the ADP must ensure full and effective implementation of the Convention. He also emphasized the need to respect, and not renegotiate, the principles that govern international action.

8. The BASIC group said that the full elaboration of the ADP's work plan would only be possible after the AWG-LCA and AWG-KP had concluded their work and that an outcome should reflect the historical responsibility of developed countries and view the Durban Platform as a historic opportunity to ensure that international climate regime evolves according to the realities of a changing world.

9. On those notes, parties while highlighting the key elements of the Durban package, called for launching the ADP's work as agreed in Durban. It was highlighted that the "fine and balanced" Durban compromise, consisting of: (i) a second commitment period under the Kyoto Protocol; (ii) a pre-2020 mitigation work plan; (iii) agreement by 2015 applicable to all; (iv) concluding the AWG-LCA; and (v) operationalizing the institutions created in Cancun and Durban was a very significant step towards mitigating climate change. On the other hand, one delegate emphasized the importance of advancing all aspects of the Durban outcome and highlighted the main focus of the Durban Platform to create a new legal instrument under the UNFCCC as "an important opportunity that must not be lost." Importance was attached to trust

and mutual reassurance, upon which the Durban Package was based, including agreement to look at the level of ambition. One another delegate stated that the importance of working on, *inter alia*, mitigation, adaptation, finance, technology development and transfer, and ensuring that the principles of equity and common but differentiated responsibilities are "fully suffused" in each item. Further, it was recalled that ambition relates to all elements of work and there was a need to continue work under the AWG-LCA, according to the Bali Action Plan.

10. At the17th session of the *Ad Hoc* Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol (AWG-KP), the parties considered a number of proposals, and *inter alia*: heard presentations on the parties' (Quantified Emissions Limitation and Reduction Commitments) QELROs submissions; discussed the level of ambition of parties' commitments and carry-over of surplus AAUs; and reviewed options for addressing the carry-over of surplus AAUs from the first to the second commitment period and the following deliberations ensued.

11. On QELROs**,** the following considerations were pointed out, namely; clarifications on QELROs submissions and associated conditions; views on market mechanisms; national policies implemented to support QELROs; and preferences for the length of the second commitment period. On "ambition", one of the delegates introduced two proposals,

(i) to establish a review of the level of ambition of parties' QELROs, coinciding with the 2013-2015 Review under the Convention, to address the concern raised by some parties that an eight-year commitment period would lock in a low level of ambition; and

(ii) a simplified procedure to amend Protocol Annex B to facilitate an increase in the level of ambition by parties.

12. Another delegate introduced a proposal on revising QELROs with a view to strengthening commitments under the Protocol. The proposal indicates that Annex I parties may, at any time, strengthen their QELROs and ensure the immediate effect of such revision by: forfeiting a part of their AAUs; transferring these units to a cancellation account established for this purpose in the national registry; and communicating such transfer to the Secretariat.

13. Parties considered legal aspects of the entry into force of the second commitment period under the Kyoto Protocol and discussed on how to secure continuity between the first and second commitment periods; the application of accounting rules in the second commitment period; options for provisional application of Protocol amendments to secure continuity pending their entry into force; and ways to raise ambition levels during the second commitment period.

14. On behalf of the African Group, it was highlighted, *inter alia*, that: the legal status of the second commitment period is not negotiable; a five-year commitment period was needed to avoid locking in low levels of ambition; and that not all Annex I parties have submitted adequate, or any, information on QELROs.

15. Another group emphasized commitment to adopting amendments to the Protocol in Doha with a view to operationalize the second commitment period. *Inter alia*, that: the length of the second commitment period should be eight years; the mid-term review to enhance the level of

ambition has to be conducted in the context of the scientific recommendations of the IPCC; and agreement is needed on an environmentally integral treatment of carry-over.

16. The representative of the AOSIS, identified the need to address surplus Kyoto units, highlighting the proposals by AOSIS and others to move this issue forward. He called for clear, unconditional, single-number QELROs for a five-year commitment period and clarifying those units from any new market mechanism under the Convention may only be used within the Kyoto accounting framework if they have been scrutinized for environmental integrity. He stressed that Protocol amendments adopted in Doha must be legally-binding on parties from 1 January 2013 onwards through the provisional application of these amendments pending their entry into force.

17. The representative of LDCs, urged those Annex I parties that have not done so to submit their QELROs. He supported: a five-year commitment period to avoid locking in the current low level of ambition for eight years; having a cap on carry-over of AAUs; and the provisional application of the proposed Protocol amendments for the second commitment period. He called for: avoiding the "distractions" by parties wanting to "jump ship"; clearing away the conditionalities; and striving for continuity.

III. UNITED NATIONS CLIMATE CHANGE CONFERENCE (30 AUGUST TO 5 SEPTEMBER 2012, BANGKOK, THAILAND)

18. The United Nations Climate Change Conference was held in Bangkok, Thailand from 30 August to 5 September 2012. The Conference included additional sessions of the *Ad Hoc* Working Group on Long-term Cooperative Action under the Convention (AWG-LCA), the *Ad Hoc* Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol (AWG-KP) and the *Ad Hoc* Working Group on the Durban Platform for Enhanced Action (ADP).

19. Under the ADP, parties convened in roundtable sessions to discuss their vision and aspirations for the ADP, the desired results of its work and how these results can be achieved. Parties also discussed how to enhance ambition, the role of means of implementation and how to strengthen international cooperative initiatives, as well as the elements that could frame the ADP's work. On behalf of Group of 77 and China (G-77/China), it was said that the Durban Platform must ensure strong linkages among mitigation, adaptation and means of implementation, and include the principles of equity and common but differentiated responsibilities (CBDR). The representative of African Group, supported limited use of carbon markets, and highlighted the need for establishing accounting rules and processes for technology transfer, among other measures. The representative of AOSIS, questioned whether adaptation could provide a sufficient solution to the impacts of climate change in small island developing states and whether the Green Climate Fund can afford to pay for such measures, and called for prioritizing mitigation under the ADP. The representative opposed a separate roundtable on principles, noting the principles should guide the work of the two workstreams.

20. On behalf of BASIC (Brazil, South Africa, India and China), it was stressed that the ADP outcome should be in complete accordance with all the Convention principles, particularly CBDR and equity. Speaking on behalf of various developing countries, it was reiterated that all

ADP work is under the Convention and must adhere to its principles, and said universality of application is not uniformity of application. He said the ADP should not become the means by which developed countries "jump ship" from their legally binding commitments. He said substantive work by the ADP on issues still being considered by the other AWGs should not be undertaken until the successful conclusion of work of those bodies.

21. Two roundtable meetings on (i) Vision for ADPs and (ii) Ambition were held. During these meetings, many countries reaffirmed that the primacy of the Convention in the work of the ADP; and that in no way should the ADP's work involve a rewriting of the Convention.

22. The AWG-KP session was devoted to resolving outstanding issues to ensure the successful completion of the group's work in Doha, Qatar, in December 2012, by recommending an amendment to the Conference of the Parties (COP) serving as the Meeting of the Parties to the Kyoto Protocol (CMP) for adoption. This amendment would allow a second commitment period under the Protocol to start immediately from 1 January 2013. The AWG-KP produced an informal paper outlining the elements for a Doha decision adopting the amendment to the Kyoto Protocol. Many parties welcomed progress made in Bangkok, particularly the increased clarity on options to address the transition to the second commitment period.

23. Speaking on behalf of the developing countries, representative said that the success in Doha would require: an ambitious and legally-binding second commitment period that includes a fair and science-based contribution by Annex I parties to closing the ambition gap; an ambitious agreed outcome under the BAP that ensures comparable mitigation ambition by non-Kyoto parties, financing ambition and addressing other unfinished business under the BAP; and greater clarity on the ADP work.

24. The AWG-LCA continued working on practical solutions to fulfill specific mandates from COP 17 in Durban. The focus was on what outcomes might be needed to conclude the group's work in Doha, how the elements will be reflected in the final outcome of the AWG-LCA, and whether additional work might be required beyond COP 18 and, if so, identifying concrete issues and whether those issues would require technical work or political consideration.

IV. CONSIDERATION OF THE CLIMATE CHANGE ISSUES AT THE FIFTY-FIRST ANNUAL SESSION OF AALCO (18 - 22 JUNE 2012, ABUJA, FEDERAL REPUBLIC OF NIGERIA)

25. At the Fifty-First Annual Session of AALCO held in Abuja, Nigeria from 18 – 22 June 2011, agenda item "Environment and Sustainable Development was considered for deliberations. **Dr. Yasukata Fukahori, Deputy Secretary-General (DSG) of AALCO** introduced the agenda item "Environment and Sustainable Development" as contained in the Secretariat document AALCO/51/ABUJA/2012/SD/S 10. The DSG said that the Organization had been following the developments on Environment and Sustainable Development since 1975 with the contemporary focus being on the implementation of the three Rio Conventions namely, the: United Nations Framework Convention on Climate Change, 1992; Convention on Biological Diversity, 1992; and United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, 1994; and Follow-Up on the

progress in the Implementation of the outcome of World Summit on Sustainable Development, 2002. The present Secretariat report contained developments in the area of International regime on climate change, international regime on desertification, and Follow-Up on the progress in the Implementation of the outcome of World Summit on Sustainable Development.

26. On the issue of Climate Change issues, the DSG said that it was the most prominent issue that the international community faced today. In the year 2011, at the Seventeenth Conference of Parties to the United Nations Framework Convention on Climate Change (UNFCCC) held in Durban, South Africa, Durban Outcome - a "package deal" was adopted. The focus at the Durban Conference was on post-2012 Kyoto Protocol commitment or second-term commitment period. The hope was that the negotiations would produce more ambitious greenhouse gas emission reduction pledged by developed countries, a second commitment period under the Kyoto Protocol, and a mandate for a new legally-binding agreement. Further, it also wanted the institutions mandated by the 2010 Cancun Agreements to become fully operational and to complete the terms of reference for the review of the long-term global goal for emission reductions.

27. Referring to the Durban Package, the DSG said that the package seemed to fulfill several objectives of countries that were among the most vulnerable to climate change: the Pacific Island Developing States and the larger Alliance of Small Island States. In fact, the Durban Package comprised decisions under both the UNFCCC and the Kyoto Protocol that accomplished many of the PSIDS and AOSIS goals for adaptation, finance, technology transfer, and capacity building. However, there was a shortcoming in terms of mitigation, and the action taken on the Kyoto Protocol's second commitment period which was mere proposal to formalize pledges made in Cancun in 2012 by developed country Kyoto Protocol parties and does not include major emitting countries. The Durban Outcome dealt with UNFCCC parties agreeing to establish the Ad Hoc Working Group on the Durban Platform for Enhanced Action ("AWG-DPEA") which would adopt, a new "protocol, legal instrument or agreed outcome with legal force" by 2015. The new AWG-DPEA has a mandate to develop proposals on the full range of climate change issues, its focus would clearly be on raising the "level of ambition" with respect to mitigation for all parties.

28. At the deliberations that ensued, delegations from the following Member States of AALCO, namely; **Nepal, Japan, People's Republic of China, Thailand, Republic of Korea, United Republic of Tanzania, Indonesia, India, Republic of Iraq, Malaysia and Yemen** made their interventions.

29. One of the delegates opined that the Durban Conference was instrumental in clarifying the pathway to the establishment of a new legal framework in which all economies need to participate. Another delegate said that climate change is, in essence, a development issue, and that sustainable development is both the aim and the right path for its effective solution. In order to address both development and climate change challenges and upholds right to development, we developing countries should, under the framework of sustainable development, take a holistic approach to economic development, poverty eradication and climate protection. Based on the aforementioned views, we welcome the outcomes of the Durban Conference, in particular

progress related to the second commitment period of the Kyoto Protocol, finance and strengthened implementation of the UNFCCC.

30. However, many problems are yet to be tackled for the implementation of the Durban outcomes and it hoped that all parties, while respecting and accommodating each other's core concerns, will take into full account both the historical responsibilities of developed countries and the practical needs of developing countries, based on the principles of equity and "common but differentiated responsibilities", and carry out further discussions on the establishment of a fair and equitable international cooperation regime addressing climate change. Another delegate pointed out that Annex I Parties to the Kyoto Protocol should commit themselves to the second-term commitment period and ensure the continuity of this legally binding agreement with more ambitious targets. Comparable mitigation efforts are needed in order to measure the emission targets and achievements of the parties effectively. The delegate urged that there was a need to check the implementation of the Green Climate Fund which required the developed Parties to make substantial financial commitments towards the fund in order to ensure its adequate capitalization and speedy access to the fund by developing Parties. Further, it was stated that developed countries ought to take meaningful steps to promote, facilitate, and finance the transfer of or access to, environmentally sound technologies to developing countries, in order to enable them to meet their mitigation and adaptation needs.

31. Another delegate said that they generally supported the two-track negotiation system, which divided developed countries duties and developing countries actions to reduce greenhouse gas emissions. One other delegate pointed out that there was an urgency to understand the true implications of climate change to the economy and the people and also provide options to move our economy forward while contributing to global climate change mitigation in a low carbon growth economy in order to establish a mechanisms and functional systems to deal with environment sustainability.

32. In addition, another delegate stressed that moving in the positive direction from Bali Roadmap to the Durban Conference, the world community's efforts to tackle the challenges posed by climate change has been appreciative. Particularly, the Durban Conference which was one of the most significant Conferences on Climate Change since the second commitment period to the Kyoto Protocol was agreed upon for the developed countries (Kyoto Protocol Parties). In addition, the inclusion of Green Climate fund, a key demand for financing the efforts of developing countries in the technology mechanism, etc. have also seen light in the form of an agreed decision by the members. One other delegate reiterated that in respect of the AWG-DP negotiations, priority should be given by the negotiating parties to deliberate on the work plan to enhance mitigation ambition rather than on the form of the outcome document. Such work plan shall reflect the principle of "common but differentiated responsibilities" (CBDR) and the options and ways to increase the level of mitigation ambition must be understood in the context of promoting sustainable development, with equal and balanced consideration to the economic, social and environmental sectors. It was urged that AALCO Member States would actively participate in the forthcoming negotiations on climate change and express their approaches in particular their stands on Common but Differentiated Responsibilities.

IV. COMMENTS AND OBSERVATIONS OF THE AALCO SECRETARIAT

33. Addressing Climate change issues at global level with specific commitments within the framework of the established climate change regime namely; UNFCCC, Kyoto Protocol and Bali Road Map remains significant. While looking forward for second commitment period post 2012, developing countries must base their contentions through principle of "common but differentiated responsibilities". Adoption of a fair, effective, comprehensive and legally-binding framework on stronger international action on climate change beyond 2012 is the need of hour, which has been prolonged through various negotiations without conclusions. The building blocks for such an outcome should certainly include concepts such as historical responsibility, justice, equity, principle of common but differentiated responsibility, as well as the effective implementation of developed countries commitments and support for developing countries. It is necessary that the outstanding issues in the Ad Hoc Working Group on Long-term Cooperative Action under the Convention (AWG-LCA) must be resolved with clear direction on how to address them. The forthcoming Conference of Parties at Doha, Qatar, is much awaited for the outcomes must be carefully balanced, reflecting the Durban package.

34. Amidst the setback of closure of the working groups (referring to the AWG-LCA, and the working group under the Kyoto Protocol tasked with finalising the second commitment period of emissions cuts by developed country Parties), developing countries need to take a cautious approach as a community of shared interests, developing countries must maintain solidarity and strengthen coordination in urging developed countries to fulfill their historical responsibilities and provide financial, technical and capacity-building support to developing countries. This is the only way to truly safeguard our long-term and fundamental interests.

35. AALCO has been following the agenda item "Environment and Sustainable Development" for the past three decades. The topic of international regime on climate change holds very significant for Member States of AALCO since most of the countries are developing countries who are adversely affected by global warming. The AALCO Secretariat urges its Member States to effectively participate at the Doha Climate Change Conference in November 2012, in order to strengthen solidarity among developing countries to achieve common goal of post-2012 commitments. At the forthcoming Conference, it is proposed to have an amendment to the Conference of the Parties (COP) serving as the Meeting of the Parties to the Kyoto Protocol (CMP) for adoption. This amendment would allow a second commitment period under the Protocol to start immediately from 1 January 2013. Therefore, there is a need to formulate an ambitious and legally-binding second commitment period which would include fair and science-based contribution by Annex I parties to closing the ambition gap. Further, States must strive to have an ambitious agreed outcome within the context of Bali Action Plan that ensures comparable mitigation ambition by non-Kyoto parties, financing ambition and so on. One another issue that surmounts the view to negotiate climate change within the Bali Action Plan process was that it reaffirms the UNFCCC's core principle of Common but Differentiated Responsibility (CBDR), whereas the Durban Platform for Enhanced Action does not address such concerns. Issue relating to equitable access to the carbon space based on the principles of the UNFCCC especially that of equity and CBDR are poignant to be addressed along with the need for technology transfers to developing countries in order to enhance their resilience to climate change.