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ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION

NOTES & COMMENTS ON SELECTED ITEMS BEFORE THE SIXTY-SIXTH SESSION OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS

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1. 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-Fifth 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-Sixth 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-Fifth Session include: Twenty-Seventh Sessions of the Commission on the Limits of the Continental Shelf (7 March to 2 April 2011, New York); Seventeenth Session of the International Seabed Authority (11-22 July, Kingston, Jamaica) and the Twenty-First Meeting of States Parties to the Law of the Sea Convention (13 to 17 June 2011, New York) and the Twelfth 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 20 – 24 June 2011; Dispute Settlement under UNCLOS; and Summary of Deliberations on the agenda item held at the Fiftieth Annual Session of AALCO (Colombo, Sri Lanka, 27 June – 1 July 2011). This report presents an overview of all these developments.

II. CONSIDERATION OF THE OCEANS AND THE LAW OF THE SEA ISSUES BY THE UN GENERAL ASSEMBLY AT ITS SIXTY-FIFTH SESSION (7 DECEMBER, 2010)

3. The UN General Assembly at its Sixty-fifth Session on 7 December 2010[1] considered the agenda item on "Oceans and the Law of the Sea" and adopted two resolutions namely; Oceans and the law of the sea;[2] and Sustainable fisheries, including

[1] For details see "General Assembly Concludes Annual Debate on the Law of the Sea Adopting Two Texts Bolstering United Nations Regime Governing Ocean Space, its Resources, Uses", *UN Press Release* GA/110331 dated 7 December 2010. The following AALCO Member States participated in the deliberations: Arab Republic of Egypt, Indonesia, Japan, People's Republic of China, Republic of Korea, Kuwait, South Africa and Libya.

[2] UNGA Res. A/65/37 A adopted on 7 December 2010. The resolution was adopted by a recorded vote of 123 in favour to 1 against (Turkey), with 2 abstentions (Colombia and Venezuela). Also it adopted another Res. A/65/37 B on 4 April 2011 in which the General Assembly endorsed the recommendations

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.[3]

4. Vide these two resolutions, the General Assembly reiterated its deep concern at the serious adverse impacts on the marine environment and biodiversity, and highlighted the links between the health of the world's oceans and sustainable human development, and called on all States to bolster their support for the United Nations framework established by the 1982 United Nations Convention on the Law of the Sea.

5. The Assembly adopted its 38-page omnibus resolution on oceans and the law of the sea, reiterating, among other things, the essential need for cooperation, including through capacity-building and transfer of marine technology, to ensure that all States, especially developing countries, small islands and coastal African States, were able to implement the Convention and to benefit from the sustainable development of the oceans and seas, as well as to participate fully in all forums and processes dealing with related legal issues.

6. Noting with concern the continuing problem of transnational organized crime committed at sea, as well as threats to maritime safety and security, including piracy, the Assembly urged States to ensure the full implementation of resolution A.1026(26) of the International Maritime Organization (2009) on acts of piracy and armed robbery against ships in waters off the coast of Somalia. It further called on States that had not yet done so to become parties to the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing related United Nations conventions, and to take appropriate measures to ensure their effective implementation.

7. By its wide-ranging text on sustainable fisheries, the Assembly called upon all States that had not done so to apply widely, in accordance with international law, the precautionary and ecosystem approaches to the conservation, management and exploitation of fish stock. It called upon States to commit to urgently reducing the capacity of the world's fishing fleets to levels commensurate with the sustainability of fish stocks, through the establishment of target levels and plans or other appropriate mechanisms for ongoing capacity assessment.

8. While the Assembly deplored the fact that fish stocks in many parts of the world were overfished or being seriously affected by the impact of climate change, it also expressed particular concern that illegal, unreported and unregulated fishing constituted a serious threat to fish stocks and marine habitats, to the detriment of sustainable fisheries, as well as food security and the economies of many States, particularly in developing countries. It urged States "to exercise effective controls over their nationals […] in order to deter and prevent them form engaging in" illegal fishing activities.

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of the Ad Hoc Working Group of the Whole on the Regular Process for global reporting and assessment of the state of the marine environment, including Socio-economic Aspects.

[3] UNGA Res. A/65/38 dated 7 December 2010. The resolution was adopted without a vote.

9. The Assembly also expressed deep concern over the impact of recognizing the economic and cultural importance of sharks in many countries, the biological importance of sharks in the marine ecosystem as key ocean predators, the fact that some are threatened with extinction, and the need for measures to promote the long-term conservation, management and sustainable use of shark populations and fisheries. The resolution reiterates the Assembly's request to the Food and Agriculture Organization (FAO) to prepare a report containing a comprehensive analysis of the implementation of the International Plan of Action for the Conservation and Management of Sharks.

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

10. It may be recalled that one of the AALCO Member States, Thailand had become State Party to the UNCLOS. In addition to Thailand, the UNCLOS as on 21 July 2011 had 162 Parties, of which 40 States are AALCO Member States.[4] 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.

11. 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.[5]

12. 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.

[4] 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.

[5] 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.*

The Agreement came into force from 11 December 2001 after receiving the requisite 30 ratifications or accessions.[6]

IV. TWENTY-SEVENTH SESSION OF THE COMMISSION ON THE LIMITS OF CONTINENTAL SHELF (7 MARCH TO 21 APRIL 2011, UN HEADQUARTERS, NEW YORK)

13. The Commission on the Limits of the Continental Shelf (CLCS) held its twenty-seventh Session at United Nations Headquarters from 7 March to 21 April 2011. Apart from the work carried out in plenary meetings, the Commission also proceeded with a technical examination of submissions made by coastal States in accordance with Article 76 of the UNCLOS, 1982.

14. At its twenty-seventh Session, the Commission continued the examination of data and other materials submitted by the following coastal States parties to the 1982 UNCLOS concerning the outer limits of their continental shelf in areas where those limits extend beyond 200 nautical miles: France (in respect of the areas of the French Antilles and the Kerguelen Islands), **Indonesia in respect of the area of north-west of Sumatra Island), Japan, Mauritius** and Seychelles (jointly in the region of the Mascarene Plateau), as well as Suriname.[7]

15. The Commission also received formal presentations of the submissions made by Denmark in respect to Faroe-Rockall Plateau Region; Maldives; and Mozambique. Upon the request of the respective submitting States, presentations on the remaining submissions that have been included on the provisional agenda for the session (notably, France in respect of La Réunion Island and Saint-Paul and Amsterdam Islands; Iceland in the Egir Basin area and in the western and southern parts of Reykjanes Ridge; Pakistan; and Sri Lanka) have been deferred to a later session.

V. SEVENTEETH SESSION OF THE INTERNATIONAL SEABED AUTHORITY (11 - 22 JULY, KINGSTON, JAMAICA)

16. The Seventeenth Session of the International Seabed Authority (ISBA) took place from 11 to 22 July 2011 at its seat in Kingston, Jamaica.[8] Ambassador Peter Thomson, Permanent Representative of Fiji to the UN as President of the Authority's 162 Member Assembly at the Seventeenth Session and Mr. Andrez Przybcin of Poland was elected as President of the Council.

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[6] 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*.

[7] Information mentioned herein is drawn from: "Commission on Limits of Continental Shelf, Meeting at Headquarters, 7 March to 21 April, will hold Plenary 28 March to 8 April", SEA/1948, 25 March 2011.

[8] See the details from: "International Seabed Authority Ends Seventeenth Session in Kingston", International Seabed Authority Press Release, SB/17/18, 22 July 2011.

17. During the Session, the Authority's executive council was unable to complete its work on draft regulations on prospecting and exploration for cobalt-rich ferromanganese crusts, reaching agreement on all provisions except those dealing with "Certificate of sponsorship" (regulation 11); "Total area covered by application" (regulation 12); "Fee for application: (regulation 21); and "Size of area and relinquishment" (regulation 27).

18. *Draft regulations for cobalt-rich crusts:* The draft Regulations on Prospecting and Exploration for Cobalt-rich ferromanganese Crusts in the Area[9] were submitted by the Legal and Technical Commission in 2009 for consideration by the Council at the Authority's sixteenth session last year. The Council was not able to complete that undertaking.

19. The text of the draft Regulations on prospecting and exploring for cobalt-rich crusts consists of a preamble and 44 regulations organized into ten parts and four annexes. The Preamble sets out the principles underlying the Regulations – that the resources of the international seabed Area are the common heritage of mankind and that activities there are for the common benefit of all mankind.

20. The draft Regulations contain provisions that stress the freedom of marine scientific research in the Area and the exercise of freedom of the high seas; and lay out the legal rules that potential prospectors must follow to gain a contract. The protection and preservation of the marine environment are covered under several regulations.

21. *Advisory Opinion of Seabed Disputes Chamber:* On 14 July 2011, members of the Council exchanged views on the landmark Advisory Opinion on responsibilities and obligations of States sponsoring activities in the Area which was rendered by the Seabed Disputes Chamber of the Hamburg-based International Tribunal for the Law of the Sea on 1 February 2011.

22. Introducing the subject at the Council's first substantive meeting, Secretary-General, Nii Allotey Odunton said the advisory opinion provided an important clarification of some of the more difficult aspects of the United Nations Convention on the Law of the Sea and the 1994 Agreement relating to the Implementation of Part XI of the Convention.

23. The universal reaction to the opinion, including from academia, members of the Authority and the seabed mining industry, had been positive, providing much-needed and long-expected certainty in the interpretation of the obligations and responsibilities of sponsoring States under the Convention and the Agreement. It was an encouraging sign for the Authority and its members, not least because it suggested that the commercial sector was developing confidence in the legal regime for the orderly development of the resources of the Area that had been put in place over the past 13 years, he added.

24. In its unanimous advisory opinion, the Chamber listed important direct obligations of sponsoring States, among which were assistance to the Authority in the

[9] ISBA/16/C/WP.2

exercise of control over activities in the Area; the obligation to apply a precautionary approach; applying the best environmental practices; and ensuring the availability of recourse for compensation in respect of damage caused by pollution, as well as an obligation to conduct environmental impact assessments).[10]

25. The Council instituted the proceedings before the Seabed Disputes Chamber in a decision taken at its sixteenth session last year, pursuant to article 191 of the United Nations Convention on the Law of the Sea. It was in response to a proposal originally submitted by the delegation of Nauru. The Chamber was requested to render an advisory opinion on three legal questions relating to the obligations and responsibilities of States sponsoring activities in the Area The Chamber, a separate judicial body within the International Tribunal for the Law of the Sea, was established in accordance with Part XI, section 5, of the United Nations Convention on the Law of the Sea and article 14 of the Statute. It has jurisdiction in disputes with respect to activities in the Area, and is entrusted with the exclusive function of interpreting Part XI of the Convention and the relevant annexes and regulations that are the legal basis for the organization and management of activities in the Area.

26. *Legal and Technical Commission Report:* The Commission, which also considered the Advisory Opinion of the Seabed Disputes Chamber at its closed meetings preceding the Authority's session, drew attention to related issues which needed to be incorporated into its future work programme: adjustments to the Nodules and Sulphides regulations to bring them in line with respect to environmental practices and protection of biodiversity, as well as the further development of the precautionary approach. It said that a list of such necessary revisions should be prepared by the secretariat for its consideration at the eighteenth session.

27. It also said the Authority as part of its work programme should prepare a model legislation to assist sponsoring States to fulfill their obligations as outlined in the advisory opinion of the Seabed Disputes Chamber.

28. The Commission should consider the suggestion by the Disputes Chamber for the creation of a mechanism to compensate for damage for which neither the contractor nor the sponsoring State was responsible.

29. In its evaluation of the annual reports of the eight contractors, the Legal and Technical Commission found that a majority had largely followed the general format prescribed by the Commission.

30. Progress was still needed in the area of technology-related issues, particularly with respect to mining and metallurgical processing of nodules. It laid out certain tasks for the Authority's secretariat: preparation of an updated version of the draft guide for contractors for assessment of possible environmental impacts arising from exploration for polymetallic sulphides. Establishment of a protocol for contractors on the collection and

[10] The text of the *dispositive* of the Chamber's advisory opinion is annexed to secretariat document ISBA/17/C/6 - ISBA/17/LTC/5.

management of data; and preparation of a report, including an indicative five-year work programme for the incoming new members of the Commission in 2012.

31. The Commission produced a report on the Environmental Management Plan for Clarion-Clipperton Zone[11] which was the focus of extensive discussion in the Council. Some Council members had reservations on the plan, stating that it was premature, and not based on sufficient scientific information. In the end the plan was not approved by the Council. The Commission said the proposed plan was consistent with the obligations, responsibilities, rules, regulations and procedures formulated in the United Nations Convention on the Law of the Sea and its associated Agreements and regulations.

32. Developed at a 2007 workshop, the plan was based on widely applied principles for the design of marine protected area networks, and included an element to protect 30 to 50 per cent of the total management area. The goals of the plan included facilitation of exploitation of seabed mineral resources in an environmentally responsible manner, consistent with the legal framework and environmental guidelines of the Authority for managing deep-sea nodule mining and protecting deep-sea environment.

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

33. The Annual Comprehensive Report of the UN Secretary-General on Oceans and Law of the Sea examines the relevance and scope of capacity-building, while presenting an overview of the capacity-building needs of States in marine science and other areas of ocean affairs and the law of the sea and reviews current capacity-building activities and initiatives in those areas.[12] The report also addresses the challenges that may constrain the potential of States, particularly least developed countries and small-island developing States, to benefit from the resources of oceans and seas, thwarting their ability to implement the Convention and other legal instruments. It presents an overview of the capacity-building needs of States in marine science and other areas of ocean affairs and the law of the sea. The report contains a review of means of implementation of capacity-building activities and initiatives in marine science and other areas of ocean affairs and the law of the sea, based mainly on the information provided by intergovernmental organizations. Lastly, it addresses the challenges in implementing capacity-building activities and initiatives and identifies opportunities for ways to move forward.

34. The Report concludes that international cooperation and assistance to strengthen marine science and support technological capacities for the sustainable management of

[11] ISBA/17/LTC/7.

[12] *Oceans and law of the sea: Report of the Secretary-General*, UN Doc. A/65/69 dated 29 March 2010. The UN Secretary-General's Report has been prepared pursuant to the request of the General Assembly in paragraph 202 of its resolution 64/71 that the Secretary-General submit to the Assembly at its sixty-fifth session a comprehensive report on oceans and the law of the sea, and make the section of the report relating to the topic of focus of the eleventh meeting of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea. It was also submitted to States Parties to the United Nations Convention on the Law of the Sea, pursuant to article 319 of the Convention.

ocean-related activities could enhance scientific understanding of the oceans as a whole and support the sustainable global development and management of marine resources. It concludes further that a comprehensive assessment of States' existing needs and capacities in that regard is essential.

VII. TWENTY-FIRST MEETING OF THE STATES PARTIES TO THE UN CONVENTION ON THE LAW OF THE SEA (13 TO 17 JUNE 2011, UN HEADQUARTERS, NEW YORK)

35. The Twenty-First Meeting of States Parties to the UN Convention on the Law of the Sea took place at the UN Headquarters in New York from 13 to 17 June 2011. The meeting elected Camillo Gonsalves (Saint Vincent and the Grenadines) as President.[13]

36. The Agenda of the meeting included the consideration of the following items: Report of the International Tribunal for the Law of the Sea to the Meeting of States Parties (2010); Information provided by the Secretary-General of the International Seabed Authority; Commission on the Limits of Continental Shelf: (a) Information provided by the Chair of the Commission (b) Workload of the Commission; Consideration of budgetary matters of the International Tribunal for the Law of the Sea; and Report of the Secretary-General under article 319 for the information of States parties on issues of a general nature relevant to States parties, that have arisen with respect to the United Nations Convention on the Law of the Sea.

37. Workload of the CLCS: The question of the increasing workload of the Commission on the Limits of the Continental Shelf has been an area of concern. At the Twenty-First Meeting of States Parties, the Chairman of the Commission informed the Meeting of the practical difficulties in managing the increasing number of submissions. She noted that the total number of submissions to the Commission on the Limits of the Continental Shelf currently stood at 56, and 10 more expected, and she stated that the body's workload clearly remained a critical issue.

38. She recalled that the Commission had reiterated that the most efficient and effective way to address its growing workload was to work on a full-time basis at UN Headquarters. Discussions on the possibility of the Commission meeting for up to 26 weeks per year were continuing in the Informal Working Group, and should the Meeting adopt such a recommendation, with the General Assembly's support, the Secretariat would need to address the associated financial and staffing implications, she said.

39. During the Meeting, the Twenty-First Meeting of States Parties to the Convention on the Law of the Sea asked the Commission to consider meeting in New York,

[13] Information mentioned herein is drawn from *UN Press Release*: "Convention on Law of the Sea Elects Bureau Members, Adopts Provisional Agenda, as it Begins Twenty-First Meeting of States Parties", SEA/1953, 13 June 2011; "Delegates Offer Differing Views regarding Workload of Commission on Limits of Continental Shelf as States Parties Continue Twenty-First Meeting", SEA/1954, 14 June 2011, and "States Parties to Convention on Law of the Sea adopt Draft Decision on Additional Working Weeks, as Twenty-First Meeting Continues", SEA/1956 dated 16 June 2011.

simultaneously with its sub-commissions, for up to six months annually over the next five years, and recommended that any request for Secretariat resources to facilitate more working weeks be presented to the General Assembly during its sixty-sixth session.

40. Adopting a draft decision by consensus, the Meeting recalled the obligation of States with experts serving on the Commission to defray all their related expenses, and urged those States to ensure their experts' full participation in the Commission's work. The text also urged those States parties in a position to do so to make contributions to the Voluntary Trust Fund, and to provide medical insurance coverage to Commission members carrying out their duties in New York.

VIII. TWELFTH MEETING OF THE UNITED NATIONS OPEN-ENDED INFORMAL CONSULTATIVE PROCESS ON OCEANS AND LAW OF THE SEA (20 TO 24 JUNE 2011, UN HEADQUARTERS, NEW YORK)

41. The Twelfth Meeting of the UN Open-ended Informal Consultative Process on Oceans and the Law of the Sea (Consultative Process or ICP-12) took place from 20-24 June 2011, at UN Headquarters in New York. The meeting was co-chaired by Amb. Don MacKay (New Zealand) and Amb. Milan Jaya Meetarbhan (Mauritius). The Meeting focused its discussions on Contributing to the assessment, in the context of the United Nations Conference on Sustainable Development, of progress to date and the remaining gaps in the implementation of the outcomes of the major summits on sustainable development and addressing new and emerging challenges".[14]

42. Co-Chair Amb. Don MacKay (New Zealand) opened the twelfth meeting of the UN Open-ended Informal Consultative Process on Oceans and the Law of the Sea, noting the particular opportunity it provides for contributing to the UN Conference on Sustainable Development, and said it also allows participants to: take stock of progress to date with regard to oceans and seas; highlight gaps in the implementation of the outcomes of major summits on sustainable development; and address new and emerging challenges. Co-Chair Amb. Milan Jaya Meetarbhan (Mauritius) urged that the Consultative Process outcome truly contributes to the assessment of progress and gaps in the implementation of the outcomes of the major summits on sustainable development. He emphasized that oceans must feature prominently in the United Nations Conference on Sustainable Development (UNCSD) agenda, and highlighted the special case of small island developing states and islands supporting small communities.

43. *Sustainable Development, Oceans and the Law of the Sea:* Delegates suggested changes to clarify the level of support on particular issues, and the meaning of the text. Argentina wished to note that in addition to lacking capacity, Regional Fisheries Management Organizations (RFMOs) also lacked a mandate to address additional issues such as Marine Protected Areas (MPA)s, while the EU disagreed. On common but differentiated responsibilities, the US suggested specifying that only "some" delegations

[14] Information mention in this part is drawn from "Summary of the Twelfth Meeting of the UN Open-ended Informal Consultative Process on Oceans and the Law of the Sea: 20-24 June 2011", *Earth Negotiations Bulletin*, vol. 25, no. 76, available online at: http://www.iisd.ca/oceans/icp12/.

recalled the principle, while the G-77/China posited that its 132 delegations would qualify as "many."

44. The overview of progress to date and the remaining gaps in the implementation of the outcomes of the major summits on sustainable development: Norway requested adding to the reference on migrating cetaceans that delegations had highlighted that renewable resources must be harvested in a sustainable way, and they were ready to cooperate with existing competent fora.

45. On MPAs in, delegates discussed adjusting the reference, with the G-77/China aiming to place the issue in the context of the process to be initiated by the General Assembly following the outcome of the fourth meeting of the BBNJ Working Group. The US wished to specify the number of delegations that noted the absence of a regime for designating MPAs beyond Areas beyond national jurisdiction, as "some," but Spain, for the EU, asserted that it had been a large number of delegations.

46. On hydrocarbon exploration and exploitation, the EU, supported by Nigeria, Indonesia and the Philippines, recommended changing language to reflect the discussion of some delegations about the "possibility of developing new instruments" to address these emerging issues. Argentina suggested adding a sentence to show that "other delegations" emphasized that the issue is adequately covered by existing obligations under international law, including UNCLOS, to protect the marine environment and stressed the need to fully implement these obligations.

47. On capacity building, the G-77/China, supported by Trinidad and Tobago, requested reference to the importance of capacity building and transfer of technology for developing countries, especially Small Island Developing States (SIDS), for fully realizing the benefits of the exploration and exploitation of marine living and non-living resources in areas within and beyond national jurisdiction. The Philippines, supported by New Zealand, stressed the "need for" a coordinated approach to capacity building and technology transfer. New Zealand suggested the establishment of a clearinghouse mechanism, but Argentina recalled the lack of consensus on this, and therefore recommended language to show that this had been proposed by "some delegates."

48. New and emerging challenges for the sustainable development and use of oceans and seas: On the impacts of climate change on oceans, including sea level rise and ocean acidification, delegates agreed to note that many delegations highlighted the need for this to be addressed in the context of the United Nations Framework Convention on Climate Change (UNFCCC). New Zealand proposed, and delegates agreed, to add language on the importance of applying the precautionary approach to avoid the possible environmental impacts of marine renewable energy.

49. During the Meeting, the delegates agreed to add a new paragraph expressing concern over the possible impacts of ocean fertilization on the marine environment.

50. On the legal regime for marine genetic resources in ABNJ, Mexico, supported by the EU, Brazil and the G-77/China, called for including language reflecting support for the possible development of an implementing agreement in the outcome of the UNCSD.

51. On over fishing it was agreed to delete a paragraph that placed equal emphasis on developing and developed country involvement in harmful subsidies, as suggested by the G-77/China, and Japan emphasized their belief that the World Trade Organization is the correct forum to discuss fishery subsidies.

52. *The Road to Rio+20 and beyond:* The need for the precautionary approach was noted in relation to the development of renewable and alternative sources of energy. The G-77/China reminded the Co-Chairs of the need to reflect that, for marine biodiversity beyond national jurisdiction, there is a need for a specific regime under UNCLOS, with the US adding that many, but not all, delegations stressed this point. Language on establishing MPAs in Areas beyond national jurisdiction was deleted, and the need for institutional frameworks was recognized as enabling integration across the three pillars of sustainable development.

53. Regarding specific elements to be forwarded by ICP-12 to the UNCSD for discussion, the G-77/China, supported by the EU, requested including mention of a "specific legal regime of BBNJ," with the US saying they understood this section of the summary of discussions to reflect one specific intervention and asked that it be modified accordingly.

54. *Co-Chairs' Proposed Elements:* Participants then turned their attention to the Co-Chairs' proposed elements. The document consisted of nine sections, each with elements that could be forwarded to the UNCSD, if consensus could be reached. The sections were:

- general elements;
- legal and policy frameworks at the global level;
- sustainable fisheries;
- conservation and sustainable use of marine biodiversity;
- climate change;
- marine pollution;
- marine science;
- SIDS; and
- capacity building and transfer of marine technology.

55. Co-Chair MacKay acknowledged the decision of past ICP meetings to avoid negotiating processes, and wondered if any of the proposed elements had attracted a "natural consensus" and could be identified without negotiation.

56. The first interventions, from the G-77/China and the EU, indicated that they did not wish to enter into discussion on the elements, and preferred to use only the Co-Chairs' Summary of Discussions as the meeting's outcome. The G-77/China said ICP-12 had been very productive despite its huge task, and that the Summary of Discussions

would be useful for delegations' future evaluation of oceans issues. Attempting to reach agreement on the elements document, however, would "lead inevitably to negotiations."

57. Brazil echoed the G-77/China's view that negotiating the elements would be undesirable. She underscored the "tremendous success" of the meeting, and praised the Summary as a needed starting point on oceans for one of the UNCSD's objectives - renewing political commitments to sustainable development.

58. Co-Chair MacKay then led a discussion on options for conveying the Summary, which delegates agreed should be reviewed to ensure inclusion of the SIDS elements, to the UNCSD in light of the "time crunch" presented by the 1 November 2011 deadline for contributions to the UNCSD compilation document. It was decided that the Co-Chairs would send it to the President of the General Assembly as a non-official document, as prepared by the Co-Chairs "of their own volition," with the request to convey it to the UNCSD Secretariat on that basis. This would not conflict, it was indicated, with the General Assembly's consideration of the document as part of its normal schedule.

IX. DISPUTE SETTLEMENT UNDER UNCLOS

A. Tribunal Delivers Order in The M/V "Louisa" Case (Saint Vincent and the Grenadines v. Spain)[15]

59. On 23 December 2010, the ITLOS delivered its Order *in The M/V "Louisa" Case (Saint Vincent and the Grenadines v. Spain),* prescribing provisional measures.

i. The Dispute

60. Saint Vincent and the Grenadines instituted proceedings against Spain on 24 November 2010, regarding the MV Louisa, a vessel flying the flag of Saint Vincent and the Grenadines, which was arrested on 1 February 2006 by the Spanish authorities. The Application instituting proceedings before the Tribunal included a request for provisional measures under article 290, paragraph 1, of the Convention, in which the Tribunal was requested, *inter alia*, to order the Respondent to release the MV Louisa and return the property seized.

61. Pursuant to article 290, paragraph 1, of the Convention, the Tribunal may, if it finds that prima facie it has jurisdiction over the dispute, prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision.

[15] "Tribunal Delivers Order in The M.V "Louisa" Case (Saint Vincent and the Grenadines v. Spain), ITLOS/Press 158 dated 23 December 2010.

ii. The Order of 23 December 2010

62. In its Order of 23 December 2010, the Tribunal finds, by 17 votes to 4, that "the circumstances, as they now present themselves to the Tribunal, are not such as to require the exercise of its powers to prescribe provisional measures under article 290, paragraph 1, of the Convention."

63. Finding that it has prima facie jurisdiction over the dispute, the Tribunal considers that, at this stage of the proceedings, it does not need to establish definitively the existence of the rights claimed by Saint Vincent and the Grenadines. In this context, the Tribunal refers to its earlier jurisprudence in the M/V "SAIGA" (No. 2) case, in which it had stated that "before prescribing provisional measures the Tribunal need not finally satisfy itself that is has jurisdiction on the merits of the case and yet it may not prescribe such measures unless the provisions invoked by the Applicant appear prima facie to afford a basis on which the jurisdiction of the Tribunal might be founded."

64. In the circumstances of the case, the Tribunal does not find that there is a real and imminent risk that irreparable prejudice may be caused to the rights of the parties in dispute before the Tribunal so as to warrant the prescription of the provisional measures requested by Saint Vincent and the Grenadines.

65. Furthermore, the Tribunal notes that the Applicant contended that "there is a definite threat to the environment by leaving this ship docked in El Puerto de Santa María for any significant additional time." In this respect, the Tribunal places on record the assurances given by Spain that "the Port authorities are continuously monitoring the situation, paying special attention to the fuel still loaded in the vessel and the oil spread in the different conducts and pipes on board" and that "[t]he Capitanía Marítima of Cadiz has an updated protocol for reacting against threats of any kind of environmental accident within the port of El Puerto de Santa María and the Bay of Cadiz."

66. The Tribunal also notes that the present Order in no way prejudges the question of the jurisdiction of the Tribunal to deal with the merits of the case or any questions relating to the admissibility of the Application, or relating to the merits themselves, and leaves unaffected the rights of Saint Vincent and the Grenadines and Spain to submit arguments in respect of those questions.

67. Finally, the Tribunal reserves for consideration in its final decision the submissions made by both parties for costs in the present proceedings.

68. Judge Paik appended a separate opinion to the Order. Judges Wolfrum, Treves, Cot and Golitsyn appended dissenting opinions to the Order.

B. Unanimous Advisory Opinion by the Seabed Disputes Chamber on Responsibilities and obligations of states sponsoring persons and entities with respect to activities in the area[16]

69. The Seabed Disputes Chamber on 1 February 2011 rendered its Advisory Opinion on the Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area. The Advisory Opinion is the first decision of the Seabed Disputes Chamber of the Tribunal and the first advisory opinion submitted to it. The eleven judges of the chamber, President Tullio Treves (Italy) and Judges Vicente Marotta Rangel (Brazil), L. Dolliver M. Nelson (Grenada), P. Chandrasekhara Rao (India), Rüdiger Wolfrum (Germany), Shunji Yanai (Japan), James Kateka (United Republic of Tanzania), Albert Hoffmann (South Africa), Zhiguo Gao (China), Boualem Bouguetaia (Algeria) and Vladimir Vladimirovich Golitsyn (Russian Federation) decided unanimously upon the Advisory Opinion.

70. The Advisory Opinion relates to the recovery of resources from the 'Area', a zone established by the United Nations Convention on the Law of the Sea as the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction. The Convention declares the Area and its resources to be the common heritage of mankind. The resources of the Area, such as polymetallic nodules and polymetallic sulphides, are managed by the International Seabed Authority.

71. The Authority regulates deep seabed mining and endeavours to ensure the protection of the marine environment. The Authority has established regulations for the prospecting and exploration for both polymetallic nodules and polymetallic sulphides. Countries already involved in the prospecting or exploration of resources in the Area include China, France, Germany, India, Japan, the Republic of Korea, the Russian Federation and a consortium of Bulgaria, Cuba, the Czech Republic, Poland, the Russian Federation and Slovakia.

72. The question of the responsibility and liability of States who sponsor entities undertaking mining activities in the Area was raised in 2009 and discussed during meetings of the Authority. The outcome of these discussions was the approval by consensus of the proposal made to the Council to request an advisory opinion from the Chamber.

C. Arbitrators Appointed in the Arbitral Proceedings Instituted by Mauritius against the United Kingdom in respect of the Dispute concerning the 'Marine Protected Area' Related to Chagos Archipelago[17]

[16] For details see "Seabed Disputes Chamber Renders Unanimous Advisory Opinion in Case No. 17", ITLOS/Press 161, 1 February 2011.

[17] Details are drawn from "Three Arbitrators Appointed by the President of the Tribunal in the Arbitral Proceedings Instituted by Mauritius Against the United Kingdom in Respect of the Dispute Concerning the 'Marine Protected Area' Related to the Chagos Archipleago", ITLOS/Press 164, dated 25 March 2011.

73. On 15 March 2011, the President of the International Tribunal for the Law of the Sea, Judge José Luis Jesus, appointed three arbitrators to serve as members of the Annex VII arbitral tribunal instituted in respect of the dispute between Mauritius and the United Kingdom concerning the 'Marine Protected Area' related to the Chagos Archipelago. The arbitrators are Ivan Shearer (Australia), James Kateka (Tanzania), and Albert Hoffmann (South Africa). The President appointed Ivan Shearer as the president of the arbitral tribunal. These appointments were made in consultation with the two parties to the dispute.

74. In accordance with article 3 of Annex VII of the United Nations Convention on the Law of the Sea, if the parties are unable to reach an agreement on the appointment of one or more of the members of the tribunal to be appointed by agreement, or on the appointment of the president of the arbitral tribunal, these appointments shall be made by the President of the International Tribunal for the Law of the Sea at the request of a party to the dispute and in consultation with the parties.

75. In a letter dated 21 February 2011, the Solicitor-General of Mauritius, acting on behalf of the Government of Mauritius, requested the President of the International Tribunal for the Law of the Sea to appoint the three arbitrators, since the two parties were unable to reach an agreement thereon.

X. SUMMARY OF DELIBERATIONS ON THE AGENDA ITEM "LAW OF THE SEA" AT THE FIFTIETH ANNUAL SESSION OF AALCO (COLOMBO, SRI LANKA, 27 JUNE 2011 – 1 JULY 2011)

76. **Dr. Xu Jie, Deputy Secretary-General of AALCO**[18] while introducing the Secretariat's Report on the agenda item, he recalled that the agenda item was taken up for consideration at the initiative of the Government of Indonesia in 1970. He mentioned that the United Nations Convention on Law of the Sea, 1982 was fast moving towards universal participation and he hoped that all the Member States of AALCO would soon accede to the UNCLOS as well as its two implementing agreements. Further, he highlighted the increase in pirate attacks and armed robbery against ships at alarming rate had raised a serious threat to international commerce and maritime navigation. He called on the Member States to take adequate measures to curb the menace of piracy by enacting adequate national legislation to criminalize acts of piracy and armed robbery at sea. The DSG also highlighted the importance of protecting the marine environment as well as preserving marine species. In that regard, he invited Member States to consider formulation of necessary legal framework on the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction.

77. The **Delegation of Japan** informed that their country attached great importance to the role played by the International Tribunal for the Law of the Sea (ITLOS) on the peaceful settlement of maritime disputes and the maintenance of legal order relating to the sea. The delegation welcomed the expansion of activities of the ITLOS in the recent

[18] For the detailed Summary Report of the Fiftieth Annual Session of AALCO, see the website of AALCO, www.aalco.int

years. On the matters relating to the Commission on the Limits of the Continental Shelf (CLCS), the delegation observed that CLCS was confronted with the serious 'workload issue' caused by a large increase in the numbers of submissions which had been earnestly discussed by the State Parties of the UNCLOS. They also informed that at the 21st Meeting of State Parties to the UNCLOS held in New York, their Government had announced to contribute 211,000 US dollars to the Trust Fund for the purpose of defraying the costs of participation of the members of the Commission from developing States in the meetings of the Commission. They hoped this would facilitate the more number of participation of developing countries in the CLCS meetings in the future.

78. The **Delegation of Republic of Indonesia** stated that they attach great importance on the role of the Organization in the development of the law of the sea in particular to the implementation and application of the 1982 UNCLOS. He mentioned that the year 2012 would mark the 30th Anniversary of the Convention. The delegation also noted with appreciation and welcomed the Kingdom of Thailand for joining as a Member to the UNCLOS recently in the month of May. They wished to invite all other Member States of AALCO to ratify or accede the Convention soon. He also informed that their country hosted the 35th Annual Conference on the Law of the Sea and Ocean Policy in Bali. The said Conference was attended by 115 participants from 14 countries aimed at sharing their experiences *inter alia*, in maritime border diplomacy. They expressed great concern on the issues relating to pirate attacks and armed robbery in the waters off the coast of Somalia.

79. The **Delegation of the People's Republic of China** expressed appreciation to the Secretariat for its comprehensive report on the Law of the Sea item. The delegation pointed out that in view of the 30th Anniversary on the adoption of UNCLOS, the Organization should deliberate upon this agenda item at its next Annual Session. He also elaborated upon three key issues, namely, i) issues relating to sustainable development of oceans, ii) safety and navigation of shipping, conservation and iii) sustainable use of marine biodiversity in areas beyond national jurisdiction. While discussing the issues relating to safety and navigation of shipping, the delegation stressed that piracy remains a major threat to safety of navigation. The issue of piracy was more severe especially in Asia and Africa. To solve the root causes of piracy, they would be willing to work with all countries in facilitating the peace process of relevant countries, and promoting their political stability, economic development and social order.

80. The **Delegation of Thailand** thanked the Secretariat for preparing the document on the agenda item. He informed that he represented Group of 77 (G 77) at the 12th Meeting of the UN Open-Ended Informal Consultative Process on Oceans and Law of the Sea (ICP 12), as a panelist held at the UN Headquarters in New York which was focused on ocean related matters which would be due to the Rio+20 Meeting in 2012. He mentioned that at the ICP 12, many AALCO Member States actively participated in the deliberations of ICP 12. He further recommended that the AALCO Member States to consider the outcome document of ICP 12 prepared by two co-chairs from Mauritius and New Zealand, and comment on it under the agenda "the Law of the Sea" at the

forthcoming UN General Assembly session, in order to enhance their collective maritime security interests at the Rio+20 Summit in June 2012.

81. The **Delegation of Malaysia** stated that UNCLOS was well recognized as the "constitution of the oceans" and "cornerstone of the maritime order". The breadth of the Convention's provisions embrace issues such as the safety of navigation as well as the protection and preservation of the marine environment. Nevertheless, the Convention could not resolve jurisdictional issues arising from unresolved maritime boundaries, she remarked. On the issue related to piracy, the delegation mentioned that although it was an age-old phenomenon, its latest incarnation off the coast of Somalia poses grave cause of concern. The delegation welcomed the concerted and consolidated response plans initiated by UN through Chapter VII of the Charter of the United Nations. In order to counter the menace of piracy, they were in the process of reinforcing its anti-piracy legislative framework with reference to the UNCLOS, the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention) and SUA Protocol. In that regard, the delegation stated that AALCO should come forward to provide necessary technical assistance to its Member States to deal with the need to enact specialized and comprehensive laws on piracy and other maritime security offences. Further, AALCO should explore the possibility of bring out a comprehensive study and a legislative drafting workshop on anti-piracy legislation in order to assist the Member States on the subject matter.

82. The delegation of Malaysia proposed that the issue of piracy be placed on AALCO's agenda for further deliberation at a special session at its Fifty-First Session of AALCO and the Special Session could focus on the cooperative legal measures and actions that could be undertaken by AALCO Member States for the purpose of preventing and combating piracy. The delegation also pointed out issues relating to the capacity building in the areas of ocean affairs and the law of the sea and preservation of marine environment and overexploiting of marine resources.

83. The **Delegation of the United Republic of Tanzania** mentioned that their country signed and ratified the UNCLOS in 1985 and they consider that it was an instrument which was put in place a more coherent management of the sea. The delegation stressed on the importance of maintaining international peace and security, sustainable use of ocean resources and the navigation and protection of marine environment. The delegation raised concern on the issue of piracy which posed a big problem to trade and security. In order to check the menace of piracy, their Government amended its penal legislation in order to ensure that there was adequate and comprehensive legal mechanisms for combating crimes related to piracy.

84. The **Delegation of the Republic of Kenya** welcomed Thailand as the 162nd Member State of the UNCLOS. As regards the workload of the CLCS was concerned, his delegation supported to have a full time Commission working in New York for a given initial duration until such time when the workload reduces. The delegation noted with grave concern on the issue of piracy and armed robbery against ships at sea off the coast of Somalia. Acts of piracy had adversely affected the fishing, tourism and shipping

industries in East Africa. In that regard, they welcomed efforts made by the international community to combat piracy, including the establishment of a Contact Group on Piracy off the Coast of Somalia which had some deterrent effect on Piracy and armed robbery in the region. His delegation also welcomed the recent interim guidance by the International Maritime Organization (IMO), on the employment of private contracted armed security personnel on board ships transiting the high risk piracy area off the coast of Somalia and in the Gulf of Aden and the wider Indian Ocean was approved by IMO's Maritime Safety Committee in May 2011.

85. The **Delegation of the Islamic Republic of Iran** while reiterating the high importance it attached to the agenda item, expressed its deep appreciation to the UN General Assembly for its useful considerations about the issues relating to the law of the sea and sustainable fisheries, including through the 1995 Agreement on the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks and called upon all the Member States to bolster their support for the United Nations framework established by the 1982 United Nations Convention on the Law of the Sea. The delegation stated that it was now acceptable that maritime piracy and armed robbery against ships at sea now in threshold of 21st century renewed its life despite of its reduction through previous centuries. The delegation urged the Member States to criminalize acts of piracy and prosecute pirates. The delegation also emphasized that AALCO Member States should take lead in formulating a legal framework in order to conserve as well as sustainable use of marine biodiversity in areas beyond national jurisdiction.

86. The **Delegation of India** stated that the topic of the Law of the Sea was of great importance to his country and he recalled the significant contributions made by AALCO to this agenda item. The delegation also welcomed Thailand as a new Member to the UNCLOS. The delegation pointed out that India had special interest in the law of the sea regime as his country was the first State as pioneer investor. On the issues relating to piracy, the delegation stated that Indian crew and seafarers were victims of piracy and in order to combat piracy, the Indian Navy was cooperating with other countries in the region. The delegation also mentioned that his country was in the process of updating its law on piracy, and it would soon come up with new legislative measures. The delegation was of the view that as the fishery resources were depleting at the increasing rate, he stressed on the need to utilize the fishery resources at a sustainable basis. In that regard, the delegation was of the view that coastal States must be given power to enforce the regulation of fishery resources not only in the territorial sea but also there was a need to have higher role in enforcing the conservation measures of fishery resources in high seas adjoining the Exclusive Economic Zone.

87. The **Delegation of the Arab Republic of Egypt** expressed its concern on growing piracy and its threats to safe international navigation. The delegation highlighted the cost of navigation and insurance had increased and caused great challenge to international community. The delegation condemned the Israeli action in the international waters against the humanitarian fleet carrying food and medicines for the besieged Gaza strip and stated that UN and other Organizations should evolve necessary

punitive actions. The delegation was of the view that it constituted clear violation of safety navigation and international law. The delegation observed that stern laws are required to suppress piracy and terrorism at Sea. The delegation recommended that AALCO should take up sea piracy and incorporate the topic in the Sessions of AALCO and deserved the Member States serious consideration.

88. The **Delegation of Pakistan** highlighted its role in combating piracy and explained the recent actions taken against piracy thus saving people of different nationalities.

XI. COMMENTS AND OBSERVATIONS OF THE AALCO SECRETARIAT

89. The AALCO Secretariat welcomes Thailand, one of the AALCO Member States who had ratified the United Nations Convention on the Law of the Sea Convention recently in June 2011. The number of States Parties, to the UNCLOS, having reached 162 is demonstrative of international community's efforts to benefit from a strong, universally accepted and implemented legal regime applicable to the oceans. It was essential for maintaining international peace and security, sustainable use of ocean resources, and the navigation and protection of marine environment. The integrity of the Convention should be safeguarded as it was the cornerstone of maritime order.

90. The focus of discussion at the Twelfth Meeting of the Informal Consultative Process on contributing to the assessment, in the context of the UN Conference on Sustainable Development (Rio+20), of progress to date and the remaining gaps in the implementation of the outcomes of the major summits on sustainable development and addressing new and emerging challenges is timely. Throughout the Meeting, the delegates repeatedly highlighted the need for a robust outcome from Rio+20 to counteract the current rate of environmental impacts and emerging threats to the health oceans. To protect the marine environment, high level attention from the States is necessary for the implementation and advancement of their commitment and obligations.

91. In view of the Commission's long-projected timeline and increasing workload, adoption of workable mechanisms to resolve those challenge were necessary. The solutions worked out at the Twenty-First meeting of States Parties are welcome step in this direction. However, questions remained with regard to the amount of resources required, their source and ways to effectively apply them so as to achieve results. It is timely that one of the AALCO Member States, Japan had announced that the Government would provide $211,000 to the trust fund to help defray the costs of members from developing countries. In this regard, more such countries should come forward to assist the trust fund.

92. An increase in piracy and armed robbery against ships is a major threat to international commerce and maritime navigation. It posed threat to the lives of seafarers and the safety of international shipping, causing considerable economic disruptions through higher transportation costs, including insurance costs were serious challenge to the international community. All acts of piracy and hijacking of commercial vessels, as

well as acts of terrorism at sea, particularly piracy in the Gulf of Aden. Recent reports suggest that piracy off the coast of Somalia and in the Gulf of Aden had expanded to areas along the eastern African coast and into the Indian Ocean.

93. Reaching a lasting comprehensive settlement of the situation in Somalia was closely tied to the spread of piracy in that region, and more attention by the international community ought to be given to that issue. In this regard, the long-term efforts through cooperative mechanism in the Straits of Malacca and Singapore remained one of the best practices and applicable mechanisms on combating piracy and armed robbery at sea. The Security Council, the Assembly and the Contact Group on Piracy off the Coast of Somalia had all underscored the need for improving the capacity of States to counter that persistent scourge. Unfortunately, many of the AALCO Member States lack national legislation to check the modern piracy. Therefore, the need of the hour is to enact adequate national legislation to criminalize acts of piracy and armed robbery at sea, and associated crimes, as well as modern procedure laws, which are sine qua non for the effective suppression of piracy.

94. On the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction, there was a need to balance the protection and use of biodiversity in such areas, taking into account developing nations' dependence on oceans. A universally accepted legal framework had yet to be established and States must exercise caution in establishing protected areas. Towards achieving this objective, AALCO Member States shall take lead in formulating such a legal framework in order to conserve as well as sustainable use of marine biodiversity in areas beyond national jurisdiction.

95. It may be recalled that the item "Law of the Sea" was taken up for consideration by the Asian-African Legal Consultative Organization (AALCO) at the initiative of the Government of Indonesia in 1970, since then it has been considered as one of the priority items at successive Annual Sessions of the Organization. The AALCO can take reasonable pride in the fact that new concepts such as the Exclusive Economic Zone (EEZ), Archipelago States and Rights of Land Locked States originated and developed in the AALCO's Annual Session and were later codified in the UNCLOS.

96. After the adoption of the Convention in 1982, the AALCO's Work Programme was oriented towards assisting Member States in matters concerning their becoming Parties to the UNCLOS and other related matters. With the entry into force of the UNCLOS in 1994, the process of establishment of institutions envisaged in the UNCLOS began. The AALCO Secretariat prepared studies monitoring these developments and the Secretariat documents for AALCO's Annual Sessions reported on the progress of work in 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.

2. MEASURES TO ELIMINATE INTERNATIONAL TERRORISM

I. INTRODUCTION

A. Background

1. 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.

2. Several international legal instruments were adopted addressing certain specific acts of terrorism, which are also known as Sectoral Conventions.[19] However, the adoption of the historic Declaration on "Measures to Eliminate International Terrorism" by the General Assembly at its 49th Session on 9th December 1994[20] gave impetus to the active consideration of the issues involved. At its 51st Session, the General Assembly adopted a Supplement to its 1994 Declaration and established an Ad Hoc Committee[21] with the mandate to elaborate an International Convention for the Suppression of Terrorist Bombings and another one on Suppression of Acts of Nuclear Terrorism. Following that mandate, the Ad Hoc Committee met twice during the year 1997 and

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

[20] A/RES/49/60.

[21] A/RES/51/210.

completed its work on the International Convention for the Suppression of Terrorist Bombings, which later was adopted by the General Assembly at its 52nd Session on 15 December 1997.[22] In the meantime, at its 53rd Session, the General Assembly initiated consideration of a draft Convention for the Suppression of Financing of Terrorism taking as a basis for discussion the draft text submitted by the delegation of France to the Sixth Committee. The Convention was adopted by the General Assembly on 9th December 1999[23]. The matters concerning elaboration of an International Convention for the Suppression of Acts of Nuclear Terrorism have been discussed extensively in the subsequent meetings of the Ad Hoc Committee and its Working Group. The UN General Assembly adopted the Convention on 13 April 2005.

3. 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 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.

4. 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. 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.

II. AD HOC COMMITTEE ON INTERNATIONAL TERRORISM

A. Background

5. In 1996, the General Assembly, in resolution 51/210 of 17 December, decided to establish an Ad Hoc Committee to elaborate an international convention for the suppression of terrorist bombings and, subsequently, an international convention for the suppression of acts of nuclear terrorism, to supplement related existing international instruments, and thereafter to address means of further developing a comprehensive legal framework of conventions dealing with international terrorism. This mandate continues

[22] A/RES/52/164.
[23] A/RES/54/109.

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. The Ad Hoc Committee's mandate is further framed by the following two declarations adopted by the General Assembly:

- the Declaration on *Measures to Eliminate International Terrorism, Res. 49/60 of 9 December 1994*; and
- the Declaration to Supplement the 1994 Declaration on *Measures to Eliminate International Terrorism, Res. 51/210 of 17 December 1996*.

B. Ad Hoc Committee's work

7. Since its establishment, the Ad Hoc Committee has negotiated several texts resulting in the adoption of three treaties:

- the *International Convention for the Suppression of Terrorist Bombings adopted by the General Assembly in resolution 52/164 of 15 December 1997*;
- the *International Convention for the Suppression of the Financing of Terrorism adopted by the General Assembly in resolution 54/109 of 9 December 1999*; and
- the *International Convention for the Suppression of Acts of Nuclear Terrorism adopted by the General Assembly in resolution 59/290 of 13 April 2005*.

By the end of 2000, work had begun on a draft comprehensive convention on international terrorism.

C. Current Mandate of the Ad Hoc Committee

8. Under the terms of General Assembly resolution 65/34 adopted on 6 December 2010 (operative paragraph 23), the Ad Hoc Committee shall, on an expedited basis, continue to elaborate the draft comprehensive convention on international terrorism, and shall continue to discuss the item included in its agenda by General Assembly resolution 54/110 concerning the question of convening a high-level conference under the auspices of the United Nations.

D. The Fifteenth Session of the Ad Hoc Committee, (11 - 15 April 2011, UN Headquarters, New York)

9. 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 UN Headquarters from 11 to 15 April 2011. In accordance with paragraph 9 of General Assembly resolution 51/210, the Ad Hoc Committee was open to all States Members of the United Nations or members of the specialized agencies or of the International Atomic Energy Agency. The Ad Hoc Committee held two plenary meetings: the 47th on 11 April and the 48th on 15 April 2011. At the 47th meeting, on 11 April, the Ad Hoc Committee adopted its programme of work and decided to proceed with its discussions in informal consultations and informal contacts. During the informal consultations on 11 and 12

April, the Committee held a general exchange of views on the draft comprehensive convention on international terrorism and on the question of convening a high-level conference. Further informal consultations regarding the draft comprehensive convention were held on 12 April and informal discussions were held on 12 and 13 April.

10. At the 48th meeting, on 15 April, the Coordinator of the draft convention, Maria Telalian (Greece), made a statement briefing delegations on the informal contacts held during the current session. The Coordinator reported that formal bilateral discussions had been organized on 12 and 13 April 2011 and additional informal discussions with delegations had been held in the course of the Ad Hoc Committee session. Delegations had reiterated the importance that they attached to the conclusion of the draft convention. At the same time, they had shared their frustrations regarding the lack of progress, particularly as there did not seem to be any indication that some of the key delegations were ready to move forward with the process. The Coordinator was nevertheless encouraged that there was a renewed sense of urgency to finalize work during the early part of the sixty-sixth session of the General Assembly and an ever increasing number of delegations had voiced their willingness to proceed on that basis. In that regard, some delegations had offered to take up the issue at the highest levels in the context of their regional frameworks in a concerted attempt to lend political support to the efforts of the Ad Hoc Committee.

11. The Coordinator observed that in the discussions with delegations there had been a focus on two aspects, namely the value added of the draft convention as a law enforcement instrument and the import of the 2007 elements of an overall package. The Coordinator observed that the draft comprehensive convention did not have only a symbolic value. In addition to the robust prevention and cooperation provisions, the negotiating process had managed to elaborate, in draft article 2 of an instrument that would be legally binding, the inclusionary elements of a legal definition of international terrorism. Once adopted, it would be the first time that States would have, in a universal counter-terrorism instrument, a definition that would serve as the basis for taking counter-terrorism measures. The Coordinator also recalled that in elaborating draft article 2, the negotiating process sought to clarify the relationship between the draft convention and other fields of international law. As such, there was a linkage between the elements in draft article 2 and the exclusionary elements of draft article 3 [18]. In presenting the consolidated text of the draft articles in document A/C.6/65/L.10, and in placing the former draft article 18 closer to draft article 2 so that it became draft article 3, the Bureau had sought to accentuate this significant relationship.

12. The Coordinator also stressed that the nature of the incremental work, in the context of the Ad Hoc Committee's efforts over the years, should not be underestimated. Draft article 2, in its present form, represented a common understanding of efforts to provide a definition of what was understood as terrorism. What the Ad Hoc Committee had been doing was not only legally sound but also politically prudent. Draft article 2 contained a consistent definition of terrorist acts, which was also in line with the general practice of the General Assembly. Indeed, since its 1994 Declaration on Measures to Eliminate International Terrorism, the Assembly had condemned terrorist activities

"wherever and by whomever committed" both in peacetime and in situations of armed conflict. It was also pointed out that, for an offence to be committed under the terms of draft article 2, it was explicitly required that a person acts "unlawfully and intentionally''. These words had been chosen carefully to denote the criminal nature of the activity. The Coordinator recalled that the 2007 elements had been presented after protracted informal consultations, in which delegations had offered proposals and ideas, and had shared with the Coordinator the principles that they wanted to see reflected. It was on the basis of such consultations that the elements had been presented; a stage had therefore been reached where the Coordinator felt comfortable to present a text. The elements were an outcome of a collective effort. As Coordinator, she considered that slicing the elements at this late stage would detract from the efforts of the many delegations that had assiduously participated in the consultations to find a compromise. Not only would such a course of action unbalance the text but it would also signal that delegations were not ready to compromise. The informal consultations concerning 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.

III. DEVELOPMENTS IN THE COUNTER TERRORISM COMMITTEE (CTC)

A. Background

13. The Counter-Terrorism Committee (CTC) derives its mandate from Security Council resolution 1373 (2001), which was adopted unanimously on 28 September 2001. The Committee is monitoring the implementation of its anti-terrorism mandates and it is made up of all 15 members of the Security Council. 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.

14. 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. 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 laws.

B. CTC adopts Plan of Action for the Implementation of Resolution 1624

15. The Counter-Terrorism Committee (CTC) adopted on 31 March 2011, a Plan of Action to assist Member States in the implementation of Security Council resolution 1624 (2005) on terrorist incitement and violent extremism. Resolution 1624 (2005) pertains to incitement to commit acts of terrorism, calling on UN Member States to prohibit it by law, prevent such conduct and deny safe haven to anyone "with respect to whom there is credible and relevant information giving serious reasons for considering that they have been guilty of such conduct."

16. The Plan of Action presented to the CTC by its Executive Directorate (CTED) calls for the development of comprehensive national counter-terrorism strategies to counter and prevent incitement to commit terrorist acts. Considering that the Internet and other technologies have been used to incite and recruit people, the Plan of Action emphasizes the importance of identifying effective measures to prevent terrorists from spreading their violent messages. CTED will also continue to collect data on good practices, codes and standards with a view to sharing them with Member States.

17. At the request of the Security Council, CTED will publish in December 2011 a global survey outlining strengths and weaknesses Member States have in implementing resolution 1624. The survey will present general trends and assess progress, which can then translate into technical assistance for States in need of support. At least two regional workshops will be organized this year to raise awareness of the provisions of the resolution and gather information for the global survey.

18. An open dialogue with Member States and engagement with partner organizations are also key elements of the Plan of Action. Communities need to be involved in the process to counter intolerance and extremism, as well. Civil society, academic institutions and the media can contribute to the fight against terrorism.

IV. DELIBERATIONS ON THE COMPREHENSIVE CONVENTION ON INTERNATIONAL TERRORISM AT THE SIXTH COMMITTEE OF UN GENERAL ASSEMBLY AT ITS SIXTY-FIFTH SESSION (2010)

A. Report of the Working Group

19. Pursuant to General Assembly resolution 64/118 of 16 December 2009 and upon the recommendation of the Ad Hoc Committee established by the General Assembly in its resolution 51/210 of 17 December 1996, the Sixth Committee decided, at its 1st meeting, on 4 October 2010, to establish a working group with a view to finalizing the draft comprehensive convention on international terrorism and to continue to discuss the item included in its agenda by the Assembly in its resolution 54/110 of 9 December 1999, in which the Assembly addressed the question of convening a high-level conference under the auspices of the United Nations. At the same meeting, the Sixth Committee elected Mr. Rohan Perera (Sri Lanka) as Chair of the Working Group. It also decided to open the Working Group to all States Members of the United Nations or members of the

specialized agencies or of the International Atomic Energy Agency. In keeping with its established practice, the Working Group decided that members of the Bureau of the Ad Hoc Committee would continue to act as Friends of the Chair during the meetings of the Working Group.

20. The Working Group held two meetings, on 18 October and on 2 November 2010. It also held informal consultations on 20 and 21 October. At its 1st meeting, on 18 October, the Working Group adopted its work programme and decided to proceed with discussions on the outstanding issues relating to the draft comprehensive convention on international terrorism and, thereafter, consider 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. The Chair, together with the Coordinator of the draft comprehensive convention, Ms. Maria Telalian, also held several rounds of bilateral contacts with interested delegations on the outstanding issues relating to the draft comprehensive convention. Annex I of the report contains the texts of the preamble and articles 1, 2 and 4 to 27 of the draft comprehensive convention, 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 General Assembly resolution 51/210 of 17 December 1996 at its sixth session (A/57/37), for discussion, taking into account developments in recent years. Annex II of the report contains texts of written proposals in relation to the outstanding issues surrounding the draft comprehensive convention. At its 2nd meeting, on 2 November, the Working Group received a report on the results of the bilateral contacts held during the current session. Annex III of the report contains an informal summary of the exchange of views during the meetings of the Working Group and its informal consultations. The informal summary is for reference purposes only and not an official record of the proceedings. At its 2nd meeting, on 2 November 2010, the Working Group decided to refer the consideration of the present report to the Sixth Committee.

B. Consideration at the Sixty-Fifth Session of the UN General Assembly

21. In their general comments, delegations stressed that terrorism was one of the most serious threats to worldwide peace and security, with some highlighting that it undermined democracy, peace, freedom and human rights. In that regard, delegations reiterated their firm condemnation of terrorism in all its forms and manifestations and their commitment to contribute to the international fight against terrorism. It was underlined that no cause could justify terrorism, and some delegations stressed that it should not be associated with any religion, culture, ethnicity, race, nationality or civilization. Views were also expressed that counter-terrorism policies must strike a balance between security considerations and respect for human rights values. Thus, delegations underscored the need for the respect for the rule of law in the context of the fight against terrorism, in strict observance of the Charter of the United Nations and international law, including human rights, humanitarian and refugee law.

22. Recognizing the central coordinating role of the United Nations in combating terrorism, States were called upon to fully implement all Security Council and General

Assembly resolutions on terrorism, singling out in particular Security Council resolutions 1267 (1999), 1373 (2001) and 1540 (2004), as well as the work of the sanctions committees established by these resolutions. Reference was also made by several delegations to the Statement by the President of the Security Council on 27 September 2010. Moreover, several delegations commended the appointment of the Ombudsperson pursuant to Security Council resolution 1904 (2009) and stressed the importance of further improvements to the listing and delisting procedures. The need to consider the impact of the reporting procedures on States was also mentioned by some delegations.

23. Delegations expressed their continued support for and commitment to the United Nations Global Counter-Terrorism Strategy (General Assembly resolution 60/288) and its four pillars, and welcomed the recent second biennial review of its implementation. In this respect, it was emphasized that it was important to implement the Strategy as it constitutes a core document and strategic framework of the international community in fighting terrorism. It was also pointed out that the four pillars of the Strategy needed to be implemented without selectivity. Some delegations noted that the Strategy was a living document which needed to be updated regularly. The institutionalization of the Counter-Terrorism Implementation Task Force was also welcomed, and, while underscoring the primary responsibility of States to implement the Strategy, support was expressed for the role of the Task Force in enhancing coordination and coherence of counter-terrorism efforts of the United Nations system and its intention to conduct regular briefings. Several delegations stressed the importance of adequate funding for the Task Force. Furthermore, several delegations stressed that the fight against terrorism included the need to give proper support and protection for the victims of terrorist attacks.

24. Delegations emphasized that cooperation at the international, regional and sub-regional levels was essential in combating terrorism. Highlighting the crucial role played and the useful work done by the United Nations Office on Drugs and Crime (UNODC) and the Counter-Terrorism Committee Executive Directorate (CTED), some delegations stressed the importance of capacity-building measures and technical assistance. Several delegations also mentioned the importance of developing partnerships, including exchanging information, among States, civil society and the private sector in the field of counter-terrorism.

25. Furthermore, a number of delegations noted that the complex challenge posed by terrorism necessitated a comprehensive response. In this regard, they alluded to the need to address the root causes of terrorism and to eliminate the conditions conducive to its spread, as well as to address the dangers and destabilizing effects of State terrorism. Several delegations also underscored the importance of dialogue and interaction among various religions, cultures and civilizations. Such approaches would broaden mutual understanding and foster a culture of tolerance.

26. Some delegations pointed to the need for a clear definition of terrorism and echoed the need to distinguish it from the exercise of the right to self-determination of peoples under foreign occupation, colonial or alien domination. The importance of becoming party to the universal and regional counter-terrorism instruments and

implementing them fully was emphasized. Several delegations stressed that perpetrators of acts of terrorism should be prosecuted, and underlined the importance of implementing the *aut dedere aut judicare* obligation in combating terrorism. Several delegations also commended the recent adoption of the *Beijing Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation* and the *Beijing Protocol Supplementary to the Convention for the Unlawful Seizure of Aircraft*, as important advancements for counter-terrorism by addressing new and emerging threats to civil aviation.

27. Some delegations pointed to the potential dangers posed particularly by the possible acquisition by terrorists of weapons of mass destruction and use of information and communication technologies, while also sharing their concern about the close links between terrorism and transnational organized crime, including money laundering, arms smuggling and trafficking in illicit drugs, as well as piracy. In particular, some delegations expressed their deep concerns regarding developments concerning the financing of terrorism, especially the increase in incidents of kidnapping and hostage-taking with the aim of raising funds for terrorist purposes and urged United Nations action to stem the tide of these developments. Attention was also drawn to the tendency to exploit local conditions to build terrorist networks in efforts to further the criminal enterprise and extremist ideology. The need to address incitement of terrorism was also underlined by some delegations, as well as the question of deliberate targeting of certain religions to provoke religious intolerance.

28. A number of delegations described the initiatives taken or planned at the national, regional and global level to counter terrorism and implement international obligations. This included the adoption of laws, as well as actions taken in relation to criminalization and addressing issues concerning financing of terrorism, money laundering, improvements to border security and denial of safe havens.

29. Concerning the work of the Ad Hoc Committee established by General Assembly resolution 51/210, delegations reiterated their call for the early conclusion of the draft comprehensive convention on international terrorism, which would supplement and strengthen the existing legal framework and enhance cooperation between States in their counter-terrorism efforts. In this context, reference was made to the 2005 World Summit Outcome (General Assembly resolution 60/1) and the United Nations Global Counter-Terrorism Strategy, stressing that concluding the draft convention should be a priority. States were urged to show flexibility and political will in order to resolve the outstanding issues, at the current session, preferably by consensus. The view was also expressed that it might be time to reconsider the usefulness of continuing the current negotiation process in the event no progress could be attained during the current session.

30. Some delegations reiterated their support for the proposal made by the Coordinator at the 2007 session of the Ad Hoc Committee (A/62/37, annex, para. 14) and considered that it constituted a balanced and legally sound compromise solution, which properly respected the integrity of international humanitarian law. It was also reiterated that the draft convention should be viewed as a criminal law instrument, dealing with

individual criminal responsibility, on the basis of the principle of extradite or prosecute. It did not lend itself to addressing State terrorism. Some delegations expressed their readiness to resolve some of the political difficulties in an accompanying resolution.

31. While some delegations stated their willingness to continue to consider the Coordinator's 2007 proposal as a compromise text, they reiterated their preference for the earlier proposals relating to draft article 18. On the one hand, it was pointed out that any compromise text had to be predicated on the principle that no cause can justify any act of terrorism and that the text should draw upon existing language that had already been agreed upon elsewhere. On the other hand, the need for a clear legal definition of terrorism, which distinguished terrorism from the legitimate struggle of peoples in the exercise of their right to self-determination from foreign occupation or colonial domination was reaffirmed. Some delegations also expressed the view that the draft convention should address all forms of terrorism, including State terrorism, and that it should cover acts by armed forces not covered by international humanitarian law. In this context, a previously made proposal to add language to draft article 2 was reiterated.

32. Some delegations reiterated their support for the proposal to convene a high-level conference under the auspices of the United Nations. While some delegations expressed a preference for convening the conference once agreement has been reached on the draft comprehensive convention on international terrorism, some other delegations pointed out that the convening of a conference should not be linked to the conclusion of the draft convention.

33. Some delegations expressed support for the initiative of Saudi Arabia to establish an international centre, under the aegis of the United Nations, to combat international terrorism, and for the proposal by Tunisia to convene a high-level conference to establish an international code of conduct in the fight against terrorism. Some delegations made reference to the establishment of regional research centres aimed at understanding international terrorism and the need to accord them support.

V. COMMENTS AND OBSERVATIONS OF THE AALCO SECRETARIAT

34. Terrorism, which has been a matter of legal concern to the international community since the days of League of Nations, poses a threat to all states and to all peoples. It is criminal and unjustifiable under any circumstances. It is a direct attack on the core values the United Nations stands for: the rule of law; the protection of civilians; mutual respect between people of different faiths and cultures; and peaceful resolution of conflict. Terrorist activities by any individual, groups, non-State entities or States have to be checked by all possible means. Furthermore, any attempt to link terrorism with any religion, race, culture or ethnic origin should be rejected.

35. Fighting terrorism has remained a priority for the United Nations. The United Nations and its Specialized Agencies have played a central role in negotiating and adopting twelve international anti-terrorism treaties. Several regional intergovernmental organizations have established anti-terrorism conventions as well, including the

Organization of American States, the Council of Europe, the South Asian Association for Regional Cooperation, the League of Arab States, the Organization of African Unity, and the Organization of the Islamic Conference. All this progress should inspire the international community of States towards negotiations aimed at drafting a comprehensive convention on international terrorism, which will coherently supplement the international body of law. Even while welcoming the recent efforts of the Member States of UN to adopt such a Convention, AALCO stresses that counter-terrorism initiatives should not be used as a pretext for interfering in the domestic affairs of countries and that each country's sovereignty and territorial integrity should be respected and should not be violated under any circumstances.

36. The AALCO reiterates its strong condemnation of terrorism in all its forms and manifestations, and highlights the critical role of dialogue and international cooperation in an effective combat against it. We underline the central role of the United Nations in the fight against terrorism and also strongly believe that measures taken to combat terrorism should also address the root causes of violence and comply with all obligations of states under international law and should adopt such measures in conformity with the Charter of the United Nations and international law, in particular international human rights, refugee and humanitarian law.

37. As is well-known, no common and internationally adopted definition of terrorism exists. Although it has diverse versions, there is a growing demand that it needs a universally acceptable definition to solve the problem. The definition may be drafted in such a manner that the root causes and underlying factors of terrorism should be taken into account, as well as protection of human rights and fundamental freedoms. The definition of terrorism may be possible on the basis of experts' views and with the support of various countries. In addition, 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".

38. Treaty-based international legal efforts to combat terrorism have suffered from some problems such as lack of effective enforcement and deterrence and are characterized in particular by the absence of a comprehensive convention governing the international dimensions of the fight against terrorism. There is no comprehensive convention on international terrorism that even modestly integrates, much less incorporates, into a single text all the twelve conventions so as to eliminate their weaknesses. The need to have such an instrument is compelling in that, the efforts of the international community in its fight against terrorism has been characterized by piecemeal approach. That is to say, each deals with a specific terrorist act such as hijacking, hostage-taking or air craft sabotage. The absence of a coherent international legislative policy on terrorism is consistent with the *ad hoc* and discretionary approach that governments have taken toward the development of effective international legal responses to terrorism. Thus, international legal norms governing terrorism rest essentially on the identification of certain types of conduct or means employed. There has been no international initiative to systematize, update, integrate, or even harmonize these

international norms. This piecemeal approach needs to be complemented by a comprehensive approach.

39. It has been the firm belief of AALCO that terrorism must be addressed with effective and legitimate means by law enforcement and the national justice systems of all countries of the world. The need to develop adequate domestic and international mechanisms to prevent, control and suppress acts of terrorism can hardly be exaggerated. National implementation laws granting enforcement powers to various agencies are crucial in the fight against terrorism. Further, mutual legal assistance in counter-terrorism and criminal matters are of prominent significance. The control of its manifestations depends on international cooperation, but its prevention requires addressing its root causes. If we are to put an end to all acts of terrorism we need an effective international legal regime with enforcement capabilities. The world community needs, however, to go beyond security measures to provide an effective answer to terrorism. We need to give every person on this globe a reason to cherish his or her own rights, and to respect those of others. We need also to ensure that innocent people do not become the victims of counterterrorism measures. We need commitment to a unifying framework that is grounded in the harmony of common values, common standards, and common obligations to uphold universal rights. It is that framework which defines us as one global community and which enables us to reach beyond our differences.

4. REPORT OF THE INTERNATIONAL CRIMINAL COURT

I. INTRODUCTION

1. On 17 July 2011, the first "International Criminal Justice Day" was celebrated, as everywhere, people want peace, justice, rule of law and respect for human dignity. The International Criminal Court (ICC) represents the gathering of nations in a community of values and aspirations for a more secure future for children, women and men around the world.[24] The ICC, governed by the "Rome Statute",[25] is the first permanent, treaty based court established to help end impunity for the perpetrators of the most serious crimes of international concern namely, the Crimes of Genocide, Crimes against Humanity, War Crimes and the Crime of Aggression[26]. The Court may exercise jurisdiction over such international crimes only if they were committed on the territory of a State Party or by one of its nationals. These conditions however do not apply if a situation is referred to the Prosecutor by the United Nations Security Council, or if a State makes a declaration accepting the jurisdiction of the Court. As of 10 August 2011, 117 countries are States Parties to the Rome Statute of the ICC.[27]

2. The Statute recognizes that States have the primary responsibility for investigating and punishing the crimes and also the Court is complementary to the efforts of States to investigating and prosecuting international crimes. The Court is the focal point of an emerging system of international criminal justice which includes national courts, international courts and tribunals with both national and international components. The implementation of the Rome Statute in domestic legal systems also has positive effects on wider aspects of the national justice system, such as offering greater access to justice for all and setting higher standards of due process for the accused. And the powerful deterrent effect of the Statute may increasingly help safeguard the rights and dignity of future generations.

3. There are currently six country situations (Uganda, the Democratic Republic of Congo, the Central African Republic, Darfur (Sudan), Kenya and Libyan Arab Jamahiriya, which are being actively investigated or prosecuted at the ICC. As of June 2011 a seventh situation was before the Court as the Prosecutor had requested authorization from the Judges to investigate the situation in Cote d' Ivoire since 28 November 2010. It may be recalled that on 16 October 2009 a Palestinian National Authority delegation submitted a preliminary report presenting its legal arguments in support of the declaration lodged on 22 January 2009, accepting the jurisdiction of the

[24] Quoted from ICC President's Message - Day of International Criminal Justice, 15 July 2011.

[25] 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.

[26] The first Review Conference of the Rome Statute of the ICC held in Kampala, Uganda from 31 May to 11 June 2010 amended the Rome Statute so as to include the definition of the Crime of Aggression and the conditions under which the Court could exercise jurisdiction with respect to the crime.

[27] Out of the 116 countries that are States Parties to the Rome Statute of the International Criminal Court, 32 are African States, 15 are Asian States, 18 are from Eastern Europe, 26 are from Latin America and Caribbean States and 25 are from Western Europe and other States.

Court over the crimes committed by Israel in Palestine. The Prosecutor of the ICC is presently analyzing the situation.

4. 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 on 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.

5. 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.

6. The Forty-Ninth Annual Session held in Dar es Salaam, (United Republic of Tanzania), 2010 Vide resolution AALCO/RES/49/SP 1, adopted on 8 August 2010 had requested the Secretary-General to consider the possibility of convening a Workshop in collaboration with the International Criminal Court in Kuala Lumpur specifically for the non-State Parties to the Rome Statute of the International criminal Court. That mandate was also reiterated at the Fiftieth Annual Session held in Colombo, Sri Lanka from 27 June to 1 July 2011; vide resolution AALCO/RES/50/S 9.

7. In pursuance of the of the mandate received from the Forty-Ninth and Fiftieth Annual Session of AALCO, the Secretariat of AALCO with active financial and technical support from the Government of Malaysia and the Secretariat of the International Criminal Court organized a two day "**Meeting of Legal Experts on the Rome Statute of the ICC: Issues and Challenges**" (hereinafter Meeting of Legal Experts) on 19 and 20 July 2011, in Putrajaya, Malaysia. The objective of that meeting was to afford the Legal Experts from the AALCO Member States an opportunity to discuss *inter alia* in a candid manner the reasons of why the Asian States were hesitant to ratify the Rome Statute. A report of the meeting forms part of this document.

8. It is pertinent to mention 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 65th Session of the General Assembly of the United Nations. The Report refers to: ICC President's Report to the 65th Session UN General Assembly; Ninth Session of the Assembly of States Parties; issues to be discussed at the forthcoming Tenth Session of the Assembly of States Parties (ASP); the Summary Report of the Meeting of Legal Experts on the Rome Statute of the ICC: Issues and Challenges, held in Putrajaya, Malaysia on 19 and 20 July 2011; and finally AALCO Secretariat Comments.

II. ICC PRESIDENT'S REPORT TO THE 65TH SESSION OF THE UNITED NATIONS GENERAL ASSEMBLY: 19 AUGUST 2010

10. The sixth annual report of the ICC[28], covering the period 1 August 2009 to 31 July 2010, was submitted to the United Nations in accordance with article 6 of the Relationship Agreement between the United Nations and the International Criminal Court[29]. It covers the main developments in the activities of the Court and other developments of relevance to the relationship between the Court and the United Nations since the fifth report of the Court to the United Nations[30] . For the purpose of this report the main points from that report have been extracted.

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. Review Conference of the Rome Statute

13. The Review Conference of the Rome Statute was held from 31 May to 11 June 2010 in Kampala. Pursuant to article 123, paragraph 1, of the Rome Statute, the Secretary-General of the United Nations, Ban Ki-moon, in his capacity as depositary of the Rome Statute, convened and opened the Conference.

[28] (A/65/313)
[29] United Nations, *Treaty Series*, vol. 2283, No. 1272.
[30] (A/64/356).

14. The Review Conference adopted the **Kampala Declaration** (declaration RC/Decl.1) in which States parties reaffirmed their commitment to the Rome Statute and its full implementation, as well as its universality and integrity. States parties decided to celebrate 17 July, the day of the adoption of the Rome Statute in 1998, as the Day of International Criminal Justice.

15. The Conference held a **pledging ceremony** in which 112 pledges from 37 States, including States not parties to the Rome Statute, and regional organizations, were made. These pledges covered, inter alia, financial contributions, support for arrests, agreements to enforce sentences, agreements on privileges and immunities, relocation of witnesses, cooperation with the Court and between States in various forms, complementarity, outreach and the designation of focal points.

16. The Conference undertook a **stocktaking of international criminal justice**, and separate panels of experts and practitioners considered the following topics: the impact of the Rome Statute system on victims and affected communities; peace and justice; complementarity and cooperation. The Conference adopted two resolutions [31], a declaration on cooperation (declaration RC/Decl.2) and a summary of the discussions on peace and justice (document RC/ST/PJ/1/Rev.1), and took note of the summaries of other topics[32].

17. The Conference amended the Rome Statute to include a **definition of the crime of aggression** and the conditions under which the Court could exercise jurisdiction with respect to that crime[33]. The exercise of jurisdiction is subject to a decision to be taken after 1 January 2017 by the same majority of States parties as required for the adoption of an amendment to the Statute.

18. By resolution RC/Res.5, adopted on 10 June 2010, the Conference amended article 8, paragraph 2 (e), of the Statute to include within the jurisdiction of the Court the following **war crimes** when committed in armed conflicts not of an international character: employing certain poisonous and expanding bullets; employing asphyxiating or poisonous gases, and all analogous liquids, materials and devices; and employing bullets that flatten easily in the human body. These crimes are reflected in new subparagraphs (xiii), (xiv) and (xv), respectively. By the same resolution, the Conference adopted the corresponding elements of crimes.

19. By resolution RC/Res.4 of 10 June 2010, the Conference decided to **retain article 124** of the Statute in its current form and agreed to further review its provisions during the fourteenth session of the Assembly of States Parties, to be held in 2015. This article grants to new States parties the possibility to opt out of the jurisdiction of the Court in respect of war crimes allegedly committed by its nationals or on its territory for a period of seven years after entry into force of the Statute for the State concerned.

[31] Resolution RC/Res.1, on complementarity, and resolution RC/Res.2, on the impact of the Rome Statute system on victims and affected communities.
[32] The summaries may be accessed at www.icc-cpi.int.
[33] see resolution RC/Res.6

20. In its resolution on strengthening the enforcement of sentences (resolution RC/Res.3), the Conference called upon States to indicate to the Court their willingness to accept sentenced persons in their prison facilities and confirmed that a sentence of imprisonment could be served in prison facilities made available though an international or regional organization, mechanism or agency.

B. Judicial Proceedings

21. The Court is seized of five country situations. The situations in Uganda, the Democratic Republic of the Congo and the Central African Republic were each previously referred to the Court by those States, themselves Parties to the Rome Statute. The situation in Darfur, the Sudan was referred by the United Nations Security Council. In each case, the Prosecutor decided that there was a reasonable basis to open investigations. During the reporting period, Pre-Trial Chamber II authorized the Prosecutor to initiate an investigation into the situation in Kenya in relation to crimes against humanity committed between 1 June 2005 and 26 November 2009. Further, the Office of the Prosecutor is conducting preliminary examinations in various situations, including in Afghanistan, Colombia, Côte d'Ivoire, Georgia, Guinea and Palestine.

22. In respect of the situation in Uganda, there is one ongoing case, *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, which is at the pretrial stage. The four warrants of arrest have been outstanding since July 2005. On 16 September 2009, the Appeals Chamber upheld the decision rendered by Pre-Trial Chamber II on 10 March 2009, which had ruled that the case against the four accused was admissible before the Court.

23. In respect of the situation in the Democratic Republic of the Congo, there are three ongoing cases, one at the pretrial stage and two at the trial stage. In *TheProsecutor v. Bosco Ntaganda*, the arrest warrant issued by Pre-Trial Chamber I under seal on 22 August 2006 and unsealed on 28 April 2008 remains outstanding.

24. In *The Prosecutor v. Thomas Lubanga Dyilo* the Court has heard the prosecution case and the defence started the presentation of its evidence on 7 January 2010. On 8 July 2010, however, Trial Chamber I ordered a stay in the proceedings. The prosecution appealed the decision, which is now pending before the Appeals Chamber.

25. The trial in the case of *The Prosecutor v. Germain Katanga and MathieuNgudjolo Chui* started on 24 November 2009 before Trial Chamber II with the presentation of prosecution evidence which continued until 16 July 2010. The trial is scheduled to resume on 23 August 2010.

26. In the situation in the Central African Republic, there is one ongoing case, *TheProsecutor v. Jean-Pierre Bemba Gombo*, now also at the trial stage since 18 September 2009, when the Presidency referred the case to Trial Chamber III. The start of the trial was scheduled for 27 April 2010. On 25 February 2010, however, the defence submitted a challenge to the admissibility of the case, which led to subsequent

postponements of the date of commencement of the trial. On 24 June 2010, Trial Chamber III confirmed that the case was admissible. The decision was appealed by the defence. The new date of commencement of the trial is to be set on 30 August.

27. In respect of the situation in Darfur, there are four ongoing cases, all at the pretrial stage.

C. Analysis of Activities

28. The Office of the Prosecutor continued to proactively monitor all information on crimes potentially falling within the jurisdiction of the Court, analyzing communications received from various sources. As at 30 June 2010, the Office had received a total of 8,792 communications relating to article 15 of the Rome Statute, 559 of which were received between 1 August 2009 and 30 June 2010.

29. During the reporting period, the Office of the Prosecutor continued its preliminary examinations in Afghanistan, Colombia, Côte d'Ivoire, Georgia and Palestine. On 14 October 2009, the Office made public its preliminary examination in Guinea. The Office continued its policy of making its monitoring activities public, subject to confidentiality requirements, when it believes it can contribute to preventing crimes and maximizing the impact of the Court's work.

D. Conclusion

30. There were significant developments in the work of the Court during the reporting period, with the opening of a new situation, three ongoing trials, the dismissal of charges against a suspect, the voluntary appearance pursuant to a summons to appear of two suspects in the Darfur situation, and the issuance of a second warrant of arrest against President Al-Bashir of the Sudan in the same situation. Many challenges remain, but none is more pressing than the execution of the nine outstanding warrants of arrest.

31. In addition, during the reporting period, the system of international criminal justice set up by States in the Rome Statute was reviewed in a Review Conference convened by the United Nations Secretary-General, and amendments to the Statute were made, *inter alia* in respect of the crime of aggression.

III. THE ASSEMBLY OF STATES PARTIES

32. The Assembly of States Parties is the management oversight and legislative body of the International Criminal Court and Part 11 of the Rome Statute provides for the Assembly of States Parties (ASP). It is composed of representatives of the States that have ratified and 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.[34] Moreover, each State Party has one vote and every effort has to be made to reach decisions by consensus. If consensus cannot

[34] According to the Chapter IV of the Rules of Procedure of the Assembly of States Parties.

be reached then decisions are taken by vote.[35] 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. On the basis of the principles of equitable geographic distribution and the adequate representation of the principal legal systems of the world, the Bureau of Assembly of States Parties consisting of a President, two Vice Presidents and 18 members are being elected by the Assembly for a three-year term. The Assembly is responsible for the adoption of the normative texts and of the budget, the election of the Judges and of the Prosecutor and the Deputy Prosecutor. It meets at least once in a year. The reports of the previous Sessions of the Assembly of States Parties (ASP-I to ASP VII) were reported in the earlier reports of AALCO.[36] It may be mentioned that the resumed sessions of all these sessions took place in the following year.

A. Ninth Session of the Assembly of States Parties (ASP IX)

33. The Assembly of States Parties to the Rome Statute of the International Criminal Court ("the Assembly") opened its ninth session at United Nations Headquarters, in New York, which lasted from 6 to 10 December 2010.

34. Opening remarks were delivered by the President of the Assembly, Ambassador Christian Wenaweser, the United Nations Secretary-General, Mr. Ban Ki-moon and the President of Colombia, Mr. Juan Manuel Santos, followed by senior Court officials.

35. The United Nations Secretary-General, Mr. Ban Ki-moon, recalled the historic Review Conference in Kampala and its momentous achievements with regard to the definition of the crime of aggression and the provisions under which the Court will exercise its jurisdiction with respect to the crime and urged all States to ratify the amendments. Furthermore, Mr. Ban Ki-moon recalled that the Court is the centerpiece of the system of international criminal justice. He also emphasized the crucial importance of States complying with their responsibilities to enforce all outstanding arrest warrants.

36. The President of the Assembly recalled the accomplishments of the Review Conference, and the fact that all decisions in Kampala had been adopted by consensus. He also joined the Secretary-General of the United Nations in his call to ratify the amendments to the Rome Statute adopted at the Review Conference. He also highlighted the challenges arising for the Assembly from situations where full cooperation by States was not forthcoming and furthermore emphasized the need to establish a dialogue between States Parties and the Court, which would address the needs of both sides as partners in the common effort to fight impunity.

37. The President of Colombia, Juan Manuel Santos asserted the strong commitment of Colombia to fight against impunity at the national level. He recalled that under the

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[35] Rome Statute article 112 (7).

[36] Refer AALCO Report on "International Criminal Court: Recent Developments" 2003/SD/S 10; 2004/SD/S 10; 2005/SD/S 10; 2006/SD/S 10; 2007/SD/S 9, AALCO/47th HEADQUARTERS (NEW DELHI) SESSION/2008/S 9 and AALCO/48/PUTRAJAYA/2009/S 9. For more information regarding the ASP-I to ASP VII refer www.icc.cpi-int.

Rome Statute, the leading role in combating these crimes lies with States and that the Court should step in only when States are unwilling or unable to do so. President Santos not only underscored the commitment of his administration to provide reconciliation and reparation to victims of violence at the domestic level but also pledged to make a donation to the Trust Fund for Victims. President Santos also expressed the commitment of Colombia to assist and work with the Court for peace and justice as a UN Security Council member starting January 2011.

38. The President of the ICC, Judge Sang-Hyun Song, noted the recent achievements of the Court, which included increased judicial activity. Furthermore, he appealed to States to continue with their financial contributions to the Court so that it can fulfill its mandate. Lastly, he stressed the importance of following up on the momentum from the Review Conference, ensuring that States continue fulfilling their pledges, increase cooperation with the ICC and uphold the complementarity principle.

39. The Prosecutor, Mr. Luis Moreno-Ocampo, briefed the Assembly on existing investigations and nine preliminary examinations that are underway, including allegations of war crimes committed in the territory of the Republic of Korea. Mr. Ocampo welcomed the implementation of the independent oversight mechanism that would oversee the internal conduct of the Court's officials but reiterated that further discussions were necessary in order to prevent any negative impact on the integrity of the Rome Statute.

40. Ms. Elisabeth Rehn, Chair of the Board of Directors of the Trust Fund for Victims, referred to the increasing engagement of the Court with victims exemplified by education, counseling, rehabilitation and reparation initiatives of the Trust Fund, which has over 70,000 direct beneficiaries.

41. During the first two days of the general debate, 47 States Parties and one Observer State spoke reiterating their commitment to the Rome Statute and international criminal justice. Some States Parties pledged to contribute a total of €400,000 to the Trust Fund for Victims, €200,000 to the Special Trust Fund for Relocation and €85,000 to a new Trust Fund which would fund the family visits of indigent detainees.

42. The Assembly also elected by consensus six members of the Committee on budget and Finance.

43. At the ninth session, the Assembly, inter alia, followed up on the stocktaking exercise of the Review Conference, considered proposals for the amendments of the Rome Statute that were not conveyed for consideration by the Review Conference, as well as considered the 2011 budget of the Court.

44. On 10 December 2010, the Assembly of States Parties to the Rome Statute of the International Criminal Court ("the Assembly") concluded its ninth session and adopted resolutions, *inter alia*, on the programme budget for 2011, permanent premises,

governance, the Independent Oversight Mechanism and on Strengthening the International Criminal Court and the Assembly of States Parties.

45. As a part of the Review Conference follow-up, the Assembly considered three stocktaking topics, namely complementarity, cooperation, impact of the Rome Statute on victims and affected communities, and decided to keep under constant review the question of enhancing efficiency and effectiveness of the Court. The focal points on pledges invited States to submit new pledges to the Assembly as well as follow up on the pledges already made. The States Parties also adopted a resolution on the establishment of the study group on governance as a collective exercise by States and the Court.

46. The Assembly of States Parties will hold its **tenth session from 12 to 21 December 2011** at United Nations Headquarters the Assembly would, *inter alia*, elect six new judges and the Prosecutor.

B. Forthcoming Tenth Session of the ASP

47. At the forthcoming tenth session the "**Plan of action of the Assembly of States Parties for achieving universality and full implementation of the Rome Statute of the International Criminal Court" would be considered. It maybe recalled that** vide resolution ICC-ASP/5/Res.3 of 1 December 2006, the Assembly decided, *inter alia,* to adopt and implement the above mentioned Plan of action, as well as to subsequent resolutions whereby the Assembly endorsed the recommendations contained in the respective Reports of the Bureau on the Plan of action and requested the Bureau to continue to monitor its implementation and to report thereon to the Assembly at the subsequent session. The ICC Secretariat recalled, in particular, paragraph 6, sub-paragraph (h), of the Plan of action, whereby the Assembly called upon States Parties to provide to the Secretariat information relevant to promotion of the ratification and full implementation of the Rome Statute, including, inter alia:

> "(i) Information on obstacles to ratification or full implementation facing States;
> (ii) national or regional strategies or plans of action to promote ratification and/or full implementation;
> (iii) technical and other assistance needs and delivery programmes;
> (iv) planned events and activities;
> (v) examples of implementing legislation for the Rome Statute;
> (vi) bilateral cooperation agreements between the Court and States Parties;
> (vii) solutions to constitutional issues arising from ratification;
> (viii) national contact points for matters related to promotion of ratification and full implementation."

48. In accordance with paragraph 7 of the Plan of action, the Assembly agreed that the Secretariat "should support States in their efforts to promote universality and full implementation of the Rome Statute by acting as a focal point for information exchange, within existing resources, including by:

a) Collecting and collating relevant information from States Parties, regional organizations, members of the non-governmental community and others engaged in promoting universality and full implementation of the Rome Statute;
b) Ensuring that such information is readily and widely accessible and disseminated to interested States and others.

49. The ICC Secretariat therefore requests that States Parties convey, by 30 September 2011, the information referred to in paragraph 6, sub-paragraph (h), of the Plan of action.

The tenth Session of the ASP would also elect the new Judges to the ICC[37]; the Prosecutor[38] and the members of the Committee on Budget and Finance[39].

IV. SUMMARY REPORT OF THE MEETING OF LEGAL EXPERTS ON THE ROME STATUTE OF THE ICC: ISSUES AND CHALLENGES

50. Pursuant to the mandate received from the Forty-Ninth Annual Session of AALCO held in 2010, which was also reaffirmed by the Fiftieth Annual Session held in Sri Lanka in 2011, the AALCO Secretariat in collaboration of the Government of Malaysia and the Secretariat of the International Criminal Court (ICC) organized a two day Meeting of Legal Experts in Putrajaya, Malaysia on 19 and 20 July 2011. Thirteen Member States of the Asian-African Legal Consultative Organization (AALCO) participated in that meeting[40]. The Welcome address was delivered by Prof. Dr. Rahmat Mohamad, Secretary-General of AALCO, the Inaugural address by H.E. Tan Sri Abdul Gani Patail, and the Keynote address by H.E. Judge Sang-Hyun Song, President of the International Criminal Court.

51. Discussions were held in three Working Groups. The First Working Group was chaired by Judge Motoo Noguchi, from Japan, a Judge of the Supreme Court Chamber, the Extraordinary Chambers in the Courts of Cambodia (ECCC). It took up the following issues: (i) Preconditions for the exercise of jurisdiction and Bilateral Immunity Agreements. The lead discussant in that segment was Mr. David Koller, Legal Officer, ICC Appeals Chamber. The Second Working Group was chaired by Prof. Dr. Rahmat Mohamad, Secretary-General of AALCO and discussed (i) Principle of Complementarity; (ii) Criteria for the Selection of Situations and the Opening of Investigations and (iii) the relationship between Peace and Justice. The lead discussant was Mr. Rod Rastam, Legal Advisor, ICC Office of the Prosecutor. The Third Working Group was again chaired by Judge Noguchi and it took up the following issues: (i) Post

[37] ICC-ASP/10/S/04
[38] ICC-ASP/10/S/06
[39] ICC-ASP/10/S/05
[40] Brunei Darussalam, People's Republic of China, Republic of Ghana, Republic of Iraq, Japan, Republic of Kenya, Great Socialist People's Libyan Arab Jamahiriya, Malaysia, Kingdom of Saudi Arabia, Singapore, Kingdom of Thailand, Republic of Uganda and the United Arab Emirates.

Kampala review Conference: An update and (ii) Implications of ratification of the Rome Statute.

52. **Prof. Dr. Rahmat Mohamad, Secretary-General of AALCO**, in his welcome address recalled that soon after the Kampala Review Conference of the Rome Statute of the ICC, the Forty-Ninth Annual Session of AALCO was held in Dar es Salaam, United Republic of Tanzania from 5 to 8 August 2010. In order to discuss the outcome and important issues relating to post Kampala Review Conference, and noting that some of the issues were of continued common concern to the Member States of AALCO, a Special Meeting on the topic "**International Criminal Court: Recent Developments**" was held in conjunction with the Forty-Ninth Annual Session, where primarily two issues namely: (i) the Principle of Complementarity; and (ii) the Crime of Aggression were discussed in greater detail.

53. Pursuant to the mandate received from the Forty-Ninth Session of AALCO and based upon the positive response received from the Government of Malaysia, and the Secretariat of the ICC, the meeting of Legal Experts was being convened. The Fiftieth Annual Session of AALCO which concluded on 1st July 2011 also adopted RES/50/S 9 which *inter alia* requested all the Member States to participate in the meeting of Legal Experts.

54. Prof. Dr. Rahmat Mohamad, mentioned that after nearly a little over a decade that the Rome Statute entered into force and the ICC envisaged there-under had been functional, till date 116 States had ratified it. However, despite the repeated calls from the Secretary-General of the United Nations for universalization of the Rome Statute, it had evoked lesser participation particularly from the Asian States. In view of that fact, he was confident that the Meeting of Legal Experts would provide a forum wherein the States Parties to the ICC, the prospective State Parties and non-State Parties to the Rome Statute especially AALCO Member States would engage in a dialogue to exchange their views and concerns relating to the Rome Statute.

55. **H.E. Tan Sri Abdul Ghani Patail, the Attorney General of Malaysia**, in his inaugural address mentioned that the aim of the meeting was to look at the implementation and practical issues pertaining to the Rome Statute as well as to enhance understanding of the issues concerned.

56. The Attorney General recalled that AALCO had been following discussions pertaining to the ICC since 1996, when the issue was first discussed at the Manila Annual Session. It had also participated in the negotiations of the Rome Statute. The Member States of AALCO demonstrated their seriousness towards the issues relating to the subject when they agreed during the Forty-Ninth Annual Session (2010) to hold an Expert Group Meeting on this subject, focused at the non-State Parties to the Rome Statute of the ICC and endeavouring to address their concerns. It was felt that this interaction would not be useful only for the AALCO Member States but would also be a reciprocal opportunity for the ICC to understand the concerns of non-State Parties. It was in this relation that he had highlighted the fact that out of the 81 Member countries of the

UN which had not ratified the ICC Rome Statute, 30 were AALCO Member States, which roughly formed about 40% of the total number. Therefore, in order to discuss common issues of concern relating to ICC, the Malaysian Delegation proposed to have another meeting in Putrajaya.

57. The Attorney General pointed out that the establishment of the ICC in 1998 was welcomed with the hope that it would put an end to the impunity for crimes and the perpetrators of the most serious crimes would be punished. However, it remained to be seen how the system actually works. He said that currently the focus of States was on the practical implementation of the Rome Statute at different levels and he hoped that the experts from ICC would shed light on some of the issues.

58. He further mentioned that Malaysia was committed to upholding the rule of law and rejected impunity of crime. Thus, before becoming a party to the Rome Statute, Malaysia had adopted a cautious approach and was considering the best way to implement the Rome Statute. For this purpose, the current practices of other countries were also being studied to ensure effective implementation of its obligations. He hoped to hear all views pertaining to the ICC bearing in mind that the majority of AALCO States were non State Parties. Tan Sri Abdul Gani Patail emphasized that one particular concern relating to the ICC was the principle of complementarity, i.e. the ICC would only intervene if the State in question was genuinely unwilling or unable to prosecute. This debate would be particularly useful as the Rome Statute did not define the term complementarity.

59. He also hoped that the meeting would discuss Art. 5 of the Statute – the crimes listed in the Statute and the relationship between the ICC and the United Nations Security Council, in light of the referral of situations by the UNSC to the ICC, particularly in view of the fact that a few Permanent Members of United Nations Security Council were not members of ICC. The Attorney General also mentioned the inclusion of the crime of aggression in the Rome Statute pursuant to the decision taken at the First Review Conference (2010) which was based on the UN General Assembly resolution 3314 of 14 December 1974.

60. Finally, Tan Sri Abdul Gani Patail said that that the quest for justice may come in various forms, however, for peace and harmony to prevail in the world, there might be varying of views but the common aim was the same. He added that Malaysia supported the ideals of ICC and not otherwise. Thus, Malaysia would continue to hold meetings like the present one so that the ICC would be respected and therefore, it was necessary to take each other's guidance and learn form experiences.

61. **H.E. Judge Sang-Hyun Song, President of the International Criminal Court** gave an overview of the mandate and current work of the ICC. Essentially, he said the ICC's task was to hold individuals accountable for the most serious crimes of international concern. He mentioned that there were four groups of crimes in the Rome Statute (Article 5), namely Genocide (Article 6); Crimes against humanity (Article 7); War crimes (Article 8) and the Crime of Aggression (Article 8 bis). He noted that

genocide and crimes against humanity did not necessarily have to occur within the context of an armed conflict. In relation to the crime of aggression he said that at the time of adoption of the Rome Statute, States could not agree on the definition of this crime, however, this shortcoming was overcome at the First Review Conference of the Rome Statute, held in Kampala, Uganda in 2010, even though the ICC could not exercise jurisdiction over this crime for at least another six years.

62. The President mentioned that six country situations were being actively investigated or prosecuted at the ICC: namely, Uganda; the Democratic Republic of the Congo, Central African Republic, Darfur (Sudan), Kenya and Libyan Arab Jamahiriya. As of June a seventh situation was before the Court as the prosecutor had requested authorization from the Judges to investigate the situation in Cote d'Ivoire since 28 November 2010. He added that since the situation in Cote d'Ivoire was not referred to the ICC by a State Party nor by the Security Council, the Prosecutor could not open an investigation without the prior approval of the Pre-Trial Chamber, following an independent judicial review. This was to prevent any frivolous or politically motivated investigations without proper basis. He added that an even bigger threshold had to be met before a warrant of arrest could be issued against an individual. These were examples of the many checks and balances contained in the Rome Statute.

63. On cases before the Court, the President informed that hearings in the ICC's first trial, that of Thomas Lubanga Dyilo had concluded and the closing arguments would be heard next month. Four more cases were at various stages of procedure preceding trial. In addition to that, arrest warrants against 11 suspects were outstanding.

64. The President noted with concern that out of the 47 Member States of AALCO, 31 countries were not Parties to the Rome Statute, with the majority of those being in the Asia-Pacific region. He emphasized that despite the differences in the geographies, histories or traditions of the AALCO Member States, the Preamble of the Rome Statute stated that "all peoples are united by common bonds, their cultures pieced together in a shared heritage". As President of the ICC it was his priority to encourage more countries from the Asia-Pacific region to join the ICC as it was the most underrepresented group of States in the ICC. While acknowledging that joining the ICC was a sovereign decision, 116 States had joined the ICC, he added that it was heartening to see more and more countries taking that step. In the last few months he had been encouraged by the announcements from not only Malaysia, but also the Maldives, Philippines and Arab Republic of Egypt. This showed a rejuvenated interest in the Court across Asia and Africa. He hoped that these developments would give good reason for all AALCO Member States to give the Rome Statute a fresh look.

65. The President realized that many countries did not want to accede to the Rome Statute because of misconceptions of the mandate and work of the ICC, it was for this reason that meetings like the present one were important. He noted that one prejudice about the ICC was that it was a tool of Western States, he denied this and stated that ICC belonged to its States Parties among which the Western States were a minority. Further the Prosecutor and Judges were elected by the Assembly of States Parties, in which every

State, irrespective of its financial contribution to the ICC had equal decision making power. The geographical and cultural diversity of the ICC as well as its gender balance were reflected in the number of Judges practically in every bench of the ICC.

66. Secondly, some claimed that the ICC only "targeted" African countries. Refuting that claim the President stated that the ICC did not target any country, region or nation, it only targets impunity. He noted that the fact that the ICC's current investigations concerned African countries meant that the Court was providing justice to African victims. Furthermore, he recalled that the first three situations were brought to the ICC by the countries themselves, and two were referred to it by the UNSC, these factors he noted were beyond the control of the ICC.

67. The third misperception of States was that the ICC would dig into a countries past once it ratified the Rome Statute. This, according to the President, was presently impossible as the Court could assume jurisdiction only after ratification and could never under any circumstance have jurisdiction for any crimes that took place before 1 July 2002.

68. The fourth and common refrain from many leaders who were hesitant to ratify the Rome Statute was because of fear of repercussion from some big powers, most frequently the United States. He noted that this may have been a relevant consideration in the past, but of late the situation had changed. The most powerful shift in attitude was the UNSC's unanimous decision in February 2011 to refer the situation in Libya to the ICC, where all 15 members of the UNSC had voted in favour of that decision.

69. For the States Parties to the Rome Statute present at the meeting, the President said that there was plenty of room to tighten the partnership between the States and the Court. He emphasized the importance of implementing domestic legislation in line with the Rome Statute. He also encouraged States parties to consider ratifying the Agreement on Privileges and Immunities and concluding agreements on the enforcement of sentences, or on relocation of witnesses, with the ICC. The President acknowledged that joining the ICC could be a daunting task for smaller countries with limited government capacity, but this should not prevent any country from joining the ICC and the global movement for the rule of law and the protection of human dignity that it represented. Technical assistance for ratification and for harmonization of domestic legislation was necessary, and available from many sources, including ICRC, United Nations, many regional organizations, civil society organizations such as Parliamentarians for Global Action and the Coalition for the International Criminal Court. He added that last week the Commonwealth had adopted a Revised Model law for national implementation of the Rome Statute. Thereafter, the President enlisted some of the benefits of joining the ICC, namely the States Party's right to nominate candidates and vote in the election of the highest officials of ICC as well as more opportunity for recruitment of staff to the ICC.

70. In conclusion, the President noted that joining the ICC also sent out a clear message that the country was committed to peace, justice and the rule of law; it would also increase the protection of its nationals and its territory against the terrible violations

of international law that threatened the most fundamental values of human dignity. The fact of the matter was that the ICC existed to protect the ordinary people, those who often found themselves far removed from the scales of justice from the most serious crimes known to humankind. He opined that this meeting had a good agenda before it which would shed light on the work of the Court. There was also a need to send out a clear message that impunity would not be tolerated, and that the full force of law would come down on anyone committing an act that shook the conscience of humanity, for that to happen everyone had a role to play and particularly the legal experts.

A. Working Session I

71. **Judge Motoo Noguchi,** the Chairperson of Working Session I in his opening remarks stated that two issues namely: (i) Preconditions for the Exercise of Jurisdiction; and (ii) Bilateral Immunity Agreements would be discussed.

72. While introducing the first issue relating to the **Preconditions for the Exercise of Jurisdiction**, Judge Noguchi referred to Article 12 of the Rome Statute relating to Preconditions to the exercise of jurisdiction and said that once a State becomes a party to the Statute, it accepts the Court's jurisdiction with respect to crimes listed under the Statute. The Court mayto exercise its jurisdiction if one or more of the following States are Parties to the Statute or have accepted the jurisdiction of the Court: (a) the territorial State (the State on whichwhose territory the conduct in question occurred), or (b) the State of the accused person's nationality (the State of which the person accused of the crime is a national) except the referral of a situation by the Security Council. Thus, a national of a non-State party can also be tried by the ICC if the crime was committed on the territory of a State Party, providing a cause of concern for some of the non State-Parties to the ICC.

73. Thereafter, Judge Noguchi referred to Article 13 of the Rome Statute which enumerates the Exercise of Jurisdiction by the Court. The Court may exercise its jurisdiction with respect to the crime of genocide, crimes against humanity and war crimes either when the situation is referred to the Prosecutor: by (i) a State Party or (ii) by the Security Council, or (iii) when the Prosecutor initiates a *proprio motu* investigation. However, in this last case, the Prosecutor must seek the authorization of the Pre-Trial Chamber before proceeding with the investigation. When the situation was referred to the Prosecutor by the Security Council, relation to any UN Member State further preconditions provided in Article 12(2) are not necessary. Judge Noguchi said that so far three situations before the ICC were referred to it by States parties, namely, Uganda, the Central African Republic, and Democratic Republic of the Congo. Two situations, namely, Darfur (Sudan) and Libya were referred by the UNSC and the situations of Kenya and Cote d Ivoire was taken up by the Prosecutor, Security Council. The *proprio motu* investigation of a situation in Kenya was opened by the Prosecutor with the authorization of the Pre-Trial Chamber. The authorization of the Pre-Trial Chamber has also been requested concerning the investigation of the situation in Cote d' Ivorie.

74. Regarding subject matter jurisdiction, the Court's jurisdiction is limited to the most serious crimes of concern to the international community as a whole. More concretely, the Court has jurisdiction with respect to the crime of genocide, crimes against humanity and war crimes, all of which were defined in the original Statute and further elaborated by the Elements of Crimes. The crime of aggression was recently defined by the amendment to the Statute, but the amended Statute provides rather complicated conditions to be met before the Court becomes to be able to actually exercise jurisdiction over this crime2017.

75. He added that, as the first permanent international criminal court, with the temporal jurisdiction on crimes committed only after 1 July 2002, the ICC can address past (i.e. from July 2002-2011), future as well as present cases. He contrasted this situation with past and existing international tribunals such as the Nuremberg and Tokyo Tribunals, the ICTY and ICTR as well as hybrid tribunals set up for: (i) Sierra Leone, (ii) East Timor, (iii) Kosovo, and (iv) Cambodia, all of which had fixed temporal, material and geographical jurisdictions to address crimes committed in the past.

76. Judge Noguchi also mentioned that the principle of complementarity was another important principle of the ICC, as the Court could only intervene when a country was unwilling or unable genuinely to carry out the investigation or prosecution at the national level.

77. Introducing the second issue relating to **Bilateral Immunity Agreements**, Judge Noguchi stated that Article 98 of the Rome Statute deals with so-called Bilateral Immunity Agreements (BIAs). These agreements were designed by the United States of America to immune its military personnel and civilians from the jurisdiction of the ICC. Till date a total of 102 BIAs have been known as signed. The last BIA was allegedly concluded in 2007. It has been said there was no indication that the current administration will pursue more BIAs.

78. Judge Noguchi added that this was the attitude of the USA some years ago when it had strong opposing position against the ICC; however, as the President of ICC had pointed out earlier this morning, the situation had recently changed to the extent that the US stating that it does not oppose any country signing the ICC. However, the discussion on BIAs may be helpful to understand what it was about and where it came from.

79. It has been widely believed that the US concluded the BIAs with many countries to ensure that US nationals will not be subject in any way to the ICC's jurisdiction in the light of preconditions to the exercise of jurisdiction which we discussed earlier. This policy is enshrined in the American Service Members Protection Act (US Domestic Legislation).

80. **Mr. David Koller, Legal Officer, ICC,** the lead discussant briefly highlighted certain aspects relating to both the above mentioned issues. He briefly reviewed the Rome Statute's provisions on: (i) Subject Matter Jurisdiction of the ICC; (ii) Jurisdiction

ratione temporis; (iii) Exercise of Jurisdiction; (iv) Preconditions to the Exercise of Jurisdiction and (v) Immunity and Jurisdiction.

81. The subject matter jurisdiction of the ICC was contained in Article 5 of the Rome Statute by virtue of which, the Court has jurisdiction over the crime of genocide (Art 6); crimes against humanity (Art 7); war crimes (Art 8) and aggression (Article 8 bis). He noted that Article 11 of the Rome Statute dealt with Jurisdiction *ratione temporis* and stated that the Court could exercise jurisdiction only for crimes after entry into force of the Rome Statute (1 July 2002). Exercise of Jurisdiction by the ICC was dealt with in Article 13 which enumerated three methods of triggering the ICC's jurisdiction: (a) referral by a State party; (b) referral by the UNSC or (c) *proprio motu* investigation by the Prosecutor with the approval of the Pre-Trial Chamber. Mr. Koller emphasized that situations could be referred to the ICC and not cases.

> Till date there had been three referrals by States Parties: (a) Uganda; (b) Democratic Republic of Congo and (iii) Central African Republic.
>
> Two situations had been referred by the UNSC: (a) Darfur, Sudan and (ii) Libyan Arab Jamahiriya.
>
> *A Proprio motu* investigation is ongoing in the situation in Kenya.
>
> He noted that it was also necessary to satisfy the provisions of Article 12 relating to the preconditions of exercise of jurisdiction. However, this article did not apply to UNSC referrals.

82. If the ICC's jurisdiction is triggered by a State Party or *proprio motu*, then either the territorial State must accept jurisdiction or the State of the perpetrators' nationality must accept jurisdiction. The acceptance of jurisdiction was automatic in case of State Parties. Other States could accept jurisdiction via ad hoc declarations (e.g Cote d Ivoire or Palestine). However, acceptance of jurisdiction does not trigger an investigation.

83. Mr. Koller, while speaking on immunity from jurisdiction, noted that there was no jurisdiction over persons under 18 at the time of crime as stated in Article 26 of the Rome Statute. However, there was no immunity based on official capacity as mentioned in Article 27 of the Rome Statute.

84. Turning to provisions relating to Immunities and Cooperation as envisaged in Article 98 of the Rome Statute, he mentioned that the Statute recognized two types of limited immunity: (i) State/diplomatic immunity of third States (Article 98(1)) and (ii) Immunity from surrender under certain international agreements (e.g SOFAs) (Article 98 (2) of the Rome Statute). Further, the immunity envisaged in Article 98 was from surrender/assistance, not from jurisdiction. The Court may obtain waiver of immunity/consent to surrender. Mr. Koller mentioned that under Article 97 of the Rome statute there was an obligation on States Parties to consult with the ICC if there were problems in executing requests.

85. In conclusion, Mr. Koller emphasized once again that jurisdiction depends on either State consent or Security Council authorization. Once jurisdiction was triggered, investigations would be carried out independently; there was no immunity from jurisdiction and finally in case of difficulty in cooperating, there was an obligation for States to cooperate with the ICC.

86. After the presentations, the following Member states presented their comments and observations: **People's Republic of China**, **Great Socialist People's Libyan Arab Jamahiriya, Malaysia, and Kingdom of Thailand.**

87. The **Delegate of the People's Republic of China** expressed his concerns about the interpretation of Article 98 of the ICC relating to the BIAs signed by the US with over 102 States. He noted that although the US policy had changed recently towards the ICC, nevertheless US military persons could not be surrendered to the ICC. It leaves an impression of double standard and is an issue that required careful consideration. He also expressed his reservation on the interpretation of Articles 26 (exclusion of jurisdiction over persons under 18) as the only provision concerning immunity issues.. He highlighted the difference between exclusion of jurisdiction and immunity, and also noted that the problem concerning Article 98 was not as simple as it appeared. Regarding preconditions to the exercise of jurisdiction, in particular the *proprio motu* investigations by the Prosecutor, he referred to the situation in Kenya and said that it was a very complicated issue and wanted to know how to interpret and regulate the powers of the Prosecutor.

88. In response to this important question Judge Noguchi said that the US had tried to safeguard all its nationals from surrender to the ICC, including the military personnel. This policy was adopted by the US several years ago and remains fundamentally, but as discussed above the US has gradually changed its attitude vis a vis the ICC. He further cited Article 16 of the Rome Statute dealing with deferral of investigation or prosecution to illustrate his point. It was also noted that the US has endorsed a position that it does not oppose any State wishing to join the ICC.[41]

89. The **Delegation of the Great Socialist People's Libyan Arab Jamahiriya** shared the concerns of the previous delegate in relation to the BIAs. He was also of the view that it was a matter of concern that the ICC seemed to be targeting African countries. He did not understand why the ICC had not investigated even a single case in Palestine. The same was true for the situations in the Republic of Iraq and Afghanistan. But when it came to Libya, the UNSC had been very quick to refer the situation to the ICC. Therefore, the ICC's action seemed to be contradictory to its call for peace, justice, equality for all.

90. In response, **Mr Rastan** from the ICC stated that for non-Party States there were two ways through which jurisdiction could be accepted – *ad hoc* acceptance by the non-Party State (article 12(3) of the Statute) or UNSC referral, pursuant the Security

[41] Stephen J. Rapp, Ambassador-at-Large for War Crimes Issues: "to clarify on the public record that the United States does not object to any country joining the ICC … it was made plain that the US does not object to countries joining." http://www.state.gov/s/wci/us_releases/remarks/165259.htm

Council's Chapter VII powers under the UN Charter. The jurisdiction of the ICC is not affected by agreements concluded under article 98 of the Statute (or so-called BIAs): the matter affects cooperation by the requested State with the ICC, not the jurisdiction of the Court itself. Afghanistan, for example, has signed a BIA with the US, but the Court nonetheless has jurisdiction in relation to any ICC crimes occurring within the territory of Afghanistan. With regard to the situation in Palestine, Palestine lodged a declaration accepting the exercise of jurisdiction by the ICC, pursuant to article 12(3) of the Statute. However, the issue was whether the declaration meets statutory requirements, which in turn relates to Palestine's own competencies to lodge such a declaration. The issue of competence or Palestine's statehood was not straightforward. Different legal arguments had been presented from numerous sources.[42] The OTP has not dismissed the Palestine situation outright but has been willing to consider the arguments presented. The OTP was looking at the Palestinian situation from many perspectives which touch on the issues of the proper interpretation of the Statute, competencies, statehood, dual nationality of alleged perpetrators, etc.

91. Mr. Rastan also noted that for non-Party States, the choice to become parties to the ICC rests solely with those States. In many situations, the exercise of ICC jurisdiction could be facilitated if States decided to become parties to the Rome Statute rather then await a UNSC referral or an ad hoc acceptance of jurisdiction. This particularly applied to countries from the Middle East and Asia, although more States from the region are becoming States Parties (such as most recently Tunisia and Bangladesh). Universal adherence to the Rome Statute by all States would therefore enable to the ICC to respond to the requirements of justice in all situations based on the same legal standards.

92. The **Delegation of Malaysia** posed a question of how the ICC picks and chooses situations or internalizes information that would come to the Office of the Prosecutor. What was the threshold, if any, that the ICC adopt when it decides to investigate cases that were brought to its attention? Secondly, how does the Office of the Prosecutor itself view Art. 98? And finally it noted the political dimension of the Rome Statute's UNSC referral provision, which had caused many States, including Malaysia, from the beginning to have strong reservations against membership in the fear that the said provision might be abused or misused by those having a political agenda.

93. In response the official from the ICC stated that Office of the Prosecutor received many communication under article 15, but most of the information related to matters that were manifestly outside of the jurisdiction of the Court. The rest of the information goes through a filtering process to determine whether the requirements of the Statute have been satisfied in relation to jurisdictional, admissibility and the interest of justice. Part of this assessment relates to the gravity of any future cases. He added that this question

[42] See *Summary of submissions on whether the declaration lodged by the Palestinian National Authority meets statutory requirements*, available at http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/palestine/summary%20of%20submissions%20on%20whether%20the%20declaration%20lodged%20by%20the%20palestinian%20national%20authority%20meets

would be dealt with in the afternoon session, while dealing with the prosecution's strategies during Working Session II.

94. The **Delegation of the Kingdom of Thailand** noted that nationality was not properly defined in Article 12 of the Rome Statute. How does the ICC determine such cases? And how would it solve the questions relating to dual nationality?

95. The official from ICC noted that it was an interesting question and that there existed relevant State practice in relation to the exercise of criminal jurisdiction by States over persons who, nonetheless, possessed two different nationalities.. However, the situation had not yet arisen before the ICC, and therefore the Judges would decide on it once it came up before the ICC.

B. Working Session II

96. **Prof. Dr. Rahmat Mohamad**, the Chairperson of Working Group II in his opening remarks mentioned that discussions would be held on the following three topics namely: (i) the Principle of Complementarity; (ii) the Criteria for the Selection of Situations and the Opening of Investigations; and (iii) the Relationship between Peace and Justice.

i. Principle of Complementarity

97. Prof. Dr. Mohamad underlined the fact that the Principle of Complementarity was one of the cornerstones of the architecture of the Rome Statute of the ICC. The Principle denoted that cases would only be admissible before the ICC if and when States were genuinely unwilling or unable to carry out investigations and prosecutions. According to this principle, the primary duty and responsibility for the enforcement of prohibitions of international crimes rests with national criminal jurisdictions.

98. He added that the principle of complementarity shaped various dimensions of ICC and domestic practice, ranging from prosecutorial strategy and criminal policy to statutory implementation and compliance. The operation of complementarity was of paramount importance to the operation and impact of international criminal justice. The application of this principle was considered as a key to the survival and vitality of the ICC's work and national juridical system, social tradition and culture.

99. He mentioned that although the word complementarity did not appear anywhere in the Rome Statute, paragraph 10 of the Preamble and Article 1 of the ICC Statute referred to the "complementary nature of the jurisdiction of the ICC". The Statute sets out the general contours of the concept in three paragraphs in Article 17. The existing text thus left a considerable degree of ambiguity and space for creative interpretation.

100. He noted with concern that as the Court started taking up the cases, it was expected to confront several challenges encompassing practical aspects and the interpretation of the Statute. To address these challenges and concerns it was suggested

that the OTP might be able to resolve some of the issues by interacting more closely and actively with national courts, adopting a policy called *positive complementarity*. It connotes that the Court and particularly the OTP should work to engage with national jurisdictions in prosecutions, using various methods to encourage States to prosecute cases domestically wherever possible. The aim of such a policy was to strengthen domestic capacity. It was therefore argued that traditional complementarity was meant to protect State sovereignty and was built on the idea that State could carry out national prosecutions as a result of the threat of international intervention by the ICC, positive complementarity looked for a more cooperative relationship between national jurisdictions and the Court.

101. Prof. Dr. Mohamad added that it was important for those who had become parties to the Rome Statute, to take certain measures. The first step in this direction may be to bring in effective national legislation.

102. The Secretary-General cautioned that one of the dilemmas of complementarity was that many of its theoretical underpinnings and operational features were still underdeveloped. Some of the conceptions deviated from classical understandings of complementarity. Core notions such as 'gravity', 'inability', 'case' and key concepts like 'self-referrals', 'primacy of domestic jurisdictions', 'positive complementarity' were at the heart of judicial and policy debate. Thus it could be argued that further clarifications on the principle of complementarity by the Court in its judgments in the future would help build confidence of the international community, mainly of States, and encourage active response in the form of adopting adequate national measures and in more States becoming parties to the Statute.

103. He recalled that the Principle of Complementarity was discussed in great detail at the Special Meeting on "The International Criminal Court: Recent Developments" held in conjunction with the Forty-Ninth Annual Session of AALCO, which was held in Dar es Salaam, United Republic of Tanzania, in August last year.

ii. Criteria for the Selection of Situations and the Opening of Investigations

104. Prof. Dr. Rahmat Mohamad said that no aspect of the ICC's work had been more controversial to date than its decisions on the situations and cases to be brought before the ICC. Every decision relating to the selection of a situation was scrutinized by the Court, and many had given rise to strong criticisms. State actors had opposed vociferously some of the ICC's decisions whether to open investigations. In particular, leaders of African States, who formed one of the most supportive constituencies of the ICC, had begun to object to the ICC's exclusive focus on prosecuting African defendants. Therefore, the African leaders had expressed particular dismay at the ICC's decision to issue arrest warrants for Sudan's President and most recently for the Libyan President.

iii. Relationship between Peace and Justice

105. Speaking on the third issue, Prof. Dr. Rahmat Mohamad pointed out that the debate relating to the relationship between Peace and Justice was highly controversial because of its political nature. It had been agreed by the international community that there was no impunity anymore for the most serious crimes and this fact had certainly changed the world in recent times. Presently, it appeared that there was a positive relation between peace and justice, unlike the past when it was perceived as peace versus justice. Nevertheless, there were also tensions between the two that had to be acknowledged and addressed properly. He added that there was an undeniable dilemma between peace and justice, which would persist for as long as there would be ongoing conflicts. However, it was important to bear in mind that future discussions on this point should deal with the topic in a holistic manner and not be narrowed down to the question of pursuing criminal charges alone. It may be recalled that there was no formal outcome on this debate during the Kampala Review Conference in 2010; nevertheless, the summary of discussions could be taken as an important component of the subject.

106. **Dr. Rod Rastan, Legal Advisor, ICC Office of the Prosecutor**, the lead discussant for Working Group II, outlined that if one looked at the Preamble in the Rome Statute it contained 11 paragraphs and only Paragraphs 9 and 10 referred to ICC. Before that that preambular paragraphs affirmed the obligations of States Parties to uphold the principles of international law at the national level as well as upholding the principles of the Charter of the UN. Thus, States already had an obligation in this area. The ICC was set up to compliment it.

107. The ICC was not created to substitute, replace or take away State sovereignty. As stated in the Rome Statute, the national courts have the primary responsibility for the investigation and prosecution of such crimes, in preference to the ICC. Besides it was always better to have justice locally if that is possible. Normally, national authorities know the contextual situation better, have better access of information and evidence and the crime scene, cost of translation and transporting staff, and witnesses to and fro was avoided, better familiarity of victims and witnesses with domestic proceedings, heightened prospects for local ownership and outreach, as well as a significant cost-savings. However, he said, that in some situations, however, this was just not possible. He highlighted this point by giving the example of Rwanda where after the 1994 Rwandan genocide, there were only a handful of lawyers left in the country and the judicial system had completely collapsed. Hence there was a situation of *inabilty*; and the need arose for an ad hoc tribunal. In the former Yugoslavia, the State authorities were allegedly involved in the crimes or were using sham courts proceedings or *in absentia* prosecutions to punish the other side and deter returns. Hence this was a situation of *unwillingness* to hold genuine national proceedings. The nearest approximation to that situation is in Darfur, Sudan, where the judiciary has not a collapsed, but the government forces and allied militia were allegedly involved in the international crimes. Thus, there was a role for the ICC to compliment the national system where it is inactive or otherwise unable or unwilling to address serious crimes.

108. Mr. Rastan added that the system created in Rome by States, focused on the primary responsibility of, and preference for, national criminal justice systems. The Court

was not set up as human rights court as an appellate body to review normal decision of national courts. The ICC is a court of first instance and, moreover, deals with cases of particular gravity, i.e. massive atrocities committed as war crimes, crimes against humanity or genocide. Nor does it take up minor perpetrators: the Prosecutor's policy is to focus on those bearing the greatest responsibility for the most serious crimes. Thus, the Court exercises jurisdiction if there was a failure at the national level (i.e. through national inaction, or an domestic unwillingness or inability to genuinely address relevant cases), and added to that cases must be of sufficient gravity.

109. He added that in situations of massive atrocities, where there may be thousands of perpetrators committing widespread crimes against countless victims in numerous incidents, even if there is evidence available, there was unfortunately not the expectation that every single perpetrator would be prosecuted.Instead, the OTP's prosecutorial strategy is that only the most serious cases would be investigated, i.e. those bearing the greatest responsibility for the most serious crimes. Obviously broader moral and prosecutorial questions arise: what about other perpetrators, what about the impunity gap, what about victims' right to redress at the national level? Hence, the importance of emphasising that the Rome Statute systems relies on combined responses to serious crimes, involving international and national judicial mechanisms, as well as other transitional justice approaches. The ICC cannot act alone; States also have their own primary responsibilities to fulfill in this area. The discussion in Kampala at the 2010 Review Conference on complementarity focused on this issue.[43]

110. Kenya was one of those situations where it was initially a regional organization, through Kofi Annan acting on behalf of the African Union Panel of Eminent African Personalities that had called for ICC assistance in the event that the national system failed to respond. The emphasis was, thus, from the very beginning on national justice, with the ICC as a back-up. Kofi Annan proposed a time frame to Kenya and said that if Kenya could not set up a mechanism then the ICC should take up the matter. The ICC Prosecutor supported this approach and also emphasised the primary responsibility of the Kenyan judicial system, and held consultations with the Kenyan Government on the matter. When it became clear that the Kenyan Parliament was unable to adopt the necessary bill to adopt a national mechanisms to deal with the post-election violence, and the Government of Kenya informed the Prosecutor that they could not proceed, the Prosecutor announced that the OTP would proceed. Kenya agreed to cooperate with the Court while maintaining they were committed to maintain justice in their own country.

111. On the identification of situations before the ICC and how it investigates, he distinguished between situations concerning States Parties (where the Court has jurisdiction on the basis of (i) territoriality and (ii) nationality of the accused); referrals from the UNSC (which may provide jurisdiction with respect to any UN Member State, including States not party to the ICC, pursuant to Chapter VII of the UN Charter); and where non-Party States voluntarily accept the jurisdcition of the Court on an ad hoc basis.

[43] http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-11-Annex.V.c-ENG.pdf

112. Mr. Rastan made an important point that in situations which were outside the ICC treaty jurisdiction, the ICC could only act if, a non-State party voluntarily went to the Court, (e.g. Cote d'Ivoire) or the UNSC gets involved. Whether it was good for UNSC to get involved? That was an issue discussed in Rome: the problem would arise if the UNSC decided to set up more ad hoc tribunals, like ICTR and ICTY, which would be more costly and inefficient when a standing permanent court existed. At the same time, the ICC is independent of the UNSC and could decline a UNSC referral if the criteria prescribed in the Rome Statute are not met. For instance, if the ICC were asked to investigate the crime of terrorism or piracy, or if the States desired to add an additional crime to jurisdiction, or the situation fell outside of the temporal jurisdiction of the Court (i.e. 1 July 2002 onwards), the ICC could decline to exercise its jurisdiction. This was the decision adopted by States during the Rome Conference.

113**.** In conclusion, Mr. Rod Rastan said that many States had posed the question that why did the ICC take up the Libyan situation and the situation in Darfur, and why did it not take up the situation in Sri Lanka or Syria. He replied all these were situation concerning non-Party States. In these situations the ICC could not act by itself, and had to await the decision of the relevant States themselves or the UNSC. The matter thus related to the political decisions made by the UNSC to refer some situations and not others. The ICC itself was not involved in such decisions and only exercises jurisdiction where it possesses it. The issue of selectivity of referrals would only be resolved when there was universal adherence to the Rome Statute, meaning all States would join and there would be expansion of the Court's treaty-based jurisdiction. The ICC, as a judicial body, could then respond in the same way to all situations based on the legal criteria, without waiting for external referral of situations affecting non-Party States.

After the presentations, the following Member states presented their comments and observations: **People's Republic of China, Republic of Kenya, Malaysia,** and **Uganda.**

114**.** The **Delegation of the People's Republic of China** noted the relationship between the ICC and UNSC, he mentioned the situations in Darfur and Libya which had been brought up before the ICC on referrals by the UNSC. He inquired what was the legal authority and criteria of the ICC to investigate situations in non State-parties. In response the official from the ICC said that even though Libya and Sudan did not have any obligations under the Rome Statute, they did have responsibilities as UN Member States under Chapter VII of the Charter of the United Nations and were bound to abide by UNSC resolutions. Whenever a situation was referred to the ICC by the UNSC, the ICC would seek cooperation of those States under the terms of the relevant UNSC resolutions imposing obligations on those States to cooperation with the Court.

115**.** The **Delegation of Kenya** explained the situation in her country and said that it arose after the post elections violence. About 1200 people had died and a lot of displacements took place and many crimes were also committed. Immediately the Government called the international mediators headed by Mr. Kofi Annan who was one of the mediators. After that a Commission of Inquiry was set up which was headed by a judge of the High Court. One recommendation made by that Commission was that a

Tribunal should be set up to hear these cases. There was also a recommendation that persons be investigated. The judge was very clear in his recommendation, that if this tribunal was not set up then this was the next course of action the matter would be given to the ICC. 2 attempts were made to create a tribunal. However, due to the political situation prevailing it was not passed in parliament. Two parties had equal votes so it was hard to get 2/3 votes. Even though Mr. Kofi Annan gave Kenya more time, it became clear a tribunal could not be set up and then the matter was handed over to the ICC.

116. The delegation highlighted that at all stages of the investigation, Kenya was kept informed. It had tried to deal with the issue of continuing investigation and signed the immunity and privilege agreement with ICC to enable it to step up an office in Kenya. Having said that, she emphasized that no two situations could be similar. However, Kenya was doing its best to reform its national judicial system they had adopted a new Constitution that brought new reforms, a Truth Justice (reconciliation) Commission was also put in place, and Kenya also had a Supreme Court. They were doing all this with the hope that one day they would be able to try the perpetrators of crime nationally.

117. In response **Mr. Rod Rastan**, once again touched upon the principle of complementarity and showed that there was a relationship between Articles 17 and 20 of the ICC and that the national courts and the ICC could take up different case at the same time. The concept allowed the national courts to take up the many cases while discharging their responsibility. He also mentioned that the question of the threshold for admissibility was contained in Article 17(1)(d) of the Rome Statute. He noted that the issue of complementarity in relation to Kenya was currently on appeal, and therefore it would be important to note the decision of the ICC Appeals Chamber on the matter once issued.

118. The **Delegation of the People's Republic of China** said that frankly speaking the principle of complementarity as enshrined in the Rome Statute was far from what was offered by the officer of ICC. According to the traditional norm of complementarity, the national judicial systems always play a primary role in prosecuting those serious crimes, and what the officer explained in the term of positive complimetarity is concerning the cooperation between State Parties and ICC. He said that rather than the Court deciding whether a State is unable or unwilling it should be the States who should make that decision in the first place. He added that in his view as Kenya was now able and willing to prosecute the cases should revert back to it.

119**.** In response **Mr. Rod Rastan** stated that Article 19 of the Rome Statute gave a procedure where States could have judicial review of this issue by the judges of the ICC. If Kenya was successful in the Appeal, theoretically the cases could be referred back to the national level. If the case proceeds genuinely, this was fine. However, if the prosecution thought something was wrong then the prosecutor could ask the Court to revisit its earlier decision. The Rome Statute was not established to ensure cases are necessarily tried at the ICC. It was created to end impunity through genuine proceedings, where at the national level or before the ICC.

120**.** The **Delegation of Malaysia** maintained that it was clear under Art 15 that the Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court. However, she asked were there any guidelines for the prosecutor before he/she could initiate any investigation? This was necessary so as to avoid selective investigation. She further added that assuming that in Malaysia, we criminalize a particular crime under specific legislation, which may not be the same crime as enlisted in the Rome Statute what would be the status?

121**.** On complementarity, Malaysia illustrated a practical scenario. Malaysia was grappling with complementary legislation by criminalizing ICC offences (internalization of the Rome Statute). They had also seen countries that said their respective national penal laws were sufficient to address ICC offences. For example, genocide vs. multiple counts of murder. Does the ICC not see the latter being sufficient?

122**.** In response Mr. Rastan, noted that under Article 15 of the Rome Statute the Prosecutor could receive information from anyone. The OTP had some experience in this regard and till date it had received over 9000 (communications), however the OTP had opened only 6 investigations to date and the majority of such communications related to matters outside the jurisdiction of the Court. The seriousness and gravity of crimes committed lay at the heart of the matter. On specific criteria, he referred to the OTP's draft *Policy Paper on Preliminary Examinations*, which had been distributed to delegates.[44]

123**.** In response to the query from Malaysia regarding the internalizing of ICC crimes into domestic legislation, **Judge Noguchi** responded that when Japan was preparing for accession, Japan looked at the approaches taken by State Parties and found two approaches fundamentally; one approach was to criminalise the Rome Statute provisions under its penal laws (e.g. Canada and Germany). Another approach was not to do this, at least before becoming a State Party. It was noted that the need for criminalization had not been made compulsory except for offenses against the administration of justice.

124**.** Japan did not have the crime of genocide and crimes against of humanity under its existing penal laws. Buthad thought that almost all of such crimes would be effectively punishable according to existing domestic crimes of murder etc. There were the slightest possibilities, if strictly speaking from legal and theoretical points of view, that certain crimes under the jurisdiction of the ICC might not be prosecutable under the existing domestic laws, such as a certain type of incitement of genocide which did not result in any casualties. However, Japan concluded that such possibilities were more or less for the sake of argument only and would not constitute a barrier for accession, because the ICC must also consider the factor of gravity of crimes in relation to the admissibility question under Article 17. This was perhaps the common understanding of all states, even those that have criminalized all the ICC crimes by domestic legislations. WhichThe approach to take would greatly depend on the domestic situation. In the case of Japan, it was

[44] http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Policies+and+Strategies/Draft+Policy+Paper+on+Preliminary+Examinations.htm

believed that if the penal code were to be revised comprehensively to adapt to the ICC, it would take many years and delay Japan's accession to the ICC.

125. **Mr. Rastan** added that reference to the obligations on States Parties to adopt implementing legislation related to Article 70, Art. 109, Part XI (on cooperation). Other than that, it was the States' decision and discretion whether and how to domesticate the ICC's penal provisions. He nonetheless noted that the concept of complementarity and the availability of the Court's admissibility provisions had led some States to decide to exhaustively domesticate all ICC crimes as international offences in the manner specific in the Rome Statute. He also pointed out Art. 17 (1) (c) cross reference to Art. 20 – linkage with conduct, suggesting that for complementarity the national courts need to be proceeding against the same person for the same conduct. He maintained that if the cases were in fact different or the national authorities were prosecuting someone for different conduct, this related to the question of sequencing (who goes first), but also to prosecutorial discretion (i.e. whether as a policy matter the same person should be charged both the ICC and national level).

126**.** The Malaysian delegate further inquired what about Sudan? Sudan had stated that it would proceed to take action against the perpetrators at the national level, but the ICC stated that it was not taking action on the same conduct.

127**.** **Mr. Rastan** replied that to date there had not been any admissibility challenges from the Government of Sudan. There were, moreover, no national proceedings for those bearing the greatest responsibility for the most serious crimes arising from the violence in Darfur. The OTP had learned that the Sudanese judges involved admitted to being frustrated with the fact that the police and the authorities were not cooperating to provide information. Hence, in Sudan, it was a situation of inaction. He noted that the ICC system was set up to ensure the end of impunity. If the national system did not respond, the ICC would.

128. The **Delegation of the People's Republic of China** inquired about the implications of the ICC Rome Statute on universal jurisdiction, whether ratification of Rome Statute would promote State Parties to enact universal jurisdiction legislation to fulfill the requirement of Complementarity Mr. Rastan recalled Rwanda – the Rule11Art. *bis* cases where situations were reverted back to the national jurisdiction – not exactly complementarity but it is perhaps the closest approximation thereto. In the *Ademi and Norac* 11*bis* referral to Croatia – the Tribunal accepted that, despite the absence of applicable penal provisions covering command responsibility by omission (article 7(3) ICTY Statute), that a combination of different relevant domestic provisions could approximate to the particular conduct sought by the ICTY Prosecutor, and accordingly referred the case to the national level. In another case, *Bagaragaza*, before the ICTR, the Tribunal was not satisfied that the national court, Norway, could sufficiently address the genocide case brought by the ICTR Prosecutor by charging the suspect under ordinary domestic penal provisions as aggravated homicide, because the essential elements of the crime (namely genocidal intent) would be insufficiently captured. Hence the ad hoc Tribunals have looked to the degree of discrepancy and their effect on the case before

deciding to refer cases to the national level. The ICC may or may not follow a similar approach and has yet to decide on such admissibility issues to date

129**.** The **Delegation of Uganda** while referring to immunity and bilateral agreements between non state party and states parties said that there was a contradiction to the concept of immunity all by itself. Mr. Rastan responded by explaining the provision is enshrined in Article 98 of the Rome Statute, and that the scope of such agreements or the interpretation of applicable immunities could be something that is examined by the judges of the Court where it arose in the context of a specific case.

130**.** **Mr. David Koller,** added that on reading Article 17, if the first question you ask was, "is there a prosecution or investigation or not?". If there was no investigation or prosecution, then there was no need to proceed with asking the question whether the state was unable or unwilling.

C. Working Session III

131. Judge Noguchi, the Chairman for Working Session III mentioned that it primarily dealt with two issues namely: (i) Post Kampala Review Conference Developments and (ii) Implications of ratification to the Rome Statute. Mr. David Koller was the lead discussant.

132**.** An overview of the First Review Conference of the Rome Statute that was held in Kampala, Uganda from 31 May to 11 June 2010 was given by Mr. Koller wherein the following points were noted:

i. Amendments to the Rome Statute:

133. The Conference adopted a resolution by which it amended the Rome Statute so as to include a definition of the crime of aggression and the conditions under which the Court could exercise jurisdiction with respect to the crime. The actual exercise of jurisdiction was subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as was required for the adoption of an amendment to the Statute.

134. The Conference based the definition of the crime of aggression on United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, and in this context agreed to qualify as aggression, a crime committed by a political or military leader which, by its character, gravity and scale constituted a manifest violation of the Charter.

135. As regards the Court's exercise of jurisdiction, the Conference agreed that a situation in which an act of aggression appeared to have occurred could be referred to the Court by the Security Council, acting under Chapter VII of the United Nations Charter, irrespective as to whether it involved States Parties or non-States Parties.

136**.** Moreover, while acknowledging the Security Council's role in determining the existence of an act of aggression, the Conference agreed to authorize the Prosecutor, in

the absence of such determination, to initiate an investigation on his own initiative or upon request from a State Party. In order to do so, however, the Prosecutor would have to obtain prior authorization from the Pre-Trial Division of the Court. Also, under these circumstances, the Court would not have jurisdiction in respect to crimes of aggression committed on the territory of non-States Parties or by their nationals or with regard to States Parties that had declared that they did not accept the Court's jurisdiction over the crime of aggression.

137. The Conference also adopted a resolution by which it amended article 8 of the Rome Statute to bring under the jurisdiction of the Court the war crime of employing certain poisonous weapons and expanding bullets, asphyxiating or poisonous gases, and all analogous liquids, materials and devices, when committed in armed conflicts not of an international character.

138. Furthermore, the Conference adopted a resolution by which it decided to retain article 124 in its current form and agreed to again review its provisions during the fourteenth session of the Assembly of States Parties, in 2015. Article 124 allows new States Parties to opt for excluding from the Court's jurisdiction war crimes allegedly committed by its nationals or on its territory for a period of seven years.

ii. Stocktaking of international criminal justice

139. The Conference concluded its stocktaking exercise on international criminal justice with the adoption of two resolutions, a declaration and summaries of discussions.

140. The resolution on the impact of the Rome Statute system on victims and affected communities, inter alia, recognized, as essential components of justice, the right of victims to equal and effective access to justice, support and protection, adequate and prompt reparation for harm suffered and access to information concerning violations and redress mechanisms. Moreover, the Conference underlined the need to optimize outreach activities and called for contributions for the Trust Fund for Victims.

141. The Conference also adopted a resolution on the issue of complementarity, wherein it recognized the primary responsibility of States to investigate and prosecute the most serious crimes of international concern and the desirability for States to assist each other in strengthening domestic capacity to ensure that investigations and prosecutions of serious crimes of international concern can take place at the national level.

142. In the Declaration on Cooperation, the Conference emphasized that all States under an obligation to cooperate with the Court must do so. Particular reference was made to the crucial role that the execution of arrest warrants played in ensuring the effectiveness of the jurisdiction of the Court. Moreover, the Review Conference encouraged States Parties to continue to enhance their voluntary cooperation and to provide assistance to other States seeking to enhance their cooperation with the Court. In addition, the Conference took note of the summary of the roundtable discussion on cooperation.

143. The Conference further took note of the moderator's summary of the panel discussion held on the issue of "peace and justice". The panel highlighted the paradigm shift the Court had brought about; there was now a positive relation between peace and justice. Although tension between the two continued to exist and had to be addressed, amnesties were no longer an option for the most serious crimes under the Rome Statute.

iii. Enforcement of sentences

144. In its resolution on strengthening the enforcement of sentences, the Conference called upon States to indicate to the Court their willingness to accept sentenced persons in their prison facilities and confirmed that a sentence of imprisonment may be served in prison facilities made available through an international or regional organization, mechanism or agency.

145. It was noted that the Review Conference had exceeded expectations both in the stocktaking and amendment of provisions forums, even though some had their doubts as to what the Conference might actually achieve beforehand.

146. Presenting his views on **"Implications of Ratification to the Rome Statute**", Judge Noguchi was of the belief that such a decision had to be taken weighing both the pros and cons of the ratification. In most cases he opined that the discussion to become a State Party focused on the concerns and problems. While realizing that it was solely a sovereign decision; States also need to see the benefits of becoming a State Party. While citing the case of Japan he stated that even though it had taken some years for Japan to become a party to the Statute, there was always a firm understanding that it had to do so. While realizing that the ICC was not a perfect institution and it still faced numerous challenges, States could become a part of the universal system to fight against impunity by joining the ICC. For Japan issues that required careful scrutiny before the accession included: (i) the possible conflict of the ICC jurisdiction with the domestic legal system; (ii) the relationship between the ICC and the Security Council; and (iii) the financial implications which arises by becoming a State Party. .

147. After the presentations, the following Member states presented their comments and observations: **Kenya, Kingdom of Thailand, and People's Republic of China**.

149. The **Delegation of Kenya** while commenting on the principle of complementarity stated that if the ICC was supposed to act as a catalyst for assisting Member States in capacity building and technical assistance what was the procedure to be followed in this aspect? Mr. Koller referred to Article 93(10) of the Rome Statute replied that the ICC, like many organizations played the role of facilitators. The court's role had focused on its activities e.g. outreach activities. Training Programmes were directed to assist counsel to apply the law domestically. Although the court may not have a specific mandate in assistance measures, informally, the Court would be happy to receive requests for assistance in any manner useful to States.

150. The **Delegation of Thailand** opined that one reason why Asian States were hesitant to ratify the Rome Statute related to the issue of non-international armed conflicts being enlisted under war crimes in the Rome Statute. She said that this article was largely based on Additional Protocol II of the Geneva Conventions of 1949, which was by far the least ratified. The concern of States related to the protection of their military personnel who would have no free hand in dealing with matters pertaining to the internal security of States. Secondly, the delegate felt that joining the ICC was an additional financial burden on a State and sometimes those resources could be used for some other priority areas e.g. the fight against piracy. Thirdly, the delegate shared the concern of some other States regarding Article 27 of the Rome Statute relating to the immunity of the head of State.

151**.** Nevertheless, as illustrated in the case of Japan, shouldering this burden amounts to a State's contribution towards the fight against impunity and providing financial support to a new system of international criminal justice. The ICC would be able to provide a rough estimate of a particular State's percentage of contribution if it were to join the ICC.

152. The issue of States with constitutional monarchies or presidential immunities facing difficulty accepting the Rome Statute was also highlighted. It was noted that it would otherwise be instructive to see how many other States with constitutional monarchies have justified their positions of joining the ICC, including Jordan. Some had taken the position that any form of decision making by the monarch would be so remote that it would never implicate the monarchy for ICC offences. Others, such as France and Luxemburg, applied a general phrasing to the effect that their respective constitutions would be applied in line with the Rome Statute. Other States have expressed that if ever a case arises implicating the monarchy or the head of State, such cases would be considered on a case by case basis and could be procedurally waived in the case of republics.

153**.** On the issue of the concern by States parties on the application of the Rome Statute to internal armed conflicts, it was stressed that the Statute places a threshold bar on "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature" that do not rise to the level of an armed conflict. Moreover, the non-international elements contain in article 8 derive from Common Article 3 of the Geneva Convention, which enjoy universal adherence. The remaining offences related to non-international armed conflict largely reflect those that are part of customary international law. Finally, the principle of complementarity holds that as long as a State genuinely addresses such situations, there would is no need for the ICC to intervene.

154. The **Delegate of the People's Republic of China** wanted to know the criteria to be applied by the ICC while adjudicating on "Crimes against Humanity" and the definition of attacks? The chair responded that the criteria for "Crimes against Humanity" had been developed under the Nuremberg Charter. Mr. Koller replied that presently the ICC did not have any jurisprudence on this issue however the definition of crimes against

humanity was set out in further detail in article 7 of the Rome Statute. Mr. Rod Rastan said that the ICC had provisionally examined the definition and elements of crimes against humanity in the Katanga/Ngodjolo and Bemba confirmation decisions as well as the Kenya article 15 decision and gave examples, but noted, as Mr. Koller had mentioned, that the jurisprudence would become more elaborated in the final judgments by the ICC in those cases. It was noted that it would be instructive to also examine the jurisprudence of the ICTY and ICTR in this regard.

D. Concluding Session

The following Member States made their concluding observations**: Brunei Darussalam; People's Republic of China; Ghana; Malaysia; Uganda; United Arab Emirates; and Japan**

155. The **Delegation of Brunei Darussalam** noted that her country was not a Party to the Rome Statute for both legal and political reasons the primary one being the sovereignty of the nation. The primary concern related to the application of Article 27 which applied to all persons, this article was in contradiction with the Constitution of Brunei Darussalam according to which the Sultan was immune. The next issue of concern was implementation of the Rome Statute into the domestic legislation, as terms such as genocide, crimes against humanity and war crimes were not defined in the penal law of the country.

156. The **Delegation of the People's Republic of China** recalled that Judge Song had said that to ratify/not ratify the ICC was a sovereign decision, he recalled that his country had principled reservations to the Rome Statute since 1998 and subsequently to the work of the ICC, even though his country did share the spirit of the Rome Statute. However, he felt it was good to engage in a dialogue on the relevant issues of concern, but was not sure whether his country was ready to join the ICC as t it had very substantial concerns, regarding the jurisdiction of the ICC. He added that it was argued by some participants that the ICC was the first permanent court for all humanity, but posed the question whether the international community as community of sovereign states was ready to accept the idea of international law?

157. The **Delegation of Ghana** said that he had come to observe the proceedings of the meeting and would report them back to the capital.

158**.** The **Delegation of Kenya** said that even though Kenya was a State Party to the Rome Statute, she was not sure whether she wanted other countries to follow suit. She maintained that Kenya being a situation country, its experience with the court had been quite challenging. According to her it was critical for States Parties to strengthen their domestic institutions so that in case of need they could avoid going to the ICC. She hoped that with the fundamental changes and the functional institutions now in place in Kenya they would be able to handle the cases within.

159. The **Delegation of Malaysia** stated that Malaysia's position regarding the ICC had been spelled out by the Attorney General. However, she believed that there was need to have the suitable legal framework in place, before proceeding to ratifying the Rome Statute. She also expressed her concern regarding monarchy and the provisions in the Rome Statute. The proper application of the principle of complementarity was the key to success of the system and it was also essential that States cooperate with the ICC.

160. The **Delegation of Uganda** said that her country was the first one to refer a situation to the ICC. Currently it was at the pre-trial stage and there were difficulties faced in arresting the suspects. Her country had domesticated the Rome Statute in 2010 as a result of which they had established an international crimes division in the High Court, which could prosecute genocide, crimes against humanity and other crimes within the Rome Statute. Only last week one case pertaining to an IRA rebel had been referred to that division and the result would have to be seen. However, there were certain other challenges to be faced the first pertained to immunity as well as the age of the criminal responsibility (Uganda-12 years) as well as the issue of sentencing-Uganda has death penalty.

161. The **Delegation of the United Arab Emirates** stated that presently his country was not a State Party to the Rome Statute, however they looked forward to joining the ICC and were studying the Rome Statute and domesticating it was a complicated process. At the same time they wanted to see the future role and direction of the ICC.

162. **Judge Noguchi** from Japan maintained that Japan was willing to share its experience of ratification with countries that are considering the accession. It would also be willing to cooperate with AALCO as well as the ICC in future activities. Questions could be referred to the Ministry of Foreign Affairs of Japan.

163. **Mr. David Koller** agreed that to join or not to join the ICC was a Sovereign decision. Meetings such as these provided Member States with an opportunity to engage with issues and concerns pertaining to the functioning of the ICC and such engagement could help States in making a conscious decision – if to join, how to join? ICC. However, he was of the view that the ICC would benefit from universal ratification. He referred to the discussion on the role of the UNSC and felt that once ICC attained universality this role would diminish. He noted that, while ratification and implementation were linked issues, there were only a few direct obligations under the Rome Statute in terms of specific implementation requirements. On the question of punishment he said that it was entirely up to State on what kind of punishment to impose and they did not necessarily have to apply the ICC punishment. He maintained that the officials from the ICC would be glad to engage further with States irrespective of the fact whether they were States Parties or non-States parties to the Rome Statute.

164. **Mr. Rod Rastan** also echoed Mr. Koller that the OTP would be willing to assist States with matters pertaining to the ICC, whether in the areas of exchanging lessons learned and best practices, participating in trainings or lending other forms of assistance.

165. **Prof. Dr. Rahmat Mohamad, Secretary-General** in his concluding remarks thanked the Judge Noguchi, Mr. Rod Rastan and Mr. David Koller for the valuable inputs provided by them on the various themes discussed during the meeting. As a follow up he envisaged three further activities: (i) Conduct a training/capacity building workshop for Judges and Prosecutors from AALCO Member States to acquaint them with the Rome Statute; (ii) to co-host a conference with the ICC for greater in-depth consideration of significant issues arising out of the present Meeting of Legal Experts and (iii) conduct research on some of the key areas pertaining to the ICC.

166**.** **Dr. Hassan Soleimani, Deputy Secretary-General** thanked the Government of Malaysia and the ICC Secretariat for co-hosting the very productive meeting of legal experts on the Rome Statute of the ICC. Special thanks were due to President Song for his keynote address. He thanked the Chairpersons for their valuable introductory remarks on the themes discussed during the meeting and the lead discussants from ICC for their important input on the functioning of the ICC. He thanked the Member States of AALCO for their keen interest and participation and also for sharing their concerns and experiences with everyone. He thanked the Secretary-General for his inspiring leadership and his colleagues for a job well done.

V. COMMENTS AND OBSERVATIONS OF THE AALCO SECRETARIAT

167. 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.

168. 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[45] 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".

169. 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

[45] 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.

functional Court operations should enable States to make informed decisions on whether changes to the Rome Statute were needed.

170. 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.

171. 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.

172. 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.

173. 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.

174. 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.

175. It may be noted that as of 10 August 2011, 117 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.

176. 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. Many of these concerns were expressed by the Member States of AALCO during the recent Expert Group Meeting on the Rome Statute

of the ICC: Issues and Challenges, which was held in Putrajaya, Malaysia and has been, discussed in Part IV of this document. Besides, some non-State Parties have expressed concern regarding the immunities of Heads of States particularly is 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.

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

178. 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.

179. 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.

180. 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.

4. 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-sixth 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 United Nations Climate Change Conference (6 to 17 June 2011, Bonn, Germany), and Consideration of the Climate Change Issues at the Fiftieth Annual Session of AALCO (27 June to 1 July 2011, Colombo, Sri Lanka). Finally, it brings forth some general comments on the issue.

II. UNITED NATIONS CLIMATE CHANGE CONFERENCE (6 – 17 JUNE 2011, BONN, GERMANY)

4. The United Nations Climate Change Conference was held in Bonn Germany from 6 to 17 June 2011. The conference included the 34th sessions of the Subsidiary Body for Implementation (SBI) and the Subsidiary Body for Scientific and Technological Advice

(SBSTA). It also comprised the second part of the 16th session of the *Ad Hoc* Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol (AWG-KP) and the second part of the 14th session of the *Ad Hoc* Working Group on Long-term Cooperative Action under the Convention (AWG-LCA). The conference drew around 3,500 participants.

5. During the Conference talks, the need to deal with the issue for a global solution under high-level leadership was emphasized. Kyoto Protocol remained critically important because it contained key rules to quantify and monitor efforts to reduce greenhouse gas emissions and important market-based mechanisms that enable cost-effective mitigation. However, on the possibility of a looming regulatory gap between Kyoto Protocol commitment periods, it was noted that the Governments could increase their efforts and come forward with middle ground solutions and options which are acceptable to all sides.

6. On second commitment period, Parties decided to work in a single contact group focusing on political elements of Annex I parties' further commitments. The contact group addressed, *inter alia*: parties to the Kyoto Protocol not intending to take commitments during a second commitment period; the flexibility mechanisms; conditionalities attached to undertaking commitments during a second commitment period and the "Durban package;" and how to move issues forward in the lead-up to Durban.

7. At the closing plenary, it was reiterated that to achieve an outcome in Durban, clear progress must be made on: (i) Annex I parties' aggregate and individual emission reductions; (ii) the nature, content and applicability of rules for a second commitment period; (iii) aspects of the AWG-KP's relationship with the AWG-LCA; and (iv) resolution of "wide disagreement" on whether to address consequential amendments to the Kyoto Protocol. Parties agreed to suspend the session rather than close it, in order to expedite the process at the AWG-KP's next meeting.

III. CONSIDERATION OF THE CLIMATE CHANGE ISSUES AT THE FIFTIETH ANNUAL SESSION OF AALCO (27 JUNE – 1 JULY 2011, COLOMBO, SRI LANKA)

8. At the Fiftieth Annual Session of AALCO held in Colombo, Sri Lanka from 27 June to 1 July 2011, agenda item "Environment and Sustainable Development was considered for deliberations. Dr. Hassan Soleimani, Deputy Secretary-General (DSG) of AALCO introduced the agenda item and informed 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.

9. On climate change issues, the DSG mentioned that the international community has been engaged in various rounds of negotiations for elaborating on a framework of action after 2012, when the Kyoto Protocol's first commitment period would expire. The DSG requested Member States to recall that in December 2007, negotiators meeting at the United Nations Climate Change Conference in Bali had approved the Bali Action Plan and Roadmap setting the Fifteenth meeting of Conference of Parties in December 2009 at Copenhagen as the deadline for agreeing on a framework for action after 2012.

10. The plan laid out the four-fold action roadmap for climate change action – mitigation, adaptation, technology and finance. It was essentially a mandate to finalize two things: one, the emission reduction commitments of industrialized countries for the second phase of the Kyoto Protocol, and two, the global goals for long-term cooperative action until 2050. Although, those negotiations were to conclude at Copenhagen, the Conference failed to achieve the requisite breakthrough.

11. The DSG also briefly summarized the developments regarding at the Sixteenth Conference of Parties of the United Nations Framework Convention on Climate Change (COP) held in Cancun, Mexico that took place from 29 November to 11 December 2010. Developments at the United Nations Climate Change Conference held from 3 to 8 April 2011 at Bangkok Thailand were also mentioned.

12. Mr. Masa Nagai, Acting Deputy Director and Senior Legal Officer, United Nations Environment Programme (UNEP), made a short presentation on "Initiatives for strengthening the rule of law for environmental sustainability". The speaker mentioned that there was a need to strengthen implementation of international commitment and enforcement of national environmental law. The presentation focused on the legal frameworks for environmental sustainability, such as supporting progressive development of international law in the field of environment, implementation of multilateral environmental agreements, and strengthening capacity of countries to develop and enforce national environmental law.

13. At the deliberations that ensued, delegations from the following Member States of AALCO, namely; the Sultanate of Oman, Pakistan, People's Republic of China, Republic of Indonesia, Malaysia, Nepal, Japan, Bangladesh, South Africa, Republic of Korea, United Republic of Tanzania, and Arab Republic of Egypt made their interventions.

14. The delegations were of the opinion that the climate negotiation process was facing a difficult uphill battle, from Copenhagen, Cancun, Bangkok to Durban, success was not guaranteed, however, there was a need to take concerted efforts to achieve common endeavours to complete the implementation of the Bali Action Plan as set out in 2007. There was a consensus among delegations on three important aspects, namely;

(i) need to build on the Copenhagen Accord for a balanced, comprehensive legally binding instrument as the certain legal basis upon which to

implement the environment and sustainable development agenda. Deeper quantified emission reduction targets should be set for developed countries for the second commitment period under the Kyoto Protocol, and those developed countries that are not Parties to the Kyoto Protocol should also take comparable emission reduction commitments,

(ii) Durban must produce a robust and workable decision. In that regard, the legal form of the agreement and a decision on Reducing Emissions from Deforestation and Degradation (REDD) + could bring about the immediate action that has to be taken, and

(iii) Addressing the trust deficit by building an open, transparent and inclusive process in order to create a conducive environment for achievement of goals in Durban.

15. It was stressed by the delegations that climate change should be addressed in the context of sustainable development and under the principle of "common but differentiated responsibilities" and within the context of the future negotiations on climate change, developed countries must assume a leadership role; and developing countries, supported through technological, financial and other assistance, should continue to implement their sustainable development policies.

16. The 17th Session of the Conference of Parties (Known as COP 17) to the United Nations Framework Convention on Climate Change and the 7th Session of the Conference of Parties serving as meeting of the Parties to the Kyoto Protocol (CMP) is to be held from 28 November to 9 December in Durban, South Africa. The First commitment period under the Kyoto Protocol would expire in 2012 and Durban Conference is the key negotiation for the Kyoto Protocol, as lack of any agreement on second commitment period would result in the Protocol lapsing. Major Issues Involved to be deliberated and agreed upon are the following:

(i) emission reduction commitments of industrialized countries for the second phase of the Kyoto Protocol

(ii) Effective institutional arrangements should be established to ensure that developed countries fulfill their commitments to provide technology, financing and capacity building support to developing countries

(iii) Nationally, developing countries should take nationally appropriate mitigation and adaptation actions, supported by technology, financing and capacity-building assistance from developed countries.

IV. COMMENTS AND OBSERVATIONS OF THE AALCO SECRETARIAT

17. 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.

18. The negotiations at Cancun, Bangkok and Bonn have revived hopes for the multilateralism and the UNFCCC process. However, there has parallely emerged different set of arguments based on 'parties to the Kyoto Protocol not intending to take commitments during a second commitment period', the flexibility mechanisms, conditionalities attached to undertaking commitments during a second commitment period and the "Durban package;" etc,. In this regard it may be hoped that through collective action the international community at Durban can deliver a full, operational architecture to implement effective, collective climate action.

19. 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 forthcoming Durban Conference is crucial for mooting the issue of developed countries taking the lead to mitigate climate change based on "common but differentiated responsibility". In this regards, the problems and concerns needs to be addressed in a concerted manner, henceforth a pre-Durban Conference meeting involving the common viewpoints of all the Member States of AALCO needs to be consolidated.

20. The AALCO Secretariat looks forward to convening such a meeting of Member States of AALCO before the Durban Conference which would strengthen solidarity among Member States so that a common goal of achieving post-2012 commitments keeping in mind the national interest and common good of the peoples across the world could be meted out. It is essential to recall the resolution on Environment and Sustainable development adopted during the recent Fiftieth Annual Session of AALCO at Colombo, Sri Lanka in 2010, wherein it urges its Member States to actively participate in the on-going Bali Road-Map negotiations. Also directs the Secretariat to follow the on-going Bali Road-Map negotiations and Cancun Agreements for stronger international cooperation on climate change for the period beyond 2012.

5. UNITED NATIONS PROGRAMME OF ASSISTANCE IN THE TEACHING, STUDY, DISSEMINATION AND WIDER APPRECIATION OF INTERNATIONAL LAW

I. INTRODUCTION

1. The United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International law [the Programme of Assistance, hereinafter] was established by General Assembly resolution 2099 (XX) of 20 December 1965 to contribute to a better knowledge of international law "as a means for strengthening international peace and security and promoting friendly relations and co-operation among States". Its continuation was subsequently authorized by the General Assembly through the adoption of resolutions at its annual sessions until its twenty-sixth session, and thereafter biennially. At its Sixty-Fourth session, the General Assembly decided to consider this agenda item on an annual basis (resolution 64/113).

2. The Programme of Assistance provides direct assistance in the field of international law by means of: (i) fellowship programmes, regional courses and symposia in international law; and (ii) the preparation and dissemination of publications and other information relating to international law.

3. The Secretary-General of the United Nations reports to the General Assembly on the implementation of the Programme of Assistance and, following consultations with the Advisory Committee on the Programme, which meets annually in the autumn, submits recommendations regarding its execution in subsequent years. In the performance of the functions entrusted to him by the General Assembly in relation to the Programme of Assistance, the Secretary-General is assisted by the Advisory Committee on the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law, the members of which are appointed by the Assembly for a period of four years[46]. The Codification Division of the Office of Legal Affairs of the United Nations is responsible for implementing the Programme of Assistance.

4. At its Sixty-Fourth session, the General Assembly authorized the Secretary-General to carry out in 2010 and 2011 the activities specified in his report, including the provision of a number of fellowships to be awarded to qualified candidates from developing countries to attend the International Law Fellowship Programme in The Hague in 2010 and 2011, and a number of fellowships to be determined in the light of the overall resources for the Programme of Assistance and to be awarded to qualified candidates from developing countries to attend regional courses in international law in 2010 and 2011; also authorized the Secretary-General to award a minimum of one scholarship in both 2010 and 2011 under the Hamilton Shirley Amerasinghe Memorial

[46] The following 25 States are Members of the Advisory Committee for a period of four years beginning from 1st January 2008 to 31st December 2011: Canada, Colombia, **Cyprus**, Czech Republic, Ethiopia, France, Germany, **Ghana, Islamic Republic of Iran**, Italy, Jamaica, **Kenya, Lebanon**, **Malaysia,** Mexico, **Nigeria**, **Pakistan,** Portugal, Russian Federation, **Sudan,** Trinidad and Tobago, Ukraine, **United Republic of Tanzania**, United States and Uruguay (Resolution 62/62).

Fellowship on the Law of the Sea, subject to the availability of new voluntary contributions made specifically for that fellowship; requested the Secretary-General to provide relevant information to the Advisory Committee on the Programme of Assistance, to facilitate its consideration of the possibility of providing funding from the regular budget for the United Nations Audiovisual Library of International Law; also requested the Secretary-General periodically to invite Member States and interested organizations, as well as individuals, to make voluntary contributions towards the financing of the Programme of Assistance or otherwise to assist in its implementation and possible expansion; and further requested the Secretary-General to report to the Assembly at its Sixty-Fifth session on the implementation of the Programme of Assistance during 2010 and, following consultations with the Advisory Committee on the Programme of Assistance, to submit recommendations regarding the execution of the Programme in subsequent years (resolution 64/113).

II. CONSIDERATION OF THE AGENDA ITEM BY THE UNITED NATIONS GENERAL ASSEMBLY AT ITS SIXTY–FIFTH SESION

5. The item entitled "United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law" was included in the provisional agenda of the Sixty-Fifth session of the General Assembly pursuant to Assembly resolution 64/113 of 16 December 2009. At its 2nd plenary meeting held on 17 September 2010, 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 18th, 27th and 28th meetings, on 22 October and on 5 and 11 November 2010. The views of the representatives who spoke during the Committee's consideration of the item are reflected in the relevant summary records (A/C.6/65/SR.18, 27 and 28). For its consideration of the item, the Committee had before it the report of the Secretary-General (A/65/514).

6. The report of the Secretary-General covers, in a broad brush manner, the implementation of the Programme of Assistance in 2010 in accordance with the guidelines and recommendations contained in the report of the Secretary-General to the General Assembly at its Sixty-Fourth session. The report gives an account of the activities performed by the Office of Legal Affairs of the United Nations and of those in which it has participated under the Programme. In the coming part of the report, a brief summary of the opinions expressed by the Member States of AALCO during the debate on the Programme of Assistance that took place at the Sixth Committee is given.

7. The **Delegation of Malaysia** reaffirmed his country's commitment to the Programme of Assistance and welcomed the funding provided by the Korea International Cooperation Agency to facilitate Malaysia's participation in the regional course in international law in the Republic of Korea, the first such course to take place for five years. He also welcomed the proposal to hold a regional course in Africa during the first quarter of 2011. While welcoming the tireless efforts of the Codification Division in implementing this programme, he also expressed his concern about the financial crisis

facing some aspects of the programme such as the maintenance of the United Nations Audio Visual Library of International law.

8. The **Delegation of the Republic of Korea** pointed out that, through its projects, the Programme of Assistance has made a positive contribution towards promoting the rule of law at the national and international levels, which was a matter central to all aspects of United Nations work and key to the achievement of its mandates. The demand for international law training and dissemination had increased significantly in line with the growing awareness of the important role played by the rule of law. After expressing his country's firm commitment to the objectives of the Programme of Assistance, he noted that his Government would host, in November 2010 the first regional course in international law to be held for five years, which would be attended by participants from developing countries in Asia. It had also made a contribution to the Audiovisual Library during the current year.

9. The **Delegation of Ghana**, speaking on behalf of the Group of African States, expressed appreciation for the diligence with which the Secretariat had carried out its responsibilities during 2010 with respect to the Programme of Assistance, whose intended goal of promoting the rule of law was now more relevant than ever. Urgent action was needed to address the challenges facing the Programme, not least the constraints posed by the lack of financial and other resources without which the fundamental promise and purpose of the Programme could scarcely be fulfilled, he added. The efforts of the Codification Division to strengthen and revitalize the Programme, including its cost-saving initiatives aimed at maintaining the number of fellowships for courses at The Hague Academy of International Law, were commendable.

10. It was gratifying that, after decades of inaction, a regional course in international law was to be held in Addis Ababa in 2011. The hope was that such courses would become a regular, if not annual, event on the continent, given the establishment of the African Union Commission of International Law, whose mandate was to promote, in collaboration with non-African organizations, the teaching, study, and wider appreciation of international law on the African continent.

11. The **Delegation of Pakistan** stated that, as an ardent advocate of the cause espoused by the Programme of Assistance, Pakistan was particularly grateful for the activities of the Codification Division and the usefulness of the Audiovisual Library and also appreciated the efforts of the Division for Ocean Affairs and the Law of the Sea, the International Trade Law Division and the Treaty Section. He expressed hope that the encouraging increase in demand for training in international law would be met with equally strong efforts to provide fellowships and that resources would be obtained to resume assistance to the regional courses. While noting that universities, philanthropic foundations, institutions and organizations have been invited to make voluntary contributions, both financial and in kind, to assist in the implementation and possible expansion of the Library, he expressed hope that an effort would be made to develop partnerships with such entities in developing countries.

12. The **Delegation of Republic of South Africa** stated that the Programme of Assistance was a core United Nations activity comprising valuable elements and should be supported as an important tool for promoting the rule of law at the national and international levels. On that score, the continuing efforts of the Codification Division to contribute to the education of students and practitioners of international law worldwide were to be commended. He was of the view that the Audiovisual Library of International Law represented a major contribution to the teaching and dissemination of international law, providing as it did an opportunity for all, regardless of location, to benefit from the knowledge of eminent experts. Member States were therefore urged to contribute in support of what was a remarkable initiative. Pledging his own Government's support for the Programme of Assistance, he urged Member States to make voluntary contributions to ensure continuation of the Programme's activities. Alternative sources of funding must nevertheless be found, including from the regular budget.

13. The **Delegation of the Islamic Republic of Iran** stated that the Programme of Assistance has made important contributions to the appreciation of international law and its role in international relations. The Programme enjoyed high credibility, which has been reinforced by the inclusion of the topic of the rule of law in the agenda of the Sixth Committee. The launching of the Audiovisual Library of International Law was a good example of how the Programme made full use of available resources, including modern technologies, to discharge its mandate and expand its audience. After welcoming the Programme's initiatives to familiarize academic and other institutions of developing countries with the latest developments in international law through regional seminars, he highlighted the need for sustainable and adequate resources in order to enable the Programme to continue its work.

14. The **Delegation of Uganda** pointed out that adequate resources for the Programme of Assistance should be provided from the regular budget. While welcoming the proposed regional training courses, he hoped that they would be sustained and extended to other countries. His country had offered to host the next regional seminar facilitated by the International Seabed Authority in 2011 or 2012, in order to show that the international seabed was a common heritage of mankind.

15. The Chairman of the Advisory Committee on the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law (from Ghana) thanked members of the Sixth Committee and the Secretariat for the support provided to the Advisory Committee. He hoped that the work of the Advisory Committee would become more regular and to that end endorsed the suggestion that the possibility of holding more than one meeting a year should be considered.

16. In their general comments, delegations expressed their strong support for the Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law. Delegations emphasized that the goal of the Programme of Assistance remains just as essential today as it was at the time of its establishment forty-five years ago, in contributing to a better knowledge of international law as a means of

strengthening international peace and security and promoting friendly relations and co-operation among States. Delegations highlighted the importance of the Programme of Assistance as a key tool in the strengthening of the rule of law at the national and international levels.

17. Delegations welcomed the report of the Secretary-General (A/65/514) concerning the implementation of the Programme of Assistance in 2010, and in particular, commended the Codification Division of the Office of Legal Affairs for its efforts in strengthening and revitalizing the various activities under the Programme of Assistance in order to meet the increasing demand for international law training and dissemination in developing countries as well as developed countries.

18. Several delegations commended the Codification Division for its cost-saving measures that resulted in an increased number of fellowships for the International Law Fellowship Programme. Some delegations noted with deep concern that in previous years, due to increased costs and significant budget cuts, the number of fellowships had declined. In this context, they recalled General Assembly resolutions 62/62 and 64/113 in which the Assembly requested that necessary resources be provided under the programme budget with a view to ensuring the effectiveness of the Programme of Assistance.

19. The establishment and continuous expansion of the United Nations Audiovisual Library of International Law was welcomed as a significant achievement by several delegations and it was noted that the Audiovisual Library had become an important resource for international law training and research for the legal community. A number of delegations also noted that the Audiovisual Library had been accessed in 191 Member States. The point was made welcoming the award conferred on the Audiovisual Library by the Association of International Law Libraries for the 2009 Best Website.

20. Delegations expressed the view that regional courses were an important mechanism for the study of subjects of particular interest to developing countries in a given region. The hosting of regional courses in the Republic of Korea in 2010 and Ethiopia in 2011 was welcomed by several delegations. They expressed the hope that the regional courses would be organized on a regular basis. A number of delegations expressed regret that no such courses had been held since 2005 due to insufficient funding for fellowships.

21. Regarding the Hamilton Shirley Amerasinghe Memorial Fellowship on the Law of the Sea, some delegations expressed concern that the Amerasinghe Fellowship had not been granted in 2007, 2008 and 2009 due to lack of resources in its trust fund. The point was made commending the decision of the Legal Counsel to provide - on an ad hoc basis - financial support from the trust fund for the dissemination of international law.

22. Several delegations expressed appreciation for the achievements of the Codification Division with respect to its desktop publishing programme and online publications. The reduction of publication backlogs was also welcomed and some

delegations commended the Codification Division for the timely publication of the 2009 United Nations Juridical Yearbook, thereby eliminating the previous backlog. In this context, the view was expressed that adequate resources within the budget of the Organization should be allocated to the Codification Division to continue this programme. Some delegations also emphasized the continuing importance of publishing hard copies of publications for the benefit of lawyers and other persons in developing countries.

23. With regard to technical assistance, the point was made commending the Treaty Section of the Office of Legal Affairs for the organization of its annual Treaty Events and seminars on International Treaty Law and Practice.

24. While several delegations commended those States that had made voluntary contributions to the Programme of Assistance and encouraged others to consider such contributions in the future, it was noted that progress on the Programme was being hindered by its dependence on voluntary sources of funding. Some delegations expressed the view that the Programme of Assistance should be regarded as a core activity of the United Nations in the promotion of international law for the benefit of all States, developing or developed and that it was crucial to ensure that the Programme had adequate resources within overall existing resources to continue to meet the needs of the international community. The view was expressed by a number of delegations that the Programme should receive sustainable adequate resources to continue and expand to meet the growing need for international law training and research materials. In this context, several delegations emphasized that to be sustainable; the Programme of Assistance must be adequately resourced from the regular budget. The point was made urging the Sixth Committee to work with the Fifth Committee in order to ensure that adequate resources were allocated to the Programme of Assistance in accordance with operative paragraph 6 of General Assembly resolutions 62/62 and 64/113 on this agenda item.

III. AALCO AND UN DECADE OF INTERNATIONAL LAW

25. By its resolution 44/23 of 17 November 1989, the General Assembly declared the period. 1990-1 999 the United Nations Decade of International Law. The main purposes of the Decade, according to paragraph **2** of the resolution, should be, *inter alia*

(a) To promote acceptance of and respect for the principles of international law;
(b) To promote means and methods for the peaceful settlement of disputes between States, including resort to and full respect for the International Court of Justice;
(c) To encourage the progressive development of international law and its codification;
(d) To encourage the teaching, study, dissemination and wider appreciation of international law.

26. On 28 November 1990, the General Assembly adopted a resolution entitled "United Nations Decade of International Law", to which was annexed the programme for the activities to be commenced during the first term (1990-1992) of the United Nations Decade of International Law.

27. The Asian-African Legal Consultative Organization- a unique regional inter-governmental organization whose very *raison d'etre* is the progressive development of international law and its codification- has always been endeavored to promote acceptance of and respect for the principles of international law in the Asian-African region. It was therefore appropriate for AALCO to address itself to and respond to the above mentioned General Assembly Resolution.

28. Even prior to this, AALCO had undertaken some significant steps towards strengthening and widening the scope of cooperation between the United Nations and the AALCO. For example, as part of its contribution to the commemoration of the Fortieth Anniversary of the United Nations , the AALCO Secretariat prepared a study on "*Strengthening the Role of the United Nations through Rationalization of Functional Modalities with Special Reference to the General Assembly"*. This study, which was submitted to the UN Secretary-General, was circulated as a document of the Fortieth Session of the General Assembly[47].It needs to be reiterated that this study had received wide support from the Members of the United Nations.

29. The item "The United Nations Decade of international Law" was placed on the agenda of the Twenty-Ninth Annual Session of AALCO held at Beijing in 1990, following the adoption by the UNGA of Resolution 44/23. It was thereafter considered at successive sessions of the AALCO as well as the General Assembly. At this Session, the Secretariat was mandated to prepare a comprehensive study on the UN Decade of International Law.

30. In pursuance of the above mandate, the Secretariat prepared and forwarded to the Office of the Legal Counsel of the United Nations its observations and views on the Decade which were reproduced in the Report of the Secretary-General of the United Nations on the item. The item has thereafter been considered at each successive sessions of the UN General Assembly as well as the AALCO.

31. The AALCO, in collaboration with one of its Member State the State of Qatar had organized a grand Symposium on the topic **"International Legal Issues Arising under the UN Decade of International law"** at Qatar, Doha in 1994. This meeting, which saw the participation of a lot of high-level Delegates, Scholars, Practitioners and other eminent persons, had produced very productive deliberations on various international legal issues of critical nature.

32. Paragraph 3 of the General Assembly Resolution 44/23 adopted in 1989, it may be recalled, had requested the Secretary-General to seek the views of the Member States and appropriate international bodies, as well as non-governmental organizations working

[47] See Document A/40/726 and A/41/437 Annex.

in the field on the programme for the Decade and an appropriate action to be taken during the Decade, including the possibility of holding a Third International Peace Conference or other suitable international conference at the end of the Decade and submit a Report thereon to the Assembly. At its 51st Session, the Sixth Committee of the UNGA considered a proposal related to the 1999 Action dedicated to the centennial of the first International Peace Conference and to the closing of the United Nations Decade of International Law submitted by the Governments of The Netherlands and the Russian Federation. The Sixth Committee considered the Programme of Action for the Celebration of the Centennial of the First International Peace Conference proposed by the above mentioned States. The proposal envisaged that the three main themes viz, (i). the armament question; (ii) humanitarian laws and the laws and customs of war; and the (iii) peaceful settlement of disputes, on the agenda of the 1999 celebration of the centennial of the first Hague Peace Conference.

33. To mark the closure of the "Decade of International Law", AALCO was called upon to organize and coordinate with the governments of the Kingdom of Netherlands and the Russian Federation, a meeting to commemorate the centennial of the First international Peace Conference. Accordingly, it convened a Meeting to consider the preliminary reports on the themes of the First international Peace Conference in New Delhi on 11th and 12th February 1999. The objective was to promote a free and frank exchange of views on the three preliminary reports on the themes of the first International Peace Conference. The Meeting was widely attended by eminent experts, distinguished lawyers from Member States, Observer States, and representatives of International Organizations and scholars from Academia[48].

34. Hence, AALCO has been performing a reasonably well role in relation to the item by conducting seminars/workshops on issues of concern to the international community as a whole and by closely cooperating with the United Nations since 1981 when it was accorded a "Permanent Observer" Status. Consultations have been routinely conducted on matters of common interest between AALCO and the competent offices and organs of the United Nations, in particular regarding representation at Meetings and Sessions and exchange of documentation and information, as also in the identification of areas where the supportive role of AALCO might be most productive. The AALCO was represented at various meetings and conferences held under the auspices of the United Nations and its agencies during the period. These consultations have enabled AALCO to reorient its work programme and to accord priority to matters that are of current interest to the United Nations with the aim of codification and dissemination of international law in the Asian-African region.

IV. COMMENTS AND OBSERVATIONS OF THE AALCO SECRETARIAT

35. The place of international law in the contemporary world affairs can hardly be exaggerated. In modern times, the world has greatly shrunk as a result of scientific and technological developments. As a consequence events in one part of the world have an

[48] See for the full report: AALCO, *Report of the Seminar on the Three Preliminary on the Themes of the First International Peace Conference* (AALCO Secretariat: 2000).

immediate impact on the rest off the world. Therefore, States maintain regular relations with other states because a modern State can not afford to lead an isolated life in the present context of world affairs. This inevitably leads to the fact that a Government of a State must not only conduct its internal affairs but also regulate its conduct towards the Governments and people of other States. Without International laws and customs, it is impossible for states to maintain relations on the basis of peace, harmony and mutual cooperation. Rather, then the rule 'might is right' will prevail that would be destructive for the global peace and humanity.

36. AALCO, aware as it is of the need to establish better and fortify the rule of law in international affairs applauds the United Nations for undertaking this item on: “The United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law”. Indeed, it has been the ardent belief of AALCO that this Programme of Assistance and the ideas and proposals which it has generated will set the tone for new initiatives and contribute towards realizing an idea which lies at the foundation of the United Nations, and which is proclaimed in the preamble of the Charter: the idea of the rule of law in the relations between States. Hence, AALCO therefore strongly supports the Programme of Assistance and is of the considered opinion that the Programme of Assistance serves as a tool not only for the promotion of international law and the rule of law, but also for capacity-building, particularly in developing countries.

37. As to encouraging the teaching, study, dissemination, and greater appreciation of international law, AALCO notes with satisfaction the multi-faceted activities carried out by the United Nations organs and agencies. The Office of Legal Affairs, in particular its Codification Division which is responsible for implementing the Programme of Assistance, has made commendable efforts to strengthen and revitalize its activities under the Programme in order to meet the changing needs of that community. The use of modern technology for that purpose is particularly welcome. In that regard, the establishment and continuing expansion of the United Nations Audiovisual Library of International Law represents an especially significant achievement, offering as it does an easy access to a vast range of legal resources, free of charge. As borne out by the statistics, the Library is already proving its worth as an important resource for the legal community, including students, international law practitioners and even historians. We also support the work of the Office of Legal Affairs, and the Treaty Section in particular, for its technical assistance to States and believe that annual treaty events contributed to more active participation by States in key international instruments.

38. The conceptual underpinnings embodying the Programme of Assistance are equally shared by AALCO. As a unique Organization comprising of Member States from Asia and Africa, AALCO serves not only as a forum for consultation and cooperation for its Member States but also as a conduit for the exchange of experience and knowledge with other regions of the world. A number of topics which are of substantive nature in the work Programme of AALCO assumed a supportive role to the work of the United Nations. With the creation of AALCO we have embarked on a wider enterprise in the

service of our continent and its peoples, for we believe that the advancement and promotion of international law, and of the rule of law, are integral to the development of Asia and Africa. We also believe that these two Continents have much to contribute to the development of international law and to the values underlying it for a better understanding and peace among nations. No wonder that in pursuance of its mandate, AALCO has contributed significantly to the progressive development and codification of international law over the years.

39. Of late, AALCO has also been organizing a lot of training programmes/work shops/seminars on a broad range of core subjects of international law, as well as specific subjects of particular interest to the developing countries from time to time. They provide an opportunity for the participants to focus on contemporary issues of international law of common concern in the Asian-African region with a view to promoting greater understanding and cooperation on such issues. By arranging these programmes AALCO, in tune with the objectives of the Programme of Assistance, seeks to make modest contribution to the advancement of the rule of law and to the work of the international legal community in general. In this regard, AALCO expresses its appreciation to the Republic of Korea and Ethiopia for hosting regional courses in international law in Seoul in 2010 and in Addis Ababa in 2011 respectively.

40. Finally, if international law was to become the “gentle civilizer of nations”, in the words of Martti Koskenniemi, the teaching, study and dissemination of the law was indispensable.

6. 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.[49]

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-four 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.[50]

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

[50] 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

6. These Notes and Comments contains firstly, Verbatim Record on the Agenda Item: "Report on Matters Relating to the Work of the International Law Commission at its Sixty-second Session" Deliberated during the Fiftieth Annual Session of AALCO, held in Colombo, Sri Lanka (29th June 2011); and secondly, Report on the Matters Relating to the work of the International Law Commission at its Sixty-Third Session. The statement delivered by Prof. Dr. Rahmat Mohamad, Secretary-General, AALCO to the Sixty-Third Session of the Commission on 26 July 2011 is also annexed.

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.

II. VERBATIM RECORD ON THE AGENDA ITEM: "REPORT ON MATTERS RELATING TO THE WORK OF THE INTERNATIONAL LAW COMMISSION AT ITS SIXTY-SECOND SESSION" DELIBERATED DURING THE FIFTIETH ANNUAL SESSION OF AALCO, HELD IN COLOMBO, SRI LANKA (29th JUNE 2011)

Background

1. The Fiftieth Annual Session of the Asian-African Legal Consultative Organization (AALCO) was held in Colombo, the Democratic Socialist Republic of Sri Lanka from 27th June to 1st July, 2011. The Thirty-two Member States of AALCO which participated in this Fiftieth Annual Session included: Arab Republic of Egypt, Kingdom of Bahrain, Bangladesh, Brunei Darussalam, People's Republic of China, Ghana, India, Republic of Indonesia, Iraq, Islamic Republic of Iran, Japan, Jordan, Republic of Kenya, Democratic People's Republic of Korea, State of Kuwait, Malaysia, Myanmar, Nepal, Nigeria, Sultanate of Oman, Pakistan, Palestine, State of Qatar, Republic of Korea, Kingdom of Saudi Arabia, Republic of South Africa, Democratic Socialist Republic of Sri Lanka, Sudan, United Republic of Tanzania, Thailand, Uganda and United Arab Emirates.

2. Representatives from the following non-Member States, namely, Democratic Republic of Congo, Republic of Kazakhstan and Russian Federation were admitted to participate as Observers. Similarly, Representatives of the following International Organizations viz., International Court of Justice (ICJ), International Committee of the Red Cross (ICRC), Indian Ocean Marine Affairs Cooperation (IOMAC), International Organization for Migration (IOM), United Nations Development Programme (UNDP), United Nations Environment Programme (UNEP), United Nations Children's Fund (UNICEF) and Saudi Fund for Development also took part in the Session as Observers.

3. His Excellency Mr. Mahinda Rajapaksa, the President of the Democratic Socialist Republic of Sri Lanka inaugurated the Session. While Hon. Rauff Hakeem, Minister of Justice, Democratic Socialist Republic of Sri Lanka was unanimously elected as the President of the Fiftieth Annual Session of AALCO, Her Excellency Mrs. Ifeyinwa Rita Njokanma, Director, International Law Department, Federal Ministry of Justice, Nigeria was elected as the Vice-President of the Fiftieth Annual Session. The deliberations on the agenda item "Report on Matters Relating to the Work of the International Law Commission at Its Sixty –Second Session" took place on 29th June, 2011, with the Vice-President of the Fiftieth Session in the Chair. The Verbatim Records of the deliberations on that agenda item reads as follows.

Her Excellency Mrs. Ifeyinwa Rita Njokanma, Vice-President of the Fiftieth Annual Session of AALCO in the Chair.

4. **The Vice-President:** I now invite the Secretary-General to present his report on the work of the International Law Commission to the distinguished delegates.

5. **Prof. Dr. Rahmat Mohamad, Secretary-General of AALCO:** Thank you Madam Chair. Madam Chair, Hon'ble Ministers, Vice-Ministers, Attornies-General, Excellencies, Ladies and Gentlemen, it is indeed my privilege and honour to introduce the "Report on the Work of the International Law Commission at its Sixty-Second Session", vide Secretariat Document No. AALCO/50/COLOMBO/2011/SD/S1.

6. As you all know, one of the statutory obligations of AALCO is to examine the questions that are under consideration of International Law Commission, and thereafter, to forward the views of its Member States to the Commission. In the discharge of this mandate, the Organization, since its establishment in 1956, has been regularly considering issues taken up by the ILC with a view to bringing Afro-Asian perspectives into the work of the ILC. Fulfillment of this mandate over the years has helped to foster closer relationship between the two organizations. It has also become customary for both the Organizations to represent each other during their annual session.

7. Madam Chair, last year at the Forty-Ninth Annual Session of AALCO held in Dar es Salaam, Tanzania, we had organized a thematic debate on the topic: *"Making AALCO's participation in the work of International Law Commission (ILC) more Effective and Meaningful"*. The debate saw the participation of three Panelists, namely Prof. Shinya Murase, Member, International Law Commission from Japan; Dr. Roy S. Lee, AALCO's Permanent Observer at the United Nations Headquarters in New York and who was a former Secretary of the ILC; and Professor V. S. Mani, a distinguished international law academic from India, who made their presentations. It was followed by deliberations in which a number of Member States of AALCO took an active part.

8. The Secretariat Report for this year covers the agenda items of the ILC as found in its Sixty-Second Session that took place from 3rd May to 4th June and 5th July to 6th August, 2010. There were as many as nine topics on the agenda of the aforementioned Session of the ILC. They were: Reservation to treaties; Expulsion of aliens; Effects of armed conflict on treaties; Protection of persons in the event of disasters; The obligation to extradite or prosecute (*aut dedere aut judicare*); Immunity of state officials from foreign criminal jurisdiction; Treaties over time; The Most-Favored-Nation clause and Shared natural resources.

9. In view of the paucity of time, I will only briefly mention, the way each of the topic mentioned above was dealt with by the Commission at its sixty-second session.

10. On the topic of "Reservations to Treaties", the Commission had before it addendum 2 to the Fourteenth Report as well as the Fifteenth and Sixteenth Reports of the Special Rapporteur. The Commission provisionally adopted 59 draft articles together

with commentaries. The Commission hence completed the provisional adoption of the set of draft guidelines. The Commission intends to adopt the final version of the Guide to Practice on Reservations to Treaties during its sixty-third session in 2011.

11. On the topic "Expulsion of Aliens", the Commission had before it the document containing a set of draft articles on the protection of the human rights of persons who have been or are being expelled, revised by the Special Rapporteur. It also considered the sixth report of the Special Rapporteur on collective expulsion, extradition disguised as expulsion, the grounds for expulsion, detention pending expulsion and expulsion proceedings.

12. On the topic "Effects of Armed Conflict on Treaties", the Commission had before it the first report of the Special Rapporteur containing his proposals for the reformulation of the draft articles as adopted on first reading, taking into account the comments and observations of Governments. The Commission also had before it a compilation of written comments and observations received from Governments. The Commission considered the Special Rapporteur's report.

13. On the topic "Protection of Persons in the event of Disaster", the Commission had before it the third report of the Special Rapporteur dealing with the humanitarian principles of neutrality, impartiality and humanity as well as the underlying concept of respect for human dignity. The Commission also adopted draft articles 1 to 5 together with commentaries.

14. On the topic "The Obligation to Extradite or Prosecute (*aut dedere aut judicare*) the Commission had reconstituted the Working Group on the topic and had discussions with the aim of specifying the issues to be addressed to further facilitate the work of the Special Rapporteur. It had before it a Survey of multilateral conventions which may be of relevance for the Commission's work on the topic, prepared by the Secretariat of the Commission, and a working paper prepared by the Special Rapporteur containing some observations and suggestions based on the general framework proposed in 2009 and drawing upon the survey by the Secretariat of the Commission.

15. On the topic "Immunity of State Officials from Foreign Criminal Jurisdiction", the Commission did not consider it in the course of its sixty-second session.

16. On the topic "Treaties over Time", the Study Group on Treaties over time was reconstituted under the chairmanship of Mr. Georg Nolte. The Commission took note of the oral report of the Chairman of the Study Group on Treaties over time and approved the recommendation of the Study Group that a request for information be included in Chapter III of the Commission's report and also brought to the attention of States by the Secretariat of the Commission.

17. On the topic "The Most-favoured-nation clause", the Commission took note of the oral report of the Co-Chairmen of the Study Group. The report considered papers on: (i) catalogue of MFN provision, (ii) the 1978 Draft Articles of the International Law

Commission, (iii) MFN in the GATT and the WTO, (iv) the Work of OECD on MFN, (v) the Work of UNCTAD on MFN, and (vi) the *Maffezini* problem under investment treaties.

18. On the topic of "Shared Natural Resources", the Commission decided once more to establish a Working Group on Shared natural resources, chaired by Mr. Enrique Candioti. The Working Group had before it a working paper on oil and gas prepared by Mr. Shinya Murase. The Commission took note of the oral report of the Chairman of the Working Group on Shared natural resources and endorsed the recommendation of the Working Group.

19. Madam Chair, it is my pleasure to draw the attention of the delegates to the information requested by the Commission on all the agenda items. Inputs provided by the Member States of AALCO would be of immense significance to the ILC in formulating the future trajectory of its work. The feedback and information on the state practice of AALCO Member States would enable the Commission to take into consideration the views of diverse legal systems. Hence, I request that delegates submit specific comments and observations on the agenda items that could, in turn, facilitate the work of the Commission.

20. Thank you Madam Vice-President.

21. **The Vice-President:** Thank you Prof. Rahmat for that Report. Now I invite Mr. Rohan Perera to present his remarks.

22. **Dr. A. Rohan Perera, Member of the International Law Commission:** Thank you Madam Chairperson. Mr. Secretary-General, my colleague in the Commission Mr. Shinya Murase, and distinguished delegates, the Secretary-General has just given you an outline of all the topics that are before the Commission. What I intend to do is not to go into all these topics given the paucity of time. Instead, I, speaking in my personal capacity, will give you an update, somewhat, of what has happened during the first half of the current Session of ILC which will be resuming next week in Geneva, so that the delegations would be in a position to focus on some of the critical issues and when the time comes for the Sixth Committee consideration of the Report you will be in a position to make valuable comments on these matters.

23. The two topics on which I will make my comments include; one is a topic on which the ILC has completed the draft articles, together with the Commentaries. Nevertheless this is an important topic on which, I think, State inputs/comments/observations would be very useful. The topic is *"The Effects of Armed Conflicts on Treaties"*. The Special Rapporteur Mr. Lucius Caflisch presented the entire set of draft articles with Commentaries to the Commission when the Commission met in April this year. Some elements that I wish to flag is that the draft articles as a whole are reflective of the general proposition that treaties are not in and of themselves terminated or suspended as a result of an armed conflict. This is the general principle that runs through the entirety of the draft articles. Another important aspect arose in the context of article 2 on definitions which define the term treaty in line with the definition of the

treaty found in Article 2 of the Vienna Convention on Law of Treaties of 1969. The term 'armed conflict' is designed to cover both resort to armed force between States as well as protracted resort to armed force between government authorities and organized armed groups. In other words, both international and internal armed conflicts. Hence, the question may be posed what effect can an internal armed conflict have on an international treaty between States. The Commentary explains the rationale for covering internal conflicts within the scope of the draft articles on this topic. It was pointed out by the Special Rapporteur that contemporary developments have blurred the distinction between international and internal armed conflicts. Internal conflicts have increased in number and statistically more frequent than international armed conflicts.

24. In addition, perhaps more importantly, it was also pointed out that many internal armed conflicts could include an external element. Although internal in character, it could have or could involve external elements such as the support and involvement by other States, third States to varying degrees, such as supplying of arms, providing training facilities and funds and so forth to private armed groups which gives it a certain foreign character or element. Accordingly, it is concluded that internal armed conflicts could affect the operation of treaties between States as much as, if not more, than international conflicts. The draft article therefore includes the effects on treaties of internal armed conflicts that is, "resort to armed force between governmental authorities and organized armed groups". However it is also important to point out that the threshold requirement has been reduced in the definition by the use of the term 'protracted' in order to constitute the type of the armed conflict sought to be covered by the draft articles. This threshold requirement serves to mitigate the potential destabilizing effect the inclusion of internal armed conflicts within the scope of the term armed conflict in the present draft articles might otherwise have on the stability of a treaty regime.

25. Getting on to the Principles set out in the draft articles I refer to Chapter I "Operation of Treaties in the Event of Armed Conflicts" which consists of articles 3 to 7. These articles 3 to 7 are central to the operation of the entire set of draft articles. Draft article 3 establishes the basic orientation of the set of draft articles of effects of armed conflicts on treaties, namely the proposition that armed conflicts does not *ipso facto*, terminate or suspend the operation of the treaties. The continuity or not of a treaty therefore would depend on the circumstances of each case. That is the general proposition governing the entire set of draft articles and draft article 3. Thereafter draft articles 4 to 7 seeks to assist the determination of the question whether a treaty continues in operation in an armed conflict. And, these articles are arranged in an order of priority. Accordingly, the first step is to seek an answer in the language of the treaty itself.

26. Therefore, draft article 4 provides then that an express provision within a treaty addressing the question of the continuity of the treaty in the context of an armed conflict, then that provision would prevail, that provision would govern the question of the continuity of treaties. In the somewhat unusual situation of two Parties anticipating a future conflict and addressing the issue at the time when they conclude a treaty which I think would be a somewhat unusual occurrence, because at the time of concluding a treaty that would be furthest away from the mind of the Parties. But however, if they

anticipate such an eventuality and include an express provision in the treaty itself then that provision prevails and that concludes the question whether that treaty would continue in operation in the event of an armed conflict. However, in the absence of an express provision resort would be next had to draft article 5. The draft article 5 provides for the established rules of treaty interpretation as we all know in Article 31 of the Vienna Convention on Law of Treaties so as to ascertain the fate of the treaty in the event of an armed conflict. Now, after recourse to article 4, that is, where there is an express provision, and resort to article 5, where the treaty is silent and you have recourse to principles of treaty interpretations, still if no conclusive answer is provided by the application of these two draft articles the inquiry then shifts to considerations extraneous to the treaty. You go outside the treaty now. First you try to find the answer within the treaty, you have not found an answer and now you move to considerations extraneous to the treaty. Accordingly, draft article 6 provides a number of contextual factors that may be relevant in making a determination one way or the other. Does a treaty continue in force in the event of an outbreak of an armed conflict? And this article refers to "all relevant factors" including (a) nature of the treaty, in particular its subject matter, its object and purpose, its context, its content and number of Parties to the treaty and (b) the characteristics of the armed conflict such as its territorial extent, the scale and intensity of the conflict, its duration and in the case of non-international armed conflict, also the degree of outside or external involvement. So article 6 provides for these extraneous considerations to be resorted to find an answer to the question does a treaty survive an outbreak of armed conflicts between the Parties.

27. Finally, the determination of this question is further assisted by draft article 7 which refers to an indicative list, I repeat, it is an indicative list and not a exhaustive list, on which the Commission deliberated for a long long time. Indicative list of treaties which is now contained in an annex, the subject matter of which provides an indication that the treaties continue in operation, the Parties would have intended these treaties to continue in operation in whole or in part even in times of armed conflict. This indicative list for example, includes treaties such as treaties creating permanent regimes, a maritime or land boundary treaty would not be likely considered to have been automatically terminated at the outbreak of an armed conflict. Because these are treaties creating permanent regimes and they survive the outbreak of an armed conflict between the Parties. Similarly among the other categories, human rights treaties and today it is accepted, both human rights and treaties involving international humanitarian law continue to apply even in times of armed conflicts and IHL or international humanitarian law are, indeed designed to apply in times of armed conflict. Hence, such treaties dealing with human rights and IHL are deemed, because of their subject matter, to survive and to continue in operation even in times of an armed conflict. So it is an indicative list providing States some guidance as to the type of treaties, because of their subject matter, which are considered to be continuing in force notwithstanding the outbreak of an armed conflict. I thought I should flag this basic structure of this draft articles, how they are designed to assist States in answering this question: does treaty X survive despite the outbreak of an armed conflict.

28. My next comment would be on a very important topic, a topic which is of considerable contemporary relevance, on which the Commission had a very intensive debates. The Commission did not consider draft articles but on the approach to be adopted and this debate will continue when the Commission resumes its sittings next week. I refer to the topic of *"Immunity of State Officials from Foreign Criminal Jurisdiction"* the Special Rapporteur of which is Mr. Roman A. Kolodkin. There are two basic questions here. The first question is: Is there an exception to immunity in respect of what are called grave crimes under international law? Does immunity give way when it involves grave crimes under international law? This is the issue which received focus during the consideration of this Report during April-May. The second issue is: what is the scope or what are the categories of officials who are sought to be covered by the draft articles on "Immunity of State Officials from Foreign Criminal Jurisdiction". One point that needs to be understood here is that, here we are dealing not with jurisdiction of international tribunals which are governed by Statutes or other special instruments. Rather, we are dealing with immunity of state officials from foreign criminal jurisdiction, in other words, the criminal jurisdictions of national courts of foreign States.

29. The Rapporteur's report proceeds on the basis that immunity of State officials from foreign criminal jurisdiction was the norm, immunity is the norm and any exception to that principle of immunity must be proved or established. That is the basis on which the third report of the Special Rapporteur proceeded. As far as categories of officials were concerned, it was stated that former state officials who are no longer holding office, they enjoy immunity *ratione materiae* or immunity in respect of acts undertaken in an official capacity, during their term of office, but not for acts performed prior to taking up office. Hence, as far as former state officials are concerned, it is a limited form of immunity. Then we come to the concept of absolute immunity or immunity *ratione personae*, here we speak basically of what is called the Troika. It has been recognized by the International Court of Justice in the *Arrest Warrant Case* that the well-known Troika, namely the Head of State, Head of Government and the Minister of Foreign Affairs who is the intermediary between the State and the international community enjoy absolute immunity and this covers both acts performed in an official capacity as well as in a personal capacity, and both while in office and prior thereto. Now the rationale for the theory of absolute immunity or immunity *ratione personae* is that with regard to these categories it is important that they enjoy this immunity for the performance of the independent and sovereign functions of the State because they personify the State. This led to the question: Are there any category of officials apart from the well-known Troika, who should enjoy immunity?

30. The point was made that today in the post-WTO context, Trade Ministers may be performing functions that may be as important as the Foreign Minister or the Defense Minister may be performing sovereign functions as much as the Foreign Minister. So, is there a need to go beyond the Troika and cover other high-ranking officials? Here, the views that were being expressed was that the Commission should look into very clear criteria, in other words, with respect to other officials there was a strong view that this must be restricted to the Troika. But even those who supported extending beyond the Troika had this to say that the functions need to be closely linked to the conduct of

foreign relations, international relations and is foreign travel to foreign States required to be performed by these officials as part of discharging the independent and sovereign functions of the State. The principle being that if you restrict that right you are undermining the very essence of not only of sovereignty but of the stability of international relations subjecting high-officials to the foreign jurisdiction of another state perhaps through politically motivated prosecutions. So because of these reasons, the Commission decided to address these to Member States to get a sense of direction. It is very important that when the matter goes before the UNGA Sixth Committee there is a feedback particularly from the States of Asia and Africa on these issues which are being very hotly debated and which are controversial. And as far as the possible exceptions in respect of grave crimes, the Special Rapporteur proceeded on the basis that where it concerns persons enjoying absolute immunity, as the law stands today, *lex lata,* there was no exception to immunity, even in respect of grave crimes, in respect of persons enjoying absolute immunity. His conclusion was that it was pertinent only in respect of other categories who enjoy immunity *ratione materiae* or limited immunity in the context of crimes under international law. So the Report adopted a fairly cautious approach and the Special Rapporteur tended to veer towards restricting the task of the Commission towards codification on the basis of as the law exists or *lex lata* rather than going down the path of progressive development or *de lega ferenda*. Naturally the Report gave rise to much debate and discussions within the Commission, which it has not concluded as I said and which will resume. But I just highlight two broad trends that emerge from these debates which require the very close attention of the Member States of Asia and Africa when the Report is placed before the Sixth Committee in October this year.

31. The first trend was that the Members took the view that you must limit sovereignty, and that you can not talk of absolute immunity where it concerned grave crimes under international law. It was argued that the principle of non-impunity for grave crimes under international law constituted a core value of the international community which needed to be considered when examining the question of immunity. In other words, it was presented in the context of a impunity Vs immunity. By granting immunity do we condone impunity and that action against impunity or the principle of non-impunity was a core value under international law. Those who supported this line of reasoning also preferred to a clash of hierarchical norms. For this they cited the judgment of *Al Adsani case*, I believe, delivered by the European Court of Justice where the minority took the view that where there was a clash between the principle of immunity and the principle against impunity in respect of grave crimes, the latter being a principle of *jus cogens* prevails over the principle of immunity and therefore, the principle of immunity must give way to a higher norm which was the principle against impunity. That was the reasoning of the minority in the European Court of Justice but those who supported this approach against absolute immunity cited this theory of clash of hierarchical norms. Those who supported either the Special Rapporteurs' approach or those who favoured preserving the institution of immunity cited the fact that the principle of immunity is an important principle of international law, well-established in customary international law and that it is a principle which plays a critical role in ensuring the stability of international relations. If leaders are to be subjected to foreign jurisdiction that creates a destabilizing effect on the international relations and prejudices the effective discharge of

State functions. It was pointed out that this too is a core value to the international community, because principle of immunity was based on international comity and it was imperative to remove the risk of politically motivated criminal proceedings and that the fact that undue limitation on immunity may lead to, what was called, a serious friction in international relations. So these were the dangers pointed out by unrestrained approach of whittling down the well-established principle of immunity could lead to international friction. So you can see two clear trends emerging through the ILC debate. Those who took a middle path noted in this regard that the challenge for the ILC is to strike a balance these two different policy considerations. As I noted earlier, the ILC would resume the debate this month. When the Report goes before the Sixth Committee of the UN General Assembly, where we receive the political inputs of Member States, ultimately it is the Member States who must decide which path the Commission must travel in this regard. So therefore my appeal to Member States of Asia and Africa is to give this matter the most serious consideration and guidance to the ILC. This matter will go before the new Commission; this Commission is going out of office at the end of this year, the new Commission who will start work on this next year. Hence, when the new Commission meets let them have the political inputs of the Member States of the United Nations.

32. That is my opinion on that issue, but I thought I should highlight these factors to sensitize the distinguished delegates on this matter.

33. Since we are running short of time, I just want to highlight one more issue which is the Study Group on Most Favoured Nations Clause which was referred to by the Secretary-General which I had the privilege of co-chairing with my colleague from Canada Prof. Donald M. Mcrae. The reason why the Commission decided to venture on to this topic is due to the uncertainty that has been created by a series of recent arbitrary decisions which tended to give a very broad and expansive interpretation to the scope of application of the most-favored nation treatment which seeks to create a level playing field among the investors of different nationalities. The over expansive interpretation has led to a situation, where it has been possible to freely borrow provisions from third party treaties completely disturbing the negotiated package that Parties may have agreed on at the time they concluded the treaty. So a number of papers have been prepared analyzing the recent arbitral awards the question whether MFN is limited only to the according of substantive treatment or does it even include dispute settlement provisions which are procedural in nature. This is the issue which arose in the famous *Maffezini case*. Prof. Murase has prepared a very interesting paper on the 1978 draft articles formulated by the ILC but not adopted by the UN General Assembly which only took note of that and that Prof Murase has explained in that paper why the situation has changed from 1978 to today, that was in the cold war context and today the importance of MFN has shifted from trade to investment with the proliferation of bilateral investment treaties. We had the WTO/GATT dispute settlement mechanism number of awards, so it is a very interesting analysis which I would recommend delegates to read.

34. This work, again is continuing. The objective of the Commission is to underline the importance of the formulation of the MFN clause, because different formulations can lead to different conclusions if the matters go into arbitration. Prof. Murase has

recommended coming up with new draft articles, there are proposals to provide model clauses, guidelines or principles to assist States so that they know when they include a most favored nation clause in an investment treaty what are the precise implications depending on the way that you have formulated your treaty provisions. This is what the Study Group is attempting to do. That work has just commenced in the last two years and this again will filter into the new Commission that will be in place in the year 2012. I will stop at this point and Prof. Murase can explain it further.

35. Thank You Mr. President.

His Excellency Mr. Rauff Hakeem, President of the Fiftieth Session of the AALCO in the Chair.

36. **Mr. President:** Thank you very much Mr. Rohan Perera, the current Chairman of the Eminent Persons Group. He has made a presentation about the ILC's current topics under discussion, particularly this issue relating to the draft articles on the Effects of Armed Conflicts on Treaties. This issue summarily arose even in the case of *Tadic* decided by the ICTY wherein there was a succinct reference to how the effect takes place. But then the use of the term protracted armed conflict raises complications. Therefore, these efforts by the ILC now to try and define this contentious issue is something of concern for all of us Member States and I am sure the delegates will pay sufficient attention to it. The other issue relating to the Immunity of State Officials from Foreign Criminal Jurisdiction is also important especially in the context of the attempts to expand it beyond the Troika and which is another developing area of international criminal responsibility. This too is a matter, I am sure, Member States would take note of and deliberate in future. The grave crime exception is another area where the Rapporteur is quite forceful to try and create a clear division between impunity and immunity. That again is something that Member States need to consider seriously so as to separate politically motivated prosecutions from the criminal proceedings and then, assist the ILC in its formulation on the issue. Then on the MFN, the draft articles that Prof. Murase is proposing is something that is worthwhile to study and reflect upon. Having said that may I now call upon Prof Shinya Murase to deliver his remarks.

37. **Prof. Shinya Murase, Member of the International Law Commission:** Thank you Mr. Chairman. Speaking in my individual capacity as Member of the International Law Commission, I would like to address just two points; one is the future topics that the ILC should take on, and the other, the need to follow-up the work of the ILC.

38. With the conclusion of three big topics, namely (i) reservation to treaties, (ii) responsibility of international organizations, and (iii) effects of armed conflicts on treaties; we need to decide on new topics for the next quinquennium. Unless we have good topics, the ILC will not sustain.

39. Selection of topics for ILC is not an easy task. It is said that there are three criteria for the selection of new topics. The first is the *practical consideration* as to whether there is any pressing need in the international community as a whole; the second is the

technical feasibility, that is, whether the topic is 'ripe' enough in light to relevant State practice and jurisprudence; and the third being the *political feasibility* whether or not the proposed topic might or might not have political sensitivity. It has been stressed by the Commission that it should not restrict itself to traditional topics, but could also consider those that reflect 'the new developments in international law and the pressing concerns of the international community as a whole'.

40. I have been proposing a new topic on the "protection of atmosphere", which I believe satisfies those three feasibility tests. I believe that we need a comprehensive "framework convention" to address the whole range of atmospheric problems such as transboundary air pollution, depletion of ozone layer and climate change. We could envisage a future Convention which is similar to Part XII of the Law of the Sea Convention on the Protection and Preservation of Maritime Environment. I sincerely hope that the Sixth Committee will endorse this proposal so that the ILC can start working on it from next year.

41. This brings me to my second point which is on the relationship between ILC and the Sixth Committee. We need to follow-up the subsequent development of the draft articles produced by ILC. In this context, I would like to draw your attention to the draft articles on the transboundary aquifer (groundwater) which was completed by ILC in 2008. This year, the Sixth Committee will decide on what to do with this set of draft articles.

42. In my personal opinion, the Sixth Committee should at least adopt a resolution in the form of a General Assembly "Declaration" on the principles and rules applicable to transboundary aquifer so that the declaration will be the basis for a future framework convention on the subject.

43. We also need to promote ratification of the State Immunity Convention as many delegations have stated and which is another product of ILC. I am not going into this topic, because you will be discussing on the issue under the next agenda item. However, I would like to recall as a footnote that it was Ambassador Sompong Sucharitkul from Thailand who laid the ground for the Convention as the first Special Rapporteur on the topic. I was the member of the ILC Secretariat some 30 years ago and I was assigned to assist Ambassador Sucharitkul and I have nostalgic memories of those days. So, I believe that his contribution as well as the contribution of Ambassador Motoo Ogiso, second Special Rapporteur, should be duly recognized when the Convention comes into effect with the necessary 30 ratifications. This is what I wanted to say and I thank you Mr. President.

44. **Mr. President:** With that brief introduction of these matters under consideration by the ILC by Prof. Murase, I will now open the discussion to the floor. There have been few requests from delegates to comment on ILC topics. May I now call upon Islamic Republic of Iran to make their intervention.

45. The **Delegate of the Islamic Republic of Iran:** In the Name of God, the Compassionate, the Merciful, thank you Mr. President for giving me the floor. I would

like to take this opportunity to thank our Secretary-General Prof. Dr. Rahmat Mohamad for his comprehensive and lucid report on the work of the ILC during its 2010 Session. I am sure that this report would be very useful for our deliberations. I would like also to thank on behalf of the Islamic Republic of Iran, the representative of the International Law Commission Mr. Rohan Perera for his excellent presentation of the work of the Commission at its sixty-third session in 2011. I would also like to commend the effort of the members of the Commission for their contributions to the codification and progressive development of international law.

46. Mr. President, during the first part of the current session of ILC, as just reported by our colleague Mr. Rohan Perera, the drafting Committee of the Commission concluded its work on a set of 18 draft articles on "Effects of Armed Conflicts on Treaties" and submitted its report to the Plenary of the Commission with the recommendation that the draft be adopted by the Commission on second reading. My delegation would like to make some preliminary comments regarding the work of the Commission in this regard. I wish to express our gratitude to Mr. Lucius Caflisch, Special Rapporteur on the topic and appreciate his taking into account the comments made by UN Member States on this topic. The Islamic Republic of Iran submitted its written comments last year on this topic to the Commission. It is reflected in document A / CN.4 / 627 / Add.1.

47. As has been said by Mr. Perera, article 2 of the draft article includes an express reference to the applicability of the draft articles to non-international armed conflicts. My Delegation continues to deem it inappropriate to include those armed conflicts in the draft. The Special Rapporteur had himself acknowledged that this could create problems. These possible effects that this category of conflicts might have on treaties are indeed governed by the provisions of the draft articles on "International Responsibility of States" under circumstances precluding wrongfulness. We must also remember that Article 73 of the Vienna Convention on the Law of Treaties, which is the basis of the Commission's work on the subject, refers exclusively to the effects on treaties of armed conflicts between States.

48. We understand, as pointed out by the Chairman of the Drafting Committee, that every conflict of non-international character would not affect the operation of treaties, rather only those conflicts which "by their nature or extent" are likely to affect a treaty. In other words, only internal armed conflicts with outside involvement would be covered by the draft articles on the topic.

49. We appreciate that the list of treaties annexed to the draft articles includes those "declaring, creating or regulating a permanent regime or status or related permanent rights including treaties establishing or modifying land and maritime boundaries". My delegation also welcomes the inclusion in the list of "treaties relating to international watercourses and related installations and facilities", the category of treaties which includes in our view treaties establishing river boundaries as well. There is no express reference to maritime or river boundaries in this annex. In our view, the list is only indicative and should be included in the draft articles after article 7 as

proposed by the Special Rapporteur and not to be annexed to the draft article as it stands now.

50. However the applicability of this category of treaties could be undermined by the provision of the article 9 of the draft article dealing with notification of termination of a treaty or its suspension. In other words, such a provision appears to be applicable to all treaties, including treaties establishing borders. It can be interpreted, in our opinion, as a kind of invitation to the State engaged in an armed conflict and willing to change its border to invoke the facility that this provision offers. Wouldn't be more appropriate to restrict the scope of this provision by excluding those treaties? By so doing we will insure much more the territorial integrity of States involved in an armed conflict and will be in line with the basic orientation of the draft articles.

51. Mr. President, the saving clause of article 14 relating to the "effect of the exercise of the right to self-defense on a treaty", in the opinion of my delegation is welcome. We support also the saving clause regarding the "Prohibit of benefit to an aggressor State". Nevertheless, the Islamic Republic of Iran would prefer, as it has been proposed by some members of the Commission regarding this saving clause, a broader formulation referring to the resort to force in violation of Article 2 § 4 of the UN Charter instead of the reference to aggression within the meaning of the Charter of the UN and Resolution 3314 of the General Assembly defining act of aggression in the year 1974.

52. Finally, we have some doubt about the inclusion of a saving clause regarding the decisions of the Security Council. As it stands in article 16 of the draft, we prefer the first reading version of this provision limited to decisions of this organ (the Security Council) taken in accordance with chapter VII of the Charter. Regarding the Report of the International Law Commission on the work of its sixty-second session held in 2010, my delegation has some comments on Chapters V and VII of this report of the ILC submitted to the General Assembly last year. I want to remember you that Chapter V and VII of this Report are devoted respectively to the "Expulsion of Aliens" and the "Protection of Persons in the Event of Disasters".

53. Mr. President, the Delegation of the Islamic Republic of Iran has already explained its position regarding these two Chapters and I am not here going to repeat them.

54. As regards the topic **Expulsion of aliens,** I would like to congratulate Mr. Maurice Kampto, Special Rapporteur on the topic for his sixth report. The report reflects a careful study of national legislations on the subject of expulsion of aliens as well as the jurisprudence of both domestic and international law. This study has enabled the Special Rapporteur to identify the common denominators as a basis for the legislation by States to deport aliens who are within their territory and the right of those expelled.

55. Regarding the first point, there is little doubt that every State has the right to expel aliens living on its territory if they pose a threat to its national security or public order. Each State has the right to judge and determine, according to its national laws and the circumstances prevailing within its territory at the time, the components of these two concepts. It would therefore be pointless to try to list the grounds that could be invoked by a State to justify the expulsion aliens. Nonetheless, two limitations exist on the sovereign right of the State to proceed with the expulsion of aliens : 1) mass expulsion and 2) expulsion in disguise. Regarding the first scenario, the only possible exception is during an armed conflict when aliens have shown hostility against the host State, an issue that we feel should be excluded from the draft.

56. Expulsion in disguise, to be distinguished from expulsion made by means of incentives and which is tolerated by international law, covers situations where a State abets or acquiesces acts committed by its citizens to provoke the forced departure of aliens. These acts are generally targeted at persons belonging to ethnic or religious minorities and are characterized by discrimination against them. Such conduct is contrary to the obligations of the host State and violates the international human rights law, since they lead in fact to mass expulsion of aliens.

57. Once decided, expulsion shall be conducted in a manner that the fundamental human rights would be fully respected. In our view, this deserves the full attention of the International Law Commission and the Special Rapporteur on the topic. The Commission should base its work on the provisions of relevant international human rights instruments which are universally accepted to identify the general principles applicable in that matter, without prejudice to the concepts and solutions admitted at the regional levels and which continue to be respected by the States concerned.

58. That being said, the International Covenant on Civil and Political Rights is of utmost relevance to this issue since the States parties undertake to respect towards all individuals within their territories, including foreigners residing legally therein, the rights granted by this document. 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.

59. Mr. President, as regards the topic **Protection of persons in the event of disasters,** I congratulate at the outset Mr. Eduardo Valencia-Ospina, Special Rapporteur, for his third report on the topic. We thank him for reminding the general agreement reached by the Commission concerning certain aspects of the scope and content of the project. More specifically, the Special Rapporteur’s right conclusion regarding the irrelevance of the new notion of “responsibility to protect” to the work on the “Protection of persons in the event of disasters” is welcome. This conclusion was endorsed by members of the Commission as well.

60. However, the discussions that took place during the sixty-second session of the Commission seem to have deviated from that conclusion. It appears indeed that the "rights based approach" continues to have adherents among members of the Commission. Such an approach implies that people affected by natural disasters are able to request international relief, which contravene the principles of State sovereignty and non-interference in internal affairs. In our opinion, the Commission should focus only on the rights and obligations of States. We do not share the sentiment that the refusal of a State to accept international aid could be characterized an "internationally wrongful act" if such refusal jeopardized the rights of victims of the disaster. It is for the affected State to determine whether receiving external assistance is appropriate or not, without his refusal triggering its international responsibility. Any suggestion to penalize the affected State would not only be expressly contrary to international law but also constitute an unprecedented misstep which could have adverse consequences for international relations and justify interventionist appetite.

61. Certainly, there is little doubt that the State affected by natural disasters is required to cooperate with other States and relevant intergovernmental organizations under international law. Such an obligation to cooperate is, however, limited only to the subjects of international law, excluding non-governmental organizations.

62. The obligation to cooperate does not oblige the State affected by the 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 State shall retain, in accordance with its domestic law, 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 practice and principles identified by the Red Cross and Red Crescent Movement, which have in turn been referred to by the International Court of justice in 1986 and by the relevant resolutions of the UN General Assembly, could be applicable.

63. Mr. President, before concluding my intervention, I want to draw the attention of our colleagues to the set of draft articles on Responsibility of International Organizations adopted on second reading by the drafting committee during the first part of the present session of the International Law Commission held in 2011. The Islamic Republic of Iran would like to underline the importance of this document for our Organization AALCO. We recommend to the Secretary General, Professor Rahmat Mohamad, to undertake a study on this Report and to present it to the next Session of our Organization as a basis for some discussions during our next annual session.

64. In the end, I would also like to thank Prof. Murase for his remarks regarding new topics and we are going to consider with interest the proposal just made by Prof. Murase.

65. Thank you very much, Mr.President.

66. **Mr. President:** Thank you Iran for that statement. Following the example of Iran the delegates can make specific comments and can hand over their entire statement to the Secretariat so that we can conclude our meeting as fast as possible. Now, I invite the delegate of the People's Republic of China.

67. The **Delegate of the People's Republic of China:** Thank you Mr. President for giving the floor to me. Mr.President, the International Law Commission (ILC) is a major legal body of the United Nations, which makes important contribution to the codification and progressive development of international law. There are active interactions between the two institutions. Briefing of AALCO's work in ILC annual session helps the Commission to get a better view of the Organization. At the same the Secretariat of AALCO always keeps a close eye on the work of the Commission. The Chinese Delegation welcomes such cooperation between ILC and AALCO.

68. Mr. President, in its sixty-second session held last year, ILC considered agenda items such as reservations to treaties, protection of persons in the event of disasters, effects of armed conflicts on treaties, expulsion of aliens, shared natural resources, treaties over time, as well as the most-favoured-nation clause, and adopted a series of draft articles. The Chinese Delegation appreciates the arduous work of the Commission and important progress it has achieved. Meanwhile, we would like to take this opportunity to share our views with other delegations on two concrete questions in particular.

69. On "Effects of Armed Conflicts on Treaties", the Commission considered the first report of the Special Rapporteur Mr. Caflish and discussed 17 draft articles including the definition of armed conflicts. The Special Rapporteur proposed to take reference to the definition of armed conflicts in the Tadic case of ICTY, where prolonged armed conflicts between governmental entities and organized armed organization were included. The Chinese Delegation is of the view that the definition aforementioned provides inadequate restrictive conditions for the term of armed conflicts therein, thus may be easily construed to any use of force in this regard and adversely affects the stabilization of treaty relations.

70. On "Expulsion of Aliens" the Special Rapporteur Mr. Kamto especially dealt with the prohibition of extradition disguised as expulsion in his Sixth Report. The Chinese Delegation believes that the international community needs flexible and practical cooperation to combat transnational crimes. Therefore, nothing should stand in the way of extradition of an alien to a requesting state when all conditions for expulsion had been met and the expulsion itself did not contravene international or domestic law. We hope that the Commission will take into account the above-mentioned questions in the future considerations of relevant item.

71. Mr. President, this year will be the last year of the current term of ILC Members. The Commission has achieved fruitful progress at its 62nd Session and previous sessions, but still has a long way ahead. It is expected to finish the second reading of draft articles

on the responsibilities of international organizations, and the drafting of the guidelines to practice of the reservation to treaties, as well as drawing out plans for its future work. We wish the Commission a successful conclusion of its work in this term.

72. Mr. President, one third of the 34 current Members of the Commission are from Asian-African Countries. Their work assists the Commission in performing its mandate in more comprehensive perspectives. We encourage AALCO to further strengthen its cooperation with the Commission, reflect the concerns of Asian-African Countries, and contribute to the comprehensive and balanced development of international law.

73. Thank you Mr. President.

74. **Mr. President:** Thank you. Now I invite the delegation from Malaysia.

75. The **Delegate of Malaysia:** Mr. President, the Honourable Secretary General and Distinguished Delegates, Malaysia has always considered the Report of the Works of the ILC as one of the most important item on the Agenda of the AALCO Annual Session. This is clearly stipulated by Article 1(d) of the AALCO Statute which provides that one of AALCO's functions is to examine subjects that are under consideration by the ILC and we shall forward our views on those subjects to the ILC. To this end, my delegation appreciates the Report prepared by the AALCO Secretariat which covers the works of the ILC at its 62nd session, the period covering 3 May-4 June 2010 and 5 July-6 August 2010.

76. Malaysia follows closely the deliberations of the ILC at its 62nd session on the 9 topics namely Reservations to Treaties; Treaties Over Time; Expulsion of Aliens; Effects of Armed Conflicts Over Treaties; Protection of Persons in the Event of Disasters; Obligation to Extradite or Prosecute; Immunity of State Officials from Foreign Criminal Jurisdiction; Most Favoured Nation Clause and Shared Natural Resources. Malaysia also is following closely the deliberations of the ILC at its current 63rd Session.

77. We had provided our views to the ILC on certain topics. In the interest of time, my delegation will provide a general overview of our positions with regards to the topics under discussion of the ILC and we had submitted our full written comments to the AALCO Secretariat.

78. **Written Statement submitted to the AALCO Secretariat:**

79. Mr. President, ***Reservation to Treaties*** is one of the most important and ambitious topics undertaken by the ILC. We have been following closely the development of the works of the ILC on this topic since its introduction on the agenda of the ILC in 1993, culminating in the submission of 16 reports so far by the Special Rapporteur Mr. Alain Pellet and the adoption of over 100 draft articles that deals with the formulation, communication and withdrawal of reservations, interpretative declarations and unilateral statements which constitute the Guide to Practice on Reservation to Treaties. We noted that the ILC had completed the provisional adoption of the draft guidelines at its 62nd session.

80. We are aware that the Guide to Practice is a non-binding instrument that serves to guide State practice with respect to reservations, interpretative declaration and unilateral statements. However, due to its importance, we agree with the AALCO Secretariat's observation that as it would be the first time that States are able to scrutinize the complete set of draft guidelines since its provisional adoption in August 2010, the time provided for States to provide comments by January 2011 is not sufficient. Malaysia, however, had done what it possibly could to provide its preliminary views to the ILC, albeit beyond the stipulated time.

81. Malaysia wishes to share some of its concerns on certain key draft guidelines that were recently adopted by the ILC.

82. Mr President, Draft guideline 3.2 relates to the various modalities that may assess the permissibility of reservations to a treaty i.e. the Contracting State, Dispute Settlement Bodies and Treaty Monitoring Body.

83. Malaysia had requested for the ILC to clarify on certain issues on the proposal to allow for these 3 entities to determine the permissibility of reservations entered by States. Malaysia is of the view that the proposal for Treaty Monitoring Body to take up this task can be given consideration. However, Malaysia cautions that the Treaty Monitoring Body shall not steer away from its pivotal purpose which is to monitor the compliance of the treaty under its competence.

84. Malaysia is further of the view that such Treaty Monitoring Body should comprise a body of experts, and not representatives of governments or countries. These experts should only be allowed to make legal findings. This could safeguard the Treaty Monitoring Body from being politically influenced by the representatives of governments or countries in its determination.

85. Malaysia has concerns on the draft guideline 3.2.5 with regard to the competence of Dispute Settlement Bodies (DSB) in determine the permissibility of reservations. We seek ILC's clarification if this draft guideline redefines the role of DSB.

86. Draft guideline 4.2.2 provides that a State that lodged reservation could be prevented from becoming one of the contracting states to the treaty when that reservation is opposed by another contracting state of that treaty.

87. States lodged reservations to treaties for various reasons, one of which is due to the States' internal policy, constitutional and legislative provisions, certain developmental gaps (which may be due to social, economic and political reasons) which would be inevitable for such States to make reservations in order to safeguard the national interest. As such we need to obtain further clarification from the ILC as to why such provision is included.

88. Malaysia notes that draft guideline 4.5.2 is intended to clarify the status of a State making a reservation deemed as invalid. Malaysia recommends that the guideline should

provide clearly that a State must express their intention of whether or not they intended to become contracting state of a treaty when their reservation is regarded as invalid.

89. Draft guideline 4.7.1 intends to provide the permissibility of an Interpretative Declaration based on its approval or opposition by other States.

90. In expressing consent to be bound by a treaty, States have in their mind certain understanding of the terms used in that treaty. Besides, the treaty calls upon its contracting parties to implement its provisions in their international relations between each other as well as in their own domestic affairs. Thus, it is necessary for the States to express its understanding and interpretation of the provisions of a treaty to enable it to apply and implement the provisions and meet their obligations.

91. Malaysia is of the view that to have approval and opposition determines the admissibility of interpretation proposed by the author state will hinder the implementation of treaty obligation by that State in its domestic and international affairs. For that reason, Malaysia is of the view that approval and opposition to Interpretative Declaration should not determine the weight to be given to interpretation proposed.

92. Malaysia is of the view that the uncertainty of the legal status of silence on a specific Interpretive Declaration could consequently lead to an undesirable result. For this reason, Malaysia is of the view that an inference should not be simply drawn from inaction of States as it will have effect on treaty interpretation. Malaysia is of the view that the term “approval” and “opposition” in draft guideline 4.7.1 must refer to express approval and opposition.

93. Draft guideline 5.2.4 provides that when a reservation formulated by a predecessor State is maintained by a successor State under draft guidelines 5.1.1 and 5.1.2, parties to the treaty may not object if they had not done so when the reservation was made by the predecessor State. Malaysia also notes that there are two exceptions to this rule laid down in paragraph (a) and (b) in the same draft guideline. Paragraph (b) of draft guideline 5.2.4 provides that a treaty party may object to a reservation maintained by a successor State even though the reservation was not objected when it was made by the predecessor State unless the territorial extension of the treaty *radically changes* the conditions for the operation of the reservation. Due to its importance, Malaysia seeks clarification as to the meaning of the phrase “radically changes” in paragraph (b) of draft guideline 5.2.4. Malaysia also seeks the ILC to clarify who would determine the scope of radical change for it to qualify as an exception to the rule laid down in draft guideline 5.2.4.

94. Malaysia wishes to reiterate its views which were raised at the 64th and 65th United Nations General Assembly sessions in relation to the inclusion of international organizations in these draft Guidelines. In this respect, since the power to make treaties by international organizations largely depends on the terms of the constituent instrument of the international organization and the mandate granted to the international organization, international organizations do not necessarily have similar authority or

responsibility as States. Thus, Malaysia is of the view that a separate regime for international organizations should be developed to address these entities and should not be made part of the draft guidelines at this juncture.

95. Malaysia reiterates that States must be provided with ample time to scrutinize and internalize the draft guidelines which are now available in its entirety, resulting from works spanning a period of 12 years. Therefore, although Malaysia had provided its comments to certain key provisions of the guidelines, the comments are provisional and we reserve the right to make further statements on all the draft guidelines.

96. Malaysia further believes that a universally acceptable set of guidelines can only be developed by the ILC if States play their part by providing actual instances around which the proposed guidelines would be applicable.

97. As such, Malaysia urges AALCO Member Countries to share your inputs in relation to this important matter. Unless we participate meaningfully by providing our views and comments to the ILC, we may miss the only opportunity available to us to partake in the development of a highly significant international law regime on reservation to treaties.

98. Mr. President, Malaysia expresses our gratitude to the Special Rapporteur, Mr. Lucius Caflish, for his First Report on the topic of ***Effects of Armed Conflicts on Treaties***.

99. Malaysia notes that our concerns and suggestions highlighted during the Sixth Committee debate in 2008 and comments submitted to the ILC in May 2010 have been considered by the Special Rapporteur in his First Report.

100. Malaysia also noted that draft articles 1 to 17 have been submitted to the Drafting Committee, which had produced its latest report on these draft articles at the end of May 2011. Due to the proximity of the time of the release of that report and this AALCO Annual Session, Malaysia would share its preliminary views concerning some of these draft articles.

101. On draft article 1, Malaysia is of the view that the proposed inclusion of the saving clause to clarify the issue of the inclusion of treaties to which international organizations are parties can be given due consideration. Malaysia also agreed that it is not necessary to include express reference to the application of draft articles to non-international armed conflicts by nature or extent, as the definition of armed conflict is provided under draft article 2 sub paragraph (b) and the “nature or extent” element is covered by Article 6.

102. With regard to the definition of “armed conflict” under draft article 2, Malaysia notes and reiterates its support for the reformulation of the definition in line with the

definition in the *Tadic* case as well as the combination of article 2 of the Geneva Conventions 1949 and article 1, paragraph (1), of the 1977 Additional Protocol II which would include the internal armed conflict on the more contemporary definition on the concept.

103. On draft article 6, Malaysia notes that the previous term "indicia" has been replaced with "factors" and the term "factors" should be viewed as "mere indications of susceptibility" depending on the circumstances. Nevertheless, Malaysia agrees with the formulation would still be non-exhaustive.

104. In relation to draft article 14, Malaysia notes that, as per mandate from the Sixth Committee, the International Law Commission has drafted this Article based on draft article 7 of the Institute of International Law Resolution 1985. It now empowers the State to suspend in whole or in part of the operation of a treaty that would be incompatible with the exercise of its inherent right of self-defence under article 51 of the United Nations Charter. This is as opposed to a State that uses force as an aggressor State, in draft article 15, to receive no benefit if it suspends treaties.

105. On draft article 15, Malaysia notes that as per mandate from Sixth Committee, the International Law Commission has drafted draft article 15 based on the draft article 9 of the Institute of International Law Resolution 1985 with some adjustments, and Malaysia finds the adjustments acceptable. Malaysia's concern is on how to determine a State committing aggression within the meaning of the Charter of the United Nations and the General Assembly resolution 3314 (XXIX).

106. Mr. President, Malaysia takes note that the Report of the AALCO Secretariat on the topic of the ***Protection of Persons in the Event of Disasters*** covers the Third Report of the Special Rapporteur and the Report of the ILC at its 62nd session. Malaysia noted that the Fourth Report of the Special Rapporteur had been issued on 11 May 2011.

107. Malaysia notes that at its 62nd session the ILC had adopted draft articles 1 to 5 on this topic, together with commentaries. Malaysia further notes draft articles 6 to 9 as proposed by the Special Rapporteur in his Third Report were provisionally adopted by the Drafting Committee.

108. Malaysia appreciates the addition of these pertinent articles. We reiterate our position that all such offers of humanitarian assistance would have to respect the sovereignty, territorial integrity and political independence of the affected State, not be arbitrarily imposed on the affected State and not automatically applying concepts under international humanitarian law as the duty of protection differs from the context of disaster situations.

109. In relation to draft article 6 on "Humanitarian principles in disaster response", Malaysia agrees that it is vital for States to observe fundamental humanitarian principles in responding to disaster. Thus, the principles of humanity, neutrality, impartiality and

non-discrimination, as envisaged in the article, should be central to any disaster response. With these principles in mind aid responders must refrain from the politicization of humanitarian aid or the conditioning of such aid on extraneous factors. Nor should such situations for other non-aid relief related purposes.

110. With reference to draft article 7 on "Human Dignity", Malaysia supports the proposal by the Drafting Committee in substituting the phrase "For the purposes of the present draft articles" with "In responding to disasters" to clarify the context in which the provision applies and to give a sense of the continuing obligation to respect and protect the human dignity of affected persons throughout the duration of the response period.

111. Draft article 8 on "Human rights" reflects another fundamental principle that the human rights of persons affected by disasters should always be respected. However it is also recognized that certain of those human rights may need to be temporarily suspended in national interest in the prevailing circumstances where the saving of lives and alleviation of suffering should be the paramount duty of States.

112. On draft article 9 on "Role of the affected State", Malaysia notes that the Drafting Committee has chosen the word "duty" over "responsibility" and "right" over "role". Malaysia is of the view that the obligation to respond to a disaster and the provision of humanitarian assistance must always remain, first and foremost, with the affected State. This topic of protection of persons in the event of disasters cannot be discussed in isolation, without due regard to other international law principles, such as the State's sovereign right to govern itself independently from any external interference.

113. Malaysia further notes that the Fourth Report introduces 3 new draft articles, namely Draft Article 10 (Duty of the affected State to seek assistance), Draft Article 11 (Duty of the affected State not to arbitrarily to withhold its consent) and Draft Article 12 (Right to offer assistance).

114. With reference to draft Article 10, Malaysia is of the view that the decision on the necessity to seek external assistance whether from third States, the United Nations, competent intergovernmental organisations or relevant non-governmental organisations should be at the discretion of the affected State as it is in the best position to determine whether a disaster exceeds its natural response capacity.

115. With reference to draft Article 11, further clarification is required as to what would be considered the arbitrary withholding of consent in the context of this draft article as well as what criteria would be used to determine the inability and unwillingness of an affected State to consent to external assistance. Further clarification is also required as to who would be the arbiter to make such determination.

116. With regard to draft Article 12, Malaysia is of the view that it is unnecessary to confer a legal right on any third State, the United Nations, the intergovernmental organisations and the non-governmental organisations to offer assistance to the affected State. As has been prefaced in draft Article 12, the guiding principle for receiving disaster

aid must always be the consent of the affected State. This is its sovereign right. In this regard Malaysia would suggest that further clarification also be provided on the phrase "shall have the right to offer." Therefore, Malaysia is suggesting certain new phrase to be introduced into this Article.

117. Malaysia unequivocally reiterates that the affected State has the principal right, and indeed the obligation, for meeting the needs of victims of disasters within its own borders. The affected State holds the right to decide where, when and how relief operations are to be conducted and possess the power to dictate the terms of the humanitarian response.

118. Mr President, Malaysia notes the AALCO Secretariat Report on the topic of ***Most-Favoured-Nation Clause,*** highlighting the progress of works undertaken by the Study Group led by Mr. Donald M. Mcrae and Mr. A. R. Perera. Malaysia also notes that further developments are expected from the current 63rd Session of the ILC which will end in August 2011.

119. Malaysia appreciates the efforts undertaken by the ILC to revive its work on this topic since 2007, in particular by revisiting the temporal relevance of the 30 draft articles on the MFN Clause adopted by the ILC on its first reading in 1978.

120. The consideration of this topic must be addressed within the context of the WTO Agreements and the plethora of regional economic agreements, customs unions, bilateral Free Trade Agreements, Bilateral Investment Treaties and Investment Guarantee Agreements.

121. It is also trite that MFN clauses are very much intertwined with the bilateral and regional interests of the States involved, is driven by domestic policies and issues of State sovereignty, is politically sensitive and technically and operationally complex.

122. Malaysia notes that the ILC's own realization of this has led to more focus being placed on developing interpretative guidelines for MFN clauses. As demonstrated by States' responses to the *Maffezini* case, this is already being handled by States in the re-drafting of their MFN clauses. Malaysia is also of the view that such interpretation should primarily be left with the State concerned and the dispute settlement tribunals they choose to refer to. Developing guidelines that are incongruent with States' practice does not contribute to the development of international law even if it may be more convenient.

123. Malaysia also observes that other trade-related bodies such as the WTO, UNCTAD and OECD are already undertaking studies on this matter. As such it would be incumbent on the ILC not to duplicate or overlap with the studies already underway and on which States have more direct participation and contribution.

124. Malaysia also takes this opportunity to highlight the ILC's own criteria for selecting a new topic/sub-topic which were elaborated by the ILC in 1997 and 1998. The topic should reflect the needs of States in respect of the progressive development and

codification of international law; the topic should be sufficiently advanced in stage in terms of State practice to permit progressive development and codification; and the topic is concrete and feasible for progressive development and codification. Along those lines, three feasibility tests were suggested for topic selection. Firstly, the practical consideration of whether there was any relevant pressing need in the international community as a whole; secondly, whether the topic was technically feasible, that is sufficiently 'ripe' in the light of relevant State practice and literature; and thirdly, related to the political feasibility of the topic – whether addressing it might or might not meet with strong political resistance on the part of States.

125. Malaysia therefore urges the ILC to measure the outcome of the studies undertaken by the Study Group and which are under discussion at the 63rd ILC Session against its own agreed criteria as enumerated above to determine the viability of its continued consideration of this topic at this time. Given the context of MFN Clause being negotiated and drafted in bilateral and regional agreements, it would seem impracticable to harmonise or standardize the interpretation and application of MFN Clause at the multilateral fora, in which such effort may well appear non-achievable.

126. Mr President, in relation to the topic ***Shared Natural Resources***, Malaysia recalls the General Assembly Resolution 63/124 of 11 December 2008 regarding transboundary aquifers in particular on the inclusion of the item entitled "The law of transboundary aquifers" in the provisional agenda of the General Assembly's sixty-sixth session in 2011, with a view to examining, *inter alia*, the question of the form that might be given to the draft articles. My delegation also recalls that States had been encouraged to make appropriate bilateral or regional arrangements for the proper management of their transboundary aquifers, taking into account the provisions of the draft articles.

127. Malaysia is of the view that while acknowledging the importance of the topic of transboundary aquifers and taking into account the global water crisis, at present, the draft articles would be useful in the form of a guideline and not in a legally binding form. Malaysia is also of the view that States may enter into appropriate bilateral or regional arrangements for the proper management of their transboundary aquifers, as recommended by the ILC, subject to the capacity and resources of States to carry it out.

128. Malaysia fully concurs with the majority views expressed by States that the transboundary oil and gas issues are essentially bilateral in nature, as well as highly political and technical, involving diverse situations. Given that oil and gas reserves are often located on the continental shelf, consideration thereof must also necessarily involve maritime delimitation issues which involve the issue of sovereignty of States, which are both beyond the mandate and purview of the Commission.

129. With regard to the AALCO Secretariat's suggestion that the ILC "*may consider surveying the practice of inter-State and private contracts in order to elucidate some general trends in practice under both public and private law*", Malaysia is strongly of the view that the said proposal is not warranted and has no basis. This is in light of the views expressed by the majority of States which opposed the ILC to continue its works on the

codification of law on transboundary oil and gas, a view shared by Malaysia. Apart from that, the proposed "survey" would require the disclosure of confidential information by State-owned and private entities, which would include highly technical data, politically sensitive issues as well as economic-related considerations.

130. Mr. President, Malaysia notes that the Commission had proposed for its future work a topic relating to ***international environmental law.*** Malaysia is of the view that this topic needs to be seriously considered. International environmental law has now become part of the mainstream of international law and the ILC is able to contribute towards clarifying and redefining the basic principles and rules of international environmental law if the topic is placed under its work. Specifically, Malaysia is of the view that the Commission should consider taking up the topic of the atmosphere, as proposed by ILC member Professor Shinya Murase.

131. Mr. President, Malaysia supports any efforts to send young officers for attachment or internship programme at ILC. Therefore, it is proposed that the ILC Members from the Asia and Africa continent open their doors to accept attachment or internship on the recommendation of the respective Governments, subject to applicable ILC rules and procedure.

132. Finally Mr. President, Malaysia associates itself with the calls for the Report of the ILC to be made available at least one month before it comes up for consideration by the Sixth Committee. An early submission of the Commission's Report would facilitate in-depth deliberations at the Sixth Committee. Thank you very much.

133. **Mr. President:** Thank you very much the Hon'ble Attorney General of Malaysia. I think his comment is worthy of note, in fact the ILC's current work needs to be deliberated for more than one and a half hours that we have allocated, even perhaps one and half days. Since we have allocated so in this agenda, in future we would provide more time for substantive matters. Now I call upon the distinguished delegate from Indonesia.

134. The **Delegate of Republic of Indonesia:** Mr. President, Hon'ble Secretary-General of AALCO, distinguished delegates, first of all I would like to place on record our highest appreciation for the excellent works of Dr. Perera.

135. The Indonesian Delegation in this opportunity would like to make a few remarks relating to the Report of the International Law Commission's 62nd Session.

136. First, let me begin with issue of "*The expulsion of aliens*". Indonesia has been observing the Expulsion of Aliens subject, as stated in International Human Rights Law, particularly in lieu with the principles of sovereignty and non-intervention. International Human Rights Law placed some restrictions on when and how a State might exercise its power to expel persons from its territory and afforded three types of protection to such persons: substantive protection against return if the person would face grave violations of

human rights, procedural safeguards during deportation procedures, and protection with regard to the methods of expulsion.

137. We do note that in addition to the general protection afforded to all foreigners, certain categories of foreigners, such as refugees and migrant workers, might be afforded additional protection against expulsion and/or benefit from additional procedural guarantees.

138. Mr. President, Distinguished Delegates, the second issue that I would like to comment is the "protection of persons in the event of disaster" The Government of the Republic of Indonesia attached great importance to the topic of protection of persons in the event of disasters, particularly in the light of Indonesia's experience following the recent natural disasters occurred in Indonesia, such as tsunami, earthquake, and volcanic eruption.

139. Humanitarian assistance should be undertaken solely with the consent of the affected country and with utmost respect for national sovereignty, territorial integrity, national unity, and the principle of non-intervention in the domestic affairs of States.

140. We view the humanitarian principles in disaster response, as stated in draft article 6, as a key provision of the draft articles, and considered neutrality, impartiality, and humanity to be core principles in humanitarian assistance efforts. It is also essential to respect the principle of non-discrimination and to take into account the needs of the particularly vulnerable, but those concerns must be seen as complementing the three core principles.

141. Furthermore, with regard to draft article 7, we concurred not to dwell on establishing human dignity as a right. As to the issue of primary responsibility of the affected State in draft article 8 proposed by the Special Rapporteur, we urge the Commission to uphold the principles of sovereignty and non-intervention. It is indisputable that the affected State has the primary duty to protect individuals in its territory. In addition to exploring the right of the international community to provide lawful humanitarian assistance, without characterizing it as a secondary responsibility, it is important to explore ways and means of improving the coordination, effectiveness and efficiency of such assistance, particularly by strengthening partnerships between affected States and the international community and developing proactive approaches to disaster management.

142. Mr. President, distinguished delegates, to sum up in conclusion, the Government of the Republic of Indonesia wants to stress once more that expulsion of aliens must only be done in circumstances when no other measurement is available.

143. Regarding the humanitarian assistance, for the sake of humanity, it plays a very vital role, but it also must be conducted in line with the principles of non-intervention, and undertaken with utmost respect for national sovereignty, territorial integrity, and national unity in the domestic affairs of States. Thank you.

144. **Mr. President:** Thank you very much. Now I call upon delegate from India.

145. The **Delegate of India:** Thank you Mr. President for giving me the floor on this very important subject on our agenda. Firstly, I thank the Secretary-General for the detailed and comprehensive introduction of the Report on the work of the International Law Commission at its 2010 Session. As the Secretary-General has highlighted, it is important that the ILC should receive the inputs/views and responses from the AALCO Member States so that those views and ideas can be taken into consideration by the Commission while it formulates draft articles on the various topics on its agenda. There are various means by which the ILC seeks inputs: firstly, in the form of information before the topic is taken up for codification; secondly, by means of questionnaires either before it takes up a topic or even during its consideration of a topic and then, through comments on the draft articles which can be made at the Sixth Committee and also sometimes when the Commission has, separately, sought views of Member States on its work. The discussions on the Report of the ILC form a very important part of the agenda of AALCO's annual sessions and I agree with the distinguished Attorney-General of Malaysia that we must allocate sufficient time for that purpose.

146. Mr. President, I also thank Mr.Rohan Perera, Member of the ILC for his detailed report on the work of the Commission at the current session. And in particular I thank him for his detailed explanation of the work of the Commission on the two very important topics which are of immediate concern to all Member States of AALCO, namely the "Effects of Armed Conflicts on treaties" and the "Immunity of State Officials From Foreign Criminal Jurisdiction". I also thank Mr. Perera as well as Prof. Murase for highlighting the new topics which they have proposed for the consideration of the Commission.

147. Mr. President, as you are aware, in the first part of its session this year, the ILC has finalized, on second reading, the text of draft articles on three important topics: the Effects of Armed Conflicts on Treaties, the Responsibility of International Organizations, and the Reservations to treaties. During the second part of this year's session, the Commission will be adopting Commentaries on these draft articles. These will then be presented to the Sixth Committee and I would urge all Member States to participate effectively in this year's session at the Sixth Committee and to present their views on how to take the work forward on these very important topics.

148. Mr. President, I also thank Prof. Murase for drawing our attention to some other topics which have earlier been considered by the Commission and which would be taken up at this years' session of the Sixth Committee. The first of this is the Draft Articles on Transboundary aquifers for which Amb. Yamada of Japan was the Special Rapporteur when they were adopted and secondly, the Convention on Jurisdictional Immunities of States and Their Properties which Convention was adopted by the Sixth Committee of the UN General Assembly after extensive discussions in the ILC and also at the Sixth Committee. Mr. President, this is a very important Convention for all of us, all the Member States of AALCO. As you are aware there were long and difficult discussions,

both in the Sixth Committee and the ILC, and we believe that the text which emerged and is now in the form of the Convention, represents a very balanced position between competing claims and between different views and it would be useful for all of us to ratify it. As I mentioned in the general debate, India has already signed and is in the process of implementing an enacting legislation which would allow us to implement this Convention. With that I thank you; I will not go into the details of the topics giving deference to your remarks Mr. President.

149. **Mr. President:** Thank you very much, now it is the turn of Japan. May I ask the Leader of the Japanese delegation to use this time to try and bring to the floor the issues concerning the Jurisdiction of Immunities of States and their property, the additional item that has been proposed so that the Members following him would also comment on that.

150. The **Delegate of Japan**: Thank you Mr. Chairman.

151. First I would like to thank for the good introduction of the topic by Prof. Dr. Rahmat Mohamad, the Secretary-General of AALCO followed by very good summary by Dr. Rohan Perera followed by Prof. Shinya Murase on the future work of the ILC.

152. In the past, 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, the 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 UN Convention on Jurisdictional Immunities of States and Their Property and the other is the Draft Articles on the Law of Transboundary Aquifers. Since our delegation will address the UN Convention on Jurisdictional Immunities of States and Their Property. Later, I would like to only refer to the Draft Articles on the Law of Transboundary Aquifers now.

153. 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. Rapid expansion of exploitation of groundwater has been taking place since the 1950s. The groundwater is now the most extracted single raw material with the result of critical over-exploitation and pollution. In order to provide 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. The UN General Assembly received the draft articles favourably and, by its Resolution 63/124, which was adopted by consensus, took note of the draft articles and decided to examine the question of the form that might be given to them in its forthcoming session this year. One form which could be given to the draft articles is to adopt them as a universal treaty at a diplomatic conference. Another 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 forthcoming session of the UN General Assembly this autumn, Japan wishes to consult with you as to how we can best proceed on this matter.

154. Mr. Chairman, with regard to the current work of the ILC, the ILC provisionally adopted a set of draft guidelines on reservations to treaties in its 62nd session last year after the consideration of the topic for 17 years since 1994 and requested the Member States of the United Nations to make comments and observations on the draft guidelines. Japan submitted its comments on the draft guidelines on reservations to treaties to the Secretariat of the ILC. If any Member State of the AALCO is interested in our comments, we are ready to share them with you. Japan also 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.

155. Mr. Chairman, 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. A sound atmospheric environment is indispensable for the survival of the mankind. While there have been a number of relevant conventions concluded for the protection of the atmosphere, they have left substantial gaps in terms of geographical coverage, targeted activities, or regulated substances. Thus there exist significant gaps in applicable principles and rules of international law. In his proposal on "the protection of the atmosphere", Professor Shinya Murase attempts to depart from the piecemeal approach and to fill these gaps by codifying and progressively developing the relevant principles and rules of international law. This topic was formally included in the Long-Term Programme of Work for the Commission in 63rd session of the ILC this year. With an authorization of the Sixth Committee of the UN General Assembly, the ILC will embark on a project on this fascinating subject at the beginning of the next term. Japan is convinced that this proposal would provide a good opportunity to endeavour an elucidation of relevant principles and rules of international law in the related fields. Our delegation would like to request AALCO Member States to consider this proposal seriously and to agree to authorize this proposal as a new topic for the ILC at the coming session of the Sixth Committee of the UN General Assembly this autumn.

156. Mr. Chairman, lastly, I would like to reiterate the proposal for the future work of the AALCO in relation to the ILC which our delegation made at the annual meeting of the AALCO last year. It is needless to say 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, it is 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.

New Proposal made by Japan: UN Convention on Jurisdictional Immunities of States and Their Property[51]

157. Mr. Chairman, allow me to spend some more time on the issue of "UN Convention on Jurisdictional Immunities of States and Their Property," which was adopted by the UN General Assembly in 2004. It took twenty-seven years since the drafting work was first started in the International Law Commission (ILC). The codification work by the ILC on jurisdictional immunity required thorough studies, taking 13 years. Ambassador Sompong Sucharitkul from Thailand was the first Special Rapporteur in charge of this topic, and with the second Special Rapporteur Ambassador Motoo Ogiso from Japan, ILC completed its drafting work and adopted the final text of the draft articles in 1991. Examination of the draft articles started in the Sixth Committee of the UN General Assembly in 1992 and the difficult negotiations took 14 years, and finally adopted in 2004 as a convention.

158. The Government of Japan was concerned about the situation of state practice in regards to State Immunities. It was an established fact that a state enjoyed immunities from the jurisdiction of the courts of another state in principle, but the principle of jurisdictional immunities underwent gradual but fundamental changes from the so called 'absolute rules' to the 'restrictive rules'. The modalities of such 'restrictive rules' varied considerably depending on the forum states. For instance, some states already had domestic legislation or judicial precedents regarding the State immunities since 1970s. Such domestic legislation and judicial precedents, of course, were the implementation of principles of international law, as well as very significant contributions to the development of law for State Immunities, they were not the final solution to providing international standard on this issue.

159. Under these circumstances, the Government of Japan considered that it was important to establish basic rules of the modalities of State Immunities at the international level. Ambassador Chusei Yamada, as the Representative of the Government of Japan, took an active role to accelerate the negotiations during the examination of the draft articles in the Sixth Committee. Traditionally, Japan places importance on the codification of customary international law. Codification of customary international law is an important function of the UN. It is often difficult to ascertain

[51] On this new proposal, three delegations viz., Republic of Indonesia, South Africa and Kenya made their comments which are attached at the end of the verbatim record of ILC from pages 32-34.

precisely what the 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. In the case of State Immunity, customary international law had largely developed as customary law. Codification of such customary law would certainly contribute to stable and equitable relations among states.

160. Mr. Chairman, while the process in the Sixth Committee was going on, at the proposal of the Government of Japan the subject was taken up for discussion in the AALCO. During the thirty-ninth Session (Cairo Session) of the AALCO in 2000, the Government of Japan prepared a background paper explaining that it was of utmost importance for the AALCO members to make an active and positive contribution in the work of the General Assembly for codification of the subject. The subject was actively discussed during the Cairo Session. 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, the States must take initiative.

161. The Convention provides that a State enjoys immunity from the jurisdiction of the courts of another State unless it has expressly consented to the exercise of jurisdiction by the court. The Convention provides certain exceptions concerning proceedings related to matters such as commercial transactions, contracts of employment, personal injuries and damage to the property, and a State cannot invoke immunities in proceedings which relate to such matters. In addition, according to the provisions of the Convention no measures of constraint, such as attachment, arrest or execution against property of a State may not be taken unless the State has expressly consented to the taking of such measures.

162. Japan signed the convention on January 11, 2007, enacted its implementing legislation in April 2009, and deposited its instrument of acceptance on May 11, 2010 with the UN Secretary-General. In Japan, the 'absolute rules' of State Immunities had been in force since 1928, but the 'restrictive rules' were in conformity with the current international standard. In order to achieve smooth transition to the restrictive rules, it was preferable for the Government of Japan to legislate its municipal laws to be consistent with the Convention.

163. Up until now, eleven States, including some of the AALCO member States such as Iran, Saudi Arabia and Lebanon, became members of the Convention. In accordance with Article 30 of the Convention, it shall enter into force on the thirtieth day following the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession with the Secretary-General of the UN, and it might still take at least several more years before the 30th ratification is to be deposited. Japan would like to expedite this ratification process as the coming into force of the convention would contribute to secure justice and order as well as to settle disputes among States on the question of jurisdictional immunity. We sincerely hope that the member States of AALCO consider

early ratification of the convention. Japan is considering to take-up this matter at the forthcoming UN General Assembly, perhaps in a form of a draft resolution. In any case, we would like to discuss with you on an appropriate ways to move this issue forward. I apologize for taking such a long time. Thank you very much Mr. Chairman.

164. **Mr. President:** Thank you very much. The Member States would take note of this Convention on Jurisdictional Immunities that needs the threshold of ratifications to be reached. Those who consider it relevant, as Japan has been saying that it took fourteen years for this Convention to be finally brought about and then for the lack of ratification it is being held up. Well, I would also thank the Japanese delegation for their suggestion on procedure about the questionnaire by the Secretariat on ILC topics which needs to be passed on to the ILC and its Special Rapporteur so that when the Draft Articles are prepared they would be considered and rationale of each country would be better taken account of. Thank you. Now let me call upon delegate from Kuwait.

165. The **Delegate of State of Kuwait**[52]**:** Thank you Mr. President. My delegation would like to comment upon the topic "expulsion of aliens", on the work of the International Law Commission at its sixty-second session. On "expulsion of aliens", the national legal provisions of State of Kuwait comes under two major laws, Criminal Expulsion and Administrative or Organizational Expulsion.

166. Under criminal expulsion clause, the process of expulsion of aliens or deportation to their country is based on criminal law containing permissive rule of deportation as a punishment which is supplementary sentence. However, the rule of expulsion as well as its execution, both are preserved by deep-rooted legal linkage whose reference could be traced to the provision of Article No.66 of Kuwaiti Criminal Code No. 16 of the year 1960, which provides "ancillary and complementary penalties prescribed in this law for expulsion of alien from country……". For dealing with measures of expulsion, Article No.79 of the Kuwaiti Criminal Code contains provision for procedures for expulsion of alien. The article also provides all provisions to detain an alien, allows the judge to order his expulsion from Kuwait after completion of his punishment, and without prejudice of administrative authority, for the expulsion of every alien in accordance with the law.

167. When an alien is sentenced to imprisonment, his freedom is curtailed because of commission of crime of moral turpitude or honesty. The judge decides on the expulsion from Kuwait only after execution of sentence. This order of judge should be announced to the concerned, which must implement it.

168. After extrapolating and analyzing text of the article No 79, it becomes clear that general reason in criminal expulsion is the permissive supplementary punishment, which is subject to its report and sentence to the discretion of the Judge when the sentence of imprisonment is imposed on an alien.

169. But the Kuwaiti Legislator wanted to do away with this general exception for those aliens sentenced with imprisonment related to one of the crimes of moral turpitude

[52] Statement was delivered in Arabic. This is an unofficial translation from the Interpreter's version.

or honesty. Therefore, the sentence of expulsion is made mandatory and beyond the powers of discretion of the judge, and that is what the second paragraph of the afore-mentioned article states for.

170. Criminal expulsion is not the only one way for the expulsion of aliens, but the law prescribed the right of a special administrative authority, in expulsion of alien whenever law requires it**.** This type of expulsion is known as the administrative expulsion, whilst article No. (20) of aliens residential law (decree 59/17) stated that "expulsion of alien from Kuwait is subject to the ordinance of head of police and public security if he does not have residential permit or its validity got expired. He is allowed to return to Kuwait if he fulfills required conditions of entry according to this law".

171. Meanwhile, Article No 24 of aliens' residential law (decree 59/17) permits the reconciliation of an alien who has violated law and residential rules, after paying the imposed fine against the violation of the residential rules and its conditions within State of Kuwait. Perhaps above mentioned reconciliation is considered one of the mechanisms made in the interest of aliens against whom an administrative order for the expulsion has been issued.

172. On legal securities provided by State to the expelled aliens, we find that the Constitution and national legislation has given to every person the right of challenge and appeal against criminal decisions, whether he is a citizen or alien. After completion of expulsion procedure, it is possible for criminally expelled alien to appeal against the said criminal order.

173. It is worth mentioning that the constitution as well as Kuwaiti law, have provided right to appeal for all people including right of challenge to criminal orders, as well as those who have been given supplementary punishments, and including expulsion. As per Article No. 166 of the Constitution which guarantees right of appeal, it reads thus "right of appeal is assurance for people, and the law states necessary measures and circumstances regarding practice of this right…".

174. In this context, the Kuwaiti law of criminal decrees and measures has given (17/1960) several ways to challenge the criminal orders, which includes permission of opposition in the judgments by default, as the article No. 187 of law of criminal decrees and measures states that "convicted person sentenced in absentia in misdemeanors and felonies may appeal, and the appeal should be against the court issued the order in absentia".

175. Thank you.

176. **Mr. President:** Now there are some Member States which would like to comment upon the UN Convention on Jurisdictional Immunities of States and their Property as proposed by Japan. But due to constraints of time, requests by Indonesia, South Africa and Kenya could not be accommodated as it stands, so I was wondering if these delegations would put it in writing and send it to the Secretariat so that we can

include it in the report. Then, we have one more Member State, Kingdom of Saudi Arabia, which wants to make a statement on the topic of ILC at its 62nd Session. May I now invite the Kingdom of Saudi Arabia.

177. The **Delegate of Kingdom of Saudi Arabia[53]:** The Kingdom is following up the work of the International Law Commission and its effective efforts toward the codification and the development of the rules of customary international law. The key feature of Commission's work is that it presents the draft articles before the member counties to get their written remarks and opinions.

178. Regarding "effects of armed conflicts on treaties", we would like to mention that the draft article includes fundamental treaties and amended treaties. Regarding the topic 'expulsion of aliens', the approach of draft articles should be in tune with international customary law with focus on aliens and they should not affect the principle of sovereignty. There are countries suffering from cross-border aliens' infiltration, or not leaving the country after the expiry of their visa stating dates of legal presence.

179. Regarding humanitarian assistance being extended to reduce natural disasters, it is necessary to take care of the balance existing between sovereignty and helping the affected people.

180. We appreciate the efforts of the International Law Commission to legislate the principle of Most Favored Nation. This principle is clear in international trade agreement but it is not clear regarding the other international agreements. Thank you very much Mr. President.

181. **Mr. President:** Thank you. We now break up for tea and when we meet up, we take up next agenda item Law of the Sea. We reconvene in another fifteen minutes.

Comments by Member States on Japan's Proposal on "UN Convention on Jurisdictional Immunities of States and Their Property"

182. The **Delegate of Indonesia:** Mr. President, Distinguished Delegates, on behalf of the Indonesian Delegation, allow me at the outset, to extend my appreciation to Japanese delegation for raising this issue as an additional agenda item. The Indonesian delegation from the beginning had welcomed the adoption of the United Nations Convention on Jurisdictional Immunities of States and Their Property. The Convention represents a fair and delicate balance between the concerns expressed by Member States. The Convention also represents a common ground and consensus among States representing different legal system providing stability and predictability in corporate law, business practices and commercial transaction between states and private parties.

183. We believe that the Convention would enhance the rule of law and legal certainty, particularly in dealings of States with natural or juridical persons, and would contribute to the codification and development of international law of practice in this area. The

[53] Statement was delivered in Arabic. This is an unofficial translation from the Interpreter's version.

existence of a binding and generally acceptable legal instrument on Jurisdictional Immunities of States and Their Property would help to clarify the scope and nature of those immunities in proceedings concerning commercial activities of States.

184. We observed that the convention was designed to save from harm the immunity of State and its property from the jurisdiction of the courts of another state, to define limits to the right of immunity for a State entering into commercial activities, and to ensure that States privileges and immunities be accorded traditionally-granted diplomatic activities. It showed that under the Article 2 of the Convention, the definition between private act (*acta jure gestionis*) and has been distinguished.

185. Mr. President, Distinguished Delegates, modern international law recognized two doctrines concerning the Privileges and Immunities of Diplomatic and Consular Mission, the Absolute and Restricted Privileges and Immunities. The absolute Privileges and Immunities falls within the ground that Diplomatic and Consular Missions are engaging foreign State's public function to performing action in the interest of a public service. The Restricted Privileges and Immunities are attached to Diplomatic and Consular Missions of Foreign States as they performing commercial transaction such as financial transaction, sale, and purchase transaction and leasing transaction. The above mentioned doctrines are actually the reflection of two principles on foreign sovereign immunity comprising of *acta jure imperii* and *acta jure gestionis.* While *acta jure imperii* refers to State's public service activities, the *acta jure gestionis* corresponds to state's commercial activities. Under Article 2 of the Convention, the definition between the two principles on foreign sovereign immunity *acta jure gestionis* and *acta jure imperii* has been distinguished.

186. Therefore, our delegation believes that this Convention is important for our interest. For any Diplomatic and Consular Mission which having legal suits, would certainly create a conflict on applicable law as the Diplomatic and Consular Missions are considered having immunities and privileges, the Convention on Jurisdictional Immunities of States and Their Property would help to clarify the scope and nature of those immunities.

187. Mr. President, Distinguished Delegates, to conclude, my delegation would like to take this opportunity to convey that it is time now to take concrete steps to disseminate as well as take into consideration to be part of this Convention. I thank you.

188. The **Delegate of the Republic of South Africa**[54] pointed out that his country since 2001 had been involved in the deliberations on the UN Convention on Jurisdictional Immunities of States and Their Property. He mentioned that in South Africa this important issue was dealt with by the Foreign States Immunities Act 87 of 1981(as amended in 1985 and 1988). He was of the view that the UN Convention represented a workable solution for reflecting universal principles of State immunity in the various legal systems of the international community. He therefore supported the statement made by Japan and recommended the increased ratification of the Convention.

[54] This is the abridged version of the Statement of the delegate of Republic of South Africa.

189. The **Delegate of Kenya:** It will be recalled that this agenda item on the UN Convention on Jurisdictional Immunities of States and their Property was discussed during previous AALCO Annual Sessions until 2006. Kenya therefore welcomes the proposal to have a short discussion on this Convention during this 50th Session of AALCO.

190. Distinguished delegates, some of us may recall that in 1977, the General Assembly recommended that the International Law Commission (ILC) should take up the study of the law of jurisdictional immunities of States and their property with a view to its progressive development and codification. The Convention, which was adopted by the United Nations General Assembly on 2 December 2004, therefore constitutes the result of 27 years of work within the ILC and the 6th Committee of the General Assembly.

191. The Convention covers the immunity of foreign states and their property from the jurisdiction of the courts of a forum state and stipulates such cases as when States Parties cannot apply jurisdictional immunities to its own State and property in other states' courts. The Convention notably aims at harmonizing state practice for *acta jure imperii*, thus enhancing legal certainty for both states and private contractors in their – mostly economic – relations, considering that states no longer enjoy absolute, but only relative immunity.

192. The Convention will only enter into force after the deposit of the thirtieth instrument of ratification, acceptance, approval or accession. To date, the instruments of ratification that have been deposited fall so far below the required number to enable the Convention enter into force.

193. Kenya supports UN Convention on Jurisdictional Immunities of States and their Property, and we are in the process of considering ratification of this Convention. As you are aware, our new Constitution provides that any treaty that Kenya is party to forms part of our laws meaning that before we ratify an instrument, we have to put in place necessary legislative and administrative measures to ensure that we comply with our Constitution.

194. Kenya therefore urges other member states of AALCO to consider ratifying the UN Convention on Jurisdictional Immunities and their Property.

195. I thank you.

III. REPORT ON MATTERS RELATING TO THE WORK OF THE INTERNATIONAL LAW COMMISSION AT ITS SIXTY-THIRD 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-third session from 26 April to 3 June and 4 July to 12 August 2011 at Geneva.

2. The Commission consists of the following members:

3. Mr. Ali Mohsen Fetais Al-Marri (Qatar); **Mr. Mohammad Bello Adoke (Nigeria)**, Mr. Lucius Caflisch (Switzerland); Mr. Enrique Candioti (Argentina); Mr. Pedro Comissário Afonso (Mozambique); **Mr. Christopher John Robert Dugard (South Africa);** Ms. Concepción Escobar Hernández (Spain); Mr. Salifou Fomba (Mali); Mr. Giorgio Gaja (Italy); Mr. Zdzislaw Galicki (Poland); **Mr. Hussein A. Hassouna (Egypt); Mr. Mahmoud D. Hmoud (Jordan); Mr. Huang Huikang (China);** Ms. Marie G. Jacobsson (Sweden); **Mr. Maurice Kamto (Cameroon);** Mr. Fathi Kemicha (Tunisia); Mr. Roman Anatolyevitch Kolodkin (Russian Federation); Mr. Donald M. McRae (Canada); Mr. Theodor Viorel Melescanu (Romania); **Mr. Shinya Murase (Japan)**; Mr. Bernd H. Niehaus (Costa Rica); Mr. Georg Nolte (Germany); Mr. Alain Pellet (France); **Mr. A. Rohan Perera (Sri Lanka);** Mr. Ernest Petric (Slovenia); Mr. Gilberto Vergne Saboia (Brazil); **Mr. Narinder Singh (India);** Mr. Eduardo Valencia-Ospina (Colombia); Mr. Edmundo Vargas Carreño (Chile); Mr. Stephen C. Vasciannie (Jamaica); Mr. Marcelo Vázquez-Bermudez, (Ecuador); **Mr. Amos S. Wako (Kenya); Mr. Nugroho Wisnumurti (Indonesia)**; and Mr. Michael Wood (United Kingdom).

4. The Commission elected **Mr. Maurice Kamto (Cameroon)** as Chairman of the Sixty-third session of the ILC.

5. The Secretary-General of the Asian-African Legal Consultative Organization (AALCO), Prof. Dr. Rahmat Mohamad, addressed the Commission on 26 July 2011. He briefed the Commission on the recent and forthcoming activities of AALCO. An exchange of views followed. The Commission was represented by Dr. A. Rohan Perera, Mr. Shinya Murase at the Fiftieth Annual Session of AALCO, held in Colombo, Sri Lanka, from 27 June to 4 July 2011.

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

(i) Reservations to treaties
(ii) Responsibility of International Organizations
(iii) Effects of armed conflicts on treaties

(iv) Immunity of State officials from foreign criminal jurisdiction
(v) Expulsion of aliens
(vi) Protection of persons in the event of disasters
(vii) The obligation to extradite or prosecute (*aut dedere aut judicare*)
(viii) Treaties Over Time
(ix) The Most-Favoured-Nation clause

7. In relation to the topic, the **"Reservation to Treaties",** at the Sixty-Third session in 2011, the Commission had before it the seventeenth report of the Special Rapporteur, as well as comments and observations received from Governments on the provisional version of the Guide to Practice on Reservations to Treaties adopted by the Commission at its sixty-second session in 2010. The Commission established a Working Group in order to proceed with the finalization of the text of the guidelines constituting the Guide to Practice, as had been envisaged during the sixty-second session. The Commission also referred to the Working Group a draft recommendation or conclusions on the reservations dialogue, and a draft recommendation on technical assistance and assistance in the settlement of disputes concerning reservations, contained, respectively, in the seventeenth report of the Special Rapporteur and in the addendum to that report. On the basis of the recommendations of the Working Group, 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 and a bibliography. In accordance with Article 23 of its Statute, the Commission recommended to the General Assembly to take note of the Guide to Practice on Reservations to Treaties and ensure its widest possible dissemination.

8. On the topic **"Responsibility of International Organizations",** the Commission had before it the eighth report of the Special Rapporteur (A/CN.4/640), as well as written comments received from Governments (A/CN.4/636 and Add.1) and international organizations (A/CN.4/637 and Add.1). The Commission considered the eighth report of the Special Rapporteur at its 3080th to 3085th meetings from 26 April to 6 May 2011. At its 3082nd meeting, held on 28 April 2011, the Commission referred draft articles 1 to 18 to the Drafting Committee with the instruction that the Drafting Committee commence the second reading of the draft articles taking into account the comments of Governments and international organizations, the proposals of the Special Rapporteur and the debate in the plenary on the Special Rapporteur's eighth report. At its 3085th meeting, held on 6 May 2011, the Commission further referred draft articles 19 to 66 to the Drafting Committee.

9. The Commission considered the report of the Drafting Committee (A/CN.4/L.778) at its 3097th meeting, held on 3 June 2011, and adopted the entire set of draft articles on the responsibility of international organizations, on second reading, at the same meeting. At its 3118th meeting, on 5 August 2011, the Commission adopted the commentaries to the aforementioned draft articles. In accordance with its Statute, the Commission submitted the draft articles to the General Assembly, together with the recommendation set out below. At its 3119th meeting, held on 8 August 2011, the Commission decided, in accordance with article 23 of its Statute, to recommend to the

General Assembly: (a) to take note of the draft articles on the responsibility of international organizations in a resolution, and to annex them to the resolution; (b) to consider, at a later stage, the elaboration of a convention on the basis of the draft articles.

10. On **"Effects of Armed Conflict on Treaties"** the Sixty-third session of the Commission considered the report of the Drafting Committee (A/CN.4/L.777 and Corr. 1 (French only)) at its 3089th meeting, held on 17 May 2011, and adopted the entire set of draft articles on the effects of armed conflicts on treaties, on second reading, at the same meeting. At its 3116th to 3117th meetings, held on 2 and 3 August 2011, the Commission adopted the commentaries to the aforementioned draft articles. In accordance with its Statute, the Commission submits the draft articles to the General Assembly, together with the recommendation set out below. At its 3118th meeting, held on 5 August 2011, the Commission decided, in accordance with article 23 of its Statute, to recommend to the General Assembly: (a) to take note of the draft articles on the effects of armed conflicts on treaties in a resolution, and to annex them to the resolution; (b) to consider, at a later stage, the elaboration of a convention on the basis of the draft articles.

11. With regard to the topic "**Immunity of State officials from foreign criminal jurisdiction**", the Commission considered the second (A/CN.4/631) and third (A/CN.4/646) 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.

12. In relation to the topic **"Expulsion of Aliens",** 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. It decided to refer to the Drafting Committee 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.

13. On the topic "**Protection of persons in the event of disasters**", the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/643 and Corr.1), 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. 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. Further, the Commission provisionally adopted six draft articles, along with commentaries, including draft articles 6 to 9, which it had taken note of at its Sixty-second session (2010), dealing with humanitarian principles in disaster response, human dignity, human rights and the role of the affected State, respectively, as well as draft articles 10 and 11, dealing with the duty of the affected State to seek assistance and with the question of the consent of the affected State to external assistance.

14. At the sixty-third session, on the topic **"The Obligation to Extradite or Prosecute (*Aut Dedere Aut Judicare*)"** the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/648). The Commission considered the report at its 3111th to 3113th and 3115th meetings from 25 to 27 and 29 July 2011.

15. In relation 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 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.

16. 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.

17. The Commission reconstituted the Study Group on the topic "**The Most-Favoured-Nation clause**". It 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 (chap. XII).

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

i. Immunity of State officials from foreign criminal jurisdiction

18. The Commission's specific interest on this topic would be to decipher what approach States wish the Commission to take and should the Commission seek to set out existing rules of international law (*lex lata*), or should the Commission embark on an exercise of progressive development (*lex ferenda*).

19. Also, which holders of high office in the States (Heads of State, Heads of Government, Ministers for Foreign Affairs, others) enjoy *de lege lata*, or should enjoy *de lege ferenda*, immunity *ratione personae*?

20. What crimes are, or should be, excluded from immunity *ratione personae* or immunity *ratione materiae*?

21. The Commission stated that it would be of great assistance if States could provide information on their law and practice in the field covered by the Special Rapporteur's three reports (A/CN.4/601, A/CN.4/631 and A/CN.4/646). Such information could include recent developments in the case law and legislation. Information on the procedural issues covered by the Special Rapporteur's third report (A/CN.4/646) would be particularly helpful.

ii. Expulsion of aliens

22. With regard to the topic "Expulsion of aliens", the Commission would like to know from States whether, in their national practice, suspensive effect is given to appeals against an expulsion decision:

- relating to an alien lawfully in the territory;
- relating to an alien unlawfully in the territory;
- relating to either, irrespective of category.

23. Does a State that has such a practice consider it to be required by international law?

24. The Commission would also welcome the views of States on whether, as a matter of international law or otherwise, an appeal against an expulsion decision *should* have suspensive effect on the implementation of the decision.

iii. Protection of persons in the event of disasters

25. The Commission reiterates that it would welcome any information concerning the practice of States under this topic, including examples of domestic legislation. It would welcome, in particular, information and comments on specific legal and institutional problems encountered in dealing with or responding to disasters.

26. The Commission has taken the view that States have a duty to cooperate with the affected State in disaster relief matters. Does this duty to cooperate include a duty on States to provide assistance when requested by the affected State?

iv. The obligation to extradite or prosecute (*aut dedere aut judicare*)

27. Are there, in the legislation of States or in the case law of domestic tribunals, certain crimes or categories of crimes in respect of which the obligation to extradite or prosecute has been implemented?

28. If so, has a court or tribunal ever relied, in this respect, on customary international law?

v. Treaties over time

29. The Commission, in its consideration of the topic "Treaties over time", attempts to clarify the practical and legal significance of "subsequent agreements" and the "subsequent practice" of the parties as a means of interpretation and application of treaties (article 31 (3) (a) and (b) of the Vienna Convention on the Law of Treaties). In this context, the Commission reminds States of its request, contained in its 2010 report,3 to provide it with one or more examples of "subsequent agreements" or "subsequent practice" which are or have been relevant to the interpretation and application of one or more of their treaties. The Commission would be interested, in particular, in instances of interpretation by way of subsequent agreements or subsequent practice which have not been subject to judicial or quasi-judicial proceedings.

vi. The Most-Favoured-Nation clause

30. In order to complete its work on the Most-Favoured-Nation clause in relation to the field of investment law, the Study Group on The Most-Favoured-Nation clause plans to consider whether any use of Most-Favoured-Nation clauses in areas outside those of trade and investment law could provide it with guidance for its work. Accordingly, the Commission would appreciate being provided with examples of any recent practice or case law in relation to Most-Favoured-Nation clauses in fields other than trade and investment law.

vii. New topics

31. The Commission decided to include in its long-term programme of work five new topics. In the selection of these topics, the Commission would be guided by the following criteria that it had agreed upon in 1998, namely that the topic:

(a) should reflect the needs of States in respect of the progressive development and codification of international law,

(b) should be sufficiently advanced in stage in terms of State practice to permit progressive development and codification and

(c) is concrete and feasible for progressive development and codification, and

(d) that account should also be taken of those topics that reflect new developments in international law and pressing concerns of the international community as a whole. The Commission would welcome the views of States on these new topics.

IV. RESERVATION TO TREATIES

A. BACKGROUND

1. In 1993, the International Law Commission (ILC) included in the Commission's agenda the topic "Law and Practice relating to Reservations to Treaties" and appointed Professor Alan Pellet as the Special Rapporteur for the topic. This inclusion was necessitated by the belief of ILC that the Vienna regime comprising of the 1969 Vienna Convention on the Law of Treaties, the 1978 Vienna Convention on Succession of States in Respect of Treaties and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, even while setting out the basic principles concerning reservations to treaties, did so in a too general way to serve as a guide for State practice, and consequently, left a number of important matters in the dark.

2. According to the ILC, these conventions provide ambiguous answers to the questions of differentiating between reservations and declarations of interpretation, the scope of declarations of interpretation, the validity of reservations (the conditions for the lawfulness of reservations and their applicability to another State) and the regime of objections to reservations (in particular, the admissibility and scope of objections to a reservation which is neither prohibited by the treaty nor contrary to its object and purpose). These conventions are also silent on the effect of reservations on the entry into force of treaties, problems pertaining to the particular object of some treaties (in particular the constituent instruments of international organizations and human rights treaties), reservations to codification treaties and problems resulting from particular treaty techniques (elaboration of additional protocols, bilateralization techniques).

3. Therefore, the ILC decided to clarify these provisions and develop protocols or guidelines as precise as possible for States. The Commission even at that early stage, had recognized the need not to challenge the regime established in articles 19 to 23 of the 1969 Vienna Convention on the Law of Treaties, but nonetheless considered that these provisions could be clarified and developed in draft protocols to existing conventions or a guide to practice.

4. Till 2007 the Commission had received Twelve reports of the Special Rapporteur on the topic and after due deliberations, the Commission had adopted more than 85 draft guidelines with commentaries covering various aspects of reservations to treaties. The General Assembly during its 2008 Session, had asked States to give their views on, in particular, the specific issues identified in the ILC's 2008 Report on Reservations to Treaties and invited Governments to provide by January 2010 information to the ILC on their practice with regard to Reservations[55].

5. At the sixtieth session, in 2008, the Commission considered the thirteenth report of the Special Rapporteur[56] on reactions to interpretative declarations and conditional

[55] See, A/RES/ 63/123/ Paras 1, 3 and 4.
[56] Document A/CN.4/600/ (see Analytical Guide)

interpretative declarations. The Commission also had before it a note by the Special Rapporteur on draft guideline 2.1.9, "Statement of reasons for reservations" which had been submitted at the end of the fifty-ninth session. At the same session, the Commission referred draft guideline 2.1.9 as well as 10 draft guidelines (2.9.1 to 2.9.10) to the Drafting Committee and proceeded to provisionally adopted 23 draft guidelines[57].

6. At the sixty-first session in 2009, the Commission had before it the fourteenth report of the Special Rapporteur[58]. The Commission also had before it a memorandum by the Secretariat on reservations to treaties in the context of succession of States. The Commission considered and provisionally adopted draft guidelines 2.8.1-2.8.11, as well as draft guidelines 2.4.0, 2.4.3 bis, 2.9.1-2.9.10 and 3.2 , 3.2.1-3.2.5 and draft guidelines 3.3 and 3.3.1. The Commission also provisionally adopted the titles of sections 2.8 and 2.9. The Commission had also adopted commentaries to the above-mentioned guidelines.

7. At its sixty-second session in 2010, the Commission had before it a second addendum to the fourteenth report of the Special Rapporteur as well as the Special Rapporteur's fifteenth[59] and sixteenth[60] reports. The Commission also had before it the memorandum submitted by the Secretariat, in 2009, on the question of reservations to treaties in the context of succession of States.

8. The Commission considered and provisionally adopted nearly 80 draft guidelines on a variety of topics ranging from permissibility of the acceptance of reservations to effects of an objection to a valid reservations to reservations, to the acceptances of and objections to reservations, and interpretative declarations in the case of succession of States. The Commission had also adopted the commentaries to the above-mentioned draft guidelines.

9. Thus, the Commission was able to provisionally adopt the entire set of draft guidelines of the Guide to Practice on Reservations to Treaties (with commentaries. The Commission also indicated that it intended to adopt the final version of the Guide to Practice during its sixty-third session in 2011, taking into consideration the observations of States and international organizations as well as the organs with which the Commission cooperates, made since the beginning of the examination of the topic, together with further observations received by the Secretariat of the Commission before 31 January 2011.

B. CONSIDERATION OF THE TOPIC AT THE SIXTY-THIRD SESSION

10. At its Sixty-third session held from 26th April to 3rd June and 4th July to 12th August 2011, the Commission had before it the seventeenth report[61] of the Special

[57] See, for the details, Official Records of the General Assembly, Sixty-Third session , Supplement No 10 (A/63/10) , paras 75-78.
[58] Document A/CN.4/614 and Add 1 (see Analytical Guide).
[59] Document A/CN.4/624 and Add. 1 and 2 (see Analytical Guide).
[60] Document A/CN.4/626 and Add.1 (see Analytical Guide)
[61] Document A/CN.4/647/ and Add.1 (see Analytical Guide).

Rapporteur addressing the question of the reservations dialogue, as well as addendum 1 to the seventeenth report which considered the issue of assistance in the resolution of disputes concerning reservations, and also contained a draft introduction to the Guide to Practice. Furthermore, the Commission had before it, the comments and observations received from Governments[62], on the provisional version of the Guide to Practice on Reservations to Treaties adopted by the Commission at its sixty-second session in 2010.

11. The Commission established a Working Group in order to proceed with the finalization of the text of the guidelines constituting the **Guide to Practice**, as had been envisaged during the sixty-second session. The Commission also referred to the Working Group a draft recommendation or conclusions on the reservations dialogue, and a draft recommendation on technical assistance and assistance in the settlement of disputes concerning reservations, contained, respectively, in the seventeenth report of the Special Rapporteur and in the addendum to that report.

12. On the basis of the recommendations of the Working Group, 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 and a bibliography[63]

13. In accordance with Article 23 of its Statute, the Commission recommended to the General Assembly to take note of the Guide to Practice on Reservations to Treaties and ensure its widest possible dissemination. The Commission also adopted a recommendation to the General Assembly on mechanisms of assistance in relation to reservations to treaties.

14. Before we move on to identify the salient features of the Guide to Practice it is essential to portray the structure of the Guide, which will go a significant way in enhancing our understanding of the host of issues addressed in it.

15. The Guide to Practice on Reservations to Treaties consists of guidelines that have been adopted by the International Law Commission accompanied by commentaries. The commentaries are an integral part of the Guide and an indispensable supplement to the guidelines, which they expand and explain. No summary, however long, could cover all the questions that may arise on this highly technical and complex subject or to provide all useful explanations for practitioners.

16. The Guide to Practice is divided into Five parts (numbered 1 to 5), which follow a logical order.

[62] Document A/CN.4/647/ and Add.1 (see, Analytical Guide).
[63] See, Official Records of the General Assembly, sixty-sixth session, Supplement No 10 (A/66/10).

Part 1 is devoted to the definition of reservations and interpretative declarations and to the distinction between these two types of unilateral statement; it also includes an overview of various unilateral statements, made in connection with a treaty, that are neither reservations nor interpretative declarations and possible alternatives to both; as expressly stated in guideline 1.6 [1.8], "The[se] definitions ... are without prejudice to the validity and [legal] effects" of the statements covered by Part 1;

Part 2 sets out the form and procedure to be used in formulating reservations and interpretative declarations and reactions thereto (objections to and acceptances of reservations and approval or recharacterization of, or opposition to, interpretative declarations);

Part 3 concerns the permissibility of reservations and interpretative declarations and reactions thereto and sets out the criteria for the assessment of permissibility; these are illustrated by examples, with commentary, of the types of reservations that most often give rise to differences of opinion among States regarding their permissibility. Some guidelines also specify the modalities for assessing the permissibility of reservations and the consequences of their impermissibility;

Part 4 is devoted to the legal effects produced by reservations and interpretative declarations, depending on whether they are valid (in which case a reservation is "established" if it has been accepted) or not;
this part also analyses the effects of objections to and acceptances of reservations;

Part 5 supplements the only provision of the 1978 Vienna Convention on Succession of States in respect of Treaties that deals with reservations — article 20 on the fate of reservations in the case of succession of States by a newly independent State — and extrapolates and adapts solutions for cases of uniting or separation of States; this last part also covers the issues raised by objections to or acceptances of reservations and by interpretative declarations in relation to succession of States;

Lastly, two annexes reproduce the text of the recommendations adopted by the Commission on the subject of, on the one hand, the reservations dialogue and, on the other, technical assistance and assistance with the settlement of disputes concerning reservations.

17. Within each part, the guidelines are divided into sections (introduced by a two-digit number where the first represents the part and the second the section within that part[64]). In principle, the guidelines carry a three-digit number within each section.

[64] For example, Section 3.4 deals with the "Permissibility of reactions to reservations" Here, the number 3 indicates that it falls under Part 3 and the number 4 refers to Section 4 of that Part. Where a section is introduced by a guideline of a very general nature that covers its entire content, that guideline has the same title and the same number as the section itself (this is true for example, of guideline 3.5 that deals with the "Permissibility of an interpretative declaration".

18. After having seen the way how the Guide is structures let us move on to identify some of the most important salient features of it.

Firstly, as its name indicates, the purpose of the Guide to Practice is to provide assistance to practitioners of international law, decision-makers, diplomats and lawyers (including those who plead cases before national courts and tribunals), who are often faced with sensitive problems concerning the permissibility and effects of reservations to treaties, a matter on which the rules contained in the 1969, 1986 and 1978 Vienna Convention's rules have gaps and are often unclear- and, to a lesser extent, interpretative declarations in respect of treaty provisions, of which these Conventions make no mention whatsoever.

Despite frequent assumptions to the contrary, its purpose is not, or, in any case, not only, to offer the reader a guide to past (and often uncertain) practice in this area, but rather to direct the user towards solutions that are consistent with existing rules (where they exist) or to the solutions that seem the most likely to result in the progressive development of such rules. In that connection, it should be stressed that while the Guide to Practice, as an instrument, or "official source", is by no means binding, the extent to which the various norms set out in the guidelines and the various legal norms embodied therein are compulsory in nature varies widely.

Secondly, some of the guidelines simply reproduce provisions of the Vienna Conventions which set out norms that were either uncontroversial at the time of their inclusion in the Conventions or have since become so; as such, while not compulsory in nature, they are nevertheless required of all States or international organizations, whether or not they are parties to the Conventions. Other rules contained in the Vienna Conventions are binding on the parties thereto, but their customary nature is open to question; reproducing them in the Guide to Practice should help establish them as customary rules.

Thirdly, and in some cases, guidelines included in the Guide supplement Convention provisions that are silent on modalities for their implementation but these rules are, in themselves, indisputably customary in nature or are required for obvious logical reasons. In other cases, the guidelines address issues on which the Conventions are silent but set out rules that are clearly customary in nature.

19. In light of these characteristics, it goes without saying that the rules set out in the Guide to Practice in no way prevent States and international organizations from setting aside, by mutual agreement, those that they consider inappropriate to the purposes of a given treaty. Like the Vienna rules themselves, those set out in the Guide are, at best, residual and voluntary. In any event, since none of them has a binding or *jus cogens* nature, a derogation to which all interested States (or international organizations) consent is always an option.

20. In a consensus decision reached in 1995 and never subsequently challenged, the Commission considered that there was no reason to modify or depart from the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions in drafting the Guide to

Practice, which incorporates all of them. But this also had implications for the very concept of the Guide and, in particular, for the commentaries to the guidelines.

21. In so far as the intent is to preserve and apply the Vienna rules, it was necessary to clarify them. For this reason, the commentaries reproduce extensively the *travaux préparatoires* to the three Conventions, which help clarify their meaning and explain the gaps contained therein.

22. Generally speaking, the commentaries are long and detailed. In addition to an analysis of the *travaux préparatoires* to the Vienna Conventions, they include a description of the relevant jurisprudence, practice and doctrine.

23. However, reading the commentaries will be useful only where the answer to a question is not provided in the text of the guidelines (or where, in a specific case, the guideline is difficult to interpret). For this reason, the guidelines appear, without commentary, at the beginning of the Guide to Practice and the user should refer first to their titles, which are designed to give as clear as possible an idea of their content.

V. RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

A. BACKGROUND

1. The Commission, at its fifty-fourth session (2002), decided to include the topic "Responsibility of international organizations" in its programme of work and appointed Mr. Giorgio Gaja as Special Rapporteur for the topic. At the same session, the Commission established a Working Group on the topic. The Working Group in its report briefly considered the scope of the topic, the relations between the new project and the draft articles on "Responsibility of States for internationally wrongful acts", questions of attribution, issues relating to the responsibility of member States for conduct that is attributed to an international organization, and questions relating to the content of international responsibility, implementation of responsibility and settlement of disputes. At the end of its fifty-fourth session, the Commission adopted the report of the Working Group. From its fifty-fifth (2003) to its sixty-first (2009) sessions, the Commission received and considered seven reports from the Special Rapporteur, and provisionally adopted draft articles 1 to 66, taking into account the comments and observations received from Governments and international organizations.

2. At its sixty-first session (2009), the Commission adopted on first reading a set of 66 draft articles on the responsibility of international organizations, together with commentaries. The Commission decided, in accordance with articles 16 to 21 of its Statute, to transmit the draft articles, through the Secretary-General, to Governments and international organizations for comments and observations.

3. At the sixty-third session, the Commission had before it the eighth report of the Special Rapporteur (A/CN.4/640), as well as written comments received from Governments (A/CN.4/636 and Add.1) and international organizations (A/CN.4/637 and Add.1). The Commission considered the eighth report of the Special Rapporteur at its 3080th to 3085th meetings from 26 April to 6 May 2011. At its 3082nd meeting, held on 28 April 2011, the Commission referred draft articles 1 to 18 to the Drafting Committee with the instruction that the Drafting Committee commence the second reading of the draft articles taking into account the comments of Governments and international organizations, the proposals of the Special Rapporteur and the debate in the plenary on the Special Rapporteur's eighth report. At its 3085th meeting, held on 6 May 2011, the Commission further referred draft articles 19 to 66 to the Drafting Committee.

4. The Commission considered the report of the Drafting Committee (A/CN.4/L.778) at its 3097th meeting, held on 3 June 2011, and adopted the entire set of draft articles on the responsibility of international organizations, on second reading, at the same meeting. At its 3118th meeting, on 5 August 2011, the Commission adopted the commentaries to the aforementioned draft articles. In accordance with its Statute, the Commission submitted the draft articles to the General Assembly, together with the recommendation set out below. At its 3119th meeting, held on 8 August 2011, the Commission decided, in accordance with article 23 of its Statute, to recommend to the General Assembly: (a) to take note of the draft articles on the responsibility of

international organizations in a resolution, and to annex them to the resolution; (b) to consider, at a later stage, the elaboration of a convention on the basis of the draft articles.

B. SELECT PROVISIONS OF THE DRAFT ARTICLES ON THE RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

5. There are 67 articles divided into five parts. The five parts are:
Part One: Introduction
Part Two: The internationally wrongful act of an international organization
Part Three: Content of the international responsibility of an international organization
Part Four: The implementation of the international responsibility of an international organization
Part Five: Responsibility of a State in connection with the conduct of an international organization
Part Six: General provisions

6. Part one defines the scope of the articles and gives the definition of certain terms. Parts Two to Four (arts. 3 to 57) follow the general lay-out of the articles on State responsibility. Part Two sets forth the preconditions for the international responsibility of an international organization to arise. Part Three addresses the legal consequences flowing for the responsible organization, in particular the obligation to make reparation. Part Four concerns the implementation of responsibility of an international organization, especially the question of which States or international organizations are entitled to invoke that responsibility. Part Five addresses the responsibility of States in connection with the conduct of an international organization. Finally, Part Six contains certain general provisions applicable to the whole set of draft articles.

1. Scope of the draft articles[65]

7. The draft articles apply to the international responsibility of an international organization[66] for an internationally wrongful act. The draft articles also apply to the international responsibility of a State for an internationally wrongful act in connection with the conduct of an international organization.

2. The internationally wrongful act of international organization-General Principles[67]

a) Responsibility of an international organization for its internationally wrongful acts

[65] Article 1
[66] "international organization" means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities;
[67] Part Two, Chapter 1

Every internationally wrongful act of an international organization entails the international responsibility of that organization.

b) Elements of an internationally wrongful act of an international organization

There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:

(a) is attributable to that organization under international law; and

(b) constitutes a breach of an international obligation of that organization.

c) Characterization of an act of an international organization as internationally wrongful

The characterization of an act of an international organization as internationally wrongful is governed by international law.

3. Breach of an international obligation[68]

a) Existence of a breach of an international obligation[69]

1. There is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation, regardless of the origin or character of the obligation concerned.
2. Paragraph 1 includes the breach of any international obligation that may arise for an international organization towards its members under the rules of the organization.

b) International obligation in force for an international organization[70]

An act of an international organization does not constitute a breach of an international obligation unless the organization is bound by the obligation in question at the time the act occurs.

c) Extension in time of the breach of an international obligation[71]

1. The breach of an international obligation by an act of an international organization not having a continuing character occurs at the moment when the act is performed, even if its effects continue.
2. The breach of an international obligation by an act of an international organization having a continuing character extends over the entire period during which the act continues and remains not in conformity with that obligation.
3. The breach of an international obligation requiring an international organization to prevent a given event occurs when the event occurs and

[68] Chapter-III
[69] Article 10
[70] Article 11
[71] Article 12

extends over the entire period during which the event continues and remains not in conformity with that obligation**.**

d) Breach consisting of a composite act[72]

1. The breach of an international obligation by an international organization through a series of actions and omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.
2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation

4. Content of the international responsibility of an international organization[73] **- General Principles**

a) Legal consequences of an internationally wrongful act[74]

The international responsibility of an international organization which is entailed by an internationally wrongful act in accordance with the provisions of Part Two involves legal consequences as set out in this Part.

b) Continued duty of performance[75]

The legal consequences of an internationally wrongful act under this Part do not affect the continued duty of the responsible international organization to perform the obligation breached.

c) Cessation and non-repetition[76]

The international organization responsible for the internationally wrongful act is under an obligation:

(a) to cease that act, if it is continuing;

(b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

d) Reparation[77]

1. The responsible international organization is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of an international organization.

e) Relevance of the rules of the organization[78]

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[72] Article 13
[73] Part Three, Chapter -1
[74] Article 28
[75] Article 29
[76] Article 30
[77] Article 31
[78] Article 32

1. The responsible international organization may not rely on its rules as justification for failure to comply with its obligations under this Part.
2. Paragraph 1 is without prejudice to the applicability of the rules of an international organization to the relations between the organization and its member States and organizations.

f) Scope of international obligations set out in this Part[79]

1. The obligations of the responsible international organization set out in this Part may be owed to one or more States, to one or more other organizations, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach This Part is without prejudice to any right, arising from the international responsibility of an international organization, which may accrue directly to any person or entity other than a State or an international organization.

5. Reparation for Injury[80]

a) Forms of reparation[81]

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this Chapter.

b) Restitution[82]

An international organization responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

(a) is not materially impossible;
(b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

c) Compensation[83]

1. The international organization responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

d) Satisfaction[84]

[79] Article 33
[80] Part Three, Chapter II
[81] Article 34
[82] Article 35
[83] Article 36
[84] Article 37

1. The international organization responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.
2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.
3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible international organization.

e) Interest[85]

1. Interest on any principal sum due under this Chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.
2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled

f) Contribution to the injury[86]

In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or international organization or of any person or entity in relation to whom reparation is sought.

g) Ensuring the fulfilment of the obligation to make reparation[87]

1. The responsible international organization shall take all appropriate measures in accordance with its rules to ensure that its members provide it with the means for effectively fulfilling its obligations under this Chapter.
2. The members of a responsible international organization shall take all the appropriate measures that may be required by the rules of the organization in order to enable the organization to fulfil its obligations under this Chapter.

6. The implementation of the international responsibility of an international Organization[88]

a) Invocation of responsibility by an injured State or international organization[89]

A State or an international organization is entitled as an injured State or an injured international organization to invoke the responsibility of another international organization if the obligation breached is owed to:

(a) that State or the former international organization individually;
(b) a group of States or international organizations including that State or the former international organization, or the international community as a whole, and the breach of the obligation:
    (i) specially affects that State or that international organization; or

[85] Article 38
[86] Article 39
[87] Article 40
[88] Part Four
[89] Article 43

(ii) is of such a character as radically to change the position of all the other States and international organizations to which the obligation is owed with respect to the further performance of the obligation.

b) Notice of claim by an injured State or international organization[90]

1. An injured State or international organization which invokes the responsibility of another international organization shall give notice of its claim to that organization.
2. The injured State or international organization may specify in particular:
   (a) the conduct that the responsible international organization should take in order to cease the wrongful act, if it is continuing;
   (b) what form reparation should take in accordance with the provisions of Part Three.

c) Admissibility of claims[91]

1. An injured State may not invoke the responsibility of an international organization if the claim is not brought in accordance with any applicable rule relating to the nationality of claims.
2. When the rule of exhaustion of local remedies applies to a claim, an injured State or international organization may not invoke the responsibility of another international organization if any available and effective remedy has not been exhausted.

d) Loss of the right to invoke responsibility[92]

The responsibility of an international organization may not be invoked if:

(a) the injured State or international organization has validly waived the claim;

(b) the injured State or international organization is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

e) Plurality of injured States or international organizations[93]

Where several States or international organizations are injured by the same internationally wrongful act of an international organization, each injured State or international organization may separately invoke the responsibility of the international organization for the internationally wrongful act.

f) Responsibility of an international organization and one or more States or international organizations[94]

1. Where an international organization and one or more States or other international organizations are responsible for the same internationally

[90] Article 44
[91] Article 45
[92] Article 46
[93] Article 47
[94] Article 48

wrongful act, the responsibility of each State or organization may be invoked in relation to that act.

2. Subsidiary responsibility may be invoked insofar as the invocation of the primary responsibility has not led to reparation.

3. Paragraphs 1 and 2:
(a) do not permit any injured State or international organization to recover, by way of compensation, more than the damage it has suffered;
(b) are without prejudice to any right of recourse that the State or international organization providing reparation may have against the other responsible States or international organizations.

g) Invocation of responsibility by a State or an international organization other than an injured State or international organization[95]

1. A State or an international organization other than an injured State or international organization is entitled to invoke the responsibility of another international organization in accordance with paragraph 4 if the obligation breached is owed to a group of States or international organizations, including the State or organization that invokes responsibility, and is established for the protection of a collective interest of the group.

2. A State other than an injured State is entitled to invoke the responsibility of an international organization in accordance with paragraph 4 if the obligation breached is owed to the international community as a whole.

3. An international organization other than an injured international organization is entitled to invoke the responsibility of another international organization in accordance with paragraph 4 if the obligation breached is owed to the international community as a whole and safeguarding the interest of the international community as a whole underlying the obligation breached is within the functions of the international organization invoking responsibility.

4. A State or an international organization entitled to invoke responsibility under paragraphs 1 to 3 may claim from the responsible international organization:
(a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with draft article 30; and
(b) performance of the obligation of reparation in accordance with Part Three, in the interest of the injured State or international organization or of the beneficiaries of the obligation breached.

5. The requirements for the invocation of responsibility by an injured State or international organization under draft articles 44, 45, paragraph 2, and 46 apply to an invocation of responsibility by a State or international organization entitled to do so under paragraphs 1 to 4.

The Chapter "Invocation of responsibility by an injured State or international organization" is without prejudice to the entitlement that a person or entity other than a

[95] Article 49

State or an international organization may have to invoke the international responsibility of an international organization.

7. Counter Measures[96]

a) Object and limits of countermeasures[97]

1. An injured State or an injured international organization may only take countermeasures against an international organization which is responsible for an internationally wrongful act in order to induce that organization to comply with its obligations under Part Three.
2. Countermeasures are limited to the non-performance for the time being of international obligations of the State or international organization taking the measures towards the responsible international organization.
3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.
4. Countermeasures shall, as far as possible, be taken in such a way as to limit their effects on the exercise by the responsible international organization of its functions.

b) Conditions for taking countermeasures by members of an international organization[98]

1. Subject to paragraph 2, an injured State or international organization which is a member of a responsible international organization may not take countermeasures against that organization unless:
   (a) the conditions referred to in article 51 are met;
   (b) the countermeasures are not inconsistent with the rules of the organization; and
   (c) no appropriate means are available for otherwise inducing compliance with the obligations of the responsible international organization concerning cessation of the breach and reparation.
2. Countermeasures may not be taken by an injured State or international organization which is a member of a responsible international organization against that organization in response to a breach of an international obligation under the rules of the organization unless such countermeasures are provided for by those rules.

c) Obligations not affected by countermeasures[99]

1. Countermeasures shall not affect:
   (a) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;
   (b) obligations for the protection of human rights;
   (c) obligations of a humanitarian character prohibiting reprisals;

[96] Part Four, Chapter II
[97] Article 51
[98] Article 52
[99] Article 53

(d) other obligations under peremptory norms of general international law.

2. An injured State or international organization taking countermeasures is not relieved from fulfilling its obligations:

(a) under any dispute settlement procedure applicable between it and the responsible international organization;

(b) to respect any inviolability of organs or agents of the responsible international organization and of the premises, archives and documents of that organization.

d) Proportionality of countermeasures[100]

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.

e) Conditions relating to resort to countermeasures[101]

1. Before taking countermeasures, an injured State or international organization shall:

(a) call upon the responsible international organization, in accordance with draft article 44, to fulfil its obligations under Part Three;

(b) notify the responsible international organization of any decision to take countermeasures and offer to negotiate with that organization.

2. Notwithstanding paragraph 1 (b), the injured State or international organization may take such urgent countermeasures as are necessary to preserve its rights.

3. Countermeasures may not be taken, and if already taken must be suspended without undue delay if:

(a) the internationally wrongful act has ceased; and

(b) the dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.

4. Paragraph 3 does not apply if the responsible international organization fails to implement the dispute settlement procedures in good faith.

f) Termination of countermeasures[102]

Countermeasures shall be terminated as soon as the responsible international organization has complied with its obligations under Part Three in relation to the internationally wrongful act.

g) Measures taken by States or international organizations other than an injured State or organization[103]

This Chapter does not prejudice the right of any State or international organization, entitled under article 49, paragraphs 1 to 3, to invoke the responsibility of another international organization, to take lawful measures against that organization to ensure

[100] Article 54
[101] Article 55
[102] Article 56
[103] Article 57

cessation of the breach and reparation in the interest of the injured State or organization or of the beneficiaries of the obligation breached.

8. Responsibility of a State in connection with the conduct of an international organization[104]

a) Aid or assistance by a State in the commission of an internationally wrongful act by an international organization[105]

1. A State which aids or assists an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(a) the State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that State.

2. An act by a State member of an international organization done in accordance with the rules of the organization does not as such engage the international responsibility of that State under the terms of this article.

b) Direction and control exercised by a State over the commission of an internationally wrongful act by an international organization[106]

1. A State which directs and controls an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

(a) the State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that State.

2. An act by a State member of an international organization done in accordance with the rules of the organization does not as such engage the international responsibility of that State under the terms of this draft article.

c) Coercion of an international organization by a State[107]

A State which coerces an international organization to commit an act is internationally responsible for that act if:

(a) the act would, but for the coercion, be an internationally wrongful act of the coerced international organization; and

(b) the coercing State does so with knowledge of the circumstances of the act.

d) Circumvention of international obligations of a State member of an international organization[108]

1. A State member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has

[104] Part Five
[105] Article 58
[106] Article 59
[107] Article 60
[108] Article 61

competence in relation to the subject-matter of one of the State's international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation.

2. Paragraph 1 applies whether or not the act in question is internationally wrongful for the international organization.

e) Responsibility of a State member of an international organization for an internationally wrongful act of that organization[109]

1. A State member of an international organization is responsible for an internationally wrongful act of that organization if:
   (a) it has accepted responsibility for that act towards the injured party; or
   (b) it has led the injured party to rely on its responsibility.
2. Any international responsibility of a State under paragraph 1 is presumed to be subsidiary.

9. This Part is without prejudice to the international responsibility of the international organization which commits the act in question, or of any State or other international organization.

[109] Article 62

VI. EFFECTS OF ARMED CONFLICTS ON TREATIES

A. BACKGROUND

1. During its fifty-sixth session (2004), the Commission decided to include the topic "Effects of armed conflicts on treaties" in its programme of work, and to appoint Sir Ian Brownlie as Special Rapporteur for the topic. At its fifty-seventh (2005) to sixtieth (2008) sessions, the Commission had before it the first to fourth reports of the Special Rapporteur (A/CN.4/552, A/CN.4/570 and Corr.1, A/CN.4/578 and Corr.1 and A/CN.4/589 and Corr.1, respectively), as well as a memorandum prepared by the Secretariat entitled "The effects of armed conflict on treaties: an examination of practice and doctrine" (A/CN.4/550 and Corr.1). The Commission further proceeded on the basis of the recommendations of a Working Group, chaired by Mr. Lucius Caflisch, which was established in 2007 and 2008 to provide further guidance regarding several issues which had been identified in the Commission's consideration of the Special Rapporteur's third report.

2. At its sixtieth session (2008), the Commission adopted on first reading a set of 18 draft articles, and an annex, on the effects of armed conflicts on treaties, together with commentaries. At the same meeting, the Commission decided, in accordance with draft articles 16 to 21 of its Statute, to transmit the draft articles, through the Secretary-General, to Governments for comments and observations. At its sixty-first session (2009), the Commission appointed Mr. Lucius Caflisch as Special Rapporteur for the topic, following the resignation of Sir Ian Brownlie from the Commission.

3. At its sixty-second session (2010), the Commission had before it the first report of the Special Rapporteur (A/CN.4/627 and Add.1), containing his proposals for the reformulation of the draft articles as adopted on first reading, taking into account the comments and observations of Governments (A/CN.4/622 and Add.1). The Commission considered the Special Rapporteur's first report and subsequently instructed the Drafting Committee to commence the second reading of the draft articles on the basis of the proposals of the Special Rapporteur for draft articles 1 to 17, taking into account the comments of Governments and the debate in the Plenary on the Special Rapporteur's report.

4. At the sixty-third session, the Commission considered the report of the Drafting Committee (A/CN.4/L.777 and Corr. 1 (French only)) at its 3089th meeting, held on 17 May 2011, and adopted the entire set of draft articles on the effects of armed conflicts on treaties, on second reading, at the same meeting. At its 3116th to 3117th meetings, held on 2 and 3 August 2011, the Commission adopted the commentaries to the aforementioned draft articles. In accordance with its Statute, the Commission submits the draft articles to the General Assembly, together with the recommendation set out below. At its 3118th meeting, held on 5 August 2011, the Commission decided, in accordance with article 23 of its Statute, to recommend to the General Assembly: (a) to take note of the draft articles on the effects of armed conflicts on treaties in a resolution,

and to annex them to the resolution; (b) to consider, at a later stage, the elaboration of a convention on the basis of the draft articles.

B. SELECT PROVISIONS OF THE DRAFT ARTICLES ON THE EFFECTS OF ARMED CONFLICTS ON TREATIES

1. Operation of treaties in the event of armed conflicts

5. "Treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation, and includes treaties between States to which international organizations are also parties.[110] "armed conflict" means a situation in which there is resort to armed force between States or protracted resort to armed force between governmental authorities and organized armed groups.[111]

6. The existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties[112]:
(a) as between States parties to the conflict;
(b) as between a State party to the conflict and a State that is not.

7. Where a treaty itself contains provisions on its operation in situations of armed conflict, those provisions shall apply.[113] The rules of international law on treaty interpretation shall be applied to establish whether a treaty is susceptible to termination, withdrawal or suspension in the event of an armed conflict.[114]

8. In order to ascertain whether a treaty is susceptible to termination, withdrawal or suspension in the event of an armed conflict, regard shall be had to all relevant factors, including: (a) the nature of the treaty, in particular its subject-matter, its object and purpose, its content and the number of parties to the treaty; and (b) the characteristics of the armed conflict, such as its territorial extent, its scale and intensity, its duration and, in the case of non-international armed conflict, also the degree of outside involvement.[115]

2. Other provisions relevant to the operation of treaties

9. The existence of an armed conflict does not affect the capacity of a State party to that conflict to conclude treaties in accordance with international law. States may conclude agreements involving termination or suspension of a treaty or part of a treaty that is operative between them during situations of armed conflict, or may agree to amend or modify the treaty.[116]

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[110] Article 2
[111] Article 2
[112] Article 3
[113] Article 4
[114] Article 5
[115] Article 6
[116] Article 8

10. A State intending to terminate or withdraw from a treaty to which it is a Party, or to suspend the operation of that treaty, as a consequence of an armed conflict shall notify the other State Party or States Parties to the treaty, or its depositary, of such intention. The notification takes effect upon receipt by the other State Party or States Parties, unless it provides for a subsequent date.

11. Nothing in the preceding paragraphs shall affect he right of a Party to object within a reasonable time, in accordance with the terms of the treaty or other applicable rules of international law, to the termination of or withdrawal from the treaty, or suspension of its operation. If an objection has been raised in accordance with this provision (paragraph 3), the States concerned shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations. Nothing in the preceding paragraphs shall affect the rights or obligations of States with regard to the settlement of disputes insofar as they have remained applicable.[117]

12. The termination of or the withdrawal from a treaty, or the suspension of its operation, as a consequence of an armed conflict, shall not impair in any way the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of that treaty.[118] Termination, withdrawal from or suspension of the operation of a treaty as a consequence of an armed conflict shall, unless the treaty otherwise provides or the Parties otherwise agree, take effect with respect to the whole treaty except where:

(a) the treaty contains clauses that are separable from the remainder of the treaty with regard to their application;

(b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other Party or Parties to be bound by the treaty as a whole; and

(c) continued performance of the remainder of the treaty would not be unjust.[119]

13. A State may no longer terminate or withdraw from a treaty or suspend its operation as a consequence of an armed conflict if, after becoming aware of the facts: (a) it shall have expressly agreed that the treaty remains in force or continues in operation; or (b) it must by reason of its conduct be considered as having acquiesced in the continued operation of the treaty or in its maintenance in force.[120] Subsequent to an armed conflict, the States Parties may regulate, on the basis of agreement, the revival of treaties terminated or suspended as a consequence of the armed conflict. The resumption of the operation of a treaty suspended as a consequence of an armed conflict shall be determined in accordance with the factors referred to in article 6.[121]

[117] Article 9
[118] Article 10
[119] Article 11
[120] Article 12
[121] Article 13

3. Effect of the exercise of the right to self-defence on a treaty

14. A State exercising its inherent right of individual or collective self-defence in accordance with the Charter of the United Nations is entitled to suspend in whole or in part the operation of a treaty to which it is a Party insofar as that operation is incompatible with the exercise of that right.[122]

4. Prohibition of benefit to an aggressor State

15. A State committing aggression within the meaning of the Charter of the United Nations and resolution 3314 (XXIX) of the General Assembly of the United Nations shall not terminate or withdraw from a treaty or suspend its operation as a consequence of an armed conflict that results from the act of aggression if the effect would be to the benefit of that State.[123]

16. The draft articles are without prejudice to relevant decisions taken by the Security Council in accordance with the Charter of the United Nations.[124] The draft articles are without prejudice to the rights and duties of States arising from the laws of neutrality. [125]The draft articles are without prejudice to the termination, withdrawal or suspension of treaties as a consequence of, *inter alia*: (a) a material breach; (b) supervening impossibility of performance; or (c) a fundamental change of circumstances.[126]

5. Indicative list of treaties referred to in article 7

(a) Treaties on the law of armed conflict, including treaties on international humanitarian law;
(b) Treaties declaring, creating or regulating a permanent regime or status or related permanent rights, including treaties establishing or modifying land and maritime boundaries;
(c) Multilateral law-making treaties;
(d) Treaties on international criminal justice;
(e) Treaties of friendship, commerce and navigation and agreements concerning private rights;
(f) Treaties for the international protection of human rights;
(g) Treaties relating to the international protection of the environment;
(h) Treaties relating to international watercourses and related installations and facilities;
(i) Treaties relating to aquifers and related installations and facilities;
(j) Treaties which are constituent instruments of international organizations;

[122] Article 14
[123] Article 15
[124] Article 16
[125] Article 17
[126] Article 18

(k) Treaties relating to the international settlement of disputes by peaceful means, including resort to conciliation, mediation, arbitration and judicial settlement;
(l) Treaties relating to diplomatic and consular relations.

VII. IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

A. BACKGROUND

1. The Commission, at its fifty-ninth session (2007), decided to include the topic "Immunity of State officials from foreign criminal jurisdiction" in its programme of work and appointed Mr. Roman A. Kolodkin as Special Rapporteur. At the same session, the Commission requested the Secretariat to prepare a background study on the topic. At its sixtieth session (2008), the Commission considered the preliminary report of the Special Rapporteur (A/CN.4/601). The Commission had also before it a memorandum by the Secretariat on the topic (A/CN.4/596 and Corr.1). In the absence of a further report the Commission was unable to consider the topic at its sixty-first session (2009). At the sixty-second session, the Commission was not in a position to consider the second report of the Special Rapporteur, which was submitted to the Secretariat.

B. CONSIDERATION OF THE TOPIC AT THE SIXTY-THIRD SESSION

2. At the present session, the Commission had before it the second report[127] and the third report[128] of the Special Rapporteur. The second report reviewed and presented a detailed overview of the issues concerning (i) the scope of immunity of a State official from foreign criminal jurisdiction, including questions relating to immunity *ratione personae* and *ratione materiae*, and the territorial scope of immunity; (ii) what criminal procedural measures may be implemented against an official of a foreign State and what measures would violate that official's immunity, in particular, reviewing the various phases in a criminal proceeding, including the investigatory phase; (iii) addressed whether there are any exceptions to immunity, including examining the various rationales for such possible exceptions; and (iv) drew number of conclusions relating to the various issues raised in the report.

C. EXCERPTS FROM THE SECOND REPORT OF THE SPECIAL RAPPORTEUR

3. Immunity of a State official from foreign criminal jurisdiction was the norm and any exceptions thereto would need to be proven. State officials enjoy immunity *ratione materiae* in respect of acts performed in an official capacity since these acts are considered acts of the State, and these included unlawful acts and acts *ultra vires*. He pointed out that these acts are attributed both to the State and to the official and suggested that the criterion for attribution of the responsibility of the State for a wrongful act also determined whether an official enjoys immunity *ratione materiae* and the scope of such immunity, there being no objective reasons to draw a distinction in that regard. It was precisely by using the same criterion of attribution for the purpose of State responsibility and of immunity of State officials *ratione materiae*, that the responsibility of the State, as well as individual criminal responsibility would be engaged for the same conduct. The

[127] A/CN.4/631.
[128] A/CN.4/646.

scope of the immunity of a State and the scope of the immunity of its official were nevertheless not identical, despite the fact that in essence the immunity was one and the same.

4. With regard to former State officials, the Special Rapporteur stated that these persons continue to enjoy immunity *ratione materiae* with respect to acts undertaken by them in an official capacity during their term in office but did not extend to acts which were performed by an official prior to his taking up office and after leaving it. Such immunity was therefore of a limited nature.

5. Concerning immunity *ratione personae*, which are enjoyed by the so-called troika, namely incumbent heads of State and Government and ministers for foreign affairs, and possibly by certain other incumbent high-ranking officials, the Special Rapporteur considered such immunity to be absolute and to cover acts performed in an official and a personal capacity, both while in office and prior thereto. In light of the link between the immunity and the particular post, immunity *ratione personae* was temporary in character and ceased upon the expiration of their term in office; such former officials nevertheless continued to enjoy immunity *ratione materiae* On the question of which acts of a State exercising criminal jurisdiction would violate the immunity of an official and what criminal procedure measures would be permissible, reference was made to the *Arrest Warrant* case[129] and the case concerning *Certain Questions of Mutual Assistance*,[130] in which the International Court of Justice developed some criteria for deciding such issues. The Special Rapporteur agreed with the Court and pointed out that only such criminal procedure measures as were restrictive in character and would prevent a foreign official from discharging his functions by imposing a legal obligation on that person may not be taken.

6. Concerning the territorial scope of immunity, the Special Rapporteur considered that immunity takes effect from the moment the criminal procedure measure imposing an obligation on the foreign official is taken, irrespective of whether the official is abroad or not.

7. Turning to the issue of possible exceptions to immunity of a State official from foreign criminal jurisdiction, the Special Rapporteur observed that in the case of immunity *ratione personae*, the predominant view seemed to be that such immunity was absolute and that no exceptions thereto could be considered. In his opinion, the question of exceptions would thus only be pertinent with regard to immunity *ratione materiae* in the context of crimes under international law. Nevertheless, after having analysed the various rationales put forward in the doctrine and in certain judicial decisions justifying such exceptions, which were in one way or another, interrelated, namely

(a) grave criminal acts cannot be official acts;

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[129] *Arrest Warrant of 11 April 2002 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, p. 3.

[130] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment, I.C.J. Reports 2008*, p. 177.

(b) immunity is inapplicable since the act is attributed both to the State and the official;
(c) *jus cogens* prevails over immunity;
(d) a customary international law norm has emerged barring immunity;
(e) universal jurisdiction; and
(f) the concept of *aut dedere aut judicare*), the Special Rapporteur remained unconvinced as to their legal soundness. Therefore, the immunity of a State official from foreign criminal jurisdiction was the norm and any exceptions to the principle of immunity needs to proved or established.

8. There are two questions that needed to be addressed in a concrete way for progress to take place on this issue. The first was: Is there an exception to immunity in respect of what are called grave crimes under international law? The second was the question of the precise categories of persons apart from the well-known troika (the Heads of States, the Heads of Governments and the Minister of Foreign Affairs), who would be considered to enjoy immunity *ratione personae.* In this regard, the crux of the Report of the Special Rapporteur on this issue was that immunity of state officials from foreign criminal jurisdiction should be the norm and that, any exception thereto needed to be proved.

9. There were two streams of thought that informed the entire debate on the topic. According to one view, sovereignty must be limited, and that one could not talk of absolute immunity when grave crimes are committed. The principle of non-impunity is a core principle, and that one could not speak of absolute immunity where grave crimes are committed even by high-ranking officials. According to another view, the principle of immunity, which is well-established in international law, including the international customary law, does not brook any infringement and that, it was critical in preserving the stability of international relations. The challenge for the Commission lay in striking a proper balance between the two schools of thought.

D. EXCERPTS FROM THE THIRD REPORT OF THE SPECIAL RAPPORTEUR

10. The Special Rapporteur dealt with substantive aspects of the immunity of the State official from criminal jurisdiction in the third report[131] intending to address the procedural aspects, focusing, in particular on questions concerning the timing of consideration of immunity, its invocation and waiver, including whether immunity can still be invoked subsequent to its waiver. The Special Rapporteur stressed that while the previous reports had been based on an assessment of State practice, the present report, even though there was available practice, was largely deductive, reflecting extrapolations of logic and offering broad propositions, not exactly precise in terms of drafting, for consideration.

11. The Special Rapporteur's proposal regarding timing of the immunity to be raised in criminal proceedings should, in principle, be considered either at initial stage or at the

[131] A/CN.4/646

pre-trial stage of the court proceedings. In this regard, the Commission should study in detail, the implications of not considering the immunity at the early stages of criminal proceedings.

12. In order for immunity to be invoked, the State of the official must know that corresponding criminal procedural measures were being taken or planned in respect of the official concerning whom the invocation related. Accordingly, the State that was planning such measures must inform the State of the official in this regard. The Special Rapporteur drew attention to the distinction that ought to be made based on the immunity *ratione personae* and immunity *ratione materiae*.

(i) In respect of a foreign Head of State, Head of Government or minister for foreign affairs, the troika, the State exercising criminal jurisdiction itself must consider *proprio motu* the question of the immunity of the person concerned and determine its position regarding its further action within the framework of international law. The Special Rapporteur suggested that in this case it was appropriate perhaps to request the State of the official in question only for a waiver of immunity. Accordingly, the State of the official in this case did not bear the burden of raising the issue of immunity with the authorities of the State exercising criminal jurisdiction.

(ii) Where an official enjoying immunity *ratione materiae* was concerned, the burden of invoking immunity resided in the State of the official. If the State of such an official wished to invoke immunity in respect of that official, it must inform the State exercising jurisdiction that the person in question was its official and enjoyed immunity and acted in an official capacity. Otherwise, the State exercising jurisdiction was not obliged to consider the question of immunity *proprio motu* and, therefore, may continue criminal prosecution.

(iii) There was also the possible case of an official other than the troika, who enjoyed immunity *ratione personae*, in which case the burden of invoking immunity also lay with the State of the official in relation to whom immunity was invoked. If the State of such an official wished to invoke immunity in respect of that official, it must inform the State exercising jurisdiction that the person in question was its official and enjoyed personal immunity since he occupied a high-level position which, in addition to participation in international relations, required the performance of functions that were important for ensuring the sovereignty of the State.

13. The AALCO Secretariat favours the view that with regard to applicability of immunity *ratione personae* beyond Troika, there was a need to identify a clear criterion in establishing such practice and also to consider the suggestion of enhancing cooperation between States in matters relating to invocation of immunity between the State exercising jurisdiction and the State of the official, in respect of the Troika as well as others. On issues concerning waiver of immunity, the AALCO Secretariat observes that right to waive the immunity of an official is vested with the State and not in the official himself

and once a waiver of immunity was validly made by the State of the official, it is possible to exercise to the full extent of foreign criminal jurisdiction in respect of that official.

14. The Member States of AALCO should give most serious consideration to this topic because of the tremendous changes happening in the international criminal law regime. Further, it was very important for the future work of the ILC to receive the views and policy guidance of Member States of AALCO on the sensitive issues which arise in the consideration of these topics. Additionally, the sensitivity of the subject-matter that are very significant to the AALCO Member States and also to other developing countries, due to their political and other situations, must not be overlooked.

VIII. 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[132]. 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) [133] 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[134]. 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[135], and draft articles 3 to 7[136].

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[137].

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[132] *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.

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

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

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

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

[137] 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[138].

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[139]; draft articles A and 9,524 as contained in the sixth report of the Special Rapporteur (A/CN.4/625); draft articles B1 and C1,525 as contained in the first addendum to the sixth report (A/CN.4/625/Add.1); as well as draft articles B and A1,526 as revised by the Special Rapporteur during the sixty-second session.

B. CONSIDERATION OF THE TOPIC AT THE SIXTY-THIRD SESSION

7. At the sixty-third session in 2011, the Commission had before it the second addendum to the sixth report of the Special Rapporteur (A/CN.4/625/Add.2), which completed the consideration of the expulsion proceedings and considered the legal consequences of expulsion, and which it considered at its 3091st to 3094th meetings, from 24 to 27 May 2011. The Special Rapporteur's seventh report (A/CN.4/642), which provided an account of recent developments in relation to the topic and proposed a restructured summary of the draft articles, was also considered. The Commission also had before it comments received from Governments.

8. At its 3094th meeting, on 27 May 2011, the Commission decided to refer to the Drafting Committee draft articles D1, E1, G1, H1, I1 and J1, as contained in the second addendum to the sixth report; draft article F1, also contained in the second addendum, as revised by the Special Rapporteur during the session, and draft article 8, in the revised version introduced by the Special Rapporteur during the sixty-second session. Then the Commission decided to refer to the Drafting Committee the restructured summary of the draft articles contained in the seventh report of the Special Rapporteur

9. At its 3126th meeting, on 11 August 2011, the Commission took note of an interim report by the Chairman of the Drafting Committee informing the Commission of the progress of work on the set of draft articles on the expulsion of aliens, which were being finalized with a view to being submitted to the Commission at its sixty-fourth session for adoption on first reading.

[138] Ibid., Sixty-fourth Session No. 10 (A/64/10), para. 91.
[139] Ibid., Sixty-fifth Session, Supplement No. 10 (A/65/10), footnotes 1244 to 1251.

10. The second addendum to the sixth report, which marked the conclusion of the consideration of expulsion procedures and took up the legal consequences of expulsion considered a number of important issues such as the implementation of the expulsion decision, the right to appeal an expulsion decision and the relations between the expelling State and the transit and receiving States, which were governed by two principles: the freedom of a State to receive or to deny entry to an expelled alien, a freedom limited by the right of any person to return to his or her own country; and the freedom, likewise limited, of the expellee to determine his or her State of destination. It also dealt with the legal consequences of expulsion from the standpoint of the rights of expelled aliens.

11. The protection of the property of aliens facing expulsion, the subject of draft article G1[140], remains well established in international law. Paragraph 1 enunciated the prohibition of the expulsion of an alien for the purpose of confiscating his or her assets, while paragraph 2 concerned the protection, free disposal and, where appropriate, return of property. The Special Rapporteur believed that the fate of property belonging to aliens expelled during armed conflict must be examined in the light of *jus in bello*, something that did not fall within the ambit of the present topic.

12. Draft article F1[141], for which the Special Rapporteur had introduced a revised version[142] during the session, concerned the protection of the human rights of aliens subject to expulsion in the transit State. That provision, reflecting logic more than established practice, specified that the rules that applied in the expelling State to protection of the human rights of aliens subject to expulsion applied *mutatis mutandis* in the transit State. The Special Rapporteur was of the view that the elaboration of a legal framework for transit in the context of the expulsion of aliens would go beyond the scope of the current topic.

13. As to the right of return in cases of unlawful expulsion, national practice seemed to be too varied for such a right to be regarded as deriving from a rule of customary law. Still, it would be illogical to say that an alien expelled on the basis of erroneous facts or mistaken grounds as established by the competent authorities of the expelling State did not have the right to re-enter the expelling State on the basis of a ruling annulling the disputed decision. That was why the Special Rapporteur proposed that, in draft article

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[140] Draft article G1 read:

Protecting the property of aliens facing expulsion

1. The expulsion of an alien for the purpose of confiscating his or her assets is prohibited.

2. The expelling State shall protect the property of any alien facing expulsion, shall allow the alien [to the extent possible] to dispose freely of the said property, even from abroad, and shall return it to the alien at his or her request or that of his or her heirs or beneficiaries.

[141] The original version of draft article F1 read:

Protecting the human rights of aliens subject to expulsion in the transit State

The applicable rules that apply in the expelling State to protection of the human rights of aliens subject to expulsion shall also apply in the transit State.

[142] The revised version of F1 read:

Protecting the human rights of aliens subject to expulsion in the transit State

The rules that apply in the expelling State to protection of the human rights of aliens subject to expulsion shall apply *mutatis mutandis* in the transit State.

H1[143], the Commission enunciate a right of return as part of the progressive development of international law.

14. The question of the responsibility of the expelling State in cases of unlawful expulsion was considered in the final part of the second addendum. Draft article I1[144] which set out the principle of such responsibility, and draft article J1[145], which addressed the implementation of that responsibility through the mechanism of diplomatic protection, were conceived as clauses merely referring to those legal institutions. The commentary to draft article I1 might mention the emergence of the concept, recognized by the Inter-American Court of Human Rights, of particular damages for the interruption of the life plan.

15. The seventh report (A/CN.4/642) gave an overview of recent developments relevant to the topic and contained a restructured summary of the draft articles. The seventh report examined the judgment of the International Court of Justice in the *Ahmadou Sadio Diallo* case[146], which addressed seven points in relation to expulsion: conformity with the law; the obligation to inform aliens detained pending expulsion of the reasons for their arrest; the obligation to inform aliens subject to expulsion of the grounds for their expulsion; prohibition of mistreatment of aliens detained pending expulsion; the obligation for the competent authorities of the State of residence to inform the consular authorities of the State of origin without delay of the detention of their national with a view to expulsion; the obligation to respect the right to property of aliens subject to expulsion; and recognition of the responsibility of the expelling State and the provision by it of compensation. The report highlighted the similarities between the positions of the Court and the developments discussed in the Special Rapporteur's reports.

I. Summary of the debate

16. Several members stressed the complex and sensitive nature of the topic and the diversity of State practice. According to one view, it was important to bear in mind that some States were not convinced by the Commission's choice of the topic. Some doubts were expressed as to whether the Commission would be able to achieve a result that would meet with the general acceptance of States; according to one proposal, the Commission should re-evaluate the topic before embarking on a second reading. Scepticism was expressed about the likelihood that the draft articles could have a real

[143] Draft article H1 read: **Right of return to the expelling State**
An alien expelled on mistaken grounds or in violation of law or international law shall have the right of return to the expelling State on the basis of the annulment of the expulsion decision, save where his or her return constitutes a threat to public order or public security.
[144] Draft article I1 read: **The responsibility of States in cases of unlawful expulsion**
The legal consequences of an unlawful [illegal] expulsion are governed by the general regime of the responsibility of States for internationally wrongful acts.
[145] Draft article J1 read: **Diplomatic protection**
The expelled alien's State of nationality may exercise its diplomatic protection on behalf of the alien in question.
[146] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment of 30 November 2010.

impact on State practice. According to another view, however, the progress made in the treatment of the topic augured well for the submission to the General Assembly, in due course, of a set of draft articles adopted at first reading which would be sufficiently well balanced to meet with general acceptance.

17. While the Special Rapporteur was commended on his careful and systematic use of both older and recent sources from various regions around the world, some doubts were expressed as to the status of the proposed draft articles. According to one view, some of the draft articles could hardly be counted as codification or desirable progressive development of the law; in this regard, the Commission should indicate clearly whether it intended to identify the existing law or to propose new rules to States. More generally, the fact that, in identifying customary norms, due account must be taken of State practice, particularly contemporary practice was underscored. Some members thought that the Commission should try to strike a balance between the right of a State to expel aliens and the limits imposed on that right by rules protecting the dignity and human rights of aliens.

18. A view was also expressed according to which some categories of aliens whose status is regulated by special norms, such as refugees, should not be covered in the draft articles, so as to avoid creating contradictory legal regimes. It was proposed that, with a view to progressive development, the Commission should draw on the rich experience of the European Union. According to another view, the practice and precedents derived from special regimes such as European Union law should be treated with caution.

19. As to the form of the final product, some members thought it doubtful that it lent itself to the framing of draft articles that might then be incorporated into a convention; the idea of drawing up draft guidelines or principles enunciating best practices was suggested. According to other members, the Commission should continue to work towards the formulation of draft articles, also given the importance of the topic.

II. Comments on the Draft Articles

20. Some members supported **draft article D1** on the return to the receiving State of the alien being expelled. It was said that it achieved a proper balance between the rights of the expelling State and respect for the alien's dignity and human rights. Doubts were expressed, however, as to whether the term "voluntary return" was appropriate when a person was ordered to leave a State's territory. Some members agreed with the Special Rapporteur that paragraphs 1 and 2 were codification, whereas paragraph 3 constituted progressive development. According to another viewpoint, however, it was doubtful whether paragraphs 1 and 2, which were based only on best practice or regional practice, amounted to codification.

21. Some members considered that paragraph 1 should be recast to prevent its being construed as encouragement to the use of undue pressure on the alien; it was argued that the verb "encourage" lacked legal precision and could pave the way to abuse. It was therefore proposed to specify that the expelling State should take the necessary measures to promote, or make possible, the alien's voluntary return.

22. Several members supported paragraph 3, at least in the context of progressive development. Some members nevertheless proposed the deletion of the reference to the expelling State's freedom to shorten the period of notice if there was reason to believe that the alien in question could abscond during that period; the vague, subjective nature of that freedom seemed to weaken paragraph 3. It was further proposed, with regard to the implementation of an expulsion decision, that the Commission consider not only the length of detention pending expulsion but also the very idea of placing an alien in detention, at least when there were no real grounds of public order or national security.

23. While some members supported **draft article E1** on the State of destination of expelled aliens, others thought that it should be reconsidered in the light of State practice. The reversal of the order of paragraphs 2 and 3 was also suggested, because paragraphs 1 and 3 were closely linked. The advisability of listing States of destination in paragraph 2 was questioned, and it was suggested that the list should not be formulated restrictively.

24. With regard to the formulation of paragraph 3, the significance and practical usefulness of the distinction drawn between a State "that has not consented" and a State "that refuses" to admit the alien were queried.

25. Some members supported **revised draft article F1**, which aimed at extending to the transit State the protection of the human rights of aliens subject to expulsion. It was, however, suggested that that provision be reworded to refer to the rules of *international law* on the protection of human rights and to make it plain that the transit State was not obliged to repeat the whole expulsion procedure. Other members considered that the wording of draft article F1 lacked clarity: on the one hand, by creating the false impression that the transit State was bound by rules of international law that were incumbent only upon the expelling State; on the other, by not specifying whether the obligations it envisaged were imposed on the expelling State, the transit State, or both. Some members endorsed the Special Rapporteur's opinion that the elaboration of a legal framework for transit arrangements for expelled aliens would go beyond the scope of the topic.

26. Several members supported **draft article G1** on protecting the property of aliens facing expulsion. It was suggested that reference be made to the protection of the property rights of aliens. It was further suggested that protection be widened to take in nationals who were unlawfully regarded by the expelling State as aliens. The possibility of distinguishing, in the context of protecting property, between aliens lawfully or unlawfully present in the territory of the expelling State was mentioned. In addition, it was proposed that an exception be made for cases where a court had found, after a fair trial, that certain property had been acquired illegally.

27. The view was expressed that the right of return to the expelling State in the event of unlawful expulsion, as set forth in **draft article H1**, stemmed from the principles of State responsibility for wrongful acts; another view was that the proclamation of that right constituted progressive development. Some members considered that the expression

"right of readmission" was more suitable, for the word "return" seemed to apply more adequately to situations when a person was expelled from his or her own country. While some members considered that draft article H1 offered a balance between the right of an unlawfully expelled alien to return to the expelling State and the latter's legitimate interest in preserving public order and national security, other members considered that draft article H1 was formulated too broadly.

28. Support was expressed for **draft article I1** on the responsibility of States in cases of unlawful expulsion. The use of the expression "unlawful expulsion" was preferred over that of "illegal expulsion", so as to align the text with the wording of the articles on the responsibility of States for internationally wrongful acts.

29. Some members supported **draft article J1** referring to diplomatic protection. It was nevertheless suggested that the fact that the provision applied only to expulsions that were unlawful under international law should be specified. It was proposed that reference be made to the right set forth in article 8 of the articles on diplomatic protection, as adopted by the Commission on second reading of a State to exercise diplomatic protection in respect of a stateless person or a refugee who is lawfully and habitually resident in its territory.

30. As regards the **question of appeals against an expulsion decision, s**ome members agreed with the Special Rapporteur that it was unnecessary to formulate an additional draft article on appeals against an expulsion decision, as draft article C1 set out the right to challenge an expulsion decision, which seemed sufficient. The view was also expressed that considerable variations in national legislation and practice, as well as divergences among treaties, raised doubts as to whether customary rules governing appeals against an expulsion decision existed.

31. According to other members, as long as there appeared to be a customary basis for the right to appeal against an expulsion decision, a specific draft article on that subject should be formulated, albeit without mentioning particular legal remedies but instead describing in the commentary variations in State practice. It was maintained that, although international law did not recognize the right of judicial remedy, the right to an effective remedy derives from State practice and from human rights guarantees. It was further proposed that the Commission recommend that States grant the right to appeal against expulsion decisions also to those aliens who were unlawfully present in their territory, thereby going beyond what was required under article 13 of the International Covenant on Civil and Political Rights. Mention was made of the risk of abuse associated with the invocation of the grounds of public order or national security to deny an alien the benefit of an appeal. Lastly, it was suggested that further thought be given to the distinction between an appeal against an expulsion decision and an appeal against expulsion itself.

32. Some members shared the Special Rapporteur's view that no general rule of international law required the expelling State to provide a right of appeal against an expulsion decision with suspensive effect. It was pointed out that to do so would be to

hamper the effective exercise of the right of expulsion, and it was suggested that the Commission should work on better defining the notion of "safe country" rather than on formulating a rule on suspensive effect. It was also asserted that acknowledging suspensive effect entailed certain drawbacks in terms of legal uncertainty resulting from procedural delays.

33. According to other members, the Commission should formulate a draft article, if only as part of progressive development, envisaging the suspensive effect of an appeal against an expulsion decision, provided that there was no conflict with compelling reasons of national security. At the very least, the alien's right to seek a stay of the expulsion decision should be articulated, drawing on article 22, paragraph 4, of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Some members pointed out that an appeal against an expulsion decision lacking suspensive effect would not be effective, since aliens who had had to leave the country were likely to encounter economic obstacles to their return to the expelling State in the event that their appeal was successful. According to a more nuanced viewpoint, the Commission should find a formulation that offered the best compromise between the rights and interests of the expelling State and those of the expelled alien, respectively.

34. While recognizing the absence of a customary rule broadly providing for the suspensive effect of an appeal against an expulsion decision, the view was expressed that the Commission should recognize as part of *lex lata* the suspensive effect of an appeal in which the person concerned could reasonably invoke the risk of torture or ill-treatment in the State of destination. In response to this proposal, it was pointed out that the obligation not to return a person to a State where he or she was exposed to such a risk existed in any event, irrespective of whether or not an appeal had been made against the expulsion decision and of whether or not the appeal had suspensive effect.

III. Concluding remarks of the Special Rapporteur

35. The Special Rapporteur was surprised to see that even now, some members were still questioning the nature of the work to be undertaken by the Commission, specifically, whether or not the topic lent itself to an exercise of codification and progressive development. That seemed all the more surprising given the abundance of State practice, as well as treaties and case law, both international and regional, on the subject of expulsion of aliens. Although it was premature to speculate on the form that the final product should take, the Special Rapporteur had a clear preference for the development of a set of draft articles rather than draft guidelines or guiding principles. The Special Rapporteur had also taken note of the proposed amendments to the draft articles, some of which could, if necessary, be dealt with by the Drafting Committee.

36. The Special Rapporteur remained convinced of the usefulness of draft article J1 on diplomatic protection, the scope of which had now been expanded to include the international protection of human rights, as demonstrated by the recent judgement rendered by the International Court of Justice in the *Ahmadou Sadio Diallo* case. Draft

article J1 was, of course, without prejudice to any individual complaint mechanism to which an alien might have recourse before an international body for the protection of his or her human rights.

37. The Special Rapporteur maintained his belief that State practice had not converged sufficiently to warrant the formulation, if only as progressive development, of a provision on the suspensive effect of an appeal against an expulsion decision. That being so, the Commission was free to do so as a policy matter.

IX. 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[147] 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 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).

3. 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.

B. CONSIDERATION OF THE TOPIC AT THE SIXTY-THIRD SESSION

4. The Commission had before it the fourth report of the Special Rapporteur[148], which dealt with the (i) responsibility of the affected State to seek assistance where its national response capacity is exceeded, (ii) the duty of the affected State not to arbitrarily withhold its consent to external assistance, and (iii) the 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.

5. The Commission provisionally adopted six draft articles, together with commentaries, including draft articles 6 to 9, which it had taken note of at its sixty-second session (2010), dealing with humanitarian principles in disaster response, human dignity, human rights and the role of the affected State, respectively, as well as draft articles 10 and 11, dealing with the duty of the affected State to seek assistance and with the question of the consent of the affected State to external assistance (chap. IX).

[147] A/CN.4/598.
[148] A/CN.4/643 and Corr.1.

6. At the Sixty-third Session of the Commission, it provisionally adopted the following draft articles with commentaries: (i) Draft Article 6 on Humanitarian principles in disaster response; (ii) Draft Article 7 on Human Dignity; (iii) Draft Article 8 on Human Rights; (iv) Draft Article 9 on Role of the Affected State; (v) Draft Article 10 on Duty of the affected State to seek assistance; (vi) Draft Article 11 on Consent of the affected State to external assistance.

7. However, the present report made proposals for adoption of draft article 10 and 11 and its commentaries. They are:

Draft Article 10:
Duty of the affected State to seek assistance

> "To the extent that a disaster exceeds its national response capacity, the affected State has the duty to seek assistance from among other States, the United Nations, other competent intergovernmental organizations and relevant nongovernmental organizations, as appropriate."

8. The Special Rapporteur in his second report noted that not all disasters are considered to overwhelm a nation's response capacity. The Commission therefore considers the present draft article only to be applicable to a subset of disasters as defined in draft article 3 of the present draft articles. The duty to seek assistance in draft article 10, as per the Commission, derives from an affected State's obligations under international human rights instruments and customary international law. Recourse to international support may be a necessary element in the fulfilment of a State's international obligations towards individuals where an affected State considers its own resources are inadequate to meet protection needs. While this may occur also in the absence of any disaster, a number of human rights are directly implicated in the context of a disaster, including the right to life, the right to food, the right to health and medical services, the right to the supply of water, the right to adequate housing, clothing and sanitation, and the right to be free from discrimination.

9. The phrase "all necessary measures" encompasses recourse to possible assistance from the international community in the event that an affected State's national capacity is exceeded. Such an approach would cohere with the guiding principle of humanity[149] as applied in the international legal system. The International Court of Justice affirmed in the *Corfu Channel* case (merits)[150] that elementary considerations of humanity are considered to be general and well-recognized principles of the international legal order, "even more exacting in peace than in war".

Draft Article 11:
Consent of the affected State to external assistance

[149] Draft article 6 affirms the core position of the principle of humanity in disaster response.
[150] *United Kingdom of Great Britain and Northern Ireland v. Albania* ("*Corfu Channel* case"), Judgment of 9 April 1949, *I.C.J. Reports 1949,* p. 22.

"1. The provision of external assistance requires the consent of the affected State.
2. Consent to external assistance shall not be withheld arbitrarily.
3. When an offer of assistance is extended in accordance with the present draft articles, the affected State shall, whenever possible, make its decision regarding the offer known."

10. Draft article 11 creates for affected States a qualified consent regime in the field of disaster relief operations. Paragraph 1 of draft article 11 reflects the core principle that implementation of international relief assistance is contingent upon the consent of the affected State. Paragraph 2 stipulates that consent to external assistance shall not be withheld arbitrarily, while paragraph 3 of the draft article places a duty upon an affected State to make its decision regarding an offer of assistance known whenever possible.

11. The principle that the provision of external assistance requires the consent of the affected State is fundamental to international law. Accordingly, paragraph 3 of the guiding principles annexed to General Assembly resolution 46/182 notes that "humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal by the affected country".[151] The Commission considers that the duty of an affected State to ensure protection and assistance to those within its territory in the event of a disaster is aimed at preserving the life and dignity of the victims of the disaster and guaranteeing the access of persons in need to humanitarian assistance. This duty is central to securing the right to life of those within an affected State's territory.[152]

12. The term "arbitrary" directs attention to the basis of an affected State's decision to withhold consent. The determination of whether the withholding of consent is arbitrary must be determined on a case-by-case basis, although as a general rule several principles can be adduced. First, 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. Second, withholding consent to assistance from one external source is not arbitrary if an affected State has accepted appropriate and sufficient assistance from elsewhere. Third, the withholding of consent is not arbitrary if the relevant offer is not extended in accordance with the present draft articles. In particular, draft article 6 establishes 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 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 is arbitrary.

Draft article 12 read as follows:

[151] General Assembly Resolution 46/182 (see footnote 558), annex, para. 3.
[152] See International Covenant on Civil and Political Rights (see footnote 566 above), art. 6, para. 1.

Right to offer assistance

> "In responding to disasters, States, the United Nations, other competent intergovernmental organizations and relevant non-governmental organizations shall have the right to offer assistance to the affected State."

13. Draft article 12, and for 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 (draft article 9, paragraph 2). Agreement was also expressed with the Special Rapporteur's view that offering assistance in the international community is the practical manifestation of solidarity and a positive duty. At the same time, it was proposed that the provision more clearly define the circumstances where an affected State could reject offers of assistance and ensure that it has the appropriate freedom to do so.

14. Hence, the view was expressed that the right to offer assistance should not extend to assistance to which conditions are attached that are unacceptable to the affected State. Furthermore, the assistance offered had to be consistent with the provisions of the draft article and, in particular, should not be offered or delivered on a discriminatory basis. It was also pointed out that draft article 12 should not be interpreted to imply permission to interfere in the internal affairs of the affected State: it merely reflected a right to offer assistance, which the affected State may refuse, subject to draft article 11.

15. In order to decipher the practice of States, it was essential to include examples of domestic legislation under this topic. In addition to a handful of multilateral, mainly regional, agreements and a somewhat larger number of bilateral treaties on mutual assistance, the bulk of the available material on what is termed as the law of disaster relief was constituted by non-binding instruments, adopted primarily at the intergovernmental level but also by private institutions and entities. Henceforth, the very notion of a disaster relief law is an emerging one whose consolidation would depend in great measure on the work of progressive development being carried out by the Commission. The State has the predominant right under its national law, to direct, control, coordinate, and supervises such assistance within its territory as enshrined in draft article 10 of this topic.

16. Draft article 11 para 3 read that:

> "When an offer of assistance is extended in accordance with the present draft articles, the affected State shall, whenever possible, make its decision regarding the offer known" and majorly depends on the consent of the affected State (draft article 11 para 1).

17. It plays a significant role in affirming the right of the affected State to restrict the entry of other states or international organizations that has the potential to interfere with the internal affairs of the affected State, subject to its consent. Therefore, one of the major concerns of the AALCO Member States with respect to preserving the integrity and sovereignty of the affected State is addressed. Primarily, the burden of proof falls on the

State to provide assistance to its people during the disaster situation, however, it is upto the State based on its own determination may or may not choose to receive external assistance. The sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the Charter of the United Nations. In this context, humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal by the affected country. Moreover, it is also desirable to note that Member States of AALCO which has domestic legislation/policy that deals with disaster relief could kindly transmit the same to the Special Rapporteur for analyzing the state practice on this topic. This would in turn add to the inclusion of the practices from other civilizations while drafting the further draft articles on this pertinent topic.

X. THE OBLIGATION TO EXTRADITE OR PROSECUTE (*AUT DEDERE AUT JUDICARE*)

A. BACKGROUND

1. The Commission, at its fifty-seventh session (2005), decided to include the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)" in its programme of work and appointed Mr. Zdzislaw Galicki as Special Rapporteur. From its fifty-eighth (2006) to its sixtieth (2008) sessions, the Commission received and considered three reports of the Special Rapporteur. At its sixtieth session (2008), the Commission decided to establish a working group on the topic under the chairmanship of Mr. Alain Pellet, with a mandate and membership to be determined at the sixty-first session. At the sixty-first session (2009), an open ended Working Group was established, and from its discussions, a general framework for consideration of the topic, with the aim of specifying the issues to be addressed, was prepared. At the sixty-second session (2010), the Working Group was reconstituted and, in the absence of its chairman, was chaired by Mr. Enrique Candioti. At the sixty-third session, the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/648). The Commission considered the report at its 3111th to 3113th and 3115th meetings from 25 to 27 and 29 July 2011.

B. SUMMARY OF THE DEBATE

2. After recalling the background to the topic and its consideration thus far including discussions of the Sixth Committee during the sixty-fifth session of the General Assembly, the fourth report, building upon previous reports, sought to address the question of sources of the obligation to extradite or prosecute, focusing on treaties and custom. The Special Rapporteur, following suggestions in the 2010 Working Group, sought to underpin the consideration of the topic around the duty to cooperate in the fight against impunity, noting, more generally, that the duty to cooperate was well established as a principle of international law and can be found in numerous international instruments. In international criminal law, the duty to cooperate had a positive overtone as exemplified in the Preamble of the Rome Statute of the International Criminal Court of 1998, containing an affirmation that "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", and, to contribute to the prevention of such crimes, a determination "to put an end to impunity for the perpetrators of these crimes".

3. The fight against impunity for the perpetrators of serious crimes of concern to the international community as a whole was a fundamental policy achievable on the one hand through the establishment of international criminal tribunals and on the other the exercise of jurisdiction by national courts. The Special Rapporteur stated that the duty to cooperate in the fight against impunity had already been considered as a customary rule by some States and in the doctrine.

4. To underscore that the duty to cooperate was overarching in the appreciation of the obligation to extradite or prosecute, the Special Rapporteur proposed to replace the former article 2 (Use of terms) with a new draft article 2 on the duty to cooperate. The Special Rapporteur reviewed the various sources of the obligation to extradite or prosecute, considering treaties first, drawing attention to a variety of possible classifications and differentiation, available in the doctrine, distinguishing such treaties. He recalled that he had previously proposed a draft article 3 dealing with treaties as a source of the obligation to extradite or prosecute. In light of the variety and differentiation of provisions concerning the obligation, the Special Rapporteur considered it useful to propose the addition of another paragraph to draft article 3 on Treaty as a source of the obligation to extradite or prosecute.

5. The Special Rapporteur also analysed the obligation *aut dedere aut judicare* as a rule of customary international law, noting that its acceptance was gaining prominence at least in respect of certain crimes in doctrinal writings of some legal scholars and was being acknowledged by some delegations in the debates of the Sixth Committee particularly during the sixty-fourth session of the General Assembly (2009), while some others had called for further study by the Commission. The Special Rapporteur also pointed to written and oral pleadings of States before the International Court of Justice, in particular in respect of *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*.

6. The Special Rapporteur also addressed the relevance of norms of *jus cogens* as a source of the obligation to extradite or prosecute as suggested by some commentators, noting that such connection arose from the assertion that there were certain prohibited acts which if committed would constitute serious breaches of obligations under peremptory norms of general international law and that consequently gave rise to an obligation on all States to prosecute or entertain civil suits against the perpetrators of such crimes when found on their territory. Moreover, States were prohibited from committing serious crimes of concern to the international community as a whole, and any international agreement between States to facilitate commission of such crimes would be void *ab initio*.

7. The Special Rapporteur noted that although there was no doubt that there were certain crimes in the realm of international criminal law whose prohibition had reached the status of *jus cogens* (such as the prohibition against torture), whether the obligation *aut dedere aut judicare* attendant to such peremptory norms also possessed the characteristics of *jus cogens* was a matter giving rise to difference of views in the doctrine.

8. Commenting on the categories of crimes associated with the obligation *aut dedere aut judicare*, the Special Rapporteur, observing that it was difficult in the present circumstances to prove the existence of a general customary obligation to extradite or prosecute, suggested that focus should rather be on identifying those particular categories of crimes which seemed to create such an obligation, on account, *inter alia*, that they were serious crimes of concern to the international community as a whole. He alluded to

the importance of differentiating between ordinary criminal offences — criminalized under national laws of States — and heinous crimes variously described as international crimes, crimes of international concern, grave breaches, crimes against international humanitarian law, etc., and paying particular attention to the latter, partly because they possessed an international or had a special grave character. Among such crimes were: (a) the crime of genocide; (b) crimes against humanity; (c) war crimes; and (d) the crime of aggression. Having considered the various issues implicated, the Special Rapporteur proposed draft article 4 on International custom as a source of the obligation *aut dedere aut judicare*. In proposing the draft article, he noted that the list of crimes covered by paragraph 2 of that article was still open and subject to further consideration and discussion.

1. General comments

9. The Special Rapporteur was commended for helpfully embarking on an analysis of issues that substantively had a bearing on the topic. Members nevertheless acknowledged the difficulties presented by the topic, particularly as it had implications for other aspects of the law, including questions of prosecutorial discretion, questions of asylum, the law on extradition, the immunity of States officials from criminal jurisdiction, peremptory norms of international law, as well as universal jurisdiction, thereby posing problems in terms of the direction to be taken and what needed to be achieved. The methodology to be adopted and the general approach to be taken were thus crucial in fleshing out the issues relevant to the topic. In this connection, attention was drawn to the valuable work of the Working Group on *aut dedere aut judicare* in 2009 and 2010 and the continuing relevance of the proposed 2009 general framework for the Commission's consideration of the topic, prepared by the Working Group. Although the Fourth report was useful in focusing on the treaties and custom as sources of the obligation, and indeed the consideration of the sources of the obligation remained a key aspect of the topic, the report had not fully addressed the issues so as to allow the Commission draw informed conclusions on the direction to be taken on the topic. In particular, concerns were expressed about the draft articles as proposed and the analysis on which they were based. It was noted that the methodology of the Special Rapporteur in treating the main sources of international law, namely treaties and customary law separately and proposing two separate draft articles therefore was conceptually problematic; the focus should be on the obligation to extradite or prosecute and how treaties and custom evidenced the rule rather than on treaties or custom as the "source" of the obligation; there was no need for a draft article to demonstrate that there was a rule in a treaty or under custom. Indeed, there were other sources that would help to inform the nature, scope and content of the obligation.

2. Draft article 2[153]: Duty to cooperate

10. Some members doubted the relevance of the draft article as a whole, with a suggestion being made that it be transformed into hortatory preambular language. It was not entirely clear why it was subject of a self-standing obligation; the formulation was question-begging, not supportable in its current form, and should be reconsidered once the implications of the duty to cooperate in the context of the topic were more clearly elaborated; more particularly, there ought to be an explanation of an explicit relationship between *aut dedere aut judicare* and the duty of States to cooperate with each other, as opposed to the duty to cooperate and the fight against impunity. Some other members however underlined the importance of reflecting in some manner the duty to cooperate, or an obligation to cooperate as preferred by some, in the fight against impunity, it being recalled that this aspect was highlighted in the 2009 general framework and by the 2010 Working Group. It was stressed that the duty to cooperate was already well established across various fields of international law. The key question to be answered was what it meant in the context of international criminal cooperation, assessing how far the political goal of the fight against impunity had crystallized into a specific legal obligation. Since the duty did not exist in a vacuum what seemed essential was to provide a context for it in relation to the topic, as well as content in aspects such as prevention, prosecution, judicial assistance and law enforcement.

11. Commenting of the draft article as such, while acknowledging the emphasis on the "fight against impunity" in paragraph 1, it was pointed out by some members that the phrase was imprecise, suggestive of preambular language than clear legal text for the operative part. It was however pointed out that slogan-sounding language like fight against impunity was commonly and easily understood, and the use of simplified language has the advantage of making draft articles of the Commission accessible. Some other members were also of the view that paragraph 1 was formulated cautiously and the use of qualifiers established unnecessary thresholds.

12. It was also noted that it was not clear why international courts and tribunals would be implicated as paragraph 1 seemed to suggest since the core aspects of the topic affected principally inter-State relations, including domestic courts. The point was nevertheless made that paragraph 1 could in fact be separated to deal with interstate cooperation and then with cooperation with international courts and tribunals, as well as cooperation with the United Nations, on the basis of article 89 of Additional Protocol I.

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[153] Draft article 2 read as follows:

Duty to cooperate

1. In accordance with the present draft articles, States shall, as appropriate, cooperate among themselves, and with competent international court and tribunals, in the fight against impunity as it concerns crimes and offences of international concern.

2. For this purpose, the States will apply, wherever and whenever appropriate, and in accordance with these draft articles, the principle to extradite or prosecute (*aut dedere aut judicare*)

13. Some members were also of the view that the phrase "crimes and offences of international concern," in the paragraph was ambiguous as to offer any guidance on the type of crimes covered by the present topic, there was need for clarity, bearing in mind the principle *nullum crimen sine lege*. For paragraph 2, it was noted that the phrase "wherever and whenever appropriate" had the potential of being construed widely, with negative consequences for inter-State relations. Moreover, its whole meaning was obscure, as at one level it seemed to denote a free standing obligation to extradite or prosecute, without stating much as to what it entailed. However, some members were more favourable to the more general openendedness implied by the language, considering it appropriate for a text that was intended to make propositions of general application.

3. Draft article 3[154]: Treaty as a source of the obligation to extradite or prosecute

14. A suggestion was made to delete the draft article in its entirety. Its paragraph 1 was considered superfluous; it was not evident how a reflection of *pacta sunt servanda* in the text helped to elucidate issues concerning the topic. To some members, paragraph 2, although currently unclear, raised possibilities for further enquiry. In providing that "[p]articular conditions for exercising extradition or prosecution shall be formulated by the internal law of the State party", it was not apparent which State party was being referred to and it also raised the possibility that a State would invoke its internal law to justify non-compliance with an international obligation. Moreover, the reference to "general principles of international criminal law" seemed vague. If anything, it was these principles which had to be fleshed out for implementation. For example, it was suggested it might be useful to make an assessment whether prosecutorial discretion was a general principle of criminal law relevant to the topic. The point was also made that draft article ought to be addressing matters concerning both the conditions for extradition, including available limitations, and the conditions for prosecution, according them different treatment as they were different legal concepts.

15. It was also noted that while the Special Rapporteur had alluded to a variety of classification of treaties and differentiation of treaty provisions in the doctrine in his report in support of the draft article, there was no further analysis or application of such classification. It would have been helpful, for instance, to explore further whether such classification and differentiation provided some possible understanding of the qualifications, conditions, requirements, and possible exceptions to extradition or prosecution provided for in the various treaties, including such aspects of extradition law concerning "double criminality", the rule of "specialty", as well as issues concerning the political offence exception and non-extradition of nationals.

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[154] Draft article 3, as amended, read as follows:

Treaty as a source of the obligation to extradite or prosecute

1. Each State is obliged either to extradite or to prosecute an alleged offender if such an obligation is provided for by a treaty to which such State is a party.

2. Particular conditions for exercising extradition or prosecution shall be formulated by the internal law of the State party, in accordance with the treaty establishing such obligation and with general principles of international criminal law.

16. The classification could also possibility have helped to show that many treaties which contain the obligation to extradite or prosecute articulated a general principle of law, or customary rule or whether it had a bearing on the application of the obligation in respect of certain "core crimes".

4. Draft article 4[155]: International custom as a source of the obligation *aut dedere aut judicare*

17. Some members viewed the present article problematic since it was not supported by the Special Rapporteur's own analysis, having himself admitted that it was rather difficult in the present circumstances to prove the existence of a general customary obligation to extradite or prosecute, and its drafting was rather tentative.

18. Although paragraph 1 seemed unobjectionable in its terms, it presented a tautology and seemed to add little to the question of the obligation *aut dedere aut judicare*. At the same time, it was recognized that the draft article seemed to address an issue central to the topic. In particular, paragraph 2, together with paragraph 3, had the potential to be elaborated into an important rule, yet as presently formulated, it was vague, obscure and the drafting was weak. It was underlined that one of the key issues to be grappled with was the distinction between "core crimes" for the purposes of the topic and other crimes. The Special Rapporteur was encouraged to undertake a more detailed study of the State practice and *opinio juris* and offer a firm view on which certain serious crimes of concern to the international community as a whole gave rise to an obligation to extradite or prosecute. Such an analysis could also consider such issues as whether the accumulation of treaties containing an obligation to extradite or prosecute meant that that States accepted that there was a customary rule, or whether it meant that States believed that they were derogating from customary law. In making such a detailed analysis, there was no need for the Special Rapporteur to await the judgment of the International Court of Justice in the *Questions relating to the Obligation to Prosecute or Extradite*.

19. Some members also recalled that the issues being raised had already been canvassed in the Commission in particular in relation to its work culminating in the adoption of the 1996 Draft Code of Crimes against the Peace and Security of Mankind. Draft article 9 thereof on the obligation to extradite and prosecute imposes an obligation on the State Party in the territory of which an individual alleged to have committed a crime of genocide, crimes against humanity, crimes against United Nations and associated personnel or war crimes is found shall extradite or prosecute that individual.

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[155] Draft article 4 read as follows:

International custom as a source of the obligation *aut dedere aut iudicare*

1. Each State is obliged either to extradite or to prosecute an alleged offender if such an obligation is deriving from the customary norm of international law.

2. Such an obligation may derive, in particular, from customary norms of international law concerning [serious violations of international humanitarian law, genocide, crimes against humanity and war crimes].

3. The obligation to extradite or prosecute shall derive from the peremptory norm of general international law accepted and recognized by the international community of States (jus cogens), either in the form of international treaty or international custom, criminalizing any one of acts listed in paragraph 2.

Draft article 3 and 4 could be reformulated, as a matter of progressive development, along the lines of draft article 9 of the Draft Code.

20. It was thus suggested that there was a need to proceed cautiously, with an appropriate differentiation in the analysis between different categories of crimes, noting in that regard that some crimes may be subject to universal jurisdiction but not necessarily to the obligation to extradite or prosecute. Similarly, grave breaches were subject to the obligation *aut dedere aut judicare* but not all war crimes are subject to it.

21. In the first place, it might be easier to make an assessment of the customary nature of the obligation in respect of certain identified "core crimes" as opposed to finding a more general obligation. It was also recalled that crimes under international law constituted the most serious crimes that were of concern to the international community as a whole. Moreover, the current topic was inextricably linked to universal jurisdiction. Indeed, the current topic was artificially separated from the broader subject of universal jurisdiction, and the obligation to extradite or prosecute would not be implicated without jurisdiction. In respect of the Draft Code it was recognised that national courts would exercise jurisdiction in regard to draft article 9 under the principle of universal jurisdiction. Accordingly, further work could not meaningfully be done without addressing universal jurisdiction and the type of crimes implicated by it. In this context, it was suggested that in future reports the Special Rapporteur could consider more fully the relationship between *aut dedere aut judicare* and universal jurisdiction in order to assess whether this relationship had any bearing on draft articles to be prepared on the topic. Moreover, the suggestion was made that present topic could be expanded to cover universal jurisdiction, taking into account the views of the Sixth Committee following a question in Chapter III of the report of the Commission at the present session.

22. It was noted that the meaning of paragraph 3 was not entirely clear and was question begging; its mandatory language did not correspond to the doubts that the Special Rapporteur expresses in his report. For example, it was not clear whether it was intended to set out the obligation to extradite or prosecute as a peremptory norm or whether it is intended to include in the obligation, crimes that violate such norms. The issues sought to
be covered by the paragraph, including the still tenuous link between crimes prohibited as constituting breaches of peremptory norms and the procedural consequences that ensue in relation to the obligation to extradite or prosecute, simply required to be teased out in an extensive analysis by the Special Rapporteur, building significantly on the comments made in his report on the views expressed in the doctrine.

C. FUTURE WORK

23. As to the future work on the present topic, the view was expressed that there was an inherent difficulty in the topic. It was even suggested that the Commission should not be hesitant to reflect on the possibility of suspending or terminating the consideration of the topic, as in the past it had done so with respect to other topics. Some other members, however, noted that the topic remained a viable and useful project for the Commission to

pursue. Moreover, States were interested in the topic and were keen for progress. It was also recalled that this aspect had been a subject of discussion in the past, and that the resulting preparation of the 2009 general framework pointed to the viability of the topic. Recognizing that the Sixth Committee was dealing with a related item on the scope and application of the principle of universal jurisdiction, it was also suggested that this matter could be combined with the topic on the *aut dedere aut judicare* obligation. It was recognized, however, that there were different views on this matter in the Sixth Committee.

XI. TREATIES OVER TIME

A. BACKGROUND

1. The International Law Commission, at its sixtieth session (2008), decided to include the topic "Treaties over time" in its programme of work and to establish a Study Group on the topic at its sixty-first session[156]. At its sixty-first session (2009), the Commission established the Study Group on Treaties over time, chaired by Mr. Georg Nolte. At that session, the Study Group focused its discussions on the identification of the issues to be covered, the working methods of the Study Group and the possible outcome of the Commission's work on the topic[157]. At the sixty-second session (2010), the Study Group was reconstituted under the chairmanship of Mr. Georg Nolte and began its work on the aspects of the topic relating to subsequent agreements and practice, on the basis of an introductory report prepared by its Chairman on the relevant jurisprudence of the International Court of Justice and arbitral tribunals of *ad hoc* jurisdiction[158].

B. CONSIDERATION OF THE TOPIC AT THE SIXTY-THIRD SESSION

2. 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.

3. 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. The Chairman's second report covers the jurisprudence under certain international economic regimes (World Trade Organization, Iran-US Claims Tribunal, International Centre for the Settlement of Investment Disputes tribunals and North American Free Trade Area tribunals), international human rights regimes (European Court of Human Rights, Inter-American Court of Human Rights, and Human Rights Committee under the International Covenant on Civil and Political Rights), and other regimes (International Tribunal for the Law of the Sea, International Criminal Court, International Criminal Tribunals for the former Yugoslavia and Rwanda, and Court of Justice of the European Union). The report explains why those regimes are covered and not others.

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[156] At its 2997th meeting, on 8 August 2008. (*Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 353). For the syllabus of the topic, see *ibid*., Annex A. The General Assembly, in para. 6 of its resolution 63/123 of 11 December 2008, took note of the decision.

[157] See Official Records of the General Assembly, Sixty- fourth Session, Supplement No. 10 (A/64/10), paras. 220–226.

[158] Ibid., Sixty-fifth Session, Supplement No. 10 (A/65/10), paras. 344–354.

4. 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. The Study Group agreed that those preliminary conclusions by its Chairman would have to be revisited and expanded in the light of other reports on additional aspects of the topic and of the discussions thereon.

5. The nine preliminary conclusions by the Chairman of the Study Group, reformulated in the light of the discussions in the Study Group, are as follows:

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- **General rule on treaty interpretation**

6. The provisions contained in Article 31 of the Vienna Convention on the Law of Treaties (VCLT), either as an applicable treaty provision or as a reflection of customary international law, are recognized by the different adjudicatory bodies reviewed as reflecting the general rule on the interpretation of treaties which they apply[159].

Approaches to interpretation

7. Regardless of their recognition of the general rule set forth in Article 31 VCLT as the basis for the interpretation of treaties, different adjudicatory bodies have in different contexts put more or less emphasis on different means of interpretation contained therein. Three broad approaches can be distinguished:

- Conventional – Like the International Court of Justice, most adjudicatory bodies (Iran-US Claims Tribunal, ICSID tribunals, ITLOS, and the international criminal courts and tribunals) have followed approaches which typically take all means of interpretation of Article 31 VCLT into account without making noticeably more or less use of certain means of interpretation

- Text-oriented – Panel and Appellate Body Reports of the World Trade Organisation (WTO) have in many cases put a certain emphasis on the text of the treaty (ordinary or special meaning of the terms of the agreement) and have been reluctant to emphasize purposive interpretation[160]. This approach seems to have to do, *inter alia*, with a particular need for certainty and with the technical character of many provisions in WTO-related agreements.

- Purpose-oriented – The regional human rights courts, as well as the Human Rights Committee under the International Covenant on Civil and Political Rights

[159] Whereas the European Court of Justice (ECJ) has not explicitly invoked the general rule contained in Article 31 VCLT when interpreting the Founding Treaties of the European Union, it has, however, invoked and applied this rule when interpreting treaties between the EU and non-member States; see e.g. Case C-386/08, *Firma Brita GmbH v. Hauptzollamt Hamburg-Hafen*, Judgment of 25 February 2010, paras. 41–43.
[160] E.g. Brazil – Aircraft, Article 21.5 Appellate Body Report, 21 July 2000, WT/DS46/AB/RW, at para. 45.

(HRC), have in many cases emphasized the object and purpose[161]. This approach seems to have to do, *inter alia*, with the character of substantive provisions of human rights treaties which deal with the personal rights of individuals in an evolving society.

8. The reasons why some adjudicatory bodies often put a certain emphasis on the text, and certain others more on the object and purpose, may lie not only in the particular subject-matters of the treaty obligations concerned, but may also be due to their drafting and other factors, including possibly the age of the treaty regime, and the procedure in which the adjudicatory body operates. It is not necessary to determine the exact degree to which such factors influence the interpretative approach of the respective adjudicatory body. It is, however, useful to bear the different broad approaches in mind when assessing the role which subsequent agreements and subsequent practice play for different adjudicatory bodies.

- **Interpretation of treaties on human rights and international criminal law**

9. The European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR) emphasize the special nature of the human rights treaties which they apply, and they affirm that this special nature affects their approach to interpretation[162]. The International Criminal Court and other criminal tribunals (ICTY, ICTR) apply certain special rules of interpretation which are derived from general principles of criminal law and human rights. However, neither the regional human rights courts nor the international
criminal courts and tribunals call into question the applicability of the general rule contained in Article 31 VCLT as a basis for their treaty interpretation. The other adjudicatory bodies reviewed do not claim that the respective treaty which they apply justifies a special approach to its interpretation.

- **Recognition in principle of subsequent agreements and subsequent practice as means of interpretation**

10. All adjudicatory bodies reviewed recognize that subsequent agreements and subsequent practice in the sense of article 31 (3) (a) and (b) VCLT are a means of interpretation which they should take into account when they interpret and apply treaties[163].

[161] E.g. ECtHR, Soering v. the United Kingdom, 7 July 1989, Series A No. 161, para. 87; IACtHR, The Right to Information on Consular Assistance. In the Framework of the Guarantees of the due Process of Law, Advisory Opinion OC-16/99 of October 1, 1999, Series A No. 16, para. 58.

[162] ECtHR, Ireland v. the United Kingdom, 18 January 1978, Series A No. 25, para. 239; Mamatkulov and Askarov v. Turkey [GC], Nos. 46827/99 and 46951/99, para. 111; IACtHR, The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75), Advisory Opinion OC-2/82 of September 24, 1982, Series A No. 2, para. 19.

[163] The ECJ, when interpreting and applying the Founding Treaties of the European Union, has generally refrained from taking subsequent practice of the parties into account; it has, however, done so when interpreting and applying treaties between the EU and third States, see e.g. Case C-52/77, *Leonce Cayrol v.*

- **Concept of subsequent practice as a means of interpretation**

11. Most adjudicatory bodies reviewed have not defined the concept of subsequent practice. The definition given by the WTO Appellate Body ("concordant, common and consistent sequence of acts or renouncements which is sufficient to establish a discernable pattern implying the agreement of the parties [to the treaty] regarding its interpretation") combines the element of "practice" ("sequence of acts or pronouncements") with the requirement of agreement ("concordant, common") as provided for in article 31 (3) (b) VCLT (subsequent practice in a narrow sense). Other adjudicatory bodies reviewed have, however, also used the concept of "practice" as a means of interpretation without referring to and requiring a discernable agreement between the parties (subsequent practice in a broad sense).

- **Identification of the role of a subsequent agreement or a subsequent practice as a means of interpretation**

12. Like other means of interpretation, subsequent agreements and subsequent practice are mostly used by adjudicatory bodies as one among several such means in any particular decision. It is therefore rare that adjudicatory bodies declare that a particular subsequent practice or a subsequent agreement has played a determinative role for the outcome of a decision.658 It appears, however, often possible to identify whether a subsequent agreement or a particular subsequent practice has played an important or a minor role in the reasoning of a particular decision.

13. Most adjudicatory bodies make use of subsequent practice as a means of interpretation. Subsequent practice plays a less important role for adjudicatory bodies which are either more text-oriented (WTO Appellate Body) or more purpose-oriented (IACtHR). The ECtHR places more emphasis on subsequent practice by referring to the common legal standards among member states of the Council of Europe[164].

- **Evolutionary interpretation and subsequent practice**

14. Evolutionary interpretation is a form of purpose-oriented interpretation. Evolutionary interpretation may be guided by subsequent practice in a narrow and in a broad sense. The text-oriented WTO Appellate Body has only occasionally expressly undertaken an evolutionary interpretation[165]. Among the human rights treaty bodies the ECtHR has frequently employed an evolutionary interpretation that was explicitly guided by subsequent practice, whereas the IACtHR and the HRC have hardly relied on subsequent practice. This may to be due to the fact that the ECtHR can refer to a

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Giovanni Rivoira & Figli, [1977] ECR 2261, para. 18; Case C-432/92, *The Queen v. Minister of Agriculture, Fisheries and Food, ex parte S. P. Anastasiou (Pissouri) Ltd and others*, [1994] ECR I-3087, paras. 43 and 50.

[164] See e.g. *Demir and Baykara v. Turkey* [GC], No. 34503/97, §§ 52, 76, 85; *A. v. the United Kingdom*, No. 35373/97, § 83, ECHR 2002-X.

[165] *US – Shrimp*, Report of the Appellate Body, 12 October 1998, WT/DS58/AB/R, para. 130.

comparatively close common level of restrictions among the member States of the Council of Europe. ITLOS seems to engage in evolutionary interpretation along the lines of some of the jurisprudence of the ICJ.

- **Rare invocation of subsequent agreements**

15. So far, the adjudicatory bodies reviewed have rarely relied on subsequent agreements in the (narrow) sense of article 31 (3) (a) VCLT. This may be due, in part, to the character of certain treaty obligations, in particular of human rights treaties, substantial parts of which may not lend themselves to subsequent agreements by governments.

16. Certain decisions which plenary organs or States parties take according to a treaty, such as the "Elements of Crime" pursuant to article 9 of the ICC Statute or the "FTC Note 2001" in the context of NAFTA[166], if adopted unanimously, may have an effect similar to subsequent agreements in the sense of article 31 (3) (a) VCLT.

- **Possible authors of relevant subsequent practice**

17. Relevant subsequent practice can consist of acts of all State organs (executive, legislative, and judicial) which can be attributed to a State for the purpose of treaty interpretation. Such practice may under certain circumstances even include "social practice" as far as it is reflected in State practice[167].

C. FUTURE WORK

18. The Study Group also discussed the future work with regard to this topic. It was expected that, during the sixty-fourth session (2012), the discussion of the second report prepared by the Chairman would be completed, to be followed by a third phase, namely the analysis of the practice of States that is unrelated to judicial and quasi-judicial proceedings. This should be done on the basis of a further report on this topic. The Study Group expected that the work on the topic would, as originally envisaged, be concluded during the next quinquennium and result in conclusions on the basis of a repertory of practice. The Study Group also discussed the possibility of modifying the working method with respect to the topic so as to follow the procedure involving the appointment by the Commission of a Special Rapporteur. It came to the conclusion that this possibility should be considered during the next session by the newly elected membership

19. At its meeting on 2 August 2011, the Study Group examined the possibility that the request for information from Governments which was included in Chapter III of the Commission's report on the work of its sixty-second session (2010) be reiterated. It was generally felt in the Study Group that more information provided by Governments in

[166] See the reference and discussion in *ADF Group Inc. v. United States of America* (Case No. ARB(AF)/00/1), ICSID Arbitration Under NAFTA Chapter Eleven, 9 January 2003, http://www.state.gov/documents/organization/16586.pdf, para. 177.
[167] See *Christine Goodwin v. the United Kingdom*, No. 28957/95, paras. 84–91, ECHR 2002-VI.

relation to this topic would be very useful, in particular with respect to the consideration of instances of subsequent practice and agreements that have not been the subject of a judicial or quasi-judicial pronouncement by an international body. Therefore, the Study Group recommended to the Commission that Chapter III of this year's report include a section reiterating the request for information on the topic "Treaties over time".

XII. THE MOST-FAVOURED-NATION CLAUSE

A. BACKGROUND

1. The topic Most-Favoured-Nation (hereafter referred to as "MFN") Clause was first considered from 1967 to 1978. A proposal to include this topic in the long term programme of work was made during the fifty-eighth session (2006), following which an open-ended working group was established in the year 2007. This topic was included in the long term programme of work of the Commission at the sixtieth session (2008). Pursuant to which, a Study Group was constituted co-chaired by Mr. Donald M. McRae and Mr. A. Rohan Perera and reconstituted at the sixty-second session (2010), under the same co-chairmanship. At its sixty-first session, the Study Group considered a framework that would serve as a road map for future work, specifically on the scope of the MFN clauses and their interpretation and application.

2. At the Sixty-second session of the ILC, the Commission took note of the oral report of the Co-Chairmen of the Study Group. The report considered papers on: (i) catalogue of MFN provision, (ii) the 1978 Draft Articles of the International Law Commission, (iii) MFN in the GATT and the WTO, (iv) the Work of OECD on MFN, (v) the Work of UNCTAD on MFN, and (vi) the *Maffezini* problem under investment treaties.

B. CONSIDERATION OF THE TOPIC AT THE SIXTY-THIRD SESSION

3. In 2010 the Study Group decided, in an effort to advance its work, to try to identify further the normative content of the MFN clauses in the field of investment, and to undertake a further analysis of the case law, including the role of arbitrators, factors that explain different approaches to interpreting MFN provisions, the divergences, and the steps taken by States in response to the case law. At the present session, the Study Group had before it an informal document, in tabular form, identifying the arbitrators and counsel in investment cases involving MFN clauses, together with the type of MFN provision that was being interpreted.

4. It also had before it a working paper on the "Interpretation and Application of MFN Clauses in Investment Agreements" prepared by Donald McRae. The working paper built upon the prior study on the "The MFN clause and the *Maffezini* case" by Rohan Perera, by attempting to identify the factors that had been taken into account by the tribunals in reaching their decisions in order to assess whether these threw any light on the divergences that exist in the case law, with the objective of identifying categories of factors that had been invoked throughout the cases and to assess their relative significance in the interpretation and application of MFN clauses.

5. It also looked into the considerations that had played a part in investment tribunal decisions, dwelling on the *source* of the right to MFN treatment, as well as its *scope*. In terms of scope, it was noted that there were many ways in which investment tribunals had framed the application of the *ejusdem generis* principle, and even within some decisions different approaches had been taken. These included (a) drawing a distinction between

substance and procedure (jurisdiction); (b) following a *treaty interpretation* approach, whether by interpreting MFN provisions as a general matter of treaty interpretation or treating the matter as one of interpreting the jurisdiction of the tribunal; (c) adopting a *conflict of treaty provisions* approach, whereby tribunals take into account the fact that the matter sought to be incorporated into the treaty has already been covered, in a different way, in the basic treaty itself; and (d) considering the *practice* of the parties as a means to ascertain the intention of the parties regarding the scope of the MFN clause. Moreover, the working paper considered the question, albeit not explicitly dealt with by the tribunals as a factor, whether the *type of claim* being made had had an influence on the willingness of tribunals to incorporate other provisions by means of an MFN clause, as well as the *limits of the application of the MFN*, including the "public policy" exceptions set out in *Maffezini*.

6. The Study Group affirmed the general understanding that the source of the right to MFN treatment was the basic treaty and not the third-party treaty;671 MFN clauses were not an exception to the privity rule in treaty interpretation. It also recognized that the key question in the investment decisions concerning MFN seemed to be how the scope of the right to MFN treatment was to be determined, that is to say what expressly or impliedly fell "within the limits of the subject-matter of the clause".

7. It thus tracked the ways in which the *ejusdem generis* question had been framed particularly through the invocation of the distinction between substantive and procedural (jurisdictional) provisions. Where an MFN clause expressly included dispute settlement procedures or expressly excluded them, there was no need for further interpretation. Interpretation, however, was necessary in situations where the intention of the parties in relation to the applicability or not of the MFN clause to the dispute settlement mechanism was not expressly stated or could not clearly be ascertained, a situation common in many BIT's, which had open textured provisions. [168]

C. ISSUES FOR CONSIDERATION OF THE COMMISSION

8. The Study Group once more affirmed the need to study further the question of MFN in relation to trade in services and investment agreements, as well as the relationship between MFN, fair and equitable treatment, and national treatment standards. A further look should also be taken at other areas of international law to see if any application of MFN there might provide some insight for the Study Group's work. The Study Group affirmed its intention not to prepare any draft articles or to revise of the

[168] It also considered the recent decision in *Impregilo S.p.A. v. Argentine Republic*,673 in particular the concurring and dissenting opinion of Professor Brigitte Stern, Arbitrator, which *inter alia* argues that an MFN clause cannot apply to dispute settlement because of a core reason intimately linked with the essence of international law itself: there is no automatic assimilation of substantive rights and the jurisdictional means to enforce them, evidencing a difference between the qualifying conditions for access to the substantive rights and the substantive rights themselves, and the qualifying conditions for access to the jurisdictional means and the exercise of jurisdiction itself. See *Impregilo S.p.A. v. Argentine Republic Argentine* Republic-Italy BIT), ICSID Case No. ARB/07/17, 17 June 2011. See: http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&action Val=viewCase&reqFrom=Home&caseId=C109.

1978 draft articles. Instead, further work will be undertaken under the overall guidance of the Co-Chairmen of the Study Group to put together a draft report providing the general background, analysing and contextualizing the case law, drawing attention to the issues that had arisen and trends in the practice and where appropriate make recommendations, including model clauses.

XIII. ANNEX

TEXT OF THE STATEMENT DELIVERED BY PROF. DR. RAHMAT MOHAMAD, SECRETARY-GENERAL OF THE ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION (AALCO) AT THE SIXTY-THIRD SESSION OF THE INTERNATIONAL LAW COMMISSION (26 JULY 2010, GENEVA)

ADDRESS BY H.E. PROF. DR. RAHMAT MOHAMAD
SECRETARY-GENERAL, ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION

SIXTY-THIRD SESSION OF THE INTERNATIONAL LAW COMMISSION
26 JULY 2011, 10 A.M. (CONFERENCE ROOM XXI)

H.E. Mr. Maurice Kamto, Chairman of the International Law Commission,
Distinguished Members of the Commission,
Ladies and Gentlemen,

At the outset, I congratulate you on behalf of the Asian-African Legal Consultative Organization (AALCO), its Member States and on my personal behalf on your election as the Chairman of the International Law Commission. The AALCO continues to attach great importance to its longstanding relationship with the Commission. It would be my earnest endeavour to further strengthen this relationship in the years to come.

Mr. Chairman,
One of the statutory obligations of AALCO is to examine the questions that are under consideration of the International Law Commission, and thereafter, to forward the views of its Member States to the Commission. **My address would be short as the verbatim of the deliberation on the topic "Report on Matters relating to the Work of the International Law Commission at its Sixty-Second Session" held at the 50th Annual Session of AALCO would be circulated to all the Members of the Commission.**

Mr. Chairman,
It is my privilege to inform the Commission that the 50th Annual Session of AALCO was held in Colombo, Sri Lanka from 27th June to 1st July 2011. This was truly a historic session, hosted by one of the founding members of the Organization. One of the significant achievements of the Session was the constitution of an Eminent Persons Group (EPG) with the aim to serve as an "Advisory Body" for the Secretary-General to steer the work of the Organization. The aim of this group would be to suggest to the Secretary-General the short, medium and long term measures needed for the substantive work of the Organization, which include, how to enhance the profile and relevance of AALCO in the international arena; and how to contribute significantly to the substantive aspects of AALCO. A preliminary meeting of the EPG was also convened on the sidelines of the Annual Session and I am happy to inform that Four ILC Members from our Member States, namely, Dr. Rohan Perera (Sri Lanka); Hon. Amos Wako (Kenya); Prof. Shinya Murase (Japan); and Mr. Narinder Singh (India) are Members of the EPG. Dr. Rohan Perera was elected as the Chairman of the EPG. Prof. Djamchid Momtaz, Former Chairman of ILC, Islamic Republic of Iran is also a Member of the EPG. I am confident that this engagement would further strengthen the AALCO-ILC relationship and take it to greater heights.

Mr. Chairman,
The deliberations on the topic International Law Commission was held on 29th July 2011. In my introductory statement at the Session, I gave a brief overview of the work of the Commission at its 62nd Session and emphasized that inputs provided by the Member States of AALCO would be of immense significance to the ILC in formulating the future trajectory of its work, and that the feedback and information on the state practice of AALCO Member States would enable the Commission to take into consideration the views of diverse legal systems.

Dr. A. Rohan Perera, Member of the International Law Commission speaking in his personal capacity, due to paucity of time, focussed only on two key topics, namely, "The Effects of Armed Conflicts on Treaties" and "Immunity of State Officials from Foreign Criminal Jurisdiction" that were specifically dealt with in the first half of the Sixty-Third Session of ILC that took place from 26th April to 3rd June, 2011. He stated that the comments/viewpoints on these two items on the part of Member States would be of extreme importance to the work of the Commission. As regards the topic "The Effects of Armed Conflicts on Treaties", he pointed out that the text of draft articles on this issue along with the commentaries thereto, were adopted by the Commission at its first part of its Sixty-Third Session held in 2011. Giving a bird's eye view of the provisions of the draft articles, he noted that these draft articles as a whole reflected the general proposition that armed conflicts, *ipso facto*, does not terminate or suspend the operation of treaties, and that this rationale ran through the entire set of draft articles adopted on this issue. As regards the determination of whether a treaty survives an armed conflict or not, he noted that firstly, recourse should be made to the language of the treaty itself as provided for in the draft article 4 and that, in the absence of an express provision, resort would next be had under draft article 5 to the traditional rules of treaty interpretation contained in Article 31 of the Vienna Convention on the Law of Treaties. However, if no conclusive

answer was found following the application of these draft articles, the enquiry would then shift to a consideration of matters extraneous to the treaty as provided for in draft article 6, he added. He clarified that draft article 7 contained an indicative list of treaties that included *inter alia,* treaties creating permanent regimes such as land and maritime boundary, and treaties on human rights and international humanitarian law which were, on the basis of their subject matter, deemed to survive even in times of armed conflict.

As regards the topic "Immunity of State Officials from Foreign Criminal Jurisdiction", Dr. Perera informed that the Second Report of the Special Rapporteur on this subject was considered at the first part of the Sixty-Third Session of ILC. Explaining the difficulties contained in framing the boundaries of this topic, he pointed out that there are two questions that needed to be addressed in a concrete way for progress to take place on this issue. The first in his view was: Is there an exception to immunity in respect of what are called grave crimes under international law? The second was the question of the precise categories of persons apart from the well-known troika (the Heads of States, the Heads of Governments and the Minister of Foreign Affairs), who would be considered to enjoy immunity *ratione personae.* In this regard, he explained that the crux of the Report of the Special Rapporteur on this issue was that immunity of state officials from foreign criminal jurisdiction should be the norm and that, any exception thereto needed to be proved.

In summarizing the main trends of the debate, he noted that there were two streams of thought that informed the entire debate on the topic. According to one view, sovereignty must be limited, and that one could not talk of absolute immunity when grave crimes are committed. The principle of non-impunity is a core principle, and that one could not speak of absolute immunity where grave crimes are committed even by high-ranking officials. According to another view, the principle of immunity, which is well-established in international law, including the international customary law, does not brook any infringement and that, it was critical in preserving the stability of international relations. The challenge for the Commission, he added, lay in striking a proper balance between the two schools of thought. He also made a plea that the Member States of AALCO should give most serious consideration to this topic when the Report on this issue is before the Sixth Committee during the forthcoming United Nations General Assembly. He stated that it was important for the future work of the ILC to receive the views and policy guidance of Member States of AALCO on the sensitive issues which arise in the consideration of these topics, he added.

Prof. Shinya Murase, Member of the International Law Commission, also speaking in his personal capacity, focused his address on two points, namely, future topics that the International Law Commission should take up, and the need to follow-up the work of ILC. He mentioned that ILC had concluded its work on three of its topics and therefore new topics were to be chosen for the next quinquennium. Selection of the topics was based on practical, technical and political feasibility of the topic, moreover the work had to reflect the new developments in international law and the pressing concerns of the international community as a whole. Prof. Murase, had made a proposal to include 'Protection of Atmosphere' as a topic and prepare a comprehensive convention to address

the whole range of atmospheric issues such as transboundary air pollution, depletion of ozone layer and climate change which could be similar like Part XII of the Law of the Sea Convention on the protection and preservation of maritime environment. He hoped that the Sixth Committee would endorse this proposal. In relation to the relationship between ILC and the Sixth Committee, the need to follow-up developments of draft articles was required. He recalled that the conclusion of draft articles on transboundary aquifers completed in 2008, which could be adopt a resolution in the form of a General Assembly 'declaration' on the principles and rules applicable to transboundary aquifer, which could be a basis for future a framework convention. On the UN Convention on Jurisdictional Immunities of States and their Property**,** he recalled the contribution of the Special Rapporteur Amb. Sompong Sucharitkal and expressed his belief that his contribution would be duly recognized when the Convention comes into force with the necessary ratifications.

Mr. Chairman,
After these two detailed presentations made by the Members of ILC, the Delegations of the **Islamic Republic of Iran, People's Republic of China, Malaysia, Republic of Indonesia, India, Japan, State of Kuwait** and **Kingdom of Saudi Arabia** expressed their views on different topics on the agenda of the International Law Commission.

On the topic, **Effects of Armed Conflicts on Treaties,** one delegation stated that Article 2 includes express reference to the applicability of the draft articles to non-international armed conflicts. The delegation stated that it continue to deem it inappropriate to include those armed conflicts. The possible effects that this category of conflicts might have on treaties were indeed governed by the provisions of draft articles on "International Responsibility of States" under circumstances precluding wrongfulness. Further, article 73 of the Vienna Convention on the Law of Treaties, which is the basis of ILC's work on the subject, refers exclusively to the effects on treaties of armed conflicts between states.
Another delegation stated that the definition of armed conflict provided inadequate restrictive conditions for the term of armed conflicts therein, and that could easily be construed to any use of force and that this in turn could affect the stabilization of treaty relations.

On the topic, **Expulsion of Aliens,** one delegation was of the view that the expulsion must be made with due respect for fundamental human rights of the deportees. Another delagtion was of the view that nothing should stand in the way of extradition of an alien to a requesting State when all conditions for expulsion had been met and the expulsion itself did not contravene international or domestic law. One delegation stated that their country had observed the topic as stated in the international human rights law, particularly in lieu of the principles of sovereignty and non-intervention. The delegation emphasized that in addition to the general protection afforded to all foreigners, certain categories of foreigners, such as refugees and migrant workers, could be afforded additional protection against expulsion and other procedural guarantees.

On the topic, **Protection of Persons in the Event of Disasters,** one delegation observed that it was for the affected State to determine whether receiving external assistance in the

event of disaster is appropriate or not. Any suggestion to penalize the affected States would be contrary to international law. Another delegation mentioned that humanitarian assistance should be undertaken solely with the consent of the affected country and with utmost respect for national sovereignty, territorial integrity, national unity and the principle of non-intervention in the domestic affairs of States. Yet another delegation reiterated that the affected State has the principal right, and indeed the obligation, for meeting the needs of victims of disasters within its own borders. The affected State holds the right to decide where, when and how relief operations are to be conducted and possess the power to dictate the terms of the humanitarian response.

On the topic, **Responsibility of International Organizations,** the delegation underlined the importance on the set of draft articles on Responsibility of International Organizations adopted on second reading by the drafting committee during the present session of the Commission and recommended that the AALCO Secretariat could undertake a study on it and present it to the next Annual Session a comprehensive report on the subject.

On the topic, **Law of transboundary aquifers,** one delegation highlighted that the ILC, in an effort to provide a legal framework for the proper management of groundwater resources, had formulated a set of 19 draft articles on the issue based on the texts drafted by Ambassador Chusei Yamada, the Special Rapporteur on the topic. In this regard, the delegation suggested that the draft articles could either be adopted as a universal treaty at a diplomatic conference or as a Declaration of the UN General Assembly. Another delegation while acknowledging the importance of the topic of transboundary aquifers and stated that taking into account the global water crisis, at present, the draft articles would be useful in the form of guidelines and not in a legally binding form. It observed that States may enter into appropriate bilateral or regional arrangements for the proper management of their transboundary aquifers, as recommended by the ILC, subject to the capacity and resources of States to carry it out.

On the topic, **Reservation to Treaties,** one delegation observed that Member States should study the draft guidelines carefully in the light of their respective practice and express their positions in the debate on the topic in the Sixth Committee of the UN General Assembly.

One delegation took note and supported the proposed topic **International Environmental Law** as the Commission would be able to contribute effectively towards clarifying and redefining the basic principles and rules of international environmental law.

As regards the topic proposed by Prof. Shinya Murase on the **Protection of Atmosphere** two delegations favoured and supported the proposal that the ILC should study the topic "Protection of the Atmosphere" as a possible future topic. One delegation stated that this was made essential by the fact that there existed significant gaps in the applicable principles and rules of international law on this issue. In this regard, the delegation requested the Member States of AALCO to consider this proposal seriously and to agree to authorize this proposal as a new topic.

On the topic **Most-Favoured Nation Clause,** one delegation stated that **t**he consideration of this topic must be addressed within the context of the WTO Agreements and the plethora of regional economic agreements, customs unions, bilateral Free Trade Agreements, Bilateral Investment Treaties and Investment Guarantee Agreements. The delegation observed that it was also trite that MFN clauses were very much intertwined with the bilateral and regional interests of the States involved, and driven by domestic policies and issues of State sovereignty, and politically sensitive and technically and operationally complex. It also observed that other trade-related bodies such as the WTO, UNCTAD and OECD are already undertaking studies on this matter. As such it would be incumbent on the ILC not to duplicate or overlap with the studies already underway and on which States have more direct participation and contribution.

Mr. Chairman,

Apart from the specific comments on the topics, some **general comments and observations** were also made by the delegations. I would like to highlight some of the important points:

- One delegation supported any efforts to send young officers for attachment or internship programme at ILC. The delegation proposed that the ILC Members from the Asian and African continents open their doors to accept attachment or internship on the recommendation of the respective governments, subjects to applicable ILC rules and procedure. The delegation also called for the Report of the ILC to be made available at least one month before it comes up for consideration by the Sixth Committee as this would facilitate in-depth deliberations.

- Another delegation pointed out that there were three ways for the Commission to obtain the opinions of the Member States. The Commission could seek the opinion before the topic is taken up, and secondly, it could elicit the view points of States by means of circulating questionnaires to them, and finally, it could also seek opinions through comments on the draft articles adopted by the Commission. The delegation urged the Member States of AALCO to respond to these requests, and also to participate in the Sixth Committee's consideration of the ILC report so that their views and positions could also make an impact on the outcomes of the ILC's work.

- While stressing the need for the Asian-African States to make a substantial contribution towards the work of ILC, one delegation suggested that the AALCO Secretariat could formulate questionnaires on each topic that was dealt with by the Commission and, in this regard, made a request that the Member States of AALCO to provide their answers to those questionnaires. The AALCO Secretariat, could, then, compile those answers and submit them to the Secretariat of ILC. This exercise, in their view, would gradually but certainly affect the formation and substance of customary international law.

- Some delegations were of the view that the Annual Sessions of AALCO should devote more time for deliberating on the agenda item relating to the work of ILC,

as it would enable the delegates to have in-depth discussions on the items on the agenda of the ILC. Taking into consideration this suggestion, the Resolution (AALCO/RES/50/S1 of 1 July 2011) adopted at the 50th Annual Session on this topic has requested the Secretary-General to consider holding a Special Meeting on this topic at the next Annual Session.

Mr. Chairman,
Allow me to express my sincere gratitude towards the Commission for inviting the Asian-African Legal Consultative Organization for participating at the Sixty-Third annual session of the Commission.

I thank you for the opportunity afforded to me.

Thank you Mr. Chairman.