

**IX. VERBATIM RECORD OF THE SPECIAL HALF-DAY MEETING ON  
“SELECTED ITEMS ON THE AGENDA OF THE INTERNATIONAL LAW  
COMMISSION” HELD ON WEDNESDAY, 20 JUNE 2012 AT 10.00 AM**

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

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

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

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

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

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

The report prepared by the AALCO Secretariat contained in AALCO/51/ABUJA/2012/SD/S 1, briefly discusses the matters relating the work of ILC at its Sixty-Third Session. The agenda items dealt during the Sixty-Third session of the ILC were: Reservations to treaties, Responsibility of International Organizations, Effects of armed conflicts on treaties, Immunity of State officials from foreign criminal jurisdiction, Expulsion of aliens, Protection of persons in the event of disasters, The obligation to extradite or prosecute (*aut dedere aut judicare*), Treaties over time, and Most-Favoured-Nation clause.

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

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

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

resolution and to annex them to the resolution. Further to consider, at a later stage, the elaboration of a Convention on the basis of those draft articles.

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

The Commission deliberated upon the addendum 2 to the sixth report and the seventh report of the Special Rapporteur on the topic “*Expulsion of Aliens*”. Addendum 2 to the sixth report completed the consideration of the expulsion proceedings (including the implementation of the expulsion decision, appeals against the expulsion decision, the determination of the State of destination and the protection of human rights in the transit State) and also considered the legal consequences of expulsion (notably the protection of the property rights and similar interests of aliens subject to expulsion, the question of the existence of a right of return in the case of unlawful expulsion, and the responsibility of the expelling State as a result of an unlawful expulsion, including the question of diplomatic protection). Following a debate in plenary, the Commission referred seven draft articles on these issues to the Drafting Committee, as well as a draft article on “*Expulsion in connection with extradition*” as revised by the Special Rapporteur during the sixty-second session held in 2010. The seventh report provided an account of recent developments in relation to the topic and also proposed a restructured summary of the draft articles.

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

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

On the topic “*Treaties Over Time*”, the Commission reconstituted the Study Group on Treaties over time, which continued its work on the aspects of the topic relating to subsequent agreements and practice. The Study Group first completed its consideration of the introductory report by its Chairman on the relevant jurisprudence of the International Court of Justice and of arbitral tribunals of *ad hoc* jurisdiction, by examining the section of the report which addressed the question of possible modifications of a treaty by subsequent agreements and practice as well as the relation of subsequent agreements and

practice to formal amendment procedures. The Study Group then began its consideration of the second report by its Chairman on the jurisprudence under special regimes relating to subsequent agreements and practice, by focusing on certain conclusions contained therein. In the light of the discussions, the Chairman of the Study Group reformulated the text of nine preliminary conclusions relating to a number of issues such as reliance by adjudicatory bodies on the general rule of treaty interpretation, different approaches to treaty interpretation, and various aspects concerning subsequent agreements and practice as a means of treaty interpretation.

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

Mr. Vice-President, pursuant to the mandate received by the Fiftieth Annual Session of AALCO held in Colombo, Sri Lanka, in 2011, an Inter-Sessional Meeting of Legal Experts to Discuss Matters relating to the ILC was held in April this year at AALCO Headquarters, New Delhi. The report of the Inter-Sessional Meeting is annexed to the Secretariat report on this agenda item from page no. 62 to 106. The Lead Discussants for the Inter-Sessional Meeting were Dr. A. Rohan Perera, who is with us today, and Prof. Shinya Murase, Member of the ILC from Japan. It was an honour for me to deliver welcome remarks on behalf of AALCO and to give a detailed presentation on “Appraisal of the Present and Future work of the ILC”.

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

Mr. Vice-President, few major suggestions that evolved out of the Legal Experts Meeting with regard to the proposed new topics were to focus on whether there was a need for the Commission to work on those proposed topics. Also, if there were any topic which a Member State considers as contemporary and relevant, it should put forward during this

meeting and the Secretariat would forward such comments to the Commission at its second part of the Sixty-fourth session which will begin next month.

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

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

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

So my first presentation is on the topic “Protection of Persons in the Event of Disasters”. From the time this topic was introduced, the Special Rapporteur, Mr. Eduardo Valencia-Ospina placed emphasis on certain tensions surrounding the core principles underlying the topic. I quote, “the tensions underlying the link between protection and the principle of respect for territorial sovereignty and the non-interference in the internal affairs of the affected State.” The question of protection of affected persons within the State, victims of natural disasters on the one hand and the fundamental principle of respect for sovereignty and territorial integrity of States which fall within both Customary International Law and Art.2 (7) of the UN Charter.

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

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

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

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

The cluster of Articles 10-12, given the underlying tensions between the principles of State sovereignty and protection, was the subject of sharp divergence of views among the members of the Commission. Some members were opposed to the idea that affected States are under or should be placed under a legal duty to seek external assistance in cases of disasters. Draft Article 11 creates a "qualified consent regime" in respect of disaster relief operations. Paragraph 1 reflects the core principle that implementation of international relief assistance is contingent upon the consent of the affected State. Paragraph II however stipulates that consent to external assistance shall not be withheld arbitrarily and paragraph III places a duty on the affected State to make its decision regarding an offer of assistance known, wherever possible. The need to develop criteria to determine the arbitrariness or otherwise of a decision to refuse consent was also discussed and several principles were adduced, for reflection as guidelines in the Commentary. One, the Commission considers that withholding consent to external assistance is not arbitrary where a State is capable of providing, and willing to provide, an adequate and effective response to a disaster on the basis of its own resources. Two, withholding consent to assistance from one external source is not arbitrary if an affected State has accepted appropriate and sufficient assistance from elsewhere. Three, withholding of consent is not arbitrary if the relevant offer is not extended in accordance with the present draft articles. Humanitarian assistance must take place in accordance with principles of humanity, neutrality and impartiality, and on the basis of non-discrimination. Conversely, where an offer of assistance is made in accordance with the draft articles and no alternate sources of assistance are available; there would be a strong inference that a decision to withhold consent would be arbitrary.

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

mere expression of solidarity was equally important as offers of assistance. It was suggested that the right of the international community to offer assistance could be combined with an encouragement by the Commission to actually make such offers of assistance on the basis of the principles of cooperation and international solidarity.

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

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

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

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

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

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

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

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

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

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

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

felt that the end product of this exercise should have practical utility for the international community of States. The discussions on this topic led to the conclusion that the Commission should establish a Working Group to discuss this issue of orientation and then to proceed with this topic.

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

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

The Special Rapporteur emphasized that immunity from criminal jurisdiction and immunity from criminal responsibility were separate concepts by way of decisions of International Courts and so on. Immunity and foreign criminal jurisdiction was the issue to be tackled. The question of State Responsibility for wrongful conduct are provided with remedies in International Law by way of international tribunals, diplomatic procedures. Here we are dealing with the jurisdiction of Domestic courts. In response to the contention of the hierarchy of norms whereby *jus cogens* prevailed over immunities the Special Rapporteur contended that *jus cogens* rules which prohibit or criminalize certain acts are substantive in nature and cannot overturn the procedural rule such as one concerning immunity. The Special Rapporteur’s point that *jus cogens* rule belongs to the sphere of substantive rules and immunity the procedural rules. And therefore one can argue that they belong to two different characters, one substantive and the other

procedural. You cannot say that one prevails over the other and this has been recently upheld by the International Court of Justice in its case concerning Germany Vs Italy. The ICJ held that there cannot be a conflict between rules which are substantive in nature and rules on immunity which are procedural in nature. The Special Rapporteur was also at pains to point out that the question of International Criminal Jurisdiction was entirely one that was to be separated and needed to be distinguished from the concept of foreign criminal jurisdiction. In his view the Rome statute of the ICC was unlikely to be relevant in respect of foreign criminal jurisdiction. This is something very important. We all know that the Rome Statute expressly precludes immunity being invoked even in respect of Heads of States. So once states voluntarily accept that obligation, and waive immunity before an international court or tribunal it has no application where it concerns the jurisdiction of domestic courts over foreign Heads of States. The Special Rapporteur was at pains to point out that we are dealing with the question of state responsibility. State Responsibility for wrongful conduct has other remedies, the diplomatic procedures, the international procedures, the international tribunals. What is emphasized here is that one state is enjoying immunity from the jurisdiction of another state, the domestic court of other states. This was an issue pointed out by the Special Rapporteur. With this I come to the end of my presentation and I thank you Vice-President.

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

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

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

on that and I am sure that the person who is in charge of this subject would have exactly the same question.

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

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

I agree with the question of distinction made between *lex lata* and *lex ferenda*. I remember that the former Special Rapporteur on this subject had expressed a note of caution that we have to focus on codifying the existing customary practice of States in international law as it exists and to invite the attention to the fact that practice of States on these matter. I want to raise a last question regarding the decision of the International Court of Justice (ICJ) on the dispute between Germany and Italy. Dr. Perera referred to this case and I have a question to him and I hope that he is in a position to answer that. I want to know if the ICJ, in insisting in this decision on immunity of States before national jurisdiction or tribunals referred only to the acts committed by armed forces of a state outside its territorial jurisdiction or the decision of the court of all the *Acta jure imperii* of States and does not make distinction between acts committed by the armed forces that is the better example I can say of *Acta jure imperii*. That decision of the ICJ insisted once more on the jurisdictional immunity of States before national tribunals. I think I will stop there and once more I want members of this august assembly to respond to the issues raised by the International Law Commission through the questionnaires of the Special Rapporteurs. Thank you very much Mr. Vice-President.

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

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

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

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

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

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

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

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

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

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

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

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

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

It is necessary to include consequential provisions regarding the protection of the human rights of the person subject to expulsion, as have been proposed by the Special Rapporteur in the 63<sup>rd</sup> Session of ILC. Such provisions provide that the rules that apply in the expelling State for protection of the human rights of aliens subject to expulsion, shall also apply mutatis mutandis in the transit State.

Come to the topic of the Protection of Persons in the Event of Disasters, regarding the issue of the responsibility of the affected State to seek assistance where its national response capacity is exceeded, our delegation is of the view that humanitarian assistance should be undertaken solely with the consent of the affected country, and with the outmost respect for the core principles such as sovereignty, territorial integrity, national unity and non-intervention in the domestic affairs of States. The need for the appropriate

balance between those principles and duty of protection were not accurately reflected in the draft articles of the topic.

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

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

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

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

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

First of all, Japan would like to welcome new members of the ILC from the Asian and African regions who were elected in the elections last November. Two new members from Asia (from Thailand and the Republic of Korea) and four new members from Africa (from Algeria, Tanzania, Libya and South Africa) were elected to the ILC. Japan wishes that those new members will make valuable inputs into the work of the ILC and collaborate constructively with other members of the ILC from Asia and Africa and other regions. At the same time, it should be borne in mind that, once they are elected, all the members of the ILC are expected to attend the Commission throughout its session from April or May to June and from July to August every year and to contribute to the work of the Commission. This is essential for more various views, especially from the Asian and African regions, to be reflected in the draft articles, guidelines or studies of each topic before the ILC.

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

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

On the other hand, Resolution 66/104 of the UN General Assembly further encouraged the State concerned to make appropriate bilateral or regional arrangements for the proper management of their transboundary aquifers, taking into account the provisions of the draft articles and decided to examine the question of the form that might be given to them in its sixty-eighth session in 2013. One possible form which could be given to the draft articles is to adopt them as a universal treaty at a diplomatic conference. Another possible form is to adopt the draft articles as a declaration, like the UN General Assembly Resolution of 1962 (XVIII), which was titled "Declaration of Legal Principles Governing the activities of States in the Exploration and Use of Outer Space". Towards the session of the UN General Assembly next year, I would like to urge Member States of the

AALCO to consider this matter seriously. Japan wishes to consult with you as to how we can best proceed on this matter.

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

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

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

Mr. Vice-President, with regard to the selection of new topics for the ILC, Japan would like to refer to the argument put forward by an academic that for a topic to be selected,

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

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

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

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

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

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

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

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

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

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

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

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

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

Turning to the content of the proposed draft articles, I should start by a note of caution regarding the progressive development of a rule which does not enjoy sufficient State

practice. I should also underline the importance of taking into account by the Commission of the views and concerns expressed during the sessions of the Sixth Committee by the Member States.

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

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

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

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

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

The principle of immunity of the “troika” (Head of State, Head of Government and Minister of Foreign Affairs) which is well established and recognized beyond any doubt

in customary international law is the key guarantor of stability in international relations and the effective tool for the smooth exercise of prerogatives of the State.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

emergency response. Principle in the AADMER could provide guide in regional practice in dealing with disaster management.

Mr. Vice-President, in relation to the topic of Expulsion of Aliens, Malaysia takes note of the Special Rapporteur's responses to the issues raised by Malaysia in the 6<sup>th</sup> Committee of the 66<sup>th</sup> Session of the UN General Assembly. Malaysia endorses the Special Rapporteur's views that it is premature at this stage to decide on the final form of the work of the ILC on this topic particularly when there are many issues that need clarification and consideration.

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

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

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

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

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

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

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

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

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

The **Delegate of Kingdom of Saudi Arabia**<sup>1</sup>: Thank your Mr. Vice-President. I thank and extend my appreciation to Dr. Perera on legal analysis regarding topic which he presented this morning. With regard to Protection of Persons in the Event of Natural Disasters, our country takes interest in draft articles for extending assistance in case of disaster. The Kingdom is a pioneer country in lending assistance to countries who face disasters. It has provided assistance to the affected States in case of floods, earthquakes and drought. In this regard, the basic problem is not in the nature of assistance, but in how to provide assistance during disaster.

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

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

The **Delegate of State of Kuwait**<sup>2</sup>: Thank you Mr. Vice-President. I thank and appreciate Dr. Rohan Perera and Prof. Momtaz on providing their views on the important topics of ILC. I would give very short remarks regarding the topic expulsion of aliens. Kuwait has respect for workers human rights which should be taken into consideration. Kuwait takes interest and care in applying such standards. This issue is very substantive which Member States of AALCO should take into consideration if any State is applying these standards or not. With regard to ICC, perhaps the main reason for establishing that international organization with an international character is to act in accordance with justice and equality whereas the UNSC is not capable to do so. Unfortunately there has been lack in

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<sup>1</sup> Statement delivered in Arabic. The Official translation from the translator's version.

<sup>2</sup> Statement delivered in Arabic. The Official translation from the translator's version.

promulgation of some rules. There are some shortcomings in implementation of treaties and agreements. No action has been taken against Israeli criminals whereas even when Sudan is not party to the ICC action has been taken against them. Therefore, action is not taken on equal basis and the issue of immunity needs more coordinated approach in ILC.

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

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

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

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

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

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

The distinguished representative of Kuwait raised the question of the absolute immunity enjoyed by the Head of State or government and raised a question of where a Head of State is not expected to commit an international crime. Here the rationale is that, as I mentioned, as far as the Rome Statute is concerned - Article 27 - clearly amounts to waiver of immunity in respect of such categories of persons. What the draft articles of the ILC is dealing with is the exercise of jurisdiction by domestic courts of foreign States. There the problem that arises is the conflict with the principle of sovereign equality. If a foreign Head of State while being in office is summoned before a foreign court of law

that will lead to a situation of international tension of disrupting stability of stable international relations and so on. So the rationale is that in such situations, there are other remedies that are available once that person has given up office. As far as the jurisdiction of International Criminal Court is concerned you cannot plead the fact that you are a serving Head of State. By virtue of being party to the Statute you have expressly waived the immunity. Different factors come into frame where national courts of foreign State begins to exercise jurisdiction over serving Heads of State and that would impact the stability of international relations. So that is the approach as far as the ILC Draft Articles are concerned.

Number of delegations referred to the work of “expulsion of aliens” which we did not discuss today due to lack of time. But as a matter of information I might just mention draft Article 27 which clearly is being presented as a matter of progressive development. The text of draft articles 1-32 were provisionally adopted last month in the first segment of the sixty-fourth session of the ILC and that is contained in the document A/CN.4/L.797. It is very important that these articles receive attention of Member States of AALCO. The first reading is complete. ILC has sought the views of the Member States particularly on the question of right of appeal. These articles proceed on the basis of persons in lawful presence and unlawful presence. It seeks to strike a balance between sovereignty and State’s right of expulsion and human rights obligations of the State. I might just mention to draft article 27 which clearly being presented as a matter of progressive development. “Suspensive effect of an appeal against an expulsion decision”: “An appeal lodged by an alien subject to expulsion who is lawfully present in the territory of the expelling State shall have a suspensive effect on the expulsion decision.” Now this was a matter of considerable comment both within the Commission and the Sixth Committee. The draft article says that an appeal can have suspensive effect on the expulsion decision. Now what effect does this have on the speedy disposal of expulsion procedures? What is the impact on the right of expulsion as a sovereign attribute? Is it supported by state practice, by case-laws etc., these are questions that ILC has raised and this is awaiting response from Member States. So draft articles 27 as approved by the Drafting Committee last month should receive your particular attention.

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

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

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

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

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

On the topic “protection of persons in the event of disasters”, my delegation appreciates the report presented by Dr. Rohan Perera and we take note of the draft articles submitted by the Special Rapporteur. On the issue of ‘immunity of State Officials from Foreign Criminal Jurisdiction, we share the general view that the work on the immunity of State officials should consider only foreign criminal jurisdiction. Questions relating to immunity with respect to international criminal tribunal and domestic courts should be excluded. The source of immunity must not be international comity but international law. Therefore, we agree with the view that the proposal of the Special Rapporteur that the timings for raising immunity in criminal proceedings should be considered either at the initial stage or pre-trial stage of the proceedings. In this regard, it is appropriate that the Commission may study in-detail the implications of not considering of immunity at the early stage of criminal proceedings. On considering the immunity ratione personae beyond Troika, we are in favour of an independent, clear criterion in establishing such practice for which we need enhanced cooperation among States concerned in matters relating of immunity of State officials. With regard to immunity, we share the view that the right to waive immunity of officials vest in the State and not in the official list.

Delegate from Japan raised the concern regarding the UN Convention on Jurisdictional Immunities of States and Their Property. This is a Convention that concerns all of us very directly. So the Convention was drafted after long discussion, in-depth negotiations at the International Law Commission and at the Sixth Committee. I join Japanese delegation in urging all Member States of AALCO to ratify or accede to this Convention so that it enters into force without much delay. I would like to add that India has already signed the Convention and is in the process of enacting legislation and as soon as that process is over, we would be in a position to ratify that. I thank you very much.

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

**The Meeting was thereafter adjourned.**