X. VERBATIM RECORD OF THE SPECIAL HALF-DAY MEETING ON "SELECTED ITEMS ON THE AGENDA OF THE INTENRATIONAL LAW COMMISSION" HELD ON WEDNESDAY, 11 SEPTEMBER 2013 AT 09.00 AM

Her Excellency Dr. Neeru Chadha, President of the Fifty-Second Session of AALCO in the Chair.

President: Today on the first-half of the day, we have the special half-day meeting on "Selected Items on the Agenda of the International Law Commission". I will give the floor to the Secretary-General now to introduce the panellists.

Secretary-General: Thank you Madam President. Her Excellency Madam President of Fifty-Second Annual Session of AALCO; Sir Michael Wood and Mr. Narinder Singh, Distinguished Members of the International Law Commission; Dr. A. Rohan Perera, Former Member of the International Law Commission; 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". First and foremost, on behalf of the Organization, I would like to pay tribute to late Ambassador Chusei Yamada and commemorate in grief, his contributions in the field of International Law as distinguished Member of the ILC from Japan and as Special Rapporteur on the topic "Shared Natural Resources".

The AALCO and the International Law Commission (ILC) has a longstanding mutual cooperation. Considering the importance of the work of ILC, the AALCO was statutorily mandated by its Member States to follow and exchange the views of its Member States on the agenda items of the ILC. Customarily, both the Organizations mutually represent at their respective annual session. On behalf of AALCO, I had the opportunity to address the Sixty-Fifth Session of the ILC. Since the AALCO's fifty-second annual session was scheduled after the sixty-fifth session of the ILC, I had briefed the Commission about AALCO's comments and observations on specific agenda items of ILC on (9 July 2013).

Excellencies, I have the privilege to invite Sir Michael Wood, Member of the ILC and distinguished Special Rapporteur for the agenda item "Formation and Evidence of Customary International Law" to this Annual Session. I look forward for Commission's message to AALCO on the Work of the ILC. I take the opportunity to invite Mr. Narinder Singh, distinguished Member of the ILC from India who has served as former President of AALCO as a panellist to this session; and Dr. A. Rohan Perera, the distinguished member of the Commission from Sri Lanka and the Chairman of the Eminent Persons Group (EPG) of AALCO, to this special Half-Day Meeting.

Briefly, the deliberations at the sixty-fifth session of the Commission focused on seven topics listed on the agenda of the ILC; namely, (i) Subsequent agreements and subsequent practice in relation to the interpretation of treaties, (ii) Provisional application of treaties, (iii) Most-Favoured Nation clause, and (iv) Obligation to Extradite or Prosecute *(aut dedere aut judicare).* With a view to have a focused deliberation on the work of the ILC; it was decided that this

Special Meeting on "Selected Items on the Agenda of the International Law Commission" would be on three important topics of ILC: namely,

- Protection of persons in the event of disasters
- Immunity of State officials from foreign criminal jurisdiction
- Formation and evidence of customary international law

Summary of the Work of ILC on its agenda Items

Madam President, Excellencies, Ladies and Gentlemen; The topic "Treaties over Time" was changed to "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" and Mr. Georg Nolte was appointed as the Special Rapporteur for this topic. The Commission considered the first report and dealt with (i) general rule and means of treaty interpretation, (ii) Subsequent agreements and subsequent practice as means of interpretation, (iii) Definition of subsequent agreement and subsequent practice as means of treaty interpretation, and (iv) Attribution of treaty-related practice to a State.

On "Provisional Application of Treaties", the Commission considered the Memorandum of the Secretariat and the First Report of the Special Rapporteur, Mr. Juan Manuel Gómez-Robledo. The report discussed the procedural history of the "provisional application of treaties*", Raison d'etre* of provisional application of treaties; Shift from provisional "entry into force" to provisional "application"; legal basis for provisional application; Provisional application of part of a treaty; Conditionality, Juridical nature of provisional application Termination of provisional application. The focus of the study would be on Article 25 of the Vienna Convention on the Law of Treaties, 1969. The principal legal issues that arise in the context of the provisional application of treaties by virtue of doctrinal approaches to the topic would review the existing State practice.

The Study Group on "Most-Favoured Nation clause" had before it a working paper entitled "A BIT on Mixed Tribunals: Legal Character of Investment Dispute Settlements" by Mr. Shinya Murase. The catalogue of the provision was prepared by Mr. Donald McRea and Dr. A. Rohan Perera. The Study Group traced the contemporary practice and jurisprudence relevant to the interpretation of MFN clauses. In this connection, it had before it recent awards and dissenting and separate opinions addressing the issues under consideration by the Study Group.

The Report of the Working Group on "Obligation to Extradite or Prosecute (*aut dedere aut judicare*)", consisted of detailed discussion of recent ICJ decision on Obligation to Extradite or Prosecute (2012) (Belgium v. Senegal). The decision was helpful in elucidating: Basic elements of the obligation to extradite or prosecute to be included in national legislation, Establishment of the necessary jurisdiction, Obligation to investigate, Obligation to prosecute, Obligation to extradite, and Consequences of non-compliance with the obligation to extradite or prosecute.

Madam President, Excellencies, Ladies and Gentlemen; As mentioned earlier, this special meeting would be focusing on three agenda items: (i) protection of persons in the event of disasters; (ii) immunity of State Officials from foreign criminal jurisdiction; and (iii) formation and evidence of customary international law. On "Protection of Persons in the Event of

Disasters", the Commission considered the sixth report of the Special Rapporteur Mr. Eduardo Valencia-Ospina. The report discussed about the historical development of concept of disaster risk reduction, prevention as a principle of international law tracing from human rights law and environmental law; international cooperation on prevention as dealt under bilateral and multilateral instruments; national policy and legislative framework on prevention, mitigation and preparedness; and proposal to include draft Article 16 on 'duty to prevent' and draft Article 5 ter on 'Cooperation for disaster risk reduction'.

As regards the topic "Immunity of State officials from foreign criminal jurisdiction", the Commission considered the second report which dealt with the Scope of the topic and the draft articles; the concepts of immunity and jurisdiction; the distinction between immunity *ratione personae* and immunity *ratione materiae*; and, the normative elements of immunity *ratione personae*. Moreover, three draft Articles 1, 3 and 4 on 'scope of the present draft articles', 'persons enjoying immunity *ratione personae*', and 'scope of immunity *ratione personae'*, was adopted by the Commission.

Madam President, Excellencies, Ladies and Gentlemen; I need not mention at length on the topic "Formation and Evidence of Customary International Law" as we have Special Rapporteur Sir Michael Wood amongst us to enlighten us on this topic. However, I would like to precisely refer to this subject. There were two main documents which were considered by the Commission. First, the memorandum of the Secretariat on "elements in the previous work of the International Law Commission that could be particularly relevant to the topic Formation and evidence of Customary Evidence of International Law; and second, First Report of the Special Rapporteur Mr. Michael Wood on this subject of Formation and evidence of Customary Evidence of International Law. The First report on the topic explains the scope and outcome of the topic which addresses whether to cover *jus cogens*; customary international law as source of international law under Article 38 of the Statute of the International Court of Justice. Also, refer to materials that would be considered during the study which focuses on (i) Approach of States and other intergovernmental actors, (ii) Case law of the International Court of Justice, (iii) Case law of other courts and tribunals, (iv) work of other bodies, and (v) Writings.

Comments of AALCO Secretariat

Madam President, Excellencies, Ladies and Gentlemen; The concept of prevention as referred under 'protection of persons in the event of disasters' is definitive concept in international law and is a possible measure to reduce the disaster risk. However, pre-disaster preparedness even at the presence of national legislations and authorities would be very limited due to shortage of funding disaster management which remains a challenge for many of the developing countries. It would be more relevant to deal with technology transfer in terms of addressing post-disaster relief and rescue operations within the country. Indeed, AALCO Secretariat is of the view that duty to offer assistance, previously discussed in the fifth report on this subject, shall be not compulsory but voluntary and should respect the principle of non-intervention in the internal affairs of the state by assistance offering state.

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. The view of AALCO Secretariat conforms to the view of the Special Rapporteur to the extent that in the absence of compelling arguments to the contrary, the status quo with regard to the extension of protection offered by immunity *ratione personae* being limited to the "troika" be maintained.

The topic "Formation and Evidence of Customary International Law" is very significant as far as AALCO Member States are concerned, because, in order to derive the 'attitude of states and international organization', materials on state practice which has been requested by the Rapporteur must be transmitted by the States. Those approaches and materials would be very essential to evolve evidentiary practices on customary international law from the developing country's perspective. Such comments and country positions would contribute towards established State practices under international law. Further, it is the strong view of the AALCO Secretariat that resolutions of International Organizations, especially AALCO, form part of customary international law. Moreover, the statements presented at forums such as AALCO, depict the 'state practice' which should also be regarded as customary international law.

I once again welcome all the panellists to this Special Meeting and look forward for a detailed discussion on these three subjects.

Thank you very much Madam President.

President: Thank you for introducing the subject. I now request Sir Michael Wood, who is a member of the International Law Commission as well as the Special Rapporteur on the topic of "Formation and Evidence of Customary International Law" to make the presentation.

Sir Michael Wood, Distinguished Member of the International Law Commission and Special Rapporteur on the topic "Formation and Evidence of Customary International Law": Thank you Madam Chairperson.

Mr. Secretary-General, Your Excellencies, Ladies and Gentlemen,

Thank you, Your Excellency, Professor Dr. Rahmat Mohamad, for the invitation. It is a great honour, and a pleasure, to address this distinguished body. The last time I attended the AALCO Annual Session was in Cairo in 1990.

I must make it clear that I am here in a personal capacity, not as a representative of the Commission in any formal sense.

Let me say how much I appreciate the fact that AALCO is organising a full half-day session on the International Law Commission, which is much appreciated.

I propose to do three things. First, I shall mention some ILC-related matters which do not actually arise from this year's session. Second, I shall describe briefly the Commission's 2013

session, focusing on those areas where the views of States would be most welcome. And finally I shall speak on the three topics which you have chosen for the present session.

United Nations Convention on the Jurisdictional Immunities of States and Their Property, 2004

I should like pay tribute to the AALCO's contribution, over the years, to the development of international law. I note that you held special meeting in March this year to commemorate the thirtieth anniversary of the Law of the Sea Convention, as well as a session yesterday. The law of treaties is another topic to which the AALCO made a significant contribution. But I would like to mention an even earlier project. Professor Gerhard Hafner has recently written that the AALCC 'led the way with its work on State immunity in the late 1950s'.[1] It was the first inter-governmental body to work, in a general way, on State immunity. At your third session, in 1960 in New Delhi, you considered a report which "proceeded from the premise that a State which entered into a transaction of a commercial or otherwise private character ought not to enjoy immunity from proceedings in another State's courts in respect of that transaction."[2]

Eventually, the seeds sown by this organization bore fruit with the adoption by the UN General Assembly, in 2004, of the **UN Convention on the Jurisdictional Immunities of States and Their Property.** A number of AALCO members played a major role: Sompong Sucharitkul from Thailand and Ambassador Ogiso from Japan were very distinguished Special Rapporteurs; more recently, the late Ambassador Chusei Yamada from Japan, whose passing we mourned earlier this year, played a central role, as did China and India. A number of AALCO members have already signed or acceded to the Convention. Those that have ratified or acceded include Iran, Japan, Lebanon and Saudi Arabia; in addition China and India have signed. I hope that more AALCO members will join the Convention in the near future, thus continuing to lead the way in this important field. 2014 will mark the tenth anniversary of the adoption of the Convention, and that would be a good date to aim for. Perhaps AALCO might make this a special topic for its meeting in 2014, with a view to encouraging participation in the Convention.

Draft Articles on Expulsion of aliens

I now turn to the Commission's first reading draft articles on expulsion of aliens, which were completed in 2011, under the wise leadership of Professor Kamto of Cameroon. States have been requested to submit written comments on the 32 draft articles by 1 January 2014. The Commission will then conduct a second (and final) reading in 2014. We will do so in light of the written and oral comments of States over the years, but particularly their written comments this year. It is essential that comments be received in good time, if Special Rapporteur Kamto, and the Commission itself, are to be able to take them fully into account. I need not stress the importance of this sensitive topic, and the importance of getting the draft articles right, both for States and for the affected individuals.

[1] G Hafner, in: O'Keefe, Tams, *The United Nations Convention on Jurisdictional Immunities of States and Their Property. A Commentary* (2013), p. 3.

[2] AALCC, *Final Report of the Committee on Immunity of States in respect of Commercial and Other Transactions of a Private Character, as revised a the third session of the AALC*C (partly reprinted in M Whiteman's Digest vol 6, 553, 573).

Guide to Practice on Reservations to Treaties

This year the annual debate on our work in the Legal Committee of the UN General Assembly will, at long last, hold a debate on the Guide to Practice on Reservations to Treaties, which the Commission adopted in 2011.[3]

The Guide is a monumental work, and your comments will be of great interest. I only have time to mention two matters:

First, the vexed question of Guideline 4.5.3, on the 'Status of the author of an invalid reservation in relation to the treaty'. This deals with what is perhaps the most difficult, and the most contentious issue of the law of reservations. Is a State making an invalid reservation a party to the treaty without benefit of the reservation, as some maintain? Or is the State concerned not a party to the treaty at all? Paragraph (1) of guideline 4.5.3 makes it clear that the decisive factor is the intention of the reserving State. This is the principle. However, paragraph (2) then raises a positive rebuttable presumption: the reserving States is considered to be a party without the benefit of the reservation *unless* it has expressed a contrary intention or such an intention is otherwise established. These two paragraphs, which are the essence of the guideline, are in my view balanced and workable.

The commentary explains that guideline 4.5.3 'largely corresponds to the progressive development of international law', and that it would therefore 'seem expedient to let the practice evolve'.[4] It is important to note that the guideline was adopted by the Commission without dissent. And it was adopted after careful study of the practice and case-law, and taking into account the views of human rights bodies and the comments of Governments, especially as expressed in the Sixth Committee in 2010.

Practice to date has been divided, though all sides seem ultimately to accept the principle that the intention of the reserving State is determinative. In my view, members of the AALCO could make an important contribution to achieving more legal certainty in this area if they could speak in support of Commission's proposal.

The second point I want to mention about reservations is possible follow-up action by the General Assembly. There are three elements:

First, the Commission's modest recommendation to the GA was "to take note of the Guide". This should not be problematic.

[3] A/66/10/Add.1. The Commission included a useful Introduction, which makes some important points about the nature of the Guide. Professor Pellet intends to publish a book, as Professor Crawford did with the State Responsibility articles. That will be an invaluable guide for the reader of the Guide. There is already a helpful 'symposium', with articles by Professor Pellet, his former assistant, Daniel Mueller, Ineta Ziemele and Läsma Liede (respectively Latvian judge and Registry member of the ECtHR), and myself. These are available online, in the *Jean Monnet Working Paper Series* (XXXXXXXXXXX), also to be published in the *European Journal of International Law.*

[4] Para. 55.

Second, the Commission has set out, in an annex to the Guide to Practice, nine 'conclusions', and recommended that "[t]he General Assembly call upon States and international organizations, as well as monitoring bodies, to initiate and pursue such a reservations dialogue in a pragmatic and transparent manner." This too seems sensible, and should not be problematic.

The *third* element of possible action for the GA is the Commission's '**Recommendation on mechanisms of assistance'** is perhaps a bit more complicated. The Commission has transmitted to the General Assembly a 'recommendation … on mechanisms of assistance in relation to reservations to treaties'.

The annex to the recommendation seeks to illustrate, in a tentative way, what a 'reservations assistance mechanism' might look like. It would have essentially two tasks: to 'make proposals to requesting States in order to settle differences of view concerning reservations', proposals which States could undertake to accept as compulsory; and to provide States with 'technical assistance in formulating reservations or objections to reservations.'

The recommendation also includes the idea of reservations 'observatories' within the Sixth Committee and elsewhere.

ILC session 2013

I now turn to the work of the ILC in 2013. You already have a thorough background paper on the work of the ILC in 2013 prepared by your Secretariat. I do not have time to go into such detail.

The topic **Subsequent agreements and subsequent practice in relation to the interpretation of treaties** deals with an important aspect of treaty interpretation. It covers subsequent agreements and subsequent practice both under article 31.3(a) and (b) ('authentic interpretation') and under article 32 VCLT ('supplementary means of interpretation'). Five draft conclusions were adopted this year, with detailed commentaries. They are largely introductory but include some interesting points. For example, one issue addressed is the role of subsequent agreements and practice in relation to 'evolutionary' interpretation.

There has not yet been great progress on the new topic **Provisional application of treaties,** though we had an interesting discussion on the first report by the Special Rapporteur, and there was a very helpful study by the Secretariat. This is potentially very interesting topic, which should be of practical interest and assistance to States.

The Commission added the topic **Protection of the environment in relation to armed conflict** to its current work programme, and appointed Ms. Jacobsson as Special Rapporteur. We look forward to her first report.

The Commission added the topic **Protection of the atmosphere** to its current work programme, and appointed Professor Shinya Murase of Japan as Special Rapporteur. The proposed topic had proved quite controversial, and it was included in the Commission's work programme, on the

last day of the session, on the basis of certain understandings put forward by Professor Murase. You will find these set out verbatim in the Commission's report.

A working group under Ambassador Kriangsak Kittichaiserie continued its consultations on where to go with the topic **Obligation to extradite or prosecute (*aut dedere aut judicare*).** A rather detailed report is annexed to the ILC's report, in the hope of eliciting reactions in the Sixth Committee on the future of the topic. The report describes how the topic has developed, and analyses the ICJ judgment of 20 July 2012 (*Belgium v. Senegal*). It does not deal with the question whether the obligation to extradite or prosecute is, already a rule of customary international law, at least in relation to certain crimes. There seems to be a general view that this is something that it would not be helpful for the Commission to address.

The Commission added the topic **crimes against humanity** (proposed by Professor Sean Murphy) to its long-term programme of work.[5] The idea is to prepare, for the General Assembly, draft articles requiring States to prevent and punish crimes against humanity and to cooperate among themselves to these ends (principally through 'extradite or prosecute' provisions). A Convention along these lines would fill a gap in international criminal law.[6] The Commission is expected, in 2014, to decide on the inclusion of the topic in its current programme of work, in light of the reactions of States in the Sixth Committee. Your views will be much appreciated.

Immunity of State officials from foreign criminal jurisdiction

I now turn to the first of the three topics highlighted on your agenda today. The topic 'Immunity of State officials from foreign criminal jurisdiction' is politically important, and there are quite different views among the members of the ILC. I do hope that government lawyers, including those represented on the AALCO, will follow it closely, and will comment in the Sixth Committee and respond in writing to the Commission's questions.

The Commission adopted three draft articles, articles 1, 3 and 4.[7] Draft article 1 defines the scope of the topic, which concerns immunity from foreign criminal jurisdiction. It does not cover the vexed question of immunities before international criminal courts and tribunals. Article 1 also makes it clear that the present draft is without prejudice to the immunity enjoyed by diplomats, consuls, persons on special missions, and others governed by special rules.

I need to say a word about special missions. The Commission's commentary stresses the practical importance of the law on special missions, both under the 1969 New York Convention and under customary international law. There have been a number of recent cases in this field, including one in the English High Court which confirmed the customary law status of the immunity of persons on special missions.[8] This is of practical importance because it means that senior officials may enjoy personal immunity from foreign criminal jurisdiction even if they do

[5] A/68/10, annex B.
[6] See, for example, L. Sadat (ed.), *Forging a Convention for Crimes against Humanity* (2011).
[7] The Special Rapporteur, Ms. Escobar Hernández, produced a second report (A/C.4/661), proposing five draft articles. The report relied heavily on the materials in the former Special Rapporteur, Ambassador Roman Kolodkin's reports, and on an excellent Secretariat memorandum from 2008.
[8] *Khurts Bat* 2011.

not fall into that narrow circle of high State officials who enjoy immunity *ratione personae* by virtue of their office.

This brings me to the main outcome of the Commission's work on his topic this year, the endorsement in draft article 3 of the so-called 'troika' (Heads of State, Heads of Government and Ministers for Foreign Affairs) enjoy immunity *ratione personae*. This was a compromise, as there remain one or two members of the Commission who do not think foreign ministers should have such immunity (i.e., they think the ICJ was wrong in the *Arrest Warrant* case) and some others who think the narrow circle of persons concerned should not be regarded a confined to the three (but include, for example, Defence Ministers and Ministers of Commerce and International Trade).

The next stages will be to look at the more complex questions surrounding official act immunity, immunity *ratione materiae*, which we should do in 2014, and then we shall come to the politically very sensitive question of possible exceptions, for example, for core crimes of international concern.[9]

Protection of Persons in the Event of Disasters

The Special Rapporteur, Valencia-Ospina, produced a lengthy sixth report on disaster risk reduction. This report dealt with eminently practical matters: the need to take steps to avert disasters before they occur, and to make preparations so that they can be dealt with as effectively as possible if and when they do occur. The report contained a great deal of information, and drew on a wealth of texts and documents. It was well researched, and afforded a sound and solid basis for the two draft articles proposed by the Special Rapporteur. However, Part IIB of the report ('Prevention as a principle of international law') was criticized.

Following the Special Rapporteur's suggestions, the Commission adopted two articles on disaster risk reduction, together with commentaries, as well the commentaries as for five draft articles approved in 2012.

The Special Rapporteur plans a final report in 2014, which should see the completion of a first reading set of draft articles.

Formation and evidence of customary international law

The topic 'Formation and evidence of customary international law', for which I have the honour to be special rapporteur, has now been renamed 'Identification of customary international law'. Work this year was of a preliminary nature, and no draft conclusions were adopted.

There seems to be agreement that the outcome of the Commission's work on this topic should be practical. "The aim is to provide guidance for anyone, and particularly those not expert in the field of public international law, faced with the task of determining whether or not a rule of

[9] The Special Rapporteur and one or two members of the Commission emphasised that the draft articles adopted so far are without prejudice to possible exceptions to immunity *ratione personae*: Draft article 4, commentary (4) *in fine*.

customary international law exists." It seems to be widely accepted that it is not our task to seek to resolve purely theoretical disputes about the basis of customary law and the various approaches to be found in the literature as to its formation and identification.

The outcome that the Commission has in mind is not a hard-and-fast set of rules, but rather a set of conclusions, with commentaries. It is important to retain the flexibility of this source of international law. Clearly "we need to strike a balance between certainty and flexibility", as Mr. Huang, the Chinese member of the Commission said. In this regard, I very much liked the way our Jordanian member, Mr. Hmoud, put it. He said that

> "… even if the Commission merely describes the current state of the law, through adopting a set of conclusions, such conclusions will definitely advance the rule of law and a clear understanding of what is part of customary international law and what is not."[10]

It is important to be clear about the scope of the topic. The aim is not to consider the substance of customary international law. We are concerned with secondary or systemic rules, that is with the means of identifying whether a rule of customary international law has emerged or not. The Secretariat memorandum puts it well: we are looking at the "approach to the identification of the rules of customary international law and the process leading to their formation."[11]

The Commission decided that we should not seek to deal with *jus cogens* within the present topic. There is a proposal that we should have a separate topic on that interesting subject.

The debate this year in the Commission was based on two papers: my first report; and an excellent Secretariat memorandum describing 'elements in the previous work of the Commission that could be particularly relevant to the topic'.[12] The memorandum is of the high quality that we have come to expect from the Codification Division of the United Nations. It contains a wealth of learning, information and insight. It is divided into five sections: the Commission's general approach; its approach to State practice; its approach to the subjective element of customary international law (*opinion juris sive necessitatis*); the relevance of the practice of international organizations; and the relevance of judicial pronouncements and writings. The memorandum finds that the Commission's practice in identifying the existence of a rule of customary international law reflects the widely accepted 'two-element' approach.

The Secretariat succeeded in distilling a coherent set of observations from the diverse elements of the work of the Commission over a long period and in many different contexts. This encourages me to hope that it may indeed be possible to conduct a similar exercise on the much broader canvas of materials listed in the first report

[10]Mr.Hmoud went on to say that 'the complexities associated with the vagueness in determining the law undermine legal stability and certainty." He also emphasised that conclusions in this topic would lead to "the avoidance of dispute and assist in reaching legal certainty that otherwise may only be reached through judicial pronouncements".
[11]Para. 12.
[12] A/CN.4/659.

My first report was introductory in nature. It sets out the basic approach that I propose to the Commission. In particular, I suggest that the rules of public international law for identifying the sources of law "can be found for present purposes by examining in particular how States and courts set about the task of identifying the law."[13]

Among other things the report dealt with the relationship between customary international law and other sources of international law. The relationship between customary international law and treaties is a matter of great practical importance for the topic. It is a reasonably well-understood question, on which there is a wealth of case-law and writings. Less obvious, less studied, perhaps less well understood is the relationship between customary international law and general principles of law within the meaning of Article 38.1(c) of the ICJ Statute.

The report sets out at some length, with examples, the range of materials that the Commission may need to take into account in the course of our work. When illustrating their richness and diversity, it also tries to highlight the general approach to the formation and evidence of customary international law which they reveal. It is noteworthy that virtually all of the materials stress the need for both State practice and *opinio juris*. The International Court of Justice, in particular, "has clearly and constantly held […] that customary international law is formed through State practice accompanied by *opinio juris*."[14]among others, in Section VIII of the report. If one studies the case-law of the International Court of Justice, in particular the *North Sea*, *Nicaragua*, and *Germany* v. *Italy* cases, it is clear that the Court views the two elements, State practice and *opinio juris*, as essential for the formation of a rule of customary international law.

This topic must be a collective effort. The Commission has requested States to provide, by 31 January 2014. It was stressed in the Commission that we need to have regard to practice of States from all of the principal legal systems of the world and from all regions.

Conferences and academic institutions can also play their part. The Council of Europe, together with France, organized a short but very interesting conference in Paris in September 2012, on '*The Judge and International Custom*'.[15] A number of distinguished judges spoke at that conference about the experience of their own courts, both national and international. There was a particularly interesting contribution from President Tomka of the International Court of Justice.

One of the aspirations of the AALCO, as I understand it, is to ensure that the voice of Asian and African States is heard loud and clear in the progressive development and codification of international law. An important part of this is the contribution of Commission members from AALCO Member States, and the contribution of AALCO Member States themselves to the work of the Commission. The Asian and African members of the Commission have undoubtedly made, and continue to make, a valuable contribution to the work of the Commission. Their presence is essential if the Commission is to be truly representative. It is unfortunate if those elected by the General Assembly do not attend regularly or at all. Of course, there are no doubt often good reasons for this; we are all busy.

[13]Para. 38.
[14]Report, para. 55
[15]*The Law and Practice of International Courts and Tribunals*.

States too have their role to play, and I would encourage all of you to respond to the various requests for information and views, both in writing and in the Sixth Committee debate which is held in October each year. I know from personal experience how difficult this can be for busy government lawyers. But it is important to contribute to the long-term development of international law, as well as with day-to-day crises.

Mr Chairman, Ladies and Gentlemen, I thank you very much for your attention.

President: Thank you Sir Michael Wood for giving various issues addressed before the ILC, and also the key issues on the agenda of this session. I shall now give the floor to Mr. Narinder Singh who is also a Member of the International Law Commission from India and has also served as President of AALCO as the former Legal Adviser to the Government of India.

Mr. Narinder Singh, Member of the International Law Commission (ILC): Thank you Madam President. Madam President, Mr. Secretary-General, Excellencies, Distinguished Delegates, Ladies and Gentlemen, I thank the Secretary-General of AALCO for inviting me to this special meeting on the work of the ILC at AALCO's Annual Session. Sir Michael Wood has already given us a very detailed account of the work of the Commission accomplished at the current year. He has also highlighted a number of issues considered by the ILC which are very relevant for AALCO Member States.

I would like to refer first of all to the Convention on Jurisdictional Immunities of States and Their Property. This is a very important Convention which recognizes the principle that States cannot claim immunity for commercial transactions. This Convention was adopted after extensive consideration over a long period both in the Commission and in the Sixth Committee. The contribution by AALCO Member States both at the Commission and at the Sixth Committee was also highlighted by Sir Michael Wood. India has signed this Convention but has not yet ratified. However, India in practice has already been applying the Convention. Under the Indian civil procedure laws, any person wishing to file a suit against a foreign government before an Indian Court requires permission from the Central government to file that case. While considering whether or not permission is to be given the government takes into account the practice of States around the world as well as the evolving jurisprudence in international law. In many cases where permission is refused the matter is taken to court. The Supreme Court of India has held that in considering whether or not to grant permission, the Government must take into consideration the "trends and developments in international law". Accordingly the Government has often referred to this Convention while taking its decision and also in responding to cases filed for refusal of permission. I hope that the Member States of AALCO sign and ratify this Convention so that it comes into force and becomes effective.

Some other topics on which the Commission has completed its work and which are important for the Member States of AALCO have also been highlighted by Sir Michael Wood. They are 'Expulsion of Aliens', 'Reservations to Treaties', and the Draft Articles of State Responsibility. I recommend that AALCO continue its consideration of these important items.

Coming to the topics which are under consideration of today's meeting, the first is the "Immunity of State Officials from Foreign Criminal Jurisdiction". This topic has great practical

significance and is also very important for all Member States. In the ILC, there is disagreement among the Members on the scope and objective of the topic. A number of Members have highlighted the importance of the need to address serious crimes and on that basis they have advocated a very restrictive application of immunity given to higher state officials. However other Members have emphasized the importance of immunity to ensure the independent exercise of their functions by the State officials, to protect them from frivolous complaints and harassment, as well as consistent State practice to justify the continuation of immunities. The Commission has agreed that the Troika that is the Head of State, Head of Government and the Foreign Minister enjoy full immunity that is they enjoy immunities both for personal acts and official acts. The Commission by including a savings clause in respect of other conventions, such as those on diplomatic and consular relations and special missions, etc., has also recognized that immunities may apply to officials other than the troika. However, some Members of the ILC still continue to question the personal immunity granted to the Ministers of Foreign Affairs on the ground that there is a need to restrict immunity and that full immunity should apply only to Heads of State and Heads of Governments. Other members including myself prefer a wider circle of high officials based on their functions to be given immunity especially in the present day world, where the conduct of foreign affairs, unlike traditionally is not limited to Ministries of Foreign Affairs and may involve a wide range of State departments. This is a topic which is of great importance to all the Member States. We look forward to further developments in the further reports which the Special Rapporteur would be coming up with on the more complex issues regarding the definition of official acts and the immunity *ratione materia*e which will happen next year. And then we also have to deal with the very sensitive issue of the possible exceptions to immunity, for example in the context of the core crimes of international concern.

The next topic that I would refer to is the 'Protection of Persons in the Event of Disasters'. The Special Rapporteur Mr. Valencia-Ospinahas so far presented six reports. In the sixth report which was presented this year, he focused on prevention and the Commission has adopted two articles on this. This report emphasized the need for States to take measures to prevent disasters before they occur and also to ensure that if and when disasters do occur they can be dealt with as quickly as possible to eliminate or at least to mitigate the effects of the disaster. In the draft articles which were adopted by the Commission in previous Sessions, the Commission has recognized the concerns of certain Members as well as opinion of States expressed in the Sixth Committee that the state in whose territory the disaster occurred is in the best position to assess the severity and extent of the disaster as well as the needs of those who are affected by the disaster. It is this State which must decide on the action which is required to deal with the after effects including the assistance to the victims. It has also recognized that it is the affected state that has the right to decide whether in dealing with the disaster it has adequate capacity to deal with the disaster on its own, or whether it would require assistance of third states and if so the extent and the nature of the assistance which is required. The draft Articles have also recognized that even when foreign state assistance is sought and received the affected State has the right to coordinate all matters relating to responses to the disaster, and also to decide on which States or organizations it would accept assistance from.

The topic of Customary International Law has been explained in great detail by Sir. Michael Wood, who is also the Special Rapporteur, and who has presented his first report on the topic this year. Hence I am not going to go into that. I thank you Madam President.

President: I now invite Dr. Rohan Perera who is a former Member of ILC and also the Chairperson of the AALCO Eminent Persons Group (EPG) to make his presentation.

Dr. A. Rohan Perera, Former Member, International Law Commission (ILC): Thank you Madam President. Mr. Secretary-General, Colleagues on the panel, Distinguished Delegates, after both the presentations including the introduction by the Secretary-General, my intention this morning is to make some comments primarily on the all-important topic as underlined by Sir Michael Wood of 'Immunity of State Officials from Foreign Criminal Jurisdiction'.

It is a topic, both legally complex and involving political sensitivity. Excellent preparatory work was accomplished by the previous Special Rapporteur Mr. Roman Kolodkin. With regard to the general orientation of the topic, the starting point of the Special Rapporteur with regard to the question 'is there exceptions to immunity *ratione personae*'? was that it should be approached on the basis of *Lex lata* or law as it exists, rather than *Lege Ferenda* which involves the element of progressive development. Accordingly he took the view that immunity was the established principle and any exceptions thereto must be proved. Although no draft articles were prepared at the time, debate in the Sixth Committee on this item, reflected a cautious approach by Member States, which underlined the importance of the *Lex lata* approach, at least as a starting point.

Number of delegations made the point that the Commission should keep in mind the distinction between the task of codifying the *Lex lata* and making proposals for the progressive development of the law, *de lege ferenda*.

Given the practical importance of the Commission's work for the Member States, the ultimate objective is that these draft articles must be acceptable to the States. International law Commission is serving the Member States of the United Nations. So this distinction must be kept in mind throughout the work on the part of the Commission on this very complex and sensitive topic. And I believe this should and will continue to guide the work of the Commission.

Considerable progress on the topic has been made under the stewardship of the current Special Rapporteur, Ms. Escobar Hernandez, who has presented several draft articles on the scope of the topic. An effort has been made to define the terms, "immunity *ratione personae*' and 'immunity *ratione materia*e', as a frame of reference for the future consideration of the topic, and to establish the respective legal regimes applicable to these notions. These definitions place an emphasis on the function of representing the State, with regard to high level State Officials enjoying immunity *ratione personae*, while the definition of immunity *ratione materia*e cover official acts performed by other officials'.

I now move on to the dilemma confronting the Commission, with regard to the scope of persons entitled to enjoy immunity *ratione personae*. The notion of the '*Troika*', namely the Heads of State, Heads of Government and the Minister of Foreign Affairs, was referred to by the ICJ in the Arrest Warrant Case, as being entitled to absolute immunity, in respect of all acts performed by them, whether official or private. I believe that there are cogent reasons for including the Minister of Foreign Affairs in this category. There have been some voices of dissent within the Commission who have raised doubts as to the inclusion of the Foreign Minister within the Troika.

The Special Rapporteur explains the rationale for the according of immunity *ratione personae* to the Troika on the basis that under the Rules of International Law, these three office holders represent the State, in its international relations, simply by virtue of their office directly, and without the need for specific powers or authorization to be granted by the State. It is the representational character which International Law attributes to these high State Officials. The sole function is to establish a homogenous, hierarchical system for the representation of the State within the international community as a whole and which promotes and facilitates the conduct of international relations. It is precisely International Law which explains the status that is granted to these officials, within International Law as a whole.

I think that encapsulates the underlying rationale for the immunity of state officials including Minister of Foreign Affairs should enjoy absolute immunity: the representational character and the conduct of international relations. We all know that under the Vienna Convention on Law of Treaties the Minister of Foreign Affairs can represent the State without the requirement of full powers. He is the intermediary between the State and the international community in international law to Heads of States and Head of Governments. It also has to be understood that customary international law recognizes the Troika that is the immunity of these three categories of officials in respect of *ratione personae*.

The other issue is should one go beyond the Troika, taking into account the realities of contemporary international relations? On the one hand, the Special Rapporteur identified the impossibility of finalizing an exhaustive list of 'other officials' outside the Troika who should be accorded immunity *ratione personae*. But on the other hand the as pointed out by some, the conduct of international relations has seen numerous changes in recent times. It has moved away from the Ministries of Foreign Affairs and as was observed by them, in a post WTO world, the Minister of Trade or Commerce also engages in international affairs with other States. These functions would be as important as that of the Minister of Foreign Affairs. Similarly, a Minister of Defence would be travelling on behalf of his State and if the immunity of the Minister is denied, courts and tribunals of a foreign State would be exercising criminal jurisdiction over visiting dignitaries. These are the realities of contemporary international relations. There are persons other than the Minister of Foreign Affairs, who are widely engaged in the conduct of international affairs.

The initial approach of the International Law Commission was to attempt to develop some criteria to determine 'other officials', who may be entitled to immunity *ratione personae*. A high degree of involvement in the conduct of inter-State affairs, of representing the State and carrying out functions on behalf of the State, was among possible criteria identified.

Now the Commission appears to be looking at the Law on Special Missions, both under Customary International Law and under the 1969 New York Convention, which could cover 'other categories' of officials even if they do not fall within the Troika. It is to be noted in this connection that there is developing recent jurisprudence in this area, as mentioned by Sir Michael Wood.

It is very important that this question needs to be addressed through such means, bearing in mind also that an expansive interpretation or an expansive approach to include 'other categories' could create an environment of impunity. So, one must have some very clear guidelines, including the possible application of the Special Missions regime.

The Commission is yet to grapple with the very difficult issue of possible 'exceptions' to immunity *ratione personae*, in respect of serious crimes under International Law or grave crimes, which have to be defined. The work of the ILC in this regard is very important. Member States should follow these developments closely and let the voices of Asia and Africa be heard.

I will now make some brief remarks about the topic Protection of Persons in the Event of Disasters. In its previous work, the draft articles reaffirmed the sovereignty and territorial integrity of an affected State and the Principle of non-intervention in the internal affairs of States in the context of providing of disaster relief. Such relief is made subject to the consent of the affected State. The draft articles however provides for a qualified consent regime, in that such consent should not be unreasonably withheld. The commentary clarifies in what circumstances the withholding of consent would be considered unreasonable and specific elements are identified.

The reaction of Member States to the draft articles, during the debate in the Sixth Committee has been a cautious one. The initial response has been that the outcome should be one comprising non-binding principles and guidelines, which preserves the operational flexibility that is required in disaster situations. The draft articles should be of practical value to States and likely to attract widespread support and acceptance, rather than conventional binding obligations.

Sir Michael Wood referred to the draft articles adopted at the last session on disaster risk reduction. The Report contains extensive treatment of the Precautionary Principle including the jurisprudence of the ICJ, starting with the Corfu Channel Case. Draft article 5 *bis* refers to forms of cooperation in providing disaster relief. Here I would like to refer to the initial reaction of Member States when the Draft Articles were debated in the Sixth Committee. States need to reflect and deepen discussion on the centrality of the principle of international cooperation and solidarity as a guiding principle on this topic, rather than approaching it from the perspective of a regime of legal rights and duties. There has been some controversy within the Commission on a host of issues such as is there a duty to seek assistance on the part of an affected State? Is there a duty o provide assistance on the part of the international community? Should international organizations and non-governmental organizations be treated on an equal basis ?

These are very sensitive issues. Rather than a strict rights and duties approach, should not a wider approach be followed with regard to these articles that is providing of disaster relief on the basis of international co-operation and solidarity Since the UNCLOS, the duty to co-operate has been entrenched. One could say that is a customary principle of International Law.

So these are perspective which Member States must bear in mind. How should States balance the consideration of preserving the sovereignty and territorial integrity of affected States, and at the same time how does it discharge the obligation of protecting its own citizens. The draft Articles and the commentaries on this topic require the closest attention of AALCO Member States. It is important that they make their views known both in writing to the Commission as well as in the deliberations in the Sixth Committee. I thank you.

President: Thank you Dr. Rohan Perera for your views on these important issues of ILC.

Prof. Djamchid Momtaz, Former Member of the ILC and the Delegate from Islamic Republic of Iran: Thank you very much Madame President. I would like to thank the Secretariat

of AALCO for organizing this very interesting Half-Day Meeting on the work of the ILC. If you allow me I would like to make some brief comments on the question of 'Immunity of State Officials from Foreign Criminal Jurisdiction' and raise some questions regarding the topic of the 'Formation and Evidence of Customary International Law' to the Special Rapporteur on this topic.

Regarding the question of Immunity of State Officials, in our view the topic must be approached from the perspective of both *lex lata* and *lex ferenda*, in other words, of codification and progressive development of international law. I feel that many States endorse the use of your methodological approach and think that such approach allow us to go beyond the Troika concept. A Product of immunity *ratione personae* would allow us to grant immunity to persons whose functions are comparable to the head of States, heads of Governments and Ministry of Foreign Affairs. Regarding this question we think that we have to on this subject adopt a special approach and I think some elements are in favour of this approach. And to throw the attention of the distinguished delegates to the fact that in some judicial practice certain domestic courts have granted immunity *ratione personae* to senior officials other than the Troika. And I would also add a second element in favour of this approach to say that the judgment of the ICJ in the Arrest Warrants case is in favour of this approach. I think the wordings of this judgment and the use of the expressions such as this allow us to extend the immunity to persons other than the Troika. It goes without saying that this immunity *ratione personae* is temporary in nature and is contingent on the term of office of person who enjoys such immunity. That is the reason why we think that the next step of the work of the Commission embark on definition of 'official acts'. This is very important in this regard.

Turing now to the 'Formation and Evidence of Customary International Law', if you allow me I want to raise some questions to the Special Rapporteur Sir. Michael Wood. The first question regards the scope of the topic. My question is why *jus cogens* should not be covered by this exercise and I am very happy to be informed by the Special Rapporteur that the question of *jus cogens* would be included in the work of the Commission as a separate topic. The *jus cogens* is not anymore a anti-box concept under international law and the ICJ in its judgment regarding the *Democratic Republic of Congo* vs. *Belgium* has referred to the notion of *jus cogens*. My delegation thinks that regarding this topic we need to preserve the flexibility of this important source of international law that is the customary law. And the ILC should aim to describe the current state of international law and not embark to create a new form of custom. In this regard we welcome the comments made by the Special Rapporteur regarding the importance of the Books of the Asian and African States and he underlined this important question. My question would be how the Special Rapporteur is intending to use the materials produced by the jurists from these countries because they are written in language other than French and English.

Another question I want to raise is that would you elaborate a single and unified system of law regarding this issue or in your opinion we have to take a different approach to the formation and evidence of customary international law in different field of international law.

And my last question relates to the role and place of the judgment of the ICJ in the formation and evidence of customary international law. I read with great interest your first report on this topic. You have said that separate and dissenting opinions of the Judges of the Court and I quote, 'must shed some light on the general approach to the formation and evidence of customary international law and codification'. I need some clarification on this point. I want to know if you

put at the same level the judgment and opinions of the Judge appended to the judgment. With that I will end. I thank you for your lucid and complete report on the work of ILC. Thank you.

President: Thank you and now I give the floor to Sir Michael Wood to respond to these questions.

Sir Michael Wood: Many thanks to Prof. Momtaz for his very pertinent questions. On the Customary International Law topic, you first asked why the ILC decided not to deal with *jus cogens* as part of this topic; I think the reasons are principle and pragmatic. In principle, it really is a distinct issue, *jus cogens* is not necessarily customary international law. The concept relates to both treaty law as well as to customary law. I think the issue is in identification: there may be overlapping but if I can put it that way, the important role of customary international law. But the real reason, the chief reason for recommending that we do not deal with the concept of *jus cogens* is pragmatic. I think it is already a very challenging subject and to add to it a whole new dimension of *jus cogens* with all its complexities and all its political difficulties would perhaps overload the Commission and that is why I was very pleased when one of our Member of the Commission made a proposal to treat the topic of *jus cogens* separately. I should stress here that the Commission has not yet decided to take that topic up. Agenda will look at that next year you will find references the proposals in this years' report to the Commission explaining why we are not including *jus cogens* as part of customary law topic. We will decide next year whether we will put it on the longer programme of work. At that stage it will be easy for the States to make their submission. There are some countries who are promoting *jus cogens* and others who are against it. Hence we will see what happens next year. You also said it used to be an anti-box, but I hope it is not a Pandora's box, because it could get extremely complicated.

The second point you referred related to the need to preserve flexibility and the need to describe the current stage of the formation of the customary law. I very much agree with that. It is not our job in this field any way to come up with theories to say that we need to be looking at this looking at that as regards customary international law in the non-traditional sense if I may call it that way.

You asked how you are intending to take account of writings and case-law from the Asian-African region which might be in languages other than English and French. The only answer to that would be that we would rely upon academic institutions that may study this matter. And one advantage of the ILC taking up a topic is to stimulate consideration of topics in academic institutions. I can more or less understand what is said in Spanish. But if it is in Arabic then I would very much look to the other Members of the Commission/ States to tell what there is there to translate the relevant parts as necessary. This applies to all the languages, the Chinese, Parsi, and others. I am very cautious of that issue.

Your third question related to whether there is a single approach to the formation of customary international law across different fields of international law, or whether there are different approaches to different fields, take law of the sea, take human rights, take humanitarian law or environmental law. My own view on that is that there must be overall a single approach otherwise international law would be fragmented following different basic approach depending on the field. There has to be a single approach but nevertheless particular types of rules, the evidence the materials you look at could vary. The ICJ gave a good example of that in the recent *Germany* vs *Italy* case where it was looking at the question of state immunity. It said in this area

of state immunity we find particular in looking at the decisions of national courts. It is at the national courts that questions of state immunity come up. So they said the decisions of national courts are helpful in this regard. Maybe it relates to international humanitarian law as well. If you read the methodology of the ICRC in relation to its special study on customary principles of international humanitarian law, there are particular issues, particular ways of looking at customary law. So overall there must be one general approach, but it does not exclude the types of rules you have to look as evidence in different ways.

On Immunity, your emphasis on looking at both *lex lata* and *lex ferenda* is interesting. But I am not sure how practical that would be because if start looking at *lex ferenda* we have to look at what the current special rapporteur has referred to as the values and principles of the international community which is something that I find extremely wary. The examples you gave that we should look at *lex ferenda* in relation to determining the scope of persons entitled to immunity *ratione personae* further going beyond the troika, what I would say is that that would be *lex ferenda*. That would be extrapolating the existing principles and it would also be relying upon existing case laws including the case of the international court including cases from around the world which have dealt with these cases involving Minister of Commerce and Defence. There is case law that we can look at. I think as much as, I would personally, that we should go beyond Troika, I suspect the Commission will not and unless questions of many States deal with that in their written comments which I think will be reviewed in the next year. Only then will the Commission be able to review what it has put forward.

President: I now give the floor to Dr. Rohan Perera to respond to the questions.

Dr. A. Rohan Perera: Thank you Madam Chairperson**.** I just want to say something about the last point which Sir Michael Wood touched uponin response to the observations made by Prof. Momtaz that there should be both *lex lata* and *de lege ferenda*. Now the position of the former Special Rapporteur was that the starting point should be *lex lata* in relation to the question of possible exceptions to immunity *ratione persone* in respect of the Troika. And he proceeded on the basis that immunity is the established principle any exception must be proved. Interestingly, it has become an interesting debate there were several delegations who took a kind of middle position. That is once you start a *lex lata* approach and then identify what are the lacunae in the existing law and once that is done then you get on to the *de lege ferenda* to identify the existing lacunae on the basis of a *lex lata* approach. But there again as Sir Michael Wood pointed out there is a danger between the context of possible exceptions this whole concept of values and principles comes in which can be political. So the point was made that *lex lata* must be the starting point. How the Commission would proceed beyond this basis point is the crux issue. Thank you.

President: Thank you Dr. Rohan Perera for your response. Now, may I open the floor for interventions from Member States. India you have the floor.

The Delegate of Republic of India: Thank you Madam President. I thank all the panellists for their presentations. I also congratulate the AALCO Secretariat for the in-depth study on this subject. I also thank the Secretary-General for introducing this agenda item. Indeed, during his introductory remarks, the Secretary-General had mentioned that AALCO Secretariat observes that immunity shall not be extended beyond Troika and there must be extreme caution while

extending the same. However, it is observed the views of the AALCO Secretariat need not be the views of the Member States of AALCO.

On the topic, "Immunity of State Officials from Foreign Criminal Jurisdiction" we appreciate the progress made thus far on the work of this topic in ILC. We agree that the State Officials, viz., Heads of State, Heads of Government and the Foreign Ministers, so called *Troika*, are entitled to immunity from criminal jurisdiction of foreign States. This is notwithstanding doubts expressed with regard to immunity of Foreign Ministers. In this regard, we may recall the ICJ Judgment in the *Arrest Warrant* case(*Arrest Warrant of 11 April 2001 between Democratic Republic of the Congo & Belgium*), where the Court analysed the State practice and concluded that the functional necessity had afforded immunity to the Foreign Ministers and accordingly the (majority) Court held that the criminal proceedings (issuance of arrest warrant) against Mr. Yarodia were *void abnitio,* since they were initiated during his term of office as Congo's Foreign Minister.

The reasons/grounds for according immunity to Troika are their seniority or high ranking offices they hold and the functions they discharge for and on behalf of the State. Thus their representational capacity of the State abroad for and functional necessity are the prime reasons for recognition and according immunity to them.

On Troika, or extending immunity to officials beyond Troika, we consider that, were the same criteria applied, a few other high ranking officials especially, Ministers of Defence and Ministers of International Trade could also be considered as the State Officials deserving immunity from the criminal jurisdiction of foreign States. We may therefore urge the Special Rapporteur and ILC to collect and analyse the State practice in this regard and come up with appropriate propositions. (In most AALCO countries – Korea, Japan, ASEAN countries, Foreign Ministers are also Ministers for international trade)

On Military Personnel, we could also agree with the proposed collapsing of all elements (other officials) in a concise manner in para 2 of draft article 1 (originally proposed as draft article 2 in the Special Rapporteur's 2nd report A/CN.4/661 dt. 4 April 2013). The new Para reads:

> "The present draft articles are without prejudice to the immunity from criminal jurisdiction enjoyed under international law by persons connected with diplomatic missions, consular posts, special missions, international organizations and military forces of a State."

However, we have certain reservations about inclusion of "military forces" by the Drafting Committee in this para. The proposition that the military personnel also enjoy immunity under international law needs clarification.

We consider that the military personnel without express (or seldom tacit) consent of a foreign State would not enjoy immunity from its criminal jurisdiction under general international law. They enjoy immunity only if that foreign State is party to the agreements, like SOFA – status of forces agreement - with the sending State. We consider that the issue of immunity to the acts (atrocities) of German forces on the Italian & Greek territory, dealt with by ICJ in the case of *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* case, was in the

context of war and not in peace time. Further, if the ILC (Drafting Committee) considers that immunity from criminal jurisdiction to the experts under agreements on economic, cultural and technical assistance and cooperation is of exceptional category, there is no reason why immunity accorded to the military personnel under SOFAs should not be considered as special or exceptional category as well.

As to the exceptions to immunity from foreign criminal jurisdiction, we must keep in mind that immunity is a procedural and preliminary issue. This was affirmed by ICJ in *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)* case. Once immunity from criminal jurisdiction is established or decided to be applicable, no higher rule (*erga omnes*) could pierce the immunity shield, unless it is specifically agreed otherwise by the States concerned and such exception would be applicable only between the consenting parties.

We agree with the Drafting Committee that the definitions part of the topic could be considered towards the end of the work. (Drafting Committee Chairman statement dt. 7th June 2013). Further, the work on the topic may take the form of draft articles to be presented to the UNGA and the States. This would fill the gap in the immunity law.

On the topic "Formation and Evidence of Customary International Law", it is well known that the CIL (customary international law or rules of CIL) is a formal source if international law. The ICJ is mandated to apply CIL to settle the disputes brought before it by the States.

Article 38 (1) (b) of the ICJ Statute describes CIL "as evidence of general practice accepted as law". One may consider this description to be of reverse (since 1920) and frequently referred to and reproduced in other international instruments.

CIL consists of "settled practice" of States and the belief that it is binding. Thus it has objective and subjective/mental elements (*opinio juris*).

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

Therefore, it is indeed laudable that the ILC took up the topic "Formation and Evidence of Customary International Law" at its 64th session last year and appointed Sir Michael Wood as Special Rapporteur. ILC considered a Note submitted by the Special Rapporteur outlining his preliminary views and ambitious schedule to complete the work on the topic by 2016. At the 65th session the ILC discussed a Memorandum on the previous work of ILC relevant to the topic and 1st Report of the Special Rapporteur.

The objective of the work on the topic, as stated by SR, was to offer guidance "on how to identify rules of customary international law in concrete cases" to the people like judges, lawyers, arbitrators, legal advisers who work in other than Foreign Ministries, etc., ie., those who might not have training in international law, but called upon to apply CIL. The study seeks to shed light on the current state of international law on the process of formation and on methods of finding evidence of rules of CIL. The task taken up by the ILC neither is nor does to find any particular rule of CIL or set of rule applicable to a situation or event or series of events. The task is to identify the manner or methods by which the processes of formation of CIL takes place to identify rules of CIL.

We welcome this. Also we welcome and look forward to his proposed further study on the relationship of CIL with other sources of international law, viz., treaties, "general principles of international law recognized by civilized nations" and also "soft law". For this, the Special Rapporteur and ILC proposed to examine and study the approaches of States and other intergovernmental actors to the topic. We agree that the concept of *jus cogens* should be kept aside from the present study. Also subject to study would be the decisions of international as well as domestic judicial bodies (especially ICJ), writings of publicists and also the work of other bodies like the International Law Association (especially its 2000 London Principles).

We look forward to further detailed reports of the Special Rapporteur and work of the ILC elaborating various elements of this topic. Thank you.

President: Thank you India. I now give the floor to Japan.

The Delegate of Japan: Thank you Madam Chairperson. First of all, I would like to express our appreciation to the Secretariat for preparing a useful document for this session as always on the work of the ILC.

At the outset of discussing the question of the work of ILC, I consider it as my duty both official and personal to inform the AALCO members with great sorrow of the passing away in March this year of Ambassador Chusei Yamada, who has been well-known among many here by his long-term dedicated service as a member of the ILC from 1992 to 2009 and as a delegate for Japan to the AALCO for 14 years from 1993 to 2007.

As member of the ILC, the late Amb. Yamada served as chairperson during the fifty-second session in the year 2000 and in 2002 he was appointed Special Rapporteur on the shared natural resources and completed drafting of the articles on the law on transboundary aquifers. As delegate to the AALCO, he regularly participated in its Annual Meetings and contributed greatly to deepening the discussions on the agenda of ILC in particular.

During the first session of ILC this year, on the third day, 8th May, a memorial session for Amb. Yamada was especially held and as many as 16 members of the Commission delivered their personal remarks praising his contribution to the work of ILC as excellent international law scholar as well as experienced diplomatic practitioner.

Madam Chair,
The provisional agenda of the forthcoming session of UN General Assembly includes among others the law of transboundary aquifers and the question of the draft articles of the law of transboundary aquifers will be considered by the Six Committee of the General Assembly under its resolution 66/104.

Against the background of rapid social and economic development and population growth in the developing countries, the demand for water resources is dramatically increasing and in particular the appropriate management of underground water is essential to the realization of sustainable development. Transboundary underground water exists all over the world. Therefore, to establish a legal framework thereupon is of vital importance to avoid disputes among the states concerned and to keep the stability of region.

From such viewpoint, the draft articles adopted by the ILC could serve as a useful platform for managing regional underground acquifers. The UNGA resolution adopted in 2008 encourages the states concerned to take into account the provisions of these draft articles in making appropriate bilateral or regional arrangements for the management of their transboundary acquifers. The draft articles reflect the wide range of the state practices and scientific grounds which have been proven in cooperation with the UNESCO and other Special Agencies. Throughout the deliberations of the Six Committee in 2008 and 2011, many countries referred to the usefulness of those draft articles.

Japan considers that the draft articles are outcome of the codification and progressive development of international law and should be taken into account widely in making bilateral and regional agreements and will actively participate in the discussion of the Six Committee. Japan, in its note submitted to the Secretary General, called for declaring the draft articles as the guiding principles.

To the Asian and African states, the appropriate management of water resources is a great task to realize their development and stabilization of society and the draft articles are useful instruments to both regions. In the course of discussions at the Six Committee, some water resource-scarce countries expressed concerns on the draft articles. But they will certainly be a useful legal framework for the appropriate management of groundwater and thereby would guarantee access to groundwater for resource-scarce countries. Japan wishes to get the cooperation of as many countries as possible.

Madam Chair,
Japan welcomes that the ILC decided to include the topic “Protection of the atmosphere” in its work programme and designated Dr. Shinya Murase as the Special Rapporteur for the topic.

Japan believes that the ILC has a large role to play in the area of protecting the atmosphere and the international community needs to make concerted efforts to that end. We hope earnestly that through consideration of that topic, the ILC will sort out various issues relating to the subject and avails itself of the opportunity to contribute to the codification and progressive development of international law.

As the protection of the atmosphere is a great task confronting the Asian-African region, we earnestly hope that the AALCO Member States will contribute actively to the deliberation on that question at the ILC.

Madam Chair,ILC, in its work to make a worthwhile contribution to the codification and progressive development of international law, needs the input from the widest range of the international community, in particular from the Asian and African states. To that end, the AALCO has an important role to play.

There are two ways of AALCO Member States to contribute to codification and progressive development of international law: one is by presenting comments in reply to inquiry, another making statements during the deliberation at the Sixth Committee. We would like to see the AALCO Member States do make utmost use of these opportunities and actively participate in those important communications with the ILC. Thank you.

President: Thank you Japan. I now call upon Thailand to make their intervention.

The Delegate of Kingdom of Thailand: Madam President, Excellencies, Distinguished Delegates, My delegation would like to express our appreciation to the speakers for their presentations which have provided us with the overall pictures of the ILC issues under consideration. Also we wish to thank AALCO for organizing this Special Half-day Meeting on "Selected Items on the Agenda of the International Law Commission" and to thank AALCO Secretariat for preparing a report of excellent quality on related matters. Thailand would also like to reconfirm our commitment to cooperate with the ILC and AALCO in their long standing task of codification and progressive development of international law.

Madam President, While there are many topics on the agenda of the ILC, the selected topics to be discussed in details are indeed of particular concern for various AALCO Member States. This delegation would like to make a few comments in this regard.

On **the Protection of Persons in the Event of Disasters**, it is recognized that people's lives need to be protected on the one hand, and that appropriate procedures must be put in place for the necessary operations to be conducted effectively, on the other hand. At the same time, even in the event of disasters, one cannot choose to ignore the important and often highly sensitive issue of state sovereignty. Therefore, we need to strike a right balance between the two principles under the specific circumstances of each case.

Madam President, The Royal Thai Government has taken a progressive view regarding disaster management and prevention. There has been a series of four-year plans to deal with various forms of potential disasters, with water management being the latest. From monitoring and early warning systems to responses and recovery measures, our process is based upon the principles of preparedness and risk reduction. In any case, while we have such active strategy in place, we also recognize that determining the national response capacity of a state is a process that may affect certain core principles, be they sovereignty, territorial integrity or non-intervention. Thus, it will not be an easy task to alleviate the concerns of States on these points.

My delegation is of the view that the nature of state sovereignty in this context encompasses both rights and obligations. That is to say, while a state affected by disaster indeed needs to ensure that its nationals and others within its territory are given assistance, this does not mean that all of the necessary components of its sovereignty are to be disregarded.

Madam President, On the **Expulsion of Aliens**, one cannot deny that it is a sovereign prerogative of a state to regulate the presence of foreigners on its territory. However, it has also been established that such a power may not be exercised with no limitation, particularly where human rights are concerned. Safeguards need to be put in place in order to ensure proper conduct in this area. While a State may be concerned with ridding itself of further problems from particular individuals, it cannot turn a blind eye on the potential violation of human rights and the consequences from the expulsion of aliens in certain circumstances. Ensuring a fair and transparent procedure of expulsion would at least lead to a more substantive protection against arbitrariness and maltreatment. In this regard, States are bound to respect the right to life and, at the least, physical integrity. Also, expulsion should not lead to cruel, inhumane or degrading treatment.

Madam President, On the **formation and evidence of customary international law**, AALCO Member States need to compile evidence of their State practice and *opinion juris* on the ILC agenda, as well as to answer questions posed by the ILC. This is to ensure that AALCO play a role in shaping the development of international law and, more importantly, that the development is shaped in the direction that takes into account the interests of AALCO Member States.

In closing, my delegation would like to commend the work of both the AALCO and ILC on these topics. Comments on specific issues have been requested with regard to ILC in particular. This delegation believes that the expertise and experience shared in this august assembly would provide ILC with valuable inputs for further deliberation. Session such as this is of great significance in the maintenance of the ILC and AALCO longstanding and mutually beneficial relationship; and we find the statements made here most constructive and thought provoking. Perhaps, we may need to reschedule the annual session of AALCO to precede the sessions of ILC to allow ILC to consider our inputs during its same year session. I thank you, Madam President.

President: Thank you Thailand. Now I call upon Malaysia to make their statements**.**

The Delegate of Malaysia: Madam Chair, Malaysia wishes to extend its gratitude to the secretariat for preparing the report on matters relating to the work of the international law commission at its 64th and 65th Session.

Madam Chair, Malaysia acknowledges the role and importance of customary international law and views that customary international law should be accorded the same recognition by the whole of the international community. Although customary international law is recognized as a source of law, views as to what constitutes customary international law are manifestly disseminated and deeply deliberated upon. Hence Malaysia agrees with the Secretariat that in-depth study should be conducted in relation to determining the formation and evidence of customary international law by taking into consideration views from different States.

In relation to the issues highlighted by the AALCO at the Commission's 65th Session, Malaysia supports that notion that analysis of the 10 questions posted is of crucial importance and that it will further shed some light in the core study of customary international law[16]. Additionally, Malaysia recommends that other related issues which the international law commission could take into consideration in formulating its study are:

(i) Customary international law for group of states / regional level – its existence and requirements for formation and evidence;
(ii) Persistent objection – density /before and after the formation of customary international law;
(iii) Evidence of customary international law – whether a piece of evidence can be used to prove both the subjective and objective elements of customary international law.

Malaysia also notes 2 draft conclusions in the first report of the Special Rapporteur relating to the scope and use of terms of "customary international law". With regard to the scope, Malaysia is agreeable to the proposition and emphasizes that the draft conclusion should be reflective of State practices from all of the principal legal systems of the world and from all regions. Further, the conclusions should be practical and able to give guidance not only to international tribunals or practitioners but also to the domestic courts and judges.

In relation to the proposed term, Malaysia is generally agreeable on the use of term of "customary international law" as per the proposal. For purposes of other terms, Malaysia reiterates that the Commission takes into account the widest possible States practices and their approaches relating to the relevant terminology/definitions, before a common understanding could be reached.

Malaysia also wishes to highlight the 10 the questions highlighted by the AALCO at the 65th Session, regarding the resolutions of organs of international organizations, including the General Assembly of the United Nations, and international conferences, and the formation of customary international law; their significance as possible evidence of customary international law. Malaysia views this part of the study as essential and looks forward to the study on the value of such resolution in light of identifying the formation and evidence of customary international law.

In conclusion, Malaysia supports the call for Member States to submit materials on state practice to the Commission to ensure that the outcome of the Study will reflect all perspectives, including that of developing countries.

Madam Chair, On the topic **"Immunity of State Officials from Foreign Criminal Jurisdiction",** Malaysia notes that the Preliminary Report of the Special Rapporteur for the topic was considered at the Commission's Sixty Fourth session while the Second Report was considered at the Sixty Fifth Session. Malaysia is particularly interested in the matter as the Special Rapporteur has proposed six (6) draft articles which capture the key issues pertaining to the immunity of State officials from foreign criminal jurisdiction.

[16] At page 70 of AALCO's report on Matters relating to the Work of international Law Commission at its Sixty-Fourth and Sixty-Fifth Session.

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

Malaysia welcomes the proposed draft Articles and will continue to conduct an in-depth study of the draft Articles. Meanwhile, Malaysia notes that draft articles 1 and 2 deal with the scope of the topic and the draft articles. It was drafted to set clear the parameters of the subject and the draft articles thereafter, taking into considerations issues that States commonly face in practice when dealing with the question of the immunity of state officials from criminal jurisdiction. Malaysia fully support the establishment of such parameters as it would set clear from the outset the scope of the topic.

Specially to draft Article 1, Malaysia would like to raise the issue on the usage of the word "certain State officials" as it raises question as who are these officials that enjoy immunity. However, Malaysia takes note that the Special Rapporteur has acknowledged the need to define the term "official", therefore the term will be used on provisional basis in the draft articles until a decision on the terminological issue has been taken[17]. On the note, Malaysia is of the view that the all State officials should be covered under the definition. A related consideration would be whether State officials who are employed on a contract basis would be covered under such definition when they undertake the function of State officials.

Further, as the Commission will exclude previously codified areas such as the immunities of diplomatic agents, consular officials members of special missions and representatives of states to international organizations, these categories of persons should be excluded from the definition of "State officials".

As regards draft Article 2, Malaysia agrees that criminal immunities granted in the context of diplomatic or consular relations or during in connection with a special mission, criminal immunities established in headquarters agreements or in treaties that govern diplomatic representation to international organizations or establish the privileges and immunities of international organization and their officials or agents, from the scope of the topic as they are settled unilaterally by a State to the officials of another State, especially while they are in its territory should also be excluded from the discussion.

[17] A/CN.4/661 para. 33 at p.10

Madam Chair, As regards Article 3(b), Malaysia queries the reason the word "judges" is also included in the above paragraph. Malaysia is of the view such inclusion is not necessary as the word "courts" should be sufficient.

As regards Article 3(d), Malaysia reiterates its view that all State officials should be receive the immunity from foreign criminal jurisdiction. As such, reference to the word "certain" State officials should be deleted. "Official acts" should also be carefully defined.

As regards Article 4, Malaysia is of the view that the categories of persons considered as Heads of State and Heads of Government should also be defined. Malaysia would suggest that the definition should include sovereign rulers who act as Head of State such as Yang di-Pertuan Agong, in addition to the head of Government such as the Prime Minister of President.

Malaysia notes that draft Article 5 focuses on one the normative element that characterize immunity *ratione personae*, which is the type of actions that the covered by such immunity. This Article explains that such immunity include all acts, whether private or official, that are performed by Head of State, Heads of Government and minister for foreign affairs prior to or during the term of their office.

Malaysia further observes that paragraph (a) of draft Article 5 covers the types of actions done prior to or during their term of office. Based on draft Article 6, it is clear that this immunity applies only while the Head of State, Head of Government or minister for foreign affairs holds office. Hence, Malaysia would like to seek clarification on the intention of the proposed term as the said term seems to contradict the temporal scope of immunity *ratione personae* which only begins when the said official takes office.

Malaysia also note that sub-paragraph (b) of draft Article 5 iterates the intention to highlight the limitation to the enjoyment of immunity *ratione personae* in sub-paragraph (a) of draft Article 5. However Malaysia queries the usage of the term "may" in sub-paragraph (b) of Article 6 as such usage seems to indicate that the enjoyment of immunity *ratione personae* is dependent upon other conditions.

Malaysia further notes that following the work plan set out in her preliminary report, the Special Rapporteur proposes to devote her third report, which will be submitted to the Commission at its sixty-sixth session, to a study of the normative elements of **immunity *ratione materiae***, focusing primarily on two particularly complex issues: the terms "official" and "official act". Malaysia looks forward to this report, particularly the draft articles on these issues and consequently the issue of exceptions to immunity. Due to the complexity of the matter, Malaysia welcomes any further guidance from AALCO Member States to enable Malaysia to study the topic in greater detail and depth.

Madam Chair, On the topic **"Protection of Persons in the Event of Disasters"**, Malaysia thanks the Special Rapporteur to the topic of Protection of Persons in the Event of Disasters, Mr. Eduardo Valencia-Ospina for his Sixth Report which contained new draft Articles 2 *ter* and 16. Malaysia notes that the International Law commission at its 65th Session in 2013 has now provisionally adopted draft Articles 5 *ter* and 16 as coming out of the work of the Commission's Drafting Committee.

Malaysia further notes the Report produced by the AALCO Secretariat on this Agenda Item. Although the said AALCO Secretariat Report covered the Commission's work at its 64th and 65th Sessions, Malaysia will limit its observations to draft Articles 16 and 5 ter, being the latest development in regards to the work of the Commission on this topic. Pending the production of the official report of the International Law Commission of its deliberations at its 65th Session and for purposes of discussion in this AALCO session, Malaysia wishes to put on record that the observations in relation to these draft articles are preliminary in nature. Malaysia will study further on the draft Articles and specific comments to the same will be submitted later.

Madam Chair, In relation to Draft Article 5 *ter* as proposed by Special Rapporteur and the Drafting Committee, Malaysia finds the general idea behind the formulation of Draft Article 5 *ter* favourable and supports cooperation that could lead to disaster risk reduction within the ambit of the principle of State sovereignty under public international law. Malaysia joins many other in subscribing to the belief that prevention is better that cure and as in this case, Malaysia supports cooperation that could lead to the circumvention of a disaster and any form of disaster risk reduction.

Madam Chair, Malaysia notes that the reference to the term "measures" at draft Article 5 *ter* appears to correlate to the "appropriate measures" stated at draft Article 16. Malaysia notes that this correlation may prove to be venturesome when Article 5 *ter* is read together with Article 5 on the "Duty to cooperate".

Malaysia further notes that Article 5 makes it mandatory for States to cooperate with the United Nations and other competent intergovernmental organizations, the International Federation of the Red Cross and Red Crescent and the International Committee of the Red Cross, and with relevant non-governmental organizations. This cooperation, read together with the measures of implementation stated at draft Article 16 and draft Article 5 *ter* may lead to the sovereign right of the States being usurped by any supra-international body.

Madam Chair, With regard to Draft Article 16, Malaysia notes that the Drafting Committee has taken a different approach in the adoption of the said Draft Article. In this context, Malaysia notes that draft Article 16 as introduced by the Special Rapporteur limits the adoption of "appropriate measures" through the establishment of institutional arrangements, whereas draft Article 16 as adopted by the Drafting Committee widens the scope of the implementation of "appropriate measures" to include the adoption of legislation and regulations by the State.

Malaysia finds that Draft Article 16 coming out from the Drafting Committee, in particular, paragraph 1 of Draft Article 16, the proposed draft by the Special Rapporteur is preferred. Malaysia maintains that any measures to be undertaken by a State to reduce the risk of disasters should be within its full capabilities and having regard to the principle of State sovereignty under public international law.

Malaysia feels that the Drafting Committee in imposing the requirement for States to adopt legislation and regulations for the prevention, mitigation and preparation for disasters may not be sensitive to these considerations. Be that as it may, Malaysia awaits the statement by the Drafting

Committee in explaining its deviation from draft Article 16 as initially proposed by the Special Rapporteur.

Whilst noting the observations made by the AALCO Secretariat on this topic, Malaysia makes reference to paragraph 132 of the Report on Matters Relating to the Work of the International Law Commission at its Sixty-Fourth and Sixty Fifth Session whereby Malaysia is of the view that the AALCO Secretariat should not only focus its observations and report on the previous session of the International Law Commission, but more importantly, AALCO should be focusing its report on the latest development in the work of the Commission and in this case, the proposed Draft Article 16 and 5 *ter*. Thank you.

President: Thank you Malaysia. South Africa you have the floor.

The Delegate of Republic of South Africa: Thank you Madam Chair.

South Africa occupies a strategic position in the world when it comes to international law enforcement cooperation. It is clear that South Africa, by virtue of its position in Southern Africa, Africa and the whole world, is an important player in combating transnational crime.

Chair, South Africa, being a State party to the UN Convention against Transnational Organized Crime (UNTOC), the Protocol against Trafficking in Arms, Trafficking in Persons and Smuggling of Migrants has obligations to assist regarding the cooperation in the fight against crime and corruption, extradition of suspects and the obtaining of evidence. Furthermore, with its membership to Interpol, the Southern Africa Regional Police Chiefs Cooperation Organization (SARPCCO), and its formal police-to-police cooperation agreements, South Africa is able to comply with the majority of requests for international cooperation.

Chair, regarding Mutual Legal Assistance the Director-General of the Department of Justice and Constitutional Development (DOJCD) is the Central Authority for all matters pertaining to mutual legal assistance and extradition within South Africa. Requests for mutual legal assistance are therefore directed to the Office of the Director General in the DOJCD for processing according to the relevant provisions in the International Cooperation in Criminal Matters Act, 1996 (Act No. 75 of 1996) (ICCMA) or the relevant treaty or convention concerned. With respect to mutual legal assistance, South Africa adopts a flexible approach in dealing with requests, and is able to render a wide range of mutual legal assistance under the ICCMA. South Africa is able to render assistance regardless of a treaty or agreement (although South Africa has a number of agreements in place). There is also no requirement for dual criminality, or where the request is to obtain evidence, there is no requirement that judicial proceedings should have been instituted before assistance can be rendered.

Chair, with respect to South Africa's extradition framework, the Extradition Act, 1962 (Act No. 67 of 1962) provides for extradition on the basis of principle dual criminality for offences punishable by a sentence of six months imprisonment or more. South Africa can also extradite its own nationals. All extraditions must be consistent with the South African Constitution, e.g. South Africa will not extradite if capital punishment were to be imposed.

Chair, South Africa has signed extradition (also mutual legal assistance) agreements with some of the Member States of AALCO. It is also a party to the EU Convention on Extradition. It should be noted that extradition is not dependent on a treaty. Under Section 3(2) of the Extradition Act, the President may in writing consent to the surrender of a fugitive. Under Section 3(3), fugitives may also be surrendered to countries, which have been designated pursuant to that section.

Having said that Chair, there are challenges encountered in implementing pertinent provisions of international legal instruments. With respect to extradition and mutual legal assistance, the problems experienced in most countries are that the process is too lengthy. The international community should look at simplifying international cooperation procedures to ensure speedy finalization of extradition and mutual legal assistance matters. With reference to the question of overcoming obstacles in exchanging information through mutual legal assistance there is a standard procedure that is followed when dealing with requests for mutual legal assistance, namely exchanging information directly between Central Authorities, through diplomatic channels.

In conclusion, Chair, it would be ideal if Member States can establish central Authorities in the jurisdictions of the respective member states, with the specific intention of expediting the process of requests in instances where the request is urgent. I thank you.

President: Thank you South Africa. I now give the floor to People's Republic of China.

The Delegate of the People's Republic of China: Thank you Madam President, I would like to thank the panelists for their excellent presentations and we also thank the AALCO Secretariat for their report on this agenda item. The ILC plays an important role in promoting rule of law at international level. We note that there is a regular communication mechanism, which we highly appreciate, between the AALCO and the ILC in order to facilitate the sharing of views on issues of mutual concern.

Madam President, now I would like to make a preliminary comment on the key topics of the ILC considered at its 65th session.

On immunity of state officials from foreign criminal jurisdictions, Ms. Hernandez, the Special Rapporteur of the topic, submitted her second report. She also correctly limits the scope of this topic to the immunity of state officials from criminal jurisdiction of a foreign court, while excluding the immunity of state officials in international judicial institutions, and excluding immunity of specific groups of officials such as diplomatic and consular officials which were already covered by relevant conventions. In the 65th session, the ILC has preliminarily adopted three draft articles on the scope of this topic and immunity *ratione personae.*

As to the scope of immunity *ratione personae,* we hold the view the customary international law is that heads of states, heads of governments and foreign ministers (the *Troika*) enjoy immunity *ratione personae*. The immunity is an absolute one without exception. However, international practice does not rule out the possibility of granting immunity *ratione personae* to other high ranking officials of a State. If we probe into state practices, it may be observed that many cases

in national courts have demonstrated that immunity *ratione personae* for officials is not limited to the *Troika*. From statements made by states at the 66th and 67th session of Sixth Committee, it can be found that many countries agree to explore, in varying degrees, the scope of immunity *ratione personae*.

On the topic of formation and evidence of customary international law, we appreciate the first report submitted by the Special Rapporteur Sir. Michael Wood. The Special Rapporteur defined the scope and outcome of this topic, and made a thorough review of research materials, in a very clear and open approach. In our opinion, the criteria on the formation and evidence of customary international law should be unified system applied to all situations; there should not be different criteria for different branches of international law or for different audiences. As *Jus cogens* and customary international law are just different legal concepts and they are not necessarily connected, we don't think it's necessary to introduce the concept of *Jus cogens* in this topic. We believe it is more helpful for the Commission to discuss relationship between customary international law and treaties, as well as customary international law and general principles of law. As for the outcome of the topic, a unified and clear guiding principle may serve the purpose. We agree with the idea that for this topic we need to strike the balance between certainty and flexibility. We agree to change the title of this topic to "Identification of customary international law", which could reflect more appropriately the substance of this topic.

Under the topic of "protection of persons in the event of disasters", the special Rapporteur, Mr. Valencia-Ospina in his sixth report proposed two draft articles regarding "prevention of disasters and disaster risk reduction", expanding the scope of this topic from the response phases after the disaster to the pre- and the post-disaster phases. We agree to this expansion. Chinese government highly values the disaster prevention, mitigation and preparedness in the disaster management. At the same time, we are of the view the ILC should note the difference between natural disaster and man-made disasters. And those states who suffered from disaster should not be obliged to bear too many responsibilities with regard to unpredictable disasters. While in the process of pre-disaster prevention, we suggest that the Commission shed some lights on the application of space technologies, add new contents on "encouraging application of space technology in field of disaster prevention, mitigation and preparedness". In that regard, we appreciate the comments made by Dr. Perera that it would be better to provide guidance for international community for international cooperation and enhancing the solidarity of it rather than impose obligations or duties on the State that has suffered from the disaster. Thank you very much madam President.

Madam President: Thank you China for the comments. I don't see any request from the floor. Iran wants to take the floor.

The Delegate of Islamic Republic of Iran: Thank you Madam President. I have a small question to Mr. Michael Wood regarding identification of customary international law. The first question is do you think we can accept the resolution of international and regional organizations in the same level as the state practice. Do these resolutions have the criteria of being CIL? And the second question is in line with the question raised by Prof. Momtaz as I want to repeat the question, regarding the separate and dissenting opinion of the ICJ. Are they in the same level of judgment of the ICJ itself. May I ask Sir Michael Wood to convey the message and opinion of the majority of the views of AALCO Member States regarding expanding the scope of immunity

ratione personae to officials beyond Troika and it was beneficial to have this meeting between the meetings of the ILC and Sixth Committee in the New York. We could have more discussion here and share our views and at the Sixth Committee. Thank you very much.

President: Thank you Iran. Sir Michael Wood you have the floor.

Sir Michael Wood: Thank you very much. Well on the last point, the views expressed in this meeting are well known to the members of the ILC and would be reporting it while reading it. I agree with you on the timing of this meeting, which is good. It would be even better if we have the views before the report of the ILC. Perhaps, on other occasion at similar level, you should make effort to try and get an advance copy of the report. On your questions, firstly I apologies for not responding to Prof. Djamchid's query on the dissenting and separate opinion. My answer would be that I would not give the same weight to separate and dissenting opinions because they are not judgments, but sometimes they give explanations and may be was required to explain certain parts of judgments and sometimes they show the way to the future. And they may give views which become international law itself. I think one must not give the same weight as the majority opinion.

On your question on resolutions of international and regional organizations as state practice- I think it is difficult to give a general answer. We have to look very carefully to circumstances in which the resolution was adopted, whether it was intended to reflect state practice, for example as with the Friendly Relations Declaration of 1970, was very carefully negotiated which understood by all State's consent to reflect the view of the law that States held at that time. There are other resolutions adopted by the UN General Assembly that has less or more weight, which one has to look very carefully. At the individual resolution before deciding whether or not they could be considered as a contribution to state practice. I did mention earlier of the possibility of regional customary law, which is an important topic which the Commission will look at. We also would look at other topics raised by the representative of Malaysia in his thoughtful presentation. Thank you.

President: Thank you. I will give the floor to the Secretary-General to make an announcement.

Secretary-General: Thank you Madam President. Having heard the statements made by the Member States of AALCO, I would like to propose to adopt a resolution in memory of late Amb. Chusie Yamada recognizing his contributions in the field of international law. Late Amb. Yamada has played a significant role in undertaking research and formulating viewpoints based on his experiences and practices from this part of the world and carrying forward to ILC for codification and progressive development of international law. In that regard, the AALCO Secretariat would provide a draft resolution expressing condolence to Late Amb. Yamada. The resolution could be adopted tomorrow at the plenary meeting. May I suggest that this message could be incorporated as a Preambular paragraph within the resolution on Special Half-Day Meeting on "Selected Items on the Agenda of the ILC" contained in AALCO/RES/52/SP 1. Thank you Madam President.

President: Thank you. I would like to request the Member States to give their comments on resolutions on different subjects to the Secretariat by this afternoon, so that the necessary

amendments could be carried out. Before we end, it is time to thank our eminent panellists, who have spared their valuable time to be here for sharing their views with Member States of AALCO on some very important subjects under consideration in the Commission and for also for agreeing to respond to the questions raised by the Member States. We thank you and with these, this half-day meeting has come to a close.

The meeting was thereafter adjourned.