CONTENTS

REPORT ON MATTERS RELATING TO THE WORK OF THE INTERNATIONAL LAW COMMISSION AT ITS FIFTY-EIGHTH SESSION

I. INTRODUCTION

1. The International Law Commission (hereafter called the "ILC" or the "Commission") established by General Assembly Resolution 174 (III) of 21st September 1947 is the principal organ under the United Nations system for the promotion of progressive development and codification of international law. The 34-member ILC held its fifty-eighth session in Geneva from 1 May to 9 June and 3 July to 11 August 2006, and elected Mr. Guillaume Pambou-Tchivounda (Gabon) as its Chairman. The AALCO was represented at the session by Amb. Dr. Wafik Z. Kamil, the Secretary-General, who addressed the ILC on 21 July 2006.

2. There were as many as nine topics on the agenda of the aforementioned session of the ILC. These were:

(i) Reservations to Treaties;
(ii) Diplomatic Protection;
(iii) Unilateral Acts of States;
(iv) International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law (International Liability in Case of Loss from Transboundary Harm Arising out of Hazardous Activities);
(v) Responsibility of International Organizations;
(vi) Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law;
(vii) Shared Natural Resources;
(viii) Effects of Armed Conflicts on Treaties; and
(ix) The Obligation to Extradite or Prosecute (*aut dedere aut judicare*).

3. On the topic of **Reservations to Treaties**, the Commission considered the second part of the Special Rapporteur's tenth report[1] and referred to the Drafting Committee 16 draft guidelines dealing with the definition of the object and purpose of the treaty and the determination of the validity of reservations. The Commission also adopted 5 draft guidelines dealing with the validity of reservations, together with commentaries. In addition, the Commission reconsidered 2 draft guidelines dealing with the scope of definitions and the procedure in case of manifestly invalid reservations which were previously adopted, in light of new terminology.

4. On the topic of **Diplomatic Protection,** the Commission considered the seventh report of the Special Rapporteur on the topic.[2] The Commission subsequently completed the second reading of the topic. The Commission decided, in accordance with article 23 of its Statute, to recommend to the General Assembly the elaboration of a convention on the basis of the draft articles on Diplomatic Protection.

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1 A/CN.4/558 and Add.1 and 2
2 A/CN.4/567

5. On the topic of **Unilateral Acts of States**, the Commission considered the ninth report of the Special Rapporteur[3] which contained 11 draft principles and reconstituted the Working Group on Unilateral Acts with the mandate to elaborate conclusions and principles on the topic. The Commission adopted a set of 10 guiding principles, together with commentaries, relating to unilateral declarations of States capable of creating legal obligations and recommended the guiding principles to the attention of the General Assembly.

6. On the topic of **International Liability for Injurious Consequences Arising Out of Acts not Prohibited by International Law (International Liability in Case of Loss from Transboundary Harm Arising Out of Hazardous Activities)**, the Commission considered the third report of the Special Rapporteur[4] and subsequently completed the second reading of the topic. Further, the Commission decided, in accordance with article 23 of its Statute, to recommend that the General Assembly endorse the draft principles by a resolution and urge States to take national and international action to implement them.

7. On the topic of **Responsibility of International Organizations**, the Commission considered the fourth report of the Special Rapporteur[5] and adopted 14 draft articles, together with commentaries, dealing with circumstances precluding wrongfulness and with the responsibility of a State in connection with the act of an international organization.

8. On the topic of **Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law**, the Commission considered the report of the Study Group and took note of its forty-two conclusions,[6] which it commended to the attention of the General Assembly. The report and its conclusions were prepared on the basis of an analytical study finalized by the Chairman of the Study Group, which summarized and analyzed the phenomenon of fragmentation taking into account of studies prepared by various members of the Study Group itself. The Commission requested that the analytical study be made available on its website and be published in its *Yearbook*.

9. On the topic of **Shared Natural Resources**, the Commission established a Working Group on Transboundary Groundwaters to complete the consideration of the draft articles submitted by the Special Rapporteur in his third report[7]. Further it referred 19 revised draft articles to the Drafting Committee and subsequently adopted on first reading a set of draft articles on the law of transboundary aquifers, together with commentaries.

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3 A/CN.4/569 and Add.1
4 A/CN.4/566
5 A/CN.4/564 and Add.1 and 2
6 A/CN.4/L.702
7 A/CN.4/551 and Corr.1 and Add.1

10. On the topic of **Effects of Armed Conflicts on Treaties**, the Commission considered the second report of the Special Rapporteur.[8]

11. On the topic of **The Obligation to Extradite or Prosecute (''*aut dedere aut judicare*'')**, the Commission considered the preliminary report of the Special Rapporteur.[9]

[8] A/CN.4/570 and Corr.1

[9] A/CN.4/571

II. SUMMARY OF THE WORK OF THE COMMISSION ON THE AGENDA ITEMS

12. With a view to providing Member States with adequate time for focused deliberations on the work of the International Law Commission, the AALCO Secretariat presents its report with certain modifications. The present section provides a brief summary of some of the topics on the agenda of the ILC. These are: Reservations to Treaties, Diplomatic Protection, Unilateral Acts of States, International Liability for Injurious Consequences arising out of Acts not Prohibited by International Law, Responsibility of International Organizations and Fragmentation of International Law.

13. The following section contains a relatively elaborate review of the work of the Commission on three topics. These are: Shared Natural Resources, Effects of Armed Conflicts on Treaties and the Obligation to Extradite or Adjudicate (aut dedere aut judicare). This division is made keeping in view the progress of the work of the Commission on these items. Therefore the Member States are requested to focus on these three topics during their deliberations at the forty-sixth session of AALCO. Nevertheless the Secretariat will welcome any comment on the other topics, which could enrich the work of the ILC in its coming session.

1. Reservations to Treaties

14. It may be recalled that the UN General Assembly in its resolution 48/31 of December 1993 endorsed the decision of the ILC to include in its agenda the topic "The law and practice relating to reservations to treaties." At its forty-sixth session in 1994, the ILC appointed Mr. Alain Pellet as Special Rapporteur for the topic. The ILC at its forty-seventh session in 1995 and the forty-eighth session in 1996 received and discussed the first[10] and second[11] reports of the Special Rapporteur, respectively.

15. The ILC continued its work on the understanding that: the title to the topic would read as "Reservations to Treaties"; the form the results of the study would take should be a guide to practice in respect of reservations; and the present work by the ILC should not alter the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions on the Law of Treaties. As far as the Guide to practice is concerned, it would take the form of draft guidelines with commentaries, which would be of assistance for the practice of States, and international organizations. These guidelines would, if necessary, be accompanied by model clauses.

16. Till 2006, the Commission received ten reports of the Special Rapporteur on the topic and after the deliberations the Commission has so far adopted 76 draft guidelines with commentaries covering various aspects of reservations to treaties.

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[10] A/CN.4/470 and Corr.1.
[11] A/CN.4/477 and Add.7.

2. Diplomatic Protection

17. The ILC at its forty-eighth session in 1996 identified the topic of "Diplomatic Protection" as one of the topics appropriate for codification and progressive development.[12] By resolution 51/160, the General Assembly in the same year invited the ILC to further examine the topic and to indicate its scope and content in the light of the comments and observations made during the debate in the Sixth Committee and any written comments that Governments might wish to make.

18. At its forty-ninth session (1997), a Working Group was established on this topic. The Working Group attempted to clarify the scope of the topic and identify issues to be studied in the context of the topic. The report of the Working Group was endorsed by the ILC. It was decided that the ILC should endeavor to complete the first reading of the topic by the end of the present quinquennium. Mr. Mohamed Bennouna was appointed Special Rapporteur for the topic. At its fiftieth session (1998), the ILC had before it the preliminary report of the Special Rapporteur.[13] At the same session, the ILC established an open-ended Working Group to consider possible conclusions, which might be drawn on the basis of the discussion as to the approach to the topic.[14] At its fifty-first session (1999), the ILC appointed Mr. Christopher John R. Dugard as Special Rapporteur for the topic to replace Mr. Bennouna who was elected as a judge to the International Criminal Tribunal for the former Yugoslavia.

19. From 2000 to 2004, the Commission had received five reports of the Special Rapporteur[15] and considered them at successive sessions. At its fifty-sixth session in 2004 the Commission adopted on first reading a set of 19 draft articles together with commentaries on diplomatic protection. The Commission also decided to transmit the draft articles, through the Secretary General, to Governments for comments and observations with the request that such comments and observations be submitted to the Secretary General by 1 January 2006.

20. At the fifty-seventh session (2005), the Commission had before it the sixth report of the Special Rapporteur[16] dealing with clean hands doctrine. At its fifty-eighth session in 2006 the Commission considered the seventh report[17] of the Special Rapporteur and subsequently completed the second reading of the topic. The Commission decided, in accordance with article 23 of its Statute, to recommend to the General Assembly the elaboration of a convention on the basis of the draft articles on Diplomatic Protection.

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12 Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10), para. 249 and annex II, addendum 1.

13 A/CN.4/484.

14 The conclusions of the Working Group are contained in Official Records of the General Assembly, Fifty- third Session, Supplement No. 10 (A/53/10), para. 108.

15 A/CN.4/538

16 A/CN.4/547

17 A/CN.4/567

3. Unilateral Acts of States

21. In the report on the work of its forty-eighth session the International Law Commission had proposed to the General Assembly that the law of unilateral acts of States be included as a topic for the progressive development and codification of international law. By its resolution 51/160, the General Assembly had *inter alia* invited the ILC to examine the topic "Unilateral Acts of States" and to indicate its scope and content. At its forty-ninth session (1997) the ILC established a Working Group on the topic. The Working Group in its consideration of the scope and content of the topic took the view that the consideration by the ILC, of the Unilateral Acts of States, was "advisable and feasible". At its forty-ninth session, the ILC had appointed Mr. Victor Rodriguez Cedano, Special Rapporteur for the topic.

22. From 1998 till 2005, the Commission received and considered eight reports of the Special Rapporteur on the topic. The eighth report[18] contained an analysis of 11 cases of State practice and the conclusions thereof. A Working Group on Unilateral Acts was reconstituted and its work focused on the study of State practice and on the elaboration of preliminary conclusions on the topic, which the Commission should consider at its next session.

23. At the fifty-eighth session in 2006, the Commission considered the ninth report of the Special Rapporteur[19], which contained 11 draft principles and reconstituted the Working Group on Unilateral Acts with the mandate to elaborate conclusions and principles on the topic. The Commission adopted a set of 10 guiding principles together with commentaries relating to unilateral declarations of States capable of creating legal obligations and commended the guiding principles to the attention of the General Assembly.

4. International Liability for Injurious Consequences Arising Out of Acts not Prohibited by International Law

24. It may be recalled that, the ILC at its forty-ninth Session in 1997 decided to proceed with its work on the topic “International Liability for Injurious Consequences Arising Out of Acts not Prohibited by International Law” dealing first with the issue of “Prevention of Transboundary Damage from Hazardous Activities”. Accordingly the Commission at its fifty-third session completed its work with the adoption of the draft preamble and a set of 19 draft articles on the issue of prevention. During its fifty-sixth session (2001), the General Assembly of the United Nations by resolution 56/82 requested the ILC “to resume its consideration of the liability aspects of the topic, bearing in mind the interrelationship between prevention and liability, and taking into account the developments in international law and comments by governments”.

25. At its fifty-fourth session (2002), in accordance with the mandate of the General Assembly, the Commission established a Working Group under the chairmanship of Mr.

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[18] A/CN.4/557

[19] A/CN.4/569 and Add.1

Pemmaraju Sreenivasa Rao with a view to proceeding with its work on the second part of the topic i.e. "International Liability for Failure to Prevent Loss from Transboundary Harm Arising Out of Hazardous Activities". The Commission adopted the report of the Working Group and appointed Mr. Pemmaraju Sreenivasa Rao as special Rapporteur for the topic. At the fifty-fifth session (2003) the Commission considered the first report[20] of the Special Rapporteur on the topic containing certain recommendations and submissions for the consideration of the Commission.

26. At the fifty-sixth session (2004) the Commission had before it the second report[21] of the Special Rapporteur. The report contained a set of 12 draft principles. The Commission established a working group to examine the proposals submitted by the Special Rapporteur. Accordingly the Working Group reviewed and revised the 12 draft principles and recommended that the eight draft principles contained in its report[22] be referred to the Drafting Committee. The Commission referred the eight draft principles to the Drafting Committee alongwith a request to prepare a text of the preamble. Based on the report of the Drafting Committee the Commission adopted on first-reading a set of eight draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities. The Commission further decided to transmit the draft principles, through the Secretary-General to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2006.

27. At the fifty-eighth session in 2006, the Commission considered the third report of the Special Rapporteur.[23] The Commission subsequently completed the second reading of the topic and decided, in accordance with article 23 of its Statute, to recommend that the General Assembly endorse the draft principles by a resolution and urge States to take national and international action to implement them.

5. Responsibility of International Organizations

28. At its fifty-second session (2000), the Commission decided to include the topic of 'Responsibility of International Organizations' in its long-term programme of work[24]. The General Assembly in its resolution 55/152 of 12 December 2000, took note of the commission's decision and in paragraph 8 of its resolution 56/82 of 12 December 2001, requested the Commission to begin its work on the topic. At its fifty-fourth session (2002), the Commission decided to include the topic in its programme of work and appointed Mr. Giorgio Gaja as Special Rapporteur for the topic. At the same session a Working Group was established and at the end of the session the Commission adopted the report of the Working Group.

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20 A/CN.4/531
21 A/CN.4/540
22 A/CN.4/661
23 A/CN.4/566
24 Official Records of the General Assembly, Fifty-fifth session, Supplement No. 10(A/55/10), chap., IX para.729.

29. From 2003 till 2006 the Commission considered four reports of the Special Rapporteur and adopted 30 draft articles together with commentaries dealing with the internationally wrongful act of an international organisaiton, attribution of conduct to an international organization, breach of an international obligation, responsibility of an international organization in connection with the act of a State or another international organization, circumstances precluding wrongfulness and responsibility of a State in connection with the act of an international organization.

6. Fragmentation of International Law

30. It may be recalled that the topic 'Risks ensuing from fragmentation of international law" was identified as a subject that might be suitable for further study by the International Law Commission's Working Group on the long-term programme of work. After consideration of the feasibility study conducted by Mr. Gerhard Hafner the Commission decided at its fifty-second session (2000) to include the topic in its long-term programme. The Commission, at its fifty-fourth session (2002) established a study Group on the fragmentation of international law, which held discussion on the topic. This study by Mr. Hafner formed the starting point for consideration of the topic.

31. At its fifty-fourth session (2002), the Commission decided to include the topic in its programme of work and established a Study Group on the fragmentation of international law chaired by Mr. Bruno Simma. It also decided to change the title of the topic to "Fragmentation of international law: difficulties arising from the diversification and expansion of international law". The commission further decided to undertake a series of studies commencing first with a study on "The function and scope of the *lex specialis* rule and the question of 'self-contained regimes'" to be undertaken by the Chairman of the Study Group.

32. At its fifty-fifth session (2003), the Commission decided to establish an open-ended Study Group on the topic and appointed Mr. Martti Koskenniemi as Chairman, to replace Mr. Bruno Simma who was no longer in the Commission. The Study Group set a tentative schedule for work to be carried out during the remaining part of the last quinquennium (2003-2006), distributed among members of the Study Group work on the other studies agreed and decided upon the methodology to be adopted for that work. At its fifty-sixth session (2004), the Commission reconstituted the Study Group. It held discussions on the study "Function and Scope of the *lex specialis* rule and the question of 'self-contained regimes', as well as discussions on the outlines prepared in respect of the other remaining studies. At the fifty-seventh session (2005), the study Group was reconstituted and it had before it the studies prepared by the Members of the Study Group. The Commission held an exchange of views on the topic on the basis of a briefing by the Chairman of the Study Group on the status of work of the Study Group.

33. At its fifty-eighth session in 2006, the Commission considered the report of the Study Group and took note of its 42 conclusions, which it commended to the attention of the General Assembly. The report and its conclusions were prepared on the basis of an analytical Study finalized by the Chairman of the Study Group, which summarised and

analysed the phenomenon of fragmentation taking into account of studies prepared by various members of the Study Group, as well as discussion within the Study Group itself (A/CN.4/L.682 and Corr.1). The Commission requested that the analytical study be made available on its website and be published in its *Yearbook*.

III. OVERVIEW OF THE WORK OF THE COMMISSION ON SELECT AGENDA ITEMS

1. SHARED NATURAL RESOURCES

A. INTRODUCTION

a. Background

34. At its fifty-fourth session (2002), the commission decided to include the topic "Shared Natural Resources" in its programme of work and accordingly appointed Mr. Chusie Yamada as Special Rapporteur for the topic. The General Assembly, in paragraph 2 of resolution 57/21 of 19 November 2002, took note of the Commission's decision to include the topic in its programme of work.

35. At its fifty-fifth session (2003) the Commission considered the first report[25] of the Special Rapporteur on the topic. In furtherance of its work on the topic the Commission also had an informal briefing by experts on groundwaters from the Food and Agricultural organization (FAO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO).

36. At its fifty-sixth session (2004) the Commission considered the second report[26] of the Special Rapporteur, which contained seven draft articles. The Commission established an open-ended Working Group on Transboundary Ground Waters chaired by the Special Rapporteur. Further, the Commission held two informal briefings by experts on ground waters.

37. At its fifty-seventh (2005) session the Commission considered the third report[27] of the Special Rapporteur on the topic, containing a complete set of 25 draft articles on the law of transboundary aquifers. The Commission decided to establish a Working Group to review the draft articles presented by the Special Rapporteur taking into account the debate in the Commission on the topic. The Working Group reviewed and revised 8 draft articles and recommended that it be reconvened in 2006 to complete its work.

b. Issues for Focused Consideration at the Forty-Sixth Session of AALCO

38. As the Commission has adopted a set of 19 draft articles on the topic on first reading, Member States of AALCO may offer their comments on each individual article or general comments on the work of the Commission.

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25 A/CN.4/533 and Add. 1
26 A/CN.4/539 and Add.1
27 A/CN.4/551 and Corr.1 and Add.1

B. CONSIDERATION OF THE TOPIC AT THE FIFTY-EIGHTH SESSION OF ILC

39. The Commission established a Working Group on Transboundary Groundwaters to complete the consideration of the draft articles submitted by the Special Rapporteur in his third report[28]; referred 19 revised draft articles to the Drafting Committee; and subsequently adopted on first reading a set of draft articles on the law of transboundary aquifers, together with commentaries. Following is the overview of the draft articles adopted by the Commission.

Part I
Introduction

Article 1 [1]
Scope

> The present draft articles apply to:
> (a) utilization of transboundary aquifers and aquifer systems;
> (b) other activities that have or are likely to have an impact upon those aquifers and aquifer systems; and
> (c) measures for the protection, preservation and management of those aquifers and aquifer systems.

40. This provision provides the scope to which the present draft articles apply. Though it is appropriate in normal writing to denote a body of underground waters as 'groundwaters', the technical term 'aquifer' is opted here as it is scientifically more precise and leaves no ambiguity. An aquifer is often hydraulically connected to one or more other aquifers. This series of two or more aquifers is termed as 'aquifer system'.

41. The present draft articles apply only to transboundary aquifers. Domestic aquifers are excluded from the scope. This draft article specifies three different categories of activities, which must be covered by these draft articles. Subparagraph (a) specifics the utilization of aquifer systems. Subparagraph (b) covers those activities that will have impact on aquifers. Such activities are those that are carried out above or around aquifers and cause some adverse effect on them. Subparagraph (c) deals with measures that are meant to embrace not only those to be taken to deal with degradation of aquifers but also various forms of cooperation.

Article 2 [2]
Use of terms

> For the purposes of the present draft articles:
> (a) "aquifer" means a permeable water-bearing underground geological formation underlain by a less permeable layer and the water contained in the saturated zone of the formation;

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[28] A/CN.4/551 and Corr.1 and Add.1

(b) “aquifer system” means a series of two or more aquifers that are hydraulically connected;
(c) “transboundary aquifer” or “transboundary aquifer system” means, respectively, an aquifer or aquifer system, parts of which are situated in different States;
(d) “aquifer State” means a State in whose territory any part of a transboundary aquifer or aquifer system is situated;
(e) “recharging aquifer” means an aquifer that receives a non-negligible amount of contemporary water recharge;
(f) “recharge zone” means the zone which contributes water to an aquifer, consisting of the catchment area of rainfall water and the area where such water flows to an aquifer by runoff on the ground and infiltration through soil;
(g) “discharge zone” means the zone where water originating from an aquifer flows to its outlets, such as a watercourse, a lake, an oasis, a wetland or an ocean.

42. This provision defines the terms aquifer, aquifer system, transboundary aquifer, aquifer State, recharging aquifer, recharge zone and discharge zone.

Part II
General Principles

Article 3
Sovereignty of aquifer States

Each aquifer State has sovereignty over the portion of a transboundary aquifer or aquifer system located within its territory. It shall exercise its sovereignty in accordance with the present draft articles.

43. This draft article establishes that each aquifer State has sovereignty over the transboundary aquifer or aquifer system to the extent located within its territory. However, it is made clear that this sovereignty is not absolute. Therefore it is intended that this sovereignty shall be exercised in accordance with the present draft articles, which will be applied against the background of general international law. The underlying spirit of this provision is the concept of permanent sovereignty over natural resources, however, with certain limitations.

Article 4 [5]
Equitable and reasonable utilization

Aquifer States shall utilize a transboundary aquifer or aquifer system according to the principle of equitable and reasonable utilization, as follows:
(a) they shall utilize the transboundary aquifer or aquifer system in a manner that is consistent with the equitable and reasonable accrual of benefits therefrom to the aquifer States concerned;
(b) they shall aim at maximizing the long-term benefits derived from the use of water contained therein;
(c) they shall establish individually or jointly an overall utilization plan, taking into account present and future needs of, and alternative water sources for, the aquifer States; and
(d) they shall not utilize a recharging transboundary aquifer or aquifer system at a level that would prevent continuance of its effective functioning

44. The basic principle applicable to the utilization of shared natural resources is equitable and reasonable utilization of the resources. Subparagraph (a) applies this principle to the present context. Subparagraphs (b) to (d) mainly deal with reasonable utilization. Reasonable utilization is often understood as sustainable utilization or optimum utilization. The underlying notion is that it requires measures to keep the resources in perpetuity.

45. In the case of aquifers, water in non-charging aquifer is not renewable. Any exploitation of such resources leads to depletion. While waters in recharging aquifers are renewable, quantity of recharge water is usually extremely small compared to the large quantity of waters stored in the aquifer over thousands of years. Thus, the concept of sustainability is not appropriate to be explicitly stated in the case of aquifer. Instead, the concept of maximizing the 'long-term benefits' is adopted. This refers to the act of maintaining certain benefits over a specific period of time. The utilization can be only for a specified period. However this provision leaves it to States to decide on the desirable benefits, time period and other relates issues.

Article 5 [6]
Factors relevant to equitable and reasonable utilization

1. Utilization of a transboundary aquifer or aquifer system in an equitable and reasonable manner within the meaning of draft article 4 requires taking into account all relevant factors, including:
(a) the population dependent on the aquifer or aquifer system in each aquifer State;
(b) the social, economic and other needs, present and future, of the aquifer States concerned;
(c) the natural characteristics of the aquifer or aquifer system;
(d) the contribution to the formation and recharge of the aquifer or aquifer system;
(e) the existing and potential utilization of the aquifer or aquifer system;
(f) the effects of the utilization of the aquifer or aquifer system in one aquifer State on other aquifer States concerned;
(g) the availability of alternatives to a particular existing and planned utilization of the aquifer or aquifer system;
(h) the development, protection and conservation of the aquifer or aquifer system and the costs of measures to be taken to that effect;
(i) the role of the aquifer or aquifer system in the related ecosystem.
2. The weight to be given to each factor is to be determined by its importance with regard to a specific transboundary aquifer or aquifer system in comparison with that of other relevant factors. In determining what is equitable and reasonable utilization, all relevant factors are to be considered together and a conclusion reached on the basis of all the factors. However, in weighing different utilizations of a transboundary aquifer or aquifer system, special regard shall be given to vital human needs.

46. This draft article is general in nature as it formulates broad factors that are relevant for equitable and reasonable utilization of aquifer systems. The rules of equitable and reasonable utilization are necessarily general and flexible and require for their proper application that aquifer States take into account concrete factors and circumstances of the resources as well as of the need of the aquifer States concerned. Each specific case has to be assessed taking into consideration relevant factors and circumstances.

Article 6 [7]
Obligation not to cause significant harm to other aquifer States

1. Aquifer States shall, in utilizing a transboundary aquifer or aquifer system in their territories, take all appropriate measures to prevent the causing of significant harm to other aquifer States.
2. Aquifer States shall, in undertaking activities other than utilization of a transboundary aquifer or aquifer system that have, or are likely to have, an impact on that transboundary aquifer or aquifer system, take all appropriate measures to prevent the causing of significant harm through that aquifer or aquifer system to other aquifer States.
3. Where significant harm nevertheless is caused to another aquifer State, the aquifer States whose activities cause such harm shall take, in consultation with the affected State, all appropriate measures to eliminate or mitigate such harm, having due regard for the provisions of draft articles 4 and 5.

47. The draft article deals with another basic principle of obligation of aquifer States not to cause harm to other aquifer States. Use your own property so as not to injure that of another is the established principle of international liability. The obligation contained in this draft article is that of 'to take all appropriate measures'. It is in substance the same as the obligation of 'due diligence'. Thus this provision encompasses questions of significant harm arising from utilization and significant harm from other activities other than utilization as contemplated in draft article 1 as well as questions of elimination and mitigation of significant harm occurring despite due diligence efforts to prevent such harm.

Article 7 [8]
General obligation to cooperate

1. Aquifer States shall cooperate on the basis of sovereign equality, territorial integrity, sustainable development, mutual benefit and good faith in order to attain equitable and reasonable utilization and appropriate protection of their transboundary aquifer or aquifer system.
2. For the purpose of paragraph 1, aquifer States should establish joint mechanisms of cooperation.

48. Draft article 7 sets out the principle of a general obligation of the aquifer States to cooperate with each other which finds its place in many international instruments. This provision, inter alia, contains the principle of sustainable development, which, the commentary says, denotes the general principle of sustainable development and should be distinguished from the concept of sustainable utilization as used in the context of draft article 4.

Article 8 [9]
Regular exchange of data and information

1. Pursuant to draft article 7, aquifer States shall, on a regular basis, exchange readily available data and information on the condition of the transboundary aquifer or aquifer system, in particular of a geological, hydrogeological, hydrological, meteorological and ecological nature and related to the hydrochemistry of the aquifer or aquifer system, as well as related forecasts.

2. Where knowledge about the nature and extent of some transboundary aquifer or aquifer systems is inadequate, aquifer States concerned shall employ their best efforts to collect and generate more complete data and information relating to such aquifer or aquifer systems, taking into account current practices and standards. They shall take such action individually or jointly and, where appropriate, together with or through international organizations.
3. If an aquifer State is requested by another aquifer State to provide data and information relating to the aquifer or aquifer systems that are not readily available, it shall employ its best efforts to comply with the request. The requested State may condition its compliance upon payment by the requesting State of the reasonable costs of collecting and, where appropriate, processing such data or information.
4. Aquifer States shall, where appropriate, employ their best efforts to collect and process data and information in a manner that facilitates their utilization by the other aquifer States to which such data and information are communicated.

49. Data and information in this draft article are limited to those concerning the conditions of aquifers. They include not only raw statistics but also results of research and analysis. Data and information concerning monitoring utilization of aquifers, other activities affecting aquifers and their impact on aquifers would be dealt with in other draft articles.

50. Under paragraph 1 the requirement that data and information be exchanged on a regular basis is to ensure that aquifer States will have the facts necessary to enable them to comply with their obligations under draft articles 4, 5 and 6. Paragraph 2 points to the uncertainties in the scientific knowledge about aquifer system and requires aquifer States to cooperate with each other or with relevant international organizations in order to collect new data and information and make them available to other aquifer States.

Part III
Protection, Preservation and Management

Article 9 [12]
Protection and preservation of ecosystems

Aquifer States shall take all appropriate measures to protect and preserve ecosystems within, or dependent upon, their transboundary aquifers or aquifer systems, including measures to ensure that the quality and quantity of water retained in the aquifer or aquifer system, as well as that released in its discharge zones, are sufficient to protect and preserve such ecosystems.

51. Draft article 9 contains obligations of both protection and preservation and they relate to the ecosystems within and outside transboundary aquifer. The obligation to protect the ecosystems requires the aquifer States to shield the ecosystems from harm or damage. The obligation to preserve the ecosystems applies in particular to freshwater ecosystems that are in a pristine or unspoiled condition.

52. Under this provision the obligation of States is limited to the taking of ‘all appropriate measures’ to protect relevant ecosystems. This allows States greater flexibility in implementation of their responsibilities under this provision. It was pointed out in the Commission that there may be instances in which changing an ecosystem in

some appreciable way may be justified by other considerations, including the planned usage of the aquifer in accordance with the draft articles.

Article 10 [13]
Recharge and discharge zones

> 1. Aquifer States shall identify recharge and discharge zones of their transboundary aquifer or aquifer system and, within these zones, shall take special measures to minimize detrimental impacts on the recharge and discharge processes.
> 2. All States in whose territory a recharge or discharge zone is located, in whole or in part, and which are not aquifer States with regard to that aquifer or aquifer system, shall cooperate with the aquifer States to protect the aquifer or aquifer system.

53. Paragraph 1 of this draft article provides for the obligations of aquifer States with regard to the protection of recharge and discharge zones of their transboundary aquifers. This obligation is at two levels. First is the obligation to identify the recharge and discharge zones of their transboundary aquifers and the second is the one to take special measures to protect such zones for the purposes of the sound functioning of the aquifers.

54. Paragraph 2 deals with the obligations of States, which are not aquifer States in relation to a particular aquifer system. Recharge or discharge zones of a particular transboundary aquifer could be located in an aquifer State other than the aquifer States that share the transboundary aquifer in question or these zones could also be located in the territories of a non-aquifer State. Thus this paragraph imposes an obligation to cooperate on the States in which recharge or discharge zones were located, even if they were not sharing the aquifer and would not receive any benefit from the aquifer.

Article 11 [14]
Prevention, reduction and control of pollution

> Aquifer States shall, individually and, where appropriate, jointly, prevent, reduce and control pollution of their transboundary aquifer or aquifer system, including through the recharge process, that may cause significant harm to other aquifer States. In view of uncertainty about the nature and extent of transboundary aquifers or aquifer systems and of their vulnerability to pollution, aquifer States shall take a precautionary approach.

55. This draft article provides the general obligation of aquifer States to prevent, reduce and control pollution of their transboundary aquifer that may cause significant harm to the aquifer States through the transboundary aquifer and aquifer related environment. Keeping in view the fact that some transboundary aquifers are already polluted to varying degrees and some are not, the draft provision uses the words ‘prevent, reduce and control’. Thus the obligation to ‘prevent’ relates to new pollution, while the obligation to ‘reduce’ and ‘control’ relate to existing pollution.

56. This provision also establishes the obligations to take a precautionary approach in view of uncertainty about the nature and extent of some transboundary aquifers or aquifer systems and of their vulnerability to pollution.

Article 12 [10]
Monitoring

1. Aquifer States shall monitor their transboundary aquifer or aquifer system. They shall, wherever possible, carry out these monitoring activities jointly with other aquifer States concerned and, where appropriate, in collaboration with the competent international organizations. Where, however, monitoring activities are not carried out jointly, the aquifer States shall exchange the monitored data among themselves.
2. Aquifer States shall use agreed or harmonized standards and methodology for monitoring their transboundary aquifer or aquifer system. They should identify key parameters that they will monitor based on an agreed conceptual model of the aquifer or aquifer system. These parameters should include parameters on the condition of the aquifer or aquifer system as listed in draft article 8, paragraph 1, and also on the utilization of the aquifer and aquifer system.

57. This draft article provides for international cooperation in monitoring. The general obligation of international cooperation is provided in draft article 7. The international cooperation takes places at several levels: regular exchange of data and information; monitoring; management and planned activities. Thus the present articles deals with monitoring. This provision provides for individual as well as joint mechanisms. Paragraph 2 provides that monitoring needs to cover not only the conditions of the aquifer but also utilization of the aquifer such as withdrawal and artificial recharge of water.

Article 13 [15]
Management

Aquifer States shall establish and implement plans for the proper management of their transboundary aquifer or aquifer system in accordance with the provisions of the present draft articles. They shall, at the request by any of them, enter into consultations concerning the management of the transboundary aquifer or aquifer system. A joint management mechanism shall be established, wherever appropriate.

58. Two kinds of obligations are introduced in the present draft article. First is the obligation of each aquifer State to establish its own plan with regard to its aquifer and to implement it. Second is the obligation to enter into consultation with other aquifer States concerned at the request of any of the latter State. The first sentence of this draft article obligates each aquifer State to establish plans with regard to its aquifer and to implement them for the proper management taking into due consideration of the rights of other aquifer States concerned. The second sentence requires that State to enter into consultations concerning the management of the transboundary aquifer if any other aquifer State requests. The last sentence provides that a joint management mechanism be established wherever appropriate.

Part IV
Activities Affecting other States
Article 14 [16 and 17]
Planned activities

1. When a State has reasonable grounds for believing that a particular planned activity in its territory may affect a transboundary aquifer or aquifer system and thereby may have a significant adverse effect upon another State, it shall, as far as practicable, assess the possible effects of such activity.

2. Before a State implements or permits the implementation of planned activities which may affect a transboundary aquifer or aquifer system and thereby may have a significant adverse effect upon another State, it shall provide that State with timely notification thereof. Such notification shall be accompanied by available technical data and information, including any environmental impact assessment, in order to enable the notified State to evaluate the possible effects of the planned activities.

3. If the notifying and the notified States disagree on the possible effect of the planned activities, they shall enter into consultations and, if necessary, negotiations with a view to arriving at an equitable resolution of the situation. They may utilize an independent fact finding body to make an impartial assessment of the effect of the planned activities.

59. Paragraph 1 of this draft article establishes the minimum obligation of a State to undertake prior assessment of the potential effect of the planned activity. Planned activities include not only utilization of transboundary aquifers but also other activities that have or likely to have an impact upon those aquifers. When the assessment of the potential effects of a planned activity indicates that such activity would cause adverse affect on the transboundary aquifers and that it may have a significant adverse effect on other States, the original State is obliged under paragraph 2 to notify the States concerned of its finding. If the notified States are satisfied with the information and the assessment provided by the notifying States, they have the common ground to deal with the activity. If they disagree, they have the obligation to try to arrive at an equitable resolution of the situation in accordance with paragraph 3.

Part V
Miscellaneous Provisions
Article 15 [18]
Scientific and technical cooperation with developing States

States shall, directly or through competent international organizations, promote scientific, educational, technical and other cooperation with developing States for the protection and management of transboundary aquifers or aquifer systems. Such cooperation shall include, *inter alia*:

(a) training of their scientific and technical personnel;
(b) facilitating their participation in relevant international programmes;
(c) supplying them with necessary equipment and facilities;
(d) enhancing their capacity to manufacture such equipment;
(e) providing advice on and developing facilities for research, monitoring, educational and other programmes;

(f) providing advice on and developing facilities for minimizing the detrimental effects of major activities affecting transboundary aquifers or aquifer systems;
(g) preparing environmental impact assessments.

60. This draft article sets out the scientific and technical cooperation to developing States. The term 'cooperation' was preferred to the term 'assistance' as it was thought that the former would represent the two-sided process to foster sustainable growth in developing countries. The rapidly growing scientific knowledge of ground water and hydrogeology is mainly owned by developed States and is not yet fully shared by many developing States. The types of cooperation listed in the draft provision represent some of the various options available to States to fulfill the obligation set forth therein. States will not be required to engage in each of the types of cooperation listed, but will be allowed to choose their means of cooperation.

Article 16 [19]
Emergency situations

1. For the purpose of the present draft article, "emergency" means a situation, resulting suddenly from natural causes or from human conduct, that poses an imminent threat of causing serious harm to aquifer States or other States.
2. Where an emergency affects a transboundary aquifer or aquifer system and thereby poses an imminent threat to States, the following shall apply:
(a) the State within whose territory the emergency originates shall:
(i) without delay and by the most expeditious means available, notify other potentially affected States and competent international organizations of the emergency;
(ii) in cooperation with potentially affected States and, where appropriate, competent international organizations, immediately take all practicable measures necessitated by the circumstances to prevent, mitigate and eliminate any harmful effect of the emergency;
(b) States shall provide scientific, technical, logistical and other cooperation to other States experiencing an emergency. Cooperation may include coordination of international emergency actions and communications, making available trained emergency response personnel, emergency response equipments and supplies, scientific and technical expertise and humanitarian assistance.
3. Where an emergency poses a threat to vital human needs, aquifer States, notwithstanding draft articles 4 and 6, may take measures that are strictly necessary to meet such needs.

61. This draft article deals with the obligations of States in responding to transboundary aquifers. An 'emergency' must cause, or pose an imminent threat of causing, 'serious harm' to other States. The seriousness of the harm involved, together with the suddenness of the emergency's occurrence, justifies the measures required by the draft article. The expression 'other States' refers to both aquifer and non-aquifer States that might be affected by an emergency. These would usually be the States in whose territories either aquifers or the recharge or discharge zones are located.

62. Paragraph 2(a) sets out the obligations of the State within whose territory the emergency originates. Paragraph (2)(b) sets out the obligation of assistance by all the States regardless of whether they are experiencing in any way the serious harm arising from an emergency. Paragraph 3 provides for the exceptions to the obligations under draft articles 4 and 6 in an emergency. Aquifer States may temporally derogate from the

obligations under those draft articles where water is critical for the people to alleviate an emergency situation.

Article 17 [20]
Protection in time of armed conflict

> Transboundary aquifers or aquifer systems and related installations, facilities and other works shall enjoy the protection accorded by the principles and rules of international law applicable in international and non-international armed conflicts and shall not be used in violation of those principles and rules.

63. The commentary to this article states that this draft article does not lay down any new rule. It simply serves as a reminder that the principles and rules of international law applicable in international and internal armed conflict contain important provisions concerning water resources and related waters. This draft article is addressed to aquifer and non-aquifer States as well keeping in view the fact that transboundary aquifer and related works may be utilized or attacked in time of armed conflict by non-aquifer States also.

Article 18 [21]
Data and information concerning national defence or security

> Nothing in the present draft articles obliges a State to provide data or information the confidentiality of which is essential to its national defence or security. Nevertheless, that State shall cooperate in good faith with other States with a view to providing as much information as possible under the circumstances.

64. This draft article allows States not to release information that is essential to its national defense or security. However, it requires the State withholding information to 'cooperate in good faith with the other States with a view to providing as much information as possible under the circumstances'. The 'circumstances' referred to are those that led to the withholding of the data or information. The obligation to provide 'as much information as possible' could be fulfilled in many cases by furnishing a general description of the manner in which the measures would alter the condition of the aquifer or affect other States. The draft article in thus intended to achieve a balance between the legitimate needs of the States concerned: the need for the confidentiality of sensitive information, on the one hand, and the need for information pertaining to possible adverse effects of planned measures, on the other.

Article 19 [3]
Bilateral and regional agreements and arrangements

> For the purpose of managing a particular transboundary aquifer or aquifer system, aquifer States are encouraged to enter into a bilateral or regional agreement or arrangement among themselves. Such agreement or arrangement may be entered into with respect to an entire aquifer or aquifer system or any part thereof or a particular project, programme or utilization except insofar as the agreement or arrangement adversely affects, to a significant extent, the utilization, by one or more other aquifer States of the water in that aquifer or aquifer system, without their express consent.

65. This draft article underscores the significance of bilateral and regional agreements. In the case of surface watercourses, numerous bilateral and regional agreements have been concluded but it is not the case with groundwaters where such collective measures are in rudimentary stage.

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

66. In view of its completion on first reading of the draft articles on the law of transboundary aquifers, the Commission would welcome from Governments:
(a) Their comments and observations on all aspects of the draft articles;
(b) Their comments and observations on the commentaries to the draft articles;
(c) Their views on the final form of the draft articles.

D. SUMMARY OF VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPIC IN THE SIXTH (LEGAL) COMMITTEE OF THE UN GENERAL ASSEMBLY AT ITS SIXTY FIRST SESSION (2006)

67. The delegate of **India** said that international practice was still evolving in the area of transboundary aquifers. Considerable growth in international practice and scientific knowledge had taken place only in recent years and he therefore welcomed the caution exhibited by the Commission in taking the view that it was premature to decide on the final form the draft articles should take. India supported including an affirmation of the principle of State sovereignty over the portion of a transboundary aquifer or aquifer system located in its territory. He then offered observations on several of the articles and said India would be submitting further comments.

68. The delegate of **Indonesia** agreed with the approach of the Commission to concentrate at this stage on the issues of non-renewable water in confined groundwater. Once that work was done, he said, the International Law Commission could take up drafting principles for oil and natural gas. Indonesia fully supported the article on State sovereignty over the portion of a transboundary aquifer, or aquifer system, located within its territory.

69. The Delegate of **Japan** said that the Commission rightly avoided attempting to establish a wide range of rules and principles which could also be applied to other shared natural resources. The Commission had rightly focused its work on formulating a legal framework on transboundary aquifers, bearing in mind the existing shortage of groundwater resources as a result of over-exploitation and pollution. His delegation believed that the form of the final instrument should be decided by the Commission on the basis of guidance received from Governments.

70. The delegate of **Jordan** said that until agreement was reached on the form the draft articles should take, the articles would serve as guiding principles for States in dealing with transboundary waters, nationally, regionally and multilaterally. He said the Commission should, at a later stage, include the utilization and activities related to oil and

natural gas whether in the second reading, or as a separate set of draft articles. He went on to comment on specific provisions of the draft articles. He welcomed the assertion in article 3 -- sovereignty of aquifer States -- that the aquifer State had sovereignty over the portion of the transboundary aquifer located within its territory. He reiterated Jordan's position that if an aquifer State did not exercise, or "if it abandoned, its right to utilization of the aquifer, the standard for equitable use by the other aquifer State, or States, was different. Those States should be able to utilize the aquifer without their use being considered inequitable vis-à-vis the other State, if that State was willingly not exercising its right. His delegation considered article 14 crucial for the protection of groundwaters against planned activities with potentially significant adverse effects. Its application might lead to the taking of precautionary measures before such harm occurred. For the State planning such activity, he said, its judgement on its effect should be based on objective grounds only. Further, the affected State should have the right to initiate consultations with the State who planned the activity, even if the latter did not notify it of its plans.

71. The delegate of **Malaysia** said that he appreciated that the additional option of using agreed standards and methodology other than "harmonized" standards had been used in the draft articles. Malaysia had supported the use of the word "encouraged" instead of "shall take" with regard to the taking of a precautionary approach, as such, an obligation must be subject to the capabilities of the States concerned. Concerning article 18 on exchange of information, he believed protection should be extended to include industrial secrets and intellectual property. He supported the inclusion of "vital human needs" in article 5 as a special factor to be taken into account in determining what was equitable and reasonable utilization of transboundary aquifers, or aquifer systems. He also supported expanding the scope of article 14 to cover any State, including a non-aquifer State, that had reasonable grounds for believing that a planned activity in its territory could affect a transboundary aquifer and cause an adverse effect on another State, including a non-aquifer State. He further supported the decision not to address the issue of compensation in circumstances where harm resulted despite efforts to prevent such harm; that issue was covered by other rules of international law.

72. The delegate of **People's Republic of China** said that international cooperation on transboundary aquifers should be based on respect for the permanent sovereignty of aquifer States over water resources within their territories, and their reasonable exploration and utilization should not be restricted. He preferred that work on the subject take the form of guiding principles, since he did not believe conditions were ripe for the formulation of a treaty. The views of countries should be solicited before deciding whether to pursue study on other transboundary issues. He then offered specific suggestions on wording in several articles.

73. The delegate of **Republic of Korea** said a move to expand work beyond aquifers to include oil and gas could face opposition from oil and gas-producing States which recognized those resources as property under their sovereign rights. As to the final form of the draft articles on transboundary aquifers, he said he supported a binding instrument in the form of a framework convention that included provisions for non-aquifer States. Provisions on rights and obligations of non-aquifer States were necessary, because the

question of groundwaters directly affected only some States, and if there were no real incentives for non-aquifer States, it was likely that only aquifer States would become parties to such an instrument. It would also be wise to formulate a dispute-settlement mechanism in the draft.

2. EFFECTS OF ARMED CONFLICTS ON TREATIES

A. INTRODUCTION

a. Background

74. At its fifty-second session (2000) the Commission identified the topic "Effects of Armed Conflicts on Treaties" for inclusion in its long-term programme of work. A brief syllabus describing the possible overall structure and approach to the topic was annexed to that year's report of the Commission. In paragraph 8 of its resolution 55/152 of 12 December 2000, the General Assembly took note of the topic's inclusion.

75. During its fifty-sixth session (2004), the Commission decided to include the topic "Effects of Armed Conflicts on Treaties" in its progarmme of work and to appoint Mr. Ian Brownlie as Special Rapporteur for the topic. The General Assembly, in paragraph 5 of its resolution 59/ 41 of 2 December 2004, endorsed the decision of the Commission to include the topic in its agenda.

76. At the fifty-seventh session (2005) the Commission considered the first report[29] of the Special Rapporteur on the topic. The report presented an overview of the issues involved in the topic together with a set of 14 draft articles in order to assist the Commission and Governments with commenting, including providing State practice. The Commission also had before it a memorandum prepared by the Secretariat entitled, "The effect of armed conflict on treaties: an examination of practice and doctrine"[30].

b. Issuers for Focused Consideration at the Forty-Sixth Session of AALCO

1. Inclusion of Situations of Non-International Armed Conflicts and Military Occupation

77. Contemporary armed conflicts have blurred the distinction between international and internal armed conflicts. The number of civil wars has increased. In addition, many of these civil wars include external elements, such as support and involvement by other States in varying degrees, supplying arms, providing training facilities and funds. Internal armed conflicts could affect the operation of treaties as much as, if not more than international armed conflicts. The draft articles proposed by the Special Rapporteur therefore include the effect on treaties of internal armed conflicts. Thus the Member States of AALCO may focus their attention on the issue of inclusion of internal armed conflicts' effects on treaties under the purview of present work of the Commission. Further the fact that a State is under occupation can affect its ability to fulfill its treaty obligations. Therefore it may also be discussed that whether military occupations should indeed be included under the definition of armed conflicts or not, even if not accompanied by protracted armed violence or armed operations.

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29 A/CN.4/552

30 A/CN.4/550 and Corr. 1

2. Ipso Facto Termination or Suspension

78. Member States may also focus on the issue of ipso facto termination or suspension of treaties. The draft article 3, contained in the report of the Special Rapporteur says that the outbreak of an armed conflict does not ipso facto terminate or suspend the operation of treaties. This provision emphasizes that the earlier position, according to which armed conflict automatically abrogated treaty relations, had been replaced by a more contemporary view according to which the mere outbreak of armed conflict, whether declared war or not, did not ipso facto terminate or suspend treaties in force between parties to the conflict. This requires closer attention as draft article 4 provides for the modes of practical implementation of the draft article 3 and the focus may be laid on the different modes of the application of the principle provided in the draft article 3.

3. Relationship with other Branches of International Law

79. Another issue on which Member States may focus upon is the view of the Special Rapporteur that the topic should form part of the law of treaties and not part of the law relating to the use of force. The related issue is also the relationship of the topic with other domains of international law, such as international humanitarian law, self-defence and State responsibility.

B. CONSIDERATION OF THE TOPIC AT THE FIFTY-EIGHTH SESSION OF ILC

80. On this topic the Commission considered the second report of the Special Rapporteur.[31]The second report says that its purpose is to present the first seven draft articles of the original draft, contained in the first report submitted at the fifty-seventh session of the International Law Commission, with reference to issues raised in the subsequent debates in the Commission and the Sixth Committee of the General Assembly. It further says that the presentation of the first seven draft articles would seem to be a practical way of moving forward.

81. The report underlines that the responses to the first report have helped to clarify a number of issues. The report mentions that several delegations favoured the inclusion of treaties concluded by international organizations. During the debate in the Commission several members supported the inclusion of such treaties. However, there was no general agreement that this was necessary and reference was made to article 74, paragraph 1, of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986.

82. The report states that general support was expressed for the view of the Special Rapporteur that the topic should form part of the law of treaties and not part of the law relating to the use of force. At the same time it was observed that the subject was closely

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[31] A/CN.4/570 and Corr.1

related to other domains of international law, such as international humanitarian law, self-defence and State responsibility.

C. SUMMARY OF VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPIC IN THE SIXTH (LEGAL) COMMITTEE OF THE UN GENERAL ASSEMBLY AT ITS SIXTY FIRST SESSION (2006)

83. The delegate of **India** said that while the topic was generally part of the law of treaties, and not on the use of force, it was also closely related to other domains of international law. The scope of the topic should be limited to treaties between States and not include those concluded by international organizations. He said the definition of "armed conflict" should be considered independently of its effects on treaties. The scope should also not deal with internal conflicts. Referring to article 7, he said India did not favour a listing of treaties that continued in operation during an armed conflict, since that raised the presumption that treaties not covered would automatically lapse.

84. The delegate of **Indonesia** said that Indonesia was not convinced by the arguments to broaden the scope of the issue to include internal conflicts.

85. The delegate of **Islamic Republic of Iran** said that he agreed that the topic of the effects of armed conflicts on treaties was not part of law relating to the use of force; rather, it was in the realm of several domains of international law, including the law of treaties, international humanitarian law, State responsibility and self-defence. While the issue of military occupation and its effects on treaties should be addressed in the drafting, he said, it was not something to be covered in the definition of "armed conflict". Referring to article 4, he said Iran supported the inclusion of "intention of the State parties". However, the article did not make any distinction between the State resorting to unlawful use of force and the State exercising self-defence; such a distinction should be taken into account throughout the draft articles. He firmly believed that the basic principles of integrity and continuity of international treaties should also be taken into account in dealing with the topic. He, therefore, believed that article 6 should be retained -- either saved intact, or incorporated into -- article 4.

86. The delegate of **Iraq** said he favoured the inclusion of treaties, concluded by international organizations, in the draft articles, as indicated by the Special Rapporteur. He also favoured the study of questions relating to treaties that had not entered into force or been ratified by States. His delegation, furthermore, supported the concept of "intention of parties" in case of an armed conflict, as explained in article 4 (susceptibility to termination or suspension of treaties in case of an armed conflict). He said his country had problems with article 7, dealing with the operation of treaties, on the basis of necessary implication from their object and purpose. He appreciated the fact that the Special Rapporteur would further review the draft article.

87. The delegate of **Japan** said a distinction must be made between the effects on bilateral treaties and those on multilateral treaties. It was also necessary to take into account, the difference between belligerent States and third States, in an armed conflict.

He questioned whether it was correct, under the United Nations Charter, to assume there was no difference in the legal effect concerning treaty relations, between an aggressor State and a self-defending State. He agreed with most Commission members that consideration should be given to situations involving non-State actors, for instance, non-international armed conflict, terrorism and so forth.

88. The delegate of **Jordan** said the topic was part of the law of treaties and should be separated from the law on the use of force. Derogation from treaty obligations should be dealt with independently from the issue of the lawfulness of the use of force; otherwise, it would lead to the creation of different sets of rules and legal consequences. He said that to provide more rights to a party which used, or claimed to use, force lawfully, in relation to suspension or termination of treaty obligations, would encourage parties to armed conflicts to do so. That contradicted the premise that war was incidental and an exception to the normal application of a treaty, with the least possible consequences to such application. Turning to some provisions of the draft articles, he said the scope of the text should include treaties, to which international organizations were parties. To exclude the effect of armed conflicts on rights and obligations of those organizations would limit the scope of the topic. He favoured the exploration of other signs of the susceptibility of a treaty to termination or suspension, such as the nature of the obligation that was derogated from, and the extent and nature of the armed conflict in question.

89. The delegate of **Malaysia** said that the scope of the articles should be limited to State-to-State treaties. Clarification was needed on whether States would have the option of opting out of the proposed regime, or parts of it, by specific exclusion clauses. He said Malaysia found the current definition of "treaty" acceptable. On the definition of "armed conflict", he agreed that the Commission should not embark on a comprehensive definition; it should reformulate the definition by simply stating that the articles applied to armed conflicts, whether or not a declaration of war existed. That would provide the necessary flexibility to accommodate evolving types of armed conflict, and should include internal armed conflicts and military occupation. He offered detailed observations on several other articles.

90. The delegate of **People's Republic of China** said that some treaties entered into, by international organizations, could be related in some way to armed conflict, and such treaties should be studied in light of the question of the effects of armed conflicts on treaties. Military action taken by a State against internal rebel groups, should not be included in the scope of application of the article, he said. That did not mean that a State could disregard its international and treaty obligations. However, a State was responsible for implementing international treaties, and internal conflicts had no direct bearing on the effectiveness of the treaty.

91. The delegate of **South Africa** said his country was encouraged by the decision to include internal armed conflicts in the definition, given that such conflicts were more common in the contemporary world, and were also capable of having the same effects as conflicts of an international nature.

3. THE OBLIGATION TO EXTRADITE OR PROSECUTE (*AUT DEDERE AUT JUDICARE*)

A. INTRODUCTION

a. Background

92. The topic "Obligation to Extradite or Prosecute (*aut dedere aut judicare*)" appeared in the list of planned topics already at the first session of the International Law Commission in 1949, but was largely forgotten for more than half a century until it was briefly addressed in articles 8 and 9 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind. These articles set out minimum contours of the principle of *aut dedere aut judicare* and the linked principle of universal jurisdiction.

93. At its fifty-sixth session (2004), the International Law Commission, on the basis of the recommendation of a Working Group on the long-term programme of work, identified the topic "Obligation to Extradite or Prosecute (*aut dedere aut judicare*)" for inclusion in its long-term programme of work. The General Assembly, in resolution 59/41 of 2 December 2004, took note of the Commission's report concerning its long-term programme of work. At its 2865th meeting, held on 4 August 2005, the Commission considered the selection of a new topic for inclusion in the Commission's current programme of work and decided to include the topic "Obligation to Extradite or Prosecute (*aut dedere aut judicare*)" on its agenda, and appointed Mr. Zdzislaw Galicki as the Special Rapporteur for this topic.

b. Issues for Focused Consideration at the Forty-Sixth Session of AALCO

1. Source of the Obligation

94. The obligation to extradite or prosecute has come to occupy a significant place in the relevant debates on international law. One of the important issues that needs attention is about the source of this obligation. States assume obligation either to extradite or prosecute by becoming a party to a treaty, which contains the provision to that effect. However, it needs clarification, the existence or non-existence of general customary obligation to extradite or prosecute, applicable to all offences under international criminal law. If the answer to this question is negative then it may also be considered whether this obligation exists in customary international law in respect of certain category of crimes only rather than as a general obligation. Member States of AALCO may focus on this issue keeping in view the growing attention to the issue of jurisdiction in respect of international crimes.

2. Universal Jurisdiction and obligation to Extradite or Prosecute

95. Another issue on which Member States may focus is the relationship or distinction between the principle of universal jurisdiction and the obligation to extradite or prosecute. It is also relevant to underline the place of the 'triple alternative', that is the

jurisdiction of the international criminal tribunals, in the larger framework of the study on the present topic.

B. CONSIDERATION OF THE TOPIC AT THE FIFTY-EIGHTH SESSION OF ILC

96. The Commission considered the preliminary report of the Special Rapporteur.[32]The text report prepared by the Special Rapporteur is a very preliminary set of initial observations concerning the substance of the topic, marking the most important points for further considerations and including a very general road map for the future work of the International Law Commission in this field.

97. The formula "extradite or prosecute" (in Latin: "*aut dedere aut judicare*") is commonly used to designate the alternative obligation concerning the treatment of an alleged offender, which is contained in a number of multilateral treaties and aimed at securing international cooperation in the suppression of certain kinds of criminal conduct. As it is underlined in the doctrine, "the expression 'aut dedere aut judicare' is a modern adaptation of a phrase used by Grotius: 'aut dedere aut punire' (either extradite or punish)". It seems, however, that for applying it now, a more permissive formula of the alternative obligation to extradition ("prosecute" (*judicare*) instead of "punish" (*punire*)) is suitable, having additionally in mind that Grotius contended that a general obligation to extradite or punish exists with respect to all offences by which another State is injured. A modern approach does not seem to go so far as Grotius did, taking also into account that an alleged offender may be found not guilty.

98. The report of the Special Rapporteur points to some authors who underline that it is necessary to distinguish between the principle of universal jurisdiction and the principle *aut dedere aut judicare*. The report cites the memorandum prepared by the Amnesty International on the relationship between these principles which says that "[t]here are two important related, but conceptually distinct, rules of international law. **Universal jurisdiction** is the ability of the court of any state to try persons for crimes committed outside its territory which are not linked to the state by the nationality of the suspect or the victims or by harm to the state's own national interests. Sometimes this rule is called permissive universal jurisdiction. This rule is now part of customary international law, although it is also reflected in treaties, national legislation and jurisprudence concerning crimes under international law, ordinary crimes of international concern and ordinary crimes under national law. (…) Under the related **aut dedere aut judicare** (extradite or prosecute) rule, a state may not shield a person suspected of certain categories of crimes. Instead, it is *required* either to exercise jurisdiction (which would necessarily include universal jurisdiction in certain cases) over a person suspected of certain categories of crimes or to extradite the person to a state able and willing to do so or to surrender the person to an international criminal court with jurisdiction over the suspect and the crime. As a practical matter, when the *aut dedere aut judicare* rule applies, the state where the suspect is found must ensure that its courts can exercise all

[32] A/CN.4/571

possible forms of geographic jurisdiction, including universal jurisdiction, in those cases where it will not be in a position to extradite the suspect to another state or to surrender that person to an international criminal court."

99. Further, the report focuses on the sources of the obligation to extradite and prosecute, scope of the obligation to extradite or prosecute, methodological questions and also contains a preliminary plan of action. The report further sees it as premature to decide if the final product of the International Law Commission's work should take the form of draft articles, guidelines or recommendations. It says that the Special Rapporteur will try, however, to formulate in subsequent reports draft rules concerning the concept, structure and operation of the principle *aut dedere aut judicare*, without any prejudice as it concerns their final legal form.

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

100. The Commission would welcome any information that Governments may wish to provide concerning their legislation and practice with regard to this topic, particularly more contemporary ones. If possible, such information should concern:

(a) International treaties by which a State is bound, containing the obligation to extradite or prosecute, and reservations made by that State to limit the application of this obligation;
(b) Domestic legal regulations adopted and applied by a State, including constitutional provisions and penal codes or codes of criminal procedures, concerning the obligation to extradite or prosecute (*aut dedere aut judicare*);
(c) Judicial practice of a State reflecting the application of the obligation *aut dedere aut judicare*;
(d) Crimes or offences to which the principle of the obligation *aut dedere aut judicare* is applied in the legislation or practice of a State.

101. The Commission would also welcome any further information that Governments may consider relevant to the topic.

D. SUMMARY OF VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPIC IN THE SIXTH (LEGAL) COMMITTEE OF THE UN GENERAL ASSEMBLY AT ITS SIXTY FIRST SESSION (2006)

102. The delegate of **Indonesia** referred to the principle which had mainly been incorporated into human rights treaties, saying that, in general, it related to the category of crimes within universal jurisdiction. In recent times, the principle had been adopted in conventions to combat terrorism and other transnational crimes. The most crucial problem was determining whether the obligation should be limited to treaties which were binding to the States concerned, or extended to appropriate customary norms or general principles of law.

103. The delegate of **Japan** said Japan was particularly interested in the extent to which the obligation to extradite or prosecute had become customary law. Ambiguity of its status, in that area, could cause problems in addressing the issue of impunity. He then listed the treaties containing the obligation to extradite or prosecute, which Japan had concluded. He said he was interested in learning the practices in other States.

104. The delegate of **Malaysia** said that it needed to be clarified whether the obligation was purely treaty-based, or whether it was a general obligation of customary international law. Although Malaysia supported the proposal for a detailed analysis of the link between the obligation and the principle of universal jurisdiction, he stressed that they were conceptually distinct principles and the Commission should focus on the obligation to extradite or prosecute. He said his country would provide information on its extradition legislation and contemporary practices.

105. The delegate of **People's Republic of China** said the obligation to extradite was an important part of combating modern crimes and impunity. The treatment of the topic should put more emphasis on the progressive development of relevant rules. The pressing task of the study of the topic was to collect and analyse treaty provisions and State implementation practices, along with national legislative and judicial practice, so as to clarify whether the obligation to extradite or prosecute was a treaty obligation, or a general obligation under international customary law. He said there should be a study on the relationship between the obligation to extradite or prosecute, and principles of international law, such as those of sovereignty, human rights protection and universal jurisdiction. Finally, the applicable scope of crimes on the topic should include at least two categories, namely, international offences and transnational crimes.

106. The delegate of **Sierra Leone** said he supported the Commission's approach in distinguishing between the principle of universal jurisdiction and the related principle, *aut dedere aut judicare*. The Commission should stimulate inspired thought and action towards providing a guide to States that were confronted with a decision to either extradite or prosecute.

107. The delegate of **Thailand** said many States had yet to prosecute offenders, while failing to extradite them, because they did not have jurisdiction over the offences committed by those offenders. The Commission should consider applying universal jurisdiction as a legal basis for that obligation, thereby allowing those States to seize the matter. The Commission should also analyze the situations, and determine the reasons why a requested State could not extradite an offender, and whether, for instance, the offender was its national, or the offence carried a death penalty. Another question that should be examined, she said, was to which categories of crimes the concept of 'obligation to extradite or prosecute' could be applied. Thailand, she added, believed the concept could be applied to crimes recognized under international customary law, as well as offences related to aircraft, narcotic drugs and terrorism.