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ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION



**REPORT ON MATTERS RELATED TO THE WORK OF THE
INTERNATIONAL LAW COMMISSION AT IT SIXTY-
NINTH SESSION**

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Introductory Note

The Report on Matters to the Work of the International Law Commission prepared by the Secretariat of AALCO is a document containing (1) a brief description of the work and deliberations on the topics under consideration of the Commission in its Session held in the preceding year; (2) a summary of views expressed by the Member States of AALCO on these topics at the Sixth Committee of the United Nations General Assembly and (3) comments and observations of the Secretariat on these topics.

Since AALCO Annual Sessions are usually held in the months of April or May of a given year, information on the matters stated above were readily available for research and consolidation. However, this year, the Annual Session of AALCO is scheduled to be held in October. At the time of writing this Report, the Seventieth Session of the Commission is underway and the documents on the topics discussed therein shall only be publicly available in the coming months of 2018. Hence Member States are requested to note that the content of this document is limited to the topics and deliberations of the Commission at its Sixty-Ninth Annual Session in 2017 for which statements and comments have been incorporated.

In light of the aforesaid limitations, every effort shall be made by the Secretariat to update the Member States on the work of the Commission at its Seventieth Session in 2018 in the form of an Addendum to this Report.

**REPORT ON MATTERS RELATING TO THE WORK OF THE
INTERNATIONAL LAW COMMISSION AT ITS SIXTY-NINTH SESSION**
(1 May-2 June and 3 July-4 August 2017)

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

A. BACKGROUND

1. The International Law Commission (hereinafter referred to as “ILC” or the “Commission”) established by the United Nations General Assembly Resolution 174 (III) of 21st September 1947 is the principal organ under the United Nations system for the promotion of progressive development and codification of international law. The Commission held its Sixty-Ninth session from 1st May -2nd June and 3rd July-4th August 2017 at Geneva, Switzerland. The Secretariat of the Asian-African Legal Consultative Organization (AALCO) had requested the Commission to circulate the viewpoints of the Member States of AALCO on the agenda items of ILC as articulated at the Fifty-Sixth Annual Session of AALCO held at the Nairobi, Kenya in May 2017.

2. The Sixty-Ninth Session of the Commission consisted of the following members:

Mr. Ali Mohsen Fetais Al-Marri (Qatar) **Mr. Carlos J. Argüello Gómez** (Nicaragua) **Mr. Bogdan Aurescu** (Romania) **Mr. Yacouba Cissé** (Côte d’Ivoire) **Ms. Concepción Escobar Hernández** (Spain) **Ms. Patricia Galvão Teles** (Portugal) **Mr. Juan Manuel Gómez Robledo** (Mexico) **Mr. Claudio Grossman Guiloff** (Chile) **Mr. Hussein A. Hassouna** (Egypt) **Mr. Mahmoud D. Hmoud** (Jordan) **Mr. Huikang Huang** (China) **Mr. Charles Chernor Jalloh** (Sierra Leone) **Mr. Roman A. Kolodkin** (Russian Federation) **Mr. Ahmed Laraba** (Algeria) **Ms. Marja Lehto** (Finland) **Mr. Shinya Murase** (Japan) **Mr. Sean D. Murphy** (United States of America) **Mr. Hong Thao Nguyen** (Viet Nam) **Mr. Georg Nolte** (Germany) **Ms. Nilüfer Oral** (Turkey) **Mr. Hassan Ouazzani Chahdi** (Morocco) **Mr. Ki Gab Park** (Republic of Korea) **Mr. Chris Maina Peter** (United Republic of Tanzania) **Mr. Ernest Petrič** (Slovenia) **Mr. Aniruddha Rajput** (India) **Mr. August Reinisch** (Austria) **Mr. Juan José Ruda Santolaria** (Peru) **Mr. Gilberto Vergne Saboia** (Brazil) **Mr. Pavel Šturma** (Czech Republic) **Mr. Dire D. Tladi** (South Africa) **Mr. Eduardo Valencia-Ospina** (Colombia) **Mr. Marcelo Vázquez-Bermúdez** (Ecuador) **Mr. Amos S. Wako** (Kenya) **Sir Michael Wood** (United Kingdom of Great Britain and Northern Ireland)

3. At the Sixty-Ninth Session of the International Law Commission, the following persons were elected: Chairman: **Mr. Georg Nolte** (*Germany*); First Vice-Chairman: **Mr. Eduardo Valencia-Ospina** (*Colombia*); Second Vice-Chairman: **Mr. Hussein A. Hassouna** (*Egypt*); Rapporteur: **Mr. Bogdan Aurescu** (*Romania*); Chairman of the Drafting Committee: **Mr. Aniruddha Rajput** (*India*).

4. There were as many as seven topics on the agenda of the Sixty-Ninth Session. These were:

- Immunity of State Officials from Foreign Criminal Jurisdiction;
- Provisional Application of Treaties;
- Protection of the Environment in relation to Armed Conflicts;
- Protection of the Atmosphere;
- Crimes against Humanity;

- Peremptory Norms of General International Law (*Jus cogens*); and
- Succession of States and Responsibility.

5. Concerning the topic “**Immunity of State Officials from Foreign Criminal Jurisdiction**”, the Commission continued its consideration of the Fifth Report of the Special Rapporteur (A/CN.4/701), which it had commenced during the Sixty-Eighth session (and which could not be completed due to lack of time). The report analysed the question of limitations and exceptions to the immunity of state officials from foreign criminal jurisdiction and proposed a single draft article on the issue. Following the plenary debate, the Commission referred draft article 7, as proposed by the Special Rapporteur in her Fifth Report, to the Drafting Committee. The Drafting Committee decided to send the revised draft article 7, along with a draft annex, to the plenary after a great deal of deliberations. Upon receipt in the plenary of this draft article and annex, consensus could not be reached within the Commission on its provisional adoption. In the midst of many concerns expressed by some members of the Commission, it provisionally adopted the draft article and annex by a recorded vote of 21-8-1 (with 4 members absent). Thereafter, the Special Rapporteur proposed commentary for the draft article and annex, which was then revised and adopted by the Commission at its later meetings.

6. With regard to the topic “**Provisional Application of Treaties**”, the Commission referred draft guidelines 1 to 4 and 6 to 9, provisionally adopted by the Drafting Committee in 2016, back to the Drafting Committee, with a view to having a consolidated set of draft guidelines, as provisionally worked out thus far, prepared. The Commission subsequently provisionally adopted draft guidelines 1 to 11, as presented by the Drafting Committee at the current session, with commentaries thereto.

7. As regards the topic “**Protection of the Environment in Relation to Armed Conflicts**”, though this topic has been on the Commission’s agenda since 2013, the prior Special Rapporteur, Marie G. Jacobsson (Sweden), did not stand for reelection in 2016. Consequently, the Commission had no report to debate during the Sixty-Ninth session, and did not engage in any substantive work on this topic. However, a Working Group had been established on the topic, chaired by Mr. Marcelo Vázquez-Bermúdez. The Working Group had before it the draft commentaries prepared by the former Special Rapporteur, even though she was no longer with the Commission, on draft principles 4, 6 to 8, and 14 to 18 provisionally adopted by the Drafting Committee at the Sixty-Eighth session of the Commission, and taken note of by the Commission at the same session. The Working Group focused its discussion on the way forward. Upon consideration of the oral report of the Chairperson of the Working Group, the Commission decided to appoint Ms. Marja Lehto as Special Rapporteur.

8. Concerning the topic “**Protection of the Atmosphere**”, the Commission had before it the Fourth Report of the Special Rapporteur (A/CN.4/705 and Corr.1), which, building upon the previous three reports, proposed four guidelines on the interrelationship between the rules of international law relating to the protection of the atmosphere and other relevant rules of international law, including the rules of international trade and investment law, the law of the sea, and international human rights law. Following the debate in the Commission, which was preceded by an informal dialogue with atmospheric scientists organized by the Special Rapporteur, the Commission decided to refer the four draft guidelines, as contained in the Special Rapporteur’s

Fourth Report, to the Drafting Committee. Upon its consideration of the report of the Drafting Committee, the Commission provisionally adopted draft guideline 9 and three preambular paragraphs, together with commentaries thereto.

9. With respect to the topic “**Crimes against Humanity**”, the Commission had before it the Third Report of the Special Rapporteur (A/CN.4/704), which addressed, in particular, the following issues: extradition, non-refoulement, mutual legal assistance, victims, witnesses and other affected persons, relationship to competent international criminal tribunals, federal State obligations, monitoring mechanisms and dispute settlement, remaining issues, the preamble to the draft articles, and final clauses of a convention. As a result of its consideration of the topic at the present session, the Commission adopted, on first reading, a draft preamble, 15 draft articles and a draft annex, together with commentaries thereto, on crimes against humanity. The Commission decided, in accordance with Articles 16 to 21 of its statute, to transmit the draft articles, through the Secretary-General, to Governments, international organizations and others, for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 December 2018.

10. With regard to the topic “**Peremptory Norms of General International Law (*Jus cogens*)**”, the Commission had before it the Second Report of the Special Rapporteur (A/CN.4/706), which sought to set out the criteria for the identification of peremptory norms (*Jus cogens*), taking the 1969 Vienna Convention on the Law of Treaties as a point of departure. The Commission subsequently decided to refer draft conclusions 4 to 9, as contained in the report of the Special Rapporteur, to the Drafting Committee, and decided to change the title of the topic from “*Jus cogens*” to “Peremptory norms of general international law (*Jus cogens*)”, as proposed by the Special Rapporteur. The Commission subsequently took note of the interim report of the Chairperson of the Drafting Committee on draft conclusions 2 and 4 to 7 provisionally adopted by the Committee, which was submitted to the Commission for information.

11. With regard to the topic “**Succession of States in Respect of State Responsibility**”, the Commission decided to include the topic in its programme of work, and to appoint Mr. Pavel Šturma as its Special Rapporteur. At its Session in 2017, the Commission had before it the First Report of the Special Rapporteur (A/CN.4/708), which sought to set out the Special Rapporteur’s approach to the scope and outcome of the topic, and to provide an overview of general provisions relating to the topic. Following the debate in plenary, the Commission decided to refer draft articles 1 to 4, as contained in the report of the Special Rapporteur, to the Drafting Committee. The Commission subsequently took note of the interim report of the Chairperson of the Drafting Committee on draft articles 1 and 2 provisionally adopted by the Committee, which was submitted to the Commission for information.

B. DELIBERATIONS AT THE FIFTY-SIXTH ANNUAL SESSION OF AALCO (NAIROBI, REPUBLIC OF KENYA, 2017)

12. The **Secretary-General of AALCO Prof Dr. Kennedy Gastorn**, gave a brief account of the nine topics that had been deliberated at the Sixty-Eighth session of the Commission: *Protection of the Atmosphere; Jus cogens; Immunity of Foreign Officials from State Criminal Jurisdiction; Protection of Persons in the Event of Disasters; Subsequent Agreement and Subsequent practice*

in relation to the Interpretation of Treaties; Protection of Environment in relation to Armed Conflict; Crimes Against Humanity; Provisional Application of Treaties and Identification of Customary International Law. He also elaborated three main topics of deliberation, namely *Protection of Atmosphere, Jus Cogens and the Immunity of State officials from Foreign Criminal Jurisdiction* in terms of how these had been dealt with by the Commission and also in terms of the areas that Member States could focus on for their deliberations. He encouraged the delegations to present their views on other agenda items of the Commission as well.

13. *The delegate of Sudan* noted that the Head of the State is the highest authority of the State who enjoys the autonomy and decision making power and that the rules of international law provide that the actions of the Head of the State must be attributed to that State. He went on to add that the State shall bear all the consequences of the actions and administrative steps of the Head of the State on the ground that the Head of the State is the highest representative of a State.

14. While mentioning that there is a close link between the legal status of the Head of the State under national law and his status in international law, he pointed out that his Country found that many provisions of the national law are related with international law and that the national Constitutional and political structures determine the legal nature of the Head of the State which is related to his legal status in international law. Since international law recognizes the principle of sovereign equality of States, all Heads of sovereign States deserve similar international treatment, they being highest authority of the state, he added. He also went on to add that the legal status of the Head of the State in international law falls under the diplomatic law which is a branch of international law, and that the international custom too remained the main source of the legal status of the Head of the State.

15. Highlighting some international conventions that have dealt with the specific issues concerning the Head of the State, he drew attention to Special Missions Convention, 1969, which identified the terms in detail in Article one Para (A) including official visits made by the Head of the State and also the missions headed by the Head of the State as representative of his State and the Vienna Convention of Law of Treaties, 1969, which provides under Article 7(ii) that some persons can represent the State by virtue of their positions without any need to present authorization papers. This includes the Head of the State, he clarified. In this regard, the delegate also made reference to the 1973 Convention for the Prevention and Prosecution of Crimes against Internationally Protected Persons, particularly its Article 1 (A), 2 (iii) which provides for personal protection to the Head of State on international level (thereby making it mandatory for the States to take necessary and appropriate measures to prevent attacks on Head of the state) and the 1975 Vienna Convention on Representation of the States in their relations with international organizations, particularly Article 5 (1) which provides that (whenever a delegation is headed by the Head of State or any member of the body assigned to perform the duties). Based on an analysis of these provisions, he came to the conclusion that international customary law and national laws of States have determined the legal status of the Head of the State at the international level as a natural person to represent the legal position under international law.

16. On the question of immunity, he pointed out that the rules of international law clearly established that the Head of State has to be protected against arrest or detention and this is a guaranteed right of the Head of the State in all circumstances. So, the State authorities cannot arrest

the Head of the State or keep him in detention anywhere whether he is in other states or in his own state, he added. He was of the further view that besides the personal immunity granted to the Head of the State, there is a near agreement in the jurisprudence that the Head of the State present outside his State in his official capacity and known to the host state authorities enjoys full criminal immunity making him exempted from criminal jurisdiction of the host State. The immunity to the Head of the State from criminal jurisdiction of other States is an absolute immunity whether the conduct of the Head of the State is in his official capacity or personal capacity, he added.

17. In conclusion and based on his reasoning, he stated that immunity to the Head of the State is not for his person, but for his State and that the international customary law and judicial precedents mandate that it must be respected and must not be violated, and it also cannot be waived off. Commenting on the International Criminal Court, he stated that it applied only to the parties to the Rome Statute and that as regards the immunity of States that are not the parties to it, it flew from customary international law rules. Accordingly, he was of the further view that no country is allowed to take measures that violate the rights of the Head of the State as long as that country is not a signatory to the Statute and that the immunity of the Head of the State remained absolute before the national judiciary of the countries even if he commits international crimes.

18. *The delegate of the Republic of Korea* spoke on two topics. On the topic “*Jus Cogens*”, the delegate expressed his confidence that the work of the ILC on this topic will contribute to the promotion of the progressive development of international law and its codification. Drawing attention to the work of the Special Rapporteur, he made reference to paragraph 108 of the ILC report, and agreed with its view that States have consistently invoked *jus cogens*, and the norm has been identified by international courts and tribunals, as well as regional and national courts. In this sense, he pointed out that, in order to identify *jus cogens*, a comparative analysis of State practice and judicial decisions was required. On the topic “*Immunity of State Officials from Foreign Criminal Jurisdiction*”, he was of the view that the study of this topic required in-depth research on relevant State practices. Hence, he welcomed the Special Rapporteur’s report, which includes the results of a deep and systematic survey of numerous instances of State practices in this field as reflected in treaties and domestic legislation, as well as in international and national case law. He was of the belief that apart from the legal perspective, the limitation of and exceptions to the immunity of State officials could be a sensitive political issue as well. He hoped that the ILC will examine this issue with caution and prudence by taking into account the larger political implications.

19. *The delegate of the People’s Republic of China* spoke on three topics that were the subject of deliberations. While expressing his views on the topic “*Protection of the Atmosphere*”, he stated that they believe that protection of the atmosphere is a common and current issue faced by the human being as well as a multifaceted one that involved politics, law and science. He also added that China was of the view that the adopted draft guidelines basically comply with the condition of understanding set by the Commission in 2013 and reflected fairly objectively the outcome of relevant studies on this issue. He suggested that the Commission take into full account the special circumstances and real needs of the developing countries and expressed his hope that the Commission will study more international practices under regional mechanisms in a comprehensive manner and continue its firm-footed effort to push ahead the work relating to this topic.

20. Regarding the topic of “Immunity of States Officials from Foreign Criminal Jurisdiction”, he noted that the issue of the exceptions to the immunity of States is a highly complicated and sensitive issue and that China supported the conclusion that there is no exception in respect of immunity *ratione personae*. He also noted that three exceptions to immunity *ratione materiae* as proposed by the Special Rapporteur are mostly evidenced by, as cited in the report, a few dissenting opinions of ICJ judgments and civil cases before some national courts and international judicial bodies, such as the European Court of Human Rights. It is open to discussion as to whether such evidences are convincing and are of relevance to this issue. In this regard he added that China believed that, immunity is procedural in nature, and falls under an entirely different category of rules from the substantive rules that determine the lawfulness of a given act. As to whether the application of procedural rules should be precluded when there is a violation of substantive rules, he said that the ICJ rendered negative answer in its judgment on the *Arrest Warrant case* and the case of *Jurisdictional Immunities of the State*. Hence, he was of the view that it will be questionable to copy indiscriminately theories and practice of the latter when determining rules applicable to the former.

21. On the topic of *Jus cogens* he stated that China was of the view that, elements of *Jus cogens* concern major interests of all States whose rights, obligations and responsibilities are directly affected and that the deliberation on this topic should be strictly in line with the provision in Article 53 of the 1969 Vienna Convention on the Law of Treaties. He suggested the Commission to clarify the implications of the basic element of *Jus cogens* based on stock-taking of state practice and further elaborate on the relationship between *Jus cogens* and the Charter of the United Nations as well as relevant resolutions of the Security Council. He said that the work under this topic should focus on codifying existing laws rather than developing new rules. In his view, the three “core elements” of the *Jus cogens* concept as proposed by the Special Rapporteur were obviously distinct from the basic elements as defined in the Convention. He further raised a few questions—Is there a need for adding new core elements? What is the basis for such additions? And what implications would they have? These are questions that deserve further considerations. In China’s point of view he said that it is premature at this stage to list the rules of *Jus cogens*. The more recommendable approach, according to him, would be to collect and study State practice in this regard, and on that basis, clarify the specific criteria of *Jus cogens* and then consider the necessity of a list as such.

22. Commenting on the role of Asian-African States in the work of the Commission, he congratulated the Commission on its fruitful progress achieved during the past five years and stated that he will look forward to another five-year success. While pointing out the fact that 13 out of 34 of the members of the ILC currently are from the Member States of AALCO, he expressed belief that their work will contribute to providing more balanced and broader perspectives and making the views of Asian and African countries better reflected in the work of the Commission in terms of codification and development of international law.

23. Commenting on AALCO’s relationship with ILC, he noted that there are active interactions between AALCO and the ILC and that over the years, the AALCO Annual Sessions have considered the topics of the ILC and maintained regular exchanges with the ILC. In conclusion he expressed his Country’s support to AALCO in further strengthening its communication and

cooperation with the ILC, which will promote codification and progressive development of international law taking into account the interests of Asian-African Countries.

24. *The delegate of India* congratulated the AALCO and made general comments on a few select topics. On the topic, “Immunity of State Officials from Foreign Criminal Jurisdiction”, he appreciated the progress made thus far in the Commission and also commended the Special Rapporteur, Professor Concepcion Escobar Hernandez for her Fifth Report on the topic. He noted that the Commission could consider her Report on a preliminarily basis and could continue the debate in the next session of the Commission, as the report was available only in English and Spanish to the Commission. The Commission considered a single draft article 7 proposed by the Rapporteur on the question of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction. Given the normative implications of the phrase, ‘limitations and exceptions’, he agreed with the methodology used by the Special Rapporteur and the usage of title of the draft Article 7 –Crimes in Respect of which Immunity does not apply. He further added that in the draft Article, the approach adopted by the Special Rapporteur is consistent and systematic, based on the State practice as reflected in treaties and domestic legislation, as well as in international and national case law. He was of the further view that the issues involved in the draft Article are highly complex and politically sensitive for the States and therefore, he advocated prudence and caution in deciding whether the Commission should focus on the codification aspect or progressive development of international law (*lex lata* or *lex ferenda*). He also made reference to the International Court of Justice’s opinion in the *Arrest Warrant Case*, wherein it was held that there existed no customary law exception to the rule according immunity from criminal jurisdiction and thus the ICJ reaffirmed inviolability of incumbent Ministers for Foreign Affairs suspected of having committed war crimes or crimes against humanity. In the *Jurisdictional Immunities of the State*, he added that the ICJ rejected such exceptions, although in the context of State immunity he considered that the ‘crimes of corruption’ proposed in para 1 of sub para (b) of the draft article 7 needed to be supported with sufficient State practice convincing that its character would constitute a serious international crime, similar to that of the other international crimes listed therein. Further he added that a determination should be made whether or not the acts of corruption fall within the ‘acts performed in an official capacity’ and thus fall within the scope of immunity *ratione materiae*. He looked forward to the next Session of the Commission, when the Special Rapporteur would introduce procedural aspects of immunity of State officials from foreign criminal jurisdiction.

25. On the topic of ‘*Jus Cogens*’, the delegate congratulated the Special Rapporteur, Mr. Dire Tladi for his First Report on the topic and noted that the Commission consider the report without formally adopting it in this session. The delegate supported the Special Rapporteur’s view reiterating that the draft conclusions would be the appropriate outcome of the topic and that Articles 53 and 64 of the Vienna Convention on the Law of Treaties provided the legal basis for acceptance and recognition of a norm by the international community of States. The delegate welcomed the future work indicated by the Special Rapporteur in particular to study the rules for identifying of norms of *Jus cogens*, including the question of the sources of *Jus cogens*, and also consider the relationship between *Jus cogens* and non-derogation clauses in human rights treaties.

26. On the topic of ‘Customary International Law’, the delegate expressed his appreciation for the Special Rapporteur, Sir Michael Wood for his Fourth Report on the topic which addressed the

suggestions of States on previously adopted draft resolutions as well as ways and means to make the evidence of customary international law more readily available. He mentioned that the Commission, in addition to this report, also considered a memorandum by the Secretariat concerning the role of decisions by the national courts in the case law of international courts and tribunals for the purpose of determining the customary international law. This resulted in 16 draft Conclusions out of this process, which reflect the valuable efforts of the Commission on this topic. He further commented on few of these draft conclusions like draft Conclusion 4 (3) which states that “Conduct of other actors” is not a practice that contributes to the formation, or expression of rules of customary international law, but may be relevant when assessing the practice of States or international organizations.” Commentary to this draft conclusion in paragraph 9 includes ‘non-State armed groups’ as one of such other actors along with NGOs, transnational corporations and private individuals and stipulates that the reaction of States to the conduct of non-State armed groups may be constitutive or expressive of customary international law. He said that their understanding, by reading both the draft conclusion and the commentary, is that the conduct of non-state armed groups is not at all constitutive or expressive of Customary International Law. He agreed with draft Conclusion 8 that the “relevant practice must be general, meaning that it must be sufficiently widespread and representative as well as consistent”. He added though universal participation is not required, it is important that participating States do represent the various geographical regions and are particularly involved in the relevant activity or those States that had an opportunity or possibility of applying the rule. He agreed with the draft Conclusion 9 that the general practice be accepted as law (*Opinio Juris*) means that the practice in question must be undertaken with a sense of legal right or obligation. Draft Conclusion 10, refers to government legal opinions as a form of evidence of acceptance as law. Although, he agreed in principle on the terms of the value of these opinions, however, he was of the view that it may be difficult to identify them as many countries do not publish the legal opinions of their law officers. He was of the further view that all treaty provisions are not equally relevant as evidence of rules of customary international law and that only fundamental norms creating treaty provisions could generate such rules. In his view strong opposition to a particular treaty, though from a few countries, could be a factor needed to be taken into account while identifying customary international law. Finally, he agreed to the provision under draft Conclusion 12 that a resolution by an international organization or an intergovernmental conference cannot create a rule of customary international law.

27. On the topic of “Provisional Application of Treaties”, he welcomed the Fourth Report of the Special Rapporteur, Ambassador Juan Manuel Gómez Robledo, and stated that the report continues the analysis of State practice, and considered the relationship of provisional application to other provisions of the 1969 Vienna Convention on the Law of Treaties, as well as the question of provisional application with regard to international organizations. The report had also dealt with the topics in which States expressed interest during the debate in the 70th Session of the General Assembly. He noted that the provisional application of a treaty will depend on the provisions of domestic law, including the manner of expressing consent. He said that India being a dualistic State, treaty will not automatically form part of the domestic law and that it applied only as a result of their acceptance by internal procedures. Thus resort to provisional application of treaties i.e., treaties being applicable/binding on the States before its entry in to force will go against the principle of dualism he clarified.

28. On the topic “Protection of the Environment in Relation to Armed Conflicts”, he took note of the Third Report of the Special Rapporteur Marie G. Jacobsson which *inter alia* dealt with the post-conflict phase of the armed conflict. He stated that the draft principles proposed under this topic should not be in conflict with the obligations arising from existing conventions and also that the work on this topic should not duplicate the efforts already undertaken in the existing regimes.

29. *The delegate of Japan* acknowledged the importance of “Protection of the Atmosphere” to find out common legal principles arising from the existing treaties related to the environment and noted that the provisional adoption of Draft Guideline 3 which stipulates an obligation to protect the atmosphere at the ILC session in 2016 was commendable. He also appreciated the Commission in analysing and discussed the differentiated obligations related to transboundary atmospheric pollution as well as obligations related to global atmospheric degradation.

30. He recalled that the 3rd Preambular Paragraph of the Draft Guidelines state that “the protection of the atmosphere from atmospheric degradation is a pressing concern of the international community as a whole” and noted that the Sixth Committee of the UNGA discussed the concept of “common concern of humankind” in the context of protection of atmosphere. Moreover, since the Paris Agreement in 2015 recalled this concept in its preamble, he considered it appropriate for the ILC to reconsider this paragraph in future sessions and update the discussions on this concept. He hoped that AALCO Member States would contribute to these discussions as protection of atmospheric environment is a serious issue for Asia and Africa.

31. He welcomed the opening of the ILC discussions the previous year on “*Jus Cogens*” with the submission of the First Report by the Special Rapporteur which introduced core elements of the concept of *jus cogens*. With regard to the intensive discussions at the Sixth Committee on whether the ILC should present an illustrative list of norms that have acquired the status of *jus cogens*, it was aware of the difficulty in identifying these norms which might result in giving an inferior status to other important norms of international law and hoped that the Commission would carefully examine the issue in future sessions. As the Second Report of the Special Rapporteur would be deliberated on the ongoing 69th Session of the ILC, it was desired that the commission analyse in detail the practice of this concept and proceed to elucidate its substantial character.

32. The Special Rapporteur presented three limitations and exceptions to which the immunity does not apply Draft Article 7 in the “Immunity of State Officials from Foreign Criminal Jurisdiction” at the previous session of ILC. These limitations are (1) certain international crimes (2) territorial tort exception and (3) corruption. The view taken by Japan on the report was that it does not provide sufficient evidence that these categories of limitations and exceptions are already established categories to which the immunity of state officials from foreign criminal jurisdiction does not apply. He considered that the relationship and fundamental differences between immunity *ratione personae* and immunity *ratione materiae* are not sufficiently analysed and hoped for further discussions. Noting that the law of immunity is fundamental for equality of state sovereignty and stable inter-state relationships, he considered it necessary to deal with the issue of limitations and exceptions to immunity with prudence.

33. Towards the end, on the issue of Cooperation between ILC and AALCO, he wished that the constructive interaction between two organs to be strengthened. He stated that in order to

provide better chance for ILC to contribute to the promotion of the progressive development of international law and its codification, the views from the international community particularly from Asian and Africa should be duly considered and in this respect highlighted AALCO's role in suggest possible new topics to ILC.

34. *The delegate of the Islamic Republic of Iran* spoke on three topics that were the subject of deliberation. As regards the topic “*Protection of Atmosphere*”, the delegate reiterated its notion that the topic of protection of the atmosphere is fraught with difficulties as it is tightly interwoven with political, technical and scientific considerations and welcomed the decision of the Special Rapporteur to deal with the question of interrelation of the law of the atmosphere with other fields of international law (laws of the sea, international trade and investment law and international human rights law) and further to focus on implementation, compliance and dispute settlement issues which is relevant in the light of the Paris Agreement adopted in November 2016. The delegate noted that the Special Rapporteur's task was not, from the outset, aimed at neither filling all the existing gaps in the legal framework regulating protection of the atmosphere, nor was it supposed to provide a descriptive list of the existing principles of international environmental law. Although, it seemed that the in the work done so far, attempts were made to strike a balance however the final outcome should reflect such a balance.

35. On the topic of ‘*Jus cogens*’, the delegate welcomed the preparation of the Second Report by the Special Rapporteur and noted that the definition of the *jus cogens* as provided in Article 53 of the 1969 Vienna Conventions on the Law of Treaties (VCLT) is ambiguous and therefore determination of the criteria for identification of its norms remains a difficult task. He was of the view that since the adoption of the Convention, courts and tribunals such as Inter-American Court of Justice have confirmed the peremptory nature of these norms adding to the list, prepared by the Commission from the outset, other norms such as prohibition of torture (which had recently received ICJ's seal of approval by its judgment on 20th July 2012 in the case concerning Belgium against Senegal). He pointed out that the Court had attempted to justify characterisation of *jus cogens* in paragraph 99 of its judgment that such a prohibition relies on extended international practice and *opinio juris* of States. To support this decision, the Court named a few international instruments containing this prohibition, its quasi-universal introduction in the domestic legislations of States and the fact that its violation is regularly denounced at national and international forums he clarified. Although the Special Rapporteur has referenced this on several occasions, due considerations must be given to the reaction of the international community with respect to violation of a norm of *jus cogens* and needs to be included in the draft conclusions, he opined.

36. He was of the considered opinion that it did not deem it wise for the Commission to draw a list of norms of *Jus Cogens* as such a list would remain indecisive and could be “modified only by a subsequent norm of general international law having the same character” to use the terms of Article 53 of the VCLT. He believed that the Special Rapporteur could focus on clarification of the scope and meaning of the two criteria defined by Article 53 of the VCLT, namely acceptance and recognition of the norm by the international community of States as a whole and its non-derogability. In this regard, he considered the view of the ICJ to be noteworthy which in its Advisory Opinion on the Legality of Threat or Use of Nuclear Weapons stressed that “the question whether a norm is part of *jus cogens* relates to the legal character of the norm.” He was of the view that norms which ensure and consolidate the international public order undoubtedly have such a

character. On the other hand, with regard to the non-derogability of the norms of *jus cogens*, ICJ in its judgment of 13th February 2012 in the case concerning jurisdictional immunities of States (Germany vs Italy-Greece intervening), underlined that “a *jus cogens* rule is one from which no derogation is permitted.”, he pointed out. Also, in its Advisor Opinion on Nuclear Weapons, the Court called “fundamental intransgressible norms” certain norms of international humanitarian law such as distinction and prohibition of unnecessary suffering.

37. On draft conclusion 7, putting aside the point that no definition is given by the Special Rapporteur to the phrase “international community of States as a whole”, it was stated that acceptance and recognition of norms of *jus cogens* by the community of States as a whole, as well as the attitude of States is relevant. The Special Rapporteur seemed to have ignored the relevance of “principal legal systems of the world” as a criterion often used in universal qualification of legal elements as referred to in Article 9 of the Statute of the ICJ and Article 8 of the Statute of the ILC to ensure fair geographical distribution. Hence, lack of acceptance and recognition by a single State will be irrelevant if all principal legal systems describe a norm as a norm of *jus cogens* he clarified.

38. He hoped that the Special Rapporteur will cover the consequences of breach of a *jus cogens* norm, particularly in the light of Article 41 of the ILC’s Draft Articles on State Responsibility for Internationally Wrongful Acts as there are a number of situations that have been created by a serious breach within the meaning of Article 40 of the Draft Articles and many States have attempted to refrain from rendering aid or assistance in maintaining such situations in terms of Article 41 of the Draft.

39. Turning to the topic of ‘Immunity of State officials from Foreign Criminal Jurisdiction’, the delegate commended the Special Rapporteur for the Fifth Report which carefully analysed the questions of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction and thanked the Drafting committee of the Commission for the provisional adoption of Articles 2, subparagraph (f) and 6 and the commentaries to the draft articles. He was of the view that immunity of State officials from foreign criminal jurisdictions while performing official acts is a direct consequence of the principle of sovereign equality and its recognition by international law is aimed at protecting sovereign immunity and ensuring peaceful international relations. Therefore, “acts performed in an official capacity” consisted of all acts comprising of functions of the State officials in their official capacity, he added. He was of the further view in this regard that, immunity *ratione materiae* must be guaranteed to all State officials in respect to acts defined as acts performed in official capacity whether they are in office or have left the office. Further, regarding crimes in respect of which immunity does not apply, distinction needs to be made between “crimes of international law” and international crimes”; while the importance of fight against the former cannot be overstated, it is the latter that seems to have reached the status of customary international law, and as such enjoy wide acceptance by the international community and may therefore be included in the list. The delegate concluded by stating that it continues to follow the work of the Commission and looked forward to further reports by the Special Rapporteur.

40. In its concluding remarks, the delegation highlighted the important role that AALCO Member States are expected to play in the work of the ILC. As the ILC is a highly technical forum

with a highly technical mandate, a more active role by AALCO Member States therein requires introduction of the most qualified jurists to gain membership thereto and to act as Special Rapporteurs. It was also noted in this regard that the current election process of ILC members seemed to need a serious review.

41. *The delegate of Republic of Vietnam* first spoke on the topic “Protection of the Atmosphere”, and appreciated the Special Rapporteur for his Third Report which focuses on the obligations of States to mitigate atmospheric degradation and the requirement of due diligence and environmental impact assessment. He welcomed the works of the Commission as Protection of atmosphere is a pressing concern on States and the international community as a whole. As a developing country, he stated that his Country recognized the need to pay regards to the consideration of equity, in which special conditions and needs of developing countries should be taken into account when discussing the draft text. He was of the view that such considerations are consistent with other international instruments that deal with the protection of environment, such as the 1972 Stockholm Declaration, the 1992 Rio Declaration and the 2015 Paris Agreement. He recognized the important obligation to protect the atmosphere through the effective prevention, reduction or control of atmospheric pollution and degradation as stated under Guideline 3. Moreover, it underlined the significance of the inclusion of environmental impact assessments in the domestic systems of States which helps ensure that proposed activities under their jurisdiction are in conformity with international standards. As the effective protection of atmosphere relies heavily upon scientific knowledge, he welcomed and encouraged the collaboration among scientists in this field as well as the development of regional and international mechanisms to support developing countries in terms of enhancing exchange of information and joint monitoring which is reflected in Guideline 8.

42. On the topic of “*Immunity of State Officials from Foreign Criminal Jurisdictions*”, while expressing gratitude to the Special Rapporteur, he made two brief observations. First, immunity of State officials from criminal jurisdiction originates from customary international law. Therefore, the codification of the rules in this matter needs to pay due regards to the principle of sovereign equality, non-intervention into domestic affairs of States, as well as the maintenance of international peace and security, with an aim to ensure the balance between the benefits of granting immunity to State officials and the need to address impunity. The drafting of the article needs to ensure the mentioned principles and reflect the codification of established norms. Secondly, the exceptions to criminal jurisdiction warrant further debate as in the course of this study, it will be necessary to clarify the concept of “*acts performed in an official capacity*”. It is ill-advised to attach the criminal nature of an act to the representative nature of such act, as in practice, the criminality of an act does not affect or determine whether an act is performed in an official capacity. Moreover, the view that international crimes should not be considered as acts performed in official capacity should be carefully considered, and greater clarity should be given to the crimes that constitute “international crimes”. Taking note of the decision of the ICJ in the *Arrest Warrant Case*, in which only serious international crimes are not considered as acts performed in an official capacity, there is a distinction that needs to be made between in concept of “international crimes” and “serious international crimes”, where to former covers a broader spectrum of criminal acts.

43. Regarding *Jus Cogens*, while thanking the Special Rapporteur for his extensive work in delivering the First Report on *Jus Cogens*, it was noted that peremptory norms play an important role in international law and is recognized under the 1969 Vienna Convention on Law of Treaties

as well as domestic legislations of many States. The Vietnamese Law on Treaties which has been adopted earlier also recognizes *jus cogens* as a principle to be adhered to in the course of negotiating and entering into international treaties, he stated. However, till date, it remains unclear on the definition, constituents and developments of such norms, he pointed out. The efforts of the Commission were commended in addressing these issues. With regard to the draft conclusions, concerns were expressed of the inconsistencies present in para 2 of draft conclusion 2 and para 2 of draft conclusion 3. In particular, the former states that peremptory norms are the exception to rules of international law that may be modified, derogated from or abrogated by agreement of States (*jus dispositivum*), whereas according to the latter, *jus cogens* is considered hierarchically superior to other norms of international law. In his view, this causes confusion as to the relationship between the two types of norms in question. Therefore, further studies needed to be undertaken to clarify this matter. Further studies by the ILC to clarify the existence of regional *jus cogens* and the effect of persistent objection in regards to *jus cogens* was also encouraged.

II. IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

A. BACKGROUND

1. At its Fifty-Eighth session, in 2006, the Commission, on the basis of the recommendation of a Working Group on the long-term programme of work, identified the topic “Immunity of State officials from foreign criminal jurisdiction” for inclusion in its long-term programme of work.¹ At its Fifty-Ninth session, in 2007, the Commission decided to include the topic in its programme and appointed Mr. Roman A. Kolodkin as Special Rapporteur for the topic.²

2. At the Sixtieth session, in 2008, the Commission had before it the preliminary report of the Special Rapporteur as well as a memorandum of the Secretariat on the topic.³ The preliminary report briefly outlined the breadth of prior consideration, by the Commission and the Institute of International Law, of the question of immunity of State officials from foreign jurisdiction as well as the range and scope of issues proposed for consideration by the Commission, in addition to possible formulation of future instruments. The Commission held a debate on the basis of this report which covered key legal questions to be considered when defining the scope of the topic, including the officials to be covered, the nature of acts to be covered and the question of possible exceptions.⁴ The Commission did not consider the topic at the Sixty-First session.

3. At its Sixty-Second session in 2010, the Commission was not in a position to consider the second report of the Special Rapporteur, which was submitted to the Secretariat.⁵ At the Sixty-Third session in 2011, the Commission considered the Second and Third Reports of the Special Rapporteur. The Second Report reviewed and presented the substantive issues concerning and implicated by the scope of immunity of a State official from foreign criminal jurisdiction, while the Third Report addressed the procedural aspects, focusing, in particular on questions concerning the timing of consideration of immunity, its invocation and waiver. The debate revolved around, *inter alia*, issues relating to methodology, possible exceptions to immunity and questions of procedure.⁶

4. At the Sixty-Fourth session in 2012, the Commission appointed Ms. Concepción Escobar Hernández as Special Rapporteur to replace Mr. Roman Kolodkin, who was no longer a member of the Commission. The Commission had before it the Preliminary Report of the Special Rapporteur.⁷

5. At the Sixty-Fifth session in 2013⁸, the Commission had before it the second report of the Special Rapporteur, in which, *inter alia*, six draft articles were presented, following an analysis of: (a) the scope of the topic and of the draft articles; (b) the concepts of immunity and jurisdiction;

¹ See *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10)*, para. 257

² See *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10 (A/62/10)*, para. 375.

³ See document A/CN.4/596 and Corr.1

⁴ See *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10 (A/63/10)*, paras. 267–311.

⁵ See *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 10 (A/65/10)*, para. 343.

⁶ See *Official Records of the General Assembly, Sixty-sixth session, Supplement No. 10 (A/66/10)*, paras. 104–203.

⁷ See document A/CN.4/654.

⁸ See document A/CN.4/661

(c) the difference between immunity *ratione personae* and immunity *ratione materiae*; and (d) identified the basic norms comprising the regime of immunity *ratione personae*. Following the debate in plenary, the Commission decided to refer the six draft articles to the Drafting Committee. Upon consideration of the report of the Drafting Committee, the Commission provisionally adopted draft articles 1, 3 and 4.

6. At the Sixty-Sixth session in 2014, the Commission had before it the third report of the Special Rapporteur,⁹ in which the Special Rapporteur undertook an analysis of the normative elements of immunity *ratione materiae*, focusing on those aspects related to the subjective element. In that context, the general concept of a “State official” was examined in the report, and the substantive criteria that could be used to identify such persons were considered, especially in respect of those who may enjoy immunity *ratione materiae* from foreign criminal jurisdiction. The report further considered a linguistic point concerning the choice of the most suitable term for designating persons who enjoy immunity, given the terminological difficulties posed by the term “official” and its equivalents in the various languages, and suggested instead that “organ” be employed. Following an analysis of relevant national and international judicial practice, treaty practice and the previous work of the Commission, the Special Rapporteur proposed two draft articles relating to the general concept of “an official” for the purposes of the draft articles and the subjective scope of immunity *ratione materiae*. It was envisaged that the material and temporal scope of immunity *ratione materiae* would be the subject of consideration in the Special Rapporteur’s next report. The Commission decided to refer the draft articles to the Drafting Committee, and subsequently provisionally adopted draft articles 2 (e) and 5 on the basis of the report of the Drafting Committee, and commentaries thereto.

7. At the Sixty-Seventh session in 2015, the Commission had before it the fourth report of the Special Rapporteur,¹⁰ which was devoted to the consideration of the remaining aspects of the material scope of immunity *ratione materiae*, namely what constituted an “act performed in an official capacity”, and its temporal scope. The report contained proposals for draft article 2, subparagraph (f), defining an “act performed in an official capacity” and draft article 6 on the scope of immunity *ratione materiae*. The Commission decided to refer the two draft articles to the Drafting Committee, and subsequently took note of draft articles 2, subparagraph (f), and 6, provisionally adopted by the Drafting Committee.

8. Towards the end of the Sixty-Eighth Session in 2016, the Commission received the Fifth Report on “Immunity of State Officials from Foreign Criminal Jurisdiction” by its second Special Rapporteur for this topic, Concepción Escobar Hernández (Spain)¹¹ which proposed a single draft article 7 on “crimes in respect of which immunity does not apply.”. The debate on the Fifth report, including this proposed draft article, commenced during the sixth-eighth session in 2016, but could not be completed due to a lack of time, and so was continued in the sixty-ninth session. That debate, as well as the ensuing discussions within the drafting committee and during the adoption of the commentary to draft article 7, proved to be one of the most contentious within the Commission in years.

⁹ See document A/CN.4/673

¹⁰ See document A/CN.4/686

¹¹ International Law Commission, Fifth Report on Immunity of State Officials from Foreign Criminal Jurisdiction, UN Doc. A/CN.4/701 (June 14, 2016) (prepared by Special Rapporteur Concepción Escobar Hernández).

B. CONSIDERATION OF THE TOPIC AT THE SIXTY-NINTH SESSION OF THE COMMISSION (2017)

9. At its session held in 2017, the Commission had before it the Fifth Report of the Special Rapporteur analysing the question of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction (A/CN.4/701), which it had begun to debate at its Sixty-Eighth session. The report (which needs to be understood and read together with previous reports) addressed, in particular, the prior consideration by the Commission of the question of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction, offered an analysis of relevant practice, addressed some methodological and conceptual questions related to limitations and exceptions, and considered instances in which the immunity of State officials from foreign criminal jurisdiction would not apply.

Specifically, the Special Rapporteur had highlighted three ideas central to this report.¹²

10. First, she noted that the phrase “limitations and exceptions” echoed the different arguments put forward in practice for the non-application of immunity. The Special Rapporteur stressed that the distinction between limitations and exceptions, despite its theoretical and normative value for the systemic interpretation of the immunity regime, had no practical significance, as “limitations” or “exceptions” led to the same consequence, namely the non-application of the legal regime of the immunity of State officials from foreign criminal jurisdiction in a particular case.

11. Second, the report addressed limitations and exceptions within the specific framework of immunity and within the context of the international legal system as a whole. In that regard, the Special Rapporteur underscored: (a) the interrelationship between immunity and jurisdiction, even though the two were different concepts; (b) the procedural nature of immunity; (c) the distinction between immunity of State officials and State immunity; and (d) the distinction between immunity from foreign criminal jurisdiction and immunity before international criminal courts and tribunals. The report further examined immunity from the point of view of international law as a normative system, in which immunity sought to guarantee respect for sovereign equality of States but had to be balanced against other important values of the international legal system.

12. Third, the report focused on the practice of States, which constituted the cornerstone of the Commission’s work. The report examined to what extent practice revealed the existence of customary norms that could be codified, following the basic methodology in the Commission’s work on the identification of customary international law. It also analysed whether there existed a trend towards progressive development of norms relating to immunity. Going beyond international jurisprudence and treaties, the report studied domestic legislation and decisions of domestic courts. The report also analysed the issues from a systemic perspective, thereby considering the regime of immunity in relation to other aspects of the contemporary international legal system, understood as a whole.

13. Finally, the Special Rapporteur drew the conclusion that it had not been possible to determine, on the basis of practice, the existence of a customary rule that allowed for the

¹² These three points are found in the Annual Report of ILC for the year 2017, Chapter VII, pp.166.

application of limitations or exceptions in respect of immunity *ratione personae*, or to identify a trend in favour of such a rule. On the other hand, she came to the conclusion that limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction did apply to State officials in the context of immunity *ratione materiae*. As a consequence of the analysis, the report contained a proposal for draft article 7 on crimes in respect of which immunity did not apply. This provision provides thus:

1. Crimes in respect of which Immunity shall not apply:
 - (i) Genocide, crimes against humanity, war crimes, torture and enforced disappearances;
 - (ii) Crimes of Corruption;
 - (iii) Crimes that cause harm to persons, including death and serious injury, or to property, when such crimes are committed in the territory of the forum State and the State official is present in said territory at the time that such crimes are committed.
2. Paragraph 1 shall not apply to persons who enjoy immunity *ratione personae* during their term of office.
3. Paragraphs 1 and 2 are without prejudice to:
 - (i) Any provision of a treaty that is binding on the forum State and the State of the official, under which immunity would not be applicable;
 - (ii) The obligation to cooperate with an international tribunal which, in each case, requires compliance by the forum State.

14. As could be understood clearly, while Paragraph 1 identified crimes to which immunity would not apply, Paragraph 2 defined the scope of limitations and exceptions and Paragraph 3 contained a without-prejudice provision in respect of situations covered by special regimes. Following its debate on the report, the Commission at its meeting held on 30 May 2017, decided to refer draft article 7, as contained in the Special Rapporteur's Fifth Report, to the Drafting Committee, taking into account the debate in the Commission. The Drafting Committee did make few changes to this provision as proposed in the report of the Special Rapporteur.¹³ Draft article 7 and the draft annex as they emerged from the drafting committee read as follows:

Article 7

¹³ It is worth pointing out here that two exceptions to immunity proposed by the Special Rapporteur in her Fifth Report had not been accepted by the Drafting Committee. An exception to immunity for crimes of corruption is not included, because the Commission decided that "they do not constitute 'acts performed in an official capacity,' but are acts carried out by a State official solely for his or her own benefit. Likewise, no exception for "territorial crimes" is included in draft article 7, by which is meant (according to the commentary) crimes committed "by a foreign official in the territory of the forum State without that State's consent to both the official's presence in its territory and the activities carried out by the official that gave rise to the commission of the crime.

Crimes under international law in respect of which immunity ratione materiae shall not apply

1. Immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law:

- (a) crime of genocide;
- (b) crimes against humanity;
- (c) war crimes;
- (d) crime of *apartheid*;
- (e) torture;
- (f) enforced disappearance.

2. For the purposes of the present draft article, the crimes under international law mentioned above are to be understood according to their definition in the treaties enumerated in the annex to the present draft articles

The annex to the present draft articles provides thus:

Annex

List of treaties referred to in draft article 7, paragraph 2

Crime of genocide

- Rome Statute of the International Criminal Court, 17 July 1998, article 6;
- Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, article II.

Crimes against humanity

- Rome Statute of the International Criminal Court, 17 July 1998, article 7.

War crimes

- Rome Statute of the International Criminal Court, 17 July 1998, article 8, paragraph 2.

Crime of apartheid

- International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973, article II.

Torture

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984: article 1, paragraph 1.

Enforced disappearance

- International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, article 2.

15. Upon receipt in the plenary of this draft article and annex, consensus could not be reached within the Commission on its provisional adoption. In the meeting held on July 20, 2017 after several members addressed the Commission as to their concerns, the Commission provisionally adopted the draft article 7 and annex by a recorded vote of 21-8-1 (with 4 members absent). Thereafter, the Special Rapporteur proposed commentary for the draft article and annex, which was then revised and adopted by the Commission at its later meetings.

C. SUMMARY OF VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPIC AT THE UN GENERAL ASSEMBLY SIXTH COMMITTEE AT ITS SEVENTY-SECOND SESSION HELD IN 2017¹⁴

16. On the topic of ‘Immunity of State Officials from Foreign Criminal Jurisdiction’, *many delegations* appreciated the Special Rapporteur for her detailed report on the limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction.

17. *The delegate of Sudan* stated that immunity of state officials from foreign criminal jurisdiction was derived from the principle of sovereign equality of States. He stated that subjugation to a jurisdiction did not negate immunity of State officials. Referring to the United Nations Convention on Jurisdictional Immunities of States and Their Property of 2004, he stressed that immunity of State officials was a principle of customary international law. Noting that the International Court of Justice had addressed the issue of jurisdiction without arriving at a decision, he also observed that there was some conflict between draft articles 10 and 27 adopted by the Commission. His delegation believed that an international convention on the topic of immunity would enhance the rule of law and legal certainty, in particular in dealings of States with natural or legal persons, and would contribute to the codification and development of international law and the harmonization of practice in the area of immunity. He stated that the conduct of any organ of the State must be regarded as an act of that State such that the expression “State Official” should also cover persons or categories of persons or categories of persons who exercised elements of governmental authority in the absence of or on behalf of the Government. The question of immunity of officials should not be left to the jurisdiction of another country and the exercise of a State of its jurisdiction was a manifestation of its sovereignty.

18. *The delegate of India* highlighted draft article 7 proposed by the Special Rapporteur and the crimes listed therein that fell outside of the protection of immunity from foreign criminal jurisdiction. That text provided less treaty practice. Furthermore, the widely accepted Vienna Conventions contained no such exceptions to immunity. Underscoring the need to show consistent State and treaty practice to support the exceptions asserted in draft article 7, he also pointed out

¹⁴ All the statements that are mentioned here as having been made by the Member States of AALCO at the UN General Assembly Sixth Committee at its session held in 2017 are available from:
<https://www.un.org/press/en/2017/gal3560.doc.htm>; <https://www.un.org/press/en/2017/gal3559.doc.htm>;
<https://www.un.org/press/en/2017/gal3557.doc.htm>; <https://www.un.org/press/en/2016/gal3535.doc.htm>;
https://www.mfa.gov.sg/content/mfa/overseasmission/newyork/nyemb_statements/sixth_committee/2016/201611/press_20161101.html; <http://www.china-un.org/eng/hyyfy/t1506789.htm>.

the importance of the status and the nature of duty being performed by the persons claiming immunity at the time of the offence.

19. *The delegate of Japan* said there was debate on whether the matter of limitations and exceptions was an established customary international law (*lex lata*) or development of a new law (*lex ferenda*). The divergent view could be due to the fact that the fifth report did not provide convincing evidence to support its conclusion. Concerning the list of crimes to which immunity did not apply, he stated more explanation would be needed on the reason for the selection of those crimes. Similarly, it was unclear whether limitations and exception of immunity would be restricted to the linked crimes. The proper balance between State sovereignty and the fight against impunity would require great attention. Hence, the responsibility of States should not be confused with that of individuals. It was important to respect the international legal order based on sovereign equality of States. In regards to discussions on procedural aspects, he expressed hope that the sixth report would provide a rich explanation and references to those issues.

20. *The delegate of People's Republic of China* said draft article 7 had been hastily adopted without thorough discussion. The Commission should proceed with caution and prudence, continuing to seek on the issue of exceptions the broadest possible consensus. The six exceptions to immunity in the draft were not grounded in general international practice, but based mainly on European and American jurisdictions. Moreover, the methodology used in the study had been marred by tendentious selectiveness, with many examples irrelevant to the immunity of State officials. The provisions of the draft failed to qualify as codification or progressive development of customary international law.

21. *The delegate of Sri Lanka* noted that the Commission had not been able to determine the existence of a customary rule allowing for the application of limitations and exceptions with respect to immunity *ratione personae*. Nonetheless, the report had also concluded that limitations and exceptions to the immunity of State officials were extant in that context. The sharply divisive debate within the Commission on draft article 7 had led to a vote on an issue that should have been given further critical analysis and a decision by consensus. The extent of the treaty practice that had been cited was problematic.

22. *The delegate of Singapore* said propositions contained within article 7 could benefit from further consideration, inviting the Commission to reconsider it. While the temporal scope of immunity *ratione materiae* was not controversial, the material scope had benefited and would still benefit from further study. Following its work on *ratione materiae*, the Commission might wish to revisit the extension of immunity *ratione personae* to high officials beyond the troika. Adding that the Commission must avoid proceedings which were politically motivated, she underscored the need to focus on safeguards to ensure that exceptions to immunity *ratione materiae* were not applied in a subjective manner.

23. *The delegate of the Republic of Korea* said that there were no limitations or exceptions with respect to immunity *ratione personae*. Meanwhile, she noted the divergence of opinions regarding limitations or exceptions to immunity *ratione materiae* such as *lex lata* or *lex ferenda*. In that regard, she pointed out that it was necessary to pay attention to the jurisprudence of the International Court of Justice on that issue.

24. *The delegate of Thailand* highlighted draft article 7, listing crimes for which immunity did not apply. The exception was for persons enjoying immunity *ratione personae*, on the basis of the Special Rapporteur's finding that no customary international law existed in relation to limitations or exceptions to such type of immunity. The work on that sensitive and complicated topic should be based on *lex lata* and State practice, she stressed.

25. *The delegate of Islamic Republic of Iran* noted that the manner in which draft article 7 had been adopted by the Commission indicated that there had been a fundamental division of opinions on certain points. The Special Rapporteur had "stepped into the path of progressive development of international law" by proposing the draft article which had not benefited from sufficient State practice. "This is why we do not agree that the draft article represents an appropriate means of addressing this issue," she said.

26. Instead of enlisting specific crimes, such exceptions were best to be applied solely regarding the most serious crimes of international concern, she continued. As stated prior by some Commission members, the report did not provide a comprehensive pertinent jurisprudence on the non-applicability of immunity *ratione materiae* by mostly relying on cases of civil proceedings and not penal proceedings. It was not possible to assume that the existence of criminal responsibility for any crimes under international law committed by a State official automatically precluded immunity from foreign criminal jurisdiction. Immunity did not depend on the gravity of the act in question, she said, urging the Commission to proceed on the topic with caution. In addition, she was doubtful whether State practice and jurisprudence supported the inclusion of crimes of torture, enforced disappearance and apartheid under the scope of exceptions. Given the sensitivity of state, she suggested that the Commission should proceed more cautiously on the topic and the divergent views could be due to the fact that the Fifth report did not provide convincing evidence to support its conclusion. The delegation looked forward to the future work of the Special Rapporteur on procedural aspects of immunity which appeared to be more significant than the substantive matter under consideration.

27. *The delegate of the Republic of South Africa* said that a careful study must be made by the Commission on the possible limits to be set to immunity *ratione personae* and immunity *ratione materiae* in the draft articles. Draft article 7 referred to crimes under international law in respect of which immunity from foreign criminal jurisdiction *ratione materiae* did not apply. The draft article contained two paragraphs, one that listed the crimes in paragraph 1 and one that identified the definition of those crimes in paragraph 2. Paragraph 1 listed the crimes which, if committed, would prevent the application of such immunity from criminal jurisdiction to a foreign official, even if those crimes had been committed by the official acting in an official capacity. Thus, draft article 7 complemented the normative elements of immunity from criminal jurisdiction, *ratione materiae*, as defined in draft articles 5 and 6. The delegate reiterated South Africa's view that a careful balance must be struck between the need to protect the traditional norm of immunity of representatives of States from the jurisdiction of foreign States, which was based on fundamental international law principles such as equality of States and the norms on the protection of human rights and the prevention of immunity for international crimes.

28. *The delegate of Malaysia* said she agreed with the Special Rapporteur that there were discrepancies in the characterization of a particular act as a limitation. She also said that draft

article 7 should be dealt with cautiously by the Commission, as the scope and parameter of the crimes committed were still undefined and had not attained the status of customary law. Thus, draft article 7 should be deliberated further.

29. *The delegate of Viet Nam* said that codification of the rules on the matter needed to be undertaken carefully with due regard to the principles of sovereign equality and non-intervention into the domestic affairs of States. As well, the need for the maintenance of international peace and security, while ensuring the balance between the benefits of granting immunity to State officials and the need to address impunity, also needed to be considered. The exceptions to criminal jurisdiction warranted further debate, she said, voicing support for the rules established under draft article 7; that text reflected existing legal principles enshrined in various international treaties.

30. *The delegate of Indonesia* said there should be no impunity for grave international crimes. The Commission had been working cautiously on that contentious topic in order to strike a balance between the fight against impunity for grave international crimes and the need to foster inter-State relations through the principle of sovereign equality. The prosecution of one country's officials by another country's courts would potentially raise problems in relation to the principle of sovereign equality. The complexity and sensitivity of the topic, particularly draft article 7, was obviously reflected in how the draft article was provisionally adopted by voting. The differing views on those important provisions, specifically concerning limitation and exception to immunity, made that provision worth revisiting.

D. COMMENTS AND OBSERVATIONS OF THE AALCO SECRETARIAT

37. Limitations and exceptions to immunity which has been the principle focus of the Special Rapporteur's Fifth Report is arguably the most contentious debate concerning the topic '*Immunity of State officials from foreign criminal jurisdiction*'. The jurisprudence of the International Criminal Court and other international and hybrid criminal tribunals have addressed the issue without conclusively resolving the contentious issue. Over the past decade, it can be said that limitations and exceptions to immunity have dominated the significant debates in the subject. This makes the Fifth Report timely, contemporary and one that evokes considerable interest in its details. The highly divergent positions expressed by the States and the truncated adoption of draft article 7 attest to this reality.

38. The Special Rapporteur, it must be acknowledged, in no uncertain terms has done commendable work on this topic contributing significantly to the scholarly material available on the topic. In this regard, the Secretariat would like to place on record, its appreciation and salutary commendations to the Commission and the Special Rapporteur on the Fifth report which inspires a great deal of confidence regarding the way forward concerning this topic.

39. As an International Organization of Forty-Seven Member States, it is but natural for the Secretariat to view the report from a dispassionate perspective and contribute to the codification and progressive development of international law through the clear articulation of its considered position of the report.

40. The Secretariat, on its part, would like to make the following observations:

41. Firstly, the Secretariat endorses the position of the Special Rapporteur that immunity *ratione personae* is one that flows from customary international law for Heads of State, Heads of Government and Minister of Foreign Affairs and it is not subject to limitations and exceptions.

42. Secondly, the report states that there is “discernable trend towards limiting the applicability of immunity...in respect of certain types of behavior that constitute crimes under international law”. However, it is submitted by the Secretariat that an in-depth analysis of existing domestic case law, municipal statutes and treaty law point to the possibility of a contrary conclusion. In most cases, if not all, the general trend in jurisprudence has been to accept claims of functional immunity as opposed to rejecting them. This reflects a real possibility that the proposal of draft article 7 constitutes a ‘normative policy’ exercise which goes beyond the pale of *lex lata* or even *lex ferenda*. This trend, according to the Secretariat should be avoided and the political anxieties of the States should be taken into account to arrive at a determination of the ‘existing customary international law’ on the subject.

43. Thirdly, while the Secretariat agrees with the normative position of the Special Rapporteur in drafting article 7, it is submitted that there should be greater clarity on the necessity of such a measure. Since immunity is a procedural question how can it be reconciled with substantive issues of criminality? If avoiding impunity is the ultimate objective why not prosecute an official in his home country or an international court/tribunal or a foreign court *after* waiver of immunities?

44. Fourthly, the report is pre-supposed on the logic that there exists a direct correlation between the gravity/seriousness of the crime and proportional need to eliminate immunities. It is the view of the Secretariat that grant of immunity historically in international law and diplomacy was accorded to respect sovereign rights of States in line with the principle of equality and comity of States. Historically, there was no necessary connect between the acts/omissions of immunity holders and the respective immunities they enjoyed. The verdicts of the International Court of Justice in the *Jurisdictional Immunities of States* case and the *Arrest Warrant* case also acknowledge this line of reasoning. This new understanding adopted in the report is based on the ruling of international verdicts and should be adopted after a broader debate on the customary international law aspects highlighted above.

45. Fifthly, the report draws an analogical equivalence of domestic courts with the practice of international courts and tribunals to assess the customary nature of immunities. This equivalence, while an attempt to capture contemporary practices in the field presents its own set of problems. Being vertical arrangements created by international resolutions or treaties, international courts and their jurisprudence operate at fundamentally different levels and all efforts to establish equivalence should factor in state sensitivities pertaining to sovereign equality. In addition, domestic jurisprudence would be a better benchmark to assess state practice in this regard as being co-ordinate horizontal entities their practice in determining questions of sovereign equality and fair treatment of foreign officials has stronger jurisprudential ground.

46. Sixthly, the Secretariat believes that there should be a broader debate on the question whether existing treaty practice demonstrates a clear position regarding limitations and exceptions to functional immunity. The obligations under the Convention for the Prevention and Punishment for the Crime of Genocide, 1948, the Geneva Conventions, 1949, the International Convention for the Protection of All Persons from Enforced Disappearances, 2006 and the International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973 should be analyzed in detail

to ascertain whether they contain any express or implied requirement that individuals suspected of committing these crimes should be deprived of immunity *ratione materiae*.

47. Seventhly, the Secretariat holds the view that the Special Rapporteur's report is predominantly based on European and North American precedents. While precedents drawn from these regions are entitled to utmost consideration as reflective area specific state practice, it is submitted that attempts to draw a universal conclusion should be more elaborative of Asian and African precedents. Additionally, most of precedents referred to in the report pertain to cases of civil immunity as opposed to criminal immunity. The Secretariat believes that Asia and Africa are rich repositories of state practice whose behavioral norms on the immunity question be given due importance, the absence of which would confirm the fears of many States that substantial universal state practice on criminal immunity of state officials is lacking and hence suggestions to this effect may not be reflective of *lex lata*. Furthermore the Secretariat believes that reliance on civil cases while definitely significant in its own right, would be of limited utility for an analysis of the topic at hand which is specifically concerned with immunity from criminal law.

48. In light of the above observations, the wide divergence of views and strong reservations expressed by States as evidenced by the divided adoption of draft Article 7, the Secretariat is of the view that the draft articles should be subject to broader deliberations before witnessing an ultimate adoption. Further analysis and deliberation on the topic should clearly articulate concerns regarding the existing state of customary international law clearly demarcating the same from progressive development and normative policy analysis.

49. While reiterating its deep sense of appreciation for the work of the Special Rapporteur, the Secretariat would like to propose a series of guiding questions to its Member States that would facilitate the working of the Rapporteur in fine-tuning and clarifying some of the concerns raised above:

1. Would it be possible for Member States to share details of legislations, court decisions, executive orders of their respective jurisdictions touching on the issue of functional immunity of officials? This assumes significance in light of the Special Rapporteur's reliance on state practice primarily centering on Europe and North America.

2. How is functional immunity invoked in your state?

3. How is functional immunity waived (if possible) in your state?

4. At what stage of the proceeding is immunity pleaded as a defence in your state (Pre-investigative, Investigative, Trial or Sentencing)?

5. What are the materials (international/municipal sources) that an executive/judicial authority in your country would rely while dealing with functional immunity claims?

6. What is your state practice regarding international assistance and co-operation in matters involving functional immunity of foreign officials?

50. The Secretariat keenly awaits the Sixth Report of the Special Rapporteur on the topic which it hopes will comprehensively debate and satisfactorily address aspects pertaining to burden of proof,

matters of evidence and other related aspects from the perspective of procedural safeguards such that the potential regime is consistent with universally recognized principles of sovereign equality and friendly relations between States while satisfactorily addressing the tricky balance between immunity and impunity, an absolute imperative for the global community.

III. PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW (JUS COGENS)

A. BACKGROUND

1. *Jus cogens*, whose meaning in Latin is “compelling law”, is also known by the term “peremptory norm” of international law, and refers to those norms of international law from which no derogation is ever permitted. While the concept of *jus cogens* is rooted in theories of natural law, it was described typically for the first time in an international instrument in Article 53 of the 1969 Vienna Convention on the Law of Treaties.¹⁵ It has been said that the concept of *jus cogens* is based upon “the acceptance of fundamental and superior values within the system and in some respects is akin to the notion of public order or public policy in domestic legal order.”¹⁶ However, despite the fact that there exists a two-stage process for identifying *jus cogens* norms – “first, the establishment of the proposition as a rule of general international law and, secondly, the acceptance of that rule as a peremptory norm by the international law community of States as a whole”¹⁷ – there is little definitive agreement on what the content of *jus cogens* norms are.

2. It was therefore suggested in 2014 by the International Law Commission’s Working Group on the long-term work programme of the Commission that *jus cogens* be included in the work programme of the Commission, and subsequently, at its Sixty-Seventh session, in 2015, the International Law Commission decided to include the topic “*Jus cogens*” in its programme of work, and also to appoint Mr. Dire D. Tladi as Special Rapporteur for the topic.

3. This development is particularly relevant given the nature of the Commission’s ongoing study and examination of topics related to the sources of international law, such as customary international law and subsequent agreements and subsequent practice in relation to treaty interpretation. The following part will therefore deal with the 2014 recommendation of the Working-Group on the long-term programme of work whose annex contained the proposal by Mr. Tladi, and upon the strength of which the topic was included in the Commission’s programme of work.¹⁸

B. CONSIDERATION OF THE TOPIC AT THE SIXTY-NINTH SESSION OF THE COMMISSION (2017)

4. At its Session held in 2017, the Commission had before it the Second Report of the Special Rapporteur (A/CN.4/706), which sought to set out the criteria for the identification of peremptory norms (*jus cogens*), taking the Vienna Convention on the Law of Treaties of 1969 (the VCLT, 1969) as a point of departure in developing the criteria. Specifically, the Special Rapporteur had

¹⁵ Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331

Article 53: “A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”; See also Article 53 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

¹⁶ Malcolm Shaw, *International Law* 5th Ed. (Cambridge University Press, 2003), p. 117.

¹⁷ *Id.*, at p. 118.

¹⁸ A/69/10.

indicated that his Second Report consisted of three substantive sections: section II on the previous consideration of the topic, section III on the criteria for *jus cogens* and section IV including proposals.

5. On the previous consideration of the topic mentioned in section II, the Special Rapporteur gave a brief overview of the initial objections raised to the handling of the topic, and also the support expressed for the same. While further underlining that there was general agreement on the need to change the name of the topic, he further recalled his intention to consider whether an illustrative list of *jus cogens* norms should be developed, highlighting how he would make a firm proposal in that regard in a future report on miscellaneous issues. He also invited members of the Commission to convey their views on the matter. Section III of the report addressed the criteria for the identification of *jus cogens*, taking Article 53 of the 1969 VCLT as the basis for those criteria, consistent with the views expressed by States, as well as State practice, decisions of international courts and tribunals, scholarly writings, and the past consideration of *jus cogens* in terms of article 53 of the 1969 Vienna Convention by the Commission itself, while not limiting the scope of the topic to treaty law. In that regard, the Special Rapporteur underlined that Article 53 contained two cumulative criteria, namely that the norm in question must be a norm of general international law, and that it must be accepted and recognized as one from which no derogation is permitted. While the Special Rapporteur had identified several other ways to approach the definition, he was of the view that this two-criterion approach should be retained. It was thus captured in proposed draft conclusion 4, where paragraph (a) reproduced the first criterion and paragraph (b) reproduced the second. On the basis of his analysis, the Special Rapporteur had proposed six draft conclusions.

6. The text of draft conclusions 4 to 9, as proposed by the Special Rapporteur in his Second Report, reads as follows:

Draft conclusion 4

Criteria for *jus cogens*

To identify a norm as one of *jus cogens*, it is necessary to show that the norm in question meets two criteria:

- (a) It must be a norm of general international law; and
- (b) It must be accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted.

Draft conclusion 5

***Jus cogens* norms as norms of general international law**

1. A norm of general international law is one which has a general scope of application.

2. Customary international law is the most common basis for the formation of *jus cogens* norms of international law.
3. General principles of law within the meaning of Article 38 (1) (c) of the Statute of the International Court of Justice can also serve as the basis for *jus cogens* norms of international law.
4. A treaty rule may reflect a norm of general international law capable of rising to the level of a *jus cogens* norm of general international law.

Draft conclusion 6

Acceptance and recognition as a criterion for the identification of *jus cogens*

1. A norm of general international law is identified as a *jus cogens* norm when it is accepted and recognized as a norm from which no derogation is permitted.
2. The requirement that a norm be accepted and recognized as one from which no derogation is permitted requires an assessment of the opinion of the international community of States as a whole.

Draft conclusion 7

International community of States as a whole

1. It is the acceptance and recognition of the community of States as a whole that is relevant in the identification of norms of *jus cogens*. Consequently, it is the attitude of States that is relevant.
2. While the attitudes of actors other than States may be relevant in assessing the acceptance and recognition of the international community of States as a whole, these cannot, in and of themselves, constitute acceptance and recognition by the international community of States as a whole. The attitudes of other actors may be relevant in providing context and assessing the attitudes of States.
3. Acceptance and recognition by a large majority of States is sufficient for the identification of a norm as a norm of *jus cogens*. Acceptance and recognition by all States is not required.

Draft conclusion 8

Acceptance and recognition

1. The requirement for acceptance and recognition as a criterion for *jus cogens* is distinct from acceptance as law for the purposes of identification of customary international law. It is similarly distinct from the requirement of recognition for the purposes of general principles of law within the meaning of Article 38 (1) (c) of the Statute of the International Court of Justice.
2. The requirement for acceptance and recognition as a criterion for *jus cogens* means that evidence should be provided that, in addition to being accepted as law, the norm in question is accepted by States as one which cannot be derogated from.

Draft conclusion 9

Evidence of acceptance and recognition

1. Evidence of acceptance and recognition that a norm of general international law is a norm of *jus cogens* can be reflected in a variety of materials and can take various forms.
2. The following materials may provide evidence of acceptance and recognition that a norm of general international law has risen to the level of *jus cogens*: treaties, resolutions adopted by international organizations, public statements on behalf of States, official publications, governmental legal opinions, diplomatic correspondence and decisions of national courts.
3. Judgments and decisions of international courts and tribunals may also serve as evidence of acceptance and recognition for the purposes of identifying a norm as a *jus cogens* norm of international law.
4. Other materials, such as the work of the International Law Commission, the work of expert bodies and scholarly writings, may provide a secondary means of identifying norms of international law from which no derogation is permitted. Such materials may also assist in assessing the weight of the primary materials.

In his report the Special Rapporteur had further proposed that the Commission change the name of the topic from “*Jus cogens*” to “Peremptory norms of international law (*jus cogens*)”.

The Second Report of the Special Rapporteur was considered by the Commission during this Session and at its meeting held on 13 July 2017, the Commission referred draft conclusions 4 to 9, as contained in the Special Rapporteur’s Second Report, to the Drafting Committee. Furthermore, the Commission decided to change the title of the topic from “*Jus cogens*” to “Peremptory norms of general international law (*jus cogens*)”. At its meeting held on 26 July 2017, the Chairperson of the Drafting Committee presented an interim report of the Drafting Committee on “Peremptory norms of general international law (*jus cogens*)”, containing the draft conclusions that it had provisionally adopted at the Sixty-Ninth session. The report was presented for information only.

To date, the drafting committee has provisionally adopted the following seven draft conclusions.

Draft conclusion 1

Scope

The present draft conclusions concern the identification and legal effects of peremptory norms of general international law (*jus cogens*).

Draft conclusion 2

General nature of peremptory norms of general international law (jus cogens)

Peremptory norms of general international law (*jus cogens*) reflect and protect fundamental values of the international community, are hierarchically superior to other rules of international law and are universally applicable.

Draft conclusion 3

Definition of a peremptory norm of general international law (jus cogens)

A peremptory norm of general international law (*jus cogens*) is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Draft conclusion 4

Criteria for identification of a peremptory norm of general international law (jus cogens)

To identify a peremptory norm of general international law (*jus cogens*), it is necessary to establish that the norm in question meets the following criteria:

a) it is a norm of general international law; and

(b) it is accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Draft conclusion 5

Bases for peremptory norms of general international law (jus cogens)

1. Customary international law is the most common basis for peremptory norms of general international law (*jus cogens*).

2. Treaty provisions and general principles of law may also serve as bases for peremptory norms of general international law (*jus cogens*).

Draft conclusion 6

Acceptance and recognition

1. The requirement of “acceptance and recognition” as a criterion for identifying a peremptory norm of general international law (*jus cogens*) is distinct from acceptance and recognition as a norm of general international law.

2. To identify a norm as a peremptory norm of general international law (*jus cogens*), there must be evidence that such a norm is accepted and recognized as one from which no derogation is permitted and which can only be modified by a subsequent norm of general international law having the same character.

Draft conclusion 7

International community of States as a whole

1. It is the acceptance and recognition by the international community of States as a whole that is relevant for the identification of peremptory norms of general international law (*jus cogens*).
2. Acceptance and recognition by a very large majority of States is required for the identification of a norm as a peremptory norm of general international law (*jus cogens*); acceptance and recognition by all States is not required.
3. While the positions of other actors may be relevant in providing context and for assessing acceptance and recognition by the international community of States as a whole, these positions cannot, in and of themselves, form a part of such acceptance and recognition.

7. These draft conclusions have not yet been adopted by the Commission, as the Special Rapporteur prefers to wait until all the draft conclusions have been completed in the Drafting Committee before drafting commentary, and the Commission only adopts draft articles or Conclusions simultaneously with their commentary. The Special Rapporteur has indicated that a Third Report in 2018 might consider the consequences of *jus cogens*, while a Fourth Report in 2019 could address miscellaneous issues.

C. SUMMARY OF VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPIC AT THE UN GENERAL ASSMEBLY SIXTH COMMITTEE AT ITS SEVENTY-SECOND SESSION HELD IN 2017¹⁹

8. *The delegate of the People's Republic of China* was of the view that the three basic norms of *jus cogens* i.e. universal application, hierarchical superiority to other norms and, protection of the fundamental values of the international community as whole proposed by the Special Rapporteur was at variance with state practice and Article 53 of the 1969 Vienna Convention. In addition it was also noted that it would be very difficult for the Commission to accurately define the fundamental values of the international community that comprise of diverse civilizations and multiple value systems. With regard to the issue whether *jus cogens* norms had priority over the procedural rules such as immunity of state officials or norms of the UN Charter the delegation was of the view that there was no consensus in the international community. The delegation also sought clarification and invited further study from the Special Rapporteur on whether notwithstanding the paucity of state practice it could be concluded that a general principle of law could be elevated to a *jus cogens* norm and as to whether an accurate definition

¹⁹ All the statements that are mentioned here as having been made by the Member States of AALCO at the UN General Assembly Sixth Committee at its session held in 2017 are available from: <https://www.un.org/press/en/2017/gal3560.doc.htm>; <https://www.un.org/press/en/2017/gal3559.doc.htm>; <https://www.un.org/press/en/2017/gal3557.doc.htm>; <https://www.un.org/press/en/2016/gal3535.doc.htm>; https://www.mfa.gov.sg/content/mfa/overseasmission/newyork/nyemb_statements/sixth_committee/2016/201611/press_20161101.html; <http://www.china-un.org/eng/hyyfy/t1506789.htm>.

of the term ‘international community as a whole’ employed in draft conclusion 7 could be arrived at.

9. *The delegate of the Republic of South Africa* noted that the Special Rapporteur had adopted Article 53 of the 1969 Vienna Convention as the basis of the work of the Commission and as such had remained within the realm of the treaty law and widely accepted customary international law. The delegation commended the Special Rapporteur for striking a balance between current jurisprudent, academic writing and state practice and for providing draft conclusions that reflect the current status of peremptory norms within the body of general international law. The delegation welcomed the Special Rapporteur’s intention to address non-derogation in the third report as consequence of *jus cogens* instead of as a criteria of its identification. However, the delegation expressed its doubts about the development of an illustrative list of *jus cogens* norms as such a list would soon become obsolete and would not be of assistance in the identification of *jus cogens* norms. If the Commission were to include a list, making explicitly clear that it was illustrative and not exhaustive, that could provide helpful guidance to States.

10. *The delegate of the Islamic Republic of Iran* noted that while the criteria for identifying *jus cogens* was based on the 1969 Vienna Convention, the report was silent on the question of who determined whether the criteria had been met. In this respect the relevance of Article 66(a) of the 1969 Vienna Convention as a solution was also highlighted. Calling for further consideration for developing a list, she said that if such a list were to be eventually developed, the one set out in Article 52 of the 1969 Vienna Convention - the prohibition of the threat or use of force - should be at the top, as that provision clearly reaffirmed that a treaty was void if its conclusion had been procured by threat or use of force, in violation of the principles of international law. Regarding the relationship between *jus cogens* and the obligations in the United Nations Charter, Article 103 of the Charter only affirmed that in the event of a conflict between the obligations under the present Charter and the obligations under any other international agreement, the obligations under the present Charter would prevail. Therefore, in the event of a conflict between norms of *jus cogens* and Charter obligations, she stressed, *jus cogens* remained superior. Meanwhile, the country’s representative drew attention to the relationship between *Jus cogens* and the obligations of the United Nations Charter. Highlighting Article 103 of the Charter, she affirmed that, in the event of a conflict between the obligations of the Charter and those of international agreements, those under the Charter would prevail. However, in the event of a conflict between norms of *jus cogens* and Charter obligations, she stressed that *jus cogens* was superior.

11. *The delegate of Thailand* welcomed the use of the definition of *jus cogens* in article 53 of the Vienna Convention on the Law of Treaties, but noted that there was no reference to the customary rule of treaty interpretation as codified in Articles 31 and 32. Thus, interpretation should follow the steps laid out in Articles 31 and 32 and ensure that the context of article 53 and the purpose of the Law of Treaties be fully taken into consideration in the Special Rapporteur’s analysis. Regarding the list of *jus cogens*, he said that such a list could hinder the development of *jus cogens*. Among other comments, he also emphasized that concrete conclusions should not

be rushed, particularly in areas where State practice was unclear or limited. However, the Commission should continue to identify and assess developments in international law pertaining to *jus cogens* that would most clearly reflect the current intention and practices of all States.

12. *The delegate of the Republic of India* noted that his delegation would be in a position to comment on draft conclusions 4 and 9 relating to the criteria for *jus cogens* following the conclusion of all drafting formalities and the subsequent debate in the Commission's plenary. Turning to the topic "*Jus cogens*", he noted that Articles 53 and 64 of the Vienna Convention provided the legal basis for acceptance and recognition of a norm. In fact, norms of the principle were hierarchically superior to other norms of international law and were universally acceptable. The peremptory norms required further elaboration with sufficient study as there were conflicting views within the Commission, he added.

13. *The delegate of Turkey* said he remained hesitant about the need for codification or progressive development of the concept. However, the title used for the Special Rapporteur's revised proposal in his second report was more consistent with the phrasing of the 1969 Vienna Convention. On listing examples to illustrate norms, he favoured an approach that addressed the methodology of identifying norms, not listing examples in an annex. Regarding the draft conclusions, the criteria for *jus cogens* in draft conclusion 4 was in line with the Vienna Convention, he added. However, he was of the view that draft number 6 reiterated number 4 and should be deleted or further elaborated. Paragraph 2 of draft conclusion 7 should be deleted for clarity, the acceptance of the community of States being the relevant factor in the identification of norms of *jus cogens*. Regarding "*Jus cogen*", he reiterated his reservations and objections on the concept during the Vienna Convention negotiations. While stating that its inclusion was one of the reasons why his country had not become a party to that instrument, he added that the Commission should adopt a prudent approach regarding that principle. He was of the further view that the adoption of some draft conclusions (which have been formulated) remained premature at the current stage and that the outcome of the work should remain an analysis and involve a general overview of related conceptual issues. Regarding paragraph 39 of the Special Rapporteur's report, he pointed out the irrelevance of South Cyprus's contestation of the Treaty of Guarantee's validity on the basis of article 4 of the Treaty being in violation of peremptory norms. That Treaty's provisions, and its provided rights and obligations for the Guarantor Powers, could not be construed as an example of either confirming or violating peremptory norms or *jus cogens*, and statements by individual States could not alter that fact. He stressed his disagreement with the appropriateness of the example itself and believed that section of the report required amendment.

14. *The delegate of Malaysia* said that further explanation on the use of Article 38(1) of the Statute of the International Court of Justice could serve as a basis for determining *jus cogens* norms of international law. Further clarification was needed on whether recognition of the whole international community of States would be required. With regards to draft conclusion 9, she stated that the work of expert bodies and scholarly writings as secondary means of identifying norms of general international law as norms of *jus cogens* must be subjected to recognition of the whole international community of States. She also added that she looked forward to the Special

Rapporteur's work on the doctrine of persistent objector and the application of *jus cogens* on a regional or bilateral basis.

15. *The delegate of Viet Nam* said that such norms played an important role in international law and were recognized under the 1969 Vienna Convention as well as the domestic legislations of many States. His country's Law on Treaties, adopted in 2016, also recognized peremptory norms of international law, or *jus cogens*, as a principle to be adhered to in the course of negotiating and entering into international treaties. However, to date, "it remains unclear on the identification of such norms," he said, commending the efforts of the Commission in addressing that issue and expressing agreement with draft conclusions 4 and 5.

16. *The delegate of Japan* said that because *jus cogens* was a norm of general international law and not a concept confined to the context of treaty law, the scope of the topic need not be limited to treaty law. Due consideration should be given to issues relating to other fields of law, such as State responsibility. An illustrative list of *jus cogens* could be useful if it included the reasons why the Commission considered the listed norms to have acquired *jus cogens* status, he averred. In preparing such a list, however, proper care should be taken to avoid any misconceptions that the listed norms were being given a special legal status. It must be clear that the list was illustrative, not exhaustive, and did not prejudice the legal status of norms not included in the list. He said that he valued the practical approach adopted by the Special Rapporteur, which enabled a concentration on analysis of practical aspects. On whether the Commission should develop an illustrative list, he said he was aware of the difficulty of that and hoped it would be addressed in future sessions.

17. *The delegate of Singapore*, while welcoming draft conclusion 4 on the criteria for identifying *jus cogens* stated that it should be consistent with Article 53 of the Vienna Convention on the Law of Treaties. It was imperative that virtually all States recognized a norm as having a *jus cogens* character before being identified as such, she said, adding her appreciation for the Special Rapporteur's clarification that the elements of paragraph 2 in draft conclusion 3 were not criteria for *jus cogens* but rather descriptive elements of *jus cogens* norms. The practical effect of the difference between descriptive elements and criteria might not be clear in practice. On the matter of a possible illustrative list, she said that the determination of the methodology in compiling such a list, if at all, was crucial.

D. COMMENTS AND OBSERVATIONS OF THE AALCO SECRETARIAT

18. This topic holds both great importance and sensitivity within the international community of States. The lack of clarity on the concept of *Jus cogens* and its application is well-known. Indeed, the way this topic has been considered at the Commission over the years including at its 2017 Session has clearly demonstrated that many elements of *Jus cogens* remain contested and that their elucidation remains essential for arriving at clear and constructive conclusions. Legal clarity is vital in order for the concept not to be misused. This is all the more compelling given the fact that a better understanding of *Jus cogens* norms could have impact on issues as varied as

extradition, universal jurisdiction, human rights and the like. The Commission's work on that item does also have the potential to influence the way in which the international community of States could regulate their conduct. Hence, the need to secure consensus on that work remains paramount.

19. As such, AALCO welcomes the consideration of the proposed draft conclusions of the Commission on the issue. We are of the view that these draft conclusions concerning the identification and the legal effects of the norms of *Jus cogens* do provide a useful framework to assist in identifying norms of *Jus cogens* and their content. The practical approach of the conclusions is necessary to reflect the dynamic nature of the formation, development, acceptance and recognition of *jus cogens* by States under general international law.

20. Be that as it may, there are few areas of concern which flow from the proposed conclusions:

First, clarification is required on the distinction between criteria for *jus cogens* laid down in draft conclusion 4 and its descriptive elements outlined in draft conclusion 3. A matter of interest in this regard relates to the fact that while the criteria for identifying *jus cogens* remain based on the VCLT, 1969, the Second Report of the Special Rapporteur is silent on the question of who determined whether or not the criteria has been met? Further clarity is also required in respect of the terms 'fundamental values' and 'international community as a whole' on which States have different understandings.

Second, the Commission needs to make sure that there are no discrepancies between the principles and terminology used in the draft conclusions on this subject when compared with those used to address similar areas in work on identification of customary international law. The Commission also need to assess as to what extent its work on the identification of customary international law would be applicable to the two step approach followed by the Special Rapporteur by which a customary international law norm is elevated to the status of a *jus cogens* norm.

Third, the requirement for acceptance and recognition as a criterion for *jus cogens* mentioned in draft conclusion 8, does not speak anything about the concept of "acquiescence" as a form of acceptance and recognition. What are the legal effects of acquiescence in this context is a question that needs to be clarified in future, as is also the question of how many states would be required to constitute a very large majority in order to affirm a rule as *jus cogens* and whether their representativeness would need to be considered.

In light of the issues raised by the Special Rapporteur and the discussion amongst the ILC Members at the 69th Session of the ILC, and comments made by the AALCO Member States at the 72nd Session of the General Assembly (Sixth Committee), the following guiding questions are in order for consideration by the AALCO Member States in their comments at the Annual Session of AALCO:

1. How do the courts of the AALCO Member States address the issue of Jus Cogens in monist and dualist legal cultures while applying treaty provisions or customary international law to cases that have been brought before them?

2. *Have the courts of the AALCO Member states identified in their jurisprudence certain norms, principles or rules that have attained the force of Jus Cogens in international law? Have they arrived at any conclusion that may assist in arriving at an illustrative list of the norms considered to have the status of Jus Cogens.?*
3. *Is there any relevant state practice in the form of legal opinions, official statements, declarations, or joint statements that express the views of the Member States of AALCO having a bearing on their approach towards the topic of Jus Cogens?*
4. *Is there any relevant state practice in the form of repudiation or termination of treaties either unilaterally or by consent between the parties on the grounds that the obligations in the treaty have in due course come in conflict with a norm of international law that has attained the status of Jus Cogens?*
5. *Whether in the opinion of the AALCO Member States it would serve the purpose of the ILC for the Special Rapporteur to prepare an illustrative list of the norms that have attained the status of Jus Cogens under lex lata?*
6. *Whether the concept of regional Jus Cogens deserves the attention of the ILC? Is there any state practice that proves the existence of regional Jus Cogens norms in the Asian or African Regions?*
7. *Is non-derogability a criteria or a consequence of the existence of Jus Cogens norms?*

IV. SUCCESSION OF STATES IN RESPECT OF STATE RESPONSIBILITY

A. BACKGROUND

1. The responsibility of States for internationally wrongful acts and the succession of States are two important areas of general international law. Some of the governing rules, which are largely customary in nature, have been codified by the U.N. International Law Commission (ILC). However, State responsibility and State succession have not been studied as a unified topic by the ILC. As is well-known, the ILC had adopted the Articles on Responsibility of States for Internationally Wrongful Acts in 2001. However, the Commission did not address the situation where a State's succession occurs following the commission of a wrongful act. This succession may occur by a responsible State or by an injured State. In other words, either the State that committed an internationally wrongful act, or the State that is victim of that act, which has been replaced by a successor State, could pursue succession. In both cases, succession gives rise to complex legal relationships.

2. It is in this context that the ILC decided to include the topic "Succession of States in respect of State responsibility" in its programme at its sixty-ninth session (2017) and appointed Mr. Pavel Šturma as its Special Rapporteur.

B. CONSIDERATION OF THE TOPIC AT THE SIXTY-NINTH SESSION OF THE COMMISSION (2017)

3. At its Session held in 2017, the Commission had before it the First Report of the Special Rapporteur (A/CN.4/708), which sought to set out the Special Rapporteur's approach to the scope and outcome of the topic, and to provide an overview of general provisions relating to the topic. The Commission considered the first report at meetings, from 13 to 25 July 2017. At its meeting held on 25 July 2017, the Commission decided to refer draft articles 1 to 4, as contained in the Special Rapporteur's First Report, to the Drafting Committee, taking into account the views expressed in the plenary debate and on the understanding that draft articles 3 and 4 would be left pending in the Drafting Committee. At its meeting held on 31 July 2017, the Chairman of the Drafting Committee presented an interim oral report on draft articles 1 and 2, provisionally adopted by the Drafting Committee. The report was presented for information.

4. The report first provided an overview of views received from delegations during the debate of the Sixth Committee at the seventy-first session of the General Assembly, in 2016, in which several delegations had expressed support for the inclusion of the topic in the Commission's long-term programme of work, with a particular focus on its potential to fill gaps within international law.

5. Regarding the scope and outcome of the topic, a question inextricably linked to the previous work of the Commission, the Special Rapporteur reiterated that the topic dealt with two areas of international law that were already the object of codification and progressive development by the Commission: namely, succession of States and State responsibility. The Special Rapporteur drew attention to the previous work of the Commission that had left gaps for examination at a later

point as well as the work concluded on the topic by the Institute of International Law. The Special Rapporteur emphasized that the aim of examining the topic was to shed more light on the question of whether there were rules of international law governing both the transfer of obligations and the transfer of rights arising from the international responsibility of States for internationally wrongful acts in situations of succession of States. With a focus on the secondary rules of international responsibility, the scope of the topic would not extend to any issues of international liability for injurious consequences arising out of acts not prohibited by international law. The Special Rapporteur indicated that the work on the topic should also follow the main principles of succession of States concerning the differentiation of transfer of a part of a territory, secession, dissolution, unification and creation of a new independent State.

6. While acknowledging that the body of scholarship and theory had supported that position, the Special Rapporteur highlighted that some scholars had questioned the existence of a general rule on State succession applicable in all circumstances. The Special Rapporteur introduced a preliminary survey of State practice in the report, including some judicial decisions, relating to international responsibility in different cases of State succession. He underlined his provisional conclusion that modern international law did not support the general thesis of non-succession in respect of State responsibility. The Special Rapporteur also examined the relevance to the present topic of the two Vienna Conventions on succession. The Special Rapporteur emphasized that, in order to ensure a systemic integration approach, it would be important to utilize the same terms and definitions in a uniform manner for succession in respect of treaties, State property, debts and archives, nationality of natural persons, and State responsibility.

7. The Special Rapporteur noted that there was no universal regime concerning succession of States, but rather several areas of legal relations to which succession of States applies. Therefore, rules on succession of States in one area, e.g. in respect of treaties, may differ from the rules in another area, e.g. in respect of State property, debts and archives. He underlined that different areas of succession were independent and governed by special rules.

8. The Special Rapporteur also drew the Commission's attention to the complicated question of whether obligations arising from wrongful acts are "debts" subject to the 1983 Vienna Convention or are otherwise to be examined under the current topic. The Special Rapporteur drew attention to his preliminary conclusion that it would be a debt for the purposes of rules on succession in respect of State debts, if such an interest in assets of a fixed or determinable value was acknowledged by the State or so adjudicated by an international court or arbitral tribunal at the date of succession. However, if an internationally wrongful act occurred before the date of the succession, but the legal consequences arising therefrom had not already been specified (e.g. a specific amount of compensation was not awarded by an arbitral tribunal), then any possible transfer of obligations or rights should be governed by rules on succession of States in respect of State responsibility.

9. According to the Special Rapporteur, from his analysis, there appeared to be support for two preliminary conclusions, namely that the traditional thesis of non-succession had been questioned in modern practice; and, that the transfer or not of obligations or rights arising from State responsibility in specific kinds of succession needed to be proved on a case-by-case basis. Drawing on the Commission's experience with respect to its work on succession of States, as well

as the rarity and highly political nature of the subject matter, the Special Rapporteur highlighted that the rules to be codified should be of a subsidiary nature. As such, they could serve two purposes. First, they could present a useful model that could be used and also modified by the States concerned. Second, in cases of lack of agreement, they could present a default rule to be applied in case of dispute.

10. The Special Rapporteur proposed four draft articles. The first dealt with the scope of the entire set of draft articles; the second presented a series of definitions of specific terms, drawing on the definitions included in the two Vienna Conventions on succession and the draft articles on responsibility of States for internationally wrongful acts; the third set out a framework to analyse the relevance of the agreements to succession of States in respect of responsibility, and the fourth provided for a framework with respect to unilateral declarations made by a successor State.

The text of draft article 1 proposed by the Special Rapporteur in his first report reads as follows:

Draft article 1 Scope

The present draft articles apply to the effect of a succession of States in respect of responsibility of States for internationally wrongful acts.

Draft article 2 Use of terms

For the purposes of the present draft articles:

- (a) “succession of States” means the replacement of one State by another in the responsibility for the international relations of territory;
- (b) “predecessor State” means the State which has been replaced by another State on the occurrence of a succession of States;
- (c) “successor State” means the State which has replaced another State on the occurrence of a succession of States;
- (d) “date of the succession of States” means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of territory to which the succession of States relates;
- (e) “international responsibility” means the relations which arise under international law from the internationally wrongful act of a State;

[...]

Draft article 3

Relevance of the agreements to succession of States in respect of responsibility

1. The obligations of a predecessor State arising from an internationally wrongful act committed by it against another State or another subject of international law before the date of succession of States do not become the obligations of the successor State towards the injured State or subject only by reason of the fact that the predecessor State and the successor State have concluded an agreement providing that such obligations shall devolve upon the successor State.
2. The rights of a predecessor State arising from an international wrongful act owed to it by another State before the date of succession of States do not become the rights of the successor States towards the responsible State only by reason of the fact that the predecessor State and the successor State have concluded an agreement providing that such rights shall devolve upon the successor State.
3. An agreement other than a devolution agreement produces full effects on the transfer of obligations or rights arising from State responsibility. Any agreement is binding upon the parties to it and must be performed by them in good faith.
4. The preceding paragraphs are without prejudice to the applicable rules of the law of treaties, in particular the *pacta tertiis* rule, as reflected in articles 34 to 36 of the Vienna Convention on the Law of Treaties.

Draft article 4

Unilateral declaration by a successor State

1. The rights of a predecessor State arising from an internationally wrongful act committed against it by another State or another subject of international law before the date of succession of States do not become the rights of the successor State by reason only of the fact that the successor State has made a unilateral declaration providing for its assumption of all rights and obligations of the predecessor State.
2. The obligations of a predecessor State in respect of an internationally wrongful act committed by it against another State or another subject of international law before the date of succession of States do not become the obligations of the successor State towards the injured State or subject only by reason of the fact that the successor State has accepted that such obligations shall devolve upon it, unless its unilateral declaration is stated in clear and specific terms.
3. Any unilateral declarations by a successor State and their effects are governed by rules of international law applicable to unilateral acts of States.

According to the Special Rapporteur, the Second Report will address issues concerning transfer of the obligations arising from the internationally wrongful act of the predecessor State, and will distinguish situations where that state has disappeared (such as dissolution) and situations where that State remains (such as secession). A Third Report in 2019 will focus on the transfer of the rights or claims of an injured predecessor State to a successor State. A Fourth Report in 2020 might address procedural and miscellaneous issues, and might allow for a first reading of the entire topic.

C. SUMMARY OF VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPIC AT THE UN GENERAL ASSMEBLY SIXTH COMMITTEE AT ITS SEVENTY-SECOND SESSION HELD IN 2017²⁰

11. *All delegations* welcomed the appointment of the Special Rapporteur and appreciated the First Report produced by him.

12. *The delegate of Islamic Republic of Iran*, concurred with members of the Commission who had requested the Special Rapporteur produce a more systematic account of the relevant materials, especially with respect to State practice and case law. He noted due to the rarity of State practice and limited number of cases on the topic, the conclusion that the rule of non-succession in respect of State responsibility had changed, seemed far from convincing. He also added that if the Special Rapporteur believed otherwise, his delegation expected him to provide rich sources of materials and reasoning to substantiate the same. He was of the further view that States had preferred to settle their disputes regarding succession through bilateral agreements. The Commission's work had not yet received widespread endorsement by States; draft articles were a good choice for its final form, he added.

13. *The delegate of Japan* said that there were several types of succession of States, including the transfer of part of the territory of a State, the independence of a State, the unification of States, the separation of parts or parts of the territory of a State, and the dissolution of States. He added that it was crucial to study State practice in each of those areas and based on the presumption on the theory of non-succession, draft article 3 and draft article 4 should focus on exceptional conditions where agreements to succession of States and a unilateral declaration might result in succession of responsibility. He also noted that issues such as liability arising from activities not prohibited by international law, responsibility of international organizations and success of governments should not be touched upon, so as not to overburden the present topic.

14. *The delegate of India* recalled that the principle of "responsibility" which would hold a State or an organization responsible for the commission of an internally wrongful act had not been favoured as part of succession in earlier attempts. He expressed support for an approach examining the question of whether there were rules of international law governing both the transfer of obligations and the transfer of rights arising from international responsibility of States for internationally wrongful act. While noting that while that topic was complex and sensitive, he added that his delegation nevertheless supported the Commission's continuing work, and called for more time and an in-depth study in that regard. He was of the further view that the Special

²⁰ All the statements that are mentioned here as having been made by the Member States of AALCO at the UN General Assembly Sixth Committee at its session held in 2017 are available from:
<https://www.un.org/press/en/2017/gal3560.doc.htm>; <https://www.un.org/press/en/2017/gal3559.doc.htm>;
<https://www.un.org/press/en/2017/gal3557.doc.htm>; <https://www.un.org/press/en/2016/gal3535.doc.htm>;
https://www.mfa.gov.sg/content/mfa/overseasmission/newyork/nyemb_statements/sixth_committee/2016/201611/press_20161101.html; <http://www.china-un.org/eng/hyyfy/t1506789.htm>.

Rapporteur's Second Report should address the issues of transfer of the obligations arising from the internationally wrongful acts of the predecessor State while also distinguishing cases where the original State had disappeared — namely, in cases of dissolution and unification — and cases where the predecessor State remained, as in situations of territorial transfer, secession and newly independent States.

15. *The delegate of Republic of Korea* stated that it was crucial to determine whether general rules on the succession of States existed or not, particularly when types of succession of States were different. He was of the view that two approaches could be used; the first would be to identify, based on the traditional rule of non-succession, a case where exceptionally the obligations and rights of a predecessor State succeed; the second would be to depart from the traditional rule of non-succession and try to find a general rule suitable to various types of succession of States. He noted that categorizing State succession was not an easy task but urged the international community to carefully consider each type of State succession in future discussions.

16. *The delegate of Turkey* said that recent observations have served to confirm concerns about the complexity and immaturity of the subject and that the complexity was due to the topic's two components, each of which could be either a political or legal matter and could not as yet be generalized or regulated in any particular way. He added that the Commission's earlier work on State succession had found little support among States and the rules of the relevant Vienna Conventions were far from being generally accepted as norms. He was of the view that in the context of the lack of concerted State practice necessary for codification, it was doubtful that progressive development of new norms and codification could be soon achieved. He was of the further view that in similar ways, uncertainty also prevailed in the second component on State responsibility for wrongful acts, where fundamental concepts were not defined in international law. Hence, he said it was doubtful, for like reasons, that the proposal on default rules could gain broad support.

17. *The delegate of Viet Nam*, said that a wide range of matters needed to be taken into account in the consideration of that complex topic, such as the responsibility towards international organizations and responsibility for acts of wrongdoing that were not necessarily in breach of international law, such as expropriation, requisition, and confiscation. He added that the principle of non-succession remained the predominantly applicable principle, noting insufficient State practice and case law to prove otherwise.

18. *The delegate of Singapore* said that she looked forward to the concise final product on that subject.

19. *The delegate of Mongolia* expressed his hope that this topic would be covered by the Commission in the near future, as it could be expected to fill the gaps remaining upon completion of the codification of succession of States in respect of treaties and in respect of State property, archives and debts, as well as in regards to nationality and State responsibility.

20. *The delegate of Sudan* urged the Commission to duly consider all the viewpoints expressed during its previous plenary. Observing that the inclusion of this topic in the long-term programme

of the Commission was timely, he said that the study would eventually contribute to the progressive development of international law, notwithstanding the potential difficulties in the efforts to specify the rules and principles of succession of States. Underscoring the many different types of succession, he also said that the issue raised thorny legal issues, with regard to archives, treaties, memberships in international organizations and property. There were few customary norms because of the diversity of cases and circumstances under which succession arose. Sudan was one of the countries affected by the “secession of a dear part of its territories”, he said, noting that situation’s effects on nationality- a subject of crucial importance given that it was closely related to human rights and freedom. It was also noted that when a State dissolved, a successor State’s responsibility for internationally wrongful acts would be different depending on whether the predecessor State had been federal or centralized.

21. *The delegate of Malaysia* supported the inclusion of the new topic of succession of States in respect of State responsibility in the Commission’s programme of work, as he felt that it would fill the gaps in the law concerning the topic. Malaysia welcomed the Commission’s having restricted the scope of the topic to the transfer of rights and obligations arising from internationally wrongful acts, excluding any issues of international liability for injurious consequences arising out of acts not prohibited under international law and of responsibility of international organizations. The delegate felt that it was essential to address clearly whether there was a general rule applicable to different types of State succession in respect of rights and obligations arising from State responsibility, prior to exploring any possible exceptions or saving clauses, such as those set out in draft articles 3 and 4. Furthermore, the delegate pointed out that in deliberating the issue of the general principle governing the succession of States in respect of State responsibility, the Special Rapporteur had placed more emphasis on State practice in European countries rather than other regions, and that a comprehensive analysis would necessarily entail analysing State practice in regions outside Europe. Referring to draft article 1 the delegate recommended that the Commission and the Special Rapporteur should undertake a comprehensive study on the role of the Security Council in addressing internationally wrongful acts in accordance with its powers to maintain international peace and security under the Charter, in order to ensure that there was no overlap between the Commission’s work and the Security Council’s statutory role.

D. COMMENTS AND OBSERVATIONS OF AALCO SECRETARIAT

22. Traditionally, neither State practice nor doctrine provided a single answer to whether and under what circumstances a successor State may be responsible for an internationally wrongful act of its predecessor. In some cases of State practice, however, it has been possible to identify division or allocation of responsibility between successor States. This trend has been highlighted in recent practice beginning in the 1990s and continues since then.

23. The Secretariat of AALCO welcomes the First Report of the Special Rapporteur that was presented in time for the deliberations to take place and which also resulted in the transmittal of four draft articles to the Drafting Committee. As already mentioned, the Drafting Committee had provisionally adopted draft article 1 on “scope” of the draft articles, which simply provides that the “present draft articles apply to the effects of a succession of States in respect of the responsibility of States for internationally wrongful acts.” Further, the drafting committee provisionally adopted portions of draft article 2 on “use of terms,” which replicates four definitions contained in prior instruments concerning secession issues (specifically, definitions for

“succession of States,” “predecessor State,” “successor State,” and “date of the succession of States”).

24. An important issue that featured during the Commission’s debate of the First Report was whether one could identify a general rule concerning the transfer of rights and obligations from a predecessor state to a successor state. The First Report noted that the general rule articulated in scholarly writings is that there is no such transfer, at least with respect to obligations. At the same time, the First Report appears to suggest that contemporary practice may indicate acceptance of an automatic transfer of rights or obligations from a predecessor state to a successor state. Yet the First Report ultimately took no definitive position as to which view was correct, nor did it advance a draft article that articulates a general rule one way or another. Inability to pronounce of the content of the general rule made it difficult to determine how best to write draft articles 3 and 4 as proposed by the Special Rapporteur, because those articles are essentially trying to explain when it is that there might be divergences from the general rule. Proposed draft article 3 is focused on the possibility of a bilateral agreement setting forth a special rule that governs in a particular situation, while draft article 4 is focused on the possibility of a unilateral declaration by a successor state setting forth a special rule that governs in a particular situation. Knowing the content of the general rule would help in determining how best to characterize these divergences.

25. The debate at the Commission has clearly shown that there is no one normative framework of relevance for the subject matter and that there is also limited State practice, even more so from the point of view of coherence. There is a need to properly assess various situations pertinent to State succession in order to avoid jumping to the assertion of succession thesis as the general rule. In this regard AALCO agrees with the members of the Commission who had requested the Special Rapporteur to produce a more systematic account of the relevant materials, especially with respect to State practice and case law. It is to be highlighted here that State practice as identified by the Special Rapporteur was highly context-specific and sensitive and that there is very little in the way of State practice in this area to guide the Commission. Due to the rarity of State practice and limited number of cases on the topic, his conclusion that the rule of non-succession in respect of State responsibility had changed, does not seem to be convincing. Going forward, it is also imperative on the part of the Commission to absolutely make sure that what it would be setting out would be *lex lata* or *lex ferenda* and in this light the following guiding questions emerge from the work of the Commission and the statements made by the Member States.

1. Whether the general rule of non-succession of state responsibility has yielded to any new rules of customary international law?

2. Whether the present work of the Commission should take the form of draft articles?

3. To what extent does the state practice reflect opinio juris? To what extent were the actions governed by international law and municipal law?

4. How do the rules of succession apply to different types of successions?

5. To what extent are the rules governing succession found in context specific agreements and unilateral declarations

V. PROTECTION OF THE ENVIRONMENT IN RELATION TO ARMED CONFLICTS

B. BACKGROUND

1. At its Sixty-Third session held in 2011, the Commission included the topic “Protection of the Environment in Relation to Armed Conflicts” in its work program, on the basis of the recommendation of the working group on the long-term program of work and appointed Ms. Marie G. Jacobsson as Special Rapporteur for the topic. After holding informal consultations at the Sixty-Fifth session, the Special Rapporteur presented an oral report to the Commission. The Commission also agreed to formulate a request to States to provide examples of international environmental law, including regional and bilateral treaties, continuing to apply in times of international or non-international armed conflict.

2. At the Sixty-Eight session of the Sixth Committee of the General Assembly, the majority of States welcomed the addition of the topic to the work program of ILC, though concerns were raised about the scope of the topic and its ramifications beyond the topic of environmental protection in relation to armed conflict. There was also general consensus that the outcome of the work on the topic was draft guidelines instead of draft articles.

3. The Commission, at its Sixty-Sixth session (2014), considered the preliminary report of the Special Rapporteur (A/CN.4/674 and Corr.1). At its Sixty-Seventh Session (2015), the Commission considered the Second Report of the Special Rapporteur (A/CN.4/685)1304 and took note of the draft introductory provisions and draft principles I-(x) to II-5, provisionally adopted by the Drafting Committee (A/CN.4/L.870).

4. At its session held in 2016 the Commission had before it the Third Report of the Special Rapporteur (A/CN.4/700), which focused on identifying rules applicable in post-conflict situations, while also addressing some preventive issues to be undertaken in the pre-conflict phase. The report contained three draft principles on preventive measures, five draft principles concerning primarily the post-conflict phase and one draft principle on the rights of indigenous peoples. Following the debate in Plenary, the Commission decided to refer the draft principles, as contained in the report of the Special Rapporteur, to the Drafting Committee.

5. The Commission subsequently received the report of the Drafting Committee and took note of draft principles 4, 6, 7, 8, 14, 15, 16, 17 and 18, provisionally adopted by the Drafting Committee. Furthermore, the Commission provisionally adopted the draft principles it had taken note of during its sixty-seventh session, which had been renumbered and revised for technical reasons by the Drafting Committee at the present session, together with commentaries thereto.

C. CONSIDERATION OF THE TOPIC AT THE SIXTY-NINTH SESSION OF THE COMMISSION (2017)

6. While this topic has been on the Commission’s agenda since 2013, the prior Special Rapporteur, Marie G. Jacobsson (Sweden), did not stand for reelection in 2016. Consequently, the

Commission had no report to debate during the Sixty-Ninth session held in 2017, and did not engage in any substantive work on this topic. A working group was convened, with Mr. Marcelo Vázquez-Bermúdez appointed as Chairperson of the Working Group, and the working group met on two occasions to consider the work to date and the way forward.²¹ During the last week of the session, the Commission appointed a new Special Rapporteur,²² Marja Lehto (Finland), to serve as Special Rapporteur, and she has produced a first report for the Seventieth session (A/CN.4/720).

D. SUMMARY OF THE VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPICS AT THE UN GENERAL ASSEMBLY SIXTH COMMITTEE AT ITS SIXTY-NINTH SESSION HELD IN 2017²³

7. *The delegate of Thailand* said little attention had been given to the prevention and mitigation of damages. In that context, he expressed interest in the development around the interrelation between international environmental law and international humanitarian law. He highlighted the need for active engagement with international organizations which would help enhance understanding of the environmental consequences of armed conflicts. He also encouraged the Commission to continue work on refining the draft principles and draft commentaries in an expeditious manner.

8. *Another delegate of Thailand* said any relevant environmental treaties could co-exist with the law of armed conflict. Having draft principles was appropriate and timely, and would raise the visibility of environmental impacts of armed conflicts. Cultural heritage, although part of the natural environment, was out of the scope of that topic, as its protection was extensively regulated through other international norms, including the United Nations Educational, Scientific and Cultural Organization (UNESCO) instruments and frameworks. She encouraged continued consultations with agencies directly involved in post-conflict situations, such as the International Committee of the Red Cross (ICRC) and the United Nations Environment Programme, in forming a coordinated response.

9. *The delegate of Malaysia* said the question of the final form of the draft principles would be the subject of further consideration. Such protection should not be viewed exclusively through the lens of the laws of warfare. Protective elements envisioned for the draft principles should therefore provide an analysis and a clarification of the applicability of, and the relationship between, international humanitarian law, international criminal law, international environmental law, human rights law and, of course, treaty law. To that end, references in the drafting process must continue to be made, particularly to issues of complementarity with other relevant branches of international law.

²¹ See Report of the International Law Commission on the Work of Its Sixty-Ninth Session, UN GAOR, 72nd Sess., Supp. No. 10, at 211, paras. 256-257, 3 UN Doc. A/72/10 (Sept. 11, 2017).

²² Ibid, paras 256-257.

²³ All the statements that are mentioned here as having been made by the Member States of AALCO at the UN General Assembly Sixth Committee at its session held in 2017 are available from: <https://www.un.org/press/en/2017/gal3560.doc.htm>; <https://www.un.org/press/en/2017/gal3559.doc.htm>; <https://www.un.org/press/en/2017/gal3557.doc.htm>; <https://www.un.org/press/en/2016/gal3535.doc.htm>; https://www.mfa.gov.sg/content/mfa/overseasmission/newyork/nyemb_statements/sixth_committee/2016/201611/press_20161101.html; <http://www.china-un.org/eng/hyyfy/t1506789.htm>.

10. *Another delegate of Malaysia* said the three temporal phases - pre-conflict, during conflict and post-conflict - were artificial and therefore it would become hard to establish separate rules applying to them. The debate on whether there should be a distinction between “environment” and “natural environment” was self-defeating; work on the topic should not be overly prescriptive. In order to produce effective guidelines on such protection, necessary linkages must be drawn with established principles on rules of engagement, proportionality, necessity and reprisals, among other things. Recognizing the fact that indigenous communities were particularly affected by, and had a significant role to play in, post-conflict remediation efforts, he asked for further analysis of the environmental consequences of armed conflict.

11. *The delegate of Viet Nam* said that in armed conflict the belligerent party who introduced harmful substances should search and destroy any remnants of war that it had used, and should also bear the responsibility to restore the environment. He noted concern over the inclusion of rights of indigenous peoples in draft principle IV as it was of little relevance to the context of armed conflicts. In addition, as the definition of indigenous peoples was handled differently from State to State, their inclusion might cause more problems than those resolved.

12. *Another delegate of Viet Nam* said that armed conflicts, regardless of the intentions of the belligerents, had grave and lasting impacts on not only the population, but also the land, water, air and ecosystem. His country had experienced first-hand and knew all too well the consequences of armed conflicts on the environment. The effects of war, despite having taken place decades ago, were still very clearly felt in Viet Nam. The same was true for all armed conflicts around the world. Expressing support for the Commission’s continuation on that topic in order to establish State responsibility in dealing with remnants of war, particularly those related to the damages to the environment, he said ILC’s research should be complementary with existing international law, particularly the Geneva Convention.

13. *The delegate of Islamic Republic of Iran* noted the appropriateness of the Special Rapporteur’s approach, particularly with regard to the temporal basis of that topic. Concerning post conflict obligations, he said he looked forward to provisions on responsibility and rehabilitation on the part of those parties whose acts had caused or lead to damage to the environment. “As a country with sad experience of an imposed war,” Iran understood the importance of that subject, he stated.

14. *The delegate of Turkey* said he would comment only after having analyzed the work to be submitted by the new Special Rapporteur. He underlined, however, the importance of coherence between the new work to be embarked on and work previously accomplished.

15. *The delegate of Republic of Singapore* stated that the Special Rapporteur’s three reports and the Commission’s work would help States address a difficult and very contemporary legal challenge.

16. *Another delegate of Republic of Singapore* expressed her appreciation to the previous Special Rapporteur and welcomed the decision of the Commission to appoint a new Special Rapporteur.

17. *The delegate of Japan* noted that the third report of the Special Rapporteur on protection of the environment in relation to armed conflicts addressed rules of particular relevance in post-conflict situations, and opined that the Commission's discussion had revealed the complexity and diversity of the issues involved. The current scope of the topic appeared to include both international and non-international armed conflict, but it was difficult to identify principles and rules applicable to both. The delegate hoped that the Commission would examine the scope of the topic carefully and focus on areas where existing rules could be identified so that the final products would be useful to Member States.

18. *The delegate of Lebanon* urged that the following subjects should be studied under this topic: responsibility and the obligation to provide reparation; application of the principles of proportionality and due diligence in the context of the environment; the humanitarian consequences of the impact of armed conflicts on the environment; and protection of the environment in situations of occupation.

E. COMMENTS AND OBSERVATIONS OF THE AALCO SECRETARIAT

19. That armed conflicts have grave and lasting adverse consequences on both the population and the eco-system is well-known. Trying to clarify and regulate the same in legal terms becomes, then critically important. A legal regime aimed at protection of the environment in relation to armed conflicts ought to incorporate preventive measures as well as mitigating rules applicable in the post-conflict phase. The Secretariat of AALCO agrees to the view endorsed by the Working Group that, in addition to aspects of the draft principles, such as streamlining, terminology, filling gaps, and overall structuring of the text, as well as completion of the draft commentaries, there were other areas that could be further addressed. Such areas include, *inter alia*, issues of complementarity with other relevant branches of international law, such as international environmental law, protection of the environment in situations of occupation, issues of responsibility and liability, the responsibility of non-State actors, and overall application of the draft principles to armed conflicts of a non-international character.²⁴

20. In its attempt to protect the environment during and after armed conflicts the Commission needs to make sure that its work on this issue complements the existing international legal regime embodied in various texts of international law. Hence the purpose of the Commission's work must be to clarify the existing rules and principles of international environmental law to armed conflicts and as such, it should refrain from redefining the recognized existing rules of international law in general and humanitarian law, in particular.

21. The new Special Rapporteur also needs to bear in mind that international humanitarian law forms the *lex specialis* in situations of armed conflict, and the extent to which rules contained in other bodies of law might apply during armed conflict should be considered on a case-by-case basis. Protective elements envisioned in the draft principles should provide an analysis and a clarification of the applicability of, and the relationship between, international humanitarian law, international criminal law, international environmental law, human rights law and, of course, treaty

²⁴ See Report of the International Law Commission on the Work of Its Sixty-Ninth Session, UN GAOR, 72nd Sess., Supp. No. 10, at 211, para. 259, 3 UN Doc. A/72/10 (Sept. 11, 2017).

law. To that end, references in the drafting process must continue to be made, particularly to issues of complementarity with other relevant branches of international law.

22. The question of fastening of responsibility on the belligerent party who introduced harmful substances in the eco-system during an armed conflict regarding restoration of the environment is another issue that the legal regime ought to take note of. In order for those principles concerning the issue of remnants of war on land and at sea, as addressed in draft principles III-3 and III-4, to be effective, there must be a clear indication of the State or entity that bore primary responsibility for dealing with minefields, mined areas, mines, booby-traps and other remnants of war.

23. Further, the appropriateness of the inclusion of the rights of indigenous peoples in draft principle IV-1 and the role such communities could play in post-conflict remediation efforts calls for further analysis. The definition of indigenous peoples varying from State to State, there are cogent apprehensions that the inclusion of draft principle IV-1 might in practice cause more problems than it attempted to resolve.

24. The Special Rapporteur also needs to recognize that in dealing with this topic, there is a need for active engagement with international organizations which deal with post-conflict situations, such as the ICRC, UNESCO and UNEP. Such concerted efforts would help enhance understanding of the environmental consequences of armed conflicts and aid in the formulation of a coordinated response.

25. The Secretariat of AALCO expresses its deep appreciation for the work done by the previous Special Rapporteur for her outstanding contribution to the topic. During the Sixty-Ninth Session held in 2017 the Commission did not make any significant progress with respect to this topic as there was no Report to debate on. It is significant, however, to note that the new Special Rapporteur has been appointed to carry the work forward. The Secretariat encourages the Commission to continue work on refining the draft principles and draft commentaries in an expeditious manner.

26. In view of the work done by the Commission on this topic so far, and taking cognizance of the issues on which urgent attention of AALCO Member States is solicited, the Secretariat of AALCO requests the Member States to deliberate upon, if deemed fit, the following issues in order to guide the future work of the Commission on this topic:

1. Whether the inclusion of the rights of the indigenous people in draft principle IV-1 in view of the plight of such communities owing to environment being affected due to armed conflicts an appropriate approach? What impediments, legal and practical, might be faced whilst attempting such inclusion? If such inclusion is apt, what role could such communities play in the post-conflict remediation efforts?

2. What steps have so far been taken by the Member States vis-à-vis addressing this topic at their national levels? The Member States may be requested to provide examples of international environmental law, including regional and bilateral treaties, continuing to apply or be invoked in times of international or non-international armed conflict.

Further, the scope and ambit of the draft principles ought to be clarified by addressing the following questions:

- i. Whether the demarcation of the topic into three temporal phases is practically feasible and necessary or merely artificial?*
- ii. What should be the exact definition of “armed conflict” for the purpose of this topic?*
- iii. Whether the draft principles should pertain only to “natural environment” or be all-encompassing and apply to cultural heritage and the like? How the overlap of legal regimes, existing and under discussion, would then, be addressed?*
- iv. What should be the exact meaning and scope of the word “effective” in draft principles IV and VI-2?*

VI. PROVISIONAL APPLICATION OF TREATIES

A. BACKGROUND

1. The Vienna Convention on the Law of Treaties, 1969 (“Vienna Convention”), in its Article 25 provides for the possibility of the application of treaties on a provisional basis. The provision originated when proposal for a clause recognizing the practice of the “*provisional entry into force*” of treaties, was made by Special Rapporteurs Gerald Fitzmaurice and Humphrey Waldock, during the consideration by the Commission of the Law of Treaties (Article 22 of the 1966 draft articles). The provision was amended at the Vienna Conference on the Law of Treaties, 1968, and substituted by “provisional application”. It was finally adopted as such at the Second Session of the Vienna Conference in 1969, and renumbered as Article 25.

Article 25 of the Vienna Convention 1969 reads as follows:

“Article 25

1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:

- (a) The treaty itself so provides; or
- (b) The negotiating States have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.”

2. At its Sixty-Fourth Session, held in 2012, the International Law Commission included the topic “provisional application of treaties” in its programme of work, and appointed Mr. Juan Manuel Gómez-Robledo as Special Rapporteur for the topic. The Special Rapporteur has thus far submitted four reports²⁵, which the Commission considered at its sixty-fifth to sixty-eighth sessions (2013-2016), respectively. The Commission has also had before it two memorandums, prepared by the Secretariat, at the sixty-fifth (2013) and sixty-seventh sessions (2015), respectively.²⁶ The subsequent Reports of the Special Rapporteur have amongst other things determined the purposes and usefulness of provisional application of treaties, systematized some general aspects of the concept, and also identified some of the contentious issues related to it such as the fact that State practice is neither uniform nor consistent, warranting an in-depth consideration of State practice, and the relationship between the Article 25 regime and other provisions of the Vienna Convention, as well as other rules of international law.

3. The Fourth Report submitted for consideration at the Sixty-Eighth Session proposed Draft Guideline 10²⁷, which was submitted to the Drafting Committee by the Commission. The

²⁵ A/CN.4/664 (first report), A/CN.4/675 (second report), A/CN.4/687 (third report), and A/CN.4/699 and Add.1 (fourth report).

²⁶ A/CN.4/658 and A/CN.4/676.

²⁷ Draft guideline 10

Commission finally took note of draft guidelines 1 to 4 and 6 to 9, as provisionally adopted by the Drafting Committee in its Report (A/CN.4/L.877), during the Sixty-Seventh and Sixty-Eighth Sessions. Draft Guideline 5 on unilateral declarations had been kept in abeyance to be returned to at a later stage.

4. At the Sixty-Ninth Session the focus of the Drafting Committee was on completing the consideration of the draft guidelines referred to the Drafting Committee last year, namely draft guidelines 5 and 10, as had been proposed by the Special Rapporteur in his third and fourth reports, respectively. Furthermore it was decided to refer all the draft guidelines taken note of in the last two years, namely draft guidelines 1 to 4 and 6 to 9, back to the Drafting Committee. The Commission has finally considered the report presented by the Chairman of the Drafting Committee²⁸ and adopted draft guidelines 1 to 11, with commentaries thereto. The Commission also had before it a further memorandum, prepared by the Secretariat, reviewing State practice in respect of treaties (bilateral and multilateral), deposited or registered in the last 20 years with the Secretary-General, that provide for provisional application, including treaty actions related thereto.²⁹ The consideration of the memorandum was deferred to the next session of the Commission.

B. CONSIDERATION OF THE TOPIC AT THE SIXTY-NINTH SESSION OF THE COMMISSION (2017)

5. At the Sixty-Ninth Session the Commission broadly picked up the work from where it had stopped in the previous Session. The Drafting Committee analyzed draft guidelines 5 and 10, as had been proposed by the Special Rapporteur in his third and fourth reports, respectively, and also took note of draft guidelines 1 to 4 and 6 to 9, and prepared a consolidated report. The Commission after considering the report presented by the Chairman of the Drafting Committee, adopted draft guidelines 1 to 11, with commentaries thereto. It is further important to note that Chairperson of the Drafting Committee for the Sixty-Ninth Session of the Commission, Mr. Aniruddha Rajput, stated that his statement for the present Session should be read together with the respective statements of his two predecessors, which are available on the Commission's website.³⁰

6. The purpose of the draft guidelines is to provide assistance to States, international organizations and others concerning the law and practice on the provisional application of treaties. They may encounter difficulties concerning, inter alia, the form of the agreement to provisionally apply a treaty or a part of a treaty, the commencement and termination of such provisional application, and its legal effects. The objective of the draft guidelines is to direct

Internal law and the observation of provisional application of all or part of a treaty

A State that has consented to undertake obligations by means of the provisional application of all or part of a treaty may not invoke the provisions of its internal law as justification for non-compliance with such obligations. This rule shall be without prejudice to article 46 of the 1969 Vienna Convention.

²⁸ "Provisional Application of Treaties: Texts and Titles of the Draft Guidelines Provisionally Adopted by the Drafting Committee at the Sixty-Seventh to Sixty-Ninth Sessions" (A/CN.4/L.895/REV.1).

²⁹ A/CN.4/707.

³⁰ First report of the Drafting Committee on "Provisional application of treaties", Chairperson of the Drafting Committee, (12 May 2017), available at: <<http://legal.un.org/ilc/sessions/69/>>, p. 3.

States, international organizations and others to answers that are consistent with existing rules or to the solutions that seem most appropriate for contemporary practice.³¹

7. Even though not legally binding as such, the draft guidelines reflect existing rules of international law. The draft guidelines are mainly based on Article 25 of both the Vienna Convention on the Law of Treaties of 1969 (the “1969 Vienna Convention”) and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986 (the “1986 Vienna Convention”), which they try to clarify and explain, and on the practice of States and international organizations on the matter, without prejudice to other rules of international law. The purpose of provisional application is to give immediate effect to all or some of the provisions of a treaty without waiting for the completion of all domestic and international requirements for its entry into force. Provisional application serves a useful purpose, for example, when the subject matter entails a certain degree of urgency or when the negotiating States or international organizations want to build trust, among other objectives.³²

8. Firstly, with regard to the proposal for draft guideline 10, on the issue of invocation of internal law, or in the case of international organizations their rules, as justification for failure to perform an obligation arising under a treaty being provisionally applied or a part thereof. The Drafting Committee was tasked with developing a “package” of three draft guidelines which arose out of the consideration of the Special Rapporteur’s proposal for draft guideline 10. The proposal had sought to reflect the provisions of Articles 27 and 46 of the Vienna Convention on the Law of Treaties of 1969 in a single provision. The Drafting Committee decided to reflect the text of the relevant provisions of the Vienna Convention in the draft guideline. This meant that a single provision was essentially dealing with the different scenarios reflected in the two Articles of the Convention.³³

9. The provision, however, became further complicated by the fact that the scope of the draft guidelines was enlarged, last year, to include treaties entered into by international organizations. Accordingly, it was felt that account needed to also be taken of the corresponding provisions in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. To simplify matters, the Drafting Committee decided to separate out the two sets of issues, relating to the operation of internal law, into two separate draft guidelines, namely 10 and 11, each with two paragraphs dealing with the position under the 1969 and 1986 Conventions, respectively. A third draft guideline, number 12, was later added to deal with agreement regarding the limitations. All three provisions underwent a series of drafting refinements, particularly with a view to making them more specific to provisional application, and by way of aligning the text as much as possible with that in the draft guidelines previously adopted.

10. In principle, the Drafting Committee decided to track the language of Article 27 of the Vienna Convention as closely as possible, and, if any changes were made, to reflect those changes in both paragraphs.

³¹ Chapter V – Provisional Application of Treaties, (A/72/10).

³² Ibid.

³³ First report of the Drafting Committee, p. 3.

Article 27 of the Vienna Convention 1969 reads as follows:

“Article 27: Internal Law and Observance of Treaties

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.”

11. **“Guideline 9 [10]**

Internal law of States or rules of international organizations and observance of provisionally applied treaties

1. A State that has agreed to the provisional application of a treaty or part of a treaty may not invoke the provisions of its internal law as justification for its failure to perform an obligation arising under such provisional application.

2. An international organization that has agreed to the provisional application of a treaty or part of a treaty may not invoke the rules of the organization as justification for its failure to perform an obligation arising under such provisional application.”³⁴

12. Even though a substantial portion of the provision has been drawn verbatim from the respective Vienna Conventions, the Drafting Committee did, however, depart from the Vienna Convention language, where the concluding words “a treaty”, in both conventions, were replaced by the phrase “an obligation arising under such provisional application”, which reflected the scope of the draft guidelines.

13. The commentary to the adoption of the draft guideline provides that this provision should be considered together with Article 27 of both 1969 and 1986 Vienna Conventions. It further states that as provisional application of a treaty or a part of a treaty is governed by international law, internal law of a State or the internal rules of an international organization, they may not be invoked as a justification for failure to perform international obligations arising from the provisional application of a treaty or a part of a treaty. Likewise, such internal law or rules cannot be invoked so as to avoid the responsibility that may be incurred for the breach of such obligations. A failure to comply with the obligations arising from the provisional application of a treaty or a part of a treaty with a justification based on the internal law of a State or rules of an international organization will engage the international responsibility of that State or international organization.³⁵

14. Regarding draft guideline 11, which was originally intended by the Special Rapporteur to serve only as the analogue for Article 46³⁶, paragraph 1, of the 1969 Convention, and paragraph

³⁴ “Provisional application of treaties: Texts and titles of the draft guidelines provisionally adopted by the Drafting Committee at the sixty-seventh to sixty-ninth sessions”, A/CN.4/L.895/Rev.1, (25 July 2017), available at: <<http://legal.un.org/ilc/sessions/69/>>.

³⁵ Chapter V, pp. 143-144.

³⁶Article 46 of the Vienna Convention 1969 reads as follows:

“Article 46: PROVISIONS OF INTERNAL LAW REGARDING COMPETENCE TO CONCLUDE TREATIES

2 of its 1986 counterpart³⁷, that is, to include only a reference to Article 46 in the form of a without prejudice clause contained in the second sentence in Article 27, the Drafting Committee, however, took a decision to reflect the full text of the respective parts of Article 46 of the two Vienna Conventions, in the draft guidelines. Hence, the Article 46 scenario of the invocation of internal law or rules regarding competence was shifted into a separate provision, namely new draft guideline 11.

15. “Guideline 10 [11]

Provisions of internal law of States or rules of international organizations regarding competence to agree on the provisional application of treaties

- 1) A State may not invoke the fact that its consent to the provisional application of a treaty or part of a treaty has been expressed in violation of a provision of its internal law regarding competence to agree to the provisional application of treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
- 2) An international organization may not invoke the fact that its consent to the provisional application of a treaty or part of a treaty has been expressed in violation of the rules of the organization regarding competence to agree to the provisional application of treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance.”³⁸

16. The absence of the provision of definition of “manifest violation”, which is present in corresponding provisions of both the conventions, also deserves a mention. There were suggestions in the Drafting Committee that the draft guidelines also include the second paragraph of Article 46 of the 1969 Vienna Convention, and its counterpart in paragraph 3 of

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.”

³⁷ Article 46 of the Vienna Convention 1986 reads as follows:

“Article 46: PROVISIONS OF INTERNAL LAW OF A STATE AND RULES OF AN INTERNATIONAL ORGANIZATION REGARDING COMPETENCE TO CONCLUDE TREATIES

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. An international organization may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of the rules of the organization regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance.

3. A violation is manifest if it would be objectively evident to any State or any international organization conducting itself in the matter in accordance with the normal practice of States and, where appropriate, of international organizations and in good faith.”

³⁸ “Provisional application of treaties: Texts and titles of the draft guidelines provisionally adopted by the Drafting Committee at the sixty-seventh to sixty-ninth sessions”, A/CN.4/L.895/Rev.1, (25 July 2017), available at: <<http://legal.un.org/ilc/sessions/69/>>.

the 1986 Vienna Convention. The prevailing view, however, was that it was not necessary to include such additional paragraphs in the text itself. Rather, they will be discussed in the accompanying commentary.

17. The commentary to the adoption of the draft guideline provides that a violation is “manifest” if it would be objectively evident to any State or any international organization conducting itself in the matter in accordance with the normal practice of States or, as the case may be, of international organizations and in good faith.³⁹

18. **“Guideline 11 [12]**

Agreement to provisional application with limitations deriving from internal law of States or rules of international organizations

The present draft guidelines are without prejudice to the right of a State or an international organization to agree in the treaty itself or otherwise to the provisional application of the treaty or a part of the treaty with limitations deriving from the internal law of the State or from the rules of the organization.”

19. Speaking about draft guideline 12, the rationale behind it was to inject an element of flexibility so as to allow for the possibility that States may in fact agree, for example, to limit provisional application so as to take into account their constitutional provisions on the competence to conclude treaties. It was also recognized that practice existed of treaties expressly making provisional application subject to limitations of internal law, and not necessarily related to the competence to agree on the provisional application of treaties. For some members, the proposed chapeau provided the necessary element of flexibility. However, the Drafting Committee could not agree whether the proposed chapeau should be limited only to draft guideline 11, or whether it could also be included in draft guideline 10. The other concern was that adding the chapeau to either draft guideline could be seen as adding new elements to the two Vienna Conventions. As indicated earlier, the basic policy of the draft guidelines was not to prejudice existing treaty law, but to be consistent with the regime of the two Vienna Conventions. The solution found was to address limitations deriving from internal law of States or rules of international organizations in a separate provision, which has now become draft guideline 12.

20. The provision is cast as a without prejudice clause, applicable to the draft guidelines generally. The purpose of the draft guideline is to confirm that States or international organizations agreeing to the provisional application of a treaty, may seek to condition such provisional application on limitations deriving from internal law, in the case of States, or the rules of the respective organization, in the case of international organizations. The recognition of such possibility was largely supported by members of the ILC, during the Plenary debate last year, as well as by member States in the Sixth Committee.⁴⁰

³⁹ Chapter V, p. 145.

⁴⁰ First report of the Drafting Committee, p. 8.

21. A key element of the provision is the reference to such possibility existing as a “right” of the State or international organization. The commentary will clarify that the reference to “right” should not be interpreted as implying the need for a separate agreement on the applicability of limitations deriving from the internal law of the State or from the rules of the international organization. It is understood that the existence of any such internal limitations on the provisional application of the treaty would be a condition of the agreement to provisionally apply the treaty, and, accordingly, subject to agreement by the other parties to the provisional application. The commentary will also confirm that this draft guideline should not be construed as an invitation to States, or international organizations, to unilaterally invoke their internal law, or rules, to terminate provisional application.

22. Next, with regard to the proposal for a draft guideline 5 on provisional application by means of unilateral declaration, the Drafting Committee proceeded on the basis of a revised proposal initially presented by the Special Rapporteur in 2016, which sought to take into account some of the concerns that were expressed in the Commission on the possibility of provisional application by way of unilateral declaration. The proposal contained two components. The first dealt with the possibility of provisional application arising from a unilateral declaration, where such outcome is envisaged in the treaty itself or it is in some other manner agreed. The second dealt with the situation where the treaty is silent, and the possibility that a State could give effect to the provisional application of a treaty by means of a unilateral declaration, provided that no objection is made in that regard. The Drafting Committee finally decided to include the first proposition as an express reference in the text of draft guideline 4 itself. Thus, by including the reference in draft guideline 4, the position right now stands that *such declaration has to take place only within the context of an agreement between the parties*. This is made clearer by the fact that the text refers to a “declaration by a State”, as opposed to “unilateral declaration”, so as to distinguish the two. There was agreement with a suggestion that the possibility be subject to acceptance, as opposed to non-objection, since the latter was potentially too uncertain in practice.⁴¹

23. “Guideline 4

Form of agreement

In addition to the case where the treaty so provides, the provisional application of a treaty or a part of a treaty may be agreed through:

- a) A separate treaty; or
- b) Any other means or arrangements, including a resolution adopted by an international organization or at an intergovernmental conference, or a *declaration*

⁴¹ **Guideline 4 - Form of agreement:**

In addition to the case where the treaty so provides, the provisional application of a treaty or a part of a treaty may be agreed through:

- (a) A separate treaty; or
- (b) Any other means or arrangements, including a resolution adopted by an international organization or at an intergovernmental conference, or a declaration by a State or international organization that is accepted by the other States or international organizations.

by a State or international organization that is accepted by the other States or international organizations.”

With the inclusion of the idea within draft guideline 4, subparagraph (b), there was no longer a need for a distinct provision for draft guideline 5 on unilateral declarations. Accordingly, the subsequent draft guidelines were renumbered. Also, as a result, the Drafting Committee undertook a toilettage of the entire text.

24. As regards draft guideline 2, there was a proposal to make an express reference to the 1986 Vienna Convention. Instead, it was agreed that the commentary will treat the two Vienna Conventions as not being on the same level, as is implied from the text of draft guideline 2.⁴²

25. Draft guideline 3 was aligned with draft guideline 6, with the addition of the phrase “between the States or international organizations concerned”.⁴³

26. On draft guideline 6 [7], a concern was expressed by one member, who had questioned the text during its adoption in Plenary in May, that member objected to the reference in the text to the provisional application of the treaty producing “the same legal effects as if the treaty were in force” does not reflect the legal position, since, inter alia, termination of provisional application would not be the same, as was apparent from draft guideline 9. Some members raised a procedural objection to addressing this matter and the substance of the proposed change. According to them, the Drafting Committee was at the stage of toilettage and the Drafting Committee had given detailed consideration to this topic, the plenary had approved the draft guideline, and the matter should not be reopened now.⁴⁴

27. The Drafting Committee considered an alternative formulation that would indicate that the provisional draft guideline 6 [7] was “without prejudice to draft guideline 8[9]”. However, the Drafting Committee was hesitant to introduce any such modification, at this stage. It was proposed that the issue could be addressed in the commentary. The Special Rapporteur agreed to reflect it in the commentary to that extent. Also, if necessary, the draft provision could be reconsidered during the second reading. In draft guideline 8 [9], the reference to “shall” was changed to “is”, which follows the existing style of the Commission for draft guidelines.⁴⁵

⁴² **Guideline 2 Purpose**

The purpose of the present draft guidelines is to provide guidance regarding the law and practice on the provisional application of treaties, on the basis of article 25 of the Vienna Convention on the Law of Treaties and other rules of international law.

⁴³ **Guideline 3 General rule**

A treaty or a part of a treaty may be provisionally applied, pending its entry into force between the States or international organizations concerned, if the treaty itself so provides, or if in some other manner it has been so agreed.

⁴⁴ **Guideline 6 [7] Legal effects of provisional application**

The provisional application of a treaty or a part of a treaty produces the same legal effects as if the treaty were in force between the States or international organizations concerned, unless the treaty provides otherwise or it is otherwise agreed.

⁴⁵ **Guideline 8 [9] Termination upon notification of intention not to become a party**

Unless the treaty otherwise provides or it is otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or international organization is terminated if that State or international organization notifies the other States or international organizations between which the treaty or a part of a treaty is being applied provisionally of its intention not to become a party to the treaty.

28. Finally, the title of draft guideline 11 [12] was amended through the replacement of the word “regarding” with the phrase “to provisional application with”. Some further minor technical changes were made to the provision.⁴⁶

C. SUMMARY OF THE VIEWS EXPRESSED BY AALCO MEMBER STATES AT THE UN GENERAL ASSEMBLY SIXTH COMMITTEE AT ITS SEVENTY SECOND SESSION HELD IN 2017⁴⁷

29. *The delegate of India* highlighted the great role that a nation had to play in the provisional application of treaties. The delegate stated that a nation’s political, social and legal system could be reflected in the manner in which it expressed consent to a treaty. For example, in some nations (dualistic States) treaties did not automatically form part of the domestic law. Their provisions became applicable only as a result of their acceptance by internal procedures.

30. *The delegate of People’s Republic of China* noted that the Commission should proceed with utmost caution with regard to the “default rule” established in draft guideline 6. The formulation represented a major development of the rules governing the topic as defined by the Vienna Convention on the law of treaties. The key to determine whether provisional application could be equated to the coming into force of a treaty was to ascertain the real intent of the parties and comprehensively examine the relevant practice of States. He further requested for clarification whether the difference in the legal effects of provisional application existed in cases of reservation to treaties, State succession or other special situations.

31. *The delegate of Singapore* stated that the Commission’s draft guideline 6 could be more definitively stated. For example, it could be recast in terms of an explicit reference to the “binding” character of provisional application instead of using the term “legal effects”. In that same draft guideline, the commentary should elaborate upon the exception to the default position contained in the proviso “unless the treaty provides otherwise or it is otherwise agreed”. He further noted in the matter of termination of the provisional application of treaties, referenced in draft guideline 6 as well as draft guideline 8, that a more definitive statement could be made in absence of express treaty language or agreement to the contrary.

32. *The delegate of Malaysia* called for caution in discerning the scenarios identified in the study of the topic, especially regarding the question of the relationship between provisional application and other provisions of the 1969 Vienna Convention and the provisional application of treaties with regard to the practice of international organizations. She stated that Malaysia’s domestic law did not provide for the provisional application of treaties. Her country had been conscientious about legislating appropriate domestic law before ratifying any treaty to ensure that its obligations under those treaties were carried out. In any case, Malaysia

⁴⁶ **Guideline 11 [12] Agreement to provisional application with limitations deriving from internal law of States or rules of international organizations**

The present draft guidelines are without prejudice to the right of a State or an international organization to agree in the treaty itself or otherwise to the provisional application of the treaty or a part of the treaty with limitations deriving from the internal law of the State or from the rules of the organization.

⁴⁷ All statements made by Member States can be found at <<http://www.un.org/press/en/content/sixth-committee>>.

would only consider becoming a party to an international treaty once its domestic legal framework was in place. Offering several comments regarding the draft guidelines, she noted that while draft guideline 9 stated that the internal law of a State might not be invoked as a justification for failure to perform international obligations arising from provisional application, guideline 11 allowed some flexibility in provisional application of a treaty in terms of internal law or rules of States. Lastly, she stated that for Malaysia it was crucial to determine the provisional application of a particular treaty from the source of obligations as provided therein. Otherwise, if recourse to alternative sources should be had, the analysis of legal effects should be guided and determined by the unequivocal indication by a State that it accepted the provisional application of a treaty, as expressed through a clear mode of consent. The draft guidelines should therefore be further discussed, taking into account States' sensitivities, the uniqueness and contextual differences of various treaty provisions, and State practice in response to such differences.

33. *The delegate of Islamic Republic of Iran* stated firstly that the principle of consent that prevailed in international law, particularly in the law of treaties, was at the core of the topic. Draft guidelines were an appropriate form for the Commission's work on the topic, as they were flexible and non-binding. The provisional application of a treaty should not serve as a basis for restricting States' rights with regard to their future conduct in relation to that treaty. He further stated that the exceptional nature of the topic and the variety of States practice, as a result of different domestic laws, required a balance of approach on the need for the early meeting of treaty obligations and the national requirements of the concerned States. Also adding that the present work had not addressed the differences between the scope and subject matter of treaties, he added that a distinction should be drawn between multilateral treaties and bilateral treaties, as the latter could not, because of its nature and parties, be provisionally applied. He went on to state that the draft guidelines and the commentaries thereto did not address certain problematic issues, including the formulation of reservations in the case of provisional application. Lastly, it was doubtful whether all the elements of the Vienna Convention could be applied by way of analogy to the provisional application of treaties. A comprehensive study of the Vienna Convention should therefore be carried out in order to determine which of its provisions applied to provisional application.

34. *The delegate of Turkey* stated that one of the purposes of the draft guidelines was to provide greater clarity on the terminology. Indeed, an extensive use of terms for provisional application had led to confusion in practice. In that regard, the model clauses, in addition to the guidelines, to be provided by the Commission, could also contribute to the consistent use of terms.

35. *The delegate of Indonesia* stated that the 1969 Vienna Convention on the Law of Treaties was the basis on which the Commission should develop a mechanism or a set of guidelines. Voicing support for guideline 11, which provided flexibility to a State to confirm to its international constitutional rules, he added that it was indeed the sovereign right of States to decide on what was best for them concerning the provisional application of treaties.

36. *The delegate of Viet Nam* stated that he supported the early completion of the guidelines to meaningfully assist States in the development of consistent practices regarding their

provisional application of treaties, despite the non-binding nature of the guidelines. However, clarification was needed on a number of issues, including on the form of agreement reflected in draft guideline 4(b). An example might be where determining the provisional application was based on an international organization's resolution that had been adopted by the majority of State parties, while some States had voiced their opposition to such a provisional application. In that regard, s/he asked how that treaty would be applied to such States. If that treaty was provisionally applied to the opposing States despite their opposition, he asked whether the national sovereignty of the States in question would be negatively affected. He further noted that regarding Draft Guideline 11 (Agreement to provisional application with limitations deriving from internal law of States or rules of international organizations), more details should be given concerning legal consequences in cases where a State or international organization made a declaration on the provisional application of a treaty while other States or international organizations did not express clear acceptance of that declaration, and on the rule that would apply in cases where a State or international organization was bound by a declaration and must provisionally apply the treaty, whereas other States or organizations had not made any such declarations and were under no obligation to provisionally apply the treaty. Lastly, the phrase "between the States or international organizations concerned" should be replaced with "between the provisionally applying States or international organizations" throughout the text.

D. COMMENTS AND OBSERVATIONS OF AALCO SECRETARIAT

37. The Secretariat of AALCO commends the work of the Drafting Committee and its Chairperson, Mr. Aniruddha Rajput, in working on draft guidelines 5 and 10, as had been proposed by the Special Rapporteur in his third and fourth reports⁴⁸, respectively, and further revising and consolidating draft guidelines 1 to 11, with commentaries thereto, to assist Member States concerning the law and practice on the provisional application of treaties. The Secretariat further acknowledges the commendable work of the Special Rapporteur, Mr. Juan Manuel Gómez-Robledo, in the previous 4 Reports on the topic, which has enabled the present set of guidelines to finally come into existence.

38. With regard to the present set of draft guidelines, 1-11, as adopted by the Commission, the Secretariat takes note of and extends its appreciation towards the extension of the scope of the draft guidelines to include treaties to which international organizations are a party. It is further pertinent to note that the draft guidelines recognize the central importance of article 25 of the 1969 and the 1986 Vienna Conventions. The reference to "other rules of international law", which reflects the understanding within the Commission that other rules of international law, including those of a customary nature, may also be applicable to the provisional application of treaties.

39. The Secretariat acknowledges and appreciates the expansion of the guideline on non-invocation of internal laws of a State or internal rules of an international organization as a justification for failure to perform international obligations arising from the provisional application of a treaty or a part of a treaty, into three separate guidelines.⁴⁹ It now provides

⁴⁸ A/CN.4/687 (third report), and A/CN.4/699 and Add.1 (fourth report).

⁴⁹ Draft guidelines 9, 10, and 11.

better attention to the rules of non-invocation of the justification of violation of a provision of a State's internal law or international organization's internal rules regarding competence to agree to the provisional application of treaties as invalidating its consent unless that violation was manifest and concerned a rule of their internal law of fundamental importance. It further secures the right of a State or an international organization to agree in the treaty itself or otherwise to the provisional application of the treaty or a part of the treaty with limitations deriving from the internal law of the State or from the rules of the organization – and thus, offering a much better clarity to the entire concept.

40. The Secretariat further commends the work of the Committee on draft guideline 5, on the possibility of provisional application by way of unilateral declaration. It appreciates the inclusion of the concept within draft guideline 4, and modifying the position that *such declaration has to take place only within the context of an agreement between the parties* [emphasis added]. This is made clearer by the fact that the text refers to a “declaration by a State”, as opposed to “unilateral declaration”, so as to distinguish the two.

41. However, regarding draft guideline 6 (“The provisional application of a treaty or a part of a treaty produces the same legal effects as if the treaty were in force between the States or international organizations concerned”), the Secretariat wishes to note that further clarity is needed in this regard on the distinction between the legal effects of a provisionally applied treaty, and one in full force. The two do not necessarily have the same effect, for example, in the case of termination of treaties. The Commentary on the draft guidelines also mentions that “As a matter of principle, provisional application is not intended to give rise to the whole range of rights and obligations that derive from the consent by a State or an international organization to be bound by a treaty or a part of a treaty. Provisional application of treaties remains different from their entry into force, insofar as it is not subject to the same rules of the law of treaties in situations such as termination or suspension of the operation of treaties provided for in Part V, section 3, of the 1969 Vienna Convention. Instead, Article 25, paragraph 2, allows for a very flexible way to terminate the provisional application of a treaty or a part of a treaty, without prejudice to the question of responsibility for breach of an obligation arising under a treaty or a part of a treaty that is provisionally applied”.⁵⁰ Therefore, although the substantive legal effects in the two situations may be the same, the procedural effects would differ. Therefore, there is a need that the said guideline (draft guideline 6) is reflective of this matter. Perhaps even using the initial suggestion of using the wordings, “the agreement to provisionally apply a treaty or a part of a treaty produces a legally binding obligation to apply that treaty or part thereof”, instead of “produces the same legal effects” would be more helpful.⁵¹ For example, it needs to address issues such as whether provisional application means that the treaty has become binding, or whether provisional application only has permissive powers. Further, clarity may be needed on whether the difference in the legal effects of provisional application existed in cases of reservation to treaties, State succession or other special situations.

⁵⁰ General Commentary on Provisional Application of Treaties, Chapter V, A/72/10, p. 140, available at: <<http://legal.un.org/docs/?path=../ilc/reports/2017/english/chp5.pdf&lang=EFSRAC>>.

⁵¹ See General Commentary on Provisional Application of Treaties, Chapter V, A/72/10, p. 139, available at: <<http://legal.un.org/docs/?path=../ilc/reports/2017/english/chp5.pdf&lang=EFSRAC>>.

42. The Secretariat further notes that the situation where treaties do not automatically become law of the land (the specific situation of Dualist States), must be taken into account and adjusted appropriately in the current set of rules.

43. The Secretariat recommends that the present addressing of the relationship of the guidelines with the provisions of the two Vienna Conventions needs further clarity and elaboration.

44. Further clarity would be useful in the case of effect of termination of provisional application, especially where the said treaty is breached by one of the parties.

45. Further, in view of the challenges involved in the provisional application of treaties, it would be useful if the Committee could come up with model clauses, which would include concrete examples of State practice and explanations.

46. A further explanation of the forms of agreement⁵² would also be much useful. For example, in what situation a resolution of, or a declaration by an international organization may be considered an agreement on provisional application? To a great extent the provisional application of treaties is a matter within the competence of a State's constitutional law. Therefore, the existence of an agreement to provisionally apply a treaty may not be readily presumed. Model provisions in this regard could be indeed helpful.⁵³

47. Lastly, if in the next session some more guidance on the specific nature of the temporary application of international treaties could be provided, it would give more clarity on the situation of provisional application of treaties vis-à-vis the application of a treaty that is in full force.

48. To sum it up, it may be stated that the present efforts by the Special Rapporteur, Mr. Juan Manuel Gómez-Robledo, as well as the Drafting Committee, in laying down and explaining the scope of the provisional application of treaties, and especially in making it more lucid as compared to the corresponding articles of the Vienna Convention, as well more comprehensive by including the position of international organizations when they are parties to a treaty, is indeed appreciation worthy. Yet, as this is a work in progress, there are a few lacunae that need to be addressed. The Member States could discuss the following issues in order to guide the future work of action of the Commission in this regard:

1. Could draft guideline 6 ("The provisional application of a treaty or a part of a treaty produces the same legal effects as if the treaty were in force between the States or international organizations concerned"), be replaced with the wordings, "the agreement to provisionally

⁵² Draft guideline 4.

⁵³ "...declaration must be clearly accepted by the other States or international organizations concerned, as opposed to mere non-objection. Most existing practice is reflected in acceptance expressed in written form. The draft guideline retains a certain degree of flexibility to allow for other modes of acceptance on the condition that it is expressed clearly. The Commission avoided the use of the word "unilateral" in order not to confuse the rules governing the provisional application of treaties with the legal regime of the unilateral acts of States". See General Commentary on Provisional Application of Treaties, Chapter V, A/72/10, available at: <<http://legal.un.org/docs/?path=../ilc/reports/2017/english/chp5.pdf&lang=EFSRAC>>.

apply a treaty or a part of a treaty produces a legally binding obligation to apply that treaty or part thereof”, to better reflect the existing position?

2. Is there a need of a draft guideline to further explain the conditions for the provisional application of a treaty where the State concerned is a “Dualist State”?

3. Does the draft guideline 8 (“termination upon notification of intention not to become a party”), need modification to be made more comprehensive, in order to explain all situations where the provisional application of a treaty can be terminated, like where the said treaty is breached by one of the parties?

4. Is there the need for model provisions to exemplify the “forms of agreement” as provided under draft guideline 4? For example, in what situation a resolution of, or a declaration by an international organization may be considered an agreement for provisional application?

5. Is there a need for a provision to distinguish between the provisional application of treaties entered into by States, and those where international organizations are also parties, wherever such differences may exist?

6. What is the specific nature and resulting obligations of the temporary application of international treaties?

VII. PROTECTION OF THE ATMOSPHERE

A. BACKGROUND

1. At the Sixty-Third Session of the International Law Commission (2011), the Commission endorsed the inclusion of the topic “Protection of the atmosphere” in its long-term programme of work.

2. The topic “Protection of the Atmosphere” was decided to be included at the Sixty-Fifth Session of the International Law Commission in 2013. Mr. Shinya Murase was appointed as the Special Rapporteur for this topic. This topic was included in its programme on the understanding that it shall not interfere with relevant political negotiations, including on climate change, ozone depletion, and long-range transboundary air pollution. It was the understanding that the topic shall not deal with, but is also without prejudice to, questions such as, liability of States and their nationals, the polluter-pays principle, the precautionary principle, common but differentiated responsibilities, and the transfer of funds and technology to developing countries, including intellectual property rights. Certain specific substances, such as black carbon, tropospheric ozone, and other dual-impact substances, which are the subject of negotiations among States, shall be excluded from the study. It was also agreed that this project should not attempt to “fill” gaps in the existing treaty regimes.

3. At its Sixty-Eighth Session in 2016, the International Law Commission had before it the Third Report⁵⁴ submitted by the Special Rapporteur, Mr. Shinya Murase, which, building upon the previous two reports, analyzed several key issues relevant to the topic, namely, the obligations of States to prevent atmospheric pollution and mitigate atmospheric degradation and the requirement of due diligence and environmental impact assessment. The report also explored questions concerning sustainable and equitable utilization of the atmosphere, as well as the legal limits on certain activities aimed at intentional modification of the atmosphere. Consequently, 5 draft guidelines were proposed. The Commission decided to send all the draft guidelines and a preambular paragraph proposed by the Special Rapporteur to the Drafting Committee. These draft guidelines, along with the preambular paragraph, as well as the commentaries to the guidelines, as formulated by the Drafting Committee were provisionally adopted by the Commission at its Sixty-Eighth Session.⁵⁵

4. At its Sixty-Ninth Session, International Law Commission had before it the Fourth Report submitted by the Special Rapporteur, Mr. Shinya Murase (A/CN.4/705), in which building on the previous three Reports, the Special Rapporteur analyzed the interrelationship between international law on the protection of the atmosphere and other fields of international law, namely, international trade and investment law, the law of the sea, and international human

⁵⁴ A/CN.4/692.

⁵⁵ Draft guidelines 3, 4, 5, 6 and 7, and a preambular paragraph were provisionally adopted by the Commission. See “Text of the draft guidelines on the protection of the atmosphere, together with preambular paragraphs, provisionally adopted so far by the Commission”, in Chapter VIII – Protection of the Atmosphere, available at: <<http://legal.un.org/ilc/sessions/68/>>.

rights law.⁵⁶ The Commission subsequently decided to refer draft guidelines 9 to 12, as proposed by the Special Rapporteur, to the Drafting Committee. The Commission finally considered the report and provisionally adopted draft preambular paragraphs 3bis, 4bis and 6 and draft guideline 9, together with commentaries thereto.⁵⁷

B. CONSIDERATION OF THE TOPIC AT THE SIXTY-NINTH SESSION OF THE COMMISSION (2017)

5. After summarizing the views of the Member States at the debate held in the Sixth Committee of the General Assembly, at its Seventy-First Session, on the draft guidelines provisionally adopted by the Commission, the Special Rapporteur in the present Report went on to analyze the interrelationship between international law on the protection of the atmosphere and other fields of international law, namely, international trade and investment law, the law of the sea, and international human rights law. Building upon the previous three Reports, the Fourth Report proposed four guidelines on the interrelationship between the rules of international law relating to the protection of the atmosphere and other relevant rules of international law, as mentioned above.

6. The Special Rapporteur further indicated that in 2018 he expected to address: (a) implementation (at the level of national law); (b) compliance (at the level of international law); and (c) specific features of dispute settlement related to the law on the protection of the atmosphere. He also hoped to conclude the first reading of the draft guidelines at the next session.

⁵⁶ The Special Rapporteur, however, mentions that to analyze their interrelationship is not in any way intended to expand the scope of the topic under draft guideline 2, as provisionally adopted by the Commission.

Guideline 2 Scope of the guidelines

1. The present draft guidelines [contain guiding principles relating to] [deal with] the protection of the atmosphere from atmospheric pollution and atmospheric degradation.
2. The present draft guidelines do not deal with, but are without prejudice to, questions concerning the polluter-pays principle, the precautionary principle, common but differentiated responsibilities, the liability of States and their nationals, and the transfer of funds and technology to developing countries, including intellectual property rights.
3. The present draft guidelines do not deal with specific substances, such as black carbon, tropospheric ozone and other dual-impact substances, which are the subject of negotiations among States.
4. Nothing in the present draft guidelines affects the status of airspace under international law nor questions related to outer space, including its delimitation.

See Shinya Murase, Special Rapporteur, “Fourth Report on the Protection of the Atmosphere”, A/CN.4/705, (31 January 2017), p. 5.

⁵⁷ See Chapter VI – Protection of the Atmosphere, available at: <<http://legal.un.org/ilc/sessions/69/>>.

7. The debate in Plenary was preceded by a dialogue with scientists organized by the Special Rapporteur on 4 May 2017.⁵⁸ Members of the Commission found the dialogue and the contributions useful.⁵⁹

8. Based upon the principles of the integrative approach, sustainable development and mutual supportiveness, the Special Rapporteur proposed draft guideline 9.

“Draft guideline 9

Guiding principles on interrelationship

In line with the principle of interrelationship, States should develop, interpret and apply the rules of international law relating to the protection of the atmosphere in a mutually supportive and harmonious manner with other relevant rules of international law, with a view to resolving conflict between these rules and to effectively protecting the atmosphere from atmospheric pollution and atmospheric degradation.”⁶⁰

9. International law related to the protection of atmosphere may be considered as an autonomous regime, but in no way is a “self-contained” or a “sealed” regime. It exists and functions in relation to other fields of international law. Fragmentation of international law is therefore widely acknowledged as a necessary challenge that must be overcome in all phases of the international legal process - that is, formulation, interpretation/application and implementation. The generalist or integrative approach, which cuts across the boundaries of special regimes, is thus indispensable in today’s efforts by the Commission to codify and progressively develop international law. The enormous growth in the number of treaties in all of the specialized fields today, on the other hand, has also led to “treaty congestion” or “treaty inflation”.⁶¹ The multitude of conventions notwithstanding, they are faced with significant gaps as well as overlaps because there has been little or no coordination or harmonization and, therefore, no sufficient coherence among them. The need to enhance synergies among the existing conventions has been emphasized repeatedly and the Commission should seize upon this opportunity, as it can play an important role in that regard.⁶²

⁵⁸ The dialogue with scientists on the protection of the atmosphere was chaired by Mr. Shinya Murase, Special Rapporteur. The dialogue included the following presentations: “Overview: ocean and the atmosphere” by Mr. Øystein Hov, President of the Commission for Atmospheric Sciences, World Meteorological Organization; “Transboundary air pollution, the United Nations Economic Commission for Europe” by Mr. Peringe Grennfelt, former Chairperson of the Working Group on Effects, Convention on Long-range Transboundary Air Pollution, Economic Commission for Europe; “Linkages between the oceans and the atmosphere” by Mr. Tim Jickells, Co-Chairperson of Working Group 38 of the Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection, World Meteorological Organization; and “Linking science with law for the protection of the atmosphere” by Mr. Arnold Kreilhuber, Head of the International Environmental Law Unit, Division of Environmental Law and Conventions, United Nations Environment Programme. The dialogue was followed by a question and answer session. The summary of the informal dialogue is available at: <<http://legal.un.org/ilc/sessions/69/>>.

⁵⁹ Chapter VI – Protection of Atmosphere, (A/72/10), p.148.

⁶⁰ Shinya Murase, p. 11.

⁶¹ See E. Brown Weiss, “International environmental law: contemporary issues and the emergence of a new world order”, *Georgetown Law Journal*, vol. 81 (1993), pp. 675-710, at pp. 697-702; S. Murase and others, “Compliance with international standards: environmental case studies”, in *Proceedings of the 89th Annual Meeting of the American Society of International Law: Structures of World Order* (Washington, D.C., American Society of International Law, 1995), pp. 206-224.

⁶² A/CN.4/667, paras. 17-18.

10. The relevant relationships fall into two general types: *[r]elationships of interpretation* [and] *[r]elationships of conflict*.” The former is “the case where one norm assists in the interpretation of another”. In such a case: “A norm may assist in the interpretation of another norm for example as an application, clarification, updating, or modification of the latter. In such a situation, both norms are applied in conjunction.” The latter “is the case where two norms that are both valid and applicable point to incompatible decisions so that a choice must be made between them”. This conclusion recalls that: “The basic rules concerning the resolution of normative conflicts are to be found in the 1969 Vienna Convention.” Further, with regards to the principle of harmonization, it is a generally accepted principle that when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations.

11. With regards to the principle of “mutual supportiveness”, it may be stated that the concept has developed at least two normative dimensions: first, one that requires States to negotiate in good faith with a view to preventing *ex ante* possible conflicts; and, second, to interpret, apply and implement relevant rules in a harmonious manner in order to resolve *ex post* actual conflicts to the extent possible. The concept of “sustainable development”, which itself is a cornerstone of international law, links long-term economic growth and livelihoods to the prevention of irreparable harm to the human environment necessary for life. This parallels the core idea of mutual supportiveness, which connects economic development and environmental protection. While the two concepts are not identical, there exists a close alliance of mutual supportiveness and sustainable development, and a certain degree of overlap.

12. After analyzing, firstly, in reasonable details the relevant components of the legal regimes of international trade law and international investment law, including the dispute resolution mechanisms within them, which relate to their inter-relationship with protection of environment – the Special Rapporteur stressing on the need to reconcile the differences between free trade and foreign investment on the one hand, and the protection of environment on the other hand, proposed draft guideline 10, to address the situation internationally and within a single instrument.

“Draft guideline 10

Interrelationship between the law on the protection of the atmosphere and international trade and investment law

States should take appropriate measures in the fields of international trade law and international investment law to protect the atmosphere from atmospheric pollution and atmospheric degradation, provided that they shall not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade or foreign investment, respectively. In order to avoid any conflict, States should ensure that interpretation and application of relevant rules of international law conform to the principle of mutual supportiveness.”⁶³

⁶³ Shinya Murase, p. 25.

13. How to reconcile conflicts between trade and environment-related obligations of States has increasingly become an issue of serious debate in international law. In considering questions of trade versus environment, it is important to distinguish between two situations: one is the case in which the measures in question have been taken by a State in accordance with the applicable multilateral environmental agreements, and another the case in which the measures have been taken merely on the basis of the State's domestic law. In the former case, coordination between two treaties should be settled in accordance with articles 30 and 31 of the Vienna Convention, while in the latter case these are basically the State's unilateral measures that can be deemed either as "opposable" or "non-opposable" in international law.

14. The first paragraph of the preamble of the Marrakesh Agreement provides that the aim of WTO is to reconcile trade and development goals with environmental needs "in accordance with the objective of sustainable development". It is important also to further note that many decisions of the Dispute Settlement and Appellate Bodies of the WTO have contained the mutual supportiveness between trade and environment regimes as the central principles. Free trade agreements are also increasingly incorporating mutual supportiveness for dealing with the interrelationship between trade and the environment. Further, as in the field of international trade law, there is a growing awareness in international investment law regarding the importance of sustainable development and mutual supportiveness in the protection of investment and the protection of the environment.

15. Even though in physical terms the sea and the atmosphere are closely linked in specific processes that determine the character of ocean-atmosphere interaction, the Special Rapporteur, in view of the fact that the inter-relationship between the sea and atmosphere, as covered under the United Nations Convention on the Law of the Sea, is limited and unilateral (one way from the atmosphere to the oceans and not the other way around), stressing on the requirement of further efforts by the international community to overcome such negative conflicts within the relevant international law, has proposed draft guideline 11.

"Draft guideline 11

Interrelationship of law on the protection of the atmosphere with the law of the sea

1) States should take appropriate measures in the field of the law of the sea, taking into account the relevant provisions of the United Nations Convention on the Law of the Sea and related international instruments, to protect the atmosphere from atmospheric pollution and atmospheric degradation and to deal with questions of maritime pollution from or through the atmosphere. In order to avoid any conflict, States should ensure that development, interpretation and application of relevant rules of international law conform to the principle of mutual supportiveness.

2) States and competent international organizations should consider the situations of small island States and low-lying States with regard to the baselines for the delimitation of their maritime zones under the law of the sea."⁶⁴

⁶⁴ Shinya Murase, p. 38.

16. The sea and the atmosphere, as physical processes are well-connected, affecting each other immensely. Many human activities nowadays are responsible for global warming, which causes the temperature of the oceans to rise, which in turn results in extreme atmospheric conditions of flood and drought, as well as mega typhoons. Also, greenhouse gas emissions from ships have been increasing in recent years at a high rate, and have contributed to global warming and climate change. One of the most profound impacts of atmospheric degradation on the sea is the rise in sea level caused by global warming. The 2009 study by the International Maritime Organization (IMO) on greenhouse gas emissions classified such emissions from ships into four categories, namely: emissions of exhaust gases, cargo emissions, emissions of refrigerants and other emissions.⁶⁵ The Fifth Assessment Report of the Intergovernmental Panel on Climate Change estimates that the global mean sea-level rise is likely to be between 26 cm and 98 cm by the year 2100.⁶⁶ That degree of change in sea level may pose a potentially serious, maybe even disastrous, threat to many coastal States, especially those with large, heavily populated and low-lying coastal areas, as well as to small, low-lying island States.

17. However, the relevant provisions of the United Nations Convention on the Law of the Sea and other related instruments address the atmosphere as long as it is within territorial airspace, and as long as it affects the marine environment. They do not address the atmosphere itself, nor situations where the oceans may affect the atmosphere. The interrelationship between the sea and the atmosphere covered by the United Nations Convention on the Law of the Sea is limited and unilateral (one way from the atmosphere to the oceans, but not the other way around), requiring further efforts by the international community to overcome such negative conflicts within the relevant international law.

18. Human rights instruments today are increasingly including protection of environment, and the human rights courts too are giving a more and more liberal interpretation to even the general provisions of such instruments, in order to bring in environmental protection within the ambit of such protection, even in places where the same may not have been explicitly mentioned. Nevertheless, international law related to the protection of the atmosphere may only coordinate appropriately with international human rights law where elements of law of the protection of the atmosphere are considered “anthropocentric” (human-centric), rather than simply being eco-centric in nature. That is, in order for the human rights instruments to apply in a way to protect the environment in general, and the atmosphere in particular, *a direct link between the atmospheric degradation and the consequent impairment of a protected human right must be established*. Secondly, the adverse effects of atmospheric degradation *must attain a certain minimum level* if they are to fall within the scope of international human rights law. The assessment of that minimum standard is relative and depends on the content of the right to be invoked, and all the relevant circumstances of the case, such as intensity and duration of the nuisance, and its physical or mental effects. Thirdly, and most importantly, is the necessity to establish a causal link between the action or omission of a State, on the one hand, and the

⁶⁵ Buhaug and others, *Second IMO GHG Study 2009* (London, IMO, 2009), p. 23. See also T.W.P. Smith and others, *Third IMO GHG Study* (London, IMO, 2014), executive summary, table 1. M. Righi, J. Hendricks and R. Sausen, “The global impact of the transport sectors on atmospheric aerosol in 2030 — Part 1: land transport and shipping”, *Atmospheric Chemistry and Physics*, vol. 15 (2015), pp. 633-651.

⁶⁶ Intergovernmental Panel on Climate Change, *Climate Change 2013: The Physical Science Basis. Working Group I Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge, United Kingdom, Cambridge University Press, 2013), p. 1180.

atmospheric degradation, on the other. Another issue in this regard is the problem in the extra-jurisdictional application of human rights law. That is, there happens to exist a disconnect between the application of environment law on the one hand, and human rights law on the other. While law on atmosphere is to be applied not only to the States of victims but also to the States of the origin of the harm, the scope of application of human rights treaties is by and large limited to the persons subject to a State's jurisdiction.

19. Also, bearing in mind the interests of future generations, including with a view to human rights protection. The goal is to ensure that the planet remains habitable for future generations. In taking measures to protect the atmosphere today, it is important to take into account the long-term conservation of the quality of the atmosphere.

20. Based broadly on the above pointers, especially taking into consideration the interests of vulnerable groups such as indigenous people belonging to low lying areas and islands, women, children, and the future generation, which may be maximum affected by the degradation of the atmosphere, the Special Rapporteur has proposed Draft Guideline 12, as follows:

Draft guideline 12

Interrelationship of law on the protection of the atmosphere with human rights law

- 1) States should make best efforts to develop, interpret and apply international human rights norms in a mutually supportive manner with rules of international law relating to the protection of the atmosphere, with a view to effectively protecting the atmosphere from atmospheric pollution and atmospheric degradation.
- 2) States should make best efforts to comply with international human rights norms in developing, interpreting and applying the rules and recommendations relevant to the protection of the atmosphere from atmospheric pollution and atmospheric degradation, particularly with regard to the human rights of vulnerable groups of people, including indigenous people, people of the least developed developing countries, and women, children and the elderly as well as persons with disabilities.
- 3) States should consider, in developing and interpreting and applying the relevant rules of international law, the impact of sea-level rise on small island and low-lying States, particularly in matters relating to human rights and migration.
- 4) States should also take into account the interests of future generations of humankind in the long-term conservation of the quality of the atmosphere.

21. At its 3359th meeting, on 17 May 2017, the Commission, upon the completion of its debate on the topic at the Sixty-Ninth Session, decided to refer draft guidelines 9, 10, 11 and 12, as contained in the Special Rapporteur's Fourth Report (A/CN.4/705) to the Drafting Committee, taking into account the debate in the Commission. The Special Rapporteur, when summing up the debate, suggested reformulations of the proposed draft guidelines, taking into account the

various comments and observations made in the plenary, in particular to streamline the draft guidelines into a single guideline.⁶⁷

22. Special Rapporteur prepared a revised working paper, which constituted the basis of discussions in the Drafting Committee. This proposal sought to restructure the draft guidelines further, by presenting, in one paragraph, aspects of the interrelationship between the rules of international law relating to protection of the atmosphere and other relevant rules of international law, particularly the rules of international trade and investment law, of the law of the sea, and of international human rights law. It grounded the interrelationship in the Vienna Convention on the Law of Treaties, and in customary international law. The proposal contained a separate paragraph relating to the interpretation and application of relevant rules of international human rights law with respect to persons belonging to vulnerable groups. Additionally, the proposal reflected, in three separate preambular paragraphs, other elements concerning the close interaction between the atmosphere and the oceans, the situation of small-island and low-lying States, as well as the interests of future generations of humankind in the long-term conservation of the quality of the atmosphere.

Preambular paragraph 3 bis

Noting the close interaction between the atmosphere and the oceans,

Preambular paragraph 4 bis

Also aware, in particular, of the special situation of low-lying coastal areas and small-island developing States due to sea level rise,

Sixth preambular paragraph

Noting that the interests of future generations of humankind in the long-term conservation of the quality of the atmosphere should be fully taken into account,

Draft guideline 9

Interrelationship among relevant rules

1. The rules of international law relating to the protection of the atmosphere and other relevant rules of international law, including inter alia the rules of international trade and investment law, of the law of the sea, and of international human rights law, should, to the extent possible, be identified, interpreted and applied in order to give rise to a single set of compatible obligations, in line with the principles of harmonization and systemic integration, and with a view to avoiding conflicts. This should be done in accordance with the relevant rules set forth in the Vienna Convention on the Law of Treaties of 1969, including articles 30 and 31 (3) (c), and the principles and rules of customary international law.

⁶⁷ “Protection of the Atmosphere: Statement of the Chairman of the Drafting Committee”, 2 June 2017, p.2.

2. States should, to the extent possible, when developing new rules of international law relating to the protection of the atmosphere and other relevant rules of international law, endeavor to do so in a harmonious manner.

3. When applying paragraphs 1 and 2, special consideration should be given to persons and groups particularly vulnerable to atmospheric pollution and atmospheric degradation. Such groups may include, inter alia, indigenous people, people of the least developed countries and people of small-island and low-lying States affected by sea-level rise.⁶⁸

C. SUMMARY OF THE VIEWS EXPRESSED BY AALCO MEMBER STATES AT THE UN GENERAL ASSEMBLY SIXTH COMMITTEE AT ITS SEVENTY SECOND SESSION HELD IN 2017⁶⁹

23. *The delegate of Japan* stated that the Special Rapporteur had invited ILC members to the dialogue session with scientists, facilitating a scientific understanding of the topic. That in turn enabled the Commission to study the matter from a general international law perspective. He further welcomed draft guideline 9 which stipulated the “interrelationship among relevant rules” as a means to avoid fragmentation. Paragraph 1 of the draft guidelines also noted that international law on the protection of the atmosphere and other relevant rules of law should be identified, interpreted and applied to give rise to one set of compatible obligations. Paragraph 3 highlighted the plight of those particularly vulnerable to atmospheric pollution and degradation, he said, voicing appreciating for its stipulation on the obligations of special care for such people with respect to human rights.

24. *The delegate of Singapore* stated that as focusing on atmospheric pollution and degradation suffered by the current generation had merit, a reference should be made to it in the preamble. Regarding the various draft guidelines it stated that a) it was questionable if draft guideline 9 had practical value; “mutual supportiveness” in paragraph 7 of the commentary was not clearly defined and more of a policy-making tool than legal principle; draft guideline was problematic owing to the “disconnect” in application of rules of international law relating to the atmosphere and human rights law. Further consideration was required on whether extraterritorial jurisdiction in respect of human rights obligations should apply in situations of trans-boundary atmospheric damage.

25. *The delegate of India* recalled the four additional draft guidelines proposed by the Special Rapporteur, including draft guideline 9 on the guiding principles on interrelationship and draft guideline 11 concerning the Law of the Sea, among others. Regarding draft guideline 9, which was adopted, and given that each field of international law had its own subject matter, scope and conditions, in-depth study was required to find the relevant and common factors between the protection of the atmosphere and other fields of international law.

⁶⁸ Protection of the Atmosphere – Text of Draft Guideline 9 and Preambular Paragraphs as Provisionally Adopted by the Drafting Committee During the Sixty-Ninth Session, A/CN.4/L.894, 30 May 2017.

⁶⁹ All statements made by Member States can be found at <<http://www.un.org/press/en/content/sixth-committee>>.

26. *The delegate of Thailand* addressed the interrelationship between rules of international law relating to the protection of the atmosphere and various other rules of international law. Those included, among others, international trade and investment law, the Law of the Sea, and international law on human rights. The Commission's work raised the visibility and importance of the issue itself, as well as the complex legal issues surrounding it, including the issue of fragmentation. Of particular interest was paragraph 1 of draft guideline 9, she said, voicing support for the suggestion that all relevant rules of international law should be identified, interpreted, and applied in way that led to a single set of compatible obligations.
27. *The delegate of South Africa* stated that the issue of protection of atmosphere should be addressed by international law as far as possible. It was evident that the area of protection of atmosphere had evolved through treaty making as well as State practice, giving rise to customary law norms. Nevertheless, such development had not always been systematic and consistent. Specialized legal instruments had been developed that addressed particular aspects of human interference with the atmosphere, without necessarily considering the body of international environmental law holistically.
28. *The delegate of Turkey* said that the guidelines the Commission was developing might bring added value to that topic. However, it should still acknowledge work already concluded, including existing treaties. The Commission should focus on better streamlining the existing legal framework and avoid imposing additional obligations on States. Guideline 4, on environmental impact assessment, obliged States to ensure that an environmental impact assessment was undertaken of proposed activities under their jurisdiction or control that were likely to cause a significant adverse impact in terms of atmospheric pollution and atmospheric degradation. That guideline, which must be treated with caution, required further consideration.
29. *The delegate of the Republic of Korea* voiced support for the insertion of three preamble paragraphs. The texts reflected a consideration of the close relationship between the atmosphere and the oceans and focused on the special situation of low-lying coastal areas and small-island developing States due to rising sea levels. In addition, in the context of sustainable development, the texts highlighted the interests of future generations in the long-term conservation of the quality of the atmosphere. As well, guideline 9 embodied the idea that the three legal processes — identification, interpretation and application of the rules of international law related to the protection of the atmosphere — should be considered in a harmonious and integrated manner.
30. *The delegate of the People's Republic of China* stated that the existing rules of international law would be needed for draft guideline 9 to apply. Noting that there was no applicable international treaty in that field, he said the article lacked the backing of international practice. While the draft guideline might have some utility for theoretical purposes, it did not offer much practical value. The Commission might wish to further consider the need to retain it.

31. *The delegate of Senegal* stated that she acknowledged the complexity related to the technical nature of the topic. The Report examined concurrent application of international law, as well as international trade law, investment law and the Law of the Sea. The Special Rapporteur had sought to shed light on the scope and relevance of that issue. The various branches were interdependent and, once established and clarified, should help to overcome the risk of legal fragmentation. It was part of general international law, and the Commission, in probing the issue of protection of the atmosphere, should refer to the doctrine and case law of general international law. Overlapping of rules of existing law should be avoided. With regard to the link between environmental protection law and the Law of the Sea, the paper mills case on the Uruguay River [Pulp Mills on the River Uruguay (*Argentina v. Uruguay*)] was a perfect example, she said. Furthermore, developing countries should be the subject of special attention with regard to vulnerability and climate change.
32. *The delegate of Malaysia* noted that given the physical relationship between the atmosphere and the oceans, it should be noted that the United Nations Convention on the Law of the Sea only addressed atmosphere-related issues in a limited and unilateral way when it came to that relationship. Therefore, a new preambular paragraph was necessary to coordinate the laws on protection of the atmosphere and the oceans. Regarding the special situation of low-lying coastal areas and small islands, the delegate also voiced her support for the new preambular paragraph 6 as it addressed the disadvantaged geographical positions of the affected States. Regarding draft guideline 9, the list of laws reflecting the inter-linkages between various international laws should not be exhaustive and should be considered on a case-by-case basis.
33. *The delegate of Viet Nam* stressed that “Protection of the atmosphere” was a topic of pressing concern for the international community, said that the term “atmosphere” needed to be more clearly defined so as to distinguish it from other territorial domains. Clarification was needed on whether the scope of “atmosphere” should include the area above sea areas. It was also necessary to develop a guideline to deal with situations of overlap in the scope of application of the rules of the protection of the atmosphere and the existing rules on the protection of the environment in general.
34. *The delegate of Indonesia* stated that he was pleased to note the growing attention the Commission was paying to the issue of the environment. Voicing support for the statement made by the Marshall Islands on behalf of the Pacific small islands developing States, he underscored the comment that the Commission should not restrict itself to discussing traditional topics. Instead, it should look into other pressing concerns of the international community as a whole. The matter of protecting the atmosphere was a difficult legal issue, with a number of legal instruments in place. Those legal instruments were piecemeal, and not all of them had been warmly welcomed by States. His delegation was concerned that a number of important issues in the field of environmental law had been excluded from the Commission’s deliberations, such as the polluter-pays principle and the principle of common but differentiated responsibilities. The Commission was in a wonderful position to offer to States to evaluate or synergize between the existing legal instruments. It was the most appropriate body to close the legal gaps between those instruments. His delegation

further believed that the preambular paragraphs of the draft guidelines on the protection of the atmosphere should include a reference to the common heritage of humankind. That powerful, symbolic principle should guide the Commission in its future work and deliberations.

35. *The delegate of Sri Lanka* stated that his delegation welcomed the Special Rapporteur's approach to dealing with the interrelationship between protection of the atmosphere and other relevant rules of international law and wished to underline the inextricable linkage between protection of the atmosphere and the oceans. He also welcomed the recognition of the fact that special consideration should be given to persons and groups that were particularly vulnerable to atmospheric pollution and atmospheric degradation. The invocation of the fundamental principle of intergenerational equity which had been recognized in the jurisprudence of the International Court of Justice, namely that the global commons were held in trust for the benefit of future generations, was most pertinent.

D. COMMENTS AND OBSERVATIONS OF AALCO SECRETARIAT

36. The Secretariat of AALCO would like to express its appreciation to Prof. Shinya Murase, the Special Rapporteur on the topic "Protection of the Atmosphere" for his Fourth Report, which was considered by the Commission at its session in 2017. It welcomes draft preambular paragraphs 3bis, 4bis and 6 and Draft Guideline 9, together with commentaries thereto, as provisionally adopted by the Commission.

37. The Secretariat in this regard first and foremost acknowledges the essential interrelationship between rules of international law relating to the protection of the atmosphere and other rules of international law, namely, international trade and investment law, the Law of the Sea, and international law on human rights, as brought forth in the report. It may be re-emphasized here that international law related to the protection of atmosphere may be considered as an autonomous regime, but in no way is a "self-contained" regime, as aptly noted by the Special Rapporteur in his report. The Secretariat fully supports the Special Rapporteur when he says that the current international law on the protection of the atmosphere exists and functions in relation to other fields of international law. Fragmentation of international law is therefore widely acknowledged as a necessary challenge that must be overcome in all phases of the international legal process, that is, formulation, interpretation/application and implementation. The generalist or integrative approach, which cuts across the boundaries of special regimes, is thus indispensable in today's efforts by the Commission to codify and progressively develop international law.

38. The Secretariat further commends the involvement of Atmospheric Scientists⁷⁰, which has made the discussions and outcomes of this session more relevant and up to date, as this is a highly technical subject.

⁷⁰ "Informal Meeting of the International Law Commission: Dialogue with Atmospheric Scientists (Third Session)", 4 May, 2017.

39. The Secretariat, however, wishes to note again draft guideline 2 “Scope of the Guidelines”⁷¹, in that the same has curtailed the scope of the topic. This restriction on the scope of analysis of this topic has also resulted in States being largely divided on the issue of the relevance of draft article 9, during the discussions in the Sixth Committee of the 72nd General Assembly Session. Many States have feared that the present drawing on the inter-relationship between international law related to the protection of the atmosphere on the one hand, and trade and investment law, law of the sea, and human rights law on the other, could create realistic danger of moving beyond the scope of the topic, as provided for in the guidelines. A meaningful expansion of the scope of draft guideline 2 might, therefore, be helpful in this regard.

40. The Secretariat, however, also notes that this work of the Commission has to take into serious account various longstanding instruments already providing general guidelines to States in matters relating to atmospheric protection. The objective of such an exercise must be to facilitate rather than complicate ongoing and future negotiations. Further, to come out with comprehensive provisions reflecting mutual supportiveness between protection of environment, trade and investment law, law of the sea, human rights law, and other, is a matter of considerable complexity, and hence, therefore, requires further research and work.

41. The Secretariat further states that given the technical and substantive nature of each of the topics dealt with by the Special Rapporteur in his Fourth Report, it would be more appropriate if the original proposal of the Special Rapporteur of having four separate guidelines, which would include three guidelines focusing on the comparisons of the protection of the atmosphere with each of the other branches of international law, is retained, and further developed, instead of having one single guideline inconclusively combining all the concepts in a piecemeal fashion.

42. The Secretariat suggests that more areas are included within the scope of the present analysis, which would make it more relevant and fruitful – for example, a better explanation of the role of ICSID in assisting developing countries when confronting large investors, trade in toxic waste, especially when the same are dumped into failed States, impact of accidents in the oceans, particularly those involving oil rigs, taking into account emergence of people’s rights in increasing number of human rights instruments, addressing the issue of the difference between small and low-lying developing nations, and other coastal States, bearing in mind that it is the issue of the very survival of the former States, and the issue of same contaminants being re-cycled between land/ocean and the atmosphere.

⁷¹ **Guideline 2 Scope of the guidelines**

1. The present draft guidelines [contain guiding principles relating to] [deal with] the protection of the atmosphere from atmospheric pollution and atmospheric degradation.
2. The present draft guidelines do not deal with, but are without prejudice to, questions concerning the polluter-pays principle, the precautionary principle, common but differentiated responsibilities, the liability of States and their nationals, and the transfer of funds and technology to developing countries, including intellectual property rights.
3. The present draft guidelines do not deal with specific substances, such as black carbon, tropospheric ozone and other dual-impact substances, which are the subject of negotiations among States.
4. Nothing in the present draft guidelines affects the status of airspace under international law nor questions related to outer space, including its delimitation.

43. Lastly, commending Preambular paragraph 4 *bis*, that makes reference to the special situation of low-lying coastal areas and small-island developing States due to sea level rise, the Secretariat would like to suggest that more emphasis is required on the legal implications of the rising sea level, and its grave impact on low-lying small island developing States, possibly in the form of an expansion of the original proposal of the Special Rapporteur in draft guideline 11 in the Fourth Report. Further it is recommended that the effect of climate change on oceans is a topic that warrants further discussions and research under this topic.

44. The above comments may be summarized to state that there is no doubt that a generalist or integrative approach, which cuts across the boundaries of special regimes, as reflected in the present report by the Special Rapporteur, as well as the draft article adopted by the Commission, is indispensable for the progressive development of international law. Yet, when it comes to integration of approaches towards a subject like the protection of atmosphere with other disciplines as complex and varied as international trade and investment law, law of the sea, or international human rights law, simply projecting a broad guideline on harmonized or mutually supportive manner of integration is not sufficient. Firstly, because these areas entail a number of key issues, which need devoted attention, research and lastly incorporation into the draft provisions. And secondly, because of the several ongoing regional and international efforts already being carried out in the subject of protection of atmosphere, including the wholesome approach (cross-linking the subject with other disciplines) being followed at various places, there is a risk of overlap or conflicting positions. Therefore, the Member States could discuss the following issues pertaining to the outcome of the discussions relating to the subject of “protection of atmosphere” at the Sixty-Ninth Session of the Commission, in order to guide the future work of action of the Commission in this regard:

1. How may the subject of protection of atmosphere be studied in an integrated manner, that is, the inter-relationship between itself and other branches of international law be analyzed, without necessarily producing overlapping or inconsistent positions or results with ongoing international and regional efforts in the protection of atmosphere, as well as within other branches of international law?

2. Should the “Scope of the Guidelines” under Draft Guideline 2 be expanded, for a comprehensive work by the Commission in this regard? Should additional sub-topics be added to make the present discussion more useful, such as the role of the present Investor-State Dispute Settlement system, impact of accidents in the oceans, and addressing the issue of the difference between small and low-lying developing nations, and other coastal States ?

3. In what form can the draft provisions best reflect and exemplify the comprehensive and integrated approach? That is, whether simply enumerating the “guiding principle of an integrative approach” is sufficient, or do we need detailed provisions in this regard?

VIII. CRIMES AGAINST HUMANITY

A. BACKGROUND

1. Since the emergence of International criminal law, three core crimes have emerged—genocide, war crimes and crimes against humanity. . Genocide has been codified by means of the 1948 Genocide Convention. War crimes have been codified by means of the “grave breaches” provisions of the 1949 Geneva Conventions and Protocol I. Yet no comparable treaty exists concerning crimes against humanity, even though the perpetration of such crimes remains an egregious phenomenon in numerous conflicts and crises worldwide.

2. The first international reference to the crime was found in the Hague Conventions. The “Martens Clause” of the 1899/1907 Hague Conventions made reference to the “laws of humanity and the ... dictates of public conscience” in the crafting of protections to persons in time of war. Later, the tribunals established at Nuremberg and Tokyo in the aftermath of the Second World War included as a component of their jurisdiction “crimes against humanity”. The principles of international law recognized in the Nuremberg Charter were reaffirmed in 1946 by the General Assembly, which also directed the International Law Commission to “formulate” those principles. The Commission then studied and distilled the Nuremberg principles in 1950, defining crimes against humanity as:

“murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.”

3. In 1993, the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) included “crimes against humanity” as part of its jurisdiction, as did the Statute for the International Criminal Tribunal for Rwanda in 1994. In 1996, the Commission defined “crimes against humanity” as part of its 1996 draft code of crimes against the peace and security of mankind, a formulation that would heavily influence the incorporation of the crime within the 1998 Rome Statute establishing the International Criminal Court (ICC).

4. At its sixty-sixth session in 2014, the International Law Commission decided to include the topic “Crimes against humanity” in its current programme of work and appointed Mr. Sean D. Murphy as its Special Rapporteur. At its sixty-seventh session in 2015, the Commission held a general debate concerning the Special Rapporteur’s first report and provisionally adopted four draft articles and commentaries thereto.⁷² At its sixty-eighth session in 2016, the Commission held a general debate on the Special Rapporteur’s second report⁷³ and provisionally adopted six additional draft articles and commentaries thereto.

⁷² See document A/CN.4/680 and Corr.1.

⁷³ A/CN.4/690

B. CONSIDERATION OF THE TOPIC AT THE SIXTY-NINTH SESSION OF THE COMMISSION (2017)

5. At the sixty-ninth session, the Commission had before it the third report of the Special Rapporteur (A/CN.4/704), which was considered at its 3348th to 3354th meetings, from 1 to 9 May 2017.

6. In his third report⁷⁴, the Special Rapporteur addressed extradition; *non-refoulement*; mutual legal assistance; victims, witnesses and other affected persons; relationship to competent international criminal tribunals; federal State obligations; monitoring mechanisms and dispute settlement; remaining issues; preamble; final clauses of a convention; and the future programme of work on the topic. The Special Rapporteur proposed seven draft articles and a draft preamble corresponding to the issues addressed in chapters I to VII and IX, respectively.

7. Chapter I of the report addresses rights, obligations and procedures applicable to the extradition of an alleged offender, based upon the different types of extradition provisions included in various treaties addressing crimes. Less detailed extradition provisions include a general obligation to consider the offences in the treaty to be extraditable offences in a State's existing extradition treaties and any future extradition treaty the State completes. More detailed extradition provisions, however, allow for the treaty itself to be used as a basis for extradition, and address a wide range of issues that can arise in the context of extradition, including: the inapplicability of the political offence exception; satisfaction of the requirements of national law in the extradition process; extradition of a State's own nationals; the prohibition on extradition when an individual will face persecution after extradition; and requirements of consultation and cooperation. Chapter I concludes by proposing a draft article addressing these points in the context of crimes against humanity.

8. Chapter II addresses the principle of *non-refoulement*. This principle, or the prohibition on returning an individual to a territory when there are substantial grounds for believing that he or she will be in danger of a specified harm, is found in a wide range of legal instruments, including conventions relating to refugees and asylum, human rights and criminal law. In such treaties, *non-refoulement* is triggered when there are substantial grounds for believing that the person will be in danger of persecution or other specified harm upon return, with the harm in question varying depending on the subject matter of the treaty. Though there are limited exceptions to the *non-refoulement* principle in conventions on refugees, including on grounds of national security, such exceptions are not included in more recent human rights treaties. Chapter II concludes by proposing a draft article providing for an obligation of *non-refoulement* in the context of crimes against humanity.

9. Chapter III addresses the rights and obligations of States regarding mutual legal assistance in connection with criminal proceedings, based upon the different types of mutual legal assistance provisions included in various treaties. Less detailed treaties include general obligations to afford the greatest possible measure of assistance. Treaties with more detailed provisions place some

⁷⁴http://legal.un.org/docs/index.asp?symbol=A/CN.4/704&referer=http://legal.un.org/ilc/guide/7_7.shtml&Lang=E

general obligations on all States parties, but also include “mini mutual legal assistance treaty” provisions. Such provisions essentially create a detailed, bilateral mutual legal assistance treaty relationship between States parties in circumstances where they do not otherwise have such a relationship (or when those States elect to use the mini mutual legal assistance treaty to facilitate cooperation). Mini mutual legal assistance treaty provisions address topics such as: transferring detained persons to another State to provide evidence; designating a central authority to handle mutual legal assistance requests; using videoconferencing for witnesses to provide testimony; and permissible and impermissible grounds for refusing mutual legal assistance requests. Chapter III concludes by proposing a draft article on mutual legal assistance most suited to issues related to crimes against humanity.

10. Chapter IV addresses the participation and protection of victims, witnesses and others in relation to proceedings within the scope of the present draft articles, as well as reparation for victims. Although prior treaties addressing crimes under national law often have not contained provisions concerning victims and witnesses, the most recent treaties do contain such provisions. Those treaties typically address the protection of victims and witnesses, as well as reparation for victims; they also sometimes address the participation of victims in legal proceedings undertaken against the alleged offender. Chapter IV concludes by proposing a draft article addressing these points.

11. Chapter V addresses the relationship of the present draft articles with the rights and obligations of States with respect to competent international criminal tribunals, such as the International Criminal Court. As a general matter, the present draft articles have been drafted so as to avoid any such conflicts. Even so, to avoid any unanticipated conflict, there is value in a provision that makes clear that the rights or obligations of a State under the constitutive instrument of a competent international criminal tribunal prevail over the rights and obligations of the State identified in the present draft articles. Chapter V concludes by proposing a draft article addressing this issue.

12. Chapter VI addresses obligations upon federal States. It reviews the practice by some States of making a unilateral declaration when signing or ratifying a treaty so as to exclude its application to part of their territories. In recent years, such declarations have been viewed with sufficient disfavour that some treaties have included articles precluding the ability of States to make such declarations. Chapter VI concludes by proposing a draft article addressing this issue.

13. Chapter VII addresses monitoring mechanisms and dispute settlement. Various monitoring mechanisms already exist that are capable of scrutinizing situations of crimes against humanity, either as such or in the context of the types of violations (such as torture) that may occur when such crimes are committed. If States wish to establish a new monitoring mechanism, numerous treaties, especially human rights treaties, provide for a monitoring mechanism body. This body can take the form of a committee, commission, court or meeting of States parties. In addition to monitoring mechanisms, many treaties also have dispute settlement clauses. These clauses will typically obligate States parties to negotiate in the case of a dispute. Should negotiations not succeed, such clauses provide for further methods of compulsory dispute settlement, including arbitration and resort to the International Court of Justice. Chapter VII concludes by proposing a draft article addressing dispute settlement.

14. Chapter VIII addresses other issues that have arisen in the course of discussions within the Commission relating to this topic, specifically concealment of crimes against humanity, immunity and amnesty. Chapter IX proposes a preamble which highlights several core elements that motivate and justify the present draft articles. Chapter X addresses the issue of final clauses, in the event that the present draft articles are transformed into a convention. The Commission typically does not include final clauses as a part of its draft articles and consequently no proposal is made in that regard. Even so, this chapter discusses possible choices available to States with respect to a final clause on reservations. Finally, chapter XI addresses a future programme of work on this topic, proposing that a first reading be completed in 2017 and a second reading in 2019.

15. At its 3354th meeting, on 9 May 2017, the Commission referred draft articles 11 to 17 as well as the draft preamble, as contained in the Special Rapporteur's third report, to the Drafting Committee. At its 3366th and 3377th meetings on 1 June and 19 July 2017, respectively, the Commission considered and adopted the two reports of the Drafting Committee on the draft preamble, draft articles 1 to 15, and the draft annex. It accordingly adopted the entire set of draft articles on crimes against humanity on first reading.

16. At its 3383rd and 3384th meetings, on 31 July 2017, the Commission adopted the commentaries to the draft articles on crimes against humanity. At its 3384th meeting, on 31 July 2017, the Commission decided, in accordance with articles 16 to 21 of its statute, to transmit the draft articles on crimes against humanity, through the Secretary-General, to Governments, international organizations and others for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 December 2018. At its 3384th meeting, on 31 July 2017, the Commission expressed its deep appreciation for the outstanding contribution of the Special Rapporteur, Mr. Sean D. Murphy, which had enabled the Commission to bring to a successful conclusion its first reading of the draft articles on crimes against humanity

C. SUMMARY OF VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPIC AT THE UN GENERAL ASSEMBLY SIXTH COMMITTEE AT ITS SEVENTY-SECOND SESSION⁷⁵ (2017)

17. *The delegate of the People's Republic of China* pointed out that many provisions of the draft articles lacked empirical analysis, as they derived mainly from analogous provisions of existing international conventions on international crimes and required a comprehensive review of the existing practice and *opinio juris* of States. Since "Peremptory norms of general international law" (*jus cogens*) was an ongoing topic of the Commission, he said that the issue of the character of such law warranted further studies.

18. He further reiterated reservations over the omission of the terms "committed in time of armed conflict" in respect to the definition of crimes against humanity in draft article 2. Regarding

⁷⁵ All the statements that are mentioned here as having been made by the Member States of AALCO at the UN General Assembly Sixth Committee at its session held in 2017 are available from: <https://www.un.org/press/en/2017/gal3560.doc.htm>; <https://www.un.org/press/en/2017/gal3559.doc.htm>; <https://www.un.org/press/en/2017/gal3557.doc.htm>; <https://www.un.org/press/en/2016/gal3535.doc.htm>; https://www.mfa.gov.sg/content/mfa/overseasmission/newyork/nyemb_statements/sixth_committee/2016/201611/press_20161101.html; <http://www.china-un.org/eng/hyyfy/t1506789.htm>

paragraph 8 of draft article 6, he argued that there were major differences between corruption, transnational organized crime, sale of children and financing of terrorism and crimes against humanity; the issue of legal persons was better left to the States in that last case.

19. *The delegate of Singapore* said that States had varying views on the precise scope and ambit of key articles related to the topic. He also mentioned that the topic would stand to benefit from further detailed consideration and the final outcome of the Commission's work should take into account States' views.

20. *The delegate of India* observed that the report on "Crimes against humanity" addressed a variety of issues, including extradition and the relationship to competent international criminal tribunals. Considering the existing international mechanisms available to deal with the topic of Crimes against humanity, such as the International Criminal Court, he indicated that the necessity of the Commission's work on that topic was not clear. He also cautioned that any work on the topic could lead to duplication of efforts already undertaken in the existing regimes.

21. *The delegate of Japan* observed that since the third report on Crimes against humanity mainly addressed procedural matters, the Commission's discussion had especially focused on the matter of mutual legal assistance. That discussion would help strengthen the horizontal relationship between States concerning the prevention and punishment of those crimes from a procedural aspect.

22. *The delegate of Thailand* said that developing a convention on the basis of the Commission's draft articles would help facilitate national prosecutions and strengthen international cooperation. While she supported, in principle, the obligation to prosecute or extradite in draft article 10, it was still unclear whether that obligation was or was not part of customary international law. Furthermore, since the draft articles were modelled on provisions of existing treaties, which addressed different types of crimes, whether or not they were compatible with the provisions related to crimes against humanity remained a subject of debate.

23. *The delegate of Sudan* expressed his concerns about the attempt to create a linkage with the Rome Statute. Drawing attention to the legal controversy regarding the International Criminal Court and "the big loopholes in the Rome Statute," he said that no agreement had been reached on a specific definition of crimes against humanity. Opinions on that had diverged even in the Preparatory Conference of the Rome Statute.

24. Furthermore, he opined that the draft articles should be independent of the Rome Statute as a staggering number of States had not acceded or ratified it, he continued. It was also premature to consider an international instrument on crimes against humanity, given that there were several international conventions on the same topic, he said, calling on the international community to avoid fragmentation, and focus on quality, not quantity.

25. *The delegate of Jordan*, voicing support for a convention on "crimes against humanity", said that it was essential to create a legal mechanism to ensure the prevention and punishment of such crimes. The delegate opined that the draft convention would not contravene the Rome Statute; rather it would allow States Parties to fulfill their obligations under that Statute. However, under

international law, he reminded the Committee it was not States that committed crimes, though they carried responsibility for crimes committed by their nationals, such as Heads of States. Also expressing support for the *aut dedere aut judicare* principle, the delegate proposed establishing a fund for the purpose of providing reparations for victims.

26. *The delegate of South Africa* mentioned that in an increasingly globalized world, there was an ever greater need for close cooperation among States and the draft articles on crimes against humanity provided a mechanism to that end, in order to ensure accountability for such crimes. However, States should remain the first line of defence in the investigation and prosecution of international crimes. He said that draft article 9(3) on “crimes against humanity” seemed to place a disproportionate burden on a State that took into custody a person alleged to have committed an offence. It required the State to immediately notify all States that had jurisdiction over the offence in terms of draft article 7(1). The current wording of that article seemed perhaps too unconditional for an obligation that was highly dependent on circumstance. While his national legislation did not necessarily require a treaty to be in place for mutual legal assistance, he said he appreciated that the draft articles might also serve as a legal basis for extradition and mutual legal assistance in the absence of a treaty for those States that required the existence of such a treaty. On the principle of non-refoulement set out in draft article 5, he stated that South Africa did not allow extradition to countries where a person might be subject to a crime against humanity. On the question of amnesty in the draft articles, he mentioned that it was important to take into account the intricacies of each situation and to guard against a blanket approach that could hamper the attainment of lasting stability.

27. *The delegate of Islamic Republic of Iran* stressed that the Commission’s work on “Crimes against humanity” must not deviate from the Rome Statute of the International Criminal Court, to the exact extent that it dealt with crimes against humanity, expressed concern that draft article 3 made references to the crimes of genocide and war crimes. According to him, significant attention was paid to the practice of international judicial organs, but not to the general practice and *opinio juris* of States in the Special Rapporteur’s report. The widespread adherence of States to the United Nations Convention against Corruption, according to the delegate, hardly justified the Special Rapporteur’s approach of modelling the draft articles largely on that Convention, since the two texts dealt with two distinct sets of crimes that were very different in nature. Furthermore, the obligation of States to prevent crimes against humanity, as currently drafted, was too broad and left little freedom for national systems in terms of administrative and procedural matters. He did not support the exclusion of the dual criminality requirement despite the principle being well established in extradition cases and upheld by numerous international instruments including the Rome Statute. Additionally, he pointed out there was no rationale accorded for incorporating a monitoring mechanism for State’s implementation and compliance with a future convention when such a mechanism existed for genocide and war crimes. The deficiency in implementing the present instruments would not be resolved with codification of the same provisions in a new instrument, the delegate said, recommending that the Commission opt for draft guidelines as the final outcome of its work on the topic.

28. *The delegate of Turkey* said of “crimes against humanity” that, as noted in the report, there was no global convention dedicated to preventing and punishing those crimes and promoting inter-State cooperation. That legal vacuum should be properly addressed. The Turkish

Government had already codified crimes against humanity in its national law and was supporting international efforts to tackle such crimes. The proposed rules, concepts and mechanisms should be established with the utmost diligence, in an unhurried manner and with full clarity, the delegate emphasized.

29. *The delegate of Indonesia*, focusing on “crimes against humanity”, recommended that draft article 4 be made more specific and prescriptive, elaborating on all aspects of relevant preventive measures. In addition, it would be legally sound to remove the words “other preventive measures” which could lead to multiple interpretations by States and result in legal uncertainty or ambiguity. On article 5, the “extradition” element should be added within the *non-refoulement* principle, given the absence of uniformed practice of extradition. Noting that his nation had criminalized 10 out of the 11 proposed acts of crimes against humanity in the draft articles, the delegate welcomed the Commission’s use of the provisions and principles in the United Nations Convention against Transnational Organized Crime and the Convention against Corruption.

30. However, he underlined the need to be cautious and learn from their implementation prior to transferring the provision “as it is”. Furthermore, the Commission should consider making international cooperation provisions mandatory, particularly those mandating the use of the treaty as a legal basis for extradition in a situation where a State made extradition conditional upon the existence of a treaty. Additionally, he cautioned that the effectiveness of draft articles would depend on the willingness of States to pursue bilateral treaties on extradition.

31. *The delegate of Viet Nam* supported the punishment of such crimes on the basis of respect for national sovereignty and non-intervention in domestic matters of other States. On the other hand, against the various challenges that were facing the International Criminal Court, more consideration needed to be given to the necessity and effectiveness of an international treaty dealing with crimes against humanity. According to him, the principle of complementarity should be upheld and priority should be accorded to the jurisdiction of national courts in dealing with crimes against humanity. Disputes pertaining to the interpretation and implementation of such a treaty should be first settled by the concerned States before they were submitted to any international court or tribunal. In order to address the problem of differences among criminal law systems, States must have the possibility to enter reservations to the treaty, as long as such reservations did not contravene the object and purpose of the treaty. In particular, the criminal liability of legal persons had yet to gain wide acceptance in international law, and accordingly, sanctions for the acts of legal persons should be addressed in the domestic law of States and the matter should be removed from the draft articles.

32. *The delegate of the Republic of Korea* stressed that the draft convention should address extradition under draft article 13, given that there was no global or universal convention on that practice. It was not necessary to address the issue of dual criminality under the provision on extradition since the draft articles required each State to adopt crimes against humanity as an offence under their own criminal laws. Expressing support for the long-form provisions on extradition and mutual legal assistance, the delegate added that, on draft article 5, no individual should be expelled, returned, surrendered or extradited to another State if there were substantial grounds for him or her to be subjected to a crime against humanity.

33. Addressing the criminal responsibility of individuals in official positions addressed in draft article 6 and based on the Rome Statute, he said holding an official position was not grounds for exclusion from criminal responsibility when an individual committed an offense. As there could be a variety of opinions on the relationship between that provision and the one discussed last year under draft article 7 on immunity of State officials from foreign criminal jurisdiction, the substance of those two provisions should be carefully reviewed in the Commission's drafting process. Finally, he voiced support for the provisions on protecting victims, witnesses and others under draft article 12.

D. COMMENTS AND OBSERVATIONS OF THE AALCO SECRETARIAT

34. The adoption of the draft articles on "Crimes against Humanity" after the first reading reflects a milestone in the history of the Commission. While war crimes and genocide have specific global conventions, the non-codification of an international mechanism to prevent, punish and promote inter-state cooperation with regards crimes against humanity was always viewed as a lacuna in international law. This absence was amplified by the existence of conventions for offences like corruption and transnational organized crime. The need for a specific treaty addressing crimes against humanity is a concern that has been consistently articulated over the years by States. The absence of a global legal framework that contained objective responsibilities on States for the prevention and punishment of crimes against humanity was a hurdle for the global human rights order. This assumes significance when confronted with the reality that crimes against humanity are perpetrated with equal ferocity and frequency like war crimes and genocide and hence the logic that these crimes require an analogous framework of prohibitions. In fact, the work of the Commission, if it reaches its logical conclusion would address the "missing link" of the world human rights order. The Third report of Mr. Sean D. Murphy, Special Rapporteur is one that has contextualized the codification debate with greater erudition, precision and clarity. The Secretariat would like to place on record its appreciation to the Commission and the Special Rapporteur for the commendable efforts in this regard.

35. At the outset, the Secretariat agrees with the normative vision of the Special Rapporteur to draft articles that would pave the way for a potential 'global convention' in the future. This task is consistent with the pressing need of the global international legal order and increasing commitments being undertaken in the field of human rights law. However, while agreeing with the broader mandate and work of the Special Rapporteur, the Secretariat would like to highlight a few aspects on the report that require urgent attention given the significance of the topic and its broad implications for international law theory and practice. These are articulated as follows:

36. Firstly, the Secretariat while endorsing the need for States to incorporate an 'obligation to prevent crimes against humanity' is unable to agree with concept of 'state responsibility' factored in for the breach of 'preventing crimes against humanity' by States in draft article 4. The Secretariat believes that crimes against humanity under the current mandate should be debated from the perspective 'individual criminal responsibility' and not state responsibility. While not entirely ruling out the regime of state responsibility in the prevention of crimes against humanity, it is submitted that the issue should be subjected to a broader debate and deeper study of customary international law before arriving at a conclusive view on the same.

37. Secondly, the Secretariat while appreciating the human rights concerns that motivated the incorporation of the principle of ‘non-refoulement’ is unable to agree with the view of the rapporteur that exceptions to ‘non-refoulement’ need not be incorporated in draft article 5. It is submitted that the exceptions to ‘non-refoulement’ are as much an integral part of the customary international law recognition of the principle and any divorce of the exception from the rule would only create confusion regarding the legal strength of the rule in customary international law.

38. Thirdly, the Secretariat expresses its doubts on clause 5 of draft article 6. This clause provides that the fact that an offence referred to in the draft articles is committed “by a person holding an official position” shall not be a ground for excluding criminal responsibility. While the Secretariat emphatically supports the position that the official position of an individual should not accord a cover of impunity for mass crimes, it is important to address the issue from the perspective of existing customary international law and municipal law which invariably carve out exceptions to criminal culpability when officials perform functions discharging their official duties. Creating a framework without a broader debate on state practices pertaining to municipal immunity would render the work of the rapporteur incomplete. While the Secretariat has an open view on the subject, it deems it fit to evolve a greater deliberation among States before a conclusive position on this point is taken.

39. Fourthly, the Secretariat is of the view that para 2 of article 7 should be deleted in its present form. This para which obligates States to assume jurisdiction in a case where the alleged offender “is present” in the territory of the concerned State is one that is likely to be controversial. While States can assume ‘territorial’, ‘active personality’ or even ‘passive personality’ jurisdiction on behalf of victims voluntarily, the position that States should assume jurisdiction in a case merely because an alleged offender is present in their territory takes away the right of a State to consider genuine asylum claims. It is submitted that since this is a matter concerning refuge/asylum status, a broader deliberation among States may be essential before arriving at a definitive conclusion.

40. Fifthly, while it is commendable that the principle ‘*aut dedere aut judicare*’ has been introduced in draft Article 10, the secretariat understands that the report factors in the potential need of States to consider questions of amnesty. While it is acknowledged that the international law position on amnesty is still evolving and is witnessing increasing limitations, customary law on the subject may not have evolved to the extent of precluding the rights of States to make decisions regarding amnesties. While amnesty granted by a state need not bar prosecution in other States, it seems unlikely that States have lost their rights in granting conditional amnesties factoring in local transitional justice requirements. The Secretariat views amnesty and likewise asylum claims to be matters falling within the domestic jurisdiction of States.

41. Sixthly, the Secretariat welcomes the incorporation of draft article 9 which broadly covers the field of victims’ rights. However, while this provision is salutary, it is submitted that the report does not effectively clarify aspects pertaining to the monetary obligation of States for reparations (if any). A general reading of the article and the commentary gives an understanding that the immediate obligation of States is limited to establishing domestic mechanisms that would be instrumental in evaluating claims of reparations without ruling out the possibility of State reparations in the event of liability. It is submitted by the Secretariat that a deeper discussion that clarifies the legal position on the monetary liability of States for crimes against humanity (if that’s

the case) is essential before a provision on reparations is incorporated in the draft articles. A position which does not take States into confidence in this regard will be problematic and should be avoided.

42. Seventhly, while welcoming draft articles 13, 14 and 15 which deal with extradition, mutual legal assistance and settlement of disputes, it is the view of the Secretariat that any conflicting interpretation of the draft articles between two or more States that may arise should be resolved by an interpretation in favour of the alleged offender. All procedural safeguards that are available to criminal defendants in municipal law should be afforded to suspect offenders under the draft articles at all stages of the extradition, mutual legal assistance stage and dispute settlement phase. Where municipal laws of two countries clash, the provision of a country that is beneficial to the suspected offender should be adopted.

43. While reiterating its deep sense of appreciation for the work of the Special Rapporteur and the laborious study undertaken to prepare the third report, the Secretariat would like to propose a series of guiding questions to its Member States which would facilitate the working of the Rapporteur in fine-tuning and clarifying some of the concerns addressed above:

1. Does your state have a specific legislation prohibiting crimes against humanity? If no, does your penal code contain provisions that criminalize conduct that may amount of crimes against humanity? Please elaborate with details.

2. Does your country have a normative framework that pertains to the 'prevention of offences'? Is it different from 'punishment of offences'? Please elaborate with details.

3. What is your country's position regarding non-refoulement of aliens? Are exceptions to non-refoulement an integral part of your state practice? Please elaborate with details.

4. What is your state practice regarding 'aut dedere aut judicare' for serious crimes? Please elaborate with details.

5. What is your state practice regarding grant of asylum? Should States have a right to consider genuine asylum claims on their territory instead assuming jurisdiction or following 'aut dedere aut judicare'? Please elaborate with details.

6. What is your state practice regarding grant of amnesty? Should States be allowed to explore options of conditional immunity for genuine and deserving cases? Please elaborate with details.

7. What is your state practice regarding immunity for domestic public servants performing official functions? Please elaborate with details.

8. What is your state practice regarding victim compensation and award of reparations for serious crimes? Does the state have monetary obligations in this regard? Please elaborate with details.