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

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I. INTRODUCTION

A. BACKGROUND

1. The International Law Commission (hereinafter referred to as "ILC" or the "Commission") established by the United Nations General Assembly Resolution 174 (III) of 21st September 1947 is the principal organ under the United Nations system for the promotion of progressive development and codification of international law. The Commission held its Sixty-third session from 26 April to 3 June and 4 July to 12 August 2011 at Geneva.[1] The session was opened by Mr. Nugroho Wisnumurti, Chairman of the sixty-second session of the Commission.

2. The Commission consists of the following members:
Mr. Ali Mohsen Fetais Al-Marri (Qatar); Mr. Mohammad Bello Adoke (Federal Republic of Nigeria), Mr. Lucius Caflisch (Switzerland); Mr. Enrique Candioti (Argentina); Mr. Pedro Comissário Afonso (Mozambique); **Mr. Christopher John Robert Dugard (South Africa);** Ms. Concepción Escobar Hernández (Spain); Mr. Salifou Fomba (Mali); Mr. Giorgio Gaja (Italy); Mr. Zdzislaw Galicki (Poland); **Mr. Hussein A. Hassouna (Arab Republic of Egypt); Mr. Mahmoud D. Hmoud (Jordan); Mr. Huang Huikang (People's Republic of China);** Ms. Marie G. Jacobsson (Sweden); **Mr. Maurice Kamto (Cameroon)**; Mr. Fathi Kemicha (Tunisia); Mr. Roman Anatolyevitch Kolodkin (Russian Federation); Mr. Donald M. Mcrae (Canada); Mr. Theodor Viorel Melescanu (Romania); **Mr. Shinya Murase (Japan);** Mr. Bernd H. Niehaus (Costa Rica); Mr. Georg Nolte (Germany); Mr. Alain Pellet (France); **Mr. A. Rohan Perera (Democratic Socialist Republic of Sri Lanka);** Mr. Ernest Petric (Slovenia); Mr. Gilberto Vergne Saboia (Brazil); **Mr. Narinder Singh (India);** Mr. Eduardo Valencia-Ospina (Colombia); Mr. Edmundo Vargas Carreño (Chile); Mr. Stephen C. Vasciannie (Jamaica); Mr. Marcelo Vázquez-Bermudez, (Ecuador); **Mr. Amos S. Wako (Kenya); Mr. Nugroho Wisnumurti (Indonesia)**; and Mr. Michael Wood (United Kingdom)[2].

3. The Commission elected the following officers: Chairperson: **Mr. Maurice Kamto (Cameroon)** and; First Vice-Chairman: **Ms. Marie G. Jacobsson (Sweden);** Second Vice-Chairman: **Mr. Bernd H. Niehaus (Costa Rica)**; Chairman of the Drafting Committee: **Mr. Teodor Viorel Melescanu (Romania)**; and Rapporteur: **Mr. A. Rohan Perera (Democratic Socialist Republic of Sri Lanka)**.

4. On 26 April 2011, the Commission elected the Commission elected **Ms. Concepción Escobar Hernández (Spain)** to fill the casual vacancy occasioned by the death of Ms. Paula Escarameia. On 17 May 2011, the Commission elected **Mr. Mohammed Bello Adoke (Nigeria)** to fill the casual vacancy occasioned by the resignation of Mr. Bayo Ojo.

5. The Secretary-General of the Asian-African Legal Consultative Organization (AALCO), Prof. Dr. Rahmat Mohamad, addressed the Commission on 26 July 2011. He briefed the Commission on the recent and forthcoming activities of AALCO. An exchange of views followed. The Commission was represented by Dr. A. Rohan Perera and Mr. Shinya Murase at the Fiftieth annual session of AALCO, held in Colombo, Democratic Socialist Republic of Sri Lanka from 27 June to 1 July 2011.

[1] UN, *Report of the International Law Commission* (Sixty-third session, (26 April–3 June and 4 July–12 August 2011), UN Doc. A/66/10 [Hereinafter ILC Report]. This Report has been prepared on the basis of the ILC Report.
[2] The names of ILC Members from the AALCO Member States is indicated in bold.

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

(i) Reservations to treaties
(ii) Responsibility of International Organizations
(iii) Effects of armed conflicts on treaties
(iv) Immunity of State officials from foreign criminal jurisdiction
(v) Expulsion of aliens
(vi) Protection of persons in the event of disasters
(vii) The obligation to extradite or prosecute (*aut dedere aut judicare*)
(viii) Treaties over time
(ix) Most-Favoured-Nation clause

7. As regards the topic "**Reservations to treaties**", the Commission had before it the seventeenth report (A/CN.4/647) of the Special Rapporteur, addressing the question of the reservations dialogue, as well as addendum 1 to the seventeenth report (A/CN.4/647/Add.1), which considered the issue of assistance in the resolution of disputes concerning reservations, and also contained a draft introduction to the Guide to Practice. Furthermore, the Commission had before it the comments and observations received from Governments on the provisional version of the Guide to Practice on Reservations to Treaties, adopted by the Commission at its sixty-second session (2010) (A/CN.4/639 and Add.1). The Commission established a Working Group in order to proceed with the finalization of the text of the guidelines constituting the Guide to Practice, as had been envisaged at the sixty-second session (2010). The Commission also referred to the Working Group a draft recommendation or conclusions on the reservations dialogue, contained in the seventeenth report of the Special Rapporteur, and a draft recommendation on technical assistance and assistance in the settlement of disputes concerning reservations, contained in addendum 1 to the seventeenth report.

8. On the basis of the recommendations of the Working Group, the Commission adopted the Guide to Practice on Reservations to Treaties which comprises an introduction, the text of the guidelines with commentaries thereto, as well as an annex on the reservations dialogue. In accordance with Article 23 of its Statute, the Commission recommended to the General Assembly to take note of the Guide to Practice on Reservations to Treaties and to ensure its widest possible dissemination. The Commission also adopted a recommendation to the General Assembly on mechanisms of assistance in relation to reservations.

9. On the topic "**Responsibility of international organizations**", the Commission adopted, on second reading, a set of 67 draft articles, together with commentaries thereto, on the responsibility of international organizations, and in accordance with article 23 of its Statute recommended to the General Assembly to take note of the draft articles in a resolution and to annex them to the resolution, and to consider, at a later stage, the elaboration of a convention on the basis of the draft articles. In the consideration of the topic at the present session, the Commission had before it the eighth report of the Special Rapporteur (A/CN.4/640) surveying the comments made by States and international organizations on the draft articles on responsibility of international organizations adopted on first reading at the sixty-first session (2009) and making recommendations for consideration by the Commission during the second reading. The Commission also had before it the comments and observations received from Governments (A/CN.4/636 and Add.1) and international organizations (A/CN.4/637 and Add.1) on the draft articles adopted on first reading.

10. As regards the topic "**Effects of armed conflicts on treaties**", the Commission adopted, on second reading, a set of 18 draft articles and an annex (containing an indicative list of treaties the subject matter of which involves an implication that they continue in operation, in whole or in part, during armed conflict), together with commentaries thereto, on the effects of armed conflicts on treaties, and in accordance with article 23 of its Statute recommended to the General Assembly to take note of the draft

articles in a resolution and to annex them to the resolution, and to consider, at a later stage, the elaboration of a convention on the basis of the draft articles.

11. In relation to the topic "**Immunity of State officials from foreign criminal jurisdiction**", the Commission considered the second (A/CN.4/631) and third (A/CN.4/646) reports of the Special Rapporteur. The second report reviewed and presented the substantive issues concerning and implicated by the scope of immunity of a State official from foreign criminal jurisdiction, while the third report addressed the procedural aspects, focusing, in particular on questions concerning the timing of consideration of immunity, its invocation and waiver. The debate revolved around, *inter alia*, issues relating to methodology, possible exceptions to immunity and questions of procedure.

12. Concerning the topic "**Expulsion of aliens**", the Commission had before it addendum 2 to the sixth report (A/CN.4/625/Add.2) as well as the seventh report (A/CN.4/642) of the Special Rapporteur. The Commission also had before it comments and information received thus far from Governments (A/CN.4/604 and A/CN.4/628 and Add.1). Addendum 2 to the sixth report completed the consideration of the expulsion proceedings (including the implementation of the expulsion decision, appeals against the expulsion decision, the determination of the State of destination and the protection of human rights in the transit State) and also considered the legal consequences of expulsion (notably the protection of the property rights and similar interests of aliens subject to expulsion, the question of the existence of a right of return in the case of unlawful expulsion, and the responsibility of the expelling State as a result of an unlawful expulsion, including the question of diplomatic protection). Following a debate in plenary, the Commission referred seven draft articles on these issues to the Drafting Committee, as well as a draft article on "Expulsion in connection with extradition" as revised by the Special Rapporteur during the sixty-second session (2010).

13. The seventh report provided an account of recent developments in relation to the topic and also proposed a restructured summary of the draft articles. The Commission referred the restructured summary of the draft articles to the Drafting Committee.

14. In relation to the topic "**Protection of persons in the event of disasters**", the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/643 and Corr.1), dealing with the responsibility of the affected State to seek assistance where its national response capacity is exceeded, the duty of the affected State not to arbitrarily withhold its consent to external assistance, and the right to offer assistance in the international community. Following a debate in plenary, the Commission decided to refer draft articles 10 to 12, as proposed by the Special Rapporteur, to the Drafting Committee.

15. The Commission provisionally adopted six draft articles, together with commentaries, including draft articles 6 to 9, which it had taken note of at its sixty-second session (2010), dealing with humanitarian principles in disaster response, human dignity, human rights and the role of the affected State, respectively, as well as draft articles 10 and 11, dealing with the duty of the affected State to seek assistance and with the question of the consent of the affected State to external assistance.

16. Concerning the topic "**The obligation to extradite or prosecute (*aut dedere aut judicare*)**", the Commission considered the fourth (A/CN.4/648) report of the Special Rapporteur addressing the question of sources of the obligation to extradite or prosecute, focusing on treaties and custom, and concerning which three draft articles were proposed.

17. In relation to the topic "**Treaties over time**", the Commission reconstituted the Study Group on Treaties over time, which continued its work on the aspects of the topic relating to subsequent agreements and practice. The Study Group first completed its consideration of the introductory report by its Chairman on the relevant jurisprudence of the International Court of Justice and of arbitral tribunals of *ad hoc*

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

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

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

i. Immunity of State officials from foreign criminal jurisdiction

19. On this topic, the Commission wished to know what approach the States wished the Commission to take. Should the Commission seek to set out existing rules of international law (*lex lata*), or should the Commission embark on an exercise of progressive development (*lex ferenda*)?

- Which holders of high office in the States (Heads of State, Heads of Government, Ministers for Foreign Affairs, others) enjoyed *de lege lata*, or should enjoy *de lege ferenda*, immunity *ratione personae*?
- What crimes were, or should be, excluded from immunity *ratione personae* or immunity *ratione materiae*?

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

ii. Expulsion of aliens

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

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

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

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

iii. Protection of persons in the event of disasters

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

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

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

25. The Commission would like to know about any legislation of States or in the case law of domestic tribunals, certain crimes or categories of crimes in respect of which the obligation to extradite or prosecute has been implemented?

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

v. Treaties over time

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

vi. The Most-Favoured-Nation clause

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

vii. New topics

29. The Commission decided to include in its long-term programme of work five new topics namely:
- (a) Formation and evidence of customary international law;
- (b) Protection of the atmosphere;
- (c) Provisional application of treaties;
- (d) The fair and equitable treatment standard in international investment law; and
- (e) Protection of the environment in relation to armed conflicts.

30. In the selection of these topics, the Commission was guided by the following criteria namely that the topic (a) should reflect the needs of States in respect of the progressive development and codification of international law, (b) should be sufficiently advanced in stage in terms of State practice to permit progressive development and codification and (c) is concrete and feasible for progressive development and codification, and (d) that account should also be taken of those topics that reflect new developments in international law and pressing concerns of the international community as a whole. The Commission would welcome the views of States on these new topics.

C. DELIBERATIONS AT THE FIFTIETH ANNUAL SESSION OF AALCO (COLOMBO, DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA, 2011)

31. The **Secretary-General**, while introducing the agenda item, noted that one of the statutory obligations of AALCO was to examine the questions that are under consideration of the International Law Commission, and thereafter, to forward the views of its Member States to the Commission.

32. While giving a brief overview of the work of the Commission on its Sixty-Second Session, he stated that there were as many as nine topics on the agenda of the aforementioned Session of the ILC, namely, Reservation to Treaties; Expulsion of Aliens; Effects of Armed Conflict on Treaties; Protection of Persons in the Event of Disasters; The Obligation to Extradite or Prosecute (*aut dedere aut judicare*); Immunity of State Officials from Foreign Criminal Jurisdiction; Treaties over time; The Most-Favored-Nation clause and Shared Natural Resources.

33. After briefly highlighting the progress under each of the topic mentioned above, he remarked that inputs provided by the Member States of AALCO would be of immense significance to the ILC in formulating the future trajectory of its work, and that the feedback and information on the state practice of AALCO Member States would enable the Commission to take into consideration the views of diverse legal systems.

34. ***Mr. A. Rohan Perera, Member of the International Law Commission (ILC)*** and current Rapporteur, speaking in his personal capacity, expressed his appreciation for the Report presented by the Secretary-General of AALCO that outlined the work of the ILC at its Sixty-Second Session held in 2010. He remarked that, in view of paucity of time, he would focus only on two key topics, viz., "The Effects of Armed Conflicts on Treaties" and "Immunity of State Officials from Foreign Criminal Jurisdiction" that were specifically dealt with in the first half of the Sixty-Third Session of ILC that took place from 26th April to 3rd June, 2011. The comments/viewpoints on these two items on the part of Member States would be of extreme importance to the work of the Commission, he added.

35. As regards the topic "The Effects of Armed Conflicts on Treaties", he pointed out that the text of draft articles on that issue along with the commentaries thereto, were adopted by the Commission at its first part of its Sixty-Third Session held in 2011. Giving a bird's eye view of the provisions of the draft articles, he informed that the draft articles have been structured into 3 parts. The first was entitled 'Scope and Definitions'. The second which was entitled 'Principles'contained two Chapters, and that the third part pertained to 'Miscellaneous'. The draft articles are followed by an annex related to draft article 7, he explained. He noted that these draft articles as a whole reflected the general proposition that armed conflicts, *ipso facto*, does not terminate or suspend the operation of treaties, and that this rationale ran through the entire set of draft articles adopted on that issue. As regards the determination of whether a treaty survives an armed conflict or not, he noted that firstly, recourse should be made to the language of the treaty itself as provided for in the draft article 4 and that, in the absence of an express provision, resort would next be had under draft article 5 to the traditional rules of treaty interpretation contained Article 31 of the Vienna Convention on the Law of Treaties. If no conclusive answer was found following the

application of these draft articles, the enquiry would then shift to a consideration of matters extraneous to the treaty as provided for in draft article 6, he added. He clarified that draft article 7 contained an indicative list of treaties that included *inter alia*, treaties creating permanent regimes such as land and maritime boundary, and treaties on human rights and international humanitarian law which were, on the basis of their subject matter, deemed to survive even in times of armed conflict.

36. As regards the topic "Immunity of State Officials from Foreign Criminal Jurisdiction", he revealed that the Second Report of the Special Rapporteur on that subject was considered at the first part of the Sixty-Third Session of ILC. Explaining the difficulties contained in framing the boundaries of that topic, he pointed out that there are two questions that needed to be addressed in a concrete way for progress to take place on this issue. The first in his view was: Is there an exception to immunity in respect of what are called grave crimes under international law? The second was the question of the precise categories of persons apart from the well-known troika (the Heads of States, the Heads of Governments and the Minister of Foreign Affairs), who would be considered to enjoy immunity *ratione personae.* In that regard, he explained that the crux of the Report of the Special Rapporteur on this issue was that immunity of state officials from foreign criminal jurisdiction should be the norm and that, any exception thereto needed to be proved. In summarizing the main trends of the debate, he noted that there were two streams of thought that informed the entire debate on the topic. According to one view, sovereignty must be limited, and that one could not talk of absolute immunity when grave crimes are committed. The principle of non-impunity was a core principle, and that one could not speak of absolute immunity where grave crimes are committed even by high-ranking officials. According to another view, the principle of immunity, which was well-established in international law, including the international customary law, does not brook any infringement and that, it was critical in preserving the stability of international relations. The challenge for the Commission, he added, lied in striking a proper balance between the two schools of thought. He also made a plea that the Member States of AALCO should give their most serious consideration to this topic when the Report on that issue was before the Sixth Committee during the forthcoming United Nations General Assembly. It was important for the future work of the ILC to receive the views and policy guidance of Member States of AALCO on the sensitive issues which arise in the consideration of these topics, he added.

37. **Prof. Shinya Murase, Member of the International Law Commission**, also speaking in his personal capacity, focused his address on two points, namely, future topics that the International Law Commission should take up, and the need to follow-up the work of ILC. He mentioned that ILC had concluded its work on three of its topics and therefore new topics were to be chosen for the next quinquennium. Selection of the topics was based on practical, technical and political feasibility of the topic, moreover the work had to reflect the new developments in international law and the pressing concerns of the international community as a whole. Prof. Murase, had made a proposal to include 'Protection of Atmosphere' as a topic and prepare a comprehensive convention to address the whole range of atmospheric issues such as transboundary air pollution, depletion of ozone layer and climate change which could be similar like Part XII of the Law of the Sea Convention on the protection and preservation of maritime environment. He hoped that the Sixth Committee would endorse this proposal. In relation to the relationship between ILC and the Sixth Committee, the need to follow-up developments of draft articles was required. He recalled that the conclusion of draft articles on transboundary aquifers completed in 2008, which could adopt a resolution in the form of a General Assembly 'declaration' on the principles and rules applicable to transboundary aquifer, which could be a basis for future a framework convention. On the UN Convention on Jurisdictional Immunities of States and their Property**,** he recalled the contribution of the Special Rapporteur Amb. Sompong Sucharitkal and expressed his belief that his contribution would be duly recognized when the Convention comes into force with the necessary ratifications.

38. The **Delegation from the Islamic Republic of Iran** thanked the representative of the ILC Dr. A. Rohan Perera for his excellent presentation on the work of the ILC at its Sixty-third session. On the work of the Commission on 'Effects of Armed Conflicts on Treaties'**,** the delegation stated that Article 2 includes express reference to the applicability of the draft articles to non-international armed conflicts. The delegation stated that it continue to deem it inappropriate to include those armed conflicts. The possible effects that this category of conflicts might have on treaties were indeed governed by the provisions of draft articles on "International Responsibility of States" under circumstances precluding wrongfulness. Further, article 73 of the Vienna Convention on the Law of Treaties, which is the basis of ILC's work on the subject, refers exclusively to the effects on treaties of armed conflicts between states. On the topic "Expulsion of Aliens" the delegation was of the view that the expulsion must be made with due respect for fundamental human rights of the deportees. On the topic "Protection of Persons in the Event of Disasters", the delegation observed that it was for the affected State to determine whether receiving external assistance in the event of disaster is appropriate or not. Any suggestion to penalize the affected States would be contrary to international law. The delegation underlined the importance on the set of draft articles on Responsibility of International Organizations adopted on second reading by the drafting committee during the present session of the Commission and recommended that the AALCO Secretariat could undertake a study on it and present to the next Annual Session a comprehensive report on the subject.

39. The **Delegation of People's Republic of China** at the outset welcomed the long-standing and mutually-beneficial cooperation existing between the ILC and AALCO. As regards the topic "The Effect of Armed Conflicts on Treaties", he stated that the definition of armed conflict provided inadequate restrictive conditions that could easily be construed to any use of force and that this in turn could affect the stabilization of treaty relations. As regards the topic "Expulsion of Aliens", he noted that nothing should stand in the way of extradition of an alien to a requesting State when all conditions for expulsion had been met and the expulsion itself did not contravene international or domestic law. He expressed hope that the Commission would pay sufficient attention to the concerns raised by his delegation in its future consideration of the topic.

40. The **Delegation of Malaysia** noted that their delegation considered the work of ILC as one of the important agenda items of the AALCO and appreciated the Secretariat report prepared on the topic. The delegation mentioned that the topics on which they would like to have deliberations were on Reservation to Treaties, Expulsion of Aliens, Effects of Armed Conflicts over Treaties, Protection of Persons in the Event of Disasters, Obligation to Extradite or prosecute, Immunity of State Officials from Foreign Criminal Jurisdiction, Most-Favoured Nation Clause and Shared Natural Resources. The delegation supported the proposed topic "International Environmental Law" as the Commission would be able to contribute effectively towards clarifying and redefining the basic principles and rules of international environmental law. The delegation also favoured the topic proposed by Prof. Shinya Murase on the 'Protection of Atmosphere'. The delegation also supported any efforts to send young officers for attached or internship programme at ILC. The delegation proposed that the ILC Members from the Asia and Africa continent open their doors to accept attachment or internship on the recommendation of the respective governments, subjects to applicable ILC rules and procedure. The delegation also proposed to make available the report of the ILC at least one month before it came up for consideration by the Sixth Committee. They also made a suggestion that AALCO should devote one full-day to the deliberations of the agenda items on the ILC so that in-depth discussions could take place.

41. The **Delegation of Indonesia** emphasized on the following topics, namely; expulsion of aliens and protection of persons in the event of disasters. On expulsion of aliens, the delegation mentioned that their country had observed the topic as stated in the international human rights law, particularly in consonance with principles of sovereignty and non-intervention. It was noted that in addition to the general protection afforded to all foreigners, certain categories of foreigners, such as refugees and migrant

workers, could be afforded additional protection against expulsion and other procedural guarantees. According, utmost importance to the topic protection of persons in the event of natural disasters, the delegation mentioned that humanitarian assistance should be undertaken solely with the consent of the affected country and with utmost respect for national sovereignty, territorial integrity, national unity and the principle of non-intervention in the domestic affairs of States.

42. The **Delegation of India**, after thanking the Secretary-General for presenting a detailed and comprehensive introduction to the work of ILC at its Sixty-Second Session, remarked that the ILC should receive views/comments from the Member States of AALCO while formulating the draft articles. The delegation pointed out that there are three ways for the Commission to obtain the opinions of the Member States. The Commission could seek the opinion before the topic was taken up, and secondly, it could elicit the view points of States by means of circulating questionnaires to them, and finally, it could also seek opinions through comments on the draft articles that it adopts. The delegation urged the Member States of AALCO to respond to these requests, and also to participate in the Sixth Committee's consideration of the ILC report so that their views and positions could also make an impact on the outcomes of the ILC's work. While agreeing with the suggestion made by the Leader of Delegation of Malaysia that the Annual Session of AALCO should devote one full day for deliberating the agenda item on ILC, the delegation added that it would enable the delegates to have in-depth discussions on the items on the agenda of the ILC. Commenting on the work of the ILC at its Sixty-Third Session, the delegation pointed out that the first part of the session of ILC that took place from April to June 2011, focused on the second reading of the text of the draft articles on three issues namely, effect of armed conflicts on treaties, responsibility of international organizations and reservations to treaties. The delegation added that the second part of the ILC Session would focus on adopting commentaries on these draft articles. In that regard, the delegation urged the Member States of AALCO to send their comments to the Commission. As regards the UN Convention on Jurisdictional Immunities of States and Their Property of 2004, the delegation informed that India had already signed the Convention and was in the process of adopting a national law on the subject before finally ratifying the Convention. The delegation also urged other Member States of AALCO to ratify this Convention which was adopted after in-depth consideration in the ILC and in the Sixth Committee, and represented a fair balance between the different views on the subject.

43. The **Delegation of Japan** at the outset expressed his appreciation for the introductory statement made by the Secretary-General on the agenda item. The delegation remarked that in the past AALCO had made important contributions to the works of the ILC by providing valuable inputs and views of its Member States. While noting that the codification works undertaken by the ILC must be followed up by the UN General Assembly in order to give effect to the works of ILC, the delegation stated that Japan was planning to take up two subjects at the forthcoming session of the UN General Assembly. They were, the UN Convention on Jurisdictional Immunities of States and Their Property and the Draft Articles on the Law of Transboundary Aquifers. As regards the law of transboundary aquifers, the delegation highlighted that the ILC, in an effort to provide a legal framework for the proper management of groundwater resources, had formulated a set of 19 draft articles on the issue based on the texts drafted by Ambassador Chusei Yamada, the Special Rapporteur on the topic. The delegation reminded that the draft articles were received favorably by the UN General Assembly, and that it decided to examine the question of the form that might be given to them in its forthcoming session this year. In this regard, he suggested that the draft articles could either be adopted as an universal treaty at a diplomatic conference or as a Declaration of the UN General Assembly. As regards the topic "Reservation to Treaties", the delegation noted that Japan had submitted its comments on the draft guidelines on the item to the Secretariat of AALCO and that Member States should study the draft guidelines carefully in the light of their respective practice and express their positions in the debate on the topic in the Sixth Committee of the UN General Assembly.

44. While expressing support for the proposal made by Prof. Shinya Murase, Member of ILC from Japan that the ILC study the "Protection of the Atmosphere" as a possible future topic, the delegation remarked that the proposal was made essential by the fact that there existed significant gaps in the applicable principles and rules of international law on this issue. In this regard, the delegation requested the Member States of AALCO to consider the proposal seriously and to agree to authorize this proposal as a new topic. While stressing the need for the Asian-African States to make a substantial contribution towards the work of ILC, the delegation suggested that AALCO Secretariat could make questionnaires on each topic that is dealt with by the Commission and, in this regard, made a request that the Member States of AALCO provide their answers to those questionnaires. The AALCO Secretariat, could, then, compile those answers and submit them to the Secretariat of ILC. Such exercise, in their view, would gradually but certainly affect the formation and substance of customary international law.

45. The **Delegation of Kuwait** stated that their delegation gave more importance to the topic relating to the Expulsion of Aliens. The delegation explained in detail the laws governing expulsion of aliens in Kuwait.

46. The **Delegation of the Kingdom of Saudi Arabia** remarked that the ILC has made substantive contributions to the codification and progressive development of international law over the years. As regards the topic "The Effects of Armed Conflict on Treaties", he stated that the work of the Commission in this area was commendable. As regards the topic of Expulsion of Aliens, the delegation noted that it should be based on the application of draft articles and of the conventional international legal principles. Finally, the delegation appreciated the work of ILC on jurisdictional immunity.

New Proposal made by Japan: UN Convention on Jurisdictional Immunities of States and their Property

47. The **Delegation of Japan** stated that the UN Convention on Jurisdictional Immunities of States and Their Property was adopted by the UN General Assembly in 2004. It took twenty-seven years since the drafting work was first started in the International Law Commission (ILC). The codification work by the ILC on jurisdictional immunity required thorough studies, taking 13 years. The ILC completed its drafting work and adopted the final text of the draft articles in 1991. Examination of the draft articles started in the Sixth Committee of the UN General Assembly in 1992 and the difficult negotiations took 14 years, and finally adopted in 2004 as a convention.

48. The delegation noted that the Government of Japan was concerned about the situation of state practice in regards to State Immunities. It was an established fact that a state enjoyed immunities from the jurisdiction of the courts of another state in principle, but the principle of jurisdictional immunities underwent gradual but fundamental changes from the so called 'absolute rules' to the 'restrictive rules'. The modalities of such 'restrictive rules' varied considerably depending on the forum states.

49. In view of the fore going circumstances, the Government of Japan considered that it was very important to establish basic rules of the modalities of State Immunities at the international level. Ambassador Chusei Yamada, as the Representative of the Government of Japan, took an active role to accelerate the negotiations during the examination of the draft articles in the Sixth Committee. Traditionally, Japan placed importance on the codification of customary international law. Codification of customary international law was an important function of the UN. In order to remove such ambiguity and to establish common understanding of customary international law, the UN had undertaken codification so far on many subjects on the basis of the works done by the UN International Law Commission. In the case of State Immunity, customary international law had largely developed as customary law. Codification of such customary law would certainly contribute to stable and equitable relations among states.

50. The delegation informed that while the process in the Sixth Committee was going on, at the proposal of the Government of Japan the subject was taken up for discussion in the AALCO. During the thirty-ninth Session (Cairo Session) of the AALCO in 2000, the Government of Japan prepared a background paper explaining that it was of utmost importance for the AALCO members to make an active and positive contribution in the work of the General Assembly for codification of the subject. The subject was actively discussed during the Cairo Session. The delegation added that, AALCO had made important contributions to the works by the ILC by providing valuable views of its Member States. The delegation emphasized that the codification works by the ILC should be followed up by the UN General Assembly in order to give effect to the ILC's works. And for that, reason the States must take initiative. Thereafter, the delegation highlighted the salient features of the Convention and why it was important to ratify it at the earliest. The delegation informed that Japan signed the convention on January 11, 2007, enacted its implementing legislation in April 2009, and deposited its instrument of acceptance on May 11, 2010 with the UN Secretary-General. In Japan, the 'absolute rules' of State Immunities had been in force since 1928, but the 'restrictive rules' were in conformity with the current international standard. In order to achieve smooth transition to the restrictive rules, it was preferable for the Government of Japan to legislate its municipal laws to be consistent with the Convention.

51. The delegation stated that until now, eleven States, including some of the AALCO Member States such as Iran, Saudi Arabia and Lebanon, had members of the Convention. However, it would enter into force on the thirtieth day following the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession with the Secretary-General of the UN, and it could take at least several more years before the 30th ratification was to be deposited.

52. The **Delegation of Republic of Indonesia**, at the outset extended their appreciation to Japanese Delegation for proposing the agenda. The delegation pointed out that the Convention represents a fair and delicate balance between the concerns expressed by Member States. It also represents a common ground and consensus among States representing different legal system providing stability and predictability in corporate law, business practices and commercial transaction between States and private parties. They believed that the Convention would enhance the rule of law and legal certainty, particularly in dealings of States with natural or juridical persons, and would contribute to the codification and development of international law and harmonization of practice in that area. Further, the delegation believed that the Convention was of their interest. For any Diplomatic and Consular Mission which were having legal suits, would certainly create a conflict on applicable law as the Diplomatic and Consular Missions were considered having immunities and privileges, the Convention on Jurisdictional Immunities of States and their Property would help to clarify the scope and nature of those immunities.

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

54. The **Delegation of Kenya** welcomed the proposal to have a short discussion on the Convention at the Session due to its importance. The delegation mentioned that the Convention covered the immunity of foreign States and their property from the jurisdiction of the courts of a forum State and stipulates such cases as when States Parties could not apply jurisdictional immunities to its own State and property in other States' courts. The delegation supported the UN Convention on Jurisdictional Immunities of States and their Property and they were in the process of considering ratification of the Convention. Further,

they urged other Member States of AALCO to consider ratifying the UN Convention on Jurisdictional Immunities and their Property.

II. RESERVATION TO TREATIES

A. BACKGROUND

1. Since 1993, the International Law Commission (ILC) has the topic "Reservations to Treaties", on its agenda for which Mr. Alain Pellet was appointed as the Special Rapporteur. The logic underlying the introduction of this agenda was stated by the ILC thus: the 1969 Vienna Convention on the Law of Treaties, the 1978 Vienna Convention on Succession of States in Respect of Treaties and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, even while setting out some principles concerning reservations to treaties, do so in terms that are too general to act as a guide for State practice and leave a number of important matters in the dark. These Conventions are also silent on the effect of Reservations on the entry into force of treaties, problems pertaining to the particular object of some treaties (in particular the constituent instruments of international organizations and human rights treaties), reservations to codification treaties and problems resulting from particular treaty techniques (elaboration of additional protocols, bilateralization techniques).

2. Till 2007 the Commission had received Twelve reports of the Special Rapporteur on the topic and after due deliberations, the Commission had adopted more than 85 draft guidelines with commentaries covering various aspects of reservations to treaties.

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

3. At its Sixty-third session (2011), the Commission had before it the seventeenth report[3] of the Special Rapporteur addressing the question of the reservations dialogue, as well as addendum 1 to the seventeenth report which considered the issue of assistance in the resolution of disputes concerning reservations, and also contained a draft introduction to the Guide to Practice. Furthermore, the Commission had before it, the comments and observations received from Governments[4], on the provisional version of the Guide to Practice on Reservations to Treaties adopted by the Commission at its sixty-second session in 2010.

4. The Commission established a Working Group in order to proceed with the finalization of the text of the guidelines constituting the **Guide to Practice**, as had been envisaged during the sixty-second session. The Commission also referred to the Working Group a draft recommendation or conclusions on the reservations dialogue, and a draft recommendation on technical assistance and assistance in the settlement of disputes concerning reservations, contained, respectively, in the seventeenth report of the Special Rapporteur and in the addendum to that report. On the basis of the recommendations of the Working Group, the Commission adopted the Guide to Practice on Reservations to Treaties, which comprises an introduction, the text of the guidelines with commentaries thereto as well as an annex on the reservations dialogue and a bibliography.[5]

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

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

6. Before we move on to identify the salient features of the Guide to Practice, it is essential to portray the structure of the Guide, which will go a significant way in enhancing our understanding of the host of issues addressed in it. The Guide to Practice on Reservations to Treaties consists of guidelines that have been adopted by the International Law Commission accompanied by commentaries. The commentaries are an integral part of the Guide and an indispensable supplement to the guidelines, which they expand and explain. No summary, however long, could cover all the questions that may arise on this highly technical and complex subject or to provide all useful explanations for practitioners.

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

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

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

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

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

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

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

8. The Commission at its Sixty-third annual session (2011) had before it the Seventeenth report of the Special Rapporteur which (A/CN.4/647) dealt with the question of the reservations dialogue, while the addendum to it (A/CN.4/647/Add.1) addressed the question of assistance in the settlement of disputes concerning reservations and proposed a draft introduction on how to use the Guide to Practice. The Special Rapporteur considered it preferable that the Commission suggest a flexible mechanism of assistance in relation to reservations, one that could provide both technical advice and assistance in resolving differences concerning reservations. The main features of such a mechanism were outlined in the draft recommendation on technical assistance and assistance in the settlement of disputes concerning reservations, contained in the addendum to the seventeenth report. The Commission adopted the guidelines and commentaries constituting the Guide to Practice on Reservations to Treaties, including an introduction to the Guide to Practice and an annex setting out conclusions and a recommendation of the Commission on the reservations dialogue. In accordance with its Statute, the Commission submitted to

the General Assembly the Guide to Practice on Reservations to Treaties, together with the recommendation. The Guide to Practice on Reservation to Treaties was adopted and transmitted to the General Assembly suggesting to (i) Consider establishing a reservations assistance mechanism, which could take the form described in the annex to this recommendation; and (ii) Consider establishing within its Sixth Committee an 'observatory' on reservations to treaties, and also recommend that States consider establishing similar 'observatories' at the regional and subregional levels. A tribute was paid to the Special Rapporteur **Mr. Alain Pellet** for his outstanding contribution in preparation of Guide to Practice on Reservation to treaties.

9. The Guide to Practice on Reservations to Treaties contains guidelines on (i) definitions, (ii) procedure, (iii) permissibility of reservations and interpretative declarations, (iv) legal effects of reservations and interpretative declarations, (v) Reservations, acceptances of reservations, objections to reservations, and interpretative declarations in cases of succession of States, and (vi) conclusion.

C. SUMMARY OF THE VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPIC IN THE SIXTH (LEGAL) COMMITTEE OF THE UN GENERAL ASSEMBLY AT ITS SIXTY-SIXTH SESSION (2011)

10. The Delegate of **Bangladesh** observed that "reservations to treaties" was one of the difficult issues in the law of treaties, and although the conditions and consequences of reservations had been established in the Conventions of 1969 and 1986, there remained certain ambiguities. That was demonstrated in subsequent developments, notably to reactions and objections of other parties to impermissible and invalid reservations. It was also stated that the guidelines were helpful for understanding better those provisions in the Conventions on reservations, and underscored that the guidelines on the effects of an established reservation were logical and based on actual State practice. However, the effects of an invalid reservation were more problematic and the Convention provisions were not very clear. It was also observed that the guidelines were useful for understanding the impact and consequences of the invalid reservations; they were not aimed at excluding the reservation-making parties from treaty relations, but to limit the relations. The provision for reservations also promoted the goal of maximum participation of the States in the multilateral treaties. However, that should not undermine the establishment of treaty relations with reserving States, especially in the case of impermissible and invalid reservations. While concluding, it was mentioned that following the guidelines would promote "healthy treaty relations".

11. The Delegate of **Singapore** opined that a "reservation dialogue" would serve a useful purpose, allowing all actors involved to articulate their reasons. The "reservation assistance mechanism" was an "overly simplistic 'one-size fits-all' response" to the differences that might arise in reservations in different treaties.

12. The Delegate of **Nigeria** applauded the adoption of the Guide to Practice, stating that the Guide was a "testimony to the dedication and commitment" of the Special Rapporteur, Alain Pellet. Reserved their comments on proposals on "reservation dialogue" and "mechanism of assistance".

13. The Delegate of **Democratic Socialist Republic of Sri Lanka** said the conclusions on the "reservations dialogue" showed the need for a satisfactory balance between safeguarding the integrity of multilateral treaties and securing the widest possible participation in such treaties.

14. The Delegate of **Arab Republic of Egypt** welcomed the Guide to Practice as a "huge legal project". However, it would be better if an abbreviated copy was made available, in order to enhance the benefits that would come from the use of the Guide.

15. The Delegate of **Indonesia** welcomed adoption of the Guide to Practice on reservations and the establishment of a flexible mechanism of assistance for dispute settlements.

16. While welcoming the adoption of the Guide to Practice on the subject, the Delegate of **South Africa** emphasized that the Guide was within the spirit and scope of the Vienna Convention on the Law of Treaties and would therefore assist States as they traversed the "complex maze of reservations, acceptance of reservations and objections thereto". Noting that the current law on reservations closely followed the International Court of Justice advisory opinion on reservations to the Genocide Convention, it was necessary to strike a balance between the integrity of the treaty and the pursuit of universality. Such balance was reflected in current law by the permissibility of, and restrictions to, reservations. On condoning of a late reservation, the provision placed the onus on other States to respond, when normally States were not obliged to respond to untimely reservations.

17. The Delegate of **Malaysia** informed that they had provided their views with regards to "reservations to treaties" but noted that they were not included in the finalized text of the Guide to Practice. A treaty monitoring body should comprise independent experts and not representatives of Governments or countries. These experts should only make legal findings in order to enable the body to execute its powers without being politically influenced by Government representatives or countries. The spirit of the guideline, did not allow for the decision of a treaty monitoring body to deprive "reserving" States from making reservations, but rather they were there to assist reserving States to "craft their reservations to render them valid for permissibility". The power to conclude treaties by international organizations largely depended on the terms of the constituent instrument of the international organization itself, and the mandate granted to that organization by its Member States. Thus, a separate legal regime for international organizations should be developed separately and not be made part of the guidelines at this time.

III. RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

A. BACKGROUND

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

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

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

3. At the sixty-third session, the Commission had before it the eighth report of the Special Rapporteur (A/CN.4/640), as well as written comments received from Governments (A/CN.4/636 and Add.1) and international organizations (A/CN.4/637 and Add.1). The Commission considered the report of the Drafting Committee (A/CN.4/L.778) and adopted the entire set of draft articles on the responsibility of international organizations, on second reading. The Commission adopted the commentaries to the aforementioned draft articles. In accordance with its Statute, the Commission submitted the draft articles to the General Assembly, together with the recommendation set out below. The Commission decided, in accordance with article 23 of its Statute, to recommend to the General Assembly: (a) to take note of the draft articles on the responsibility of international organizations in a resolution, and to annex them to the resolution; (b) to consider, at a later stage, the elaboration of a convention on the basis of the draft articles.

4. There are 67 articles divided into five parts. The five parts are: Introduction, The internationally wrongful act of an international organization, Content of the international responsibility of an international organization, The implementation of the international responsibility of an international organization, Responsibility of a State in connection with the conduct of an international organization, General provisions. Part one defines the scope of the articles and gives the definition of certain terms. Parts Two to Four (arts. 3 to 57) follow the general lay-out of the articles on State responsibility. Part Two sets forth the preconditions for the international responsibility of an international organization to arise. Part Three addresses the legal consequences flowing for the responsible organization, in particular the obligation to make reparation. Part Four concerns the implementation of responsibility of an international organization, especially the question of which States or international organizations are entitled to invoke that responsibility. Part Five addresses the responsibility of States in connection with the conduct of an international organization. Finally, Part Six contains certain general provisions applicable to the whole set of draft articles.

5. A tribute was paid to the Special Rapporteur **Mr. Giorgio Gaja** for his outstanding contribution in preparation of the draft articles on the responsibility of international organizations.

C. SUMMARY OF THE VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPIC IN THE SIXTH (LEGAL) COMMITTEE OF THE UN GENERAL ASSEMBLY AT ITS SIXTY-SIXTH SESSION (2011)

6. Commenting on the topic at the Sixty-Sixth Session of the UNGA (2011), the Delegate of **Singapore** said that the law of international responsibility and the question of accountability encompassed both legal and political considerations and it was a "critical task" of the Commission.

7. The Delegate of **Nigeria** stated that the 'principle of reparation'[6] is a welcome development and contributed to the progressive development of international law.

8. The Delegate of the **Democratic Socialist Republic of Sri Lanka** said several of the draft articles on the "responsibility of international organizations" were based on limited practice, and there was need for applying "a certain degree of circumspection" when dealing with some of them.

9. While deliberating upon this topic, the Delegate of **Arab Republic of Egypt** appreciated the 'cautionary approach' mentioned while dealing with responsibility of IOs and States; there should not be confusion on the distinction between responsibility of Member states and IOs. The draft articles could include contemporary issues like technology while expanding the area of practice.

10. The Delegate of the **Islamic Republic of Iran** said that it invoked practical difficulty of implementation. One example was the possibility of an international organization invoking self-defence, noting that the term had a different meaning when applied to UN peacekeeping operations. The question present in this matter was whether self-defence could be applied when the attack was by a non-State entity. According to the Special Rapporteur's assertions, self-defence included the defence of safety zones established by the United Nations against attacks usually carried out by non-State actors. *The behaviour of military forces of States could not be attributed to the organization when the Security Council had authorized Member States to take appropriate action outside a chain of command. Member States of an international organization, as in the case of the United Nations, faced great difficulty when dealing with responsibility. He stated his belief that the "brunt of responsibility" should be borne by the members of the organization because of their role in the organization's decision making, or because of their contribution to the wrongful act of the organization*.

11. The Delegate of the **Indonesia** mentioned that before elaborating these draft articles into Convention, national legal systems should be taken into effect. When subjects to controversies, IOs had right to self-defence.

12. The Delegate of the **People's Republic of China** observed that it was not convincing that uniform rules was applicable to all those entities. Noting the lack of practice in that regard, the international community had not yet reached consensus on the relevant rules of responsibility of IOs. Therefore, such practice, cases and literature must be annexed to the General Assembly resolution, he added.

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[6] Article 31 of the Draft Articles of Responsibility of International Organization deals with Reparation:

1. The responsible international organization is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of an international organization.

13. While commenting upon the topic, the Delegate of **Republic of Korea** opined that the practices of States and IOs on this subject should be collected and analysed.

14. The Delegate of **South Africa** mentioned that legal personality of an IO was not the same as the legal personality of a State. It endorsed the notion that the conduct of an IO could be judged independently from that of its constituent members.

15. The Delegate of **Malaysia** called for more time for States and IOs to evaluate and review the draft articles. It was also premature to consider the elaboration of a convention based on the draft articles, as there was an absence of consensus on the elaboration of a convention on the "responsibility of States for internationally wrongful acts".

IV. EFFECTS OF ARMED CONFLICTS ON TREATIES

A. BACKGROUND

1. During its fifty-sixth session (2004), the Commission decided to include the topic "Effects of armed conflicts on treaties" in its programme of work, and to appoint Sir Ian Brownlie as Special Rapporteur for the topic. At its fifty-seventh (2005) to sixtieth (2008) sessions, the Commission had before it the first to fourth reports of the Special Rapporteur (A/CN.4/552, A/CN.4/570 and Corr.1, A/CN.4/578 and Corr.1 and A/CN.4/589 and Corr.1, respectively), as well as a memorandum prepared by the Secretariat entitled "The effects of armed conflict on treaties: an examination of practice and doctrine" (A/CN.4/550 and Corr.1). The Commission further proceeded on the basis of the recommendations of a Working Group, chaired by Mr. Lucius Caflisch, which was established in 2007 and 2008 to provide further guidance regarding several issues which had been identified in the Commission's consideration of the Special Rapporteur's third report.

2. At its sixtieth session (2008), the Commission adopted on first reading a set of 18 draft articles, and an annex, on the effects of armed conflicts on treaties, together with commentaries. At the same meeting, the Commission decided, in accordance with draft articles 16 to 21 of its Statute, to transmit the draft articles, through the Secretary-General, to Governments for comments and observations. At its sixty-first session (2009), the Commission appointed Mr. Lucius Caflisch as Special Rapporteur for the topic, following the resignation of Sir Ian Brownlie from the Commission.

3. At its sixty-second session (2010), the Commission had before it the first report of the Special Rapporteur (A/CN.4/627 and Add.1), containing his proposals for the reformulation of the draft articles as adopted on first reading, taking into account the comments and observations of Governments (A/CN.4/622 and Add.1). The Commission considered the Special Rapporteur's first report and subsequently instructed the Drafting Committee to commence the second reading of the draft articles on the basis of the proposals of the Special Rapporteur for draft articles 1 to 17, taking into account the comments of Governments and the debate in the Plenary on the Special Rapporteur's report.

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

4. At the sixty-third session, the Commission adopted the entire set of draft articles on the effects of armed conflicts on treaties, on second reading. The Commission also adopted the commentaries to the aforementioned draft articles. In accordance with its Statute, the Commission submitted the draft articles to the General Assembly, together with the recommendation set out below. The Commission then decided in accordance with article 23 of its Statute, to recommend to the General Assembly: (a) to take note of the draft articles on the effects of armed conflicts on treaties in a resolution, and to annex them to the resolution; (b) to consider, at a later stage, the elaboration of a convention on the basis of the draft articles.

5. The text of the draft articles on the effects of armed conflicts on treaties contains --- parts: (i) Scope and definitions, (ii) principles, and (iii) Miscellaneous. There are 18 draft articles along with an indicative list of treaties referred to in article 7.

6. A tribute was paid to the Special Rapporteur **Mr. Lucius Caflisch** and previous Special Rapportuer Sir Ian Brownlie for their outstanding contributions in preparation of the draft articles on the effects of armed conflicts on treaties.

C. SUMMARY OF THE VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPIC IN THE SIXTH (LEGAL) COMMITTEE OF THE UN GENERAL ASSEMBLY AT ITS SIXTY-SIXTH SESSION (2011)

7. The Delegate of **Democratic Socialist Republic of Sri Lanka** commented that the draft articles followed the orientation that such conflicts did not, *ipso facto*, terminate or suspend treaty operation. Concern was raised on the inclusion of 'internal' armed conflicts too within the definition of "armed conflict".

8. The Delegate of **India** agreed that the existence of an armed conflict did not automatically terminate or suspend a treaty because the decision to bring an end to a treaty would be made in accordance with the law on treaties and would be based on all relevant factors. The delegate said that the "indicative list" of treaties as contained in an annex to the draft articles, could be considered together. Those treaties were different in nature and scope; while some were permanent, others depended upon the parties' intention. Further, the topic should be limited to treaties between States and the definition of "armed conflict" should reflect only conflicts between States. The draft articles should be annexed to a General Assembly resolution, with the elaboration of a convention considered at a later stage.

9. The Delegate of **People's Republic of China** commented that there was still "room for improvement". Treaties concluded between IOs and States should be included in the scope of the draft articles; currently they applied to only States. Because of the increasing activities of international organizations, it was becoming more common for those organizations to conclude treaties with States, which might be affected by armed conflict. The relevant articles were primarily based on work and practice of two States, namely, the United States and the United Kingdom, and this was an "insufficient and imbalanced" reference to State practice, and undermined the universal applicability of the relevant draft articles. Therefore, the Commission should conduct its continued studies on a wider range of State practice.

10. The Delegate of **Islamic Republic of Iran** observed that despite "clear preference" by many delegations, that the topic be confined to international armed conflicts, draft article 2 included a direct reference to "non-international armed conflicts." The possible effects of that category of conflicts might have on treaties were governed by the provisions of draft articles on International Responsibility of States under circumstances precluding wrongfulness. The delegate welcomed the inclusion of internal armed conflicts with outside involvement within the purview was encouraging, since such conflicts could become international in both "nature" and "extent".

11. The Delegate of **Indonesia** opined that the draft articles should only be applicable to international armed conflict, not to internal conflicts, which were in many cases triggered by separatist movements.

12. The Delegate of **South Africa** commended the Law Commission for including "treaties on international criminal justice" which supported the survival and continued operation of treaties such as the Rome Statute of the International Criminal Court, but also could encompass other general, regional and even bilateral agreements establishing mechanisms for trying persons suspected of having perpetrated international crimes. "The inclusion of war crimes renders essential the survival of the treaties considered here". Treaties relating to diplomatic relations and to consular relations should be placed in the class of agreements which would not be necessarily terminated or suspended in case of an armed conflict, as even in armed conflict, consular relations could continue. Further, it supported the position that treaties declaring, creating or regulating a permanent regime or status, or related permanent rights, were not suspended or terminated in case of an armed conflict.

13. The Delegate of **Republic of Korea** said that since conflicts made it difficult or impossible at times for treaty parties to fulfill their obligations and impaired the stability of treaties and the relations between parties, it was necessary to distinguish between treaties whose operation was not affected during armed conflict and those which were.

14. The Delegate of **Singapore** supported article 3 which stated that the existence of an armed conflict did not in and of itself cause the suspension or termination of a treaty, thus affirming that treaty rights and obligations could not be "lightly ignored or overridden". However, articles 5, 6 and 7, dealing with issues of termination, withdrawal or suspension of a treaty as a result of armed conflict could arise because of the interpretation of those specific articles. It also supported that the General Assembly could take note of the draft articles, and annex them to a relevant resolution but there was no need to be elaborated into a convention.

V. IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

A. BACKGROUND

1. At its fifty-eighth session, in 2006, the ILC, 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[7]. At its fifty-ninth session, in 2007, the Commission decided to include the topic in its programme of work and to appoint Mr. Roman A. Kolodkin as Special Rapporteur for the topic[8].

2. At the sixtieth session, in 2008, the Commission had before it the preliminary report of the Special Rapporteur[9] as well as a memorandum of the Secretariat on the topic. 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[10].

3. The Commission did not consider the topic at the sixty-first session. 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.

4. At the sixty-third session in 2011, the Commission considered the second[11] and third[12] 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.

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

5. At the present session, the Commission had before it the second report of the Special Rapporteur (A/CN.4/631). The Commission considered the report at its meetings convened on 10, 12 and 13 May, and at its meetings on 25 and 29 July 2011. The Commission also had before it the third report of the Special Rapporteur (A/CN.4/646). The Commission considered the report at its meetings, on 25, 27, 28 and 29 July 2011.

(a) Introduction by the Special Rapporteur of his second report

6. While complementing the comprehensive and well-structured report of the Special Rapporteur, Members dwelt at length on the *general orientation of the topic*, acknowledging in particular its obvious political ramifications, as well as its impact on international relations. Recognizing that the topic was

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[7] See *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 257. For the syllabus on the topic, see *ibid*., annex C.
[8] See *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 375.
[9] A/CN.4/601.
[10] See *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), paras. 267-311
[11] A/CN.4/631
[12] A/CN.4/646.

difficult and challenging, it was pointed out that it was imperative to agree on matters of principle and on the direction of the topic before the Commission could meaningfully proceed further in the discussion. Some members agreed broadly with the reasoning and conclusions of the report.

7. While some other members welcomed the inclusion in the report of competing arguments voiced in relation to the topic, they also expressed concern that the report presented certain biased conclusions, failing to take into consideration developing trends in international law concerning, in particular, the question of grave crimes under international law. The very premise on which the topic had been analysed — from the concept of absolute sovereignty — was questioned, noting that the report raised fundamental preliminary questions on the substance.

8. Moreover, questions were raised as to the perspective from which the Commission should approach the topic, whether, for example, by focusing on *lex lata* or *lex ferenda*. Views were also expressed that the topic was particularly suitable to codification and progressive development and thus allowed the Commission to approach it from both aspects of its mandate. Some members were of view that the Commission should establish a working group to consider the questions raised in the discussions, as well as the question of how to proceed with the topic. While some members considered that the second report constituted a good point of departure for the elaboration of texts, the view was also expressed that the general direction in which the Commission wished to steer the topic had to be settled prior to moving forward. Even while some Members suggested that such a working group should be established already at the current session, some members considered it premature and preferred to postpone such a decision to the Commission's next session.

(b) The question of possible exceptions to immunity

9. Diverse views informed the debate within the Commission on possible exceptions to immunity. While some members agreed with the findings of the Special Rapporteur on this point, some other members expressed the view that the Commission could not limit itself to the *status quo* and had to take into account relevant trends that had an impact on the concept of immunity, in particular developments in human rights law and international criminal law. The assertion that immunity constituted the norm to which no exceptions existed was thus unsustainable.

10. Views were also expressed that the principle of non-impunity for grave crimes under international law constituted a core value of the international community which needed to be considered while examining the question of immunity. The topic would thus be more appropriately addressed from the perspective of hierarchy of norms; or norms between which there existed some tension.

11. Some other members supported the Special Rapporteur's conclusions concerning exceptions to immunity. They nevertheless envisaged the possibility of some further analyses to elucidate possible limitations to immunity as part of the progressive development of international law. In this context, the view was expressed that in establishing any such limitations, immunity *ratione personae* must cease to exist only after the high-level officials no longer serve their term of office. In order to facilitate future discussions, it was suggested that a further analysis of the earlier work of the Commission in this area should be made, as well as a study on exceptions to immunity, focusing on State practice, distinguishing clearly between the *lex lata* and proposals *de lege ferenda*.

12. Commenting individually on the *various rationales for possible exceptions* to immunity, some members contended that several of them merited further examination. Some members considered that the rationale that peremptory norms of international law prevail over the principle of immunity had merit. In their view, the report failed to provide a convincing analysis for the assertion that the different nature of the norms in play, procedural on the one hand and substantive on the other hand, prevented the

application of hierarchy of norms; these aspects needed to be further analysed in light of existing State practice.

13. The view that the commission of serious crimes under international law could not be considered as acts falling within the definition of official duties of a Head of State generated some support in the Commission and references were made to the *Bouterse* case and opinions expressed in the *Pinochet* case. It was noted that, if immunity was justified on the theory of preserving the honour and dignity of the State, then it was undercut when its officials committed grave crimes under international law. It was suggested that the Commission should identify the offences that could under no circumstances be considered as part of the official functions, referring to the crimes under the Rome Statute of the International Criminal Court as a useful starting point. The opinion was also expressed that in cases of universal jurisdiction, there were also grounds to argue that exemptions to immunity existed.

14. As regards the scope of immunity, it was observed that immunity *ratione personae* covered acts both of a private and an official nature. However, concern was nevertheless expressed by some members over the categorical conclusion in the report that such immunity was absolute. While some members were of the opinion that the list of officials benefiting from immunity *ratione personae* should be restricted to the three categories of officials — the so-called troika — views were also expressed in favour of extending immunity to certain other high-level officials representing the State in its international relations; and involving a considerable amount of travel abroad. In order to determine how far the class of persons entitled to immunity *ratione personae* extends beyond the troika, it was suggested that the Commission consider the rationale behind such immunity.

15. While it was generally agreed that immunity *ratione materiae* only covered acts by State officials undertaken in their official capacity during their term in office, it was stressed that the issue raised many difficult considerations that still needed to be determined concerning the scope of such immunity and persons to be covered. Some other members agreed with the Special Rapporteur that, other than in a few exceptional situations, a link between the attribution of conduct for the purpose of State responsibility and of immunity necessarily existed, including with regard to acts *ultra vires*.

(c) Introduction by the Special Rapporteur of his Third Report

16. It may be remembered here that while the preliminary and second reports of the Special Rapporteur considered the substantive aspects of the immunity of the State official from criminal jurisdiction, the third report (A/CN.4/646) which was intended to complete the entire picture — addressed the procedural aspects, focusing, in particular on questions concerning the timing of consideration of immunity, its invocation and waiver, including whether immunity can still be invoked subsequent to its waiver.

17. The Special Rapporteur stressed that while the previous reports had been based on an assessment of State practice, the present report, even though there was available practice, was largely deductive, reflecting extrapolations of logic and offering broad propositions, not exactly precise in terms of drafting, for consideration.

18. As regards the *timing*, namely when and at what stage immunity should be raised in criminal proceedings, the Special Rapporteur, recalling in particular the advisory opinion of the International Court of Justice *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, that questions of immunity were preliminary issues, which must be expeditiously decided *in limine litis*, stressed that the question of the immunity of a State official from foreign criminal jurisdiction should in principle be considered either at the early stage of court proceedings or even earlier at the pretrial stage, when the State that is exercising jurisdiction decides the

question of taking criminal procedural measures which are precluded by immunity in respect of the official.

19. On *invocation of immunity*, meaning, *inter alia*, who was in a position legally to raise the issue of immunity, the Special Rapporteur emphasized that only the invocation of immunity or a declaration of immunity by the State of the official, and not by the official himself, constituted a legally relevant invocation or declaration capable of having legal consequences.

20. The Special Rapporteur drew attention to the distinction that ought to be made based on the immunity *ratione personae* and immunity *ratione materiae*.

First, in respect of a foreign Head of State, Head of Government or minister for foreign affairs — the troika — the State exercising criminal jurisdiction itself must consider *proprio motu* the question of the immunity of the person concerned and determine its position regarding its further action within the framework of international law. The Special Rapporteur suggested that in this case it was appropriate perhaps to request the State of the official in question only for a waiver of immunity.

Secondly, where an official enjoying immunity *ratione materiae* was concerned, the burden of invoking immunity resided in the State of the official. If the State of such an official wished to invoke immunity in respect of that official, it must inform the State exercising jurisdiction that the person in question was its official and enjoyed immunity and acted in an official capacity.

Thirdly, there was also the possible case of an official other than the troika, who enjoyed immunity *ratione personae*, in which case the burden of invoking immunity also lay with the State of the official in relation to whom immunity was invoked. If the State of such an official wished to invoke immunity in respect of that official, it must inform the State exercising jurisdiction that the person in question was its official and enjoyed personal immunity since he occupied a high-level position which, in addition to participation in international relations, required the performance of functions that were important for ensuring the sovereignty of the State.

21. The Special Rapporteur pointed out that the State (including its court) that was exercising jurisdiction, it would seem, was not obliged to "blindly accept" any claim by the State of the official concerning immunity. However, a foreign State may not disregard such a claim if the circumstances of the case clearly did not indicate otherwise. On the question of *waiver of immunity*, the Special Rapporteur noted that the right to waive the immunity of an official was vested in the State, not in the official himself. In the view of the Special Rapporteur, it would seem that, following an express waiver of immunity, it was legally impossible to invoke immunity. At the same time, it was also noted that an express waiver of immunity may in some cases pertain only to immunity with regard to specific measures.

22. While pointing out that once a waiver of immunity was validly made by the State of the official it was possible to exercise to the full extent foreign criminal jurisdiction in respect of that official, the Special Rapporteur, also alluded to a related aspect concerning the *relationship between a State's assertion that its official had immunity and the responsibility of that State for an internationally wrongful act* in respect of the conduct which gave rise to invocation of immunity of the official, underscoring that irrespective of the waiver of immunity with regard to its official, the State of the official was not exempt from international legal responsibility for acts attributed to it in respect of any conduct that may have given rise to questions of immunity.

(d) Summary of the Debate on the Special Rapporteur's Third Report

23. While commending the Report, it was considered generally that the analysis made in the report was convincing and the extrapolations drawn logical. Although the third report was viewed as less open to debate than the second report, some comments were nevertheless made that procedurally it would have been more appropriate to consider it after the Commission had reached definitive conclusions on the second report, the debate concerning which highlighted the fact that there were still a number of basic issues that needed to be resolved, bearing on the direction of the topic as a whole.

24. On the other hand, some members took the view that the third report was an important part of the overall picture drawn by the Special Rapporteur and could easily have been part of the second report. It was also observed that some of the views presented certain risks for the future not only for the Commission but also for the development of international law itself. It was cautioned that there was a risk to the reputation of the Commission if there was a greater tilt towards State interests; the Commission would not be in a position to find the necessary balance between the old law — based on an absolute conception of sovereignty — and the new expectation of the international community in favour of accountability.

25. There was general agreement that immunity ought to be considered at the early stage of the proceedings or indeed earlier during the pretrial stages, including when a State exercising jurisdiction takes criminal procedure measures against an official that would otherwise be precluded by immunity. It was however recognized that in practice such a goal might be difficult to realize, and would likely necessitate appropriate domestic legislation.

26. At a more general level, it was noted that it might be useful to have more information about the procedural position in the practice of States under the various legal systems. However, some members largely agreed with the Special Rapporteur in his conclusions on invocation. There was agreement in the general proposition that only the invocation of immunity by the State of the official and not the official himself constituted a legally relevant invocation of immunity. It was also noted that in respect of other officials enjoying immunity *ratione materiae* the State of the official must invoke the immunity. It was however contended that the reasoning for the State exercising jurisdiction raising the question of immunity *proprio motu* could not be limited to cases where the immunity of the troika was implicated.

27. It was also noted that some of the uncertainties over whether the troika should be enlarged to include other high-level officials, such as ministers of international trade or of defence, that were raised in the debate on the second report were germane to the present report. This was more so when considered against the differentiation drawn between the troika and other State officials enjoying immunity *ratione materiae*. While the reasons offered by the Special Rapporteur for the differentiation seemed plausible and convincing, it was contended that if in contemporary international relations, a foreign minister was only one among several State officials who frequently represented the State abroad, then a distinction in the way immunity was to be asserted — based on being widely known — did not appear to be justified.

28. It was noted that the Special Rapporteur in the present report, as in previous reports, had not distinguished "ordinary" crimes, concerning which matters were implicated in the *Case concerning certain questions of mutual assistance in criminal matters*, from grave international crimes, in relation to which special considerations applied, as had been countenanced in the debate on the second report. Consequently, it was pointed out that the Special Rapporteur had failed to address the possibility that the procedural issue at hand was not one of invocation of immunity or waiver thereof but rather the absence of immunity in respect of situations in which grave international crimes were committed, although it was also countered by other members that the assertion that there was no immunity for such "core crimes"

was abstract and general, and the Commission will have to deal with these matters in greater detail at a later stage.

29. Regarding the conclusion of the Special Rapporteur that it was the prerogative of the State of the official to characterize the conduct of an official as being official conduct of the State, but that the State exercising criminal jurisdiction did not have to "blindly accept" such a characterization, it was suggested that such a conclusion seemed rather broad and unclear. It was necessary to find a balance, each case had to be assessed on its merits, the use of terms like "prerogative" and suggesting that there was a "presumption" arising out of mere appointment of an official was going too far (although some members did not see anything untoward in its use). It was also pointed out that State invoking immunity should at least be encouraged to provide the grounds for its invocation.

30. As regards waiver of immunity some members agreed with the Special Rapporteur that the right to waive immunity vested in the State of the official not in the official himself and that waiver of immunity *ratione personae* must be express. It was, however, observed that two situations concerning waiver of immunity needed be distinguished, namely waiver of immunity in individual cases and renunciations of immunity for certain categories of cases which may be contained in a treaty rule.

31. In this regard, while some members agreed that there was a general reluctance to accept an implied waiver based on the acceptance of an agreement, some doubts were expressed by others regarding the assertion by the Special Rapporteur in his report that State's consent to be bound by an international agreement establishing universal jurisdiction for grave international crimes or precluding immunity did not imply consent to the exercise of foreign criminal jurisdiction in respect of its officials, and therefore waiver of immunity.

32. On whether *non-invocation* by a State of the immunity of an official could be considered an implied waiver, it was noted that as long as a State did not have knowledge, which was certain, of the exercise of jurisdiction over one of its officials, or had not yet had sufficient time to consider its response, the non-invocation of immunity cannot be taken as a waiver. However, it was acknowledged that a limited waiver which enabled a State to take certain preliminary measures would not preclude the invocation of immunity at a later stage of a trial in respect of a prosecution.

33. He stressed that in order for a trend to establish an emerging norm, practice needed to be prevalent and this was not the case with respect to exceptions, even in the case of immunity *ratione materiae*. He also went on to note that despite all this, the Commission was not precluded from developing new norms of international law when expectations with regard to its effectiveness were justified.

(e) Concluding remarks of the Special Rapporteur

34. The Special Rapporteur contextualized the issues by recalling that there were many truisms in international law, including that the development of human rights had not resulted in the disappearance of sovereignty or the elimination of the principles of sovereign equality of States and non-interference in the internal affairs, despite having a serious influence on their content. The central issue for consideration in the present topic was not so much the extent to which changes occurring in the world and in international law had had an influence on sovereignty as a whole, but rather how more specifically there was an influence on the immunity of State officials, based on the sovereignty of a State; the essential question being how had the immunity of State officials in general and immunity from the national criminal jurisdiction of other States in particular been affected.

35. While conceding that the impact on the vertical relationship, namely how international criminal jurisdiction had been affected, was very clear, the Special Rapporteur noted such was not the case with respect to the quite distinct and separate horizontal relationship involving interactions between sovereign States and their national criminal jurisdictions. The question of international criminal jurisdiction was entirely one that was to be separated and distinguished from foreign criminal jurisdiction. In his view, article 27 of the Rome Statute of the International Criminal Court which was often invoked as evidencing the changes that had taken place was unlikely to be relevant in respect of foreign criminal jurisdiction.

36. The Special Rapporteur affirmed that his explicit positions on the issues as reflected in the second report were reached not on *a priori* basis but after a review of State practice, case law and the doctrine, bearing in mind his professional life experience and legal background. He stressed that practice and doctrine had led him to accord significance to the distinction between immunity *ratione personae* and immunity *ratione materiae* and this difference needed to be taken into account in the substantive and procedural consideration of the topic. He confirmed the assumption that immunity *ratione materiae* applied to all State officials and former officials in respect of acts carried out in an official capacity. Regarding the circle of persons enjoying immunity *ratione personae*, the Special Rapporteur reaffirmed that there was no doubt, based on an objective legal analysis, that the troika enjoyed immunity. Such immunity was not exclusive to the troika.

37. He acknowledged that there were serious conceptual differences in the debate concerning immunity and exceptions to immunity. However, whichever position was preferred conceptually, it was firmly established in international law that certain holders of high ranking office in a State enjoyed immunity, both civil and criminal, from jurisdiction in other States. This was a norm — not allowing exceptions — which applied to the troika. This was confirmed by two decisions of the International Court Justice and this was broadly supported by State practice, in national court decisions and doctrine. He conceded that his use of "absolute" in the report was not entirely felicitous because even in case of immunity *ratione personae*, such immunity was limited in time and substance.

38. The Special Rapporteur noted that in future it will be necessary to devote attention to circumstances in which cooperation among States could be enhanced on issues of the immunity of States officials and exercise of jurisdiction, as well as matters concerning settlement of disputes. He clarified that the various conclusions in the reports were not intended to be draft articles; they only reflected a summary for the convenience of the reader. To formulate draft articles at this stage before resolving the basic issues would be premature.

C. SUMMARY OF THE VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPIC IN THE SIXTH (LEGAL) COMMITTEE OF THE UN GENERAL ASSEMBLY AT ITS SIXTY-SIXTH SESSION (2011)

39. Commenting on the topic, the Delegate of **People's Republic of China** observed that although much progress had been made on the complex issue, the international community had still to develop a "uniform statutory norm". He urged the ILC to bring clarity to the issue. He noted the reports of the Special Rapporteur which he felt provided a sound basis for the Commission's codification work towards that next phase. On the scope of immunity *ratione personae* (personal immunity) he said that that should at least cover the "troika" of Heads of State, Heads of Government and ministers of foreign affairs. The rule had its source in customary international law and international practice, and had been sustained in decisions by the International Court of Justice. However, a great number of situations in international relations were no longer limited to the "troika", especially since nowadays other high level officials more often participated in international exchanges. The trend was to grant such immunity to high level officials, since it satisfied a practical need. He said the Commission should formulate a set of criteria for

reference in order to minimize controversy. As for the exceptions to immunity, he said he agreed with the Special Rapporteur that such exceptions had no evidence in customary international law. However, immunity of States was not a "courtesy" extended by one State to another, but rather an important principle of international law based on the principle of sovereign equality and *par in parem no habet imperium* (an equal having no power over an equal). If those legal principles were to be superseded by other rules, the foundation of modern international relations would be seriously eroded and could "lead to disastrous consequences". Further, if a State's domestic court could prosecute the leader of another State, such prosecuting State might take advantage and interfere in the internal and external affairs of the defendant's State. That would upset the principle of non-interference and affect political stability. He also referred to exceptions that "could induce political abuse of indictment", which could "poison" bilateral relations between States. In the case of exceptions being granted, a series of practical legal issues would then be triggered, such as how to avoid double standards in the exercise of jurisdiction over officials of the affected State, as well as how to guarantee due process when faced with a lack of sufficient evidence and an inability to obtain judicial assistance, among other concerns. Concluding, he said that the topic did not lend itself to being developed into relevant rules of international law, as it would initiate "great controversies" and make consensus difficult. He urged that the Commission focus on the codification of established rule of international law.

40. Commenting on the topic, the Delegate of **Democratic Socialist Republic of Sri Lanka** pointed out that there was a clear need to agree on matters of principle before formulating draft articles. Noting that criminal prosecutions could lead to serious frictions in inter-State relations, he cautioned that a careful balance must be struck between preserving the immunity of State officials and addressing exceptions to the rule.

41. Commenting on the topic the Delegate of **Islamic Republic of Iran** stated that the topic of "immunity of State officials from foreign criminal jurisdiction" was of critical importance in the relations between States. His delegation shared the Special Rapporteur's "note of caution" that the Commission should focus on codifying the existing rules of international law rather than engaging in an exercise for progressive development. The Law Commission should take sovereignty, principally immunity of State officials, as its departure point and avoid "confusing this subject" with that of the accountability of State officials. He said the principle of immunity of the troika – Head of State, Head of Government, foreign minister - was well established, and it was a key guarantor of stability in international relations.

42. Commenting on the topic the Delegate of **Thailand** noted that the International Law Commission should codify existing international law on the immunity of State officials from foreign criminal jurisdiction, and explain the developing trends, especially trends related to immunity or non-immunity from the most serious crimes. The final product of those deliberations should strike a balance between stable international relations and avoiding impunity for the most serious crimes, he opined. Furthermore he reminded that while immunity served as a procedural bar to criminal prosecution, impunity absolved individuals from criminal responsibility. Whereas immunity over official acts belonged to the State concerned, that State could not act without accountability. He said international instruments on the repression of international crimes, such as the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, rejected the absolute immunity of State officials. Beyond treaty obligations or obligations imposed on States by the Security Council, several States exerted universal jurisdiction over certain grave crimes. The fundamental question for the Commission was therefore how the right balance could be struck; the answer could be found in the Sixth Committee's discussion of universal jurisdiction. In that context, the judgment of the International Court of Justice, which recognized the absolute immunity of Heads of State, Government and foreign ministers, should be followed until customary international law "had crystallized to the contrary."

VI. EXPULSION OF ALIENS

A. BACKGROUND

1. At its fifty-second session, in 2000, the ILC on the basis of the recommendation of a Working Group on the long-term programme of work, identified the topic "Expulsion of aliens" for inclusion in its long-term programme of work[13]. The General Assembly, in resolution 55/152 of 12 December 2000 took note of the Commission's report concerning its long-term programme of work. In resolution 56/82 of 12 December 2001 the Assembly requested the Commission to further consider the topic, having due regard to comments made by Governments.

2. At its fifty-sixth session, in 2004, the Commission decided to include the topic "Expulsion of aliens" in its programme of work and to appoint Mr. Maurice Kamto as Special Rapporteur for the topic[14]. At its fifty-seventh session, in 2005, the Commission had before it the preliminary report of the Special Rapporteur[15] setting out an overall view of the subject, while highlighting the legal problems which it raised and the methodological difficulties related to its consideration.

3. At its fifty-eighth session, in 2006, the Commission had before it the second report of the Special Rapporteur on the topic[16], and a memorandum prepared by the Secretariat. The Commission decided to consider the second report at its next session in 2007. At its fifty-ninth session, in 2007, the Commission considered the second and third reports of the Special Rapporteur[17], dealing, respectively, with the scope of the topic and definition (two draft articles), and with certain general provisions limiting the right of a State to expel an alien (five draft articles).

4. The General Assembly, in its resolution 62/66 of 6 December 2007 invited Governments to provide information to the ILC on the topic. At its sixtieth session, in 2008, the Commission considered the fourth report of the Special Rapporteur[18]. The first part of the report dealt with the issues raised by the expulsion of persons having dual or multiple nationalities and the second part addressed the problem of loss of nationality and denationalization in relation to expulsion. Following the debate on the report, the Commission established a Working Group under the chairmanship of Mr. Donald M. McRae to consider these two issues. The Working Group determined that there was no need to have separate draft articles on these matters since the necessary clarifications will be made in the commentaries to the draft articles.

5. At the sixty-first session in 2009, the Commission had before it the fifth report of the Special Rapporteur[19] and comments and information received from Governments up to that point. The Special Rapporteur presented to the Commission a revised and restructured version of draft articles 8 to 14, taking into account the plenary debate. The Special Rapporteur then submitted to the Commission a document containing a set of draft articles on protection of the human rights of persons who have been or are being expelled, revised and restructured in the light of the plenary debate. He also submitted a new draft work plan with a view to restructuring the draft articles (A/CN.4/618). The Commission decided to postpone its consideration of the revised draft articles to its sixty-second session.

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[13] See *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10* (A/55/10), paras. 726-728 and 729 (4). For the syllabus on the topic, see *ibid*., annex (4).
[14] See *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 364.
[15] A/CN.4/554.
[16] A/CN.4/573 and Corr.1.
[17] A/CN.4/581.
[18] A/CN.4/594
[19] A/CN.4/611 and Corr.1

6. At the sixty-second session in 2010, the Commission had before it the draft articles on the protection of the human rights of persons who have been or are being expelled, as revised and restructured by the Special Rapporteur[20]; the new draft workplan presented by the Special Rapporteur with a view to structuring the draft articles; and the sixth report presented by the Special Rapporteur[21]. The Commission likewise had before it comments and information received thus far from Governments. It decided to refer to the Drafting Committee draft articles 8 to 15 on the protection of the human rights of persons who have been or are being expelled, originally contained in the fifth report, as subsequently revised and restructured by the Special Rapporteur; draft articles A and 9, as contained in the sixth report of the Special Rapporteur; draft articles B1 and C1, as contained in the addendum to the sixth report, as well as draft articles B and A1, as revised by the Special Rapporteur during the session[22].

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

7. At the present session, the Commission had before it the second addendum to the sixth report of the Special Rapporteur (A/CN.4/625/Add.2), and the seventh report of the Special Rapporteur (A/CN.4/642. The Commission also had before it comments received from Governments.

8. The Commission took note of an interim report by the Chairman of the Drafting Committee informing the Commission of the progress of work on the set of draft articles on the expulsion of aliens, which were being finalized with a view to being submitted to the Commission at its sixty-fourth session for adoption on first reading. The second addendum to the sixth report (A/CN.4/625/Add.2) marked the conclusion of the consideration of expulsion procedures and took up the legal consequences of expulsion. The second addendum also contained the last of the draft articles that the Special Rapporteur intended to propose.

9. The first question considered, that of the implementation of the expulsion decision, was the subject of draft article D1[23], while the next subject addressed in the second addendum was the right to appeal an expulsion decision, something that had already been mentioned briefly in the first addendum (A/CN.4/625/Add.1) in connection with the right to challenge the expulsion decision, set out in draft article C1.

10. The next subject discussed in the second addendum was relations between the expelling State and the transit and receiving States, which were governed by two principles: the freedom of a State to receive or to deny entry to an expelled alien, a freedom limited by the right of any person to return to his or her own country; and the freedom, likewise limited, of the expellee to determine his or her State of destination. Mention had also to be made of the "safe country" concept, although it was still evolving and was confined for the time being to European practice. Draft article E1 concerned the identification of the State of destination of expelled aliens[24].

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[20] A/CN.4/618.

[21] A/CN.4/625 and Add.1.

[22] See *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 10* (A/65/10).

[23] Draft article D1 read:

Return to the receiving State of the alien being expelled

1. The expelling State shall encourage the alien being expelled to comply with the expulsion decision voluntarily.

2. In cases of forcible implementation of an expulsion decision, the expelling State shall take the necessary measures to ensure, as far as possible, the orderly transportation to the receiving State of the alien being expelled, in accordance with the rules of international law, in particular those relating to air travel.

3. In all cases, the expelling State shall give the alien being expelled appropriate notice to prepare for his/her departure, unless there is reason to believe that the alien in question could abscond during such a period.

[24] Draft article E1 read:

State of destination of expelled aliens

11. Draft article F1[25] for which the Special Rapporteur had introduced a revised version during the session[26], concerned the protection of the human rights of aliens subject to expulsion in the transit State. That provision, reflecting logic more than established practice, specified that the rules that applied in the expelling State to protection of the human rights of aliens subject to expulsion applied *mutatis mutandis* in the transit State. The Special Rapporteur was of the view that the elaboration of a legal framework for transit in the context of the expulsion of aliens would go beyond the scope of the current topic.

12. The protection of the property of aliens facing expulsion, the subject of draft article G1[27], was well established in international law. Paragraph 1 enunciated the prohibition of the expulsion of an alien for the purpose of confiscating his or her assets, while paragraph 2 concerned the protection, free disposal and, where appropriate, return of property. The Special Rapporteur believed that the fate of property belonging to aliens expelled during armed conflict must be examined in the light of *jus in bello*, something that did not fall within the ambit of the present topic.

13. The question of the responsibility of the expelling State in cases of unlawful expulsion was considered in the final part of the second addendum. Draft article I1[28], which set out the principle of such responsibility, and draft article J1[29], which addressed the implementation of that responsibility through the mechanism of diplomatic protection, were conceived as clauses merely referring to those legal institutions. The commentary to draft article I1 might mention the emergence of the concept, recognized by the Inter- American Court of Human Rights, of particular damages for the interruption of the life plan.

14. Be that as it may, the seventh report (A/CN.4/642) gave an overview of recent developments relevant to the topic and contained a restructured summary of the draft articles. The seventh report then examined the judgment of the International Court of Justice in the *Ahmadou Sadio Diallo* case[30], which addressed seven points in relation to expulsion: conformity with the law; the obligation to inform aliens detained pending expulsion of the reasons for their arrest; the obligation to inform aliens subject to

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1. An alien subject to expulsion shall be expelled to his or her State of nationality.

2. Where the State of nationality has not been identified, or the alien subject to expulsion is at risk of torture or inhuman and degrading treatment in that State, he or she shall be expelled to the State of residence, the passport-issuing State, the State of embarkation, or to any other State willing to accept him or her, whether as a result of a treaty obligation or at the request of the expelling State or, where appropriate, of the alien in question.

3. An alien may not be expelled to a State that has not consented to admit him or her into its territory or that refuses to do so, unless the State in question is the alien's State of nationality.

[25] The original version of draft article F1 read:

Protecting the human rights of aliens subject to expulsion in the transit State

The applicable rules that apply in the expelling State to protection of the human rights of aliens subject to expulsion shall also apply in the transit State.

[26] The revised version of F1 read:

Protecting the human rights of aliens subject to expulsion in the transit State

The rules that apply in the expelling State to protection of the human rights of aliens subject to expulsion shall apply *mutatis mutandis* in the transit State.

[27] Draft article G1 read:

Protecting the property of aliens facing expulsion

1. The expulsion of an alien for the purpose of confiscating his or her assets is prohibited.

2. The expelling State shall protect the property of any alien facing expulsion, shall allow the alien [to the extent possible] to dispose freely of the said property, even from abroad, and shall return it to the alien at his or her request or that of his or her heirs or beneficiaries.

[28] Draft article I1 read:

The responsibility of States in cases of unlawful expulsion

The legal consequences of an unlawful [illegal] expulsion are governed by the general regime of the responsibility of States for internationally wrongful acts.

[29] Draft article J1 read:

Diplomatic protection

The expelled alien's State of nationality may exercise its diplomatic protection on behalf of the alien in question.

[30] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment of 30 November 2010.

expulsion of the grounds for their expulsion; prohibition of mistreatment of aliens detained pending expulsion; the obligation for the competent authorities of the State of residence to inform the consular authorities of the State of origin without delay of the detention of their national with a view to expulsion; the obligation to respect the right to property of aliens subject to expulsion; and recognition of the responsibility of the expelling State and the provision by it of compensation. The report highlighted the similarities between the positions of the Court and the developments discussed in the Special Rapporteur's reports.

i. Summary of the Debate

15. While stressing the complex and sensitive nature of the topic and the diversity of State practice obtaining in this topic, several members commended the Special Rapporteur for his careful and systematic use of both older and recent sources from various regions around the world. However, some doubts were expressed as to the status of the proposed draft articles. According to one view, some of the draft articles could hardly be counted as codification or desirable progressive development of the law; in this regard, the Commission should indicate clearly whether it intended to identify the existing law or to propose new rules to States. More generally, the fact that, in identifying customary norms, due account must be taken of State practice, particularly contemporary practice was underscored.

16. Some members thought that the Commission should try to strike a balance between the right of a State to expel aliens and the limits imposed on that right by rules protecting the dignity and human rights of aliens. According to one opinion, the Commission should merely elaborate some well grounded, basic standards and guarantees, leaving certain latitude for national policies. According to another view, the work of the Commission would be of greater practical relevance if the set of draft articles went beyond the existing rules of general international law and the provisions of conventions that enjoyed virtually universal acceptance, to address sensitive questions such as the propriety of placing aliens awaiting expulsion in detention, the possibility of appealing an expulsion decision and various aspects of cooperation between States.

17. As to the form of the final product, some members thought it doubtful that it lent itself to the framing of draft articles that might then be incorporated into a convention; the idea of drawing up draft guidelines or principles enunciating best practices was suggested. According to other members, the Commission should continue to work towards the formulation of draft articles, also given the importance of the topic.

ii. Comments on the Draft Articles

18. Some members supported **draft article D1** on the return to the receiving State of the alien being expelled. It was said that it achieved a proper balance between the rights of the expelling State and respect for the alien's dignity and human rights. Doubts were expressed, however, as to whether the term "voluntary return" was appropriate when a person was ordered to leave a State's territory.

19. Some members considered that paragraph 1 should be recast to prevent its being construed as encouragement to the use of undue pressure on the alien; it was argued that the verb "encourage" lacked legal precision and could pave the way to abuse. It was therefore proposed to specify that the expelling State should take the necessary measures to promote, or make possible, the alien's voluntary return.

20. Regarding paragraph 2, some members proposed that the phrase "as far as possible" be deleted, for it could create the mistaken impression that, in some cases, there was no need to abide by international

law; at most, mention could be made of the possibility of adopting such coercive measures as were needed to implement the expulsion decision, bearing in mind the behaviour of the person concerned. Several members supported paragraph 3, at least in the context of progressive development.

21. While some members supported **draft article E1** on the State of destination of expelled aliens, others thought that it should be reconsidered in the light of State practice. The reversal of the order of paragraphs 2 and 3 was also suggested, because paragraphs 1 and 3 were closely linked.

22. Some members supported **revised draft article F1**, which aimed at extending to the transit State the protection of the human rights of aliens subject to expulsion. It was, however, suggested that that provision be reworded to refer to the rules of *international law* on the protection of human rights and to make it plain that the transit State was not obliged to repeat the whole expulsion procedure. Other members considered that the wording of draft article F1 lacked clarity.

23. Several members supported **draft article G1** on protecting the property of aliens facing expulsion. It was suggested that reference be made to the protection of the property rights of aliens. It was further suggested that protection be widened to take in nationals who were unlawfully regarded by the expelling State as aliens.

24. The view was expressed that the right of return to the expelling State in the event of unlawful expulsion, as set forth in **draft article H1**, stemmed from the principles of State responsibility for wrongful acts; another view was that the proclamation of that right constituted progressive development.

25. Support was expressed for **draft article I1** on the responsibility of States in cases of unlawful expulsion. The use of the expression "unlawful expulsion" was preferred over that of "illegal expulsion", so as to align the text with the wording of the articles on the responsibility of States for internationally wrongful acts.

26. Some members supported **revised draft article 8** on expulsion in connection with extradition, subject to possible drafting amendments. Other members felt that the wording should be reviewed and clarified.

iii. Concluding remarks of the Special Rapporteur

27. The Special Rapporteur was surprised to see that even now, some members were still questioning the nature of the work to be undertaken by the Commission, specifically, whether or not the topic lent itself to an exercise of codification and progressive development. That seemed all the more surprising given the abundance of State practice, as well as treaties and case law, both international and regional, on the subject of expulsion of aliens. Although it was premature to speculate on the form that the final product should take, the Special Rapporteur had a clear preference for the development of a set of draft articles rather than draft guidelines or guiding principles.

28. The Special Rapporteur remained convinced of the usefulness of draft article J1 on diplomatic protection, the scope of which had now been expanded to include the international protection of human rights, as demonstrated by the recent judgement rendered by the International Court of Justice in the *Ahmadou Sadio Diallo* case. The Special Rapporteur also remained convinced of the usefulness of a draft article on expulsion in connection with extradition. The Special Rapporteur maintained his belief that State practice had not converged sufficiently to warrant the formulation, if only as progressive development, of a provision on the suspensive effect of an appeal against an expulsion decision.

29. Be that as it may, in relation to the topic "Expulsion of aliens", the Commission would like to know from States whether, in their national practice, suspensive effect is given to appeals against an expulsion decision:

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

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

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

C. SUMMARY OF THE VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPIC IN THE SIXTH (LEGAL) COMMITTEE OF THE UN GENERAL ASSEMBLY AT ITS SIXTY-SIXTH SESSION (2011)

31. Commenting on the topic, the delegate of **India** spoke in support of the approach taken by the Special Rapporteur on the topic, which dealt with the right of a State to expel, and the rights and remedies available to the person being expelled. Laws governing expulsion and extradition were, however, he said, different and one could not be used as an alternative for the other.

32. Commenting on the topic the Delegate of **Japan** stated that the International Law Commission should study further State practice and international instruments and jurisprudence existing in this area, particularly with regard to criticisms by some that the topic was not yet ripe for codification.

33. Commenting on the topic, the Delegate of **Arab Republic of** E**gypt** stressed how important it was to abide by basic human rights as inscribed in international law. With such expulsions increasing, and concern over suspected terrorists, there should not be "en masse" expulsions of illegal immigrants because of race, religion, or ethnicity. He noted that his country was a party to the United Nations Refugee Convention of 1951 on this matter.

34. Commenting on the topic, the Delegate of **Islamic Republic of Iran** stated that a State's right to expel aliens living on its territory, if they threatened national security, could not be contradicted. The emphasis must be on conducting the expulsion in a manner that respected fundamental human rights of the deportees. He expressed doubts whether it was advisable to formulate any provisions on appeals against expulsion decisions, and agreed with the Special Rapporteur that there was no need for additional draft articles on this question, since there was no obvious evidence in State practice. The final form of the draft articles into a convention was also doubtful in his view, but rather the article should be guidelines for States to refer to when engaged in their own practice.

35. Commenting on the topic the Delegate of **Republic of Korea** noted that, while acknowledging the rights of States to expel aliens for violating domestic regulations or damaging national interests based in sovereignty, it was also necessary to keep a balance between State sovereignty and the human rights of the expelled aliens. Any appeal against an expulsion decision must be possible for basic human rights. On a national level, the country ensured that a "suspensive" effect be given to appeals against an expulsion decision. On an international level, he emphasized the "non-refoulement principle" by which, as a contracting party to the Convention on the Status of Refugees, the Korean Government would not

"expel" refugees in any manner whatsoever to States where their lives or freedoms would be threatened on account of their race, religion, nationality, membership of a particular group or political opinion.

36. Commenting on the topic the Delegate of **Thailand** noted that with respect to the "expulsion of aliens", appeals against an expulsion decision were only available to aliens lawfully in the territory of the expelling State. He then addressed several specific concerns he had with the draft articles on the topic, including the protection of the property of an alien facing expulsion. Exceptions should be made for cases where the court had found that property had been acquired illegally. Also of concern was the text on the right of return to the expelling State; the term "return", he said, should be replaced with "readmission". He was of the view that addressing the relationship between extradition and expulsion of aliens might be out of place within the text. In addition, these draft articles should not cover aliens whose status was regulated by special norms, such as international refugee law. The draft articles, in his opinion, should instead take the form of draft guidelines or guiding principles.

VII. PROTECTION OF PERSONS IN THE EVENT OF DISASTERS

A. BACKGROUND

1. At the fifty-ninth session of the International Law Commission (2007), it was decided to include the topic "Protection of Persons in the Event of Disasters" in its programme of work and Mr. Eduardo Valencia-Ospina (Colombia) was appointed as Special Rapporteur. At the same session, the Commission requested the Secretariat to prepare a background study on the topic, initially limited to natural disasters. At the sixtieth session (2008), the Commission had before it the preliminary report of the Special Rapporteur[31] that traced the evolution of the protection of persons in the event of disasters, identified the sources of the law on the topic, previous efforts towards codification and development of the law in the area, and a broad outline on various aspects of the general scope with a view to identifying the main legal questions to be covered.

2. At its sixty-first session (2009), the Commission considered the second report of the Special Rapporteur analysing the scope of the topic *ratione materiae*, *ratione personae* and *ratione temporis*, and issues relating to the definition of "disaster" for purposes of the topic, as well as undertaking a consideration of the basic duty to cooperate. The report further contained proposals for draft articles 1 (Scope), 2 (Definition of disaster) and 3 (Duty to cooperate).

3. The Commission also referred the draft articles 1 to 3 to the Drafting Committee, on the understanding that if no agreement was possible on draft article 3, it could be referred back to the Plenary with a view to establishing a Working Group to discuss the draft article. Later, the Commission received the report of the Drafting Committee and took note of draft articles 1 to 5, as provisionally adopted by the Drafting Committee.

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

4. The Commission had before it the fourth report of the Special Rapporteur[32], which dealt with the (i) responsibility of the affected State to seek assistance where its national response capacity is exceeded, (ii) the duty of the affected State not to arbitrarily withhold its consent to external assistance, and (iii) the right to offer assistance in the international community. Following a debate in plenary, the Commission decided to refer draft articles 10 to 12, as proposed by the Special Rapporteur, to the Drafting Committee.

5. The Commission provisionally adopted six draft articles, together with commentaries, including draft articles 6 to 9, which it had taken note of at its sixty-second session (2010), dealing with humanitarian principles in disaster response, human dignity, human rights and the role of the affected State, respectively, as well as draft articles 10 and 11, dealing with the duty of the affected State to seek assistance and with the question of the consent of the affected State to external assistance (chap. IX).

6. At the Sixty-third Session of the Commission, it provisionally adopted the following draft articles with commentaries: (i) Draft Article 6 on Humanitarian principles in disaster response; (ii) Draft Article 7 on Human Dignity; (iii) Draft Article 8 on Human Rights; (iv) Draft Article 9 on Role of the Affected State; (v) Draft Article 10 on Duty of the affected State to seek assistance; (vi) Draft Article 11 on Consent of the affected State to external assistance.

[31] A/CN.4/598.
[32] A/CN.4/643 and Corr.1.

7. However, the present report made proposals for adoption of draft article 10 and 11 and its commentaries. They are:

Draft Article 10:
Duty of the affected State to seek assistance

> "To the extent that a disaster exceeds its national response capacity, the affected State has the duty to seek assistance from among other States, the United Nations, other competent intergovernmental organizations and relevant nongovernmental organizations, as appropriate."

8. The Special Rapporteur in his second report noted that not all disasters are considered to overwhelm a nation's response capacity. The Commission therefore considers the present draft article only to be applicable to a subset of disasters as defined in draft article 3 of the present draft articles. The duty to seek assistance in draft article 10, as per the Commission, derives from an affected State's obligations under international human rights instruments and customary international law. Recourse to international support may be a necessary element in the fulfilment of a State's international obligations towards individuals where an affected State considers its own resources are inadequate to meet protection needs. While this may occur also in the absence of any disaster, a number of human rights are directly implicated in the context of a disaster, including the right to life, the right to food, the right to health and medical services, the right to the supply of water, the right to adequate housing, clothing and sanitation, and the right to be free from discrimination.

9. The phrase "all necessary measures" encompasses recourse to possible assistance from the international community in the event that an affected State's national capacity is exceeded. Such an approach would cohere with the guiding principle of humanity[33] as applied in the international legal system. The International Court of Justice affirmed in the *Corfu Channel* case (merits)[34] that elementary considerations of humanity are considered to be general and well-recognized principles of the international legal order, "even more exacting in peace than in war".

Draft Article 11:
Consent of the affected State to external assistance

> "1. The provision of external assistance requires the consent of the affected State.
> 2. Consent to external assistance shall not be withheld arbitrarily.
> 3. When an offer of assistance is extended in accordance with the present draft articles, the affected State shall, whenever possible, make its decision regarding the offer known."

10. Draft article 11 creates for affected States a qualified consent regime in the field of disaster relief operations. Paragraph 1 of draft article 11 reflects the core principle that implementation of international relief assistance is contingent upon the consent of the affected State. Paragraph 2 stipulates that consent to external assistance shall not be withheld arbitrarily, while paragraph 3 of the draft article places a duty upon an affected State to make its decision regarding an offer of assistance known whenever possible.

11. The principle that the provision of external assistance requires the consent of the affected State is fundamental to international law. Accordingly, paragraph 3 of the guiding principles annexed to General Assembly resolution 46/182 notes that "humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal by the affected country".[35] The

[33] Draft article 6 affirms the core position of the principle of humanity in disaster response.
[34] *United Kingdom of Great Britain and Northern Ireland v. Albania* ("*Corfu Channel* case"), Judgment of 9 April 1949, *I.C.J. Reports 1949*, p. 22.
[35] General Assembly Resolution 46/182 (see footnote 558), annex, para. 3.

Commission considers that the duty of an affected State to ensure protection and assistance to those within its territory in the event of a disaster is aimed at preserving the life and dignity of the victims of the disaster and guaranteeing the access of persons in need to humanitarian assistance. This duty is central to securing the right to life of those within an affected State's territory.[36]

12. The term "arbitrary" directs attention to the basis of an affected State's decision to withhold consent. The determination of whether the withholding of consent is arbitrary must be determined on a case-by-case basis, although as a general rule several principles can be adduced. First, the Commission considers that withholding consent to external assistance is not arbitrary where a State is capable of providing, and willing to provide, an adequate and effective response to a disaster on the basis of its own resources. Second, withholding consent to assistance from one external source is not arbitrary if an affected State has accepted appropriate and sufficient assistance from elsewhere. Third, the withholding of consent is not arbitrary if the relevant offer is not extended in accordance with the present draft articles. In particular, draft article 6 establishes that humanitarian assistance must take place in accordance with principles of humanity, neutrality and impartiality, and on the basis of non-discrimination. Conversely, where an offer of assistance is made in accordance with the draft articles and no alternate sources of assistance are available; there would be a strong inference that a decision to withhold consent is arbitrary.

Draft article 12 read as follows:
Right to offer assistance

> "In responding to disasters, States, the United Nations, other competent intergovernmental organizations and relevant non-governmental organizations shall have the right to offer assistance to the affected State."

13. Draft article 12, and for the general proposition that offers of assistance should not be viewed as interference in the internal affairs of the affected State, subject to the condition that the assistance offered did not affect the sovereignty of the affected State as well as its primary role in the direction, control, coordination and supervision of such relief and assistance (draft article 9, paragraph 2). Agreement was also expressed with the Special Rapporteur's view that offering assistance in the international community is the practical manifestation of solidarity and a positive duty. At the same time, it was proposed that the provision more clearly define the circumstances where an affected State could reject offers of assistance and ensure that it has the appropriate freedom to do so.

14. Hence, the view was expressed that the right to offer assistance should not extend to assistance to which conditions are attached that are unacceptable to the affected State. Furthermore, the assistance offered had to be consistent with the provisions of the draft article and, in particular, should not be offered or delivered on a discriminatory basis. It was also pointed out that draft article 12 should not be interpreted to imply permission to interfere in the internal affairs of the affected State: it merely reflected a right to offer assistance, which the affected State may refuse, subject to draft article 11.

i. Specific issues on which the Commission seeks comments

15. The Commission has reiterated that it would welcome any information concerning the practice of States under this topic, including examples of domestic legislation. It would welcome, in particular, information and comments on specific legal and institutional problems encountered in dealing with or responding to disasters. Further, the Commission has taken the view that States have a duty to cooperate with the affected State in disaster relief matters. However, does this duty to cooperate include a duty on States to provide assistance when requested by the affected State.

[36] See International Covenant on Civil and Political Rights (see footnote 566 above), art. 6, para. 1.

D. SUMMARY OF THE VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPIC AT THE SIXTH (LEGAL) COMMITTEE OF THE UN GENERAL ASSEMBLY AT ITS SIXTY-SIXTH SESSION (2011)

16. The Delegate of **Democratic Socialist Republic of Sri Lanka** appreciated for avoiding "politically contentious" issues. Agreed that it was the affected State which could best determine when a disaster exceeded its national capacity to provide assistance and that State consent to receive assistance was a crucial requirement. The language "duty to seek assistance" was more appropriate than "duty to request assistance", as was "duty to offer assistance" rather than "right to offer assistance".

17. The Delegate of **Pakistan** said that the principle of independence and territorial sovereignty of States was enshrined in international law. The primary responsibility of the State affected by a disaster flowed from its obligation to its citizens. Only the affected State could assess its need for international assistance. Pakistan supported Special Rapporteur's observation on the topic that the State was primarily responsible for overseeing relief operations, and that relief operations required State consent. Any legal right to provide assistance should therefore be avoided. Draft articles 10 and 11 on the topic, in that regard, were based on the assumption that States which did not seek international assistance would undermine the practice of international cooperation during disasters. It was also essential to consider whether States, the United Nations, other intergovernmental organizations and nongovernmental organizations, as referenced in article 12, should be treated as if they were on the same juridical footing.

18. The Delegate of **India** noted the provision in the draft articles recognizing the duty of the affected State to seek assistance from third parties. These articles also indicated the duty of the State to protect and provide relief to its citizens and the responsibility of the State to oversee aid relief and assistance. Emphasizes the importance of State sovereignty, and assistance could be provided only with the consent of the affected State.

19. The Delegate of **Arab Republic of Egypt** said that it was a State's responsibility to request help when its national capacity was overwhelmed, and it was equally important to respect the sovereignty of States when discussing this important topic and to ensure that any rules and regulations not infringe on the rights of States.

20. The Delegate of **People's Republic of China** observed that the affected States bore the primary responsibility when responding to natural disasters. This not only facilitated more effective international cooperation but motivated affected States to assume responsibilities on their own initiative, and to be more committed to building disaster-relief capacities. Further, disaster relief should never be politicized and become an excuse for interfering in the internal affairs of a State, as that would be a violation of the principles of humanity, neutrality and impartiality, contradicting the "spirit of relief" and compromising relief activities.

21. The Delegate of **Islamic Republic of Iran** viewed that the dual nature of a State's sovereignty, which entailed both rights and obligations to take all measures to provide assistance to its nationals and other persons living in its territory, could not be "disproportionately broadened" to a legal obligation to seek external assistance. The obligation to cooperate when receiving aid did not oblige the State to accept relief, as such humanitarian aid remained subject to the consent of the affected State. The affected State had the right, in accordance to its domestic law to direct, control, supervise and coordinate the assistance provided in its territory.

22. The Delegate of **Indonesia** expressed that the core principles of sovereignty, non-intervention, State consent, and the need to ensure balance between those principles and the duty of protection were not

accurately reflected in the draft articles. Assistance should be carried out based on national legislation, political independence, sovereignty and territorial integrity.

23. The Delegate of **Republic of Korea** stated that such protection was not considered as a duty but a right of the aid donor. International organizations such as the United Nations should be active in requesting assistance for the affected States. The texts of the draft articles could have been "less obscure". By the wording of draft article 10 it was not clear when a disaster exceeded the national response capacity of the affected State or not.

24. The Delegate of **Thailand** agreed with the Commission that the concept of responsibility to protect must not be extended to cover response to natural disasters and related matters. Commentary to the draft articles should further clarify which human rights were to be protected in those instances. In draft article 12, the word "right" in the phrase "right to offer assistance", be substituted with the word "duty" because offers of assistance from the international community were part of international cooperation, as opposed to assertion of rights.

25. The Delegate of **Japan r**ecalled the massive earthquake and tsunami that had struck Japan in March. Delegate expressed their gratitude for the heart-warming encouragement and support from around the world, especially all United Nations Member States. The Commission could codify and elaborate rules and norms to facilitate "the flow of international assistance to those in need". In that context, the primary responsibility to protect victims of a disaster lay with the affected State. The Commission should deepen its discussion as to whether it was justifiable to characterize seeking assistance as a "duty" of the affected State, while offering assistance was considered the "right" of other States. The delegate also highlighted the importance of and need for international solidarity during disasters.

26. The Delegate of **Singapore** said the focus of the concept should be on the duty of the State that received offers of assistance to give serious consideration to such offers, whether they emanated from States or such referenced organizations. On the question raised by the Commission of whether the duty to cooperate included a duty on States to provide assistance when requested by the affected States, the Commission's attention was drawn to the 2005 agreement of the Association of Southeast Asian Nations (ASEAN) Agreement on Disaster Management and Emergency Response; the relevant article stated that the parties would "promptly respond to a request for assistance from an affected Party". The regional agreement did not oblige State parties to provide assistance, but did require them to respond promptly to such a request.

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

A. BACKGROUND

1. The Commission, at its fifty-seventh session (2005), decided to include the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)" in its programme of work and appointed Mr. Zdzislaw Galicki as Special Rapporteur. From its fifty-eighth (2006) to its sixtieth (2008) sessions, the Commission received and considered three reports of the Special Rapporteur. At its sixtieth session (2008), the Commission decided to establish a working group on the topic under the chairmanship of Mr. Alain Pellet, with a mandate and membership to be determined at the sixty-first session. At the sixty-first session (2009), an open ended Working Group was established, and from its discussions, a general framework for consideration of the topic, with the aim of specifying the issues to be addressed, was prepared. At the sixty-second session (2010), the Working Group was reconstituted and, in the absence of its chairman, was chaired by Mr. Enrique Candioti.

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

2. At the sixty-third session, the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/648). After recalling the background to the topic and its consideration thus far including discussions of the Sixth Committee during the sixty-fifth session of the General Assembly, the fourth report — building upon previous reports — sought to address the question of sources of the obligation to extradite or prosecute, focusing on treaties and custom. The Special Rapporteur, following suggestions in the 2010 Working Group, sought to underpin the consideration of the topic around the duty to cooperate in the fight against impunity, noting, more generally, that the duty to cooperate was well established as a principle of international law and can be found in numerous international instruments. In international criminal law, the duty to cooperate had a positive overtone as exemplified in the Preamble of the Rome Statute of the International Criminal Court of 1998, containing an affirmation that "the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation", and, to contribute to the prevention of such crimes, a determination "to put an end to impunity for the perpetrators of these crimes".

3. The fight against impunity for the perpetrators of serious crimes of concern to the international community as a whole was a fundamental policy achievable on the one hand through the establishment of international criminal tribunals and on the other the exercise of jurisdiction by national courts. The Special Rapporteur stated that the duty to cooperate in the fight against impunity had already been considered as a customary rule by some States and in the doctrine.

4. To underscore that the duty to cooperate was overarching in the appreciation of the obligation to extradite or prosecute, the Special Rapporteur proposed to replace the former article 2 (Use of terms) with a new draft article 2 on the duty to cooperate. The Special Rapporteur reviewed the various sources of the obligation to extradite or prosecute, considering treaties first, drawing attention to a variety of possible classifications and differentiation, available in the doctrine, distinguishing such treaties. He recalled that he had previously proposed a draft article 3 dealing with treaties as a source of the obligation to extradite or prosecute. In light of the variety and differentiation of provisions concerning the obligation, the Special Rapporteur considered it useful to propose the addition of another paragraph to draft article 3 on Treaty as a source of the obligation to extradite or prosecute.

5. The Special Rapporteur also analysed the obligation *aut dedere aut judicare* as a rule of customary international law, noting that its acceptance was gaining prominence at least in respect of certain crimes in doctrinal writings of some legal scholars and was being acknowledged by some delegations in the debates of the Sixth Committee particularly during the sixty-fourth session of the General Assembly (2009), while some others had called for further study by the Commission. The Special Rapporteur also pointed to written and oral pleadings of States before the International Court of Justice, in particular in respect of *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*.

6. The Special Rapporteur also addressed the relevance of norms of *jus cogens* as a source of the obligation to extradite or prosecute as suggested by some commentators, noting that such connection arose from the assertion that there were certain prohibited acts which if committed would constitute serious breaches of obligations under peremptory norms of general international law and that consequently gave rise to an obligation on all States to prosecute or entertain civil suits against the perpetrators of such crimes when found on their territory. Moreover, States were prohibited from committing serious crimes of concern to the international community as a whole, and any international agreement between States to facilitate commission of such crimes would be void *ab initio*.

7. The Special Rapporteur noted that although there was no doubt that there were certain crimes in the realm of international criminal law whose prohibition had reached the status of *jus cogens* (such as the prohibition against torture), whether the obligation *aut dedere aut judicare* attendant to such peremptory norms also possessed the characteristics of *jus cogens* was a matter giving rise to difference of views in the doctrine.

8. Commenting on the categories of crimes associated with the obligation *aut dedere aut judicare*, the Special Rapporteur, observing that it was difficult in the present circumstances to prove the existence of a general customary obligation to extradite or prosecute, suggested that focus should rather be on identifying those particular categories of crimes which seemed to create such an obligation, on account, *inter alia*, that they were serious crimes of concern to the international community as a whole. He alluded to the importance of differentiating between ordinary criminal offences — criminalized under national laws of States — and heinous crimes variously described as international crimes, crimes of international concern, grave breaches, crimes against international humanitarian law, etc., and paying particular attention to the latter, partly because they possessed an international or had a special grave character. Among such crimes were: (a) the crime of genocide; (b) crimes against humanity; (c) war crimes; and (d) the crime of aggression. Having considered the various issues implicated, the Special Rapporteur proposed draft article 4 on International custom as a source of the obligation *aut dedere aut judicare*. In proposing the draft article, he noted that the list of crimes covered by paragraph 2 of that article was still open and subject to further consideration and discussion.

i. General comments

9. The Special Rapporteur was commended for helpfully embarking on an analysis of issues that substantively had a bearing on the topic. Members nevertheless acknowledged the difficulties presented by the topic, particularly as it had implications for other aspects of the law, including questions of prosecutorial discretion, questions of asylum, the law on extradition, the immunity of States officials from criminal jurisdiction, peremptory norms of international law, as well as universal jurisdiction, thereby posing problems in terms of the direction to be taken and what needed to be achieved. The methodology to be adopted and the general approach to be taken were thus crucial in fleshing out the issues relevant to the topic. In this connection, attention was drawn to the valuable work of the Working Group on *aut dedere aut judicare* in 2009 and 2010 and the continuing relevance of the proposed 2009 general framework for the Commission's consideration of the topic, prepared by the Working Group. Although

the Fourth report was useful in focusing on the treaties and custom as sources of the obligation, and indeed the consideration of the sources of the obligation remained a key aspect of the topic, the report had not fully addressed the issues so as to allow the Commission draw informed conclusions on the direction to be taken on the topic. In particular, concerns were expressed about the draft articles as proposed and the analysis on which they were based. It was noted that the methodology of the Special Rapporteur in treating the main sources of international law, namely treaties and customary law separately and proposing two separate draft articles therefore was conceptually problematic; the focus should be on the obligation to extradite or prosecute and how treaties and custom evidenced the rule rather than on treaties or custom as the "source" of the obligation; there was no need for a draft article to demonstrate that there was a rule in a treaty or under custom. Indeed, there were other sources that would help to inform the nature, scope and content of the obligation.

ii. Draft article 2[37]: Duty to cooperate

10. Some members doubted the relevance of the draft article as a whole, with a suggestion being made that it be transformed into hortatory preambular language. It was not entirely clear why it was subject of a self-standing obligation; the formulation was question-begging, not supportable in its current form, and should be reconsidered once the implications of the duty to cooperate in the context of the topic were more clearly elaborated; more particularly, there ought to be an explanation of an explicit relationship between *aut dedere aut judicare* and the duty of States to cooperate with each other, as opposed to the duty to cooperate and the fight against impunity. Some other members however underlined the importance of reflecting in some manner the duty to cooperate, or an obligation to cooperate as preferred by some, in the fight against impunity, it being recalled that this aspect was highlighted in the 2009 general framework and by the 2010 Working Group. It was stressed that the duty to cooperate was already well established across various fields of international law. The key question to be answered was what it meant in the context of international criminal cooperation, assessing how far the political goal of the fight against impunity had crystallized into a specific legal obligation. Since the duty did not exist in a vacuum what seemed essential was to provide a context for it in relation to the topic, as well as content in aspects such as prevention, prosecution, judicial assistance and law enforcement.

11. Commenting of the draft article as such, while acknowledging the emphasis on the "fight against impunity" in paragraph 1, it was pointed out by some members that the phrase was imprecise, suggestive of preambular language than clear legal text for the operative part. It was however pointed out that slogan-sounding language like fight against impunity was commonly and easily understood, and the use of simplified language has the advantage of making draft articles of the Commission accessible. Some other members were also of the view that paragraph 1 was formulated cautiously and the use of qualifiers established unnecessary thresholds.

12. It was also noted that it was not clear why international courts and tribunals would be implicated as paragraph 1 seemed to suggest since the core aspects of the topic affected principally inter-State relations, including domestic courts. The point was nevertheless made that paragraph 1 could in fact be separated to deal with interstate cooperation and then with cooperation with international courts and tribunals, as well as cooperation with the United Nations, on the basis of article 89 of Additional Protocol I.

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[37] Draft article 2 read as follows:

Duty to cooperate

1. In accordance with the present draft articles, States shall, as appropriate, cooperate among themselves, and with competent international court and tribunals, in the fight against impunity as it concerns crimes and offences of international concern.

2. For this purpose, the States will apply, wherever and whenever appropriate, and in accordance with these draft articles, the principle to extradite or prosecute (*aut dedere aut judicare*)

13. Some members were also of the view that the phrase "crimes and offences of international concern," in the paragraph was ambiguous as to offer any guidance on the type of crimes covered by the present topic, there was need for clarity, bearing in mind the principle *nullum crimen sine lege*. For paragraph 2, it was noted that the phrase "wherever and whenever appropriate" had the potential of being construed widely, with negative consequences for inter-State relations. Moreover, its whole meaning was obscure, as at one level it seemed to denote a free standing obligation to extradite or prosecute, without stating much as to what it entailed. However, some members were more favourable to the more general openendedness implied by the language, considering it appropriate for a text that was intended to make propositions of general application.

iii. Draft article 3[38]: Treaty as a source of the obligation to extradite or prosecute

14. A suggestion was made to delete the draft article in its entirety. Its paragraph 1 was considered superfluous; it was not evident how a reflection of *pacta sunt servanda* in the text helped to elucidate issues concerning the topic. To some members, paragraph 2, although currently unclear, raised possibilities for further enquiry. In providing that "[p]articular conditions for exercising extradition or prosecution shall be formulated by the internal law of the State party", it was not apparent which State party was being referred to and it also raised the possibility that a State would invoke its internal law to justify non-compliance with an international obligation. Moreover, the reference to "general principles of international criminal law" seemed vague. If anything, it was these principles which had to be fleshed out for implementation. For example, it was suggested it might be useful to make an assessment whether prosecutorial discretion was a general principle of criminal law relevant to the topic. The point was also made that draft article ought to be addressing matters concerning both the conditions for extradition, including available limitations, and the conditions for prosecution, according them different treatment as they were different legal concepts.

15. It was also noted that while the Special Rapporteur had alluded to a variety of classification of treaties and differentiation of treaty provisions in the doctrine in his report in support of the draft article, there was no further analysis or application of such classification. It would have been helpful, for instance, to explore further whether such classification and differentiation provided some possible understanding of the qualifications, conditions, requirements, and possible exceptions to extradition or prosecution provided for in the various treaties, including such aspects of extradition law concerning "double criminality", the rule of "specialty", as well as issues concerning the political offence exception and non-extradition of nationals.

16. The classification could also possibility have helped to show that many treaties which contain the obligation to extradite or prosecute articulated a general principle of law, or customary rule or whether it had a bearing on the application of the obligation in respect of certain "core crimes".

iv. Draft article 4[39]: International custom as a source of the obligation *aut dedere aut judicare*

[38] Draft article 3, as amended, read as follows:

Treaty as a source of the obligation to extradite or prosecute

1. Each State is obliged either to extradite or to prosecute an alleged offender if such an obligation is provided for by a treaty to which such State is a party.

2. Particular conditions for exercising extradition or prosecution shall be formulated by the internal law of the State party, in accordance with the treaty establishing such obligation and with general principles of international criminal law.

[39] Draft article 4 read as follows:

International custom as a source of the obligation *aut dedere aut iudicare*

1. Each State is obliged either to extradite or to prosecute an alleged offender if such an obligation is deriving from the customary norm of international law.

2. Such an obligation may derive, in particular, from customary norms of international law concerning [serious violations of international humanitarian law, genocide, crimes against humanity and war crimes].

17. Some members viewed the present article problematic since it was not supported by the Special Rapporteur's own analysis, having himself admitted that it was rather difficult in the present circumstances to prove the existence of a general customary obligation to extradite or prosecute, and its drafting was rather tentative.

18. Although paragraph 1 seemed unobjectionable in its terms, it presented a tautology and seemed to add little to the question of the obligation *aut dedere aut judicare*. At the same time, it was recognized that the draft article seemed to address an issue central to the topic. In particular, paragraph 2, together with paragraph 3, had the potential to be elaborated into an important rule, yet as presently formulated, it was vague, obscure and the drafting was weak. It was underlined that one of the key issues to be grappled with was the distinction between "core crimes" for the purposes of the topic and other crimes. The Special Rapporteur was encouraged to undertake a more detailed study of the State practice and *opinio juris* and offer a firm view on which certain serious crimes of concern to the international community as a whole gave rise to an obligation to extradite or prosecute. Such an analysis could also consider such issues as whether the accumulation of treaties containing an obligation to extradite or prosecute meant that that States accepted that there was a customary rule, or whether it meant that States believed that they were derogating from customary law. In making such a detailed analysis, there was no need for the Special Rapporteur to await the judgment of the International Court of Justice in the *Questions relating to the Obligation to Prosecute or Extradite*.

19. Some members also recalled that the issues being raised had already been canvassed in the Commission in particular in relation to its work culminating in the adoption of the 1996 Draft Code of Crimes against the Peace and Security of Mankind. Draft article 9 thereof on the obligation to extradite and prosecute imposes an obligation on the State Party in the territory of which an individual alleged to have committed a crime of genocide, crimes against humanity, crimes against United Nations and associated personnel or war crimes is found shall extradite or prosecute that individual. Draft article 3 and 4 could be reformulated, as a matter of progressive development, along the lines of draft article 9 of the Draft Code.

20. It was thus suggested that there was a need to proceed cautiously, with an appropriate differentiation in the analysis between different categories of crimes, noting in that regard that some crimes may be subject to universal jurisdiction but not necessarily to the obligation to extradite or prosecute. Similarly, grave breaches were subject to the obligation *aut dedere aut judicare* but not all war crimes are subject to it.

21. In the first place, it might be easier to make an assessment of the customary nature of the obligation in respect of certain identified "core crimes" as opposed to finding a more general obligation. It was also recalled that crimes under international law constituted the most serious crimes that were of concern to the international community as a whole. Moreover, the current topic was inextricably linked to universal jurisdiction. Indeed, the current topic was artificially separated from the broader subject of universal jurisdiction, and the obligation to extradite or prosecute would not be implicated without jurisdiction. In respect of the Draft Code it was recognised that national courts would exercise jurisdiction in regard to draft article 9 under the principle of universal jurisdiction. Accordingly, further work could not meaningfully be done without addressing universal jurisdiction and the type of crimes implicated by it. In this context, it was suggested that in future reports the Special Rapporteur could consider more fully the relationship between *aut dedere aut judicare* and universal jurisdiction in order to assess whether this

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3. The obligation to extradite or prosecute shall derive from the peremptory norm of general international law accepted and recognized by the international community of States (jus cogens), either in the form of international treaty or international custom, criminalizing any one of acts listed in paragraph 2.

relationship had any bearing on draft articles to be prepared on the topic. Moreover, the suggestion was made that present topic could be expanded to cover universal jurisdiction, taking into account the views of the Sixth Committee following a question in Chapter III of the report of the Commission at the present session.

22. It was noted that the meaning of paragraph 3 was not entirely clear and was question begging; its mandatory language did not correspond to the doubts that the Special Rapporteur expresses in his report. For example, it was not clear whether it was intended to set out the obligation to extradite or prosecute as a peremptory norm or whether it is intended to include in the obligation, crimes that violate such norms. The issues sought to be covered by the paragraph, including the still tenuous link between crimes prohibited as constituting breaches of peremptory norms and the procedural consequences that ensue in relation to the obligation to extradite or prosecute, simply required to be teased out in an extensive analysis by the Special Rapporteur, building significantly on the comments made in his report on the views expressed in the doctrine.

v. Future work

23. As to the future work on the present topic, the view was expressed that there was an inherent difficulty in the topic. It was even suggested that the Commission should not be hesitant to reflect on the possibility of suspending or terminating the consideration of the topic, as in the past it had done so with respect to other topics. Some other members, however, noted that the topic remained a viable and useful project for the Commission to pursue. Moreover, States were interested in the topic and were keen for progress. It was also recalled that this aspect had been a subject of discussion in the past, and that the resulting preparation of the 2009 general framework pointed to the viability of the topic. Recognizing that the Sixth Committee was dealing with a related item on the scope and application of the principle of universal jurisdiction, it was also suggested that this matter could be combined with the topic on the *aut dedere aut judicare* obligation. It was recognized, however, that there were different views on this matter in the Sixth Committee.

C. SUMMARY OF THE VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPIC AT THE SIXTH (LEGAL) COMMITTEE OF THE UN GENERAL ASSEMBLY AT ITS SIXTY-SIXTH SESSION (2011)

24. The Delegate of **India s**upported the approach taken by the Special Rapporteur, which dealt with the right of a State to expel, and the rights and remedies available to the person being expelled. Laws governing expulsion and extradition were, different and one could not be used as an alternative for the other.

25. The Delegate of **Japan** said that more study on State practice and international instruments and jurisprudence in this area was essential.

26. The Delegate of **Arab Republic of Egypt** reiterated the importance of abiding by basic human rights as inscribed in international law. With such expulsions increasing, and concern over suspected terrorists, there should not be “en masse” expulsions of illegal immigrants because of race, religion, or ethnicity.

27. The Delegate of **Islamic Republic of Iran** viewed that a State’s right to expel aliens living on its territory, if they threatened national security, could not be contradicted. The emphasis must be on conducting the expulsion in a manner that respected fundamental human rights of the deportees. It is also not advisable to formulate any provisions on appeals against expulsion decisions, and agreed with the

Special Rapporteur that there was no need for additional draft articles on this question, since there was no obvious evidence in State practice. Instead of final form of the draft articles converting into a convention, the article should be in the form of guidelines for States to refer to when engaged in their own practice.

28. The Delegate of **Republic of Korea** acknowledged the rights of States to expel aliens for violating domestic regulations or damaging national interests based in sovereignty, however it was also necessary to keep a balance between State sovereignty and the human rights of the expelled aliens. Appeal against an expulsion decision must be possible for basic human rights. On a national level, a "suspensive" effect be given to appeals against an expulsion decision. On an international level, the "non-refoulement principle" by which, as a contracting party to the Convention on the Status of Refugees, the Korean Government would not "expel" refugees in any manner whatsoever to States where their lives or freedoms would be threatened on account of their race, religion, nationality, membership of a particular group or political opinion.

29. The Delegate of **Thailand** emphasized that appeals against an expulsion decision were only available to aliens lawfully in the territory of the expelling State. Raised concerns on the protection of the property of an alien facing expulsion. Exceptions should be made for cases where the court had found that property had been acquired illegally. On the right of return to the expelling State; the term "return", should be replaced with "readmission". Those draft articles should not cover aliens whose status was regulated by special norms, such as international refugee law. It should instead take the form of draft guidelines or guiding principles.

IX. TREATIES OVER TIME

A. BACKGROUND

1. The International Law Commission at its sixtieth session held in 2008, decided to include the topic "Treaties over time" in its programme of work, on the basis of the recommendation of a Working Group on the long-term programme of work, and to establish a Study Group thereafter at its following session in 2009[40].

2. At its sixty-first session, in 2009, the Commission established a Study Group on Treaties over Time, chaired by Mr. Georg Nolte[41]. The Commission subsequently took note of the oral report of the Chairman of the Study Group.

3. As a basis for the discussion, the Study Group had before it the following documents:

- two informal papers presented by the Chairman, which were intended to serve as a starting point for considering the scope of future work on the topic;
- the proposal concerning this topic contained in Annex A of the Commission's report on its 2008 session (A/63/10, at p. 365); and
- some background material, including relevant excerpts of the Commission's articles on the Law of Treaties, with commentaries; of the Official Records of the United Nations Conference on the Law of Treaties; and of the conclusions and the report of the Commission's Study Group on the Fragmentation of international law (A/61/10, para. 251 and A/CN.4/L.682).

4. The Study Group agreed on the following[42]:

(a) Work should start on subsequent agreement and practice on the basis of successive reports to be prepared by the Chairman for the consideration of the Study Group, while the possibility of approaching the topic from a broader perspective should be further explored;

(b) The Chairman would prepare for next year a report on subsequent agreement and practice as addressed in the jurisprudence of the International Court of Justice, and other international courts and tribunals of general or ad hoc jurisdiction;

(c) Contributions on the issue of subsequent agreement and practice by other interested members of the Study Group were encouraged, in particular on the question of subsequent agreement and practice at the regional level or in relation to special treaty regimes or specific areas of international law;

(d) Moreover, interested members were invited to provide contributions on other issues falling within the broader scope of the topic as previously outlined.

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[40] See *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 353. For the syllabus on the topic, see *ibid*., annex A

[41] See *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), paras. 218-219.

[42] *Ibid*., para. 226.

5. At its sixty-second session in 2010, the Study Group on Treaties over time was reconstituted under the chairmanship of Mr. Georg Nolte. The Study Group began its work on the aspects of the topic relating to subsequent agreements and practice, on the basis of an introductory report prepared by its Chairman on the relevant jurisprudence of the International Court of Justice and arbitral tribunals of ad hoc jurisdiction. It recommended that a request for information be included in Chapter III of the Commission's report and be also brought to the attention of States by the Secretariat. The Commission took note of the oral report of the Chairman of the Study Group on Treaties over time and approved the recommendation concerning the request for information from States.

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

6. At the present session, the Study Group on Treaties over time was reconstituted again under the chairmanship of Mr. Georg Nolte.

7. The Commission took note of the oral report of the Chairman of the Study Group on Treaties over time and approved the recommendation of the Study Group that the request for information included in Chapter III of the report of the Commission on the work of its sixty-second session (2010) be reiterated in Chapter III of the Commission's report on its work at the current session.

8. The Study Group first took up the remainder of the work on the introductory report prepared by its Chairman on the relevant jurisprudence of the International Court of Justice and arbitral tribunals of *ad hoc* jurisdiction. Accordingly, members discussed the section of the introductory report relating to a possible modification of a treaty by subsequent agreements and practice and the relation of subsequent agreements and practice to formal amendment procedures. As with respect to the other parts of the introductory report and following a proposal by the Chairman, the Study Group considered that no conclusions should be drawn, at this stage, on the matters covered in the introductory report.

9. The Chairman noted that the following additional documents had been submitted for consideration by the Study Group: the second report by the Chairman on the "Jurisprudence under special regimes relating to subsequent agreements and subsequent practice", a paper by Mr. Murase entitled "The Pathology of "Evolutionary" Interpretations: GATT Article XX's Application to Trade and the Environment" and a paper prepared by Mr. Petrič on subsequent agreements and practice concerning a particular boundary treaty. The Study Group discussed the paper by Mr. Murase in connection with the pertinent point addressed in the Chairman's second report, and decided to postpone the consideration of the paper prepared by Mr. Petrič until it would discuss issues of subsequent agreement and subsequent practice that are unrelated to judicial or quasi-judicial proceedings.

10. The Chairman's second report covers the jurisprudence under certain international economic regimes (World Trade Organization, Iran-US Claims Tribunal, International Centre for the Settlement of Investment Disputes tribunals and North American Free Trade Area tribunals), international human rights regimes (European Court of Human Rights, Inter-American Court of Human Rights, and Human Rights Committee under the International Covenant on Civil and Political Rights), and other regimes (International Tribunal for the Law of the Sea, International Criminal Court, International Criminal Tribunals for the former Yugoslavia and Rwanda, and Court of Justice of the European Union). The report explains why those regimes are covered and not others.

11. The Study Group considered the second report on the basis of the twenty "General conclusions" contained therein. Discussions focused on the following aspects: reliance by adjudicatory bodies under

special regimes on the general rule of treaty interpretation; the extent to which the special nature of certain treaties - notably human rights treaties and treaties in the field of international criminal law - might affect the approach of the relevant adjudicatory bodies to treaty interpretation; different emphasis placed by adjudicatory bodies on the various means of treaty interpretation (e.g. more text-oriented or more purpose-oriented approaches to treaty interpretation in comparison with more conventional approaches); general recognition of subsequent agreements and practice as a means of treaty interpretation; the significance of the role assigned by various adjudicatory bodies to subsequent practice among the various means of treaty interpretation; the concept of subsequent practice for the purpose of treaty interpretation, including the point in time from which a practice may regarded as "subsequent"; possible authors of relevant subsequent practice; as well as evolutionary interpretation as a form of purposive interpretation in the light of subsequent practice. Due to lack of time, the members of Study Group could only discuss eleven of the conclusions contained in the second report. In the light of these discussions in the Study Group, the Chairman reformulated the text of what have now become his nine preliminary conclusions.

i. Future work and request for information

12. The Study Group also discussed the future work with regard to this topic. It may be recalled that it was expected that, during the sixty-fourth session (2012), the discussion of the second report prepared by the Chairman would be completed, to be followed by a third phase, namely the analysis of the practice of States that is unrelated to judicial and quasi-judicial proceedings. This should be done on the basis of a further report on this topic. The Study Group expected that the work on the topic would, as originally envisaged, be concluded during the next quinquennium and result in conclusions on the basis of a repertory of practice. The Study Group also discussed the possibility of modifying the working method with respect to the topic so as to follow the procedure involving the appointment by the Commission of a Special Rapporteur. It came to the conclusion that this possibility should be considered during the next session by the newly elected membership.

13. At its meeting held on 2 August 2011, the Study Group examined the possibility that the request for information from Governments which was included in Chapter III of the Commission's report on the work of its sixty-second session (2010) be reiterated. It was generally felt in the Study Group that more information provided by Governments in relation to this topic would be very useful, in particular with respect to the consideration of instances of subsequent practice and agreements that have not been the subject of a judicial or quasi-judicial pronouncement by an international body. Therefore, the Study Group recommended to the Commission that Chapter III of this year's report should include a section reiterating the request for information on the topic "Treaties over time".

ii. Preliminary conclusions by the Chairman of the Study Group, reformulated in the light of the discussions in the Study Group

14. The nine preliminary conclusions by the Chairman of the Study Group, reformulated in the light of the discussions in the Study Group, are as follows:

(1) General rule on treaty interpretation

15. The provisions contained in Article 31 of the Vienna Convention on the Law of Treaties (VCLT), either as an applicable treaty provision or as a reflection of customary international law, are recognized by

the different adjudicatory bodies reviewed as reflecting the general rule on the interpretation of treaties which they apply[43].

(2) Approaches to interpretation

16. Despite the general rule recognized in Article 31of VCLT**,** different adjudicatory bodies have in different contexts put more or less emphasis on different means of interpretation contained therein. Three broad approaches can be distinguished:

> *Conventional*: Like the International Court of Justice, most adjudicatory bodies (Iran-US Claims Tribunal, ICSID tribunals, ITLOS, and the international criminal courts and tribunals) have followed approaches which typically take all means of interpretation of Article 31 VCLT into account without making noticeably more or less use of certain means of interpretation.
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> *Text-oriented*: Panel and Appellate Body Reports of the World Trade Organisation (WTO) have in many cases put a certain emphasis on the text of the treaty (ordinary or special meaning of the terms of the agreement) and have been reluctant to emphasize purposive interpretation[44]. This approach seems to have to do, *inter alia*, with a particular need for certainty and with the technical character of many provisions in WTO-related agreements.
>
> *Purpose-oriented*: The regional human rights courts, as well as the Human Rights Committee under the International Covenant on Civil and Political Rights (HRC), have in many cases emphasized the object and purpose[45]. This approach seems to have to do, *inter alia*, with the character of substantive provisions of human rights treaties which deal with the personal rights of individuals in an evolving society.

(3) Interpretation of treaties on human rights and international criminal law

17. The European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR) emphasize the special nature of the human rights treaties which they apply, and they affirm that this special nature affects their approach to interpretation[46]. The International Criminal Court and other criminal tribunals (ICTY, ICTR) apply certain special rules of interpretation which are derived from general principles of criminal law and human rights. However, neither the regional human rights courts nor the international criminal courts and tribunals call into question the applicability of the general rule contained in Article 31 VCLT as a basis for their treaty interpretation. The other adjudicatory bodies reviewed do not claim that the respective treaty which they apply justifies a special approach to its interpretation.

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[43] Whereas the European Court of Justice (ECJ) has not explicitly invoked the general rule contained in Article 31 VCLT when interpreting the Founding Treaties of the European Union, it has, however, invoked and applied this rule when interpreting treaties between the EU and non-member States; see e.g. Case C-386/08, *Firma Brita GmbH v. Hauptzollamt Hamburg-Hafen*, Judgment of 25 February 2010, paras. 41–43.

[44] E.g. Brazil – Aircraft, Article 21.5 Appellate Body Report, 21 July 2000, WT/DS46/AB/RW, at para. 45.

[45] E.g. ECtHR, *Soering v. the United Kingdom*, 7 July 1989, Series A No. 161, para. 87; IACtHR, *The Right to Information on Consular Assistance. In the Framework of the Guarantees of the due Process of Law*, Advisory Opinion OC-16/99 of October 1, 1999, Series A No. 16, para. 58.

[46] ECtHR, *Ireland v. the United Kingdom*, 18 January 1978, Series A No. 25, para. 239; *Mamatkulov and Askarov v. Turkey* [GC], Nos. 46827/99 and 46951/99, para. 111; IACtHR, *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75)*, Advisory Opinion OC-2/82 of September 24, 1982, Series A No. 2, para. 19.

(4) Recognition in principle of subsequent agreements and subsequent practice as means of interpretation

18. All adjudicatory bodies reviewed recognize that subsequent agreements and subsequent practice in the sense of article 31 (3) (a) and (b) VCLT are a means of interpretation which they should take into account when they interpret and apply treaties[47].

(5) Concept of subsequent practice as a means of interpretation

19. Most adjudicatory bodies reviewed have not defined the concept of subsequent practice. The definition given by the WTO Appellate Body ("concordant, common and consistent sequence of acts or pronouncements which is sufficient to establish a discernable pattern implying the agreement of the parties [to the treaty] regarding its interpretation") combines the element of "practice" ("sequence of acts or pronouncements") with the requirement of agreement ("concordant, common") as provided for in article 31 (3) (b) VCLT (subsequent practice in a narrow sense). Other adjudicatory bodies reviewed have, however, also used the concept of "practice" as a means of interpretation without referring to and requiring a discernable agreement between the parties (subsequent practice in a broad sense)[48].

(6) Identification of the role of a subsequent agreement or a subsequent practice as a means of interpretation

20. Like other means of interpretation, subsequent agreements and subsequent practice are mostly used by adjudicatory bodies as one among several such means in any particular decision. It is therefore rare that adjudicatory bodies declare that a particular subsequent practice or a subsequent agreement has played a determinative role for the outcome of a decision[49]. It appears, however, often possible to identify whether a subsequent agreement or a particular subsequent practice has played an important or a minor role in the reasoning of a particular decision. Most adjudicatory bodies make use of subsequent practice as a means of interpretation. Subsequent practice plays a less important role for adjudicatory bodies which are either more text-oriented (WTO Appellate Body) or more purpose-oriented (IACtHR). The ECtHR places more emphasis on subsequent practice by referring to the common legal standards among member states of the Council of Europe.

(7) Evolutionary interpretation and subsequent practice

21. Evolutionary interpretation is a form of purpose-oriented interpretation. Evolutionary interpretation may be guided by subsequent practice in a narrow and in a broad sense. The text-oriented WTO Appellate Body has only occasionally expressly undertaken an evolutionary interpretation[50]. Among the human rights treaty bodies the ECtHR has frequently employed an evolutionary interpretation that was explicitly guided by subsequent practice,662 whereas the IACtHR and the HRC have hardly

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[47] The ECJ, when interpreting and applying the Founding Treaties of the European Union, has generally refrained from taking subsequent practice of the parties into account; it has, however, done so when interpreting and applying treaties between the EU and third States, see e.g. Case C-52/77, *Leonce Cayrol v. Giovanni Rivoira & Figli*, [1977] ECR 2261, para. 18; Case C-432/92, *The Queen v.Minister of Agriculture, Fisheries and Food, ex parte S. P. Anastasiou (Pissouri) Ltd and others*, [1994] ECR I-3087, paras. 43 and 50.

[48] E.g. *The M/V "SAIGA" (No. 1) Case (Saint Vincent and the Grenadines v. Guinea), Prompt Release, (Judgment)* ITLOS Case No. 1 (4 December 1997), paras. 57–59; see also *Case concerning Kasikili/Sedudu Island (Botswana v. Namibia)*, *I.C.J. Reports 1999*, p. 1096, para. 80.

[49] But see e.g. *The Islamic Republic of Iran* and *The United States of America*, Interlocutory Award No. ITL 83-B1-FT (Counterclaim), September 9, 2004, 2004 WL 2210709 (Iran-U.S.Cl.Trib.), paras. 109–117 and 134.

[50] *US – Shrimp*, Report of the Appellate Body, 12 October 1998, WT/DS58/AB/R, para. 130.

relied on subsequent practice. This may to be due to the fact that the ECtHR can refer to a comparatively close common level of restrictions among the member States of the Council of Europe. ITLOS seems to engage in evolutionary interpretation along the lines of some of the jurisprudence of the ICJ.

(8) Rare invocation of subsequent agreements

22. So far, the adjudicatory bodies reviewed have rarely relied on subsequent agreements in the (narrow) sense of article 31 (3) (a) VCLT. This may be due, in part, to the character of certain treaty obligations, in particular of human rights treaties, substantial parts of which may not lend themselves to subsequent agreements by governments. Certain decisions which plenary organs or States parties take according to a treaty, such as the "Elements of Crime" pursuant to article 9 of the ICC Statute or the "FTC Note 2001" in the context of NAFTA[51], if adopted unanimously, may have an effect similar to subsequent agreements in the sense of article 31 (3) (a) VCLT.

(9) Possible authors of relevant subsequent practice

23. Relevant subsequent practice can consist of acts of all State organs (executive, legislative, and judicial) which can be attributed to a State for the purpose of treaty interpretation. Such practice may under certain circumstances even include "social practice" as far as it is reflected in State practice[52].

C. SUMMARY OF THE VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPIC AT THE SIXTH (LEGAL) COMMITTEE OF THE UN GENERAL ASSEMBLY AT ITS SIXTY-SIXTH SESSION (2011)

24. Commenting on the topic, the Delegate of the **Islamic Republic of Iran** noted that the role of subsequent practice as a means of treaty interpretation should not be overstated. He was not sure if it would be suitable to give different organs of the State equal treatment when identifying subsequent practice.

[51] See the reference and discussion in *ADF Group Inc. v. United States of America* (Case No. ARB(AF)/00/1), ICSID Arbitration Under NAFTA Chapter Eleven, 9 January 2003, http://www.state.gov/documents/organization/16586.pdf, para. 177.
[52] See *Christine Goodwin v. the United Kingdom*, No. 28957/95, paras. 84–91, ECHR 2002-VI.

X. MOST-FAVOURED-NATION CLAUSE

A. BACKGROUND

1. The topic Most-Favoured-Nation (hereafter referred to as "MFN") Clause was first considered from 1967 to 1978. A proposal to include this topic in the long term programme of work was made during the fifty-eighth session (2006), following which an open-ended working group was established in the year 2007. This topic was included in the long term programme of work of the Commission at the sixtieth session (2008). Pursuant to which, a Study Group was constituted co-chaired by Mr. Donald M. McRae and Mr. A. Rohan Perera and reconstituted at the sixty-second session (2010), under the same co-chairmanship. At its sixty-first session, the Study Group considered a framework that would serve as a road map for future work, specifically on the scope of the MFN clauses and their interpretation and application.

2. At the Sixty-second session of the ILC, the Commission took note of the oral report of the Co-Chairmen of the Study Group. The report considered papers on: (i) catalogue of MFN provision, (ii) the 1978 Draft Articles of the International Law Commission, (iii) MFN in the GATT and the WTO, (iv) the Work of OECD on MFN, (v) the Work of UNCTAD on MFN, and (vi) the *Maffezini* problem under investment treaties.

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

3. In 2010 the Study Group decided, in an effort to advance its work, to try to identify further the normative content of the MFN clauses in the field of investment, and to undertake a further analysis of the case law, including the role of arbitrators, factors that explain different approaches to interpreting MFN provisions, the divergences, and the steps taken by States in response to the case law. At the present session, the Study Group had before it an informal document, in tabular form, identifying the arbitrators and counsel in investment cases involving MFN clauses, together with the type of MFN provision that was being interpreted.

4. It also had before it a working paper on the "Interpretation and Application of MFN Clauses in Investment Agreements" prepared by Donald McRae. The working paper built upon the prior study on the "The MFN clause and the *Maffezini* case" by Rohan Perera, by attempting to identify the factors that had been taken into account by the tribunals in reaching their decisions in order to assess whether these threw any light on the divergences that exist in the case law, with the objective of identifying categories of factors that had been invoked throughout the cases and to assess their relative significance in the interpretation and application of MFN clauses.

5. It also looked into the considerations that had played a part in investment tribunal decisions, dwelling on the *source* of the right to MFN treatment, as well as its *scope*. In terms of scope, it was noted that there were many ways in which investment tribunals had framed the application of the *ejusdem generis* principle, and even within some decisions different approaches had been taken. These included (a) drawing a distinction between substance and procedure (jurisdiction); (b) following a *treaty interpretation* approach, whether by interpreting MFN provisions as a general matter of treaty interpretation or treating the matter as one of interpreting the jurisdiction of the tribunal; (c) adopting a *conflict of treaty provisions* approach, whereby tribunals take into account the fact that the matter sought to be incorporated into the treaty has already been covered, in a different way, in the basic treaty itself; and (d) considering the *practice* of the parties as a means to ascertain the intention of the parties regarding the scope of the MFN clause. Moreover, the working paper considered the question, albeit not explicitly dealt with by the tribunals as a factor, whether the *type of claim* being made had had an influence on the

willingness of tribunals to incorporate other provisions by means of an MFN clause, as well as the *limits of the application of the MFN*, including the "public policy" exceptions set out in *Maffezini*.

6. The Study Group affirmed the general understanding that the source of the right to MFN treatment was the basic treaty and not the third-party treaty; MFN clauses were not an exception to the privity rule in treaty interpretation. It also recognized that the key question in the investment decisions concerning MFN seemed to be how the scope of the right to MFN treatment was to be determined, that is to say what expressly or impliedly fell "within the limits of the subject-matter of the clause".

7. It thus tracked the ways in which the *ejusdem generis* question had been framed particularly through the invocation of the distinction between substantive and procedural (jurisdictional) provisions. Where an MFN clause expressly included dispute settlement procedures or expressly excluded them, there was no need for further interpretation. Interpretation, however, was necessary in situations where the intention of the parties in relation to the applicability or not of the MFN clause to the dispute settlement mechanism was not expressly stated or could not clearly be ascertained, a situation common in many BIT's, which had open textured provisions. [53]

C. Issues for consideration of the Commission

8. The Study Group once more affirmed the need to study further the question of MFN in relation to trade in services and investment agreements, as well as the relationship between MFN, fair and equitable treatment, and national treatment standards. A further look should also be taken at other areas of international law to see if any application of MFN there might provide some insight for the Study Group's work. The Study Group affirmed its intention not to prepare any draft articles or to revise of the 1978 draft articles. Instead, further work will be undertaken under the overall guidance of the Co-Chairmen of the Study Group to put together a draft report providing the general background, analysing and contextualizing the case law, drawing attention to the issues that had arisen and trends in the practice and where appropriate make recommendations, including model clauses.

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

C. SUMMARY OF THE VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPIC AT THE SIXTH (LEGAL) COMMITTEE OF THE UN GENERAL ASSEMBLY AT ITS SIXTY-SIXTH SESSION (2011)

10. The Delegate of **Democratic Socialist Republic of Sri Lanka** said that the study group's efforts should result in something that would be of practical utility to States, such as general guidelines and model clauses to assist States with negotiating investment treaties.

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[53] It also considered the recent decision in *Impregilo S.p.A. v. Argentine Republic*,673 in particular the concurring and dissenting opinion of Professor Brigitte Stern, Arbitrator, which *inter alia* argues that an MFN clause cannot apply to dispute settlement because of a core reason intimately linked with the essence of international law itself: there is no automatic assimilation of substantive rights and the jurisdictional means to enforce them, evidencing a difference between the qualifying conditions for access to the substantive rights and the substantive rights themselves, and the qualifying conditions for access to the jurisdictional means and the exercise of jurisdiction itself. See *Impregilo S.p.A. v. Argentine Republic Argentine* Republic-Italy BIT), ICSID Case No. ARB/07/17, 17 June 2011. See: http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&action Val=viewCase&reqFrom=Home&caseId=C109.

11. The Delegate of **India** noted that the clause had been introduced in international trade law, and subsequently in investment treaties, in order to prevent discrimination and to ensure free and fair treatment. However, after the various arbitral decisions on the topic, there was a divergence of interpretation on the scope of application of the clause in the investment regime. The delegation upheld the importance of studying the different formulations of the clause that could be included in the investment treaties and the precise implication of their inclusion as they would bring some clarity on the meaning and application of the clause and would benefit countries willing to conclude investment treaties.

12. The Delegate of **Thailand** noted that the "most-favoured-nation clause" was of practical significance, in a globalized world, international investment agreements were more important than ever. The delegation supported the Commission's work that sought to prevent fragmentation of international investment agreements by ensuring greater coherence in the approach taken by arbitral tribunal decisions, particularly regarding their application of the most-favoured-nation clause. These efforts would contribute to greater certainty in investment law and security and predictability for foreign investors and States.

13. The Delegate of **Islamic Republic of Iran** stated that it was closely related and intertwined with other fields of international law, in particular with private international law, trade law and investment law areas, covered by the United Nations Commission on International Trade Law (UNCITRAL) and the World Trade Organization (WTO). However, it was hoped that the Commission's efforts would lead to tangible results during that time.

XI. COMMENTS AND OBSERVATIONS OF THE AALCO SECRETARIAT

1. The AALCO Secretariat appreciates the outstanding contribution and work of the Special Rapporteurs in preparation of Guide to Practice on Reservation of Treaties, Draft Articles on the Responsibility of International Organizations, and Draft Articles on Effects of Armed Conflicts on Treaties. The work of ILC on these three agenda items has been completed and the final document in the form of Guide or Draft Articles has been adopted. Vide Article 23 of the Statute of the ILC, these legal instruments has been recommended to the General Assembly of the UN for taking note of the draft articles in the form of resolutions and consider the same for elaboration into a convention at a later stage.

2. On the ongoing agenda items of the Commission, AALCO Member States are requested to cooperate and transmit their comments and observations on those topics considering the relevance of these agenda items for each developing country. On the issue of **"Immunity of State officials from foreign criminal jurisdiction",** the Member States may provide the valuable information whether the troika enjoyed *de lege lata* or *de lege ferenda* immunity *ratione personae;* and what crimes are to be exempted from? The AALCO Secretariat favours the view that with regard to applicability of immunity *ratione personae* beyond Troika, there was a need to identify a clear criterion in establishing such practice and also to consider the suggestion of enhancing cooperation between States in matters relating to invocation of immunity between the State exercising jurisdiction and the State of the official, in respect of the Troika as well as others. On issues concerning waiver of immunity, the AALCO Secretariat observes that right to waive the immunity of an official is vested with the State and not in the official himself and once a waiver of immunity was validly made by the State of the official, it is possible to exercise to the full extent of foreign criminal jurisdiction in respect of that official. The Member States of AALCO should give most serious consideration to this topic because of the tremendous changes happening in the international criminal law regime. Further, it was very important for the future work of the ILC to receive the views and policy guidance of Member States of AALCO on the sensitive issues which arise in the consideration of these topics. Additionally, the sensitivity of the subject-matter that are very significant to the AALCO Member States and also to other developing countries, due to their political and other situations, must not be overlooked.

3. Attention must be sought to the discussions on **"Expulsion of aliens"** as it is presently dealing with the suspesive effect on the implementation of the decision while the matter is under appeal. In order to decipher the practice of States, it was essential to include examples of domestic legislation under this Topic. In spite of the existing international customary rule of the State territorial sovereignty with regard to the admission, permanence and expulsion of aliens, the right of the State under that rule is not absolute and that the State is bound by a number of obligations deriving directly from the international human rights law. It also needs to be remembered here that provisions regarding non-expulsion of aliens, refugees, stateless persons and others should not contravene the legal regime that exist on these categories of people. In this regard, the twenty or odd draft articles on expulsion of aliens which have now been referred by the Commission to the drafting committee do contain some positive aspects on various aspects of the issue of expulsion of aliens. However, AALCO believes that more reflection is needed on the direction to be taken, including on proposed standards and principles that may be supported by current state practice.

4. On the topic **"Protection of persons in the event of disasters"**, alongside a handful of multilateral, mainly regional, agreements and a somewhat larger number of bilateral treaties on mutual assistance, the bulk of the available material on what is termed as the law of disaster relief was constituted by non-binding instruments, adopted primarily at the intergovernmental level but also by private institutions and entities. Henceforth, the very notion of a disaster relief law is an emerging one whose consolidation would depend in great measure on the work of progressive development being carried out by the Commission. The State has the predominant right under its national law, to direct, control,

coordinate, and supervises such assistance within its territory as enshrined in draft article 10 of this topic. It plays a significant role in affirming the right of the affected State to restrict the entry of other states or international organizations that has the potential to interfere with the internal affairs of the affected State, subject to its consent. Therefore, one of the major concerns of the AALCO Member States with respect to preserving the integrity and sovereignty of the affected State is addressed. Primarily, the burden of proof falls on the State to provide assistance to its people during the disaster situation, however, it is upto the State based on its own determination may or may not choose to receive external assistance. The sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the Charter of the United Nations. In this context, humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal by the affected country. Moreover, it is also desirable to note that Member States of AALCO which has domestic legislation/policy that deals with disaster relief could kindly transmit the same to the Special Rapporteur for analyzing the state practice on this topic. This would in turn add to the inclusion of the practices from other civilizations while drafting the further draft articles on this pertinent topic.

SECRETARIAT'S DRAFT
AALCO/RES/51/SP 1
22 JUNE 2012

RESOLUTION ON HALF-DAY SPECIAL MEETING ON "SELECTED ITEMS ON THE AGENDA OF THE INTERNATIONAL LAW COMMISSION"
(*Deliberated*)

The Asian-African Legal Consultative Organization at its Fifty-First Session,

Having considered the Secretariat Document No.AALCO/51/ABUJA/2012/S 1;

Having heard with appreciation the introductory statement of the Secretary-General and the views expressed by the Chairperson and the Panelists and the statements of the Member States during the Special Half-Day Meeting on "Selected Items on the Agenda of the International Law Commission" jointly organized by the Government of Federal Republic of Nigeria, International Law Commission (ILC) and AALCO held on 20 June 2012 at Abuja, Nigeria;

Having followed with great interest the deliberations on the item reflecting the views of Member States on the work of the International Law Commission (ILC);

Expressing its appreciation for the statement made by the Representative of the ILC on its work;

Recognizing the significant contribution of the ILC to the codification and progressive development of international law;

Also Recognizing the outstanding contribution of the Special Rapporteurs in preparation of Guide to Practice on Reservation of Treaties, Draft Articles on the Responsibility of International Organizations, and Draft Articles on Effects of Armed Conflicts on Treaties;

Commending the initiative of the Secretary-General in convening the Inter-Sessional Meeting of Legal Experts to discuss Matters relating to the ILC on 10 April 2012 at AALCO Headquarters, New Delhi, India and the fruitful exchange of views on the items deliberated during that meeting:

1. **Recommends** Member States to contribute to the work of ILC, in particular by communicating their comments and observations regarding issues identified by the ILC on various topics currently on its agenda to the Commission.

2. **Requests** the Secretary-General to continue convening AALCO-ILC meetings in future.

3. **Also requests** the Secretary-General to bring to the attention of the ILC the views expressed by Member States during the Annual Sessions of AALCO on the items on its agenda during its Fiftieth Annual Session, and

4. **Decides** to place the item on the provisional agenda of the Fifty-Second Annual Session.

REPORT OF THE
INTER-SESSIONAL MEETING OF LEGAL EXPERTS TO DISCUSS MATTERS RELATING TO THE ILC,
TUESDAY, 10 APRIL 2012,
AALCO HEADQUARTERS, NEW DELHI

The Inter-Sessional Meeting of Legal Experts to Discuss Matters Relating to the ILC was convened on Tuesday, 10 April 2012, at the Headquarters of AALCO in New Delhi.

The welcome remarks of the meeting were delivered by Prof. Dr. Rahmat Mohamad, Secretary-General (SG) of AALCO. He welcomed Dr. A. Rohan Perera, who was a former Member of the ILC from Democratic Socialist Republic of Sri Lanka and Chairman of the AALCO-EPG; and Prof. Shinya Murase, Member of the ILC from Japan to briefly narrate to the participants the approach of the ILC on various agenda items of ILC. He welcomed the distinguished speakers who had travelled all the way from their capitals to guide the work of AALCO in relation to maters of ILC on certain specific agenda items. The purpose of the meeting was to understand the nuances, issues and the findings based on law relied upon by the Members of the ILC while dealing with codification of the research areas.

The SG informed that AALCO was statutorily mandated to follow the work of the ILC vide Article 1 (d) of the Statutes of AALCO. It was also a customary practice that a Representative of the ILC addressed the Annual Session of AALCO, on the progress of work in the ILC, while the Secretary-General of AALCO addressed the ILC Session reporting on the common minimum consensus that emerged from the deliberations on the ILC topics at an Annual Session. Appraisal of perspectives of AALCO Member States at the annual session of ILC was very significant because it addressed the issues from the perspective of developing countries.

The outcomes of the deliberations at the Fiftieth Annual Session of AALCO (Colombo, Sri Lanka, 2011) emphasized that AALCO must devote more time to discuss the ILC agenda Items. It was also suggested that an inter-sessional meeting could be very helpful in placing the concerns of the AALCO Member States in relation to certain agenda items of the ILC. Hence, it was decided to convene an Inter-Sessional meeting to discuss two important Agenda Items of ILC; (i) Immunity of State officials from foreign criminal jurisdiction; and (ii) Protection of Persons in the event of Disasters. These ongoing topics would be discussed at this meeting by Dr. A. Rohan Perera, as these two topics were of major concern for countries from the Asian and African regions.

At the sixty-third session (2011) of the ILC, five new topics were proposed by the then members of the ILC. At the inter-sessional meeting, Prof. Shinya Murase would discuss and brief the participants on the proposed New Topics of ILC. However, there would be an elaborate discussion on (i) Protection of the Atmosphere; and (ii) The Fair and Equitable Treatment Standard in International Investment Law.

The SG said that he looked forward to a fruitful discussion and thought-provoking deliberations that would provide concrete suggestions and recommendations which would be mutually beneficial to both the Organizations.

After the welcome remarks, **Prof. Dr. Rahmat Mohamad, Secretary-General (SG) of AALCO** made a presentation on **"An Appraisal of the Present and Future Work of International Law Commission".** The SG briefly narrated the historical background of the ILC stating that the ILC was created under Article 13(1) (a) of the Charter of the United Nations, which provides that the General Assembly shall initiate studies and make recommendations for the purpose of encouraging the "progressive development and codification of international law". Since its formal establishment in 1946, the ILC had considered and produced draft articles, draft conventions and other draft instruments on many core topics of international law, including the law of treaties, the law of the sea, diplomatic and consular relations, the creation of an international criminal court, and State responsibility.

He mentioned that the Special Meeting was devoted to understanding the topics that were on the agenda of the ILC with a view to enable the Member States of AALCO understand better the critical issues involved in them. The following topics were currently on the programme of work of the International Law Commission:

- Expulsion of aliens
- The obligation to extradite or prosecute (aut dedere aut judicare)
- Protection of persons in the event of disasters
- Immunity of State officials from foreign criminal jurisdiction
- Treaties over time
- The Most-Favoured-Nation clause

I. Expulsion of Aliens

The SG said that at its fifty-second session, in 2000, the ILC had identified the topic "Expulsion of aliens" for inclusion in its long-term programme of work and at its fifty-sixth session in 2004, it decided to include the topic "Expulsion of aliens" in its programme of work and appoined **Mr. Maurice Kamto** as Special Rapporteur for the topic.

At its fifty-seventh session, in 2005, the Commission had before it the preliminary report of the Special Rapporteur setting out an overall view of the subject, while highlighting the legal problems which it raised and the methodological difficulties related to its consideration. At its fifty-eighth session, in 2006, the Commission had before it the second report of the Special Rapporteur for the topic, Mr. Maurice Kamto, and a memorandum prepared by the Secretariat. The Commission decided to consider the second report at its next session in 2007.

At its fifty-ninth session, in 2007, the Commission considered the second and third reports of the Special Rapporteur, dealing, respectively, with the scope of the topic and definition (two draft articles), with certain general provisions limiting the right of a State to expel an alien (five draft articles). At its sixtieth session, in 2008, the Commission considered the fourth report of the Special Rapporteur.

At the sixty-first session in 2009, the Commission had before it the fifth report of the Special Rapporteur and comments and information received from Governments up to that point. The Special Rapporteur presented to the Commission a revised and restructured version of draft articles 8 to 14, taking into account the plenary debate. The Special Rapporteur then submitted to the Commission a document containing a set of draft articles on protection of the human rights of persons who have been or are being expelled, revised and restructured in the light of the plenary debate.

At the sixty-second session in 2010, the Commission had before it the draft articles on the protection of the human rights of persons who had been or were being expelled, as revised and restructured by the Special Rapporteur; the new draft work plan presented by the Special Rapporteur with a view to structuring the draft articles; and the sixth report presented by the Special Rapporteur. The Commission likewise had before it comments and information received thus far from Governments. It decided to refer draft articles 8 to 15 to the Drafting Committee on the protection of the human rights of persons who have been or are being expelled, originally contained in the fifth report, as subsequently revised and restructured by the Special Rapporteur; draft articles A and 9, as contained in the sixth report of the Special Rapporteur draft articles B1 and C1, as contained in the addendum to the sixth report, as well as draft articles B and A1, as revised by the Special Rapporteur during the session.

At the sixty-third session in 2011, the Commission had before it addendum 2 to the sixth report of the Special Rapporteur, which completed the consideration of the expulsion proceedings and considered the legal consequences of expulsion, as well as his seventh report, which provided an account of recent developments in relation to the topic and proposed a restructured summary of the draft articles.

Important Issues

The important issues identified were that the Expulsion of Aliens was a complex topic, involving a delicate balance between the right of States to decide upon the admission of an alien, which was inherent in State sovereignty, and the safeguarding of fundamental human rights.

The Reports produced by the Special Rapporteur reflected a careful study of national legislations on the subject of expulsion of aliens as well as the jurisprudence of both domestic and international law. That study had enabled the Special Rapporteur to identify the common denominators as a basis for the legislation by States to deport aliens who were within their territory and the rights of those expelled. There was little doubt that every State had the right to expel aliens living on its territory if they pose a threat to its national security or public order. Each State had the right to judge and determine, according to its national laws and the circumstances prevailing within its territory at the time, the components of these two concepts. It would, therefore, be pointless to try to list the grounds that could be invoked by a State to justify the expulsion of aliens.

Nonetheless, two limitations did exist on the sovereign right of the State to proceed with the expulsion of aliens: 1) mass expulsion; and 2) expulsion in disguise. Expulsion in disguise, to be distinguished from expulsion made by means of incentives and which was tolerated by international law, covers situations where a State abets or acquiesces acts committed by its citizens to provoke the forced departure of aliens. Those acts were generally targeted at persons belonging to ethnic or religious minorities and were characterized by discrimination against them. Such conduct was contrary to the obligations of the host State and violated the international human rights law, since they lead in fact to mass expulsion of aliens.

Once decided, expulsion shall be conducted in a manner that the fundamental human rights would be fully respected. The Commission should base its work on the provisions of relevant international human rights instruments which were universally accepted, to identify the general principles applicable in that matter, without prejudice to the concepts and solutions admitted at the regional levels and which continue to be respected by the States concerned. That being said, the International Covenant on Civil and Political Rights was of utmost relevance to that issue since the States Parties undertook to respect towards all individuals within their territories, including foreigners residing legally therein, the rights granted by that document. The expulsion must be made with due respect for fundamental human rights of the deportees. They must be protected against any inhuman and degrading treatment. That criterion applied even during the detention of aliens awaiting deportation. In all cases, the property rights of deportees should, as well, be respected and guaranteed by the authorities of the host State.

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

On the topic of obligation to extradite or prosecute which was included on the ILC's long-term programme at its fifty-sixth session in 2004, was considered to have achieved sufficient maturity for its codification, with the possibility of including some elements of progressive development, and **Zdzislaw Galicki** was appointed the Special Rapporteur for the topic. Galicki's preliminary report explained the principle, discussing briefly its sources and scope, before setting out the options available to the ILC, was presented to the Commission at its fifty-eighth session. His second report discussing the preliminary views of the ILC members and the Sixth Committee was presented to the Commission at its fifty-ninth session. It seems from the reports to date that the Special Rapporteur will conduct a thorough examination of the sources, scope and shortcomings of the *aut dedere aut judicare* obligation, in particular focusing on whether the obligation exists at customary international law. Where the process might be particularly instructive was not only in its analysis of State practice, but also the views it sought from States on the nature of the obligation outside treaty law, thereby providing a clearer indication of *opinio juris* than that currently available.

During the last session, the Special Rapporteur introduced his fourth report on the obligation to extradite or prosecute. The report summarizes the work of the Commission on the topic and discusses descriptively the potential sources of the obligation to extradite or prosecute – treaties and customary international law. The report also includes several draft articles.

Important Issues

Under the *aut dedere aut judicare* (extradite or prosecute) rule, the SG highlighted that a state may not provide a safe haven for a person suspected of certain categories of crimes. Instead, it was *required* either to exercise jurisdiction (which would necessarily include universal jurisdiction in certain cases) over a person suspected of certain categories of crimes or to extradite the person to a state able and willing to do so or to surrender the person to an international criminal court with jurisdiction over the suspect and the crime. As a practical matter, when the *aut dedere aut judicare* rule applies, the state where the suspect is found must ensure that its courts can exercise all possible forms of geographic jurisdiction, including universal jurisdiction, in those cases where it will not be in a position to extradite the suspect to another state or to surrender that person to an international Court.

Although the extradite or prosecute obligation played a central role in the enforcement of international crimes and in ensuring that there was no impunity, like all international norms, its customary status depended on sufficient evidence of State practice and *opinio juris*. If there was insufficient State practice and *opinio juris,* the norm could not be said to bind States outside a treaty, no matter how important its role might be considered by scholars and some States.

It was noted that the obligation to extradite or prosecute was sometimes invoked as the basis for exercising universal jurisdiction. However, obligation to extradite or prosecute was not equivalent to universal jurisdiction. Obligation to extradite or prosecute was a treaty obligation which was applicable only among States parties to that treaty. When treaties provide for the obligation to extradite or prosecute, they always at the same time provide for specific conditions under which the obligation applies and different treaties provide for different conditions of its applicability.

The work of ILC on "extradite or prosecute" needed more rigour, including a more careful analysis of what exactly the various treaties containing an "extradite or prosecute" obligation require, whether bilateral (and thus also applicable to ordinary crimes) or multilateral, before a conclusion was made whether that there was a customary law basis for the proposed obligation.

III. Protection of Persons in the Event of Disasters

The topic "Protection of Persons in the Event of Disasters" had been decided to be included in the agenda at the Fifty-ninth session of the Commission in 2007. Mr. ***Eduardo Valencia-Ospina*** (Colombia) was appointed as Special Rapporteur for the topic. At the same session, the Commission had requested the Secretariat to prepare a background study on the topic, which focused and was limited to 'natural disasters' only. The Special Rapporteur had, since then, presented a Preliminary report and four reports on the topic. The Commission had provisionally adopted 11 draft articles with commentaries at its Sixty-second (2010) and Sixty-third session (2011) respectively. Draft article 12 was still under consideration by the Commission and that provision deals with "right to offer assistance" to the affected state.

Important Issues

Highlighting the important issues on the topic, the SG mentioned that in recent years, the world was confronted with an increasing number of natural disasters, both in number as well as in intensity, besides facing interconnected global challenges such as climate change, population growth, urbanization, and the security of energy and water. Continued high food prices, as well as the impact of the financial crisis, further added to the vulnerability of already fragile populations. In light of those, as also of problems related to humanitarian access and the necessity to fill current gaps in the international protection regime, the AALCO considered the work on the draft articles on protection of persons in the event of disasters a particularly opportune undertaking. Furthermore, the Special Rapporteur had very correctly excluded armed conflicts from the scope of the topic, on the basis that international humanitarian law constitutes Lex Specialis in such situations. The same line of reasoning would apply with equal force to the protection of the environment in relation to the present topic.

However, it needed to be emphasized that humanitarian response should not be used as a pretext to intervene in the domestic affairs of States as emphasized by the ICJ in the case of *Nicaragua V. United States of America*. In that case, the court referred to the purposes followed in the practice of the red cross in the context of humanitarian assistance in order to escape condemnation as an intervention in the internal affairs of the affected State, and specified that these purposes included "to prevent and alleviate the human suffering" and "to respect for the human being, and that humanitarian assistance must be given without discrimination to all in need".

The work would contribute significantly to the codification and progressive development of the international legal protection .AALCO would continue to follow the work closely and would assist the International Law Commission and the Sixth Committee in that endeavour.

IV. Immunity of State officials from foreign criminal jurisdiction

At its fifty-eighth session, the ILC endorsed the inclusion in its long-term programme of work on the topic "Immunity of State officials from foreign criminal jurisdiction" and appointed **Mr. Roman Kolodkin** as the Special Rapporteur. Preliminary Report of the Special Rapportuer was comprehensive and well-researched and identified key issues pertaining to the topic for further consideration. SG stated that the Special Rapporteur had also underlined the fact in delimiting the scope of the topic, the treatment of the subject concerned only immunity of state officials from foreign criminal jurisdiction and not immunity from international criminal jurisdiction, which was governed by special regimes. 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.

Important Issues

It was observed that the Special Rapporteur had pertinently observed in his Report that Heads of State, Heads of Governments and Ministers of Foreign Affairs constituted the "basic threesome" or the triumvirate of state officials who enjoyed personal immunity and that under International law, it was those three categories of officials who were accorded special status by virtue of their office and of their functions. Their special status was evidenced by the provisions of key international conventions, in particular the Vienna Convention on the Law of Treaties, which accorded these persons, by virtue of their functions, the competence to perform all acts relating to the conclusion of a treaty.

The establishment of the International Criminal Court and the ad hoc criminal tribunals reflects a growing belief that Heads of States and other senior state representatives should be held accountable for serious violations of international law. It was now being questioned whether Foreign States and their officials still had immunity from proceedings concerning grave human rights abuses in national courts. To solve these dilemmas it was necessary to find a final answer to the question of whether high state officials could be held liable for committing crimes of international relevance and, if so, under what circumstances. It was precisely in that context, the work of the ILC on the topic assumes immense significance. There was thus an opportunity for the Commission to provide real guidance to national prosecuting authorities and courts in identifying the precise contours of an exception to immunity in respect of international crimes; such guidance would resolve the current tension and properly reflect current trends in international law.

V. Treaties over Time

The International Law Commission, at its sixtieth session (2008), decided to include the topic "Treaties over time" in its programme of work and to establish a Study Group on the topic at its sixty-first session. At its sixty-first session (2009), the Commission established the Study Group on Treaties over time, chaired by **Mr. Georg Nolte**. At that session, the Study Group focused its discussions on the identification of the issues to be covered, the working methods of the Study Group and the possible outcome of the Commission's work on the topic. At the sixty-second session (2010), the Study Group was reconstituted under the chairmanship of Mr. Georg Nolte and began its work on the aspects of the topic relating to subsequent agreements and practice, on the basis of an introductory report prepared by its Chairman on the relevant jurisprudence of the ICJ and arbitral tribunals of *ad hoc* jurisdiction.

Important Issues

Elucidating the role of *subsequent agreement* and *subsequent practice* as a means of interpretation was of particular importance as major treaties age and their context changes. Many international treaties, both bilateral and multilateral, could not be amended easily, yet they must fulfil their purpose. Subsequent agreements and subsequent practice are means of interpretation that are particularly characteristic of international law. Although their importance for the application of international law could not be denied, the way in which they are used has not been sufficiently explored so far. In particular, an exhaustive analysis of state practice and practice of international organizations has not yet been carried out.

AALCO considers the nine preliminary conclusions presented by the Chairman of the Study Group as a valuable basis for further elaboration of the topic. They are worded in an open and flexible manner, thus leaving enough room to integrate further reports and results of state practice as well as that of international organizations in the future. They were well-balanced as they showcased the importance of subsequent agreement and subsequent practice without ignoring their relation to other means of

interpretation. The extensive analysis of approaches to interpretation by different international adjudicatory bodies was helpful for structuring future analysis of the subject.

AALCO was of the considered view that it regarded the work done by the ILC on the issue as a fundamental step towards establishing manageable and predictable criteria for these means of interpretation and in that regard, the work of the Study Group would go a long way in assisting Member States of the United Nations in approaching the delicate subject matter.

VI. The Most-Favoured-Nation Clause

The Most-Favoured-Nation standard of treatment, which was a core element of international investment agreements, was a provision contained in a treaty under which a granting State agrees to accord to the other contracting State, i.e. the beneficiary State, treatment that was no less favourable than that which it accords to third States.

The Commission at its sixtieth session decided to include the topic "The Most Favoured Nation Clause" in its Programme of work and to establish a Study Group on the topic at its sixty-first session. A Study Group co-chaired by **Mr. Donald M. Mc Rac** and **Mr. A. Rohan Perera** was established at the sixty-first session during which it considered inter alia, a framework that would serve as a road map for future work and agreed on a work schedule involving the preparation of papers intended to shed additional light on questions concerning in particular the scope of MFN clauses and their interpretation and application.

Important Issues

AALCO appreciated the extensive research and analysis undertaken by the Study Group, and again wished to recognize Mr. Donald McRae and Mr. A. Rohan Perera in particular for their stewardship of that project as co-chairs of the Study Group, as well as the other members of the Commission who had made important contributions in helping to illuminate the underlying issues.

AALCO supported the Study Group's decision not to prepare new draft articles or to revise the 1978 draft articles. MFN provisions were principally a product of treaty formation and tend to differ considerably in their structure, scope and language. They also were dependent on other provisions in the specific agreements in which they were located, and thus resist a uniform approach. Given the nature of MFN provisions, AALCO agreed with the Study Group that interpretive tools or revised draft articles were not appropriate outcomes. AALCO encouraged the Study Group to continue with the study and description of current jurisprudence, which could serve as a useful resource for governments and practitioners who had an interest in that area, and were interested to learn more about what areas beyond trade and investment the Study Group intended to explore.

AALCO welcomed the Working Paper prepared by Mr. Donald Mc Rae on the 'interpretation and application of MFN clauses in investment agreements'. That paper had thrown some light on the prevailing divergences concerning the topic. AALCO felt that it was important to study the different formulations of MFN clauses that could be included in the investment treaties and precise implications of their inclusion. That would bring some clarity on the meaning and application of the MFN principle to the benefit of countries willing to conclude investment treaties. In that regard, AALCO fully subscribed to the view of the Study Group that the topic needed to be looked at, in relation to trade in services and investment agreements. The non-discriminatory application of MFN clause, fair and equitable treatment of States, and the national treatment standards deserved special attention.

After outlining briefly on the topics that were currently on the agenda of the ILC, the Secretary-General gave a brief overview of the topics that the Commission was going to take up in the near future. There were totally five topics and the Secretary-General dealt with them one by one.

ILC: PROPOSED NEW TOPICS

I. Protection of the Atmosphere

The threat to global atmospheric resources and attendant consequence were all too real. The protection of atmosphere which required a broad and multidimensional endeavour, was a long-term and complex undertaking. The international community had been taking (both transnationally and domestically) a number of initiatives, both at the legal and policy level, to tackle a whole range of problems brought to the fore by the international environmental consciousness that came into being in the 1970s.

These problems include among many others,

- Transboundary air pollution
- Depletion of ozone layer
- Climate change
- Desertification
- Deforestation

However, all those and other environmental problems were interrelated and could not be dealt with in isolation from each other. Nor did they obey national frontiers. Ensuring compliance by members of the international community with their international environmental obligations had become a matter of increasing concern in recent years. The growth of international environmental issues was reflected in the large body of principles and rules of international environmental law which applied bilaterally regionally and globally. The progress in developing international legal control of activities had been, piecemeal and often reactive to particular incidents or the availability of new scientific evidence. The diverse problems found in the implementation of these instruments had not only exposed the problems associated with the legal regime, but also created the need for ILC to look into that issue with the following objectives;

Firstly, there were gaps existing in the existing Conventions relating to the atmosphere. The number of relevant Conventions had remained a mere patchwork of instruments which covered only specific geographical areas and a limited range of regulated activities and controlled substances. The incremental approach had its particular limitations for the protection of the atmosphere, which by its very nature warrants holistic treatment in the form of a framework Convention by which the whole range of environmental problems of the atmosphere could be covered in a comprehensive and systematic manner.

Secondly, the ILC, by taking up that issue, would be expected to provide appropriate guidelines for harmonization and coordination with other treaty regimes outside international environmental law, which might come in conflict with the proposed convention during the compliance and implementation phases.

Thirdly, the proposed draft articles would help provide the framework for harmonization of national laws and regulations with international rules, standards and recommended practices and procedures relating to the protection of the atmosphere.

Fourthly, it was hoped that the proposed project would establish ***Guidelines*** on the mechanisms and procedures for cooperation among States in order to facilitate capacity-building in the field of transboundary and global protection of the atmosphere.

II. The Fair and Equitable Treatment Standard in International Investment Law

The obligation to provide "fair and equitable treatment" was often stated, together with other standards, as part of the protection due to foreign direct investment by host countries. Although some references to that standard could be found in the first negotiating attempts of multilateral trade and investment instruments,

it had become established as a principle mainly through the increasing network of bilateral investment treaties (BITS). In recent years, the concept of fair and equitable treatment had assumed considerable prominence in the practice of States owing to the conclusion of more than 3000 BITS between the (capital –exporting) developed and the (capital-importing) developing countries. Almost all of these treaties expressly incorporated a reference to the fair and equitable treatment standard in a form which assured foreign investors that they would receive fair and equitable treatment from the host country of the foreign investment.

The meaning of the "fair and equitable treatment" standard might not necessarily be the same in all the treaties in which it appeared. The proper interpretation might be influenced by the specific wording of a particular treaty, its context, negotiating history or other indications of the parties' intent. The attempts to clarify the normative content of the standard itself have, until recently, been relatively few. Against this background, it is not surprising that questions concerning the meaning and scope of the fair and equitable treatment standard have become the subject of a fair degree of litigation in recent years.

Throughout the course of the last decade, the treatment standard had been frequently invoked in investor-State arbitrations. Under its aegis, tribunals had developed a number of vaguely defined sub-categories, or what had been referred to as 'facets' or 'components' of the standard, such as the obligation of the State to refrain from acting in an arbitrary manner, to afford justice and due process to foreign investors, to act transparently, and to respect the legitimate expectations of the investor. Despite such attention, the precise application of and relationship between these components remained vague and elusive.

In the light of those brief facts, the issues that needed to be clarified on the part of ILC were as follows;

Firstly, to delineate the normative content of the "fair and equitable treatment" in order to ascertain what were the elements of fair and equitable treatment in Practice?

Secondly, was Fair and Equitable Treatment a principle of international law?

Thirdly, the relationship of "fair and equitable treatment" with some other standards that were also, not infrequently, incorporated in the BITS. Those include; the most-favoured–nation treatment and the national treatment.

Fourthly, was fair and equitable treatment synonymous with the international minimum standard?

Fifthly, does the Fair and Equitable Treatment Standard now represent customary international law?

Sixthly, in what ways had Fair and Equitable Treatment affected other provisions of Bilateral Investment Treaties?

It might be possible that a set of ***Guidelines*** for States could emerge from the study. The guidelines could indicate whether or not the fair and equitable standard reflected Customary International Law, and then sets out the implications which were likely to follow for States if they formulated the fair and equitable treatment standard in one of a number of different ways.

III. Provisional Application of Treaties

The provisional application of a treaty found its legal basis in Article 25 of the Vienna Convention on Law of Treaties (VCLT) 1969. If a treaty was applied before its formal entry into force, it was applied provisionally. In such a case, a negotiating state was bound by the treaty although the treaty has not yet been formally ratified on the national level. In general, negotiating states would only consider such a

provisional application if one of the states must submit the treaty to a Constitutional ratification process. Provisional application was thus a frequently used tool when national ratification might prolong the period between conclusion of a treaty and its entry into force.

Article 25 of the VCLT merely confirmed the basic principle that a treaty might be provisionally applied. It was left to the Parties to agree on the exact scope and conditions of the provisional application. From practice it appeared that the provisional application of a treaty by a state usually commences at the date of that state's signature of the treaty. Negotiating states could also agree on another date on which the provisional application of a treaty becomes effective. Agreement on such other date was more likely if the provisional application of a treaty was agreed upon in some other manner than in the treaty itself.

It was essential to define what provisional application consists of in order to determine its legal effects and consider certain issues that the VCLT addressed only in part: the preconditions of provisional application and its termination. Those matters would be illustrated in the following paragraphs. That would decipher the need for the ILC to take it up.

A study by the ILC based on a thorough analysis of practice would elucidate the issues considered in the preceding paragraphs. That study might lead to the drafting of a few articles that would supplement the scant rules contained in the Vienna Convention. Those articles could address in return the meaning of provisional application, its preconditions and its termination. The Commission could also elaborate some **Model Clauses** which would be of assistance to States intending to give a special meaning to the provisional application of a treaty or set out particular rules on its preconditions or termination.

IV. The Formation and Evidence of Customary International Law

Customary International Law, (CIL) notwithstanding the great increase in the number and scope of treaties, remains an important source of international law. An understanding of custom was critical to an understanding of international law at least for two reasons; Firstly, there remained important areas of international relations governed primarily by customary rules. To pick one example, the law of state responsibility remains largely the domain of custom. Secondly, even in areas where one or more treaties exist, CIL often played an important role. For example, in the human rights area there were a number of important treaties, but there remained the question of which human rights rules had the status of CIL and therefore apply to all states, including non-State Parties.

The most commonly cited and authoritative definition of CIL was found in Article 38 of the Statute of the International Court of Justice, which provided that "international custom, as evidence of a general practice accepted as law" is one of the sources of international law. Customary international law is normally said to have two elements. First, there is an objective element consisting of sufficient state practice ("general practice" under the ICJ definition). Second, there is a subjective element, known as *opinio juris*, which required that the practice be accepted as law or followed from a sense of legal obligation.

That definition of custom, which was the most traditional one and faced a host of problems, giving birth to differing approaches to the formation and identification of customary international law. The most important problems that arose in relation to the concept of CIL include; its imprecise character, lack of agreement on the amount or consistency of practice that was required, and even when the practice was consistent, how widespread that practice must be, the forms of evidence that could be used to demonstrate state practice etc.

Hence, securing a common understanding of the process could be of considerable practical importance. That was so not least because questions of customary international law increasingly fell to be dealt with

by those who may not be international law specialists, such as those working in the domestic courts of many countries, those in government ministries other than Ministries for Foreign Affairs, and those working for non-governmental organizations.

Hence, the ILC has identified a number of areas of CIL in order to clarify the following issues;

Firstly, the identification of State practice. What counts as "State practice"? Acts and omissions, verbal and physical acts. How might States change their position on a rule of international law?

Secondly, the nature, function and identification of *opinio juris sive necessitatis*.

Thirdly, relationship between the two elements: State practice and *opinio juris sive necessitatis*, and their respective roles in the identification of customary international law.

Fourthly, how new rules of customary international law emerge; how unilateral measures by States might lead to the development of new rules; criteria for assessing whether deviations from a customary rule had given rise to a change in customary law; potential role of silence/acquiescence.

Fifthly, the role of "specially affected States".

Sixthly, the time element, and the density of practice; "instant" customary international law.

Seventhly, whether the criteria for the identification of a rule of customary law may vary depending on the nature of the rule or the field to which it belongs.

Eighthly, the "persistent objector" theory.

Ninthly, treaties and the formation of customary international law; treaties as possible evidence of customary international law; the "mutual influence"/interdependence between treaties and customary international law.

Tenthly, resolutions of organs of international organizations, including the General Assembly of the United Nations, and international conferences, and the formation of customary international law; their significance as possible evidence of customary international law.

Eleventhly, formation and identification of rules of special customary international law between certain States (regional, subregional, local or bilateral – "individualized" rules of customary international law). Does consent play a special role in the formation of special rules of customary international law?

In view of that, the Commission's final output in that field could take one of a number of forms. One possibility would be a series of **Propositions,** *with* **Commentaries**.

For the sake of convenience, the topic was proposed to be considered in a number of stages (though the division between them would not be rigid):

- underlying issues and collection of materials;
- some central questions concerning the identification of State practice and *opinion juris*;
- particular topics; and conclusions.

V. Protection of Environment in Relation to Armed Conflict

The law of war historically paid scant attention to the protection of the environment. Its main focus was to regulate hostilities so as protect combatants from unnecessary injury. Since World War II, it had turned to the protection of the civilian population and individual civilians. It does not follow that the environment does not receive any protection at all. In as much as international humanitarian law places constraints on the use of means and methods of warfare, the environment was indirectly protected. Thus, the provisions of the Hague or the Geneva Conventions, through the protection of civilian property and objects, offer *indirect* protection of the environment. Similarly, the banning of weapons of mass destruction, such as biological and chemical weapons, or the restraints on activities related to nuclear warfare, such as the testing of nuclear weapons, also ultimately limit potential damage to the environment caused by armed conflicts.

Hence, the protection of the environment in armed conflicts had been primarily viewed through the lens of the laws of warfare, including international humanitarian law. However, that perspective was too narrow as modern international law recognised that the international law applicable during an armed conflict may be wider than the laws of warfare.

It was out of concern "that the environment continues to be the silent victim of modern warfare" that the United Nations Environment Programme (UNEP) and the Environmental Law Institute "undertook a joint assessment of the state of the existing legal framework protecting natural resources and the environment during armed conflict" in 2009. The assessment was the result of an international expert meeting held by UNEP and the ICRC in March 2009. Based on ten key findings, the Report provides for Twelve recommendations, among them that the ILC, as *"the leading body with expertise in international law"*, should *"examine the existing international law for protecting the environment during armed conflict and recommend how it can be clarified, codified and expanded"*.

The main issues raised by the problem that could be dealt with by the ILC were as follows**;**

Firstly, the consideration of the applicability of multilateral environmental agreements during armed conflicts as part of its ongoing analysis of the "effect of armed conflict on treaties";

Secondly, to extend protection of the environment and natural resources in the context of non-international armed conflict;

Thirdly, to consider how the detailed standards, practice and case law of international environmental law could be used to clarify gaps and ambiguities in international humanitarian law.
Fourthly, to identify any new developments in case law or in customary law

Fifthly, clarify the applicability of and the relationship between International Humanitarian Law, International Criminal Law, International Environmental Law and Human Rights Law.

Sixthly, to further develop the findings of the ILC's work on the Effect of Armed Conflict on Treaties, particularly on matters concerning the continued application of treaties relating to the protection of the environment and human rights.

Seventhly, to clarify the relation between existing treaty law and new legal developments (including legal reasoning)

Eighthly, to suggest what needs to be done to achieve a uniform and coherent system (so as to prevent the risk of fragmentation).

Ninthly, to envisage the formulation of applicable rules and formulate principles of general international law of relevance for the topic.

The topic would also fit well into the ambitions expressed by the ILC in 1997, namely that the Commission should not restrict itself to traditional topics, but should also consider those that reflect new developments in international law and pressing concerns of the international community as a whole.

The final outcome could be either a Draft Framework Convention or a Statement of Principles and Rules on the Protection of the Environment in Times of Armed Conflict.

Having summarized the new topics proposed to be taken up by the ILC, the Secretary-General wished that during the course of the day there would be deliberations in an elaborate manner on those subjects. Thereafter, he invited Dr. A Rohan Perera for his presentation on the topic "Protection of Persons in the Event of Disasters".

TOPIC: "PROTECTION OF PERSONS IN THE EVENT OF DISASTERS"

Dr. A. Rohan Perera, Former Member of ILC from Sri Lanka who was the Lead Discussant on that topic explained the nuances of the Agenda Item. He said that in introducing the Fourth Report on the topic, "Protection of persons in the event of disasters", the Special Rapporteur recalled that the broad concept of protection proposed since the First report, called for the recognition of "the tensions underlying the link between protection and the principle of respect for territorial sovereignty and the non-interference in the internal affairs of the affected State." The "poles of tension" as referred to by the Special Rapporteur between sovereignty and protection, became manifest and sharply underlined the debate, on the cluster of Draft Articles 10, 11 and 12, both within the Commission and in the Sixth Committee, during the annual consideration of the ILC Report.

Draft articles 10 and 11 dealt with the "duties" of the affected State, while Draft Article 12 referred a "right" of third parties, including States, International Organizations or Non-Governmental Organizations to offer assistance in disaster situations.

Commenting on *Draft Article 10,* Dr. Rohan Perera mentioned that it addressed the particular situation in which a disaster exceeds a State's national response capacity. The Article stipulates that in such circumstances, the affected State has the duty to seek assistance, from among others, States, the United Nations, other competent inter-governmental organizations, and relevant non-governmental organizations. The Special Rapporteur explained that the Draft Article "affirms the central position of obligations owed by States towards persons within their borders".

Dr. Rohan Perera said that, referring to the relationship between Draft Article 10 to Draft Articles 5 and 9 the Special Rapporteur pointed out that the duty expounded in Draft Article 10, was a specification of the content of Draft Article 5 and 9. It was also recalled that Draft Article 9 (1) stipulated that an affected State by virtue of its sovereignty had the duty to ensure the protection of persons and the provision of disaster relief and assistance on its territory. Draft Article 5 affirmed that the duty to cooperate was incumbent upon not only potentially assisting States, but also the affected State, where such cooperation was appropriate.

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

The cluster of Articles 10-12, given the underlying tensions between the principles of State sovereignty and protection, was the subject of sharp divergence of views among the members of the Commission. Some members were opposed to the idea that affected States are under or should be placed under a legal duty to seek external assistance in cases of disasters. Their opposition was premised on the basis that, as it currently stood, international law did not place any such binding duty upon affected States. Those supporting that view took up the position that the Draft Article should be re-formulated in exhortatory terms to the effect that an affected State **should** seek external assistance, in cases where a disaster affects its national response capacity rather than in mandatory terms that a States **shall** seek such assistance, as currently drafted.

On the other hand, those who supported the Draft Article as currently drafted, emphasized that recourse to international support may be a necessary element in the fulfillment of a State's international obligations towards individuals, where an affected State considers its own resources inadequate to meet protection needs. They emphasized that rules of Human Rights were implicated in the context of a disaster,

including the right to life, right to food, the right to health and medical services, the right to supply of water, adequate housing, clothing and sanitation and the right to be free from discrimination.

A middle ground that seemed to emerge during the debate pointed towards the notion of international cooperation in rendering external assistance in disaster situations, where a State's national capacity has exceeded. The guiding principles attached to landmark GA resolution 46/182 had stipulated: "The magnitude and duration of many emergencies may be beyond the response capacity of many affected countries. International cooperation to address emergency situations and to strengthen the response capacity of affected countries is thus of great importance. Such cooperation should be provided in accordance with International Law and National Laws."

The notion of international cooperation and solidarity, in contrast to a "rights and duties" approach in seeking and providing assistance, appeared to point the way towards an ultimate consensus.

The current formulation of Draft Article 10 also proceeded on the basis of an affected State "seeking" assistance, rather than making a "request" for assistance carried an implication that the consent of an affected State was automatically granted, upon acceptance of that request by a Third State". In contrast it was pointed out that, a duty to "seek assistance" implies a broader negotiated approach to the provision of international assistance. "The term 'seek' entailed the proactive initiation by an affected States, of a process through which agreement may be reached."

The Draft Article as currently drafted therefore, placed a duty upon an affected State, to take positive steps, actively, to seek out assistance to the extent that a disaster exceeds its national response capacity.

The Commission recognized that the Government of an affected State would be in the best position to determine the severity of a disaster situation and the limits of its national response capacity. It was emphasized in that connection that such an assessment must be one that was made in good faith. In re-iterating the importance of the Principle of Good Faith as recognized in the UN Charter and the Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States, the Special Rapporteur stated: "A good faith assessment of the severity of a disaster was an element of an affected State's duty, by virtue of its sovereignty, to ensure the protection of persons and the provision of disaster relief and assistance on its territory".

Another issue which gave rise to some concerns within the Commission, was the reference to "States, the United Nations, other competent Intergovernmental Organization, and relevant Non-Governmental Organizations as appropriate". The Special Rapporteur sought to allay such concerns by pointing to the use of the phrase, "as appropriate", which the Special Rapporteur explained was adopted to emphasize the discretionary powers of an affected State, to choose from among States and various other entities involved, the assistance that was most appropriate to its specific needs. It was further clarified that the term "as appropriate", further reflected the fact that the duty to seek assistance does not imply that a State was obliged to seek assistance from every source listed in Draft Article 10.

Notwithstanding these clarifications however, concerns remained among some members, on the desirability of treating on par, States, Inter-Governmental Organizations and Non-Governmental organizations, in a provision which sought to cast a legal duty on affected States to seek external assistance.

On *Draft Article 11,* dealing with the consent of an affected States to external assistance, also raised number of issues which were the subject of intensive discussion within the Commission.

As a whole, the Draft Article created for affected States, a "qualified consent regime" in the field of disaster relief operations. Paragraph (i) reflected the core principle that implementation of international relief assistance, was contingent upon the consent of the affected State. Paragraph (ii), however stipulates

that, consent to external assistance shall not be withheld arbitrarily. Paragraph (iii) places a duty on the affected State to make its decision regarding an offer of assistance known, wherever possible.

There was a broad degree of support for Paragraph (i), on the basis that the principles that the provision of external assistance requires the consent of the affected State, was fundamental to International Law. The consent requirement was highlighted in the Guiding Principles attached to GA Resolution 46/182. The consent requirement was also viewed as being in comport with the primary role of the affected State in the direction, control, coordination and supervision of disaster relief assistance in its territory, as envisaged in Draft Article 9.

However, the stipulation that an affected State's right to refuse an offer of assistance was not unlimited and the assertion in Article 11 (ii) that "consent shall not be withheld arbitrarily", was the subject of a sharp divergence of views. The Special Rapporteur sought to explain its rationale in the basis of the "dual nature of sovereignty as entailing both rights and obligations". However, there was some disagreement on that approach and those expressing such reservations also pointed out that the provision should not be drafted in mandatory terms using the term "shall", but rather in non-mandatory terms, such as to indicate that "consent to external assistance should not be withheld arbitrarily".

On the other hand those supporting the Special Rapporteur's approach emphasized that the duty of an affected State to ensure protection and assistance to those within its territory, in the event of disasters was aimed at preserving the life and dignity of victims of disasters and guaranteeing the access of persons in need to humanitarian assistance.

The need to develop criteria in determining the arbitrariness or otherwise of a decision to refuse consent also engaged the attention of the Commission. The range of views expressed on that difficult question was reflected in the commentary to the Draft Article so as to provide some degree of clarity. It, states, *inter alia*, that the determination whether consent was withheld arbitrarily or otherwise, must be determined on a case by case basis. However, it was pointed out that as a general rule, several principles could be adduced:-

1. The withholding of consent to external assistance would not be arbitrary, where a State was capable of providing and willing to provide an adequate an effective response to a disaster, on the basis of its own resources;
2. Withholding of consent to assistance from external sources was not arbitrary if, an affected State has accepted appropriate and sufficient assistance from elsewhere;
3. Withholding of consent was not arbitrary, if the relevant offer was not extended in accordance with the present Draft Articles; Humanitarian assistance must take place in accordance with Principles of Humanity Neutrality and Impartiality and on the basis of non-discrimination.

Conversely, where an offer of assistance was made in accordance with the Draft Articles and no alternate sources of assistance were available there would be a strong inference that decision to withhold consent was arbitrary.

Draft Article 12, on a "Right to offer assistance" was also subject of a sharply divided debate within the Commission. In introducing the Draft Article, the Special Rapporteur stated: "It served to acknowledge the legitimate interest of the international community to protect persons in the event of disasters."

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

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

In terms of a contrary view however, the contemporary understanding of Article 2 (7) of the Charter allowed for limitations and exceptions, especially in the context of protection of Human Rights. It was also pointed out that Article 12 should not be interpreted to imply permission to interfere in the internal affairs of an affected State. It merely reflected a right to offer assistance, which the affected State may refuse.

Those opposed to a 'right' to offer assistance approach, also highlighted the particular problems that would arise where external assistance was offered by NGOs. Such an approach would imply that NGOs enjoyed same rights as a State. It was accordingly suggested that the provision merely indicate that, "third actors may offer assistance", thereby providing an authorization and not a right.

Given those concerns, Dr. Rohan Perera said that suggestions were also made on the need to clearly differentiate between assistance by non-affected States and Inter-Governmental Organizations and that provided by Non-Governmental Organizations, working with strictly humanitarian motives."

A further view that emerged was that the provision be recast as a positive duty to offer assistance, cast on the international community. However, the contrary view was also expressed that it may be going too far to recognize a specific legal obligation on States and Organizations, to provide assistance.

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

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

Elaborating upon the *6th Committee Debate* on this topic, Dr. Rohan Perera said that on the cluster of Draft Articles 10-12, during the consideration of the ILC Report, reflected very much the range of diverse views, which characterized the discussion of these Articles in the Commission. It was also noteworthy, that on certain aspects there was a broad convergence of views across the geographical and political divide.

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

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

Commenting on the specific Draft Articles, the UK was of the view that the duty to seek assistance, set out in Draft Article 10, was 'clearly progressive development' and that the argument in the Commentary that such a duty could be spelled out from existing international obligations in the two Human Rights Covenants, "was questionable". On the requirement in Draft Article 11 that consent shall not be arbitrarily withheld, the UK delegation expressed the view that "this represents progressive development rather than a reflection of the law as it stands."

On the 'right' to offer assistance set out in Draft Article 12, the UK was of the view that, the idea is essentially superfluous in that, as a matter of sovereignty, "States could always offer whatever they want". The interventions made by the delegations of Ireland and Austria were also in similar vein, and militated against a notion of either a duty to seek assistance or a right to provide assistance.

From the Asian region, similar sentiments were expressed by the delegations of Japan, Sri Lanka, Indonesia and Islamic Republic of Iran, stressing, *inter alia*, that it was the Government of an affected State that would be best placed to determine whether a disaster had exceeded its national response capacity. Japan in particular requested the Commission to deepen the discussion on the 'rights and duties' dimension and stressed the importance of international solidarity in the event of disasters.

> "The Commission is requested to continue to deepen the discussion as to whether it is justifiable in view of the progressive development of international law, to characterize the seeking of assistance as a 'duty' of the affected State, while offering of assistance is understood as a 'right' of other States. from this point of view, Japan would like to note the remarks of some members of the Commission, who have emphasized during the discussion, the importance and the necessity of international solidarity in the event of disasters."

Similarly, the delegation of Sri Lanka stated:

> "We also share the concerns which have been expressed in the Commission regarding the reference to a "Right to Offer Assistance" in Draft Article 12. This should be reformulated to reflect a positive duty on the International Community to offer disaster relief on the basis of well established Principles of International CO-operation and Solidarity, rather than as a legal right. What is required is a flexible operational framework that facilitates the providing of international disaster relief under a broad umbrella of international co-operation and solidarity."

These statements encapsulates the growing support, both within the Commission as well as within the Sixth Committee, of the importance of an approach based on the Principle of International Cooperation and solidarity rather than a 'rights and duties' based approach.

On the question of treating NGOs on par with States and Intergovernmental Organizations in providing external assistance, several countries from the Asian region voiced concern. Thus the delegation for Islamic Republic of Iran, for instance stated:

> "Certainly there is little doubt as to the obligation of the State affected by natural disasters to co-operate with other States and competent Inter-Governmental Organizations. Such an obligation to cooperate is however limited only to the subjects of International Law, excluding NGOs."

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

> "There have been significant problems in some major disaster operations with the involvement of foreign actors that lack the requisite skills and ability to contribute to a well co-ordinated, appropriate and a high quality response. As such, States can and should be selective about the

foreign assistance they seek, and accept in the wake of natural disasters. They may wish to target requests to specific types of assistance or to particular actors in order to fill identified gaps in national capacity. This approach should also help to minimize the significant problems that inappropriate assistance can create."

Dr. Rohan Perera highlighted that those words of caution of the leading International Agency, active in the field of disaster relief operations and which had made a distinct contribution to the development of practical Guiding Principles in rendering international disaster relief assistance, which had been taken on board by the Special Rapporteur, merits the close attention of Asian and African States, as the work on that challenging and complex topic resumes at the forthcoming session of the ILC.

Prof. Shinya Murase, Member of ILC from Japan observed that solidarity and international cooperation was the core of this topic. One of the examples of solidarity cited was when Japan experienced Tsunami last year most of the Missions of the Western countries were fleeing the country whereas one of the Ambassadors went to the affected areas inspite of being advised not to visit the affected place. Such a visit was the spirit of solidarity. During the disaster, Japan received assistance from nearly 161 countries and 43 International organizations. However, on disaster relief and assistance, it was necessary to develop 'model provisions' and a roster of accredited Non Governmental Organizations who would be capable to assist during such disasters. He also said that there was a need for 'model status of forces agreement' which does at the initial stage of disaster military forces that are self-sustaining. There must also be a Military forces agreement which countries like US, People's Republic of China, Republic of Korea and Sri Lanka has that are like Peacekeeping operations under the UN.

The delegate of Sri Lanka asked whether ILC has asked for such guidelines/instruments.

Dr. Rohan Perera replied that in the present scenario there was no legal framework and it was the Sri Lankan experience of Tsunami that recommended for such mechanism. It could either be a convention or soft law in the form of resolution/declaration and each State does not have basic operational principles that were why they have Memorandum of Understanding (MoUs). Soft laws on this subject could be implemented in domestic level by each State.

The delegate of Kenya thanked Dr. Rohan Perera for his elaborate presentation and asked for further comments on 'unable/unwilling' concept and whether it was subjective/objective test.

Dr. Rohan Perera said that ILC had decided to work upon Responsibility to Protect in the event of disaster (R2P) but there was tremendous resistance within the Commission itself. In the last year's Report of the Secretary-General on Implementing the R2P and Follow-up to the outcome of the Millennium Summit 2005 World Summit Outcome: Operationalizing the responsibility to protect, stated that the concept of R2P would cover only: (i) genocide, (ii) war crimes, and (iii) ethnic cleansing and crimes against humanity. The unable/unwilling notion does not figure in the present context and it was only a dichotomy between rights and duties. Therefore, middle ground should be taken. Solidarity was the concept that was strongly supported.

The delegate of Myanmar asked whether "IFRC" warning was on 'inappropriate assistance'.

Dr. Rohan Perera replied that IFRC's experience in this field is well established as a lead humanitarian assistance organization. ILC report of the Sixth Committee does not cite any specific instances. However, aftermath of a disaster would be too huge and the burden to check for credentials of NGOS rendering assistance would be on the affected States.

The delegate of People's Republic of China expressed sincere gratitude on the work done by AALCO Secretariat in the form of relevant background paper on the subject On behalf of the Chinese Government

the delegate said that they were in total agreement with the comments and observation of the Background Paper prepared by the AALCO Secretariat especially the idea of possible Model Law on disaster relief to be drafted by AALCO Secretariat. The delegate supported the Secretariat to play an active role in the in-depth discussion and consideration of the subject.

Referring to the background paper, the delegate said that Article 12 of the Draft Articles, which was currently under consideration by the ILC, was of much contention. It lays down the right to offer assistance. Although the special Rapporteur claimed that simply asserted those offers of assistance were not, *ipso facto,* illegitimate, nor could they be construed as unlawful interference in the internal affairs of the affected State, China doubted if it really completed the entire picture.

First of all, instead of simply putting it into such terms as duty and right, what shall be emphasized or envisioned here was solidarity and cooperation of the international community in disaster prevention and release. In the same line, article 10 shall also be called into question. China assumed that the so-called duty of an affected States to seek outside assistance simply could not be hooked up and artificially linked to the so-called right of the international community to offer assistance, which only serves to pit one against another and militate against international cooperation in disaster relief. Secondly, according to the current drafting of article 12, the right to offer assistance belongs not only to States, but also to non-state third parties, especially non-governmental organizations. China fully supported the irreplaceable role played by non-governmental organizations in disaster relief, but whether it was appropriate to endow them with same rights as States and inter-governmental organizations, in their view deserved second thoughts. As a matter of fact, it had been proposed during the relevant discussion in ILC at Geneva in 2011, that the ILC should differentiate between assistance by the non-affected States and inter-governmental organizations, China deemed the proposal reasonable and pragmatic.

The delegate on behalf of the Chinese Government expressed full support of the work to be done by ILC with respect to the subject of protection of persons in the event of disasters and was also confident of the progress already achieved. They wished the ILC all success in that aspect.

The High Commissioner of Sri Lanka to India said that this was an important topic and for diplomats it would be a learning experience. It was essential to understand how to handle disaster assistance, be it hard/soft law, basic principles would be applied. It appears that it was somewhere between rights and duties regime and international solidarity and cooperation but the main intention should not be to politicize the situation and embarrass the government of the affected State. He cited the example of Myanmar.

Dr. Rohan Perera replied that he had focused his presentation on the current work on Draft Articles 10, 11 and 12 but already there are preceding Draft Articles which has dealt in detail with the issue of humanitarian purposes, consent of affected States and the definition of arbitrarily withholding the consent etc. the concept of R2P has no application in those circumstances. In Myanmar's situation disaster relief has to be exclusively for humanitarian purposes.

The Delegate of Malaysia commented that regarding Draft Article 10, right to determine the national capacity rests solely and within the absolute discretion of the affected State. Special Rapporteur has tried to put the same within that understanding and by virtue of Draft Article 10 (2) the legal obligations was imposed. However, further consideration was required taking into account the principle of sovereignty equality of states which was paramount.

Regarding Draft Article 11 (2), it recognizes the inherent right of State to withhold its consent. It clearly states that discretion of the State shall not be arbitrarily exercised. However, Malaysia was of the opinion that they don't anticipate determination of legal grounds of arbitrariness and it was the discretion of the affected State.

Regarding Draft Article 12, they were concerned with the wordings offered interference in the internal affairs of the affected State and sought clarification of intention on the part of assisting State and how it was recorded. Further, in order to bring down legal effect of misinterpretation, we propose to include: "without prejudice to the affected State" which would give an upper hand to the affected State.

The delegate commented Prof. Murase for his proposals and said they should be carefully considered in order to provide a workable practical solution about Model Law. "roster of accredited NGOs" assisting affected States should be made provided that priority must be sovereignty of States.

Moreoever, it was advisable to refer to the ASEAN Agreement on Disaster Management and Emergency Response. Malaysia could share the experiences from that wherein disaster preparedness was the key issue negotiated. The ASEAN worked for practical solution rather than mere legal provisions which were also take into account concerns of the preceding speakers.

Secretary-General of AALCO read out the Comments by Ambassador Kriangsak Kittichaisaree, Member of the ILC from Thailand:

> **"General Comments**
>
> AALCO members should press the ILC to have an equitable geographical representation of Special Rapporteurs from Africa and Asia. (In 2011, there were 8 Special Rapporteurs of the ILC, 6 of whom were from Europe, only one of whom was from Africa and the other one was from South America.
>
> **Protection of Persons in the Event of Disasters:**
>
> Debates in the 6th Committee last year focused on the concerns that the Responsibility to Protect (R2P) concept might be extended to apply to the situation of protection of persons in the event of disasters. Paragraph 286 of the ILC Report of the 63rd Session states the ILC's endorsement of the UN Secretary-General's position that "[t]he responsibility to protect applies, until Member States decide otherwise, only to the four specified crimes and violations: genocide, war crimes, ethnic cleansing and crimes against humanity. To try to extend it to cover other calamities, such as HIV/AIDS, climate change or the response to natural disasters, would undermine the 2005 consensus and stretch the concept beyond recognition or operational utility."
>
> Nevertheless, the definition of "disasters" in Article 3 of the ILC's draft articles is quite broad. "Disasters" are defined as "a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society." The four specified crimes mentioned by the UN Secretary-General may also fit in this definition of "disasters".
>
> States must distinguish between the commission of these four specified crimes, on the one hand, and "disasters" that do not involve commission of such international crimes, on the other hand. In the former situation, the debate should be on the prevention of abuse of the R2P concept. In the latter situation, the debate should focus on the existence and scope of the "duty" or "right" of other States and actors to cooperate with the affected State in disaster relief matters."

After this interesting Question and Answer session the debate on the topic concluded.

TOPIC: "IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION"

Dr. A. Rohan Perera, Former Member of ILC from Sri Lanka who was the Lead Discussant on that topic explained the nuances of the Agenda Item. He discussed about the Second Report of the Special Rapporteur. The debate in the International Law Commission (ILC) on the topic of Immunity of State Officials from Foreign Criminal Jurisdiction centered around three principal issues: (i) general orientation of the topic; (ii) scope of immunity; and (iii) question whether or not there were exceptions to immunity with regard to grave crimes under international law.

Regarding the "**General Orientation of the Topic**" he said that the Special Rapporteur in his introduction to the Second Report emphasized the importance of looking at the actual state of affairs as a starting point for the Commission's consideration of the topic and explained that it was from the perspective of the *lex lata* that he had proceeded to prepare his report. From that perspective the Special Rapporteur was of the view that immunity of a state official from foreign criminal jurisdiction was the norm and any exception thereto would need to be proven.

The position of the Special Rapporteur on the General Orientation of the Topic led to an intense discussion in the Commission as to the perspective from which the Commission should approach the topic. i.e. whether from the *lex lata* or *lex ferenda* perspective. It was pointed out that even if one chose to adopt the approach of the Special Rapporteur who had analyzed the issue from a strict *lex lata* perspective, the interpretation given to the relevant state practice and judicial decisions relating to this topic could plausibly lead one to different conclusions as to the existing law.

On the other hand, to approach a topic from a *de lege ferenda* perspective raised other questions involving competing policy considerations including to what extent the Commission should develop the law and whether it would be appropriate for it to take a lead in the area in the light of the divergent policy considerations involved. The point was also made that the issues of principle implicated by the topic may not necessarily be best described in terms of *lex lata* versus *de lege ferenda*, but rather involved the application of rules that were all *lex lata*.

However, views were also expressed that the topic was broadly suitable for codification and progressive development which allowed the Commission to approach the topic from both aspects of its mandate. It was recognized, however that the Commission needed to proceed with caution in order to achieve an acceptable balance between the need to ensure stability in international relations and the need to avoid impunity for grave crimes under international law. In that regard, it was pointed out that in deciding on what approach should be adopted it would be essential to keep in mind the practical value of the end product, which inter alia, was intended to serve the interests of the international community. It was further emphasized that in approaching the question of immunity, it was important to recall that it was the legal and practical interests of the State that were engaged and not those of the individual (para 118 to 119 Report of the ILC 63rd Session).

Dr. Rohan Perera mentioned that the outcome of the discussion in the Commission on the General Orientation of the topic led to the conclusion that the Commission should establish a Working Group to discuss at its 64th Session and determine how best to proceed with the topic. It was recognized that the general direction in which the Commission wished to steer the topic had to be settled prior to moving forward (para 120 Report of the ILC 63rd Session).

With regard to the 6th Committee Debate when the agenda item was debated upon at the 66th session of the UNGA, number of countries commenting on the Second Report of the Special Rapporteur adverted to the need to address upfront, the question of the General Orientation of the topic. Several Countries

underlined the need for a cautious approach and the importance of approaching the issue from *lex lata* perspective. Thus for instance the Representative of the United Kingdom stated that it was essential that the Commission kept clearly in mind the distinction between its task of codifying the *lex lata* and making proposals for the progressive development of *lex ferenda*. Given the very practical importance of the Commission's work on the topic, they urged the Commission to ensure that such distinction was to be made clear throughout their work and that any proposals they make for the *lex ferenda* by way of draft articles for a future Convention are thought through with rigour and vigour that has informed the work to date" (UK Statement of 31/10/2011).

Dr. Rohan Perera said that several other delegations expressed the view that the Commission should as a first step concentrate on the identification of existing rules (*lex lata)* "an exercise that would also show situations where international law in force is unable to keep pace with present developments". Once the Commission identified the existing laws and its discrepancies with such developments it was stated that the Commission should as a second step, try to propose rules *De Lege Ferenda* aimed at bringing international law in conformity with those developments (Statement of Austria 1/11/2011).

Thus the 6th Committee debate reflects an approach which in principle endorses the Special Rapporteur's position of treating the *lex lata* perspective as the starting point. However, it nevertheless underlined the need that having codified and identified the gaps, the Commission should proceed to the next stage the *De Lege Ferenda* perspective. This is the challenging task before the working group that is to be established in May 2012 and the position of Asian-African States on this approach would no doubt be of value to the Commission in determining the future direction of the topic of Immunity of State Officials from Foreign Criminal Jurisdiction.

With regard to "**Scope of Immunity**" as to whether officials to be covered under the topic there was a broad degree of consensus within the Commission in the light of State practice and recent judicial decisions that Heads of State, Heads of Government and Ministers of Foreign Affairs who constituted the so called "troika" of State officials enjoyed personal immunity "rationae personae". Views were also expressed in favour of extending immunity *rationae personae* to certain other high level officials representing the State in its international relations whose functions involved a substantial amount of foreign travel on behalf of the state.

Dr. Rohan Perera observed that it was with regard to the "other categories of State Officials" outside the established "troika" that the Commission was required to move into unsettled territory. The challenge before the Commission was to strike a delicate balance between the need to expand, albeit cautiously, the different categories of state officials to be granted jurisdictional immunities "*rationae personae*", in the light of contemporary developments in international relations on the one hand and the need to avoid the risk of a liberal expansion of such categories, which could be conducive to an environment of impunity under the cover of immunity.

In its approach to the question of determining the categories of State Officials entitled to immunity rationae personae, the Commission tended to veer towards a process of identifying and defining applicable criteria to be invoked in granting jurisdictional immunities to high ranking officials, while taking due account of the principle of functional necessity and the representative character of the officials concerned.

In the identification of such criteria it was emphasized that prime consideration must be given to the notion that the representation of the State in international relations must be an indispensable part of the functions of the officials concerned.

Dr. Rohan Perera explained that in the course of the debate at the Sixth Committee it was asserted by some members that:

(a) A very high degree of involvement of the State Officials in the conduct of foreign affairs on behalf of the State must be established in asserting immunity; and

(b) To consider in defining eligible categories, only those persons who exercise powers intrinsic to the State, thereby excluding the vast majority of State Officials whose work could be performed equally by the private sector as well or who did not have the instruments of State power at their disposal.

The rationale underlining the approach pursued by some members on that issue was that the effective conduct of a State's foreign relations were an integral factor in the preservation of its sovereignty. Together they constituted an integral whole, which should be considered as such, when establishing the criteria for granting jurisdictional immunities to different categories of State Officials.

A debate within the Commission indeed reflects the readiness of the ILC to adopt a flexible and pragmatic approach in an attempt to strike the requisite balance between the need to preserve the sovereign function of the States on the one hand and the need to avoid an overly broad expansion of jurisdictional immunities and thereby create a fertile terrain for impunity.

During the 6th Committee Debate on the ILC Report several delegations underscored the need to take into account in addressing the Scope of Immunity of State Officials, the current realities in the conduct of international relations and the fact that the nature of representations in international relations had undergone fundamental change. Consequently it was recognized that there was a need to examine possible "other categories of State Officials" beyond the "troika" who by virtue of their functions may be entitled to immunity 'rationae personae" (see Statement of Sri Lanka 1/11/2011).

In general, delegations who adverted to this aspect emphasized the need to reflect the reality of how foreign policy was conducted today amongst States involving high officials other than the Minister of Foreign Affairs. At the same time they underlined the need for caution in that regard and that any expansion of the list of high officials beyond the "troika" must be contingent on the specific functions entrusted to such high officials by the State (See statement of Singapore 2/11/2011).

On the **"Question of Exceptions to Immunity"** of a State Official from Foreign Criminal Jurisdiction, the Special Rapporteur observed that in the case of immunity "rationae personae" the predominant view seemed to be that such immunity was absolute and covered acts performed both in an official capacity or personal capacity and committed both while in office and prior thereto and that no exceptions thereto could be considered. In the opinion of the Special Rapporteur, the question of exceptions could only be pertinent with regard to immunity "ratione materiae" concerning acts performed in an official capacity, in the context of crimes under international law. At the same time, the Special Rapporteur acknowledged the widely held opinion that the issue of exceptions to immunity fell within the sphere of progressive development of international law. In his view however the issue raised serious concerns including in relation to politically motivated prosecutions, trials in absentia and evidentiary problems as a result of lack of cooperation of the State concerned. He cautioned the Commission against drafting provisions *de lege ferenda* and recommended that it should restrict itself to codifying existing law.

The question of possible exceptions to immunity gave rise to diverse views within the Commission. While some members agreed with the conclusions of the Special Rapporteur, some other members expressed the view that the Commission could not limit itself to the status quo and had to take into account the relevant trends that had an impact on the concept of immunity, in particular developments in human rights law and international criminal law. According to the view the assertion that immunity constituted the norm to which no exceptions existed was thus unsustainable. In that context it was pointed out that the question of how to situate the rule on immunity in the overall legal context was central to the debate.

Such line of argument sought to emphasize that a superior interest of the international community as a whole had evolved in relation to certain grave crimes under international law which resulted in an absence of immunity in such cases. It was therefore contended that instead of addressing that issue in terms of "rule" and "exception", with immunity being the rule, it seemed more accurate to examine the issue from the perspective of responsibility of the State and its representatives in those limited situations - which shock the conscience of mankind - and consider whether any exceptions thereto in the form of immunity may exist (Para 121 to 124 Report of the ILC Commission 63rd Session).

The rationale for the exceptions to immunity was also sought to be explained on the basis that in the case of conflict between the rules of immunity and those established in international crimes, the latter being rules of *jus cogens*, had to prevail. That approach sought to examine the issue of immunity and exceptions from the perspective of a hierarchy of norms and sought to draw strength from the minority opinion of dissenting judges in the case of *AI-Adsani* Vs. *United Kingdom* in the European Court of Human Rights (ECHR) which stated:

> "Due to the interplay of 'jus cogens' rule on prohibition of torture and the rules on State immunity, the procedural bar on State immunity is automatically lifted because those rules, as they conflict with the hierarchically higher rule, do not produce any legal effect."

However, the majority of the judges in the European Court held that the court was unable to discern in the international instruments, judicial authorities or other materials before it, any firm basis for concluding that as a matter of international law, the State no longer enjoy immunity from civil suit in the courts of another state, where acts of torture were alleged.

The Special Rapporteur in his concluding remarks contextualized the issues by recalling that there were many truisms in international law including that the development of human rights had not resulted in the disappearance of sovereignty or the elimination of the principles of sovereign equality of States and non-interference in the internal affairs despite having a serious influence on their content. The Special Rapporteur pointed out that the central issue for consideration in the present topic was not so much the extent to which changes occurring in the world and in international law had an influence on sovereignty as a whole, but rather how more specifically there was an influence on the immunity of State officials, based on the sovereignty of a State; the essential question being how had the immunity of State officials in general and immunity from the national criminal jurisdiction of other States in particular, been affected.

The Special Rapporteur emphasized that to juxtapose immunity and combating impunity was incorrect. Combating impunity had a wider context involving a variety of interventions in international law including the establishment of international criminal jurisdiction. Moreover, it was pointed out that immunity from criminal jurisdiction and individual criminal responsibility were separate concepts. Immunity and foreign criminal jurisdiction was the issue to be grappled with and not immunity and responsibility.

In response to the contention of the hierarchy of norms whereby *jus cogens* prevailed over immunities, the Special Rapporteur contended that *jus cogens* rules which prohibit or criminalize certain acts were substantive in nature and could not overturn a procedural rule such as the one concerning immunity.

The Special Rapporteur also pointed out that the question of international criminal jurisdiction was entirely one that was to be separated and distinguished from foreign criminal jurisdiction. In his view the Rome Statute on the ICC was unlikely to be relevant in respect of foreign criminal jurisdiction (Para 187 to 189 Report of the ILC 63rd Session).

Dr. Rohan Perera then highlighted the debate in the 6th Committee which also mirrored the range of diverse views that were expressed in the Commission on possible exceptions to immunity. The need to strike an appropriate balance between several fundamental principles was emphasized by several delegations. For instance, it was pointed out that the topic revolves around two major values protected by international law, namely immunity of State officials and the obligation of avoiding impunity, and that to serve the interests of the International Community would require a balance being struck between State sovereignty, the rights of individuals and the need to avoid impunity for serious crimes under international law (Statement of Portugal).

In addressing the issue of possible exceptions to the immunity of State officials some delegations also underlined the need to bear in mind the fact that the risk of politically motivated criminal prosecutions before foreign courts could very well lead to serious frictions in inter-State relations. Hence there was a clear need to strike a careful balance between the respective policy considerations involved, namely preserving the well established principle of immunity of State officials and that of addressing the issue of possible exceptions to this rule (Statement of Sri Lanka dated 1/11/2011 and also New Zealand dated 2/11/2011).

Some States also emphasized the fact that immunity of States was not a courtesy by one State to another, but rather an important principle of international law that was based on fundamental legal principles, namely sovereign equality resting on the maxim '*par in parem non habet imperium'*. It was thus contended that if the above fundamental legal principles were placed in a position where they may be superseded by other rules at any time, the very foundation of modern international relations would be seriously eroded and lead to disastrous consequences. (Statement of People's Republic of China 2/11/2011).

The distinction drawn by the Special Rapporteur between international criminal jurisdiction and assertion of jurisdiction by foreign courts also found support within the 6th Committee. Thus it was pointed out that the scope of immunity of State officials from criminal jurisdiction needs to be examined in different ways, depending on whether the proceedings concerned were taken by a national court or whether the alleged offence falls within the competence of an international court.

It was pointed out where the ICC was concerned the Rome Statute expressly set limits on the possibility of invoking immunities deriving from other sources of international law. However, this limitation on immunities does not apply where the competence of a national court was concerned. The latter involved situations where the principle of sovereign equality between States and the stability of international relations must be guaranteed. (Statement of Switzerland 31/10/2011).

The sharp divergence of views that have characterized the discussion of possible exceptions to immunity both within the Commission and in the 6th Committee is likely to dominate the Working Group to be established at the 64th Session of the ILC. The outcome was likely to be guided and determined by the availability of cogent evidence of State practice, judicial decisions and other material. That was a matter that required the highest priority of States of the Asian-African region.

Dr. Rohan Perera then cited the recent judgment of the International Court of Justice (ICJ) in the **"Jurisdictional Immunities of States case" (Germany and Italy - 3rd February 2012).** He said that the recent Judgment of the ICJ in the case of *Germany Vs. Italy*, although involving civil proceedings as distinct from criminal proceedings, nevertheless had clear implications for the ongoing work on the question of immunity of State officials from foreign criminal jurisdiction. The case arose out of proceedings before the Italian Courts against Germany in respect of what were termed as serious violations of the laws of armed conflict which amounted to crimes under international law committed during the Third Reich. The arguments made by Italy were based upon the proposition that international law does not accord immunity to a State or at least restrict its immunity where it has committed serious

violations of the laws of armed conflict. The court made it clear that the actions of the German armed forces and other organs of the German Reich, which were the subject matter of proceedings before the Italian Courts, were serious violations of the laws of armed conflict. The question for determination before the court was whether that fact operated to deprive Germany of an entitlement to immunity.

On the question whether Customary International Law (CIL) had developed to a point where a State was not entitled to immunity in the case of serious violations of human rights law or the law of armed conflict, the court came to the conclusion that apart from the decisions of the Italian courts which were the subject of the present proceedings, there was almost no State practice which might be considered to support the proposition that a State was deprived of its entitlement to immunity in such case. The court pointed out that there was a substantial body of State practice from other countries which demonstrated the fact that CIL does not treat a State's entitlement to immunity as dependent upon the gravity of the act of which it was accused or the peremptory nature of the rule which it was alleged to have violated (Paras 81-83, 84 and 85 of the ICJ judgment).

In the course of the argument before the court, the question of the *jus cogens* limitations which figured prominently in the ILC discussion on immunity of State officials was also raised. The court having gone into the history of the negotiation of the 2004 U.N. Convention on Immunities of States and their property (2004) observed that during the debates in the 6th Committee, no State had suggested that a *jus cogens* limitation to immunity should be included in the draft convention. The court therefore concluded that that history indicated that at the time of adoption of the U.N. Convention in 2004, States did not consider that CIL limited immunity in the manner which was now being suggested by Italy.

Referring to the argument of hierarchy of norms, the court observed that the argument depended upon the existence of a conflict between a rule or rules of *jus cogens* and the rules of customary law which required one State to accord immunity to another. In the opinion of the court, however, no such conflict existed. Assuming for that purpose that the rules of the law of armed conflict which prohibit the murder of civilians in occupied territories, the deportation of civilian inhabitants to slave labour and the deportation of prisoners of war to slave labour, are rules of *jus cogens*, there was no conflict between these rules and the rules on State immunity. The two sets of rules address different matters on the rules of State immunity were procedural in character and were confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings were brought was lawful or unlawful.

The Separate Opinion of Judge Abdul Koroma, places the central issue before the Court in perspective, when he states;

> "The case before the Court however, is not about the legality of the conduct of Germany's armed forces, during the Second World War, or Germany's international responsibility for such conduct. The question in this case is limited to whether Germany is entitled to immunity before the Italian domestic courts, with respect to the conduct of its armed forces in the course of the conflict. The Court did not need to address the substantive matter of the legality of Germany's conduct, to resolve the issue of sovereign immunity. Indeed the Court's jurisdiction in this case is limited to addressing only the issue of jurisdictional immunity" (para 3).

Judge Bennouna, in his Separate Opinion, also elaborated on the dichotomy between immunity and responsibility, and emphasized the fact that immunity before foreign courts did not mean complete exoneration from responsibility. In other words, the granting of immunity by these courts can in no sense mean that the State concerned is exonerated from responsibility. It merely defers consideration of that responsibility to other diplomatic and judicial bodies (para 8.).

That line of reasoning was consistent with the reasoning of the Special Rapporteur on the Immunity/responsibility dichotomy, wherein he stated that combating impunity had a wider context involving a variety of interventions in International Law, including the establishment of International Criminal Jurisdiction.

The above reasoning stands in stark contrast to the views of some of the dissenting judges, such as Judge Trindade whose dissenting opinion tends to blur the immunity/responsibility distinction, viz,". The central principles at issue here were, in my perception, the principle of humanity and the principle of human dignity. State Immunity could not in his view be unduly placed above state responsibility for international crimes... The above reasoning falls into that unfortunate error of juxtaposing immunity/responsibility and combating impunity, which the Special Rapporteur cautioned against.

The conclusion reached by the majority Judges in the Immunity of States Case was supported by a series of Judgments of domestic Courts from different jurisdictions (such as UK, Canada, Poland, Slovenia, New Zealand and Greece) where the argument of *jus cogens* displacing the law of State immunity had been rejected. In that respect the ICJ judgment in *Germany Vs. Italy* fully supported the majority view of the European Court in the *Al Adsani Case*. In reaching the conclusion that under Customary International Law as it presently stands, a State was not deprived of immunity by reason of the fact that it was accused of serious violations of international human rights law or the international law of armed conflict, the court sought to emphasize that it was addressing only the immunity of the State itself from the jurisdiction of the courts of other States and therefore that the question of whether and if so to what extent immunity might apply in criminal proceedings against an official of the State, was not an issue in the present case (Para 91 of the Judgment). It would be interesting to examine the impact of that statement in relation to *ratione materaie* immunity of State officials which were considered acts of the State.

Despite that careful circumscribing of scope of judgment, the key issues addressed by the court, particularly on the relationship between *jus cogens* and the rule of State immunity would undoubtedly be of persuasive authority in further consideration of these issues before the Working Group to be established on the question of immunity of State Officials in respect of Foreign Criminal Jurisdiction.

Discussing on the **"Third Report of the Special Rapporteur",** Dr. Rohan Perera said while the preliminary and second reports of the Special Rapporteur dealt with substantive aspects of the immunity of State Officials, the third report addressed a series of procedural issues, which in the words of the Special Rapporteur was, 'intended to complete the entire picture'. The report focused particularly on: (i) timing of consideration of immunity; (ii) invocation/waiver of immunity; (iii) substantiation of immunity; and (iv) question of implied waiver.

While commenting upon the issue of "**Timing**", namely when and at what stage immunity should be raised in criminal proceedings, the Special Rapporteur was of the view that questions of immunity were preliminary issues, which must be expeditiously decided in *limine litis*. He stressed that the question of the immunity of a State Official from foreign criminal jurisdiction should, in principle, be considered either at the early stage of court proceedings, or even earlier at the pre-trial stage, when the State that was exercising jurisdiction decides the question of taking criminal procedural measures.

There was general agreement in the Commission that immunity ought to be considered at the early stage of the proceedings or indeed earlier during the pre-trial stage as stated by the Special Rapporteur. The Advisory Opinion of the ICJ in "*Differences Relating to Immunity From Legal Process of a Special Rapporteur of the Commission on Human Rights"* was cited by the Special Rapporteur in support of the above position.

Interestingly the recent ICJ Judgment on *Jurisdictional Immunities of States* (Germany Vs. Italy) cited above, addressing the same point stated that:

> "Immunity from jurisdiction is immunity not merely from being subjected to an adverse judgement but from being subjected to the trial process. It is therefore, necessarily preliminary in nature. Consequently a national court is required to determine whether or not a foreign state is entitled to immunity as a matter of international law, before it can hear the merits of the case brought before it and before the facts have been established. If immunity were to be dependent upon the State actually having committed a serious violation of international human rights law or the law of armed conflict, then it would become necessary for the national court to hold an inquiry into the merits in order to determine whether it had jurisdiction. If on the other hand, the mere allegation that the State had committed such wrongful acts were to be sufficient to deprive the State of its entitlement to immunity, immunity could in effect be negated simply by skillful construction of the claim." (para 82).

In relation to the issue of **"Invocation of Immunity and duty to Notify State of Official",** on the question as to who was in a position legally to raise the issue of immunity, the Special Rapporteur emphasized that only the invocation of immunity or a declaration of immunity by the State of the Official and not by the Official himself, constituted a legally relevant invocation or declaration capable of having legal consequences.

In order for immunity to be invoked it was vital that the State of the Official should know that criminal procedural measures were in fact being taken or planned in respect of the official concerned. Accordingly, the State that was planning such measures was obliged to inform the State of the Official in this regard.

On the duty to "**notify**", the Special Rapporteur drew attention to a distinction that ought to be made based on categories of State Officials enjoying immunity *rationae personae* on the one hand and those enjoying immunity *rationae materiae* on the other. In respect of the Troika, a foreign Head of State or Head of Government or the Foreign Minister, the State exercising criminal jurisdiction itself must consider, *proprio motu*, the question of immunity of the person concerned and determine the position within the framework of international law. Given the high political office these Officials hold, the State of the Official in that case, does not bear the burden of raising the issue of immunity with the authorities of the State exercising criminal jurisdiction.

On the other hand, in respect of persons enjoying immunity *rationae materiae* it was pointed out that the burden of invoking immunity resided in the State of the Official. If the State of such an official wish to invoke immunity in respect of that official it must inform the State exercising jurisdiction, that the person in question was its official, acted in an official capacity and enjoyed immunity, facts which were essentially within the knowledge of the official's State. Otherwise, the State exercising jurisdiction was not obliged to consider the question of immunity *proprio motu* and therefore might continue criminal prosecution.

Dr. Rohan Perera while addressing the question of "**waiver of immunity**" said that the Special Rapporteur noted that the right to waive immunity of an official was vested in the State and not in the official himself. However, when the Head of State or Head of Government or the Foreign Minister waive immunity with respect to himself, the State exercising criminal jurisdiction was entitled to assume that such was the wish of the State of the official, at least until it was otherwise notified by that State.

On the issue whether waiver should be expressed or implied, Special Rapporteur was of the view that the waiver of immunity of a serving Head of State or Government or Foreign Minister must be expressed. A waiver of immunity of officials other than the Troika, but who enjoyed immunity *rationae personae*, of officials who enjoyed immunity *rationae materae*, may be either expressed or implied. Implied waiver in this case, might be imputed *inter alia* from the non invocation of immunity by the State of the official.

As regards the response within the Commission to the Special Rapporter''s Third Report was that the analysis contained in the report was convincing and logical. However, two aspects arising from the Third Report attracted particular comment within the Commission. These were:

(a) question of substantiation of immunity; and
(b) implied waiver through subscribing to an international treaty

(a) Substantiation of Immunity

Dr. Rohan Perera said that at the Commission, commenting on the substantiation of immunity, in respect of immunity *rationae materiae*, several members adverted to the Special Rapporteur's observation that it was the prerogative of the State of the official to characterize the conduct of the official as being "official conduct of the State", and at the same time that the State exercising criminal jurisdiction did not have to "blindly accept" such a characterization and took the view that such a conclusion seemed "rather broad and unclear." These members stressed that it was necessary to find the balance. Each case had to be assessed on its merits. It was pointed out that the use of terms such as "prerogative" and suggesting that there was a "presumption" arising out of the mere appointment of an official, may be going too far.

In that regard reference was also made to the ICJ Advisory opinion on the *Immunity of Special Rapporteur of the Commission on Human Rights case*, which was used as confirmation of the general proposition that if the official capacity of the official and the official nature of his acts was manifest in a specific situation, the burden to demonstrate that he was acting in an official capacity "was significantly alleviated".

(b) Implied Waiver Through Subscribing To An International Treaty

Dr. Rohan Perera said that the Special Rapporteur's assertion that a State's consent to be bound by an international agreement establishing universal jurisdiction for grave international crimes, does not imply consent to the exercise of international criminal jurisdiction in respect of its officials and therefore did not constitute an implied waiver of immunity, also generated some discussion within the Commission. While some members supported the view that there was a general reluctance to accept an implied waiver, based on the acceptance of an agreement unless there was a manifest expression of a clear intent to waive immunity, some others took a contrary view.

According to the latter view the conclusion of an agreement establishing universal jurisdiction, with *aut dedere aut judicare* provisions and establishing criminal jurisdiction for grave international crimes, without any distinction based on official capacity of the perpetrators, pointed to a construction that the State parties intended to waive immunity. However, it was also pointed out by other members, that unless there was express provision on waiver of immunity, such a broad inference, based on mere silence in the treaty should not be lightly drawn on implied waiver.

The 6th Committee debate on the topic "Immunity of State Officials" concentrated on the Second Report of the Special Rapporteur and substantive issues contained therein such as the general orientation of the topic, scope of immunity and possible exceptions for grave crimes. The lack of attention to the procedural issues raised in the Third Report which was less contentious in nature, was perhaps for the reason, (which was also apparent in the debate within the Commission), that it would be more proper to consider such procedural issues after the Commission had reached definitive conclusions with regard to the key substantive issues in the Second Report - these constituted the basic issues that needed to be resolved bearing on the general direction of the topic as a whole.

Dr. Rohan Perera said nevertheless, as the work of the ILC on that topic resumes at the 64th Session, the issues raised in the Third Report must also engage the close attention of the Asian-African States.

Secretary-General of AALCO read out the Comments by Ambassador Kriangsak Kittichaisaree, Member of the ILC from Thailand:

"Immunity of State Officials from Foreign Criminal Jurisdiction:

This topic does not stand alone. It is related to another topic currently under the ILC's agenda; namely, the obligation to extradite or prosecute. It is also related to the topic "Scope and Application of the Principle of Universal Jurisdiction" under consideration of the 6th Committee of the UN General Assembly, which several States (especially those from Latin America, Africa, and West Asia) have refused to allow the ILC to take up, arguing that universal jurisdiction must be considered in the proper context of international relations and not just international law.

The ILC is particularly interested in receiving comments on the following issues.

(a) What approach would States wish the ILC to take on the topic of Immunity of State Officials from Foreign Criminal Jurisdiction? Should the ILC seek to set out existing rules of international law (*lex lata*), or should the ILC embark on an exercise of progressive development (*lex ferenda*)?
(b) Which holders of high office in the States (Heads of State, Heads of Government, Ministers for Foreign Affairs, others) enjoy *de lege lata*, or should enjoy *de lege ferenda*, immunity *ratione personae*?
(c) What crimes are, or should be, excluded from immunity *ratione personae* or immunity *ratione materiae*?
(d) What are the national law and practice of States in this matter, including recent developments in the case law and legislation, and current procedures on the invocation and waiver of immunity.

Issues (a) and (c) are entwined. Western European States are in favour of denying immunity to perpetrators of genocide, war crimes and crimes against humanity (including other serious crimes like ethnic cleansing and torture). They rely mainly on the Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant of 11 April 2000 (Democratic Rep. of the Congo v. Belgium) Case* (ICJ Judgment of 14 Feb. 2002) as correctly stating the current state of customary international law on immunity of State officials from foreign criminal jurisdiction. Several other States disagree on the grounds that the Joint Separate Opinion of these three ICJ Judges did not represent the view of the ICJ in the case at hand, and that while denial of such immunity can be found in treaties (e.g., the ICC Statute and the Torture Convention) it is not part of the general customary international law. The information pertaining to issue (d) will help answer the questions posed in issues (a) and (c). If answers to the questions in (a) and (c) can be found, they will also answer the questions in (b).

The ICJ has recently rendered judgment in the *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening) Case* (ICJ Judgment of 3 Feb. 2012) that could be relevant to the topic of Immunity of State Officials from Foreign Criminal Jurisdiction. It should be noted, however, that the ICJ Judgment of 3 Feb. 2012 concerns jurisdictional immunities of the State, as opposed to State officials. Besides, the jurisdictional immunities in that case are not jurisdictional immunities from criminal jurisdiction, but from civil suits arising from commission of serious crimes under international law. Yet, immunity of State officials derives from the principle of sovereign equality of States whereby an equal cannot have jurisdiction over an equal. If the States in question are denied immunity then their officials cannot enjoy immunities, either.

The majority of the ICJ in *Germany v. Italy* held that Germany was entitled to State immunities because the acts of the German armed forces in Italy during WWII constituted acts taken in the

exercise of sovereign power (*acta jure imperii*). Although such acts also constituted war crimes, the majority ruled that under current international law States continue to be entitled to sovereign immunity for *acta jure imperii* committed by their armed forces during armed conflict.

It is the dissenting opinions in *Germany v. Italy* that could open up possibilities for denial of the immunity of State officials from foreign criminal jurisdiction. It depends on how one construes the reasoning of Judge Conçado Trindade, and, to a lesser extent, those of Judge Bennouna and Judge Yusuf in their respective dissenting opinions in the context of a judgment on jurisdictional immunities of the State. The dissenters seem to contend that in those exceptional circumstances where immunity may prevent the victims of international crimes (that is, genocide, war crimes and crimes against humanity) from obtaining an effective remedy or where no other means of redress is available, domestic courts should set aside immunity irrespective of whether or not the acts in question fall into the category of *acta jure imperii*.

As mentioned above, the topic of immunity of State officials from foreign criminal jurisdiction comes hand-in-hand with the topic of the obligation to extradite or prosecute and that of the scope and application of the principle of universal jurisdiction. Denying immunity of incumbent or former State officials may cause not only frictions in international relations, but sometimes it may also unravel delicate deals in return for despotic leaders' relinquishing their power. Therefore, in addition to the test stated in the preceding paragraph, should immunity of a State official from foreign criminal jurisdiction be upheld only if and when setting aside such immunity would worsen and/or prolong grave and widespread human sufferings at the home State of that State official?"

The delegate of People's Republic of China appreciated the work of AALCO Secretariat for preparing the much informative background paper on the subject. Secondly, the very subject of State Official's immunity from foreign criminal jurisdiction has overwhelming political implications. As clearly expressed by the Chinese delegation in the speech made at the 6th committee of the UN on this subject, immunity never meant impunity. He said China fully understood and supported the prevention and the punishment of the serious international crimes through appropriate mode, e.g., diplomatic channels, jurisdiction by the person's own State and jurisdiction of International judicial organs. on the other hand, with disregard to the current international practice and indeed the relevant international norms, *lex lata*, to deliberately create and make such new rules as exceptions to State officials' immunity would greatly harm the stability of international relations for sure, bearing in mind its possible and serious technical side effect like politically motivated prosecutions, trials *in absentia* and evidentiary problems as a result of the lack of cooperation of the State concerned. Hence it was seriously necessary for the ILC to strike the delicate balance between peaceful and effective conduct of relations between and among States, and punishment of the so-called core crimes. In line with the understanding, China concurred fully with the special Rappoteur, Mr. Kolodkin, that the ILC should restrict itself to codifying existing law instead of drafting provisions *de lege ferenda.*

Thirdly, as proposed by the special Rapporteur in the introduction to his second report, China recognized that ILC has indeed an important role to play in harmonizing the application of immunities in national jurisdiction, which would serve to avoid any dubious practice involving disregard of immunity. They had noticed that there were many issues, both of substantive and procedural nature, to be further tackled, examples of which include the need to establish a criteria for high level officials enjoying immunity *ratione personae,* whether the distinction between *acta jure imprrii* and *acta jure gestionis* also applies in the context of immunity *ratione materiae* of State officials, whether acts performed *ultra vires* by State officials should be covered by the immunity *ratione materiae,* to name only a few. These issues call of themselves for a working group to be established within the ILC.

As for *immunity ratione personae* enjoyed by high ranking State officials beyond the Troika, China admits and fully respected their existence both in theory and in practice.

As for the applicability of the standard of *acta jure imperii* and *acta jure gestionis* immunity *ratione personae,* China tentatively thinks it impractical and untenable, because allowing this distinction would ingeniously lead to entanglement and confusion of civil and criminal criterions, which was hard to be effectively applied in practice.

As for whether acts performed *ultra vires* by the State officials should be covered by the immunity *ratione materiae,* China cherished a positive attitude. Indeed, relevant International instrument seemed to support that view. For example, Article 7 of the Responsibility of the States for International Wrongful Acts adopted by ILC in 2001 stipulates that,

> "The conduct of an organ of a State or of a person or entity empowered to exercise elements of the government authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions."

The delegate of Malaysia stated that the topic invited attention from AALCO Member States and sought advice and assistance from present and former members of the ILC. There were ten issues raised by the Special Rapporteur generally agreed. The February 2012 ICJ judgment should be read seriously because it clearly distinguished the legal disposition. The judgment was very much instructive and persuasive. The 'Troika' should be left as it was and the immunity should not be extended to other categories unless it was elucidated by the Second Report and supplemented by strong legal basis. On the issue of exception, no basis in practice and customary international law should stand guided by ILC Second Report. The study was at a very initial stage and therefore, it required clear elucidation where exception would apply.

Dr. Rohan Perera replied that the ICJ was very careful in the case of Germany Vs. Italy because there was distinction between State immunity and immunity of State officials. In other cases it was civil proceedings but in that case it was both civil and criminal proceedings. Acts of State distinction got deleted or blurred.

The Attorney General of Kenya asked as to what would be the interface between principles of immunity of State officials vis-à-vis jurisdiction of the International Criminal Court (ICC) while issuing warrants against the Heads of States like in the case of Sudan which was not a State Party to the ICC. The warrants were sought to be enforced in State Parties. Citing the example of Kenya, the delegate said hat Kenya had pending cases before the ICC. Kenya recognized the immunity of sitting Heads of States and since Kenya is a party to the ICC, the country was bound by treaty obligation to take the warrants and to proceed with the investigation.

Dr. Rohan Perera replied that it was a very complicated question and as far as to ICC was concerned its simple. The position as far as non-State Party was concerned was also clear because ICC had jurisdiction by virtue of reference by the Security Council. In the above mentioned case, Kenya was a State Party so obviously would be bound by the Statute of the ICC. However, the issue at hand was beyond that.

Secretary-General in response to that said that in relation to *pacta sunt servanda* whether UN Security Council overrides law of treaties principle.

The delegate of Kenya said that Vienna Convention on Law o Treaties (VCLT), 1969 is stand alone treaty and neither VCLT nor ICC was superior to each other, rather they were complementary to each other.

Dr. Rohan Perera said that in relation to *pacta sunt servanda* the international community in Rome vested with central jurisdictional powers and it includes the Security Council. Hence that treaty was binding.

The delegate of Kenya asked what approach would harmonise those treaties.
Dr. Rohan Perera replied that the core issue as pointed out by Special Rapporteur Sir Ian Brownlie was development of other areas of law and expansion of jurisdiction. He said that such proliferation would lead to disappearance on the discipline of immunity acceptable in international law. Harmonizing these conventions by de-linking immunity from responsibility and explaining other point to other laws and remedies. Therefore, if a country were a State Party, then addressing it under those binding treaties would be the solution.

The delegate of Islamic Republic of Iran said that there was a contradiction and ambihuity in terms of genocide, human rights violations and so on, if possible ILC should define the term by describing it in quantity or number.

Dr. Rohan Perera said that those were the issues that ILC had to address, like what were the exceptions, what crimes had to be deal with, for example in genocide, there was genocide Convention and after Rome Statute concept of war crimes emerged. Henceforth, going beyond the grave breaches was a generic term and the ILC must pay a very careful consideration.

The delegate of People's Republic of China commented that these questions had severe political ramifications. He said that in Kenya situation, it was quite right because it was bound by two conventions and one must take into account Article 98 of the Rome Statute. He observed that it was a reality that extraterritorial jurisdiction was undertaken in developed countries against the officials of the developing countries.

Dr. Rohan Perera observed that it was a fact that jurisdiction has been exercised against the leaders of the developing world by virtue of Prosecutorial discretion. There are very vide powers given to the Prosecutors and is subject to political reviews and there was a need to scale *suo moto* powers of Prosecutors. Pretrial proceedings would definitely try to further those infirmities.

The delegate of Qatar said that it was a good idea to concentrate upon the concrete outcome and AALCO needs to give input on this distinction. Also there was a need further to push for progressive development rather than what has been. *Suo moto* powers and pre-trial proceedings were a matter of debate in the ICC itself. There was a need to scale down the powers of ICC.

Dr. Rohan Perera said that *suo moto* power of Prosecutors was a very big issue and pretrial proceedings is whether warrant should be issued or not. Even at that stage extra-legal factor come into play.

Prof. Murase opined that ILC faced lot of confusion as to who were the State officials presently under the ambit of the topic and who are to be covered. It had to be decided that whether to limit the Troika to top ranking officials. Further there has to be consistency with the previous works of ILC for example the "Draft Code on Peace and Security of Mankind" which places Heads of State as ordinary citizens and how do we reconcile these issues. On Prosecutorial Discretion UN made guideline in 1990 which has to be updated.

The delegate of Sri Lanka asked Prof. Murase that if a country has already provided immunity for officials and others who are not covered by domestic laws could they be given immunity outside their country. Could Heads of State be prosecuted for grave crimes in a foreign State.

Dr. Rohan Perera replied that answer to the latter part was clear that immunity to the Troika would be customary international law.

Secretary-General asked the question on waiver of immunity.
Dr. Rohan Perera said that the Third Report of the Special Rapporteur covers the issue of waiver of immunity and implied waiver issues.

After this interesting Question and Answer session the debate on the topic concluded.

TOPICS: "PROTECTION OF ATMOSPHERE AND FAIR AND EQUITABLE TREATMENT STANDARD IN INTERNATIONAL INVESTMENT LAW"

Prof. Shinya Murase, Member of ILC from Japan was the Lead discussant on the agenda item "Protection of Atmosphere" which has been one of the proposed new topics of the ILC. Prof. Murase briefly stated the criteria for selection of new topics. Selection of topics for ILC has not been an easy task. There were three criteria for the selection of new topics. The first was the practical consideration as to whether there was any pressing need in the international community as a whole; the second was the technical feasibility, that is, whether the topic was 'ripe' enough in light to relevant State practice and jurisprudence; and the third being the political feasibility. Whether or not the proposed topic might or might not have political sensitivity and whether there was strong resistance. It has been stressed by the Commission "it should not restrict itself to *traditional topics* but could also consider those that reflect *new developments and pressing concerns* of the int. community as a whole" (ILC Report 1997/98).

"Protection of atmosphere", was a topic proposed by Prof. Murase and he believed that it satisfied those three feasibility tests. The other problem was availability of Special Rapporteur and for the topic at hand; since Prof. Murase had proposed, he has well-researched the topic. He said that we need a comprehensive "framework convention" to address the whole range of atmospheric problems such as transboundary air pollution, depletion of Ozone layer and climate change. Further, one could envisage a future convention which was similar to Part XII of the Law of the Sea Convention on the protection and preservation of maritime environment.

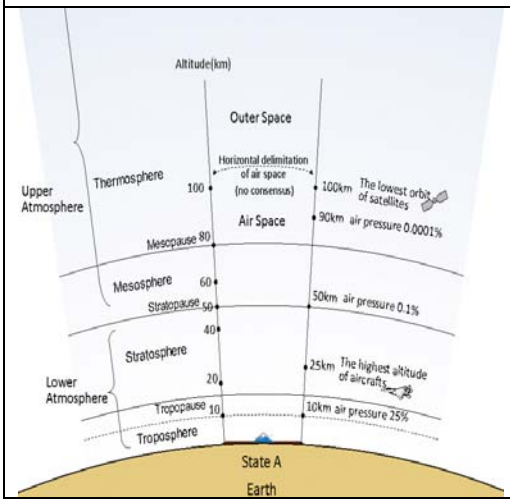
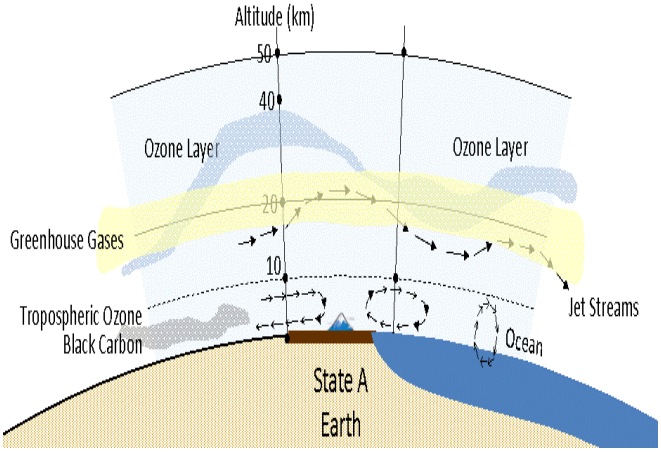
Prof. Murase mentioned that there was a need to Re-define the role of ILC. There has been shift of emphasis from (i) Codification to Progressive Development, (ii) Traditional Topics to Special Regimes like human rights, environment and trade, etc. The New Role of ILC in the 21st Century would be to address Special Regimes and General International Law by placing topics of Special Regimes in the context of General International Law.

On the topic "Protection of Atmosphere", he said that regarding '**Feasibility',** there were the following issues, namely;

- Environmental Degradation which was a pressing concern
- A number of Conventions and the relevant judicial decisions of international courts and tribunals have formed the gamut of international environmental law
- There was a need for de-politicization

Dealing with the rationale on the topic, he said that it has always been patchwork of Conventions. A comprehensive framework convention (like UNCLOS Part XII), which took a holistic approach was needed for the protection of Atmosphere: "One Atmosphere".

He explained the pressing need for ILC to work on this topic through the following two diagrams.

(i) Spheres above the earth	(ii) Atmospheric circulation
	

Prof. Murase also proposed that the Outline of the Draft Articles on the topic could be divided into the following parts and could be completed within this quinquennium.

(i) General Provisions: Definition, Objective, Scope, Legal Status of the Atmosphere,
(ii) Basic Principles,
(iii) Preventive and Precautionary Measures,
(iv) Implementation,
(v) Responsibility and Liability,
(vi) Mechanisms for Cooperation,
(vii) Procedural Rules for Compliance, and
(viii) Dispute Settlement.

Secretary-General of AALCO read out the Comments by Ambassador Kriangsak Kittichaisaree, Member of the ILC from Thailand:

"Protection of the Atmosphere *And* The Fair and Equitable Treatment Standard in International Investment Law:

These two topics are among the five new topics included in the ILC's long-term programme. The other new topics are: formation and evidence of customary international law, provisional application of treaties, and protection of the environment in relation to armed conflicts.

Some of the topics under the ILC's agenda will be completed soon, including the topic of protection of persons in the event of disasters, and the topic of expulsion of aliens. The topic of the obligation to extradite or prosecute has made little progress and might be set aside pending the ICJ's judgment in the *Question relating to the Obligation to Extradite or Prosecute (Belgium v. Senegal)* in which the ICJ has already begun its deliberation after the conclusion of the public hearings in that case on 21 March 2012.

Because of their practical relevance to the international community, especially African and Asian States, the topic of Protection of the Atmosphere and the topic of Fair and Equitable Treatment Standard in International Investment Law should be given a priority by the ILC over the other three new topics.

AALCO Members should arrive at common positions on Protection of the Atmosphere, to be submitted to the ILC.

The Model Agreement for Promotion and Protection of Investment adopted by AALCO at its 23rd Session can also be pertinent to the ILC's work on the Fair and Equitable Treatment Standard in International Investment Law. So should the jurisprudence of AALCO's regional centres for international commercial arbitration."

The delegate of Malaysia thanked Prof. Murase for the presentation and the research done by him for addressing the issue. He drew attention of Prof. Murase to certain queries, namely; (i) the subject was not purely legal but highly technical, scientific unlike the Law of the Sea. Moreover a look at the paper suggested that there were gaps existing in the international environmental law and therefore they sought clarification with the number of Parties to existing Convention. The issue would be addressed as a compromise text because of the formulation of provision; clarity was very important because it involved scientific method as international standards. There must be restorative mechanism while dealing with environmental issues.

Prof. Murase replied that the United Nations Environment Programme (UNEP) was very cooperative in these areas. There existed a gap in the UNFCCC regime and transboundary air pollution substances convention. We have few conventions dealing with various aspects in international environmental law. For example, we have Part XI of the UNCLOS which works as Framework Convention.

The delegate of People's Republic of China supported the views of Prof. Murase and wished him success in further research. The topic was very contemporary as it was ensuring the protection of the next generation. He raised two important questions, namely: (i) possibility of interplay of climate change and this topic, and (ii) status of possible use of traditional use and convention. Also whether the project would be codification of law or progressive development of international law.

Prof. Murase replied that interplay between climate change regime and this topic must be avoided. Climate change regime has been extremely politicized and the concept of "common but differentiated responsibility" is very contentious concept now. There were three concepts of equity: (i) equity infra legum (within law), (ii) equity outside the law (but close to be law), and (iii) equity contra legume (contrary to the existing law).

Further, in the ICJ's judgment in Nicaragua Case, it was criticized for taking political issue. ILC could not take the same approach because it deals with legal elements only. Also, the subject would predominantly fall within the category of progressive development.

The delegate of Malaysia said that while addressing this issue it should be restorative justice or restrictive. These terms were very generic in nature. There were practical problems while dealing with this topic. He also said that there was responsibility on the part of the polluter to restore the environment back to the same position.

Prof. Murase replied that certain standard for restitution process needs to be framed.

An Observer Delegate (Dr. Lavanya Rajamani) opined that there was a problem in relation to feasibility tests and the question was broadly technical and political in nature.

Prof. Murase said that any legal question would have political implications also.

Prof. Shinya Murase, Member of ILC from Japan while discussing on the proposed new topic "The Fair and Equitable Treatment Standard in International Investment Law" said that there were currently

3000 bilateral investment treaties (BITs) and a number of arbitral cases that has to be reviewed in order to frame an approach to decipher the subject. There was a great need for clarifying the relevant standards in BITs, like the most-favoured nation treatment, national treatment, Full Protection and Security, International Minimum Standard, etc. the topic was relevant and suitable for AALCO to undertake a study because there have been a previous study on the related subject which was AALCC Model Agreements on Promotion and Protection of Investments (1984).

On the challenges and problems alongside the criticisms posed were those whether the subject was suitable topic for ILC or not. Reason being that firstly, ILC was not an organ competent to deal with international investment law, secondly, A BIT was not international law between States but an agreement between a State and a corporation. The same was true with investment arbitration also. In the light of such circumstances, was there a need for a multilateral agreement in that field, especially in the past experience of failure of Multilateral Agreement on Investment (MAI, 1998)

The next important question would be what could be the possible final form of the research – a Study, or a set of statements or a set of guidelines. Prof. Murase opined that forming a Study Group was a viable option rather than appointing a Special Rapporteur. With regard to commencing the research work, he suggested that after the completion of the Study Group on MFN, that the topic could be taken up.

Dr. Rohan Perera opined that it was necessary to analyse the arbitration jurisprudence of the ICSDI which was very diverse. Dr. Rohan Perera compared the Most-Favoured nation (MFN) clause to an untamed wild horse, and in investment disputes there would be relationship between MFN clause and National Treatment clause. Hence, it was contingent upon States that the treatment you give to one State must not be in non-contingent standard wherein full protection was accorded.

Investment law was a very specialized area. In the first ever investment dispute case before the ICSID, a Hong Kong based company sued the Government of Sri Lanka. The key issues were 'the unconditional obligation of "full protection and security". With regard to the specific issue of the Standard of Liability under the general pattern followed by Bilateral Investment Treaties, the basic argument developed by the company amounts to an assertion that the traditional "due diligence" criterion applicable under the minimum standard of customary international law had been replaced by a new type of "strict or absolute liability not mitigated by concepts of due diligence'. Also, the MFN provision contained in Article 3, which may be invoked to increase the host Sate's liability in case a higher standard of international protection becomes granted to investments pertaining to nationals of a Third State.

Dr. Perera also cited the case pertaining to White Industries Australia Limited vs. Republic of India on "equal protection" clause.

An Observer delegate (Dr. P. S. Rao, Former Member of the ILC from India and presently Legal Adviser to the Government of State of Qatar) said that the topics like MFN and relating to the investment laws were very contemporary working in which the ILC would be duly addressing the concerns of the developing countries. Only suggestion was to complete the work on time because there should not be delay in justice or denial of justice.

The delegate of Malaysia stated that minimum standard must be linked to customary international law. It was also emphasized that the needs of the State were the top priority must genuinely reflect in the work of the ILC. He also commented that in order to sustain membership new topics must not be taken out that does not serve the purpose of the States.

Prof. Murase replied that Member States must table the topic of their choice and priority for the ILC to consider.

TOPIC: "OTHER NEW TOPICS OF ILC"

On the proposed new topic of ILC **"Formation and Evidence of Customary International Law",** Prof. Murase said that it was an academic topic for which he referred to the International Law Association's "London Statement of Principles Applicable to the Formation of General Customary International Law," 2000. He raised doubts regarding the Practical Utility of the subject. He said that endless discussion was feared on the issues like objective element of general State practice and subjective element of opinion juris. The queries relating to objective element of general State practice were (1) What conduct counts as State practice?, (2) What weight to be given to an act of the State? (3) Which State organ's acts count? (4) Only physical acts or verbal acts count? And by whom? (5) How wide the practice should be? and (6) How to measure the density of the practice?

The subjective element queries relating to opinion juris which included (1) How could we know a "belief" of a State? (2) Can we count a State practice also as its "*opinio*"? Double counting? And (3) whose *opinio* was relevant?

The concerns raised in relation to the subject were on the nature of the final outcome of the Project which could not be an "authoritative guidance". He said that the project may end up either with stating the obvious or stating the ambiguous; endless question-begging propositions with contingent phrases and saving clauses such as "as the case may be", "unless the context otherwise requires", "as the case may be", "in all appropriate circumstances", "according to the circumstances", etc. Also the issues were that the:

(i) essential features of customary norms are their ambiguity and flexibility. It is a court which is to determine the exact content of the customary norm in a specific case.
(ii) The British Institute of International and Comparative Law considered in 1998 that the topic was not appropriate for ILC as it is "exceptionally theory-dependent."
(iii) Being essentially an academic exercise, the topic may be more suited for a Study Group, to be established after the current Study Group on "Treaties over Time" finishes its mandate.

On the topic **"Provisional Application of Treaties" Prof. Murase mentioned that t**he rule was already provided in Article 25 of the Vienna Convention on Law of Treaties, 1969. The question depended largely on the interpretation of a specific treaty in question. It was a too Small a Topic for ILC to take up. Further, there was an excellent article by Arsanjani and Reisman, "Provisional Application of Treaties in Int. Law: The Energy Charter Treaty Awards," in *The Law of Treaties beyond VC*, 2011 (Festschrift Gaja) which has elaborately explained this topic.

On the topic **"Protection of the Environment in relation to Armed Conflicts" Prof. Murase stated that it was a good topic however there were some foreseeable difficulties. The** Existing Rules in Geneva Protocols and Other Instruments might be the sufficient database on that subject. The International Committee of the Red Cross (ICRC) has recently decided not to undertake the topic for lack of support among States and the subject involves weaponry and warfare, which might be too delicate for ILC to take on.

The delegate of People's Republic of China said that in order for AALCO Member States to be abreast of the new topics, there must be more discussions. AALCO must involve in supplementing its views to Member States.

The delegate of Malaysia commented that AALCO should write to Member States about the five topics and at the annual session take their responses and place it before the ILC.

The delegate of Sri Lanka asked what the status of the current agenda items was.

Dr. Rohan Perera replied that work has been completed by the ILC on three major areas and has been placed before the UN General Assembly for adoption. On other remaining topics, Member State would take up a position which would form part of further consideration by the ILC Members.

The delegate of Sultanate of Oman said that the ALCO could circulate through embassies in New Delhi which in turn could forward the same to the concerned focal points in the Ministry for consideration and comments.

Dr. Xu Jie, Deputy Secretary-General of AALCO proposed a vote of thanks on behalf of AALCO. He thanked Dr. A. Rohan Perera, former Member of the ILC from Democratic Socialist Republic of Sri Lanka for the detailed discussion on the two important current topics of the ILC, namely; (i) Protection of Persons in the Event of Disasters; and (ii) Immunity of State Officials from Foreign Criminal Jurisdiction. He said that those are two important topics which had to be discussed in the light of differing perspectives of the Asian – African countries.

He also thanked Prof. Shinya Murase, Member of the ILC from Japan for his lucid presentations on the two new topics of the ILC; (i) Protection of Atmosphere; and (ii) The fair and equitable treatment standard in International Investment Law which were very informative. Other new topics on the Long-term programme of work of the ILC that were also briefly discussed has been very useful. He extended his deep gratitude to the eminent scholars for their excellent presentation on the topics of ILC and also for taking time from their busy schedule to explain the nuances of the issues involved in those topics.

The DSG also thanked the esteemed former Member of the ILC Dr. P. S. Rao from India for his comments and observations on the topics which enabled the Secretariat to frame the perspectives more efficiently. He said that the effort to host the meeting would not have been practically significant without the active participation and encouragement by Member States through designating senior officials from their concerned Ministries to discuss on these topics and also to share their rich experiences which has emerged as a state practice. He extended his my sincere gratitude towards the whole-hearted cooperation extended by the Member States and the Members of the ILC towards conducting the meeting. He also thanked the other participants present at the meeting who had shown keen interest in the topics discussed.

The DSG finally thanked the Secretary-General Prof. Dr. Rahmat Mohamad, for steering the event and his colleagues, Dr. Hassan Soleimani and Dr. Yasukata Fukahori, Deputy Secretaries-General for their support and encouragement. He expressed gratitude to all the Secretariat Staff especially the Legal Staff for their sincere efforts in organizing, planning and conducting the meeting with utmost sincerity.

LIST OF PARTICIPANTS
AT THE INTER-SESSIONAL MEETING OF LEGAL EXPERTS TO DISCUSS MATTERS RELATING TO THE ILC ON 10 APRIL 2012, AT AALCO HEADQUARTERS

1.	Democratic Socialist Republic of Sri Lanka	Dr. A. Rohan Perera, Former Member of the International Law Commission (ILC) and Chairman of the Eminent Persons Group (EPG) Mr. Prasad Kariyawasam, High Commissioner, Sri Lanka High Commission, New Delhi, India. Ms. Lakshmi Gunasekera, Head, Law Commission, Ministry of Justice, Sri Lanka. Ms. Mahishini Colonne, Deputy High Commissioner, Sri Lanka High Commission, New Delhi, India.
2.	People's Republic of China	Mr. Feng Qinghu, Counselor, Department of Treaty and Law, Ministry of Foreign Affairs, China.
3.	India	Dr. P. S. Rao, Legal Adviser to the State of Qatar and Former Member of ILC, India Dr. Lavanya Rajamani, Professor, Centre for Policy Research, New Delhi. Mr. Parshant Atkaan, Research Associate, Indian Institute of Foreign Trade, New Delhi Mr. P. R. Thulasidhass, Doctoral Scholar, Jawaharlal Nehru University, New Delhi
4.	Indonesia	Ms. Hendra Henny Andries,

		Minister Counsellor, Embassy of Indonesia, New Delhi
5.	Islamic Republic of Iran	Mr. Mohammad Ajam, Minister Counsellor, Embassy of Islamic Republic of Iran, New Delhi.
6.	Japan	Prof. Shinya Murase, Member of the International Law Commission (ILC)
7.	Kenya	Prof. Githu Muigai, Attorney-General of Kenya Mr. Eliphas M. Barine, Deputy Head of Mission, High Commission of Kenya, New Delhi (India)
8.	Malaysia	H. E. Dato Tan Seng Sung, High Commissioner of Malaysia, New Delhi. Mr. Raszlan Abdul Rashid, Deputy High Commissioner, High Commission of Malaysia in India, New Delhi Mr. Mohd. Radzi Harun, Deputy Head of International Affairs, Division 1, International Affairs Division Attorney-General's Chamber Dr. Intan Murnira Ramli, International Affairs Division Attorney-General's Chamber Mr. Saifulrijal Azhari, International Affairs Division Attorney-General's Chamber Col. Dzulkafli Mustaffa, Defence Adviser, High Commission of Malaysia in India, New Delhi Mr. Ahmad Hashim Mahmood, Counsellor,

		High Commission of Malaysia in India, New Delhi Mr. Muhammad Hattab Kassim Immigration Counsellor, High Commission of Malaysia in India, New Delhi Mr. Faizal Shani, Second Secretary (Political), High Commission of Malaysia in India, New Delhi
9.	Myanmar	Ms. Ba Hla Aye, Counsellor, Embassy of Myanmar, New Delhi
10.	Saudi Arabia	Mr. Mansour Algefari, Ministry of Justice, Kingdom of Saudi Arabia Mr. Mossad Hamad Alateeq Ministry of Justice, Kingdom of Saudi Arabia
11.	Sultanate of Oman	Mr. Salim H. Al-Battashi, Minister, Embassy of Sultanate of Oman in India, New Delhi
12.	State of Palestine	Mr. Saleh Fhied, Emabssy of State of Palestine, New Delhi
13.	Qatar	Prof. Yaser Khalaileh, College of Law, Qatar University, khalaileh@qu.edu.qa Mr. Najat Al-Khalaf, Manager Department, Ministry of Justice, Qatar.
14.	Sudan	Mr. Ahmed Omer Ahmed Taboul Counsellor, Emabssy of Sudan, New Delhi
15.	Syria	Dr. Ms. Nasiba Safa Kouwatly,

		Minister, Embassy of Syria, New Delhi
16.	Uganda	Mr. Lubega Farouq, Ministry of Jusitce, Attorney General's Chamber, Uganda
17.	Yemen	Mr. Mohammed Ahmed Al-Mustafa, First Secretary, Embassy of Yemen, New Delhi
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		Dr. Xu Jie Deputy Secretary General
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		Ms. Shannu Narayan Legal Officer
		Mr. S. Pandiaraj Legal Officer