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ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION

REPORT ON THE NON-DELIBERATED AGENDA ITEMS FOR THE FIFTY-SECOND ANNUAL SESSION OF AALCO

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CONTENTS

I. THE STATUS AND TREATMENT OF REFUGEES

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THE STATUS AND TREATMENT OF REFUGEES
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CONTENTS

THE STATUS AND TREATMENT OF REFUGEES
(Non-Deliberated)

I. INTRODUCTION

1. The Asian-African Legal Consultative Organization (AALCO) has been concerned with the issues relating to the Status and Treatment of Refugees ever since this topic was introduced in its agenda in 1964 at the behest of Arab Republic of Egypt. Within AALCO, this has been a keenly debated subject during its Annual Sessions, which has contributed immensely to the exploring and framing of policies that take into account the rights and duties of refugees in the Member States. While working in pursuance of its mandate, AALCO has collaborated with the Office of the United Nations High Commissioner for Refugees (UNHCR), both formally as well as informally. This cooperation and mutual assistance was formalized by the Signing of the Memorandum of Understanding (MOU) between the two Organizations on 23rd May 2002. The MOU provides for the undertaking of joint studies and envisages holding of seminars and workshops on topics of mutual interest and concern.

2. It is pertinent to remember here the distinguished record of contributions on the part of AALCO to the cause of the protection of refugees. This includes the adoption of the "Principles Concerning the Treatment of Refugees" in 1966 at its Eighth Annual Session, which are commonly known as 'Bangkok Principles'. Further study improved upon these principles by adopting two addenda. The first, which was adopted in 1970 at AALCO's Eleventh Session held in Accra, contained an elaboration of the 'right to return' of any person who, because of foreign domination, external aggression or occupation, has left his habitual place of residence. Furthermore, in 1987 at the Twenty-Sixth Session held in Bangkok, AALCO had adopted 'Burden Sharing Principles' as an addendum to the Bangkok Principles of 1966. These principles have highlighted the growing trend towards finding durable solutions to the refugee problems and for international assistance to relieve the burden of those countries faced with large-scale influx of refugees. Burden and responsibility sharing arrangements, including resettlement, represent a significant component of durable solutions for displacement situations. These principles provide a legal framework, which while "recommendatory in nature" nevertheless forms guiding principles for state practices in the Asian-African region. They remain a term of reference and an expression of the region's concern for refugees.

3. Apart from the adoption of the 2001 Revised text of the Bangkok Principles, two other important initiatives of AALCO related to refugee protection need to be mentioned here; the "Concept of Establishment of Safety Zones for Internally Displaced persons" and the preparation of the "Model Legislation of Refugees". As regards the concept of safety zone (an area within a Country to which Internally Displaced Persons (IDPs) and prospective refugees can flee to secure assistance and protection), AALCO had adopted "A Framework for the Establishment of a Safety Zone for Displaced Persons in Their Country of Origin" in 1995. It incorporates some twenty principles that provide for: the aim of the establishment of safety zone; the conditions for establishment; the supervision and management of the zone; the duties of the Government and of the conflicting parties involved; and the rights and duties of the displaced persons.

4. Besides, the AALCO Secretariat was mandated by the Thirty-First Session that took place at Islamabad, Pakistan in 1992, to prepare draft model legislation on refugees to assist Member States in enacting national laws on refugees. Accordingly, the Secretariat had submitted "A Model Legislation on the Status and Treatment of Refugees" to the Thirty- Fourth Annual Session held at Doha in 1995. The draft emphasized the need to provide for the rights and duties of refugees; rules for the determination of refugee status; mechanisms to address the refugee exodus etc.

5. It is also pertinent here to recall the special study that was undertaken by AALCO along with UNHCR on "The Problem of Statelessness: An Overview from the African Asian and Middle Eastern Perspective", which was released during the formers' Forty-Sixth Annual Session that took place at Cape Town, Republic of South Africa in 2007.

6. The AALCO Secretariat's Report for the current year focuses on the ongoing displacements due to conflicts and natural disasters that have recently occurred or are currently occurring and efforts made by the UNHCR and other agencies to ease them. In particular, conflicts arising in North Africa - in Syria and Sudan as well as the in South East-Asia and Eastern Africa have contributed to the homelessness of millions. Developing countries have the greatest burden to bear with respect to refugees particularly the Internally Displaced Persons ("IDP"), according to UNHCR Deputy High Commissioner for Refugees, Alexander Aleinikoff, as many as eighty percent of the world's displaced coming from and cared for in developing countries and the greatest objections coming from regions which do not bear a proportionate burden of acceptance and hosting refugees. With this in mind, the conditions affecting displacement and implementation of measures in these troubled regions merit a closer look.

II. FOCUS ON AFRICA

A. Refugee and Displacement Situations in Africa

7. The countries in East Africa and the Horn of Africa continue to see massive migrations of refugees, as well as significant internal displacements of persons due to conflict and famine. Particularly hard hit are the countries of Somalia, Sudan and Congo, with most of the emigrations happening in these countries. Kenya, Ethiopia, Republic of Yemen and Uganda have also seen large influxes of refugees.

8. According to United Nations High Commission for Refugees (UNHCR) estimates[1], there are over 1,015,230 refugees from Somalia to neighbouring countries, as well as an estimated 1.1 million internally displaced persons. The largest populations of refugees have found their way to Kenya, Ethiopia and the Republic of Yemen, with half a million Somalian refugees in Kenya and over 200,000 Somalian refugees in Ethiopia and the Republic of Yemen. Between January and May 2013 alone over 7,000 new Somalian refugees entered Ethiopia and nearly 3,000 made their way to the Republic of Yemen. The continued influx of refugees, particularly in

[1] Refugee assessment report available at < http://www.unhcr.org/519625e49.html>

regions such as the Dollo Ado region of Ethiopia where Somalian refugees outnumber the local populace, continues to place severe infrastructural demands on these countries that are extremely difficult to meet.

9. Conflict in Sudan continues despite the creation of South Sudan, with clashes having driven as many as 200,00 Sudanese refugees to South Sudan,[2] and over 90,000 to Ethiopia.[3] Many refugees had experienced crop failure in Sudan before seeking refuge. Particularly in South Sudan, refugees moved into areas which lacked basic infrastructure or host communities and were largely inaccessible during the rainy season, resulting in malnourishment and deaths of many children and members of other vulnerable groups.

10. Conflict in the Democratic Republic of Congo (DRC), including clashes between government forces and a new rebel group known as M23 in the eastern DRC have forced more than 41,000 refugees to seek protection in Uganda. The deteriorating security situation in the DRC has also pushed some 20,000 refugees into Rwanda since late April 2012. In all, over 50,000 refugees have left DRC, while almost 3 million continue to find themselves as displaced persons.

11. West Africa was also plagued by political upheaval in 2012, particularly in Côte d'Ivoire and Mali. Despite the West Africa sub-region benefiting from robust economic growth, high rates of unemployment and poverty also continue to foster mixed-migration movements within the subregion, as well as externally. In Mali, the Tuareg-led uprising, which began in January 2012, caused the displacement of 205,000 people within Mali consequent to the crisis and about 100,000 refugees to Burkina Faso and Niger. Plans have also been established for the voluntary repatriation of Ivorian refugees in the region, with UNHCR and the Government of Côte d'Ivoire signing separate tripartite agreements with Ghana, Liberia, Guinea and Togo.

12. In Southern Africa, many governments have begun restricting access to the asylum system by requiring travel documents at entry points and applying the "first safe country" principle, whereby entry is refused to asylum-seekers who have travelled through a safe country prior to their arrival. The reason for this is due to the mixed-migration movements towards South Africa placing strains on resources in camps in Zimbabwe, Mozambique and Malawi when they take up temporary residence. However, several countries have pledged to accede to relevant international and regional instruments and to undertake reforms to address the challenges of mixed migration. This includes Mozambique signing the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, as well as Madagascar, Mozambique, South Africa and Zambia pledging to accede to one or both of the Statelessness Conventions in December 2011 in response to the risk of statelessness.

B. Priorities in Africa

13. 6 December 2012 saw the coming into force of the 2009 African Union Convention for the Protection and Assistance of Internally Displaced Persons in

[2] Available at < http://data.unhcr.org/SouthSudan/country.php?id=251>

[3] Available at <http://data.unhcr.org/Sudanese_Refugees_in_Ethiopia/country.php?id=65>

Africa (the "Kampala Convention"), one month after receiving the 15th ratification by Swaziland on 6 November 2012. The coming into force of this Convention was a major milestone as it is the first-ever binding regional instrument on internal displacement. The Convention provides an important new international legal framework for the protection of the internally displaced in Africa. The Convention sets out the obligations of not only the State parties, but also of the African Union, international organizations and members of armed groups, to prevent displacement, protect and assist people once displacement has occurred, and to find lasting solutions to displacement. Under the Convention, "States have specific obligations to allocate resources, adopt national policies and strategies and enact or amend national laws to ensure that displacement is prevented and that IDPs are protected and supported until they reach a sustainable solution to their displacement."[4] UNHCR will continue to promote the ratification and implementation of the Convention by African states.

14. UNHCR also continues to urge States to accede to and ratify the statelessness conventions; the 1954 Convention on the Status of Stateless Persons and, the 1961 Convention on the Reduction of Statelessness. As of August 2012, nine countries in Sub-Saharan Africa were parties to the 1961 Convention on the Reduction of Statelessness, while 16 have signed and ratified the 1954 Convention on the Status of Stateless Persons. The Conventions assist States to identify stateless people, or people at risk of statelessness, within their borders and to formulate laws and policies to prevent and reduce statelessness.

15. Another of the UNHCR's major goals for 2013 in Sub-Saharan Africa is to continue implementing the comprehensive solution strategies for Angolans and Liberians who ceased to hold refugee status in 2012, and also to implement solutions for Rwandans refugees whose status was revoked in June 2013. Voluntary repatriation will be promoted and any former refugees who had expressed a wish to be repatriated before cessation entered into force, but who could not return, will receive UNHCR support. The UNHCR also plans to place emphasis on local integration. Special efforts to support the local integration of 162,000 newly naturalized Tanzanians and for reintegration of 35,000 Burundian former refugees from the Mtabila camp in the United Republic of Tanzania are scheduled to continue.

16. As has been the case in the past, sexual and gender-based violence remains a principal concern, and UNHCR's updated strategy to deal with such violence will guide its prevention and response efforts. Particular attention will be paid to the needs of displaced women and children and considerations of age, gender and diversity will be brought into consideration for programme activities. Key priorities with regard to the protection of children include registration and documentation of displaced children at birth; equal access to education, especially for girls; completion of Best Interest Determination (BID) for unaccompanied, separated and at-risk children; and reduction of malnutrition and mortality through the provision of greater access to health care, supplementary nutrition and therapeutic feeding.

[4] Statement by the UN Special Rapporteur on the human rights of internally displaced persons, Chaloka Beyani, to mark the coming into force of the Kampala Convention, available at < http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12868&LangID=E >

III. FOCUS ON ASIA

A. Refugee and Displacement Situations in Asia

17. The Asia and the Pacific region has one of world's largest refugee situations with the region accounting for almost 30 per cent of the global population of concern to UNHCR, or some 9.5 million people.

18. The Afghan refugee situation constitutes the world's largest protracted refugee situation. There are approximately 1.7 million registered Afghan refugees in Pakistan and almost 1 million in the Islamic Republic of Iran. It is also estimated that in addition to the number of registered Afghans, approximately a million unregistered and undocumented Afghan refugees reside in both Pakistan and the Islamic Republic of Iran. Despite ongoing efforts since 2002 and the voluntary return of over 5 million Afghans to Afghanistan, efforts have been hampered by the unpredictable security situation and lack of both the opportunity for livelihood and basic facilities.

19. Escalating conflict in Myanmar in June 2012 also resulted in large numbers of people being internally displaced as well as fleeing to Thailand, Bangladesh and Malaysia. On the other hand, ongoing peace negotiations between the Government and insurgent groups in South-Eastern Myanmar have increased the prospects for the return of internally displaced persons, as well as refugees from Myanmar in Thailand. It is estimated that approximately 400,000 people in Myanmar find themselves to be either refugees or internally displaced persons.

20. Two years after the June 2010 conflict in South Kyrgyzstan and subsequent return of some 400,000 people who were displaced internally and externally, UNHCR, in partnership with other relevant agencies, is continuing to assist the Government of Kyrgyzstan towards the sustainable reintegration of those who were affected by the conflict.

21. India continues to grant asylum and provide assistance to an estimated 200,000 refugees. In Nepal, more than 69,000 of an original total of 108,000 refugees from Bhutan have found a durable solution in third countries, thanks to the support of resettlement States and the cooperation of the Government of Nepal. Meanwhile, consolidation of the camps for the refugees from Bhutan in the country was completed in May 2012, with the seven original camps being merged into two. In the Democratic Socialist Republic of Sri Lanka, three years after the end of the conflict, approximately 468,000 people have returned to their places of origin, while an undetermined number remain displaced in various parts of the country.

B. Priorities in Asia

22. The People’s Republic of China is expecting an Exit-Entry Administration Law to come into force in July 2013, and similarly, the National Assembly of the Republic of Korea has passed a new refugee law that will come into force in July 2013. This latter legislation is meant to strengthen the Republic of Korea's domestic asylum system as well as improve refugee protection in the region. UNHCR is working with the Mongolian Government to build Mongolia’s national capacity in preparation for accession to the 1951 Convention Relating to the Status of Refugees.

The Government of Japan has extended the term of a pilot resettlement project by two years and has expanded the resettlement selection sites to two other refugee camps in Thailand and established an Experts Council to discuss the way forward after the pilot phase.

23. The UNHCR, with the Government of Nepal and the UN Country Team, has developed a five-year Community-Based Development Programme/Transitional Solutions Initiative (CBDP/TSI) which aims to promote peaceful coexistence between the remaining refugees and host communities. Currently, the final programme document is pending the approval of the Government of Nepal.

24. In the South-East Asian region, no country has become party to the 1961 Convention on the Reduction of Statelessness and the Philippines is the only country to become a party to the 1954 Convention. This is a situation identified by the UNHCR as an issue in need of rectification in order to develop a regional approach to refugee protection and international migration issues in the region. UNHCR is also participating in the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime, which this year adopted a Regional Cooperation Framework to respond to the challenges posed by mixed migration. To facilitate the implementation of the Framework, the Regional Support Office was established in Bangkok in September 2012.

25. The Socialist Republic of Vietnam and the Lao People's Democratic Republic have both included a definition of a "stateless person" in their nationality laws, in order to aid in the identification of stateless individuals. UNHCR is currently working with the Government of the Philippines, UNFPA and UNICEF, to improve levels of birth registration in Mindanao. In Vietnam, revisions to the country's nationality laws allow Cambodians who were formerly considered refugees to be naturalized, and Vietnamese women who had lost their citizenship through marriage to foreigners to reacquire it.

26. In an effort to ensure a coordinated and consistent approach to the Afghan situation, UNHCR has engaged the Governments of Afghanistan, the Islamic Republic of Iran, and Pakistan, and facilitated the articulation of a multi-year solutions strategy for Afghan Refugees. The Solutions Strategy for Afghan Refugees to Support Voluntary Repatriation, Sustainable Reintegration and Assistance to Host Countries was endorsed at an international conference in Geneva in May 2012.

IV. FOCUS ON THE MIDDLE EAST

A. Refugee and Displacement Situations in the Middle East

27. The conflict in the Syrian Arab Republic has caused massive number of refugees to flee the country to the neighbouring states, particularly Jordan, Lebanon and Turkey. More than 1.7 million Syrian refugees are estimated to have fled the country with roughly half a million having found their way to Jordan, Lebanon and Turkey. Over 100,000 Syrian refugees also found their way to Iraq and Iraqi Kurdistan. Into 2013, the number of Syrian refugees fleeing the country has seen increases from month to month.

28. There are still nearly 150,000 registered Iraqi refugees in the region despite over 50,000 having returned to Iraq by late 2012. In addition there are over 1 million internally displaced Iraqis living in challenging conditions.

B. Priorities in the Middle East

29. While refugees from Syria have generally met with hospitable conditions and hospitality in the receiving states, resources to support these refugees is an obvious problem being worked on by UNHCR and the receiving states to be solved. One of the most pressing issues faced in the middle east is that of gender-based violence in Syria which has played a large role in forcing the displacement of large numbers of women and girls in the area. Violence faced by women in the conflict zones, as well as limited resources in terms of gender-based violence services and support in the region continue to compound the problem.

V. COMMENTS AND OBSERVATIONS OF THE AALCO SECRETARIAT

30. The 1951 United Nations Convention Relating to the Status of Refugees is the key legal document ensuring the protection and well-being of refugees. The 1951 Convention has saved the lives of millions of people over the years, and will no doubt continue to serve and strengthen the international protection regime through the reaffirmation and practical evolution of its principles. However, the 1951 Convention is proving to be somewhat inadequate for refugee protection because it is not flexible in the face of what are perceived to be the new refugees – those fleeing, for example, from ethnic violence in Bosnia or Kosovo – also need to be realized. This is because the definition of refugee as contained in the 1951 Convention remains relatively narrow, covering only people fleeing individual persecution by their governments.

31. Additionally, challenging new trends in forced displacement are emerging. It may be remembered here that the 1951 Convention responded to displacement due to persecution and war. Today, there are many other drivers of displacement, which include: population growth, urbanization, climate change, food insecurity, energy demand and others. As the 1951 Convention has aged, the landscape of international displacement and migration has become increasingly complex, begging questions as to the sufficiency of the definitions and protections provided in the Convention. The above-mentioned challenges are only a few of the many critical issues that are in urgent need for creative solutions.

32. The 1951 UN Convention on the Status and Treatment of Refugees, consciously excludes persons who have not crossed an international border from UNHCR's competence and yet, nearly half the people assisted by UNHCR today are internally displaced. This important evolution rests in part on the restrictive and impractical nature of UNHCR's original Statute, which necessitated a mandate extension. Additionally, UNHCR's reorientation is a product of underlying post-Cold War political and international sociological factors, in particular the emergence of international humanitarianism, the erosion of the principle of absolute sovereignty, the emergence of “new wars”, and asylum fatigue.

33. Critics claim that UNHCR's involvement with IDPs lacks a legal basis and ultimately undermines the institution of asylum. Proponents highlight that in many of today's complex emergencies it is impossible to distinguish between people who have crossed an international border and those who have not.

34. In this context, UNHCR should act pragmatically based on humanitarian necessity, as opposed to rigid normative criteria.[5] The UNHCR has assisted not only traditional refugees but also a broad category of "persons of concern" which included Internally Displaced Persons, Returnees and other victims of conflict. Milestones such as the coming into force of the 2009 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa on 6 December 2012 are large steps in the right direction towards the recognition and appropriate attention being paid to the protection of Internally Displaced Persons.

35. In addition to its mandate to protect and assist refugees, the UNHCR also has a less well-known mandate to prevent and reduce statelessness and to protect stateless persons. In addition to promotion of the covenants relating to the protection of refugees, UNHCR has also promoted its agenda of encouraging states to accede to the 1954 Convention on the Status of Stateless Persons and, the 1961 Convention on the Reduction of Statelessness.

36. The UNHCR has found itself operating in new circumstances, particularly in the midst of violent conflict, with its role changing and evolving. These changes illustrate the enhanced roles that both refugee crises and the UNHCR play in contemporary world politics. The UNHCR is most certainly deserving of commendation for the way it has adapted to and fulfilled its ever-changing role. It may also be beneficial to review and renew UNHCR's mandate in the appropriate manner and through the appropriate channels in order to reflect its changing role, and to better prepare for future situations that may arise and require UNHCR's attention.

[5] David Lanz, Journal of Refugee Studies (2008), 21 (2) (Oxford University Press)

VI. ANNEX

SECRETARIAT'S DRAFT
AALCO/RES/DFT/52/S 3
12 SEPTEMBER 2013

THE STATUS AND TREATMENT OF REFUGEES
(Non-Deliberated)

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

Considering the Secretariat Document No. AALCO/52/ HEADQUARTERS (NEW DELHI)/2013/S 3;

Reaffirming the importance of the 1951 Convention relating to the Status of Refugees (the 1951 Convention), together with the 1967 Protocol thereto, as complemented by the Organization of African Unity Convention of 1969, as the cornerstone of the international system for the protection of refugees;

Commending the Office of the United Nations High Commissioner for Refugees (UNHCR) for the important contribution that it has made towards the protection of refugees and internally displaced persons, since the establishment of the UNHCR;

Recognizing the landmark achievement of the coming into force of the 2009 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, also known as the "Kampala Convention";

1. **Acknowledges** the desirability of comprehensive approaches by the international community to the problems of refugees and displaced persons, including addressing root causes, strengthening emergency preparedness and response, providing effective protection and achieving durable solutions;

2. **Calls upon** all States that have not yet done so to ratify/accede to, and implement fully the 1951 Convention relating to the Status of Refugees and the 1967 Protocol thereto, as well as other relevant international and regional instruments, including the 1954 Convention on the Status of Stateless Persons, the 1961 Convention on the Reduction of Statelessness, and the Kampala Convention.

3. **Directs** the Secretariat to explore, in the near future, the possibility of organizing a joint seminar or workshop in collaboration with the UNHCR with the aim of studying the feasibility of drafting a Model Law on Refugees and Internally Displaced Persons in the Asian-African region; and,

4. **Decides** to place this item on the provisional agenda at its Fifty-Third Annual Session.

II. LEGAL PROTECTION OF MIGRANT WORKERS

THE LEGAL PROTECTION OF MIGRANT WORKERS
(Non-Deliberated)

CONTENTS

LEGAL PROTECTION OF MIGRANT WORKERS
(Non-Deliberated)

I. INTRODUCTION

1. The item entitled "Legal Protection of Migrant Workers" was included on the agenda of AALCO at the reference of the Government of Philippines during AALCO's Thirty-Fifth Annual Session held at Manila in 1996. Even since, it has been a subject of intense deliberations at various Annual Sessions of AALCO and occasionally in special meetings.

2. The resolution adopted at the Thirty-Sixth Session at Tehran in 1997 directed the AALCO Secretariat to study the utility of drafting a Model Legislation on the legal protection of migrant workers within the framework of the *1990 UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* [the ICMW, 1990], international labour Conventions and Recommendations along with the relevant resolutions of the UN General Assembly. This was in accordance with the established practice of AALCO to adopt legal instruments in the nature of principles, guidelines or model legislations to enable Member States to incorporate internationally recognized principles into their national legal systems.

3. The Member States of AALCO were urged to transmit to the AALCO Secretariat their national legislations if any, on the situation of migrant workers. Both the Government of Sri Lanka and the Government of Philippines responded by reiterating the immense significance of having a model law on the topic. Be that as it may, the year 2000 saw a fresh impetus being given to the topic when AALCO entered into a Cooperation Agreement with the International Organization for Migration [IOM].

4. Against this backdrop, Resolution SP/1 "Special Meeting on Some Legal Aspects of Migration" adopted on 24th June, 2001 at the Fortieth Annual Session of AALCO *inter alia* directed the Secretariat to explore the feasibility of drafting a "Model Agreement for Cooperation Among Member States on Issues Related to Migrant Workers" and requested the Secretary-General to consider the possibility of convening an open-ended working group for an in-depth consideration of these issues. Pursuant to that mandate, a *draft Model Agreement*[6] was prepared by the Secretariat in collaboration with IOM. Useful input was also received from the Office of the High Commissioner for Human Rights (OHCHR). This agreement, which has a Preamble and twenty articles, is yet to be adopted formally by the Member States.

5. The AALCO Secretariats Report for the last year focused on the issues thrown up by the Informal Thematic Debate on Migration and Development that took place in May 2011 at the UN General Assembly. This year's Report of the AALCO Secretariat would focus on the ***High-Level Dialogue on International Migration and***

[6] The complete name of which is: Draft Regional Model Cooperation Agreement Between States of Origin and
States of Destination / Employment within AALCO Member States

Development that would be hosted by the UN General Assembly at its 68th Session from 3-4 Oct 2013.

II. BACKGROUND TO THE HIGH-LEVEL DIALOGUE ON MIGRATION AND DEVELOPMENT

6. Prior to 2006, the multi-dimensional aspects of international migration had been addressed in the outcome documents of numerous international conferences and summits, convened by the United Nations. Both the World Population Plan of Action, adopted at the 1974 United Nations World Population Conference, and the Recommendations for Action, agreed at the 1984 International Conference on Population, addressed relevant aspects of international migration, including its relationship with development, the protection of migrant workers, irregular migration, and forced displacement. Chapter X of the Programme of Action, adopted by the International Conference on Population and Development in Cairo in 1994, is one of the most comprehensive texts on international migration adopted by the international community to date. Subsequently, most major United Nations conferences and their outcome documents, including the World Summit for Social Development (Copenhagen, 1995), the Fourth World Conference on Women (Beijing, 1995), the United Nations Millennium Declaration (2000), and the World Summit Outcome (2005) have addressed relevant aspects of international migration.

7. Since "Cairo", the issue of international migration and development has been a sub-item with biennial periodicity on the agenda of the second committee of the General Assembly.2 For several years, the second committee considered the possibility of convening an international conference on international migration and development. This debate resulted in the decision, in December 2003, to convene a high-level dialogue on international migration and development with a non-binding outcome (chairman's summary) (A/RES/58/208).

A. The 2006 High-Level Dialogue

8. The High-level Dialogue (HLD) on International Migration and Development in September 2006 was the first-ever high-level event organized by the United Nations General Assembly devoted exclusively to discussing the multidimensional aspects of international migration and Development.[7] The HLD 2006 demonstrated the strong commitment of Member States, United Nations entities, observers, non-governmental organizations, civil society and the private sector to examining the relationship and synergies between international migration and development. There was general consensus that the High-level Dialogue presented a unique opportunity to identify ways and means to maximize the developmental benefits of international migration and to reduce its negative impacts.

9. The 2006 High-level Dialogue, held in September 2006, moved forward the global debate on international migration in three main ways.

[7] The second HLD that will take place on 3-4 October 2013, will be dealt with in the next section of the Report.

First, Member States endorsed the proposal of the Secretary-General to create a forum to continue the global dialogue on international migration and development. The Global Forum on Migration and Development (GFMD) was established as a voluntary, non-binding and informal consultative process, led by and open to all States Members and observers of the United Nations.

Second, ahead of the Dialogue, the Secretary-General appointed Mr. Peter Sutherland as his special representative (SRSG) on international migration and development. Since 2006, the SRSG has acted as the main link between the state-led GFMD and the United Nations.

Third, and in response to the recommendations of the Global Commission on International Migration (GCIM), the Secretary-General established the Global Migration Group (GMG) with a view to increasing system-wide coherence between the United Nations system and IOM in their response to the opportunities and challenges presented by international migration.

10. The first HLD of 2006 established that international migration can contribute to development if supported by the right policies. And nearly all Member States participating in the High-level Dialogue expressed an interest in the continuation of global dialogue on international migration and development. It also needs to be highlighted here that HLD 2006 also led to the creation of the Global Forum on Migration and Development (GFMD). This is a state-led, voluntary process dedicated to informal, non-binding and outcomes-oriented dialogue. Emerging as an outcome of the first ever UN General Assembly High Level Dialogue on Migration and Development in 2006 — but created to operate as a process *outside* of the UN system — policymakers and stakeholders from countries worldwide participate in various GFMD meetings, among which is a large annual convening of 2 days, to discuss the relation between migration and development, share experiences and forge practical cooperation.

B. Informal Thematic Debate on Migration and Development

11. Pursuant to General Assembly resolution *A/RES/63/225*, the President of the General Assembly convened an Informal Thematic Debate on International Migration and Development ('the debate') in New York on 19 May 2011. The purpose of the debate was to take stock of and contribute to the on-going dialogue on international migration and development, including the process leading to the General Assembly's second High-level Dialogue on International Migration and Development in 2013.

12. The debate recognized that international migration has many positive consequences for migrants, their families and both countries of destination and of origin. Remittances improve the standard of living of families remaining in the country of origin, including by expanding their access to health and education services. While the developmental impact of remittances could be improved, it was acknowledged that remittances were private income and could not be a substitute for foreign direct investment or official development assistance. Participants expressed concern about the international recruitment of skilled professionals, such as doctors, nurses and teachers, from developing countries facing serious shortages of those

skills. The adoption of the Global Code of Practice on the International Recruitment of Health Personnel by the 63rd World Health Assembly in 2010 was welcomed.

13. Despite a widespread recognition of the positive contributions of international migration to development, several participants cautioned that international migration should not be considered as an alternative to development. While migrants can be encouraged to contribute to development efforts, Governments remained responsible for achieving sustainable development and improving human wellbeing, including by reducing poverty.

14. Several participants called for redoubling efforts to ensure respect for the fundamental rights and freedoms of international migrants. Racist and xenophobic undertones are increasingly taking hold of the political discourse in major receiving countries, underscoring the need to redouble efforts to protect the rights of all international migrants. Migrant workers are often subject to discrimination and even exploitation. Given their secluded working environment, domestic workers, most of whom are women, are particularly vulnerable to abuse. Participants underscored that migrants were first and foremost human beings with inalienable rights that transcend their immigration status. Member States were urged to ratify and implement all international instruments relevant to international migration, including the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

15. The debate acknowledged the success of the Global Forum on Migration and Development in fostering cooperation, sharing good practices and promoting a constructive dialogue among Member States, relevant international agencies, as well as with civil society. Noting that informal processes have their limitations, some Member States called for the establishment of more formal mechanisms to advance the debate on international migration and development. They identified the United Nations-and in particular the General Assembly-as the most suitable venue for the development of such mechanisms.

III. UN HIGH-LEVEL DIALOGUE ON INTERNATIONAL MIGRATION AND DEVELOPMENT 2013

16. It may be recalled here that in resolution 63/225, adopted in December 2008, the General Assembly had decided to follow up the 2006 High-level Dialogue by convening a second High-level Dialogue on International Migration and Development during its 68th session in 2013. Pursuant to the same resolution, the PGA organized a one-day informal thematic debate on international migration and development on 19 May 2011.

17. The General Assembly of the United Nations (UN) will hold the second High-Level Dialogue (HLD) on International Migration and Development during 3-4 October 2013. The major theme of the HLD will be to identify the concrete measures to strengthen coherence and cooperation at all levels, with a view to enhancing the benefits of international migration for migrants and countries alike and its important links to development, while reducing its negative implications. It also needs to be highlighted here that this will be a joint exercise involving the participation of the

International Organization for Migration (IOM), the United Nations Department of Economic and Social Affairs (UNDESA) and the United Nations Population Fund (UNFPA).

18. In particular, this HLD would witness on the whole four Plenary Sessions and the convening of four interactive round-table Meetings[8]. ***Round Table 1***: This would be devoted to assessing the effects of international migration on sustainable development and I identifying relevant priorities in view of the preparation of the post-2015 development framework. ***Round Table 2:*** This would deal with measures to ensure respect for and protection of the human rights of all migrants, with particular reference to women and children, as well as to prevent and combat the smuggling of migrants and trafficking in persons and to ensure orderly, regular and safe migration. ***Round Table 3:*** This would focus on strengthening partnerships and cooperation on international migration, mechanisms to effectively integrate migration into development policies and promoting coherence at all levels. ***Round Table 4:*** This would deal with international and regional labour mobility and its impact on development.

19. It needs to be welcomed that the General Assembly has clearly recognised, in both its resolutions in the 2nd and 3rd committees, the importance of human rights as a cross cutting issue for the High Level Dialogue. Accordingly HLD will have a roundtable specifically dedicated to measures to ensure respect for and protection of the human rights of all migrants. This round table meeting needs to be welcomed wholeheartedly as a positive step in mainstreaming human rights into the agenda of the HLD. Even while acknowledging so, a number of issues that are of critical concern to the protection of the human rights of migrant workers needs to be highlighted.

A. Protection of the Human Rights of all Migrant Workers

20. There are certain distinctions that need to be made at the out set here. The topic clearly distinguishes between firstly, a focus on promoting human rights of migrants, whilst secondly, combatting smuggling and trafficking. It is thus important that these two issues are sufficiently delinked, otherwise, the conflation of the topics may falsely give the impression that irregular migration is a criminal offence, in line with trafficking or smuggling, and the conflation of the issues may contribute to the undue criminalisation of irregular migration.

21. Furthermore, it is important to distinguish between smuggling and trafficking; while trafficking by definition includes exploitation and entails a number of serious human rights violations, smuggling is essentially the service of moving people from point A to point B, and does not necessarily involve any human rights violation. While trafficking always is, smuggling is not per se a crime against migrants. Indeed, we sometimes celebrate some smuggling operations, such as the "underground railway" that drove escaped American slaves to Canada or the one portrayed in the film "Casablanca".

[8] Bela Hovy, " Briefing on the Preparations for the 2013 High-Level Dialogue on International Migration and Development [Department of Economic and Social Affairs, United Nations: New York, September 2012]

22. All migrants, by virtue of their human dignity and without discrimination, and with very few and narrowly defined exceptions, are protected by international human rights law. Except for two, they enjoy all civil, political, economic, social and cultural rights guaranteed by the international human rights instruments. The important point that needs to be underlined here is the fact that these rights extend to all migrants, whatever their administrative status. This was affirmed by a recent resolution of the General Assembly (65/212) on the Protection of Migrants, where the international community "reaffirms the duty of States to effectively promote and protect the human rights and fundamental freedoms of all migrants, especially those of women and children, regardless of their immigration status".

23. This principle is replicated in the two Covenants (ICCPR and ICESCR) which explicitly refer to "national origin" as a prohibited ground of discrimination in the enjoyment of civil, political, economic, social and cultural rights. The fundamental tenets of international human rights law – non-discrimination and equality of treatment – have to be fully applied to migrants, just as they are to any other marginalised group in society. Ensuring the prohibition of discrimination in law and practice has been identified as a key challenge in ensuring protection of the human rights of migrants at the national level.

24. The human rights standards contained in the Universal Declaration of Human Rights, the two international human rights covenants, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families and other international human rights instruments as well as related normative standards of other branches of law, particularly international refugee law and international labour law, provide a solid framework for policy-making on migration.

25. The application of these standards in relation to migration have been further developed by other specialized bodies, including UN treaty bodies and special procedures, as well as the ILO supervisory bodies. The Human Rights Council and the General Assembly (Third Committee) adopt resolutions each year which consider respectively the human rights of migrants, and the protection of migrants and of women migrant workers. The General Assembly (Second Committee) also considers the issue of "international migration and development" in a separate process. In addition, migrants are also protected by other normative standards in more specialized fields of law.

26. The ILO has numerous instruments concerning international labour law. This includes, among others, the Migration for Employment Convention (Revised), 1949 (No. 97), the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), and other pertinent instruments such as the Private Employment Agencies Convention, 1997 (No. 181) and the Domestic Workers Convention, 2011 (No. 189), as well as the accompanying Recommendation No. 201, and the HIV and AIDS recommendation, 2010 (No. 200). Humanitarian law and refugee law are also very relevant, including the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.

27. Moreover, international criminal law plays an important role, in particular with regard to the protection of victims of human trafficking and of smuggled

migrants, including the Convention against Transnational Organized Crime and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, as well as the Protocol against the Smuggling of Migrants by Land, Sea and Air.

B. Addressing gaps in the International Legal Framework

28. Even though as we have seen, there exists a robust international legal framework in relation to the protection of the rights of all migrant workers, there are a number of problems /gaps afflicting the protection of the rights of migrant workers and their families. The United Nations Special Rapporteur on the Human Rights of Migrants ***Mr. Francois Crepeau*** has clearly highlighted these shortcomings in the Report that he submitted to the UN General Assembly. Some of the most important aspects of the same are highlighted here.

a. Detention

29. As the Special Rapporteur observed in his first thematic report to the Human Rights Council (A/HRC/20/24), detention of migrants in an irregular situation is becoming increasingly widespread, and States use a wide range of reasons to justify these practices, in particular that of deterrence. However, the right to liberty and security of person is applicable to all deprivations of liberty, including immigration control. Legitimate objectives for detention are the same for migrants as they are for anyone else: when someone presents a risk of absconding from future legal proceedings or administrative processes, or when someone presents a danger to their own or public security. Thus detention should never be mandatory, it should only be a means of last resort, and, if used, personalised reasons must be put forward by States to justify a detention and such reasons should be clearly defined and exhaustively enumerated in legislation.

b. Criminalisation of Irregular Migration

30. In 2008, the former Special Rapporteur presented a report to the Human Rights Council on the criminalisation of irregular migration. Criminalising irregular entry and/or stay can lead to unnecessary detention, prevent migrants from accessing such key rights as health or housing, and can encourage stigmatisation, hostility and xenophobia against migrants.

c. Xenophobia

31. Lack of understanding about the human rights of migrants makes them an increasingly vulnerable group, easily targeted. The Special Rapporteur observes that, as a result of this lack of information and understanding, migrants are increasingly subject to xenophobia, anti-migrant sentiment, hate speech and hate crimes, which in and of themselves are human rights violations, and can lead to further serious human rights abuses, particularly when physical violence is involved.

d. Migrant Children

32. It is well-known that migrant children continue to be a particularly vulnerable category of migrants. In 2009, the former Special Rapporteur presented a report to the Human Rights Council on the protection of children in the context of migration. He noted that children who are unaccompanied or separated from their parents are particularly vulnerable to human rights violations and abuses at all stages of the migration process, and that the lack of distinction between adult and child migrants is a major challenge. Better knowledge about the rights of these children, and the obligation to protect them is paramount.

f. Borders

33. Some States have responded to irregular migration by intensifying border controls, in some cases "externalising" border controls to countries of origin and transit, using bilateral agreements and/or aid in order to transform these countries into a buffer zone to reduce migratory pressures on receiving States, without any accompanying measures to ensure the respect for the human rights of migrants in the process.

34. Hence, though the relevant human rights instruments and the framework exist to protect the rights of the migrant workers, it is characterized by a number of problems as we have just identified. It is precisely in this context that HLD 2013 offers an important opportunity to discuss threadbare all the issues and complexities that prevent the enjoyment of human rights for the migrant workers and their families. Due to all of these problems that the migrant workers and their families fact in the countries of destination, it can be suggested that the HLD should have an explicit and cross-cutting focus on the human rights of all migrants, including the human rights safeguards surrounding the detention of migrants. More specifically, the HLD could invite Member States to explore alternatives to immigration detention, and address some of the other gaps noted above. In particular, the HLD should promote real recommendations to States in the fields identified, including on means to progressively abolish the administrative detention of migrants, and providing concrete recommendations about.

35. The need to discuss international cooperation efforts in addressing migration issues too can hardly be exaggerated. Specifically, in terms of international cooperation, there is a need for more productive partnerships between developed and developing countries to address areas of mutual interest in the management of migration. This is likely to require a considerable overhaul of the normative and institutional infrastructure of multilateral migration management. This may be some way off, but action on shared development objectives may be one relatively easy step forward. Given the global and interdependent scope of the challenges, it would seem wise to have global and interdependent approaches to tackling them. The HLD 2013 could be used a forum to carry out more effective dialogue between the developing and the developed countries along with other stakeholders with a view to find out solutions that could a significant way in protection the rights of migrant workers and addressing migration challenges in a much more efficient and meaningful manner.

IV. COMMENTS AND OBSERVATIONS OF THE AALCO SECRETARIAT

36. Given the overwhelming realization that international migration has many positive consequences for migrants, their families and both countries of destination and of origin, the UN High Level Dialogue on International Migration and Development to be held in 2013 will be a milestone in the emphasis given to migration by the international community. International migration deserves continued attention from the international community, both because international cooperation is necessary to take advantage of the opportunities that international migration generates and because its impact is likely to increase in the future.

37. As the United Nations Special Rapporteur on the human rights of migrants has rightly pointed out, "migration is a rational and reasonable behavior; people move to where opportunities are and where they can find a better life. It is also an inherently international issue. Thus, any policy that relies on unilateral means to curb natural migration will never be successful". Pursuing international migration for the sake of national economic development, accompanied by the receiving countries' selective immigration policies, will only benefit skilled labor migration, while aggravating the human insecurity of undocumented migrants.

38. In recent years, a spate of new international and regional legal developments has established and extended the human rights of migrant workers and their families. The international community, however, has not embraced the standards on migrant workers, particularly in relation to irregular migrants with enthusiasm. For example, ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families remains very low. Many Industrialized countries of employment, or migrant-receiving countries, including the United States, even though participated actively in the drafting of the ICMW, have not yet become a Party to it[9]. The same is true for other specialized migrant worker rights treaties adopted by the International Labour Organization (hereinafter ILO).

39. Given the hostility that States have been harbouring in adhering to the legal instruments protecting the human rights of migrant workers and the reasons (as we have noted above) for doing so, the forthcoming HLD 2013 offers an important opportunity to undertake an explicit and cross-cutting focus on human rights of all migrant workers. It could also be used for laying a solid foundation for sustained multilateral cooperation that maximizes the benefits of labour migration for origin and destination countries and for migrant workers themselves. The HLD 2013 could be used to ensure awareness-raising on the human rights of migrants among the general public, and specific training to professionals dealing with migrants. States could be asked to develop a public discourse that fosters inclusiveness, non-discrimination, recognition of diversity and pluralism as social assets, etc. They should develop legislation, policies and practices to that effect, and empower all their institutions, including their human rights institutions, to implement and monitor such legislation, policies and practices.

[9] See the Annex for the list of States from the Member States of AALCO that have become a Signatory/Party to the ICMW 1990.

40. In this regard, the HLD 2013 could be used by States for showcasing their good practices and sharing their innovative policies, programmes and projects that they have adopted in the area of migration management with one another. Every effort should be made to continue the dialogue, strengthen partnerships, support capacity development and safeguard the rights of migrants. No opportunity should be missed to facilitate the contribution of international migration to improve human wellbeing and, in particular, to reduce poverty and contribute to the achievement of the Millennium Development Goals.

41. AALCO, committed as it is to developing a long-term and forward-looking perspective on international migration would continue to monitor closely the developments that are occurring in the field of migration law, particularly in relation to the ensuing High-Level Dialogue on Migration and Development that is scheduled to take place in 2013. It would continue to focus on the many facets of the migration-development nexus with a view to assist its Member States in highlight the future migration trends and their developmental impact for its Member States.

V. ANNEX – I

Participation of Asian-African States in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
(1990)

Entry into force : 1st July, 2003
Status : Signatories 35, Parties: 46 [as of 26 -6 - 2013]

Signature	**Ratification/Accession**
Cameroon	**Bangladesh**
Sierra Leone	**Egypt**
	Ghana
	Indonesia
	Libya
	Nigeria
	Philippines
	Senegal
	Sri Lanka
	Syria
	Turkey
	Uganda

VI. ANNEX – II

SECRETARIAT'S DRAFT
AALCO/RES/DFT/52/S 5
12 September 2013

LEGAL PROTECTION OF MIGRANT WORKERS
(Non-Deliberated)

The Asian-African Legal Consultative Organization at its Fifty-Second Session

Having considered the Secretariat Document No. AALCO/52/HEADQUARTERS (NEW DELHI)/ 2013 /S 5;

Recognizing the obligation of all States to promote and protect basic human rights and fundamental freedoms for all migrants and their families regardless of their migratory condition as provided for in various international legal instruments including the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW, 1990);

Acknowledging the important nexus between international migration and development and the need to deal with the challenges and opportunities that migration presents to countries of origin, transit and destination, and recognizing that migration brings benefits as well as challenges to the global community;

Acknowledging further the important contribution provided by migrants and migration to development, as well as the complex interrelationship between migration and development;

Welcoming the forthcoming High Level Dialogue on International Migration and Development to be held at the United Nations General Assembly on 3-4 October 2013 and the high level and broad participation that provides an opportunity to address constructively the multidimensional aspects of international migration and development;

1. **Requests** all Member States, in conformity with their respective constitutional systems, to effectively promote and protect the human rights of all migrants, in conformity with the international legal instruments to which they are party;

2. **Reaffirms** the resolve to take measures to ensure respect for and protection of the human rights of migrants, migrant workers and members of their families;

3. **Encourages** Member States that have not yet done so to consider ratifying/acceding to the relevant international legal instruments on the situation of migrant workers, particularly the ICMW 1990; and

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

III. INTERNATIONAL TERRORISM

INTERNATIONAL TERRORISM
(Non-Deliberated)

CONTENTS

INTERNATIONAL TERRORISM
(Non-Deliberated)

I. INTRODUCTION

A. Background

1. The Charter of the United Nations sets out the purposes of that Organization, which includes the maintenance of international peace and security, taking of collective measures to prevent threats to peace and suppression of aggression and promotion of human rights and economic development. Terrorism constitutes and assault on the principles of law, order, human rights and the peaceful settlement of disputes. Terrorism thus runs counter to the principles and purposes that define the United Nations. The United Nations has been taking concrete steps to address the threat of terrorism, helping Member States to counter this scourge.

2. The present international framework to counter terrorism comprises principally of several instruments that deal with certain specific acts of terrorism and together these are referred to as "Sectoral Conventions".[10] However, this has not replaced the need for a comprehensive convention that deals with the issue and the United Nations and the International Community has been working towards this end.

[10] These conventions are: 1. Convention on Offences and Certain Other Acts Committed on Board Aircraft; signed at Tokyo on 14 September 1963 (entered into force on 4 December 1969). 2. Convention for the Suppression of Unlawful Seizure of Aircraft; signed at The Hague on 16 December 1970 (entered into force on 14 October 1971). 3. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; signed at Montreal on 23 September 1971 (entered into force on 26 January 1973). 4. Convention on the Prevention and punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; adopted by the General Assembly of the United Nations on 14 December 1973; entered into force on 20 February 1977). 5. International Convention against the Taking of Hostages; adopted by the General Assembly of the United Nations on 17 December 1979 (entered into force on 3 June 1983). 6. Convention on the physical Protection of Nuclear Material; signed at Vienna on 3 march 1980 (entered into force on 8 February 1987). 7. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; signed at Montreal on 24 February 1988 (entered into force on 6 August 1989). 8. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; signed at Rome on 10 March 1988 (entered into force on 1 March 1992). 9. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf; signed at Rome on 10 March 1988 (entered into force on 1 March 1992). 10. Convention on the Marking of Plastic Explosives for the Purpose of Detection; signed at Montreal on 1 March 1991 (entered into force on 21 June 1998). 11. International Convention for the Suppression of Terrorist Bombings; adopted by the General Assembly of the United Nations on 15 December 1997 (entered into force on 23 May 2001). 12. International Convention for the Suppression of the Financing of Terrorism; adopted by the General Assembly of the United Nations on 9 December 1999 (entered into force on 10 April 2002). 13. International Convention for the Suppression of Acts of Nuclear Terrorism, adopted by the UN General Assembly on 13 April 2005

3. Apart from the above stated 13 Sectoral Conventions there are other Regional Conventions formulated at the initiative of various regional organizations to counter the menace of terrorism at the regional levels. This process was started almost at the same time as it was started by the United Nations. The OAS was in the forefront in this regard and its anti terrorism Convention was adopted in 1971. This was followed by the Council of Europe, South Asian Association for Regional Cooperation (SAARC), League of Arab States, Organization of Islamic Conference, Organization of African Unity (OAU), and the Commonwealth of Independent States.[11]

4. The adoption of the Declaration on "Measures to Eliminate International Terrorism" by the General Assembly at its 49th Session on 9th December 1994[12] along with a declaration supplementing the same at the 51st Session in 1996[13] establishing an ad hoc committee gave impetus to the active consideration of the issues involved to arrive at a comprehensive framework convention. Initially, the committee was mandated to elaborate conventions on suppression of terrorist bombings and nuclear terrorism and pursuant to its work a convention relating to terrorist Bombings was adopted by the General Assembly in the year 1997.[14] Upon the initiation of the General Assembly at it's 53rd Session, the committee began working on legal responses to combat funding of terrorism, which then resulted in the adoption of the Convention for the Suppression of Financing of Terrorism on 9th December 1999.[15] The matters concerning elaboration of an International Convention for the Suppression of Acts of Nuclear Terrorism was extensively discussed at the subsequent meetings of the Ad Hoc Committee and its Working Group and the UN General Assembly adopted the Convention on 13 April 2005.[16] The mandate of the committee to 'address means of further developing a comprehensive legal framework of convention dealing with international terrorism' continues to be renewed and revised on an annual basis by the General Assembly in its resolutions on the subject "measures to eliminate international terrorism".

5. At its 53rd Session, the General Assembly decided that the negotiations on the "Draft Comprehensive Convention on International Terrorism" based on the draft circulated by India earlier at the 51st Session in 1996, would commence in the Ad Hoc Committee at its meeting in September 2000. In addition, it was also to take up

[11] These Conventions are: 1. OAS Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and related Extortion that are of International Significance, concluded at Washington, D.C. on 2 February 1971; 2. European Convention on the Suppression of terrorism concluded at Strasbourg on 27 January 1977; 3. SAARC Regional Convention on Suppression of Terrorism, signed at Kathmandu on 4 November 1987; 4. Arab Convention on the Suppression of Terrorism, signed at a meeting held at the General Secretariat of the League of Arab States in Cairo on 22 April 1998; 5. Treaty on Cooperation among States Members of the Commonwealth of Independent States in Combating Terrorism, done at Minsk on 4 June 1999; 6. Convention of the Organization of the Islamic Conference on Combating International Terrorism, adopted at Ouagadougou on 1 July 1999; 7. OAU Convention on the Prevention and Combating of terrorism, adopted at Algiers on 14 July 1999.

[12] A/RES/49/60

[13] A/RES/51/210.

[14] International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly at its 52nd Session on 15 December 1997 (A/RES/52/164.)

[15] A/RES/54/109.

[16] adopted by the General Assembly in resolution 59/290

the question of convening a high level conference under the auspices of the United Nations to address these issues. Pursuant to that mandate, a Working Group of the Sixth Committee, in its meeting held from 25th September to 6th October 2000, considered the "Draft Comprehensive Convention on International Terrorism", as proposed by India. Since then the matter has been under active consideration of the Ad Hoc Committee and the Sixth Committee of the UN General Assembly.

6. In addition to the General Assembly, the Security Council has also been engaged in framing legal responses to combat and curb acts of terrorism. On 28 September 2001 through resolution 1373 (2001), the Security Council established the Counter Terrorism Committee (the "CTC"), which consists of all the 15 Members of the Security Council with the mandate to monitor the implementation of the Council's anti terrorism efforts. The Committee monitors the implementation of resolution 1373 (2001) by all States and tries to increase the capacity of States to fight terrorism. The CTC is charged with ensuring every State's compliance with Council requirements to prevent terrorist activities, and with identifying the weaknesses in the capacity of the States to do so. For States with deficiencies in legislation, funds, or personnel, the CTC is expected to help them remedy their difficulties and upgrade their capacity. However, where the Committee concludes that the deficiencies are in political will, it will leave it to the Security Council to decide what measures to take to bring such determinedly non-compliant States in compliance with the 1373 mandates.

7. Seeking to revitalize the Committee's work, in 2004 the Security Council adopted resolution 1535, creating the Counter-Terrorism Committee Executive Directorate (CTED). The CTED is to provide the CTC with expert advice on all areas covered by resolution 1373.[17] In addition to this, the CTED would also facilitate technical assistance to countries, and promote closer cooperation and coordination both within the UN system of organizations and among Regional and Intergovernmental bodies. During the September 2005 World Summit at the United Nations, the Security Council – meeting at the level of Heads of States or Governments for just the third time in its history – adopted resolution 1624 concerning incitement to commit acts of terrorism. The resolution also stressed the obligations of countries to comply with international human rights laws.

8. The item entitled "International Terrorism" was placed on the agenda of the Fortieth Session of AALCO, held at New Delhi between 20 – 24 June 2001, upon a reference made by the Government of India. It was felt that consideration of this item at AALCO would be useful and relevant in the context of the on-going negotiations in the Ad Hoc Committee of the United Nations on elaboration of the comprehensive convention on international terrorism. The successive sessions directed the Secretariat to monitor and report on the progress in the Ad Hoc Committee of negotiations relating to the drafting of a comprehensive international convention to combat terrorism; and requested the Secretariat to carry out, an in-depth study on this topic. The Centre for Research and Training (CRT) has brought out *A Preliminary Study on the Concept of International Terrorism* in the Year 2006.

[17] The Security Council extended the mandate of the CTED through its Resolution 1963 (2010) (20 December 2010)

B. Deliberations In The Half-Day Special Meeting On International Terrorism, Held In Conjunction With The 51st Annual Session, Abuja, Nigeria, 2012

9. Twenty Six Member States of the Asian-African Legal Consultative Organization participated at the Fifty-First Annual Session held at Abuja, Nigeria between the 18th and 22ndth of June, 2012. At the annual session, a special half-day meeting was earmarked for deliberations upon the topic "International terrorism". The meeting was held on 21 June and the session was chaired by **U. Thiha Han,** the Vice-President of the Annual Session. Introducing the topic, **Dr. Hassan Soleimani**, the Deputy Secretary General of AALCO highlighted the following issues to be relevant for discussion at the meeting: (i) Challenges before the Ad Hoc Committee on International terrorism; (ii) International legal cooperation in criminal matters against terrorism; and (iii) countering financing of international terrorism. Dr. Soleimani referred to the status of negotiations at the Ad Hoc Committee and pointed out that there was yet to be any agreement regarding the definition of terrorism. It was also pointed out by him that dealing with terrorism also means the need to deal with the activities such as money laundering, illegal arms trade and trade in narcotic substances.

10. **Mr. Rohan Perera**, the Chairman of the UN Ad-Hoc Committee on Measures to Eliminate International Terrorism, referred to the history of international efforts to counter terrorism and the nature and status of the initiatives that are presently taken up by the UN. Mr. Perera the referred to the complexities involved in the process of defining 'terrorism', in particular the difficulty of distinguishing terrorists from freedom fighters. Mr. Perera then explained the rationale for a comprehensive convention on terrorism. According to him, the convention is required to ensure a comprehensive coverage of the issue and fill the gaps left by the sectoral conventions. He further pointed out that the draft text proposed by the sponsor State India contained an operational definition of the term and that it covered specific criminal acts with a terrorist intent. He then referred to the position taken up by the Organization of Islamic States, which insisted on a generic definition that maintained the distinction between terrorism and acts committed in the course of exercising the right to self-determination. It was pointed out by him that the European States, however, opposed this position and has opted for an operational definition. According to Mr. Perera, the Ad Hoc Committee must then shift its focus from the definitional problem and spend its attention on addressing the concerns that has arisen in the context of the scope of application of the convention. He pointed out that following this approach, the committee has adopted a pragmatic approach and pushed for a 'Choice of Law' provision that carves out the scope of application of the Convention. The key elements of this approach is that activities of 'armed forces' that covered under the Humanitarian Laws are not covered by this convention and the activities undertaken by the military forces of a State, in exercise of their duties, in as much as they are governed under other rules of international law are not covered by this convention. He further pointed out that this compromise formula would indeed leave the convention not as comprehensive as all parties would desire it to be, but nevertheless the convention would operate alongside other applicable legal regimes and would preserve the integrity of such other laws. Mr. Perera then pointed out that the fact that all delegations are now prepared to negotiate on the basis of this approach was indeed a positive step.

11. **Mr. Peter Terkaa Akper**, SAN, Senior Special Assistant to the Attorney General of the Federation and Minister of Justice, Federal Republic of Nigeria made a presentation on the topic "Legal Response to Terrorism in Nigeria: Issues and Challenges". During the course of his presentation, he elaborated on the increasing threats paused by terrorists activities, referring to examples from within and outside of Nigeria. This was followed by a presentation of the provisions and an explanation of the working of the Nigerian Counterterrorism Laws. He then referred to the challenges faced by the law and order agencies in this context, globally, such as coordination, information etc. He also referred to the need to engage with communities and foster community based organizations to prevent the spread of terrorist activities within their communities. He then referred to the various steps taken by Nigeria to align the Nigerian Counter Terrorism law with the International Standards.

12. In the deliberations that followed, delegations from People's Republic of China, Myanmar, Democratic Socialist Republic of Sri Lanka, Republic of Indonesia, Islamic Republic of Iran, India, Uganda, Japan, Republic of Korea, Malaysia, State of Kuwait, State of Palestine, Iraq and the Observer Delegation of the International Committee of Red Cross (ICRC) made their statements. The Delegations of the Democratic People's Republic of Korea and Republic of Yemen gave their written statements for reflection in the final record of the Session.

13. The Delegate of the **People's Republic of China** referred the increasing number of terrorist incidents all across the world and the use of developments in information technology by terrorists to propagate their ideas and for their operations. Reaffirming the commitment of China to fighting terrorism, it was further pointed out by him that the fight against terrorism must be made fully in conformity with the UN Charter and other principles of international law. It was further asserted that state sovereignty should be respected and double standards must be abandoned. It was also suggested by the delegate that that further studies be carried out on international rules relating to the use of force in combating terrorism, so as to ensure that counter-terrorism efforts are made in conformity with international law. The delegate then referred to the various activities undertaken by China with respect to this issue and ended his speech by stressing on the important role played by regional organizations in combating terrorism

14. The Delegate of the **Union of Myanmar** described terrorism to be the most serious challenges facing the international community today and stressed on the need to prosecute and punish the perpetrators of these acts. The delegate stated that international terrorism was a threat to international peace and security and also expressed the belief of his country in "in the inherent right of individual or collective self-defense as recognized by the Charter of the United Nations". The Delegate expressed his countries' sincere desire and commitment to cooperate with States, both on a regional and global basis. The delegate then referred to the actions taken by Myanmar to combat terrorism, particularly international terrorism.

15. Pointing out the various dimensions of the threats posed by terrorism, the delegate of **the Democratic Socialist Republic of Sri Lanka** reaffirmed its commitment and support to combating terrorism. Referring to the previous work of

the Ad Hoc Committee on International Terrorism, the delegate pointed out that Sri Lanka has been actively involved at all points of time in the working of the committee. The delegate then pointed out the importance of the need to reach a conclusion to the negotiations on the Draft Comprehensive Convention and adoption of the same to bridge the gaps in the existing legal framework. It was pointed out that Extradition and mutual legal assistance are some of the most important weapons in the armory of States in the fight against international terrorism. It was further pointed out that though extradition required bilateral treaties Sri Lanka has always taken steps to render assistance on reciprocal basis whenever requests are made outside without bilateral dispute. It was also pointed out that current framework for freezing the monitory assets of terrorists would require more international cooperation for it to be effective. Referring to the increasing nature of cross border workings of terrorists organizations, the delegate pointed out that fighting terrorism is possible only with cooperation and joint action by the States.

16. The Delegate of the **Republic of Indonesia** in his speech condemned all forms of terrorism in whatever motivation and manifestation. It was pointed out that fighting terrorism requires a strong commitment to enhance international cooperation in order to prevent and eradicate terrorism, at a multilateral and regional level, as well as bilateral levels. Explaining the position of Indonesia, the delegate pointed out that at multilateral level cooperation under the UN framework and continuous support to UN agencies was significant in the fight against terrorism. To this end, the delegate expressed commitment to the UN Global Counter-Terrorism Strategy (UNGCTS) and stated that attention needs to be given to the implementation of the same. The delegate then described the various actions and initiatives taken up by Indonesia at the national, regional and global levels towards this end. It was then pointed out that to fight terrorism it is required to have broad long term strategies and to use soft power and also address the root causes or condition conducive to terrorism. It was stated that prevention and eradication steps should also be implemented by soft power approaches along with interfaith dialogue spreading education and promoting intercommunity engagements. The delegation also pointed out the importance of putting de-radicalization program to the forefront of counter terrorism strategy and that efforts to eradicate terrorism must be inconformity with democratic principles, rule of law and respect for human rights. it was also asserted that the combat of terrorism must be in accordance with International Law and the UN Charter.

17. The Delegate of the **Islamic Republic of Iran** described terrorism to be a challenge to international peace and security. It was pointed out that terrorism "has long been manipulated by some as a political leverage against others" and that this was "ensued by double standards in dealing with terrorist groups or terrorist acts" which in turn gave room for terrorist groups to hold and survive. It was asserted that terrorism could not be overcome without addressing also State terrorism. It was pointed out that terrorism in any form cannot be justified and that it needs to be condemned. It was further pointed out that the menace cannot be eradicated unless the root causes and conditions conducive to its spread are identified and removed. It was further pointed out that a definition of terrorism must strengthen international cooperation and end ambiguities surrounding this term. It was also pointed out that the definition must make a clear distinction between acts of terrorism and legitimate struggle of peoples under foreign occupation for restoring their fundamental right of self-determination.

18. The Delegate of **India** stated that her country continued to believe that terrorism in all its forms and manifestations irrespective of its motivations is a criminal and punishable act. Referring to the 1994 Declaration it was pointed out that "no considerations of political, philosophical, racial, ethnical, religious or any other nature could justify criminal acts in creating to promote a state of terror in the public" and that this position has been reiterated in several other international conventions and declarations. The delegate then referred to the actions taken by India to put this international policy objective into practice. With respect to the Comprehensive convention, the delegate expressed hope that the international community would soon finalize the draft convention in the spirit of cooperation and mutual accommodation. Referring to the status of negotiations and the issues on which there are disagreements, it was pointed out that the 2007 proposal has been receiving active support b several countries. It was further asserted that the draft article 18 of the convention already encapsulates the objectivesof the 2007 proposal. It was also pointed out that that killing of innocent civilians cannot be justified for any cause therefore, a legitimate cause for the national struggle for liberation have to be permitted only within the parameters of the IHL.

19. The Delegate of **Uganda** pointed out the need to emphasize on as many bilateral arrangements as possible to facilitate extradition and cooperation in fighting terrorism. Referring to the provisions of the Ugandan constitution relating to human rights, the delegation pointed out the numerous challenges involved in observing human rights in the process of fighting terrorism. The delegation also pointed out the difficulties of internalizing some of the international norms into local laws as at times it conflicted with the Constitutional norms.

20. The Delegate of **Japan** called for more international cooperation with respect to information sharing, making of rules and standards on counter-terrorism measures, assistance in capacity building on anti-terrorist measures and also to address the root causes of terrorism. To this end the delegation pointed out that Japan was making efforts to strengthen national counter terrorism methods, promote international cooperation and assist developing countries in capacity building. It was pointed out that To prevent and eradicate terrorist activities, it was vital to enhance international legal framework to deal effectively with international terrorism. It was also pointed out that to prevent terrorism it was important to cut the inflow of money to terrorist networks.

21. The Delegate of the **Republic of Korea** pointed out its commitment to implementing the international norms and standards relating to countering terrorism and further expressed it's strong support for adoption of the Draft Comprehensive Convention on International Terrorism.

22. The Delegate of **Malaysia** pointed out that the issues for focused deliberation revolve around the unresolved issues at the United Nations relating to its agenda item entitled "measures to eliminate terrorism" particularly on the draft Comprehensive Convention on International Terrorism (draft CCIT). It was stated that Malaysia's position on the same has been explained during the Sixth Committee and the Ad-Hoc Committee meetings at the United Nations. It was also pointed out that a deadlock in negotiations need not mean that there has to be stop in fighting terrorism and that

State still has the sovereign right to cover the grey areas by means of its own domestic legal framework. The delegate also pointed out the importance of mutual cooperation in fighting terrorism and further referred to the work done by Malaysia at other regional forums in this regard. The delegate then explained the Malaysian legal framework framed for fighting terrorism.

23. The Delegate of the **State of Kuwait** described terrorism to be the greatest evils that the international community is facing in the present day. It was pointed out that to fight terrorism there needs to be a universal strategy specifically, a clear definition of terrorism. Stating that the Arab League has taken the lead for cooperation by adopting The Arab Convention for the Suppression of Terrorism, adopted by the Council of Arab Ministers of the Interior and the Council of Arab Ministers of Justice, in Cairo, April 1998, the delegation called the attention of the member states to the definition of terrorism adopted therein. The delegate then pointed out the measures taken by Kuwait to counter terrorism and further emphasized on the need to prevent and cut the flow of money into terrorist activities.

24. Describing international terrorism as enemy of humanity which needs to be condemned by one and all, the delegate of the **State of Palestine** stated that international cooperation was imperative to curb that menace. The delegation pointed out that the killing of innocent civilians was the most dangerous aspect of this crime and that this was more so in the case of state sponsored terrorism that was being committed by Israel in the occupied territories of Palestine. The delegation called on the Member States of AALCO to raise their voices to punish Israel for its actions and made a further call for the deployment of an international force for the protection of Palestinians from State sponsored terrorism. The delegation also stated that it was important to make a distinction between resistance and terrorism.

25. The delegate of the **Republic of Iraq** described terrorism to be a great danger for protecting people as it tends to end peace and security. The delegation expressed the support of Iraq to the efforts of the international community in its efforts towards finding a solution to international terrorism and in particular reference was made to the the efforts made by the Arab league in 2011. It was proposed that AALCO could prepare a convention on terrorism based on existing UN conventions and the Arab League convention.

26. The delegate of **the Kingdom of Saudi Arabia** stated that soon his country would make legislation for combating terrorism and that once it is finalized AALCO members would be informed of the same.

II. DEVELOPMENTS IN THE AD HOC COMMITTEE ON INTERNATIONAL TERRORISM

27. The Ad-Hoc Committee on International terrorism did not meet in the year 2012 and is to be reconvened only in the year 2013.[18] At the 48th Meeting of the Fifteenth Session of the Committee, held on 15 April, 2011, it was decided by the committee to recommend that the Sixth Committee, at the sixty-sixth session of the General Assembly, establish a working group to finalize the draft comprehensive

[18] General Assembly Resolution 66/105 (13 January 2012), ¶ 25.

convention on international terrorism and continue to discuss the item included in its agenda by Assembly resolution 54/110 concerning the question of convening a high-level conference under the auspices of the United Nations.

28. On 14 January 2013, the General Assembly adopted resolution 67/99 entitled "measures to eliminate international terrorism". The General Assembly decided that the Ad Hoc Committee established by General Assembly resolution 51/210 shall, on an expedited basis, continue to elaborate the draft comprehensive convention on international terrorism and discuss the item included in its agenda by Assembly resolution 54/110 concerning the question of convening a high-level conference under the auspices of the United Nations. It was also decided that the Ad Hoc Committee is to meet from 8 to 12 April 2013 in order to fulfill the above and that its future meetings shall be decided upon subject to substantive progress in its work.

III. DEVELOPMENTS IN THE COUNTER TERRORISM COMMITTEE

29. During the reporting period, the CTC continued working on its mandate by organizing a number of programs, conferences and meetings relating to fighting terrorism. The CTC continued with organizing workshops and seminars on thematic issues. During the reporting period, the major issues considered by the committee where include countering incitement to terrorism by preventing subversion of educational, cultural and religious institutions; terrorism prevention and countering incitement to terrorism through the Internet; and preventing the abuse of non-profit organizations for terrorism financing purposes.

30. On 07 March 2013, in the informal briefing by the Chair of the CTC, it was stated that measures would be adopted to increase the transparency in the committee's work and to this end periodic informal briefings would be held for member States.[19] It was also stated that the CTED would be requested to hold periodic briefings for Member States on thematic and regional issues relating to the implementation of Resolutions 1373 (2001) and 1624 (2005). The chair also referred to the numerous other measures that are intended to be taken to ensure more attention to the thematic and regional concerns relating to the global fight against terrorism. It was further stated that the Committee, with the assistance of the CTED would work to identify the best practices, elements and good standards that would help the Member States to develop their counter terrorism strategies. It was also pointed out by the chair that terrorists are increasingly taking advantage of the developments in information technology and that this pauses numerous challenges to law enforcement. The Chairman drew the attention of the Member States to the activities proposed to be undertaken by the CTC with respect to addressing these challenges.

31. On 11 March 2013, The CTC adopted a new revised procedures for the Counter-Terrorism Committee's stocktaking of Member States' implementation of Security Council resolutions 1373 (2001) and 1624 (2005).[20] The revised procedures

[19] Informal Briefing by the Chairman of the CTC to the Member States On 07 March 2013, available at: <http://www.un.org/en/sc/ctc/docs/2013/2013-03-07-briefing_ctc_chair.pdf>

[20] Revised procedures for the Counter-Terrorism Committee's stocktaking of Member States' implementation of Security Council Resolutions 1373 (2001) and 1624 (2005), available at: <http://www.un.org/en/sc/ctc/docs/2013/2013_03_11_stocktaking_revised_procedures.pdf>

have been designed with the aim of ensuring thoroughness, consistence, transparency and even-handedness in the analysis and stocktaking of Member States' implementation of Security Council resolutions.

32. On 2 May 2013, the CTED presented before the Member States a new tool for assessing their' implementation of Security Council Resolutions 373 (2001) and 1624 (2005). The new tool that comprises of the overview for implementation assessment (OIA) and the detailed implementation assessment (DIS) replaces the previous evaluation document of the Committee.

33. During the reporting period, the Committee continued with its focus on region-specific discussions and issues identified in th3 Global Survey of the Year 2011.[21] In tune with its mandate, the committee held numerous events aimed towards enhancing the capacity of States to deal with anti-terrorism efforts.[22] In particular, on 24 May 2013, a special event was held at UN Headquarters on the topic "Countering Terrorism Through The use Of New Communications and Information Technologies".

IV. DELIBERATIONS ON THE COMPREHENSIVE CONVENTION ON INTERNATIONAL TERRORISM AT THE SIXTH COMMITTEE OF THE UNITED NATIONS GENERAL ASSEMBLY AT ITS SIXTY-SEVENTH SESSION

34. The Sixth Committee considered and made deliberations on this item at its 1st, 2nd, 3rd, 23rd, 24th, and 25th meetings held on 8 and 9 October and 6, 9 and 16 November 2012 respectively.[23]

35. At the first meeting, the Committee established a Working Group to continue with carrying out the mandate of the Ad-Hoc Committee that was established by the General Assembly. Mr. Rohan Perera (Sri Lanka) was elected as the Chairman of the Working Group. The Working Group was open to all members of the United Nations, The Specialized Agencies of the UN and the International Atomic Energy Agencies. Three meetings were held by the working group on 22 and 24 October and 6 November, 2012. At its 23rd meeting, the 6th Committee received an oral report of the chairman of the working group on the results of the informal consultations held during that session.[24]

36. During the general debate on the item, statements were made by the representatives of Canada Egypt (on behalf of the States of the Organization of Islamic Cooperation), Iran (Islamic Republic of) (on behalf of the Non-Aligned Movement), Saudi Arabia, Senegal, the United Arab Emirates, Kuwait, Pakistan, India, Thailand, Malaysia, the Syrian Arab Republic, Bangladesh, Libya, Egypt (on behalf of the African Group), China, the Democratic People's Republic of Korea,

[21] S/2009/620, annex
[22] Letter dated 20 March 2012 from the Chair of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, S /2012/172 (22 March 2012), Annex.
[23] A/C.6/67/SR.1, 2, 3, 23, 24 and 25
[24] A/C.6/67/SR.23

Qatar, South Africa, Kenya, Iraq, the Sudan, Japan, Maldives, Nigeria, the Republic of Korea, Iran (Islamic Republic of and Indonesia. The representatives of the Syrian Arab Republic, Kuwait, Saudi Arabia, Israel, the Democratic People's Republic of Korea and the Republic of Korea made statements in the exercise of the right of reply.

37. Delegations further underscored the need for multilateral action against terrorism and emphasized on the central role of the United Nations in this regard. Delegations reiterated their support for the United Nations Global Counter Terrorism Strategy and called for its full implementation in a transparent manner. The strengthening of the Counter Terrorism Implementation Task Force was called for along with a call to enhance its activities aimed at a balanced implementation of the four pillars of the strategy with equal attention to all four pillars. States welcomed the creation of the United Nations Centre for Counter Terrorism and extended their support for the proposed creation of a United Nations Coordinator for Counter Terrorism.

38. While delegations generally welcomed the working of the Security Council with respect to this issue, some of the delegations pointed out that on occasions, the resolutions of the Council has been abused. Some of the delegations also condemned the use of the resolutions to further politically motivated acts. It was further pointed out that the listing and delisting processes where still essentially based on political considerations rather than on any judicial process.

39. Delegations also welcomed the working of the CTC and the CTED and further stressed the importance of Security Council Resolution 1373 (2001) in the international efforts to counter terrorism. Some of the delegations also pointed out the importance of the work of the UNODC, UNICRI and other specialized organizations within the UN in this regard. Delegations also called for the development of partnerships to promote coordination and exchange of information between States with respect to countering terrorism. The role of regional organizations in this effort was also referred to.

40. Delegations also referred to the need to give proper support and protection for the victims of terrorist attacks and highlighted this to be an essential part of the global effort to fight terrorism.

41. Delegations also referred to the need for intercultural and interreligious dialogue aimed at fostering a culture of tolerance and the need to counter radicalization and extremism as part and parcel of any counter terrorism efforts. A number of delegations referred to the need to address the root causes of terrorism and prevent or eliminate these conditions that are responsible for the emergence and spread of terrorism. Delegations pointed out that rehabilitation, reintegration of the youth who are turning to radical methods and economic and social development of marginalized communities are also important steps to be taken to prevent the spread of terrorism. Delegations condemned acts against religious beliefs, violence in the name of religion and the use of religion to incite violence.

42. Attention was also drawn to the possible acquisition by terrorists of weapons of mass destruction and the use of information and communication technology for fund raising, recruitment etc. The links between transnational organized crime, arms

smuggling, drug trafficking and terrorist organizations was also referred to. The need to build the capacity of all the States to address these issues was also pointed out.

43. Delegations expressed support and their willingness to participate in the work of the Ad Hoc Committee established by the General Assembly. Several delegations called for the conclusion of the draft comprehensive convention on international terrorism, which States believed that would bolster the efforts of the international community on this subject by facilitating cooperation and mutual legal assistance and providing a definition of terrorism to ensure universal criminalization of acts related to terrorism. It was stressed that the finalizing the draft convention at the earliest was to be a matter of immense priority and delegations were urged to use the anticipated renewal of the mandate of the Ad Hoc Committee as an opportunity to explore new methods that would bridge the positions of all member States. Delegation urged States to engage on this issue in a constructive manner and exhibit flexibility in order to bring the process to a close at the earliest. Some of the delegations expressed support for the elements of a possible package presented by the Coordinator on the issues concerning the draft convention at the 2007 Session of the Ad Hoc Committee and pointed out that this constituted a viable solution. While some of the delegations expressed support for the 2007 proposal, they reiterated their preference for the earlier proposals, particularly on the scope of the convention. The need to make a clear definition of terrorism, that distinguished terrorism from legitimate struggles in the exercise of the right of self determination of peoples under colonial and alien domination or foreign occupation was reaffirmed. While so some delegations continued to express the view that the draft convention must address all forms of terrorism, including State terrorism and that it must also cover acts by armed forces that do not confirm to international humanitarian law. It was pointed out that in the absence of the ability to make an agreement on the convention; it was pointless to discuss the matter every year.

44. Some delegations expressed support for the proposal to convene a high-level conference under the auspices of the United Nations and it was pointed out that conference could also assist in resolving the outstanding issues that surround the draft convention. Some delegations also called for fixing a date for the high level conference. Some delegations on the other hand expressed preference for convening such a conference only after an agreement had been reached on the draft convention.

V. CONSIDERATION AT THE SIXTY-SEVENTH SESSION OF THE UNITED NATIONS GENERAL ASSEMBLY

45. At the 67th Session of the UNGA, the General Assembly Considered the Report of the Secretary General to the Assembly on "Measures to Eliminate International Terrorism". 25 In his report, the Secretary General discussed the information he received from States and from international organizations on the measures adopted to combat terrorism. Further, the current status of international instruments relating to suppression of terrorism was also discussed. The Assembly also considered the report of the Secretary General on "Technical assistance for

[25] A/67/162 (19 July 2012) and A /67/162/Add.1 (24 September 2012).

implementing the international conventions and protocols related to terrorism"[26] and on "Measures to prevent terrorists from acquiring weapons of mass destruction."[27]

46. On 14 January 2013, the General Assembly adopted resolution 67/99 entitled "measures to eliminate international terrorism".[28] The Assembly reaffirmed its commitment to Global Counter Terrorism strategy (adopted in 2006) and its previous declarations on the subject. Affirming the need to develop combating measures in conformity with international law, particularly humanitarian and refugee laws, the need for international cooperation, both among States and international organizations was stressed. The resolution called upon States to implement the Strategy and also enhance the implementation of the relevant legal instruments and to intensify the exchange of facts relating to terrorism. It was further decided by the Assembly that the Ad Hoc Committee established by General Assembly resolution 51/210 shall, on an expedited basis, continue to elaborate the draft comprehensive convention on international terrorism and discuss the item included in its agenda by Assembly resolution 54/110 concerning the question of convening a high-level conference under the auspices of the United Nations. It was also decided that the Ad Hoc Committee is to meet from 8 to 12 April 2013 in order to fulfill the above and that its future meetings shall be decided upon subject to substantive progress in its work.

47. On 4th January 2013, the General Assembly adopted resolution 67/44 on, "measures to prevent terrorists from acquiring weapons of mass destruction".[29] Noting the linkage between weapons of mass destruction and terrorism, the international community was called upon to support international efforts to prevent terrorists from acquiring weapons of mass destruction and appealed to Member States to accede to and ratify the Convention for Suppression of Acts of Nuclear Terrorism. The Assembly also mandated the Secretary-General to compile a report on measures taken by international organizations on issues relating to the linkage between the fight against terrorism and the proliferation of weapons of mass destruction and to seek the views of Member States on the issue and to include the subject matter in the provisional agenda for the 67th session.

48. On 4 January 2013, the Assembly adopted the resolution on "Preventing the acquisition by terrorists of radioactive sources".[30] The Assembly reaffirmed the importance of the existing conventions that touch upon this issue and the resolutions of the International Atomic Energy Agency on this subject. It further, called on Member States to support international efforts to prevent the acquisition and use by terrorists of radioactive materials and sources, and, if necessary, suppress such acts. It further called on States to support and endorse the efforts of the International Atomic Energy Agency to enhance the safety and security of radioactive sources, as described in General Conference resolution GC(56)/R ES/10 and to enhance the security of radioactive sources as described in the Nuclear Security Plan for 2010–2013. The resolution, further, stressed the need for international cooperation and exchange of information to achieve these ends.

[26] A /67/158 (19 June 2012).
[27] A/67/135 (10 July 2012) and A/67/135 /Add.1 (18 September 2012).
[28] A/RES/67/99.
[29] A/RES/67/44.
[30] A/RES/67/51

VI. COMMENTS AND OBSERVATIONS OF THE AALCO SECRETARIAT

49. Terrorist activities irrespective of whether they are committed by individuals, groups, non-State entities or in any other entity, poses a threat to both international peace and security and to human life and the dignity of human beings. Terrorism needs to be checked by all possible means. Any attempts to link or justify terrorism to any particular religion, race, culture or ethnic origin must be discouraged and rejected.

50. While evolving measures to counter international terrorism, it is essential that they conformity with international law, the UN Charter, human rights law, humanitarian law and refugee law. In this context, it is also important to note that counter terrorism initiatives cannot be permitted to be used as a pretext for interfering in the domestic affairs and such measures must respect the sovereignty and territorial integrity of States under all circumstances.

51. The United Nations has an indispensible role to play in any action against terrorism as the cooperation of the international community is vital to win the fight against terrorism. Being a vital issue of global relevance since no State is immune from the effects of terrorism, greater cooperation and coordination amongst all the UN Member States is essential to combat the threat. In this direction, Member States of AALCO may consider ratifying/acceding to the existing international counter terrorism conventions, including the 1997 International Convention for the Suppression of Terrorist Bombings; 1999 International Convention for the Suppression of the Financing of Terrorism; and 2005 International Convention for the Suppression of Acts of Nuclear Terrorism. The report of the CTED on the implementation of resolution 1624 (2005) of the Security Council highlights the areas on which attention needs to be bestowed and Member States may adopt measures towards that end. Apart from this, national implementation and enforcement mechanisms, including legislations are crucial in the fight against terrorism. Further, mutual legal assistance in counter-terrorism and criminal matters are of much significance. Further, the new tool, prepared by the CTED, for assessing implementation of Security Council Resolutions 373 (2001) and 1624 (2005) can be made use of by AALCO member States to make an assessment of the status of these resolutions.

52. As a result of negotiations spanning over nearly a decade under the auspicious of the United Nations, the international community has managed to increasingly come closer to adopting a comprehensive convention on terrorism. Arriving at a consensus on the definition of terrorism is in itself a major task. Though a number of versions and multiple concerns are being voiced, there appears to be growing consensus on a universally acceptable definition. The definition needs to take in to account the factors that lead to terrorism and must confirm to international law that protects basic human rights and fundamental freedoms. Framing of such a definition can be possible with the help of both the experts in the field and Member States. The proposal made by the coordinator of the Ad Hoc Committee on International Terrorism in 2007 has so far not met with any open objection from the delegations. Member States are encouraged to clarify their position and concerns regarding the 2007 proposal so as to enable its consideration and to propose any alternate language. AALCO Member States can contribute more usefully by working together in the on-going negotiations on the

"Draft Comprehensive Convention on International Terrorism", particularly as regards finding an acceptable definition of "terrorism".

53. The AALCO Secretariat could explore the possibility of jointly convening a seminar or joint programme with other international organizations, especially the United Nations Office on Drugs and Crimes (UNODC), or Member States of AALCO on dealing with the legal aspects of combating terrorism.

VII. ANNEX

SECRETARIAT'S DRAFT
AALCO/RES/DFT/52/S 7
12 SEPTEMBER 2013

INTERNATIONAL TERRORISM
(*Non-Deliberated***)**

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

Having C**onsidered** the Secretariat Document No. AALCO/52/ HEADQUARTERS (NEW DELHI)/2013/S 7;

Recalling the relevant international instruments, where applicable, and resolutions of the United Nations General Assembly and the Security Council relating to measures to eliminate international terrorism and the efforts to prevent, combat and eliminate terrorism;

Taking note of the ongoing negotiations in the Ad Hoc Committee established by the General Assembly of the United Nations by its resolution 51/210 of 17 December 1996 to elaborate a Comprehensive Convention on International Terrorism based on the proposal made by the Republic of India;

Expressing grave concern about the worldwide increase in acts of terrorism, which threaten the life and security of innocent people and impede the economic development of the concerned States;

Recognizing the need for the international community to collectively combat terrorism in all its forms and manifestations;

Reaffirming that international effort to eliminate terrorism must be strengthened in accordance with the Charter of the United Nations and taking into account international human rights law, international humanitarian law, and refugee law;

Calling for an early conclusion and the adoption of a comprehensive convention on international terrorism by expediting the elaboration of a universally acceptable definition of terrorism:

1. **Encourages** Member States to consider ratifying/acceding to the relevant conventions on terrorism.

2. **Also encourages** Member States to participate in the work of the above mentioned Ad Hoc Committee on International Terrorism.

3. **Directs** the Secretariat to follow and report on the progress of work in the Ad Hoc Committee on International Terrorism.

4. **Also directs** the Secretariat to obtain national legislation or information on national legislation, as the case may be, on combating terrorism to facilitate exchange of information among Member States.

5. **Requests** the Secretary-General to hold seminars and joint programmes in cooperation with other international organizations, especially United Nations Office on Drugs and Crime, on dealing with the legal aspects of combating terrorism, and

6. **Decides** to place the item on the provisional agenda of its Fifty-Third Annual Session.

IV. ESTABLISHING COOPERATION AGAINST TRAFFICKING IN WOMEN AND CHILDREN

ESTABLISHING COOPERATION AGAINST TRAFFICKING IN WOMEN AND CHILDREN
(Non-Deliberated)

CONTENTS

ESTABLISHING COOPERATION AGAINST TRAFFICKING IN WOMEN AND CHILDREN
(Non-Deliberated)

I. INTRODUCTION

A. Background

1. The Government of Republic of Indonesia proposed the topic "Establishing Cooperation against Trafficking in Women and Children" on the agenda of the AALCO at its Fortieth Annual Session held in New Delhi, in June 2001. Considering the relevance of this topic and impact of this problem on the countries in the Asian and African region, this topic was included in the agenda item of AALCO's Work Programme. The legal regime on this issue comprises of United Nations Convention against Transnational Organized Crime (TOC Convention) and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (Trafficking in Persons Protocol) and were adopted in the year 2000. The Convention entered into force on 29 September 2003. The Convention has 147 signatories and 177 State Parties to it and 45 AALCO Member States are either parties or signatories to it. The Trafficking in Persons Protocol came into force on 25 December 2003 and till date has 117 Signatories and 157 countries as parties to it and 35 Member States of AALCO are either parties or signatories to it.

2. At the Forty-Third Annual Session of AALCO, held in June 2004 in Bali, Republic of Indonesia, a resolution (RES/43/SP 1) adopted after in-depth and thought provoking presentations and discussions at the Special Meeting on the topic, reiterated inter alia, the request for Member States, who are not a party to the TOC Convention and its Trafficking in Persons Protocol, to consider becoming parties to them. It further requested Member States to transmit to the AALCO Secretariat their national legislations, if any, on this subject.[31] Also, the resolution directed the Secretary-General to develop, in cooperation with Member States, a Model Law for the criminalization of trafficking in persons as well as protection of victims of trafficking, before, during and after criminal proceedings, based on human rights approach with a view to developing a concrete action plan for a joint effort against trafficking in persons, especially women and children.[32]

3. As a preliminary initiative of fulfilling the mandate entrusted via the said resolution towards drafting a Model Law, the Secretariat studied the national legislations received from the Member States of AALCO in the light of the Trafficking in Persons Protocol, prepared an outline with a view to developing a concrete action plan for a joint effort against trafficking in persons, especially women and children. Accordingly an outline of the model law in the form of addendum was presented at the Forty-Forth Annual Session, for consideration of the Member States.

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[31] So far the Secretariat has received responses from the following Member States relating to their respective national legislations on the topic: **Tanzania, Sultanate of Oman, Singapore, People's Republic of China, Republic of Korea, Republic of Indonesia, Republic of Uganda, Philippines, Japan, Mauritius, Cyprus, Ghana, Qatar, United Arab Emirates, Sudan, Nepal, Lebanon, Myanmar, Syrian Arab Republic, Arab Republic of Egypt, Malaysia, Thailand and Kuwait.**

[32] Operative Para 9 of the Resolution (RES/43/SP1).

4. During the Forty-Fourth Annual Session of the AALCO in Nairobi, Kenya, in June-July 2005, delegations reiterated and emphasized on the urgent need for cooperation within the framework of the TOC Convention and the Trafficking in Persons Protocol. Most of the delegations affirmed the need for the model legislation on this issue. Thereafter, at the Forty-Fifth Annual Session of the AALCO at Headquarters, New Delhi, India in April 2006, the Secretariat presented a draft model legislation consisting of Preamble and five draft articles. The delegates from various Member States had an in-depth discussion on this topic. Further, at the Forty-Sixth Annual Session of AALCO at Cape Town, Republic of South Africa, in July 2007, the Secretariat, revised the draft model legislation and presented a set of Preamble and five draft articles. At the Forty-Seventh Annual Session, the Secretariat report had briefly traced the nexus between trafficking and international migration issues, and had requested its Member States for having safe migration laws and rules in its territory. The Secretariat report for the Forty-Eighth Annual Session highlighted Women's rights that are affected while being trafficked; the International legal instruments that cover their rights and the legal obligations of the States in ensuring their rights. A Special Half-day meeting was held on "Transnational Migration: Trafficking in Persons and Smuggling of Migrants" jointly by Government of Malaysia and AALCO. At the Forty-Ninth Annual Session of AALCO, the Secretariat brief covered the developments that occurred at various International Organizations in relation to this area of relevance. This topic was a non-deliberated item.

5. During the Session, a proposal was made to convene a Workshop on "Trafficking in Persons, Smuggling of Migrants and International Cooperation". Subsequently, a workshop on this topic was jointly organized by the AALCO and the Government of Malaysia in Putrajaya, Malaysia from 24 to 26 November 2010. At the workshop, one of the suggestions that emerged was to address the issue of Mutual Legal Assistance in Criminal matters for both Asian and African regions. At the Fiftieth Annual session of AALCO held in Colombo, Democratic Socialist Republic of Sri Lanka from 27 June to 1 July 2011, a Half-Day Special Meeting on "Trafficking in Women/Children, Migrant Workers and Protection of Children" was jointly organized by the Government of Sri Lanka, AALCO, International Organization for Migration (IOM) and United Nations Children's Fund (UNICEF). The meeting deliberated upon a wide range of issues pertaining to trafficking, its nexus with migration, effects of trafficking on women and children and child trafficking in Asia. However, this topic was a non-deliberated item at the Fifty-First Annual session of AALCO held in Abuja, Nigeria from 18 to 22 June 2012.

II. RECENT DEVELOPMENTS

A. Sixth Session of the Conference of Parties to the United Nations Convention against Transnational Organized Crime (15 to 19 October 2012, Vienna, Austria)

6. The sixth regular session of the Conference of Parties (COP) to the TOC Convention[33] was convened from 15 to 19 October 2013 at Vienna, Austria. The COP

[33] For "Report of the Conference of the Parties to the United Nations Convention against Transnational Organized

considered "Review of the implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto: Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children". Three documents prepared by the UNODC Secretariat were considered while deliberating upon this agenda item by the COP:

(a) Report on activities of the United Nations Office on Drugs and Crime to promote and support the implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime[34];
(b) Note on transmitting the recommendations adopted by the Working Group on Trafficking in Persons at its meeting held in Vienna from 10 to 12 October 2011[35]; and
(c) Report on best practices for addressing the demand for labour, services or goods that foster the exploitation of others[36].

7. It may be recalled that in February 2012, the UNODC had issued "A comprehensive strategy to combat trafficking in persons and smuggling of migrants" to clarify its activities and priorities in the following areas: (a) providing technical assistance for the implementation of the Trafficking in Persons Protocol; (b) supporting inter-agency cooperation and coordination; and (c) managing the United Nations Voluntary Trust Fund for Victims of Trafficking in Persons, Especially Women and Children. The UNODC global programmes on trafficking in persons and smuggling of migrants offers expertise to its Member States in the following key areas upon requests: (a) legislative assistance; (b) criminal justice responses and international cooperation; (c) data collection and research; (d) prevention and awareness-raising; and (e) victim protection and support.

8. During the Conference, states pointed out the measures taken at the national level to combat trafficking in persons, including ratification of the Trafficking in Persons Protocol. Few other measures included the adoption of national action plans, establishment of national coordination and information collection mechanisms, adoption of measures for the non-criminalization and enhanced protection of and assistance for victims of trafficking, taking measures for seizing and recovering assets, development of awareness-raising activities and the elaboration of bilateral and regional agreements.

9. It was reiterated that trafficking in persons was a serious form of organized crime that affects countries of origin, transit and destination at equal level. Hence, it required a holistic, multidimensional approach that balanced criminal justice aspects with human rights. The need for a victim-centred approach to fight trafficking in persons, the importance of identifying victims of the same and the establishment of comprehensive protection and assistance mechanisms for victims and witnesses were highlighted.

Crime on its sixth session, held in Vienna from 15 to 19 October 2012", see UN Document No. CTOC/COP/2012/15 dated 5 November 2012.
[34] See document no. CTOC/COP/2012/2.
[35] See document no. CTOC/COP/2012/3.
[36] See document no. CTOC/COP/2012/4.

10. Appreciating the reports of the secretariat on best practices for addressing the demand for labour, services or goods that foster the exploitation of others, it was observed that it could be used as a baseline for information on current global efforts. The Conference also emphasized the need to continue the analysis of key concepts of the Trafficking in Persons Protocol and welcomed the UNODC issue paper on abuse of a position of vulnerability and other means within the definition of trafficking in persons. The recommendations and the outcome of the recent meeting of the Working Group on Trafficking in Persons including the recommendations regarding future areas of work and support for the extension of its mandate, were noted.

11. The Conference adopted the following resolutions on: (i) Ensuring effective implementation of the TOC Convention and the Protocols thereto, (ii) Promoting accession to and implementation of the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the TOC Convention, (iii) Implementation of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the TOC Convention, and (iv) Implementation of the provisions on technical assistance of the TOC Convention.

12. The fifth session of the Working Group on Trafficking in Persons would be held from 6 to 8 November 2013 in Vienna, Austria. The Conference decided that the seventh regular session of the Conference of Parties to the TOC Convention would take place from 6 to 10 October 2014.

B. Fifty-seventh session of the Commission on Status of Women (4 to 15 March 2013, UN Headquarters, New York)

13. The Fifty-seventh session of the Commission on Status of Women[37] was held from 4 to 15 March 2013 at the United Nations Headquarters, New York. In order to provide input to the annual ministerial review and the development cooperation forum of the UN Economic and Social Council (ECOSOC), certain agreed conclusions adopted by the Commission on Status of Women were transmitted to the ECOSOC in accordance with resolution 2008/29 of 24 July 2008 of the ECOSOC. The Report of the Special Rapporteur Ms. Rashida Manjoo on "Violence against women, its causes and consequences" was considered, which is pertinent to the transnational organized crime of trafficking in persons.

14. The agreed conclusions adopted by the Commission reiterated on commitments by member states to strengthen national efforts with due international cooperation for addressing the rights and needs of women and girls affected by natural disasters, armed conflicts, other complex humanitarian emergencies, trafficking in persons and terrorism which largely forms part of violence against women and girls. Emphasis was laid on need to achieve full realization of the

[37] For "Report of the fifty-seventh session (4-15 March 2013) of the United Nations Commission on Status of Women" See ECOSOC document No. E/2013/27 and E/CN.6/2013/11.

internationally agreed goals and commitments related to gender equality and the empowerment of women, including the Millennium Development Goals.

15. The Commission, among other things, urged that appropriate measures should be taken to:

(i) address the root factors, including external factors, that contribute to trafficking in women and girls;

(ii) prevent, combat and eliminate trafficking in women and girls by criminalizing all forms of trafficking in persons, in particular for the purpose of sexual and economic exploitation,

(iii) strengthen existing civil and criminal legislation with a view to providing better protection of the rights of women and girls and by bringing to justice and punishing the offenders and intermediaries involved, including public officials, by protecting the rights of trafficked persons and preventing revictimization;

(iv) ensure that identified victims of trafficking in persons are not penalized for having been trafficked;

(v) provide identified victims of trafficking appropriate protection and care, such as rehabilitation and reintegration in society, witness protection, job training, legal assistance, confidential health care and repatriation with the informed consent of the trafficked person, regardless of their participation in any legal proceeding; and accelerate public awareness, education and training to discourage the demand that fosters all forms of exploitation;

(vi) strengthen international cooperation by development assistance commitments, sharing of information and communications and prevent their misuse to combat perpetration of violence against women and girls, including the criminal misuse of information and communications technology for sexual harassment, sexual exploitation, child pornography and trafficking in women and girls, and emerging forms of violence, such as cyberstalking, cyberbullying and privacy violations that compromise the safety of women and girls; and

(vii) ensure that all workplaces are free from discrimination and exploitation, violence, and sexual harassment and bullying which should be appropriately prohibited through regulatory measures.

16. While considering the report of the Working Group on Communications on Status of Women, the Commission noted that communications regarding other forms of violence against women and girls, including domestic violence, early marriage, child and forced marriage, female genital mutilation/cutting, and trafficking in women and girls for the purpose of sexual exploitation, were forwarded to the Commission. There have also been communications regarding:

(i) failure by States, resulting in a climate of impunity, to exercise due diligence to prevent such violations and to adequately and in a timely manner investigate, prosecute and punish the perpetrators,

(ii) failure by States to provide adequate protection, support and reparation for victims and their families, and

(iii) failure by States to ensure access to justice.

17. The Fifty-eighth session of the Commission on Status of Women is scheduled to be held from 10 to 21 March 2014 at the United Nations Headquarters, New York.

C. 22nd Session of the Commission on Crime Prevention and Criminal Justice (22 to 26 April 2013, Vienna, Austria)

18. The 22th Session of the UNODC Commission on Crime Prevention and Criminal Justice (CCPCJ)[38] was held from 22 to 26 April 2013 in Vienna, Austria. The thematic discussion was on "challenges posed by emerging forms of crime that have a significant impact on the environment and ways to deal with it effectively." The sub-themes for the thematic discussion held at this session were: (i) "Emerging trends and challenges, including those linked to data collection and its analysis, criminalization and criminal justice"; (ii) "Challenges linked to related offences"; (iii) "Possible ways to increase effectiveness of preventive and responsive measures of criminal justice systems, including using existing international treaties to combat crime, as well as on the basis of strengthening partnerships between public and private sectors and civil society"; and (iv) "International collaboration and partnerships, including the role of the United Nations Office on Drugs and Crime in counteracting unlawful conduct that may have a negative impact on the environment".

19. During the thematic discussion it was stated that the international community was faced with increasingly diverse types of emerging forms of crime that had a significant impact on the environment, ranging from illegal trafficking in wild fauna and flora to illegal logging, illegal fishing, illegal waste management, illegal mining and trafficking in precious metals. Therefore, immediate attention must be sought by the international community to address poaching and trafficking in wildlife, especially in those species on the verge of extinction. This became more aggravated due to the lack of an internationally accepted definition of such "environmental crimes" and the fact that such crimes remained underreported or unreported posed challenges for data collection and analysis.

20. Some Member States stressed that wildlife and forest crime was a form of organized crime. Others identified clear links with other transnational organized crimes, including drug trafficking, firearms trafficking, corruption, money-laundering and trafficking in human beings, as well as highly violent crimes and, in some cases, terrorism. Environmental crimes not only affected the environment by threatening biodiversity and destroying ecosystems but also damaged sites of national heritage and undermined sustainable economic and social development. Such crimes had a negative impact on communities and livelihoods, especially in developing countries. In some cases, serious consequences for human health and threats to national security and stability had been observed. Those challenges required a global solution and had to be addressed at the national, regional and international levels through a comprehensive, balanced and coordinated approach tackling both supply and demand and consisting of measures such as prevention activities, reducing demand, improving legal frameworks, strengthening law enforcement activities, promoting inter-agency

[38] For "Report on the twenty-second session (7 December 2012 and 22-26 April 2013): United Nations Commission on Crime Prevention and Criminal Justice" See document no. E/2013/30, E/CN.15/2013/27.

cooperation between police, customs and border control authorities, building the capacity of judges and prosecutors in order to better adjudicate crimes, and strengthening data collection and information-sharing. The involvement of affected communities had proven very helpful in natural resource management and other successful strategies. On those notes, there was a need to effectively utilize the existing international legal framework, including the TOC Convention, the United Nations Convention against Corruption, and the Convention on International Trade in Endangered Species of Wild Fauna and Flora.

21. As per the mandate received at the twenty-first session of the CCPCJ to direct certain institutes to convene a workshop, the United Nations Crime Prevention And Criminal Justice Programme Network Institutes (PNI) held A Workshop on "Emerging Forms of Crime that have an Impact on the Environment: Lessons Learned", wherein the following topics were discussed: (i) Emerging Crimes that have an Effect on the Environment: Scope, Trends and Links to Corruption and Organized Crime, (ii) Effect, Issues and Challenges for Victims of Crimes that have a Significant Impact on the Environment, (iii) Combating transnational trafficking of waste: lessons learnt from Italy, (iv) Strengthening the Response of the Criminal Justice System on the National and International Level: Good Practice, and (v) Emerging Crimes that have an effect on the Environment: Scope, Trends and links to Corruption and Organized Crime.

22. The ECOSOC took note of the report of the 22nd session of the CCPCJ, decided that the thematic discussion at the forthcoming 23rd session would be on "International cooperation in criminal matters" as per its decision 2010/243 of 22 July 2010.

III. COMMENTS AND OBSERVATIONS OF THE AALCO SECRETARIAT

23. In view of the growing concern of states towards close nexus between environmental crimes, misuse of information and technology for organizing various forms of trafficking including trafficking in women and children leading to exploitation in all manifestations, it is essential that Member States of AALCO actively provide their comments in those areas. It is also essential to continue improving regional and international cooperation in addressing environmental crime. At the national level, strengthened partnerships were required, including the involvement of local communities, civil society organizations, academic and research institutes, the private sector and international organizations, in order to ensure a consolidated response to that type of crime.

24. Further, thematic discussion for at the 23rd of the CCPCJ would be on "International cooperation in criminal matters", wherein Member States are invited to analyse the obstacles that their national judiciaries encountered in terms of mutual legal assistance and extradition with regard to such crimes. Recalling that many of the AALCO Member States have bilateral agreements to address mutual legal assistance and extradition in criminal matters, it would be highly recommended to transmit principles and provisions to the CCPCJ to incorporate the concerns of developing

countries which have state practice in these areas. AALCO welcomes the *Global Report on Trafficking in Persons 2012* published by the UNODC in December 2012. The Report explains the global trafficking patterns, its flows, forms of exploitation, regional patterns and global criminal justice system's response. Various measures have been taken by AALCO Member States to understand this issue and address the concerns of the victims of trafficking in persons especially women and children. Most of the Member States of AALCO are either parties or signatories to the TOC Convention and its Trafficking in Persons Protocol, their efforts in terms of adhering to these instruments, is a manifest example of recognising this issue as a menace that needs to be addressed effectively at all levels.

IV. ANNEX

SECRETARIAT DRAFT
AALCO/RES/52/S 8
12 SEPTEMBER 2013

RESOLUTION ON ESTABLISHING COOPERATION AGAINST TRAFFICKING IN WOMEN AND CHILDREN
(Non-Deliberated)

The Asian-African Legal Consultative Organization at its Fifty-Second Annual session,

Considering the Secretariat Document No. AALCO/52/HEADQUARTERS SESSION (NEW DELHI)/2013/S 8;

Being Mindful of the increasing number of individuals being exploited through trafficking in persons especially women and children and smuggling of migrants, including from the Asian-African region;

Convinced of the need to eliminate all forms of trafficking in persons and smuggling of migrants and bearing in mind the overlapping nature between trafficking in persons and smugglings of migrants, which are flagrant violations of human rights;

Noting the continuing efforts of Member States in combating trafficking in persons and smuggling of migrants, and encouraging them to inform and update the AALCO Secretariat of pertinent developments in their respective States, in order to share experience amongst Member States;

Also noting the increasing environmental crimes and various forms of trafficking in persons, especially women and children;

Acknowledging with appreciation that some Member States have submitted to the AALCO Secretariat their national legislations and other relevant information related to the topic, and urges other Member States to do the same:

1. **Encourages** the Member States which are not yet party to consider ratifying/acceding to the UN Convention against Transnational Organized Crime and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, adopted in 2000;

2. **Directs** the Secretariat to follow and report on the developments in this regard, including the work undertaken by other fora;

3. **Mandates** the Secretary-General to constitute an open-ended Committee of Experts to conduct study on ways and means to enhance mutual legal assistance in criminal matters among Member States for their further consideration;

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

V. THE INTERNATIONAL CRIMINAL COURT: RECENT DEVELOPMENTS

AALCO/52/HEADQUARTERS (NEW DELHI)/2013/S 9
For Official Use Only

THE INTERNATIONAL CRIMINAL COURT: RECENT DEVELOPMENTS (*Non-Deliberated*)

CONTENTS

THE INTERNATIONAL CRIMINAL COURT: RECENT DEVELOPMENTS
(Non-Deliberated)

I. INTRODUCTION

A. Background

1. The International Criminal Court (ICC), governed by the "Rome Statute"[39], is the first permanent; treaty based international criminal court established to end impunity for the perpetrators of the most serious crimes of international concern: the Crimes of Genocide, Crimes against Humanity, War Crimes and the Crime of Aggression.[40] The Court may exercise jurisdiction over such international crimes only if they were committed on the territory of a State Party or by one of its nationals. These conditions however do not apply if a situation is referred to the Prosecutor by the United Nations Security Council, or if a State makes a declaration accepting the jurisdiction of the Court. The Prosecutor can initiate an investigation on the basis of a referral from the Security Council or from a State Party. In addition, investigations may also be initiated *propio motu* on the basis of information on crimes within the jurisdiction of the court, received from individuals or organizations.

2. The Rome Statute was adopted on 17 July 1998 and it entered into force on 1 July 2002. As on 30 January 2013, 138 States have signed the Treaty, of which 121 States have ratified it. [41] Out of this 32 Countries are African States[42] and 16 are from Asia – Pacific Region.[43] The ICC is an independent judicial body and is not a part of

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[39] Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by procesverbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002.

[40]The definition of crime of aggression and the conditions under which the court could exercise jurisdiction with respect to that crime was included in the Rome Statute by way of its amendment at the first review conference of the Statute, held between 31 May and 11 June 2010. However, the conditions for entry into force decided at Kampala provide that the Court shall refrain from exercising jurisdiction over the crime until 1 January 2017, after which a decision is to be made by States Parties to activate the jurisdiction.

[41] United Nations Treaty Collection, Entry on Rome Statute, Available at : <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en> accessed 30 January 2013. The last state that ratified the Treaty was Guatemala on 2 April, 2012.

[42] Burkina Faso, 30 November 1998; Senegal, 2 February 1999; Ghana, 20 December 1999; Mali, 16 August 2000; Lesotho, 6 September 2000; Botswana, 8 September 2000; Sierra Leone, 15 September 2000; Gabon, 20 September 2000; South Africa, 27 November 2000; Nigeria, 27 September 2001; Central African Republic, 3 October 2001; Benin, 22 January 2002; Mauritius, 5 March 2002; Democratic Republic of the Congo, 11 April 2002; Niger, 11 April 2002; Uganda, 14 June 2002; Namibia, 20 June 2002; Gambia, 28 June 2002; United Republic of Tanzania, 20 August 2002; Malawi, 9 September 2002; Djibouti, 5 November 2002; Zambia, 13 November 2002; Guinea, 14 July 2003; Congo, 3 May 2004; Burundi, 21 September 2004; Liberia, 22 September 2004; Kenya, 15 March 2005; Comoros, 18 August 2006; Chad, 1 January 2007 and Madagascar, 14 March 2008;Seychelles, 10 August 2010

[43] Fiji, 29 November 1999; Marshall Islands, 7 December 2000; Nauru, 12 November 2001; Cyprus, March 2002; Cambodia, 11 April 2002; Mongolia, 11 April 2002; Jordan, 11 April 2002; Tajikistan, 5 May 2002; Timor-Leste, 6 September 2002; Samoa, 16 September 2002;

the United Nations Organizations. Although, the Court's expenses are funded primarily by States Parties, it also receives voluntary contributions from governments, international organizations, individuals, corporations and other entities. As on 30 January 2013, 72 States have ratified/acceded and 62 States have signed the Agreement on the Privileges and Immunities of the International Criminal Court.[44]

3. The Statute places the primary responsibility on States for the investigation and prosecution of the crimes. The Court works on the principle of complementarity to the efforts of the States in investigating and prosecuting international crimes. The Court is the focal point of an emerging system of international criminal justice which includes national courts, international courts and tribunals with both national and international components (hybrid tribunals). The implementation of the Rome Statute in domestic legal systems also has positive effects on wider aspects of the national justice system, such as offering greater access to justice for all and setting higher standards of due process for the accused. And the powerful deterrent effect of the Statute may increasingly help safeguard the rights and dignity of future generations.

4. As on 25 February 2013, 18 cases in 8 Situations have been brought before the Court. Four State Parities to the Statute – Uganda, The Democratic Republic of Congo, the Central African Republic and Mali have referred situations ongoing in their territories to the Court. In addition, the Security Council has referred the situation in Darfur, Sudan and in Libya – both non-state Parties. The Prosecutor has opened an investigation in all of the above situations. On 31 March 2010 the Pre-Trial Chamber Granted the Prosecutor authorization to open and investigation *proprio motu* with respect to the situation in Kenya. On 3 October 2011, the Pre-Trial Chamber granted permission to the Prosecutor's request for authorization to open investigation *proprio motu* into the situation in Côte d'Ivoire.

5. This Secretariat Report prepared for the Fifty-Second Annual Session of AALCO seeks to highlight the developments that have taken place after the Fifty-First Annual Session of the Organization.

II. AALCO'S WORK PROGRAM ON ICC

A. Consideration of the Item at the 51st Annual Session of AALCO, Abuja, Nigeria.

6. At the opening of the Annual Debate, Mr. Mohammed Bello Adoke, SAN, CFR, Honourable Attorney General of the Federation and Minister of Justice**, Nigeria** pointed out that A large number of the State Parties to the Rome Statute of the International Criminal Court (ICC) are from African and Asian Continents. HE stated that t he African Continent alone has 33 State Parties, yet the relationship between the

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Republic of Korea, 13 November 2002; Afghanistan, 10 February 2003; Japan, 17 July 2007 Cook Island, 18 July 2008 Bangladesh, 23 March 2010 and Maldives on 21 September 2011.

[44] United Nations Treaty Collection, Entry on Agreement on the Privileges and Immunities of the International Criminal Court., available at: <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-13&chapter=18&lang=en> accessed 30 January, 2013.

ICC and the African Union has been less than satisfactory and that there was a need for the ICC to engage Africa constructively in the global effort to end impunity.

7. The Secretary- General went on to talk about the circumstances surrounding the establishment of the ICC and its mandate to dispense justice without undermining peace processes. The SG while noting the operational reality of the ICC mentioned the first verdict of the Trial Chamber I, which held Thomas Lubango Dyilo guilty of war crimes. Further, the SG enlisted the issues for deliberation at the Fifty-First Annual Session. He then addressed the significant role of the ICC in the International Criminal Justice system by discussing the core features that enhance its achievements. The SG firstly spoke about the expansive territorial and subject- matter jurisdiction of the ICC, proceeding to the principle of complementarity under the Rome Statute. Another feature of the ICC discussed was the relationship between the UN and the ICC, forged by the Relationship Agreement of 2004, and progressively evolving through cooperation requests. The SG also spoke about the victim outreach efforts undertaken by the ICC, including ordering reparations for victims and the establishment of a Trust Fund to assist victims.

8. The SG mentioned how the ICC practices the principle of individual responsibility in order to neutralize the major players in the perpetration of serious crimes. He also mentioned that far from being an obstacle to peace, the ICC creates conditions conducive to reconciliation and negotiation processes by focusing international attention towards these horrific crimes so as to help bring the belligerents to the negotiating table and help to marginalize those who bear the greatest responsibility for serious crimes and exclude them from the negotiating frame.

9. The SG stated that merely ratifying the Rome Statute was not enough and genuine commitment to the Court required the adoption of necessary implementing legislation. He also mentioned that the principle of complementarity needs to be further strengthened. He stated that the ICC has regrettably evoked lesser participation from Asian states.

10. The SG finally, went on to discuss the issues concerning the relationship between non-party States and the Rome Statute, broadly divided into questions of jurisdiction of the Court and cooperation with the Court. Some concerns raised by non- State parties were regarding the immunities of Heads of States particularly if it is a Monarch as well as the cost entailing membership to the ICC. The SG said that the other major challenges before the ICC are mainly universality, sustainability and complementarity. He concluded by stating that in order to achieve universality, sustainable efforts should be taken to iron out the misconceptions surrounding the Rome Statute and thereby accommodate the non-States parties in to the system.

11. The Leader of the Delegation of the **State of Kuwait** stated that he completion of the Statute of the International Criminal Court after the definition of aggression crime at the end of the activities of Kampala Review Conference 2010, invites is to put this International Court before its responsibilities and urge it on standardization of conviction and arrest. Congratulating Mrs. Fatou Bensouda on assuming post of the Prosecutor of the International Criminal Court, the delegate expressed his hope that

this would change the policies of the ICC and achieve with that the complete international justice, far from mixing the law with international political balance.

12. The Leader of the Delegation from the **Republic of Korea** Stated that Since the establishment of the ICC, the Republic of Korea has fulfilled its obligations as a State Party with sincerity and particular attention. The Government of the Republic of Korea, her asserted, has contributed to the effective functioning of the ICC by providing voluntary contributions and also by proactive leadership of H.E. Judge Sang-Hyun Song as the President of the Court. The Republic of Korea, according to him, will continue to make every effort to support the Court in order to eradicate the culture of impunity by bringing about international criminal justice.

13. The representative of **the People's Republic of China** stated that his country supports to establish an independent, impartial, effective and universally recognized international criminal court to effectively punish the most serious international crimes. He further called upon the curt t he court to get rid of prejudice and political distraction, to win the trust of the state parties from developing countries.

14. The Delegation of **Republic of Yemen** urged the Member States of AALCO to join Rome Statute on the International Criminal Court and during limited period of time not exceeding two years. He pointed out that in the past, the international community had not taken adequate measures to encourage Yemen for joining the Rome Statute by support or pressure and that It was advisable that today Legal Consultative Organization provides necessary incentives to the Yemeni government and the other authorities through support for the procedure of ratification be done as quickly early as possible.

15. The delegate representing **Tanzania** stated that Tanzania remains a staunch member of Rome Statute and recognizes the significant role that the Court plays in fostering international peace and security as well as the dispensation of international justice. He further stated that, however, they are also mindful of the recent developments such as the sentiments of *double standards* which have brought the prominence of the Court to test. It was strongly appealed that efforts should be taken to rectify the status of this important Court.

16. The representative of **South Africa** stated that South Africa was proud to have been part of the African Group, the biggest block at the Rome negotiations, which vigorously supported the adoption of the Rome Statute. It was stated that the South Africa firmly believes that the scourge of impunity must also be addressed by keeping in place an effective system of individual criminal liability for international crimes, thereby giving full effect to the prohibition of aggressive war in the Charter of the United Nations. He further stated that in this regard, it is to be remembered that complementarity forms the cornerstone of the Rome Statute, and that the International Criminal Court will only intervene once it is clear that the national criminal jurisdiction will not proceed. It was pointed out that in order to fight impunity where it begins, it is the challenge of all the AALCO Member States to assist each other to strengthen national jurisdictions to effectively investigate and prosecute these crimes. The delegation further reiterated call for all the AALCO Member States to ratify the Rome Statute as the battle against impunity will only be won once universal ratification of the Rome Statute has taken place. Further, the delegation called on all

the AALCO Member States to support the election of African and Asian candidates for senior positions in the International Criminal Court as well as to continue to engage with the International Criminal Court.

III. ASSEMBLY OF THE STATE PARTIES OF THE ROME STATUTE

17. Part 11 of the Rome Statute provides for the Assembly of States Parties (ASP), which is the management oversight and legislative body of the International Criminal Court. It comprises of representatives of the States that have ratified and has acceded to the Rome Statute. Each State Party is represented by a representative who is proposed to the Credential Committee by the Head of the State of the Government or the Minister of Foreign Affairs. Each State Party has one vote, however every effort must be taken to reach decisions by consensus and votes are taken only in the absence of that. Other States, which have either signed the Statute or signed the Final Act of the Rome Diplomatic Conference, may sit in the Assembly as Observers. The Bureau of Assembly of States Parties consisting of a President, two Vice Presidents and 18 members are elected by the Assembly for a term of three years. The election is based on the principles of equitable geographic distribution and adequate representation of the principal legal systems of the world. The Assembly is responsible for the adoption of the normative texts, the budget and the election of the Judges and of the Prosecutor and the Deputy Prosecutor. It meets at least once in a year.

A. The Eleventh Session of the Assembly of State Parties (ASP XI)

18. The Eleventh Annuals Session of the Assembly of State Parties (the "ASP") was held at The Hague, The Netherlands from 14 to 22 of November, 2012. The Assembly adopted 8 Resolutions on: budgeting, amendment of Rules of Procedure and Evidence by way of addition of Rule 132 *bis* (on designation of a judge for the preparation of the trial), on permanent premises, on independent oversight mechanism, on co-operation, complementarity, victims and reparations & THE strengthening OF the ICC and the ASP. The ASP also made a Recommendation concerning the election of the Registrar of the International Criminal Court. The General Debates of the ASP was held on 15th November 2012. The representatives of the States Parties, Observer States, Intergovernmental Organizations and Non-Governmental Organizations had participated in the General Debates. 12 States who are members of AALCO had also participated in the debate (eleven as parties to the Rome Statute and one as an Observer. AALCO had also participated in the debate in its capacity as an Intergovernmental Organization. The Secretary – General of AALCO presented the views of the Organization at the General Debate.

B. Statements by Member States of AALCO.

19. The representatives of the following Member States of AALCO had presented their views at the general debate: Botswana, Bangladesh, Ghana, Japan, Kenya, Nigeria, Republic of Korea, Sierra Leone, South Africa, and Uganda. The Representative of China had also presented the views of his State, in its capacity as an Observer State.

20. The representative of **Bangladesh** reiterated its commitment to the purpose and principles of the Rome Statute. It was asserted that it is important for the pursuit

of peace that criminals are brought to justice in all cases of crimes against humanity and that irrespective of how mighty the perpetrator is or where the crime is committed no one must be immune from punishment or the crime must not go unnoticed. It was further pointed out that only a sound international mechanism can prevent such instances of crimes against humanity and that in this lies the paramount contribution of the ICC. The delegate pointed out that the ICC is gaining increasing global recognition and that persons in power would now be repeatedly reminded that a permanent international tribunal would bring perpetrators of heinous crimes is now in existence. Acknowledging that financial constraints have come again and again in relation to the ICC, the delegate however underscored the responsibility of the Member States to ensure that the Court's ability to work does not suffer due to overambitious consciousness over budget. Referring to the Prosecutor's statement that anymore austerity would seriously affect the working of the Court, the delegate pointed out that the same would only hurt the very purpose of the ICC and that the Member States has a responsibility to support and institution that has been loaded with an important mandate and from which the International Community expects so much to be instrumental in ending the era of immunity.

21. The representative of **Botswana** pointed out that the ICC has developed into a strong force against impunity and has set itself apart in providing refuge for victims of crimes against humanity and grave violation of human rights. The delegate characterized the inclusion of aggression into the list of crimes over which the Court has jurisdiction as an indication of the commitment of the States Parties to fighting impunity and safeguarding international peace and security and the protection of international citizenry. It was pointed out that the basic founding principle of the Statute was complementarity, by which the court is allowed to intervene only where the States were unwilling or unable to prosecute. The importance of maintaining the mutual relationship between the Court, States Parties, Situation Countries and partner institutions were reiterated by the delegate. It was pointed out that self-referrals were the majority of the cases that attracted the attention of the Court and that it was critical that the Court must continue to cultivate this positive image in order to gain universal acceptance, inspire confidence, further ratification and for encouragement of the domestication of the Statute and for co-operation. It was pointed out that the judicial work of the Court has increased and hence the resultant cost factors need to be addressed to ensure that the mandate of the Court is delivered. To this end, a prudent management of the finite resources available was called for, however alongside the exploration of a balanced approach to the ways forward so that the key components of delivery of justice is not compromised. It was also pointed out that the measures to remedy this financial situation must also take into account the need to safeguard the independence of the Court.

22. The representative of **Ghana** reiterated its commitment to the Rome Statute and the obligations imposed by it. The delegate also pointed out that the country is in the process of internalizing the Treaty and is deliberating on the amendments made at the Kampala review conference. The support of the State to the functioning of the various branches of the Court and in particular to the ongoing investigation into the situation in Cote d'lvoire was also reiterated. The delegate also pointed out that towards capacity building to advance the principle of complementarity, the prosecutors of Ghana has been undertaking active participation in the training programs conducted by the Court. It was also pointed out that measures are being undertaken by it to

educate and sensitize its citizens about the Court and its activities. The delegate further emphasizes that to end impunity; International Criminal Law has chosen to punish the persons who bear the most responsibility. It was further stated that it is important that the ICC does not select and pursue alleged perpetrators just for the sake of achieving some regional or racial balance in trials or prosecutions or for political expediency. Prosecutions are to be conducted based only on the merits of each case and the demands of justice, rule of law, due process, impartiality, objectivity, independence and fairness. It is also important to take into account the interests of both the accused and the victim. It was also stated that towards this end it was hoped that the ICC would soon establish regional liaison offices as appropriate in all regions without delay. The representative also pointed out the need to clarify or re-examine the relevant provisions of the Treaty that suggests that heads of States may not be entitled to immunity and the current provisions that require respect for established Rules of International Law, particularly in the light of the recent decisions of the ICJ on this issue. Underscoring the importance of achieving universal ratification, the representative asserted that this would facilitate the ongoing efforts to address more effectively the challenges facing the court such as the Role of the Security Council, promoting a constructive relationship between the Court and various regional organizations and cooperation between the United Nations and the Court.

23. The representative of **Japan** pointed out that the ICC was on its way to ending impunity for the most serious crimes of international concern and its very first judgment in the Lubanga case was a milestone towards this path. The representative also noted that the Court is gaining increasing international reception, with more and more states joining the statute. It was pointed out that achieving universality was an important goal and reiterated Japans support towards this, particularly in the Asia-Pacific region. The representative assured his country's legal assistance for any other State that wished to join the Court. The representative pointed out that a major challenge that remains is gaining the cooperation of States for the execution of arrest warrants and collection of evidence for trials. It was pointed out that obtaining such cooperation was essential to ensure that the mandate of the court is fulfilled and for the maintenance of its credibility. It was pointed out that co-operation between the United Nations and the Court was particularly crucial in cases where situations in a non-State Party are referred to the Court by the Security Council. Another challenge that was pointed out was the need to improve the efficiency of the Court. Though Independence was crucial, it was pointed out that this cannot mean that the court must be placed beyond scrutiny of its management and governance. To ensure sustainability it is thus essential to address the Court's long term "cost drivers" within its limited resources. It was asserted that streamlining or expediting the criminal process of the Court and addressing the financial concerns are two aspects of the same coin. The "Lessons Learned" initiative of the Court towards this end was welcomed and it was pointed out that the initiative would carry out a comprehensive review of its criminal justice system and a through reassessment of its management and governance. The delegate pointed out that his government was in the process of taking a closer look at the work of the Study Group in Governance which was achieved a Roadmap on reviewing the criminal procedure of the Court and enhancing the transparency and predictability of the budget process. Attention was also drawn to the challenges raised by the principle of complementarity. It was pointed out that States Parties must take every effort to exercise national jurisdiction over the ICC crimes rather than "dumping" a situation on the ICC simply because of domestic

difficulties in handling it. It was further asserted that to ensure sustainability of the Court it was essential that the States Parties not burden the Court with a large number of additional crimes that are political controversial or that which may be effectively prosecuted and punished by national jurisdiction. Supporting the amendments made at the Kampala Conference, it was further pointed out that "legal integrity" for the Statue is a necessity and that elimination of legal ambiguities are necessary. The representative extended the support of his country to all quiet dialogue amongst the various parties towards this end.

24. The representative of **Kenya** stated that the Country attached great importance to the Role of the Court and reiterated its commitment to the Court and the Rome Statute. The representative called on all others who were not parties to the Rome Statute, particularly those within the Security Council of the United Nations to join the Court at the earliest. It was pointed out that the application of the principle of complementarity was a necessary condition for the achievement of the objectives of the Court and that much remained to be done by Member States towards this end, particularly in providing national mechanisms to deal with criminal justice in this context. It was pointed out that the national mechanisms to deal with punishment of serious crimes needs to be evolved and strengthened. Referring to the witness protection agency that has been evolved by Kenya and which works in collaboration with the Court, the representative pledged the support of the agency to cases not just within Kenya but also to other situations that may arise in the region. The representative also referred to the other measures of Co-operation adopted between Kenya and the Court. The representative called for development and implementation of outreach programs by the court to facilitate interaction between the stakeholders, affected parties and the Court. It was also pointed out that adequate financial resources are imperative for the working of the Court and called on all Member States to provide the Court with the necessary finances to facilitate the working of the Court.

25. Reiterating its commitment to the Rome Statute, the representative of **Nigeria** asserted that it was important that the Court remains independent and free from political pressure or interference in carrying out its mandate. It was pointed out that the Court must continue to exhibit its judicial character, free from political inclinations of any sort. Pointing out that the establishment of the Court and its working has sent out a strong global message of the end of impunity, the delegation expressed its pleasure at the expansion of the number of Member States and highlighted the need to diversify the investigations and other activities into other regions of the world too as a means of countering perceptions of double standards. It was pointed out that prosecution is only one aspect of justice for the victims and this must be complemented with attention to the plight of the victims, survivors and affected communities. To this end, the need to improve and strengthen the outreach and public information activities of the Court and building strategic partnerships that support the Court was also pointed out. The delegation also extended its support to the various budgetary proposals aimed at improving and strengthening the activities of the Court.

26. The representative of **Republic of Korea** pointed out that, though the number of cases in which the Court is engaged in seems to be small, the work of the Court needs to be assessed from the viewpoint of not numbers but from its impact. The Lubanga Judgment was hailed as one of great significance, particularly considering its

subject matter – the conscription of child soldiers. The delegation then pointed out that achieving universality of the Statute, not just with respect to the number f ratifications, but also the applicability of the Statute through full cooperation of the all the parties was essential in securing the future of the Court. It was also pointed out that achieving qualitative universality by measures such as providing assistance to the Special tribunals and Courts in Sierra Leone and in Lebanon was also a welcome measure. It was also pointed out that to achieve a full measure of the working of the Court it was essential that the States Parties internalize the Rome Statute and establish machinery for its implementation – a measure that is still underway. Co-operation from Non-Parties was also pointed out as important to achieve the mandate of the Court, failing which the impression may be created that such Non-State Parties may become safe havens for perpetrators. The delegation further extended their full support to measures such as the Trust Find for victims and internship programs designed to further complementarity.

27. The delegate of **Sierra Leone** reaffirmed the States commitment to the Rome Statute and the obligations imposed by it, including cooperation with investigations in the ongoing situations. It was pointed out that cooperation with other International Courts and Tribunals continues to be a matter of great challenge and that it was difficult to see specific lessons learned that could apply to the ICC beyond the importance of cooperation between States and other Institutions. It was pointed out that the courts deterrence lies in its threat of prosecution and that to achieve this cooperation between the Court and Member States was essential. It was also pointed out that the role of Complementarity was a crucial one and that the roles of national governments in prosecutions of serious crimes of international concern were crucial. It was pointed out that justice is indeed a crucial component of peace and that there can be no peace achieved without promoting justice.

28. The representative of **South Africa** welcomed the signing of the contracts to construct the permanent premises of the Court and pointed out that financial commitments will have to be made to continue with the mandate of the Court. The delegation stated that it believed that when the Court undertook prosecutions in the implementation of Chapter VII referrals from the Security Council, was acting on behalf of the international community and that there was a need to explore the possibility of United Nations funding for such situations. The delegation called for further engagement between the parties on the matter of relationship between the ICC and the Security Council. It was also pointed out that as long as the structure of the Security Council remains unrepresentative and undemocratic, its decisions might impact negatively on the ICC. It was then pointed out that the Member States have thus a responsibility to support the UN processes for reform. The delegation referred to the Statements of President Jacob Zuma during the High Level meeting on Rule of Law at the 67th Session of the General Assembly on this point.

29. The representative of **Uganda** stated that it is in the process of internalizing the provisions of the Rome Statute. It was stated that the principle of complementarity was one of the cornerstones of the Rome Statute and that it firmly believed that the one of the ways of strengthening the system envisaged by the Rome statute was by way of integrating it into the National Systems. The representative then outlined the measures taken by Uganda towards this end. The measures taken towards apprehending the accused persons involved in the referral by Uganda, in cooperation

with other States was also stated. The delegation also extended its support for the system of roster of experts who can assist the functioning of the Court.

30. In its capacity as an observer Country, **China** had also participated in the Debate. The representative of China stated that it supported the efforts of the international community in punishing the most serious crimes of international concern and the establishment of an independent and fair tribunal for that purpose. It was pointed out that, however, the Court shall adhere to the UN Charter and the universally recognized principles of law codified therein and that it would not undermine the jurisdiction of the security council to determine whether there exists a condition that is a threat to peace, a breach of peace or an act of aggression. It was also pointed out that the Court is to function strictly within the framework of the principle of complementarity and that it is the sovereign state that assumes the primary responsibility to punish such crimes. The Court, according to the delegate, is designed to subsidize and not substitute national jurisdictions. It was further pointed out that cooperation with States needs to handled in a careful manner and that rights of non States Parties is to be respected in accordance with International Law. It was also asserted that justice cannot be achieved at the expense of peace and that the Court is to exercise its jurisdiction in a prudent manner, without prejudice to the efforts of the International Community to achieve a political settlement of a conflict.

C. Statement by the Secretary-General of AALCO

31. Outlining the history of the Rome Statute and the Role of the Court, the Secretary- General of AALCO spoke about the various activities of the Organization on International Criminal Law and the promotion of the Rome Statute. The Secretary General referred to the numerous consultative processes facilitated by AALCO and it was said that the following issues were found to be of concern to the Member States: (i) The relationship between the ICC and the UN Security Council (ii) the principle of complementarity in the light of the post ICC Review Conference Developments (iii) Bilateral Immunity Agreements (iv) Why Asian States were hesitant to ratify the Rome Statute (v) The Immunity of Heads of States (vi) it is important for States Parties and non-States Parties to the Rome Statue to strengthen their domestic legal institutions (vii) Domestication of the provisions of the Rome Statute into Domestic Legislations (viii) *proprio motu* powers of the prosecutor and (ix) imparting proper training to Prosecutors and Judges about the provisions of the Rome Statute.

32. It was pointed out that with increasing numner of situations being referred to the Court, there are fresh challenges emerging and that considering the limited resources available at its disposal, all the States Parties are to reflect carefully on the futute of the Court. It was further pointed out that though the ICC is an independent judicial body, this does not mean tottal immunity from a critical examination of its management and governance. A need to further strenghen and formalise the relationship between the Court and the UN was also pointed out. It was also pointed out that the questioned remained as to the legal basis of the ICC investigating situations in non-party States upon referals by te Security Council.

22. The Secretary- General then stated that the adoption of the crime of agression to the ICC crimes was indeeed a moment of historic significance, however, there remained ambiguities and serious concern over the defenition of the Crime.

33. It was pointed out that the challenges before the ICC are mainly, universality, sustainability and complementarity - The expression "unable or unwilling" was still not free of ambiguities. Pointing out that a variety of political and legal systems are prevalent in the world and hence achieving universality and internalization of the Treaty into domestic law indeed poses numerous challenges.

34. Explaining the role and functioning of AALCO, once again the Secretary General reiterated the support of AALCO to any State that requires legal assistance with respect to any matter of legal concern relating to the Rome Statute.

D. Resolutions Adopted at ASP XI

35. The Eleventh Annual Session of the Assembly of States Parties adopted 8 Resolutions on budgeting, amendment of Rules of Procedure and Evidence by way of addition of Rule 132 *bis* (on designation of a judge for the preparation of the trial), on permanent premises, on independent oversight mechanism, on co-operation, complementarity, victims and reparations & The strengthening OF the ICC and the ASP.

36. On Complementarity, the ASP resolved to continue and strengthen effective domestic implementation of the Rome Statute and to enhance the capacity of national jurisdictions to prosecute the most serious crimes of International concern. Welcoming the international community's engagement in strengthening the capacity of domestic jurisdictions and the commitment by United Nations bodies to continue to mainstream capacity building activities towards this end, the ASP stressed that the proper functioning of the principle of complementarity entails that States incorporate the crimes set out in articles 6, 7 and 8 of the Rome Statute as punishable offences under their national laws. Further welcoming the report of the Bureau on complementarity and the progress made in implementing the Review Conference resolution on complementarity, the ASP requested the Bureau to remain seized of this issue and continue the dialogue with the Court and other stakeholders. The ASP further encouraged the States, international and regional organizations and civil society to submit to the Secretariat information on their complementarity-related activities.[45]

37. On Cooperation, the ASP emphasized on the the importance of timely and effective cooperation and assistance from States Parties and other States under an obligation or encouraged to cooperate with the Court pursuant to Part 9 of the Rome Statute or a United Nations Security Council resolution. It was pointed out that the failure to provide such cooperation in the context of judicial proceedings affects the efficiency of the Court and that non-execution of Court requests can have on the ability of the Court to execute its mandate. The ASP requested the Bureau, through its Working Groups, "to consider, in light of the further views obtained from the relevant organs of the Court, the issue of non-essential contacts, and to report thereon to the Assembly well in advance of its twelfth session". It further called upon States Parties as well as non-States Parties that have not yet done so to become parties to the Agreement on Privileges and Immunities of the International Criminal Court as a

[45] Resolution ICC-ASP/11/20

matter of priority and to incorporate it in their national legislation, as Appropriate. The States parties were also called on to consider strengthening their cooperation with the Court "by entering into agreements or arrangements with the Court or any other means concerning, inter alia, protective measures for witnesses, their families and others who are at risk on account of testimony given by witnesses, and sentence enforcement". It was also decided that that the Assembly of States Parties shall continue to monitor cooperation with a view to facilitating States Parties in sharing their experiences and considering other initiatives to enhance cooperation, and, to this end it was also decided that the Assembly will include a specific item on cooperation on the agenda of its twelfth session.[46]

38. On independent monitoring mechanisms, the ASP recognized the importance of the same in accordance with its previous resolutions and decided to continue discussions on the Independent Oversight Mechanism.[47]

39. On permanent Premises, the ASP approved the decided cash flow and welcomed the proceedings completed to date and called for completion within the estimated costs. The ASP further reiterated the invitation to States Parties and members of civil society with a proven track record of commitment to the mandate of the Court to raise funds for the permanent premises project.

40. On the strengthening of the ICC and the ASP, it was Decided " to keep the status of with a view to facilitating the provision of technical assistance that States Parties to the Rome Statute, or States wishing to become parties thereto, may wish to request from other States Parties or institutions in relevant areas." The ASP called for further political and diplomatic support for the work of the Court, particularly concerning situations where conflicts were going on. States parties were also called upon to give concrete commitments to statements and declarations made at the Kampala Review Conference. The resolutions also touched on Agreement on Privileges and Immunities, relationship with the Host State, Relationship with the United Nations on Counsel, Governance, Victims and trust fund for Victims and on measures to further strengthen the International Criminal Court.[48]

41. On Victims and Reparations, the ASP noted with concern the reports from the court on the persistent backlogs the Court has had in processing applications from victims seeking to participate in proceedings and assessed this to be a situation that impacts on the effective implementation and protection of the rights and interests of victims under the Rome Statute. It called for a modification in the system for victims to apply to participate in proceedings in order to ensure the sustainability, effectiveness and efficiency of the system. The Asp further invited the Bureau o report to the Assembly at its twelfth session on any appropriate measures to be taken towards this end. Taking note of the principles for reparations established by the court in the Lubanga Case, the ASP recalled the need for the Court to ensure that coherent principles relating to reparations are established and requested the Court to report back to the Assembly at its twelfth session. It was also pointed out that that liability for reparations is exclusively based on the individual criminal responsibility of a

[46] Resolution ICC-ASP/11/Res.5
[47] Resolution ICC-ASP/11/Res.4
[48] Resolution ICC-ASP/11/Res.8

convicted person and therefore under no circumstances shall States be ordered to utilize their properties and assets, including the assessed contributions of States Parties, for funding reparations awards, including in situations where an individual holds, or has held, any official position. The ASP further stressed the need for freezing and identification of any assets of the convicted person as being indispensable for reparations. It further called Upon States, international and intergovernmental organizations, individuals, corporations and other entities to contribute voluntarily to the Trust Fund for Victims.[49]

42. The ASP resolved to add Rule 132 *bis* after Rule 132 of the Rules of Procedure and Evidence. The new Rule deals with the Designation of a judge for the preparation of Trial. The Rule states that the Trail Chamber may designate one or more of its members for ensuring the preparation of the trial and the assigned judge is to take such measures to ensure and facilitate the expeditious and fair conduct of the trail. The Rule also lays down the powers of the designated judge incidental to this purpose.[50]

IV. CONSIDERATION OF THE ITEM AT THE SIXTY-SEVENTH SESSION OF THE GENERAL ASSEMBLY, 2012

A. Report of the President of the ICC to the Sixty–Seventh Session of the General Assembly, 14 August 2012

43. The Eighth Annual Report on the ICC, governing the period 1 August 2011 to 31 July 2012 was submitted to the General Assembly of the United Nations on 14 August 2012.[51] The Report was submitted in accordance with Article 6 of the Relationship Agreement between the International Criminal Court and the United Nations. The report covers the main developments and activities of the Court and other developments relevant to the relationship between the Court and the UN since the last report.

44. In carrying out its functions, the Court relies on the cooperation of States, international Organizations and civil society in accordance with the Rome Statute and international agreements concluded by the Court. Areas where the Court requires cooperation from States include analysis, investigations, the arrest and surrender of accused persons, asset tracking and freezing, victim and witness protection, provisional release, the enforcement of sentences and the execution of the Court's decisions and orders.

45. The Court is independent from, but has close historical, legal and operational ties to, the United Nations. The relationship between the Court and the United Nations is governed by the relevant provisions of the Rome Statute and by the Relationship Agreement and other subsidiary agreements.

[49] Resolution ICC-ASP/11/Res.7
[50] Resolution ICC-ASP/11/Res.2
[51] A/67/308

B. Judicial Proceedings

46. The Court made significant progress on its judicial work during the reporting period, including the issuance of its first judgment and sentence in the case of Thomas Lubanga. In addition to this, there was one new case at the confirmation of charges phase, two new cases in the trial phase and four new arrest warrants.

47. The Court issued its first judgement, in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, on 14 March 2012. Mr. Lubanga was sentenced to 14 years' imprisonment The judgment and the sentence are subject to confirmation in appeal. The Court also completed the trial in its second case, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, on 23 May 2012. The Chamber is now in deliberation as to the judgment that needs to be issued.

48. During the reporting period, the Court continued its investigations in the six situations of which it was already seized: the Central African Republic, Darfur (the Sudan), the Democratic Republic of the Congo, Kenya, Libya and Uganda. There are seven situations under investigation before the Court presently. On 18 July 2012, the Prosecutor was referred the situation in Mali, which brings the number of preliminary examinations conducted by the Office of the Prosecutor to eight. With regard to Palestine, the Prosecutor concluded on 3 April 2012 that the declaration lodged by the Palestinian National Authority did not meet the statutory requirements. On 3 October 2011, Pre-Trial Chamber III authorized the Prosecutor to start an investigation in Côte d'Ivoire with respect to crimes committed since 28 November 2010 and also with respect to continuing crimes insofar as those crimes were part of the context of the ongoing situation in the country. On 22 February 2012, Pre-Trial Chamber III expanded its authorization to include crimes allegedly committed between 19 September 2002 and 28 November 2010

The Situation in Democratic Republic of Congo

49. The Court has issued its first judgment in the case of Thomas Lubanga, convicting and sentencing him to a period of 14 years. In the case of Germain Katanga and Mathieu Ngudjolo, the trial has been completed and judgement is awaited. In Callixte Mbarushim**ana** case, the Pre-Trial Chamber refused to confirm the charges and the appeal against this was also rejected. The accused person has been subsequently released in pursuance of this. In the case of Bosco Ntaganda, a second warrant has been issued by the Pre-Trial Chamber for three counts of crimes against humanity and four counts of war crimes. In the case against Sylvestre Mudacumura, On 13 July 2012, Pre-Trial Chamber II issued a warrant for nine counts of war crimes.

The Situation in the Central African Republic

50. The proceedings in the case against Jean-Pierre Bemba Gombo are scheduled to continue, with the presentation of evidence by the defence on 14 August 2012. On 12 and 13 December 2011, Pre-Trial Chamber I issued two decisions, concerning Malawi and Chad, in which it found that the two States parties had failed to cooperate with the Court owing to their failure to arrest and surrender Omar Hassan Ahmad Al Bashir to the Court while he was present on their territory Finding that "customary international law creates an exception to Head-of-State immunity when international

courts seek a Head of State's arrest for the commission of international crimes", the Chamber reiterated that States parties were under the obligation to arrest and surrender Mr. Al Bashir to the Court if he was on their territory. Both decisions were reported to the United Nations Security Council.

The Situation in Darfur (the Sudan)

51. On 28 September 2011, Trial Chamber IV decided that, following the agreement reached between the parties as to facts and evidence, the trial would only proceed on the basis of the contested issues. On 1 March 2012, Pre-Trial Chamber I issued a warrant against Mr. Abdel Raheem Muhammad Hussein, currently Minister of National Defense of the Sudan for war crimes and crimes against humanity allegedly committed in Darfur during 2003 and 2004.

The Situation in Kenya

52. On 30 August 2011, the Appeals Chamber, by majority, rejected the appeal of the Government of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 on the admissibility of the case. The confirmation of charges hearing was held from 1 to 8 September 2011. On 23 January 2012, Pre-Trial Chamber II issued its decision confirming the charges against William Samoei Ruto and Joshua Arap Sang for crimes against humanity. The appeals against the same has also been rejected by the Appeal Chamber. The confirmation of charges hearing was held from 21 September 2011 to 5 October 2011. On 23 January 2012, Pre-Trial Chamber II issued decisions confirming the charges against Francis Kirimi Muthaura and Uhuru Muigai Kenyatta for the crimes against humanity of murder, forcible transfer of population, rape, persecution and other inhumane acts committed in Kenya in January 2008, and declining to confirm the charges against Mohammed Hussein Ali.

The Situation in Libya

53. On 22 November 2011, Pre-Trial Chamber I decided to terminate the proceedings against Muammar Mohammed Abu Minyar Gaddafi upon receipt of a death certificate from the Libyan authorities. On 23 November 2011, Pre-Trial Chamber I was informed of the arrest of Saif Al-Islam Gaddafi in Libya. On 6 December 2011, Pre-Trial Chamber I decided to seek information on an urgent basis from the Libyan authorities on a number of issues, including the arrest and surrender of Saif Al-Islam Gaddafi, his legal representation and his state of health. On 23 January 2012, the Libyan authorities indicated that they were willing to facilitate a visit between Saif Al-Islam Gaddafi and the Registry. On 3 February 2012, the Chamber ordered the Registry to make arrangements as soon as possible for a visit between Court personnel and Mr. Gaddafi. On 1 May 2012, Libya filed a challenge concerning the admissibility of the case of Saif Al-Islam Gaddafi. The challenge is pending before Pre-Trial Chamber I. In addition, Libya has requested a postponement of the execution of the surrender request concerning Saif Al-Islam Gaddafi that was granted on 1 June 2012.

The situation in Côte d'Ivoire

54. On 23 November 2011, Pre-Trial Chamber III issued a warrant against Laurent Gbagbo on allegations of crimes against humanity. Laurent Gbagbo was surrendered to the Court on 30 November 2011 and his first court appearance took place on 5 December 2011. On 5 April 2012, Pre-Trial Chamber III decided to encourage a collective application system for victims wishing to participate in the proceedings in order to expedite the management of applications and enhance the system of participation.

Outstanding arrest warrants

55. At the time of the submission of the present report, requests for the arrest and surrender of persons subject to arrest warrants issued by the Court are outstanding against 12 individuals:

(a) Uganda: Mr. Joseph Kony, Mr. Vincent Otti, Mr. Okot Odhiambo and Mr. Dominic Ongwen, outstanding since 2005;

(b) Democratic Republic of the Congo: Mr. Bosco Ntaganda, two warrants of arrest, outstanding since 2006 and 2012; and Mr. Sylvestre Mudacumura, outstanding since 2012;

(c) Darfur, the Sudan: Mr. Ahmad Harun and Mr. Ali Kushayb, outstanding since 2007; Mr. Omar Al Bashir, two warrants, outstanding since 2009 and 2010; and Mr. Abdel Raheem Muhammed Hussein, outstanding since 2012;

(d) Libya: Mr. Saif Al-Islam Gaddafi and Mr. Abdullah Al-Senussi, outstanding since 2011.

C. Preliminary Examinations

56. The Office of the Prosecutor is responsible for determining whether a situation meets the legal criteria established in the Rome Statute as warranting investigation by the Court. For that purpose, the Office conducts a preliminary examination of all situations brought to its attention based on statutory criteria and the information available. During the reporting period, the Office began a preliminary examination of the situation in Mali, continued preliminary examinations in Afghanistan, Colombia, Georgia, Guinea, Honduras, the Republic of Korea and Nigeria, and concluded its preliminary examination of the situation in Palestine. The Office continued to analyse information received from various sources alleging the commission of crimes potentially falling within the Court's jurisdiction. From 1 August 2011 until 30 June 2012, the Office received 287 communications relating to article 15 of the Rome Statute, of which 176 were clearly outside the Court's jurisdiction; 28 warranted further analysis; 35 were linked to a situation already under analysis; and 47 were linked to an investigation or prosecution.

V. COMMENTS AND OBSERVATIONS OF THE AALCO SECRETARIAT

57. The first conviction and sentence at the International Criminal Court in the tenth year of its functioning is a good time to take stock of how well an institution that was designed to counter war crimes and crimes against humanity around the world has performed so far. The guilty verdict on the democratic republic of Congo rebel warlord, Thomas Lubanga, for conscripting children under 15 is a welcome sign that individuals can be brought to justice for
grave violations of human rights even if "their" governments lack the will or capacity to prosecute them.

58. The ICC has a mandate to probe atrocities and prosecute individuals up and down the official chain of command in 120 countries that have ratified the Rome Statute. Despite its global mandate, however, all prosecution cases in its ten year history come from Africa: Uganda, the DCR, Sudan, the Central African republic, Kenya, Libya and Cote d' Ivoire. The silence of the Court on the territory of some state-parties needs explanation. There are some grave violations in other territories which the ICC chooses to ignore. In January 2009, after suffering heavy Israeli bombing in civilian areas in Gaza, the Palestinian National Authority lodged a declaration with the ICC under a provision of the Court's statute allowing states voluntarily to accept its jurisdiction. However, the prosecutor chose to take a stand that the declaration is not in accordance with the provisions of the Rome Statute. Despite hundreds of civilian deaths and a UN report which spoke of Israeli war crimes. Unfortunately, on 7 April 2012, the Prosecutor of the ICC has stalled the bid by the Palestinian Authority for an investigation into Israel's conduct during the Gaza war of 2008 because Palestine does not have the required legal status of an internationally recognized independent State The ongoing investigations in Afghanistan and other areas and the result thereof are also seminal in ensuring that the Court is able to project itself as a neutral and apolitical establishment. This sentiment was echoed in the statement of at least one of the Member States of AALCO at the 51st Annual Session when it pointed out that there seems to be an opinion building that the ICC is not even in the way it chooses to interfere.

59. Having said that, the establishment of the International Criminal Court capped the efforts of the international community to enforce the applicability of international humanitarian law, and advance the cause of justice and the rule of law on a universal scale.

60. However, taking this work forward involves further deliberation and clarity on the concept of complementarity so that the Court is not too burdened with too much of work, building capacity at the national level and respecting public international law as it stands today. Further, the work of the ICC must be such that it promotes peace and not further justice at the cost of peace.

61. Another matter of concern is charting out the contours of the applicability of the Statute to Non-State Parties and in situations where the Security Council makes a referral under chapter VII. Another associated issue with this is the financial commitments that must arise following such kinds of referrals.

62. Further clarity on the scope of the duty to Co-operate with the proceedings, particularly in the case of compliance with arrest warrants is required as honoring the warrants and implementing them is seminal to the fulfillment of the mandate of the Court.

63. Though the Member States at Kampala were ready to add aggression to the list of ICC crimes, there still exit doubts and disagreement over the definition of the crime. Further consultations and agreement on this is inevitable if indeed acts of aggression are to be penalized in a manner consistent with the obligations under International Human Rights Law.

VI. ANNEX

SECRETARIAT'S DRAFT
AALCO/RES/DFT/52/S 9
12 SEPTEMBER 2013

INTERNATIONAL CRIMINAL COURT: RECENT DEVELOPMENTS
(*Non-Deliberated*)

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

Considering the Secretariat Document No. AALCO/52/HEADQUARTERS (NEW DELHI)/2013/S 9;

Taking note of the progress in cases before the International Criminal Court (ICC);

Also taking note of the deliberations and decisions of the Eleventh Session of the Assembly of States Parties to the Rome Statute of the ICC;

Being aware of the importance of the universal acceptance of the Rome Statute of the ICC and in particular, the principle of complementarity;

1. **Encourages** Member States that are not yet party to consider ratifying/acceding to the Rome Statute and upon ratification/accession consider adopting necessary implementing legislation.

2. **Further encourages** Member States that have ratified the Rome Statute to consider becoming party to the Agreement on the Privileges and Immunities of the ICC.

3. **Directs** the Secretariat to follow up the deliberations in the forthcoming Twelfth Session of the Assembly of States Parties and its meetings, and follow the developments regarding cases taken up by the ICC, and present a report at the Fifty-Third Annual Session.

4. **Requests** the Secretary-General to explore the possibility of convening a workshop in collaboration with the ICC, in a Member State of AALCO, for Prosecutors and Judges from AALCO Member States, aimed at capacity building and familiarizing them with the working of the ICC, and

5. **Decides** to place this item on the provisional agenda of the Fifty-Third Annual Session.

VI. REPORT ON THE WORK OF UNCITRAL AND OTHER INTERNATIONAL ORGANIZATIONS IN THE FIELD OF INTERNATIONAL TRADE LAW

REPORT ON THE WORK OF THE UNCITRAL AND OTHER INTERNATIONAL ORGANIZATIONS IN THE FIELD OF INTERNATIONAL TRADE LAW
(Non-Deliberated)

CONTENTS

REPORT ON THE WORK OF UNCITRAL AND OTHER INTERNATIONAL ORGANIZATIONS IN THE FIELD OF INTERNATIONAL TRADE LAW
(Non-Deliberated)

I. INTRODUCTION

A. Background

1. The issues concerning International Trade Law were first included in the agenda of the Asian-African Legal Consultative Organization (AALCO) at the Third Session, in 1960 in Colombo, pursuant to a reference made by the Government of India. At the Fourth Session, in 1961 in Tokyo, the topic "Conflict of Laws relating to Sales and Purchases in Commercial Transactions between States or their Nationals" was considered by the Member States.

2. The United Nations Commission on International Trade Law (UNCITRAL), which was constituted by the United Nations General Assembly resolution No. 2205 (XXI), held its First Session in New York in 1968 and the major items that were selected for study and consideration by the UNCITRAL included the topic of "International Sale of Goods". At the Second Session of the UNCITRAL in 1969, the representatives of Ghana and India suggested that the then Asian-African Legal Consultative Committee (AALCC) should revive its consideration of the subject of the International Sale of Goods so as to reflect the Asian-African view-point in the work of the UNCITRAL.[52] Upon that request, the then AALCC considered it as priority item at the Eleventh Session held in Accra, Ghana in 1970.

3. At its Eleventh Session in Accra in 1970, AALCC also decided upon the establishment of a Standing Sub-Committee to deal with economic and trade law matters as a regular feature of its activities and official relations were established with the UNCITRAL in the year 1971, which have since resulted in fruitful and effective collaboration between the two Organizations in several areas of trade law. From then onwards, AALCC started considering the issues pertaining to international trade law and the international organizations dealing with such matters, viz., United Nations Conference on Trade and Development (UNCTAD), International Institute for the Unification of Private Law (UNIDROIT) and Hague Conference on Private International Law (HCCH).

4. Until 2003, AALCO considered the agenda entitled, "Progress Report concerning the Legislative Activities of the United Nations and other Organizations in the field of International Trade Law". At the Forty-Third Session, in Bali in 2004, the title had been changed to the "Report on the Work of UNCITRAL and other International Organizations in the Field of International Trade Law" so as to focus more upon the work of UNCITRAL.[53]

[52] AALCC Report of the Eleventh Session held in Accra (Ghana), 19-29 January 1970, p. 259.
[53] For the other agenda items on this topic, See, Table-III- Substantive Matters Considered at the AALCO Annual Sessions, in Fifty Years of AALCO: Commemorative Essays in International Law (New Delhi, 2007).

5. This report prepared by the AALCO Secretariat is intended to provide an overview of the work of UNCITRAL and other International Organizations engaged in the field of international trade law. The Organizations covered in the report are as follows:

a. UNCITRAL (United Nations Commission on International Trade Law)
b. UNCTAD (United Nations Conference on Trade and Development)
c. UNIDROIT (International Institute for the Unification of Private Law)
d. HCCH (Hague Conference on Private International Law)

II. REPORT ON THE WORK OF UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL) AT ITS FORTY-FIFTH SESSION IN THE YEAR 2012

A. Introduction to UNCITRAL

6. The United Nations Commission on International Trade Law is the primary organ of the United Nations system to harmonize and develop progressive rules in the area of international trade law. A substantial part of the Commission's work is carried out in meetings of the Working Groups, while the Commission meets annually to review and adopt recommendations towards guiding the progress of work on the various topics on its agenda. The Commission is also mandated to submit an annual report to the General Assembly, as to the tasks accomplished at its sessions.

B. Agenda of UNCITRAL at its Forty-Fifth Session

7. The forty-fifth session of the UNCITRAL was held in Vienna from 25 June to 6 July 2012. The Commission had on its agenda, *inter alia*, the following topics for consideration:

a. Finalization and adoption of a Guide to Enactment of the UNCITRAL Model Law on Public Procurement.
b. Finalization and adoption of the recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules, as revised in 2010.
c. Arbitration and conciliation.
d. Online dispute resolution.
e. Electronic commerce.
f. Insolvency law.
g. Security interests.

C. Finalization and adoption of a Guide to Enactment of the UNCITRAL Model Law on Public Procurement

8. The Commission had before it:
a. the report of Working Group I (Procurement) on the work of its twenty-first session (A/CN.9/745);
b. a note by the Secretariat introducing a proposal for a chapter in a draft

Guide to Enactment of the UNCITRAL Model Law on Public Procurement (A/CN.9/754 and Add.1-3); and

c. a note by the Secretariat introducing a proposal for a Revised Guide to Enactment to accompany the UNCITRAL Model Law on Public Procurement (A/CN.9/WG.I/WP.79 and Add.1-19)

9. Based on the mandate received from the UN General Assembly *vide* resolution 2205 (XXI) of 17 December 1966 to further the progressive harmonization and unification of the law of international trade, UNCITRAL adopted the Guide to Enactment of the UNCITRAL Model Law on Public Procurement, at its 949th meeting, on 28 June 2012, as contained in document A/CN.9/WG.I/WP.79 and Add.1-19, as amended by Working Group I (Procurement) at its twenty-first session and further amended by the Commission during its forty-fifth session, and in document A/CN.9/754 and Add.1-3, as amended by the Commission during the forty-fifth session, following debates pertaining to proposed amendments.

10. The Commission also recalled the adoption of its Model Law on Public Procurement at its forty-fourth session in 2011, while expressing its appreciation of Working Group I and its chair Tore Wiwen-Nilsson for his leadership.

11. The Commission noted in its decision that procurement constitutes a significant portion of public expenditure in States and recommended that all States use the Model Law on Public Procurement and to consider the Guide to Enactment when they assess their needs in public procurement law reform or enact or revise their public procurement laws. The Commission also, in the resolution, requested the Secretary-General to publish the UNCITRAL Model Law on Public Procurement with its Guide to Enactment and disseminate it broadly to Governments and other interested bodies.

D. Finalization and adoption of the recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules, as revised in 2010

12. The Commission recalled that, at its fifteenth session in 1982, it had adopted "Recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules". The preparation of the 1982 recommendations had been undertaken by the Commission to facilitate the use of the UNCITRAL Arbitration Rules (1976) in administered arbitration and to deal with instances when the Rules were adopted as institutional rules of an arbitral body or when the arbitral body was acting as appointing authority or provided administrative services in ad hoc arbitration under the Rules.

13. The Commission had before it:

a. draft recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules as revised in 2010 (A/CN.9/746 and Add.1); and,

b. a compilation of comments by Governments on the draft recommendations (A/CN.9/747 and Add.1).

14. The Commission heard an oral presentation on the draft recommendations, and was informed that the draft recommendations had been prepared by the Secretariat after consultation with arbitral institutions, including the circulation to arbitral institutions in various parts of the world of a questionnaire, prepared in cooperation with the International Federation of Commercial Arbitration Institutions, on the use of the UNCITRAL Arbitration Rules.

15. Following the discussion of proposed amendments to the recommendations, the Commission adopted the decision, at its 952nd meeting on 2 July 2012, to adopt the recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules as revised in 2010.

16. The Commission recalled General Assembly resolutions 31/98 of 15 December 1976 and 65/22 of 6 December 2010 recommending the use of the UNCITRAL Arbitration Rules in the settlement of disputes arising in the context of international commercial relations and, while noting that arbitration is one of the most effective and efficient means for dispute resolution, stated its belief that the Recommendations would significantly enhance the efficiency of arbitration under UNCITRAL Arbitration Rules as revised in 2010.

17. The Commission also expressed its belief that the draft recommendations as amended by the Commission at its forty-fifth session would be acceptable to arbitral institutions and other interested bodies in countries with different legal, social and economic systems and could significantly contribute to the establishment of a harmonized legal framework for a fair and efficient settlement of international commercial disputes and to the development of harmonious international economic relations.

E. Arbitration and Conciliation

18. In accordance with a decision of the Commission at its forty-third session in 2010, Working Group II (Arbitration and Conciliation) commenced its work on the preparation of a legal standard on transparency in treaty-based investor-State arbitration at its fifty-third session, held in Vienna from 4 to 8 October 2010, and continued it at its fifty-fourth session, held in New York from 7 to 11 February 2011; its fifty-fifth session, held in Vienna from 3 to 7 October 2011; and its fifty-sixth session, held in New York from 6 to 10 February 2012.

19. The Commission had before it the reports of the Working Group on its fifty-fifth and fifty-sixth sessions (A/CN.9/736 and A/CN.9/741, respectively).

20. The main concern voiced at the discussion related to discussions on article 1 of the draft rules, which had focused mainly on the scope of application of the rules on transparency, which some delegations described as merely a matter of form. Some delegations asked that the Working Group finish its work for consideration by the Commission by the forty-sixth session. In response, it was said that the decision on the scope of application was a very complex and delicate issue and that bridging the gap between the different opinions in the Working Group on the scope of applicability

would require creative solutions, so the Working Group should not rush unnecessarily.

21. It was also pointed out that the matter of applicability of the rules on transparency under existing and future investment treaties were complex and delicate issues of treaty interpretation and should be carefully considered.

22. Furthermore, the Commission reaffirmed the importance of ensuring transparency in treaty-based investor-State arbitration, as highlighted at its forty-first session in 2008, and at its forty-fourth session in 2011.

F. Online dispute resolution

23. The Commission recalled that, at its forty-fourth session in 2011, it had reaffirmed the mandate of the Working Group relating to cross-border business-to-business and business-to-consumer electronic transactions, and had decided that in the implementation of its mandate, the Working Group should also consider specifically the impact of its deliberations on consumer protection and that it should report to the Commission at its forty-fifth session.

24. At its current session, the Commission took note of the Working Group's decision to restructure the commencement provisions of article 4 of the draft rules and to reconsider those provisions at a future meeting. The Commission also took note of the Working Group's mindfulness of consumer protection issues throughout its deliberations, as well as the perceived benefits of online dispute resolution in promoting interaction and economic growth within and between regions, including in post-conflict situations and in developing countries.

25. Views were expressed that a global system for online dispute resolution must provide for final and binding decisions by way of arbitration and that such a system would be of great benefit to developing countries and countries in post-conflict situations as it would improve access to justice by providing an efficient, low-cost and reliable method of dispute resolution. This in turn would contribute to economic growth and the expansion of cross-border commerce, which would enable greater access to foreign markets for small and medium-sized enterprises in developing countries and, in the event of a dispute, mitigate their disadvantages.

26. Following the discussion it was decided that the Working Group would report at a future session on how the draft rules would respond to the needs of developing countries and those facing post-conflict situations. The Working Group would also continue to deliberate upon the effects of online dispute resolution on consumer protection in developing and developed countries and countries in post-conflict situations. The Working Group would also continue to explore a range of means of ensuring that online dispute resolution outcomes were effectively implemented.

G. Electronic commerce

27. The Commission recalled that at its forty-fourth session in 2011, it had mandated Working Group IV (Electronic Commerce) to undertake work in the field of electronic transferable records and that such work might include certain aspects of

topics such as identity management, the use of mobile devices in electronic commerce and electronic single window facilities.

28. The Commission also took note of other developments in the field of electronic commerce. It welcomed Economic and Social Commission for Asia and the Pacific (ESCAP) resolution 68/3, on enabling paperless trade and the cross-border recognition of electronic data and documents for inclusive and sustainable intraregional trade facilitation, adopted by ESCAP at its sixty-eighth session, held in Bangkok from 17 to 23 May 2012.

29. The Commission welcomed the ongoing cooperation between its secretariat and other organizations particularly, "Electronic single window legal issues: a capacity-building guide", prepared jointly by the United Nations Network of Experts for Paperless Trade in Asia and the Pacific (UNNExT), ESCAP and the Economic Commission for Europe (ECE), with substantive contribution from the UNCITRAL secretariat. The secretariat of the World Customs Organization also made a statement noting the growing importance of single window facilities for trade facilitation.

30. The Commission took note of the decision by CEFACT at its eighteenth session, held in Geneva from 15 to 17 February 2012, to initiate work to establish a framework for the ongoing governance of digital signature interoperability in coordination with UNCITRAL, the International Organization for Standardization (ISO) and other relevant organizations.

H. Insolvency Law

31. The Commission recalled that, at its forty-third session in 2010, it had endorsed the recommendation by its Working Group V (Insolvency Law) contained in document A/CN.9/691, paragraph 104, that activity be initiated on two topics:

a. guidance on the interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency, and possible development of a model law or provisions on insolvency law addressing selected international issues, such as jurisdictions, access and recognition; and,
b. responsibility of directors of an enterprise in the period approaching insolvency.

32. The Working Group commenced its work on both topics at its thirty-ninth session, held in Vienna from 6 to 10 December 2010, and continued its deliberations at its fortieth session, held in Vienna from 31 October to 4 November 2011, and forty-first session, held in New York from 30 April to 4 May 2012. The Commission had before it the reports of the Working Group on the work of its fortieth and forty-first sessions (A/CN.9/738 and A/CN.9/742, respectively)

33. The Commission noted that the work on topic (a) was well advanced and might be completed in time for consideration and adoption by the Commission at its forty-sixth session in 2013. The Commission also noted that, while that work would take the form of revisions to the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency, it would not change the text of the Model Law itself, but rather provide guidance on its use and interpretation.

34. The Commission also noted that while the Working Group had considered the possibility of adding material on enterprise groups to the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency, it had been agreed that references could be included to part three of the UNCITRAL Legislative Guide on Insolvency Law which specifically addressed the treatment of enterprise groups.

I. Security Interests

35. The Commission had before it the reports of Working Group VI (Security Interests) on the work of its twentieth session, held in Vienna from 12 to 16 December 2011, and its twenty-first session, held in New York from 14 to 18 May 2012 (A/CN.9/740 and A/CN.9/743, respectively).

36. At its twentieth session, the Working Group had agreed that the text being prepared should take the form of a guide (the draft Registry Guide), with commentary and recommendations along the lines of the UNCITRAL Legislative Guide on Secured Transactions and, where the draft Registry Guide offered options, provide examples of model regulations in an annex (A/CN.9/740, para. 18). The Working Group had also agreed that the draft Registry Guide should be presented as a separate, stand-alone, comprehensive text that would be consistent with the Secured Transactions Guide.

37. The Commission also noted that the Working Group, at its twenty-first session, had agreed to propose to the Commission that the Working Group should develop a model law on secured transactions based on the general recommendations of the Secured Transactions Guide and consistent with all the texts prepared by UNCITRAL on secured transactions.

J. Date and Venue of the Forty-Sixth Session

38. The Forty-Sixth session was scheduled to be held at Vienna from 8 to 26 July 2013.

III. REPORT ON THE WORK OF THE UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD)

39. This part of the Secretariat's report takes note of major developments of the United Nations Conference on Trade and Development (UNCTAD). The fifty-ninth annual session of the Trade and Development Board was held in Palais des Nations, Geneva from 12 to 28 September 2011.

A. Fifty-Ninth Annual Session of Trade and Development Board (17-28 September 2012, Palais des Nations, Geneva)

40. Along the sidelines of the fifty-ninth session of the Trade and Development Board of UNCTAD, a High-level segment on "Growth with jobs for poverty reduction: What can Africa learn from other regions?" was organized. The panelists and the delegations identified certain structural deficiencies that had held back

employment-generating growth within Africa, such as: (a) Lack of structural transformation and of higher productivity activities, with increased dependence on commodities trade; (b) Food production and food security concerns, aggravated by a hasty shift to market-based systems with limited involvement of the State; (c) Low levels of intra-Africa trade, despite multiple efforts to integrate countries at the sub regional level; and (d) The multiple global crises which had led to a contraction of trade, remittances, official and development assistance and aggravated commodity price volatility.

41. Among other organizational matters, the other substantive agenda items during the session were:

(i) Interdependence: Coordinating stimulus for global growth;
(ii) UNCTAD's contribution to the implementation of the Istanbul Programme of Action for LDCs: First progress report;
(iii) Economic Development in Africa: Structural Transformation and Sustainable Development in Africa;
(iv) Evolution of the international trading system and its trends from a development perspective;
(v) Development strategies in a globalized world: Reducing inequalities for balanced and sustainable development;
(vi) Investment for development: Towards a new generation of investment policies for inclusive growth and sustainable development;
(vii) UNCTAD's contribution to the implementation of and follow-up to the outcomes of the major United Nations conferences and summits in the economic and social fields;
(viii) Technical cooperation activities in relation to assistance to the Palestinian people; and so on.

42. The report of the *Trade and Development Board* reviews recent trends in the global economy and explores the links between income distribution, growth and development. It was highlighted that as global output growth was slowing down, developed economies witnessed high unemployment, ongoing deleveraging and downward pressures on real wages that were causing lack of demand. An exit from recession in crisis-hit countries could not be left to market forces alone and therefore, policies should aim to restore demand, instead of further depressing it with fiscal retrenchment. Additionally, reflecting upon the recently concluded Rio+20 Summit and its implication for trade and development, emphasis was given on more sustainable and green economy that could enhance sustainable development goals which focuses on introduction of stringent environmental and social standards that restrict imports of many goods and act as non-tariff measures.

43. In comparison, it was observed that GDP growth is stronger in developing and transition economies as countercyclical policies have supported resilient domestic demand. On the debate about the relationship between income inequality and growth, UNCTAD argued that rising inequality is neither a necessary condition for sound economic growth, nor its natural result. Henceforth, full participation of all citizens in the proceeds of the economy as a whole is necessary for successful and sustained development. While analyzing main structural causes of recent changes in income distribution, including trade, technological change, and finance-led globalization, it was contended that the impacts of globalization and technological change on domestic

income distribution were not uniform. Rather, they depend on initial conditions and on how macroeconomic, financial and labour market policies interact with the forces of globalization and technological development. Structural changes do not necessarily lead to greater inequality if appropriate employment, wage, and income distribution policies were adopted. The contribution of labour-market institutions and policies, were upheld as they could effectively respond to current challenges and lead to sustained growth and more inclusive development.

IV. REPORT ON THE WORK OF THE INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT)

44. The 92nd session of the Governing Council of UNIDROIT was held in Rome from 8 to 10 May 2013. The topics discussed during the session were: (i) Principles of International Commercial Contracts; (ii) International Interests in Mobile Equipment; (iii) Third Party Liability for Global Navigation Satellite System (GNSS) Services; (iv) Transactions on transnational and connected capital markets; (v) Private Law and Development; and (vi) Promotion of UNIDROIT Instruments.

A. Principles of International Commercial Contracts

45. At the 91st session of the UNIDROIT Governing Council in 2012, a proposal was submitted to set up a restricted Working Group for the preparation of Model Clauses for use by parties intending to indicate in their contract more precisely in what way they wish to see the UNIDROIT Principles of International Commercial Contracts used during the performance of the contract or when a dispute arises. After the Meeting of the Working Group in February 2013 which revised the Model Clauses with comments thereto, it was unanimously adopted by the Governing Council at its 92nd session. The new edition of the UNIDROIT Principles consists of 211 Articles structured as follows[54]:

Preamble
Chapter 1: General provisions;
Chapter 2: Section 1: Formation, Section 2: Authority of agents;
Chapter 3: Section 1: General provisions (*containing former Articles 3.1 (amended), 3.2, 3.3 and 3.19 (amended)*), Section 2: Ground for avoidance (*containing former Articles 3.4 to 3.16, 3.17 (amended), 3.18 and 3.20, and a new Article 3.2.15*), Section 3: Illegality (*new*);
Chapter 4: Interpretation;
Chapter 5: Section 1: Content, Section 2: Third Party Rights, Section 3: Conditions (*new*);
Chapter 6: Section 1: Performance in general, Section 2: Hardship;
Chapter 7: Section 1: Non-performance in general, Section 2: Right to performance, Section 3: Termination (*containing former Articles 7.3.1 to 7.3.5, 7.3.6 (amended) and a new Article 7.3.7*), Section 4: Damages;
Chapter 8: Set-off;

[54] For the revised Model Clauses with comments see http://www.unidroit.org/english/principles/modelclauses/modelclauses-2013.pdf.

Chapter 9: Section 1: Assignment of rights, Section 2: Transfer of obligations, Section 3: Assignment of contracts;
Chapter 10: Limitation periods;
Chapter 11: Section 1: Plurality of obligors (*new*), Section 2: Plurality of obligees (*new*).

46. The Model Clauses are primarily based on the use of the UNIDROIT Principles in transnational contract and dispute resolution practice, i.e. they reflect the different ways in which the UNIDROIT Principles are actually being referred to by parties or applied by judges and arbitrators. Hence, they are divided into four categories according to whether their purpose is: (i) to choose the UNIDROIT Principles as the rules of law governing the contract, (ii) to incorporate the UNIDROIT Principles as terms of the contract, (iii) to refer to the UNIDROIT Principles to interpret and supplement the CISG when the latter is chosen by the parties, and (iv) to refer to the UNIDROIT Principles to interpret and supplement the applicable domestic law, including any international uniform law instrument incorporated into that law.

B. International Interests in Mobile Equipment

47. The Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Space Assets (Cape Town Space Assets protocol) was adopted at the diplomatic Conference held in Berlin, Germany, in 2012. This new Protocol seeks to extend the Cape Town regimen to commercial financing in outer space. The implementation and ratification of the Cape Town Space Assets protocol is pending.

C. Third Party Liability for Global Navigation Satellite System (GNSS) Services

48. In 2005, the Governing Council of UNIDROIT was given a proposal to examine the possibility of preparing an international instrument for liability resulting from Global Navigation Satellite System (GNSS) malfunctioning. In 2009, the UNIDROIT Secretariat was entrusted by the Governing Council with the preparation of a feasibility study focusing on gaps in liability resulting from the malfunctioning of satellite-based navigation systems. The study illustrated the situation as regards the different services available and the work that had already been done by other organizations such as the International Civil Aviation Organisation (ICAO). The Governing Council considered that study and confirmed the interest of the subject and recommended its inclusion in the triennial Work Programme of UNIDROIT. Preparation by the EU Commission of an impact assessment intended to evaluate the need for a European regulation on the liability of GALILEO was to be conducted and transmitted to the Council. The decision of the Commission on whether or not to proceed with the drafting of a regulation would be based on that impact assessment. The instrument would deal with the example of most liability instruments, set a liability limit, that would also help the insurability of the activities, and cover aspects such as liability channeling, provision for supplementary compensation to guarantee satisfactory recovery of losses, and criteria for identifying the competent jurisdiction.

D. Transactions on transnational and connected capital markets

49. UNIDROIT has started work in the field of 'close-out netting'[55] which is a mechanism applied by financial institutions and other participants in the financial market in their daily operations to reduce their credit risk exposure. The Study group established a set of draft Principles on the enforceability of close-out netting provisions, and the Governing Council had agreed at 91st session to convene a Committee of governmental experts to consider these draft Principles. The Committee of governmental experts approved a revised set of the Draft Principles as Draft Principles on the Operation of Close-out Netting Provisions. These Principles on the Operation of Close-out Netting Provisions retaining the text of the provisions as prepared by the Committee was adopted at the 92nd Session of the Governing Council.

> "Principle 1: Scope of the Principles
> (1) These Principles deal with the operation of close-out netting provisions that are entered into by eligible parties in respect of eligible obligations.
> (2) Except as otherwise expressly indicated in these Principles, the term 'operation' encompasses the creation, validity, enforceability, effectiveness against third parties and admissibility in evidence of a close-out netting provision.
>
> Principle 2: Definition of 'close-out netting provision'
> 'Close-out netting provision' means a contractual provision on the basis of which, upon the occurrence of an event predefined in the provision in relation to a party to the contract, the obligations owed by the parties to each other that are covered by the provision, whether or not they are at that time due and payable, are automatically or at the election of one of the parties reduced to or replaced by a single net obligation, whether by way of novation, termination or otherwise, representing the aggregate value of the combined obligations, which is thereupon due and payable by one party to the other.
>
> Principle 3: Definition of 'eligible party' and related notions
> (1) 'Eligible party' means any person or entity, other than a natural person who is acting primarily for personal, family or household purposes, and includes a partnership, unincorporated association or other body of persons.
> (2) 'Qualifying financial market participant' means any of the following:
> (a) a bank, investment firm, professional market maker in financial instruments or other financial institution which (in each case) is subject to regulation or prudential supervision;
> (b) an insurance or reinsurance company;
> (c) an undertaking for collective investment or an investment fund;
> (d) a central counterparty or a payment, clearing or settlement system, or the operator of such a system which (in each case) is subject to regulation, oversight or prudential supervision;
> (e) a corporation or other entity that, according to criteria determined by the implementing State, is authorised or supervised as an important participant in the implementing State's markets in contracts giving rise to eligible obligations.
> (3) 'Public authority' means any of the following:
> (a) a governmental or other public entity;

[55] Close-out netting is one of the most important methods used in the financial markets for the reduction of counterparty credit risk. It allows market participants to reduce their outstanding mutual obligations and the risks in their contractual relations to a net exposure in relation to each of their counterparties that is often only a small fraction of the gross exposure. Consequently, the operation of close-out netting agreements reduces the risk that the inability of one market participant to meet its obligations creates or increases financial difficulties for counterparties which could lead to a chain of failures or difficulties (contagion effect). Thus, netting reduces systemic risk, reduces costs for the institutions and increases the liquidity in the market.

(b) a central bank;

(c) the Bank for International Settlements, a multilateral development bank, the International Monetary Fund or any similar entity.

Principle 4: Definition of 'eligible obligation'

(1) 'Eligible obligation' means:

(a) an obligation arising under a contract of any of the following kinds between eligible parties at least one of which is a public authority or a qualifying financial market participant:

(i) Derivative instruments, that is to say, options, forwards, futures, swaps, contracts for differences and any other transaction in respect of an underlying or reference asset or a reference value that is, or in future becomes, the subject of recurrent contracts in the derivatives markets;

(ii) Repurchase agreements, securities lending agreements and any other securities financing transaction, in each case in respect of securities, money market instruments or units in an undertaking for collective investment or an investment fund;

(iii) Title transfer collateral arrangements related to eligible obligations;

(iv) Contracts for the sale, purchase or delivery of:

a. securities;

b. money market instruments;

c. units in an undertaking for collective investment or an investment fund;

d. currency of any country, territory or monetary union;

e. gold, silver, platinum, palladium or other precious metals;

(b) an obligation of an eligible party (whether by way of surety or as principal debtor) to perform an obligation of another person which is an eligible obligation under subparagraph (a);

(c) a single net obligation determined under a close-out netting provision entered into by the same parties in respect of obligations under sub-paragraph (a) or (b).

(2) An implementing State may elect to broaden the scope of paragraph (1)(a) in one or both of the following ways:

(a) by providing that it is to extend to obligations arising under contracts between parties neither of whom is a public authority or a qualifying financial market participant;

(b) by providing that it is to extend to obligations not limited to those listed in paragraph (1); subject, in either case, to such limitations or exceptions as the implementing State may specify.

Principle 5: Formal acts and reporting requirements

(1) The law of the implementing State should not make the operation of a close-out netting provision dependent on:

(a) the performance of any formal act other than a requirement that a close-out netting provision be evidenced in writing or any legally equivalent form;

(b) the use of standardised terms of specific trade associations.

(2) The law of the implementing State should not make the operation of a close-out netting provision and the obligations covered by the provision dependent on the compliance with any requirement to report data relating to those obligations to a trade repository or similar organisation for regulatory purposes.

Principle 6: Operation of close-out netting provisions in general

(1) The law of the implementing State should ensure that a close-out netting provision is enforceable in accordance with its terms. In particular, the law of the implementing State:

(a) should not impose enforcement requirements beyond those specified in the close-out netting provision itself;

(b) should ensure that, where one or more of the obligations covered by the close-out netting provision are, and remain, invalid, unenforceable or ineligible, the operation of the closeout netting provision is not affected in relation to those covered obligations which are valid, enforceable and eligible.

(2) These Principles do not render enforceable a close-out netting provision or an eligible obligation that would otherwise be unenforceable in whole or in part on grounds of fraud or conflict with other requirements of general application affecting the validity or enforceability of contracts.

Principle 7: Operation of close-out netting provisions in insolvency and resolution

(1) Subject to Principle 8 and in addition to Principle 6, the law of the implementing State should ensure that upon the commencement of an insolvency proceeding or in the context of a resolution regime in relation to a party to a close-out netting provision:

(a) the operation of the close-out netting provision is not stayed;

(b) the insolvency administrator, court or resolution authority should not be allowed to demand from the other party performance of any of the obligations covered by the close-out netting provision while rejecting the performance of any obligation owed to the other party that is covered by the close-out netting provision;

(c) the mere entering into and operation of the close-out netting provision as such should not constitute grounds for the avoidance of the close-out netting provision on the basis that it is deemed inconsistent with the principle of equal treatment of creditors;

(d) the operation of the close-out netting provision, and the inclusion of any obligation in the calculation of the single net obligation under the close-out netting provision, should not be restricted merely because the close-out netting provision was entered into, an obligation covered by the provision arose or the single net obligation under the close-out netting provision became due and payable during a prescribed period before, or on the day of but before, the commencement of the proceeding.

(2) These Principles do not affect a partial or total restriction of the operation of a close-out netting provision under the insolvency law of the implementing State on grounds which include factors other than, or additional to, those referred to in sub-paragraphs (c) and (d) above, such as knowledge of a pending insolvency proceeding at the time the close out netting provision was entered into or the obligation arose, the ranking of categories of claims, or the avoidance of a transaction as a fraud of creditors.

Principle 8: Resolution of financial institutions

These Principles are without prejudice to a stay or any other measure which the law of the implementing State, subject to appropriate safeguards, may provide for in the context of resolution regimes for financial institutions."

E. Private Law and Agricultural Development

50. The 91st session of Governing Council in 2012 established a list of possible subjects which may be developed in the area of private law and agricultural development. The first topic would be preparation of a legal guide on contract farming. Accordingly, a Working Group has been set up for the Preparation of a Legal Guide on Contract Farming.

V. REPORT ON THE WORK OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (HCCH)

51. The Council on General Affairs and Policy met from 9 to 11 April 2013and reviewed the work progress of the Hague Conference. The Council emphasised the importance of engaging all the Members in the work of the Conference, and recognised the value of open-ended Working Groups in achieving this objective. The Work programme of the Permanent Bureau for the current Financial Year 2013-2014 are: 1. Choice of Law in International Contracts; 2. Recognition and enforcement of foreign civil protection orders; and, 3. Continuation of the Judgments Project.

A. Choice of Law in International Contracts

52. The Council welcomed the work carried out by the Working Group and in

November 2012 gave its preliminary endorsement of the Draft Hague Principles on Choice of Law in International Contracts[56]. The Council mandated the Working Group to prepare a draft Commentary, circulate it to all Members and Observers for comments, finalise the draft Commentary in light of these comments, and present a complete draft of the Commentary, together with the Principles, to Council. The Council would then be invited to either give its final endorsement of the complete package of the Principles and the Commentary, or if necessary submit the package to the Special Commission.

53. The Draft Hague Principles on the Choice of Law in International Contracts as approved in November 2012 includes: The Preamble, Scope of the Principles, Freedom of choice, Rules of law, Express and tacit choice, Formal validity of the choice of law, Agreement on the choice of law, Severability, Exclusion of *renvoi,* Scope of the chosen law, Assignment, Overriding mandatory rules and public policy (ordre public), and Establishment.[57]

B. Recognition and enforcement of foreign civil protection orders

54. The Council welcomed the work carried out by the Permanent Bureau and invited it to continue exploratory work, including further comparative research (such as a country profile), and investigation on the feasibility of a future instrument. The Permanent Bureau subject to availability of funds, shall convene an Experts Group Meeting for assistance towards this topic. Such a Questionnaire was circulated to Members of the Organisation in November 2012, and information from the 24 Members (representing 39 States) was received. The Questionnaire consists of six parts.

C. Continuation of the Judgments Project

55. A Working Group and an Experts Group were established to study this subject pursuant to a 2011 mandate by the Council on General Affairs and Policy. The Council took note of the reports of the Working Group and Experts' Group that met in February 2013, and the useful progress that was made in those discussions. The purpose of the meeting was to prepare proposals "in relation to provisions for inclusion in a future instrument relating to recognition and enforcement of judgments, including jurisdictional filters". The report of the meeting consisted in brief relationship with the Choice of Court Convention, substantive scope, categories of Judgment to be included, Recognition and Enforcement Process, and Jurisdictional Filters.

VI. COMMENTS AND OBSERVATIONS OF THE AALCO SECRETARIAT

56. The UNCITRAL's role is very crucial in progressive modernization, harmonization and unification of the law of international trade and in reducing or removing legal obstacles to the flow of international trade, especially those affecting developing countries. It would contribute significantly to universal economic

[56] For the text of the Principles see http://www.hcch.net/upload/wop/gap2013pd06en.pdf.
[57] Document available at: < http://www.hcch.net/upload/wop/contracts2012principles_e.pdf>

cooperation among all States on the basis of equality, equity, common interest and respect for the rule of law, to the elimination of discrimination in international trade and, thereby, to peace, stability and the well-being of all peoples. During the Forty-fifth session of the UNCITRAL, the Commission adopted Finalized version of the Guide to Enactment of the UNCITRAL Model Law on Public Procurement and recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules, as revised in 2012. The work of UNCITRAL in the areas of arbitration and conciliation, online dispute resolution, electronic commerce, insolvency law and security interests are noteworthy.

57. The Working Groups established by the Commission has made considerable progress during this session, which is very encouraging. AALCO hopes that its Member States would continue to support and actively participate in the work of the UNCITRAL and its Working Groups. In furtherance of which, the Member States are urged to consider adopting, ratifying or acceding to the instruments adopted by the UNCITRAL and to implement them, in order to promote uniformity and consistency in the international trading system.

58. The UNCTAD's fifty-ninth session dealt with specific topics of relevance to AALCO Member States especially, the topic on addressing income inequality in relation to development of Africa. The Trade and Development Report 2012, contends that the increasing concentration of income in fewer hands limits nation's economic potential by reducing demand for goods and services and by reducing educational prospects and social mobility of majority of the population. These trends could be reversed only if governments intervene in the fiscal and labour-market policies. It is also essential to note that income inequality has considerably increased due to falling rates of wages and hence, measures should be adopted to distribute income evenly which would enable developing countries to perform better.

59. UNIDROIT's revised Model Clauses supplementing the Principles of International Commercial Contracts along with comments and UNIDROIT Draft Principles on the Operation of Close-out Netting Provisions was a very welcome approach in terms of increasing interests among Member States to address the issues that are very essential for economic transactions that are core to the development of many of the developing countries. Likewise, the HCCH's revised draft articles on Choice of Law in International Contracts are also important to be addressed and require adequate attention by Member States. The HCCH's Council has been mandated to look into the private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements. It is very important that AALCO Member States closely participate in the negotiations and law-making in these Organizations because of the increasing convergence between private and public international law that could have serious implications at domestic level. A consolidated view from the Asian-African perspective and cooperative mechanisms would facilitate in effective functioning and adequate representation in these organizations which address international trade law matters.

VII. ANNEX

SECRETARIAT DRAFT
AALCO/RES/52/SD 12
12 SEPTEMBER 2013

REPORT ON THE WORK OF THE UNCITRAL AND OTHER INTERNATIONAL ORGANIZATIONS IN THE FIELD OF INTERNATIONAL TRADE LAW

(*Non-Deliberated)*

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

Considering the Secretariat Document No. AALCO/52/HEADQUARTERS SESSION (NEW DELHI)/2013/SD 12,

Being aware of the Finalized version of the Guide to Enactment of the UNCITRAL Model Law on Public Procurement and recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules, as revised in 2012, at its forty-fifth session;

Welcoming the decision of the UNCITRAL to follow topics in the areas of settlement of commercial disputes, security interests and insolvency law and undertaking the work in the area of online dispute resolution;

Taking note of the adoption of UNIDROIT Draft Principles on the Operation of Close-out Netting Provisions;

Also welcoming the adoption of the "Draft Hague Principles on the Choice of Law in International Contracts";

1. **Expresses** its satisfaction for AALCO's continued cooperation with the various international organizations competent in the field of international trade law and hopes that this cooperation will be further enhanced in the future;

2. **Urges** Member States to consider adopting, ratifying or acceding to the instruments prepared by the UNCITRAL, and other International Organizations, including the Recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules as revised in 2010;

3. **Requests** the AALCO Secretariat to host a joint workshop or training program on the law of international trade in cooperation with relevant international organizations or Member States of AALCO;

4. **Urges** AALCO Member States to continue to participate actively in the relevant meetings and processes of UNCITRAL and other international organizations which address international trade law matters; and

5. **Decides** to place this item on the provisional agenda of the Fifty-Third Session.

VII. WTO AS A FRAMEWORK AGREEMENT AND CODE OF CONDUCT FOR WORLD TRADE

AALCO/52/HEADQUARTERS (NEW DELHI)/2013/S 13
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WTO AS A FRAMEWORK AGREEMENT AND CODE OF CONDUCT FOR WORLD TRADE

(Non-Deliberated)

CONTENTS

WTO AS A FRAMEWORK AGREEMENT AND CODE OF CONDUCT FOR THE WORLD TRADE

(Non-Deliberated)

I. INTRODUCTION

1. At the Thirty-Fourth Session of the AALCO (1995) held at Doha, Qatar, the item "WTO as a Framework Agreement and Code of Conduct for the World Trade" was for the first time introduced in the Agenda of AALCO. This coincided with the Uruguay Round negotiations which were completed in 1994 and had culminated in the establishment of the World Trade Organization (WTO) in 1995. Thereafter, this item continued to remain on the agenda of the Organization and was deliberated upon during the subsequent sessions. At these sessions, the Secretariat was directed to monitor the development related to the WTO, particularly the relevant legal aspects of dispute settlement mechanism.

2. In fulfillment of this mandate, the Secretariat had been preparing reports and presenting it to the Member States for their consideration and deliberation. In furtherance of its work programme, the AALCO in cooperation with the Government of India also convened a two-day seminar on 'Certain Aspects of the functioning of the WTO Dispute Settlement Mechanism and other Allied Matters' at New Delhi (1998). Further, at the Forty-Second Session held in Seoul (2003), the Secretariat presented a Special Study on 'Special and Differential Treatment under WTO Agreements'.

3. The Report of the Secretariat prepared for the fifty-first Annual Session that took place in Nigeria focused on the deliberations that took place at the Eighth Ministerial Conference of WTO (with a background on the issues found in Doha round) that took place from 15-17 December 2011 at Geneva. This year's Report would focus on the reasons for the failure of the conclusion of the Doha round from the viewpoint of developing states in particular. After highlighting the primary reasons for the deadlock of the Doha round, it would go on to offer some General Comments.

II. DOHA DEVELOPMENT AGENDA

4. The WTO Doha Round of multilateral trade negotiations, begun in November 2001, has entered its 12th year. The negotiations have been characterized by persistent differences among the United States, the European Union, and developing countries on major issues, such as agriculture, industrial tariffs and non-tariff barriers, services, and trade remedies. Partly as a result of being labeled a development round to entice developing countries to participate in the first place, developing countries (including emerging economic powerhouses such as China, Brazil, and India) have sought the reduction of agriculture tariffs and subsidies among developed countries, non-reciprocal market access for manufacturing sectors, and protection for their services industries. The United States, the European Union, and other developed countries

have sought increased access to developing countries' industrial and services sectors while attempting to retain some measure of protection for their agricultural sectors. Given the differences, there is frustration over the ability of WTO member states to reach a comprehensive agreement. In the following part of the Report, an attempt is made to find out the major bones of contention that plague the successful completion of the Doha round of negotiations.

A. Background

5. From November 9 to November 14, 2001, trade ministers from member countries met in Doha, Qatar, for the fourth WTO Ministerial Conference. At that meeting, they agreed to undertake a new round of multilateral trade negotiations[58]. Before the Doha Ministerial, negotiations had already been underway on trade in agriculture and trade in services. These ongoing negotiations had been required under the last round of multilateral trade negotiations (the Uruguay Round, 1986-1994). However, some countries, including the United States, wanted to expand the agriculture and services talks to allow tradeoffs and thus achieve greater trade liberalization.

6. It needs to be pointed out that there were additional reasons as well for the negotiations. Just months before the Doha Ministerial, the United States had been attacked by terrorists on September 11, 2001. Some government officials called for greater political cohesion and saw the trade negotiations as a means toward that end.

7. With the backdrop of a sagging world economy, terrorist action, and a growing number of regional trade arrangements, trade ministers met in Doha. At that meeting, they adopted three documents that provided guidance for future actions. The *Ministerial Declaration* includes a preamble and a work program for the new round and for other future action. This Declaration folded the ongoing negotiations in agriculture and services into a broader agenda. That agenda includes industrial tariffs, topics of interest to developing countries, changes to WTO rules, and other provisions. The *Declaration on the TRIPS Agreement and Public Health* presents a political interpretation of the WTO Agreement on Trade-Related Intellectual Property Rights (TRIPS)[59]. A document on *Implementation-Related Issues and Concerns* includes numerous decisions of interest to developing countries[60].

8. Especially worth noting is how the role of developing countries changed at the Doha Ministerial. Since the beginning of the GATT, the major decision-makers were almost exclusively developed countries. At the preceding Ministerial Conference (Seattle, 1999), developing countries became more forceful in demanding that their

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[58] For information on the results of the Doha Ministerial Conference, see CRS Report RL31206, *The WTO Doha Ministerial: Results and Agenda for a New Round of Negotiations*, by William H. Cooper

[59] See CRS Report RL33750, *The WTO, Intellectual Property Rights, and the Access to Medicines Controversy*, by Ian F. Fergusson

[60] The Ministerial Declaration (WT/MIN(01)/DEC/1), the Declaration on the TRIPS Agreement and Public Health (WT/MIN(01)/DEC/2), and the Implementation-Related Issues and Concerns (WT/MIN(01)/DEC/17) are available through the WTO home page at http://www.wto.org/.

interests be addressed. Some developing countries insisted that they would not support another round of multilateral negotiations unless they realized some concessions up-front and the agenda included their interests. Because of the greater influence of developing countries in setting the plan of action at Doha, the new round became known as the Doha Development Agenda. Furthermore, it was felt by a number of developing countries that only a few developing countries benefitted from the expansion of world trade in the post-Uruguay round. Hence, the need to improve existing rules and correct imbalances was felt by many developing countries to be of utmost significant. This also played a critical role in the launching of the Uruguay round and the in naming this as a Development Round.

9. It also needs to be highlighted here that the Doha round was envisaged as a 'larger' 'deeper' and 'fairer' round than other rounds.

- Larger - given its enlarged scope with additions to the built-in agenda of the Uruguay Round
- Deeper - as envisaged level of reductions on subsidies and tariffs almost double those in the previous round
- Fairer - as it would remove obstacles to trade and make the development dimension more central to the multilateral trading system.

10. The key areas of negotiations that form part of the Doha round include the following;

- Agriculture
- Non-Agriculture Market Access
- Services
- Trade Facilitation
- Development Issues
- Intellectual property rights under TRIPs (23.4)
- WTO Rules
- Environmental Goods and Services

11. Since each of these issues can be explored in great detail, the Report is confined to analyzing the major sticking points that characterize two of these issues. They are; Agriculture and Services.

B. Agriculture

12. Agriculture had for many decades been left out of the rules of the GATT system, at the request of the developed countries, whose agriculture system could not take on the competition of the degree of liberalization called for in GATT. Thus in fact the developing countries had made a huge concession by allowing agriculture (in which they have a comparative advantage) to remain outside GATT. It was their expectation that bringing back agriculture into the trading system's rules through the Uruguay Round would bring them many benefits. However, in this, they were also to be disappointed.

13. The WTO's Agreement on Agriculture (AoA) comprises rules in three areas: market-access, domestic support and export subsidies. In all these areas, the developed countries were expected to reduce their protection. In reality, however, the developed countries have been able to continue to maintain high levels of protection. Many of them set very high tariffs on several products; thus, even after the required 36% tariff reductions of the Uruguay Round, they remain prohibitively high. Domestic support has also remained very high; in fact, the total amount of domestic subsidies in OECD countries has in some years actually risen above the pre-WTO levels as there was an increase in permitted types of subsidies which more than offset the decrease in those subsidies that come under discipline. The export subsidies budget in developed countries is also to be reduced by only 36% under the agreement.
14. In the export subsidy issue, there has been some progress, as the WTO's Hong Kong Ministerial conference in 2005 agreed that as part of the Doha deal, export subsidies of the developed countries would be eliminated b y the end of 2013.

15. On the question of domestic subsidies, there has been the most controversial debate. The AoA has a loophole allowing developed countries to increase their total domestic support by shifting from one type of subsidy to other types of subsidy, while maintaining or even increasing the total amount of subsidies. Under the AoA are the following types of domestic support: (1) The Aggregate Measure of Support or AMS (widely termed the Amber Box), which is price-based and which is categorized as directly trade-distorting), (2) The *de minimis* support (certain amounts of domestic subsidy that are allowed, calculated as a percentage of the value of agricultural production); (3) the Blue Box (grants to farmers to assist them in setting aside production; which are considered trade-distorting but to a lesser degree than the Amber Box); and the Green Box (direct payments to farmers, and grants to maintain the environment, and other "indirect" subsidies), which is supposed not to be trade distorting, and there are no disciplines to limit the amounts that can be given to farms on this account. However, in reality, the Blue and Green Box subsidies also have significant effects on the market and trade, and are thus also trade-distorting. They allow the farm to obtain parts of its revenue from different and new sources, and to remain in business, which otherwise it might not. Since the conclusion of the Uruguay Round, there has been a significant shift of US domestic support from the Amber Box to the Green Box. It has hardly made use of the Blue Box. In a dispute settlement case on cotton, it was found that the US had been wrongly shielding some trade-distorting subsidies within the Green Box, and was asked to change its policies accordingly.

16. The US has to remove these subsidies, or to shift them into one of the trade-distorting boxes. One option is to move the subsidies to the Blue Box (which it has previously not used), and the US is thus seeking to change the definition or criteria of this box, through the Doha negotiations, to enable the shifting to take place. The EU, which makes extensive use of the Blue Box, is reducing its "trade-distorting" subsidies, but significantly increasing its Green Box subsidies (decoupled payments) under its Common Agricultural Policy (CAP) reform. Understandably, many developing countries have expressed concern that what the major developed countries are doing is not so much to reduce their actual domestic subsidies, but merely shifting the subsidies from one box to other boxes.

17. The developed countries' subsidies enable their farm products to be sold locally and also exported, often at levels below the production cost. Farmers in

developing countries lose export opportunities and revenues from having their market access blocked in the developed countries that use subsidies and also in third countries. They also often lose part of their own domestic market to the artificially cheap imports. In recent years, many developing countries have experienced surges in imports of many agricultural products. Often, imports were artificially cheapened by domestic and/or export subsidies.

18. Thus, developing countries are facing serious implementation problems in agriculture. They have had to remove non-tariff controls and convert these to tariffs. With the exception of LDCs, they are expected to reduce their own bound tariff rates. They also have had low domestic subsidies (due to financial constraints) and are now not allowed to raise these subsidies beyond a certain level. Increased competition from imports has increased fears of food insecurity.

19. In the Doha negotiations, the basic framework for establishing the negotiating modalities was agreed to at a mini-Ministerial meeting in July 2004, and endorsed by the General Council. The negotiations since then have mainly been an elaboration of this framework. In the domestic subsidy aspect, a key concept that has emerged is the overall trade-distorting domestic support (OTDS), comprising the AMS or amber box, the blue box and the *de minimis* support (a minimum of domestic support that is provided). The Green Box subsidies are excluded from OTDS. Much of the Doha discussion since July 2004 has been on the maximum OTDS that the developed countries should be allowed.

20. This framework gives the EU and US considerable leeway to (1) move trade-distorting subsidies from the Amber Box to the Blue Box and *de minimis* in order to make fuller use of their total allowed TDS; (2) make creative use of the Green Box which has no limits and has loose criteria at present, and thus enable some subsidies that are in effect trade-distorting to be counted as non-trade- distorting subsidies.

21. The level of the actual OTDS is presently far below the level of total allowed TDS for the US and the EU. Therefore the developed countries can afford to reduce the level of allowed TDS significantly, before the cut reaches the level where the present actual TDS is affected. In the informal language of WTO negotiations, this would mean the US and EU would only cut "water" (i.e. the difference between allowed and actual subsidies) and not their actual subsidies. This is the reason why the EU and US have been able to announce offers to cut their AMS and their total allowed TDS by a seemingly large degree, while in reality these offers do not necessitate real cuts in the present applied level (in the case of the US) or in the applied level that is already planned for (in the case of the EU, with reference to its CAP). This is one of the present stumbling blocks to the reaching of an agreement on agriculture Modalities.

22. In October 2005, the US announced an offer which was estimated independently as meaning it would cap its total allowed TDS at $22.7 billion. This compares with the $19.7 billion of actual TDS in 2005 that was estimated in a simulation exercise by WTO members, and to what is commonly believed to be a level of around $11 billion in 2007. In 2005, the European Union made its offer to cut its allowed OTDS by 70%. This implies the present allowed OTDS of Euro110 billion would be reduced to Euro 33 billion. The conclusion from the above is that

even when considering only the trade-distorting support, the US and EU offers are not sufficient to ensure real cuts in the actual or the already planned levels of domestic support.

23. As has been pointed out: "The really significant escape route is the Green Box which amounts to US$50 billion and Euro 22 billion in 2000 respectively in the US and EU and the possibility of unlimited increase in future…Thus the Green Box, particularly its window of 'decoupled income support' (paragraph 6 of Annex 2 of the AoA) will continue to be the route to give farmers unlimited amounts as subsidies[61].

24. The market access outcome is complicated by the introduction of a category of tariff lines known as "sensitive products" and "special products", which are allowed to have treatment that is more lenient (i.e. result in lower tariff reductions) than if the cuts in the tiered formula are adhered to. In the December 2008 text of the Chair, developed countries can designate 4% of their agricultural tariff lines as "sensitive products", whose tariff reductions can deviate by one-third, or half or two-thirds from the tiered formula rates.

25. Developing countries have also been fighting to establish two "special and differential treatment" elements in market access.: "special products" (SPs) and a special safeguard mechanism (SSM)[62]. These elements are championed by the Group of 33 developing countries, which are especially concerned about how further import liberalisation would worsen the extent of import surges and displace the domestic farmers from the local market.

26. Developing countries have also been fighting to establish two "special and differential treatment" elements in market access.: "special products" (SPs) and a special safeguard mechanism (SSM). These elements are championed by the Group of 33 developing countries, which are especially concerned about how further import liberalisation would worsen the extent of import surges and displace the domestic farmers from the local market. On SSM, the developing countries with defensive interests (led by the G33) have proposed that developing countries be allowed to defend their domestic farmers from being damaged by import competition, by establishing a special safeguard which does not need to follow the normal safeguard procedures (in the WTO's existing safeguard agreement).

27. While the WTO membership has agreed to the establishment of a SSM for use by developing countries, those members with an export interest (including the United

[61] Das, Bhagirath Lal (2006). "Why the EU and US offers on farm trade are not good enough." TWN Briefing Paper 33.

[62] In the SSM, a developing country can take safeguard action without having before hand to show injury to small farmers and to relate this to imports as the cause. Under the SSM, action in the form of imposing an additional tariff can be triggered when either the price of the import goes below a certain threshold, or the volume of import increases above a certain threshold. The Uruguay Round did create a special agricultural safeguard along these lines, but only countries that carried out the "tariffication" exercise (to eliminate quantitative restrictions and instead convert these into tariffs) could avail themselves of this special safeguard. The majority of these eligible are developed countries. The developing countries have thus argued that they should also be able to make use of a special safeguard mechanism.

States, Australia and some agricultural-exporting developing countries) have proposed many restrictions to the use of the SSM, such as that the change in price or volume of import has to be large before the SSM can be used, and that the SSM can be used on only a small number of products at any one time and only for a limited duration. The inability to agree on the conditions of use of the SSM, especially on the conditions for raising the SSM duty above the pre-Doha level, was one of the main factors for the collapse of the July 2008 mini-Ministerial meeting held at the WTO.

28. In conclusion, there are many imbalances in the existing WTO rules on agriculture, as the markets of developed countries are still extremely protected, and the rules were crafted in such a way that enabled this continued protection, especially in domestic subsidies. Meanwhile, the developing countries cannot compete with the developed countries in subsidies due to their financial constraints, but they have significantly liberalised their agricultural imports and many have experienced an increase in import surges, which have had damaging effects on local production. The Doha Work Programme was supposed to correct this imbalance, by addressing the loopholes, and especially by cutting the actual (and not just the allowed) domestic subsidies of developed countries. However, the developing countries are most likely to get a bad deal, if the Doha Round were to conclude on the lines of the Chair's December 2008 draft.

29. There is the probability that the developed countries' domestic subsidies will not be really reduced, or at best by only a little. They would be cutting "water" (the difference between the actual and the allowed levels) in OTDS, while they are able to maintain or increase the subsidies in the Green Box. Because of this maintenance of high domestic support, the developed countries will be able to continue to dump products that are subsidised at artificially low prices onto the poorer countries that cannot afford to subsidise, and to do this even if their export subsidies are eliminated.

C. Services

30. The General Agreement on Trade in Services (GATS), is said to be relatively development friendly because there are many development flexibilities built into its provisions. In the present GATS architecture, a developing country can decide whether to enter any service sector in its schedules of commitments. Thus, sectors can be excluded. And if a sector is included in the schedule, the country can decide the extent of liberalization to commit in that sector, in each of the 4 modes of service delivery. Restrictions and limits can be placed, for example restrictions on foreign equity ownership in Mode 3 on "commercial presence."

31. Negotiations are based on the bilateral request-offer modality. Countries can make requests for liberalization in certain sectors. However, it is up to each developing country to decide how to respond to the requests it receives. The country can make as much or as little in its offers as it deems appropriate to its interests. Additional "special and differential treatment" clauses have been established in the GATS and in subsequent documents that clarify that developing countries should be allowed to liberalise less than developed countries and to choose their own pace of liberalisation.

32. However these flexibilities and even the architecture of the GATS itself came under threat in 2005 from proposals for "benchmarking" or, in more recent terminology, "complementary approaches" or "establishment of targets and indicators." The proposals were mainly from developed countries including the EU, Japan and Australia, supported by the US.

33. Under these proposals, countries would be required to liberalise in a certain minimum number of key sectors. The EU in October 2005 proposed that developing countries be required to improve their commitments or make new ones in 57% of the services sub-sectors. Other proposals are that developing countries would be required to bind in the GATS their present level of liberalisation in the various sectors, and then to extend the level of liberalisation through new GATS commitments. These proposed changes would, if accepted, affect the present architecture of the GATS and contradict the bottom-up and positive-list approach, thereby removing much of the present development flexibilities of the GATS.

34. Particularly targeted was the liberalisation of "commercial presence", or Mode 3 of the GATS. The developing countries were asked to open up a minimum percentage of subsectors for the participation of foreign service enterprises and providers. Some proposals called for developing countries to bind existing levels of actual liberalisation, and then go further by committing to liberalise even more deeply. Such an approach would remove many of the current development-friendly aspects of the GATS and would coerce many developing countries to commit to liberalise in several important services sectors.

35. Another proposal by the developed countries is that "plurilateral negotiations" be established, to complement the bilateral request-offer modality. In the plurilateral modality, a set of countries that demand wider and more rapid opening in a service sub-sector can formulate their demands and requests to a set of countries for negotiations on these demands. This plurilateral approach was also opposed by many developing countries which believed that they would be subjected to greater pressure under this method, and that this would also go against the development flexibilities of the GATS.

36. At the Hong Kong Ministerial Conference in December 2005, the "benchmarking" or "numerical targeting" approach was rejected by a large number of developing countries, and thus it has been left out of the negotiating agenda, at least for now. However the "plurilateral" modality of negotiations was adopted, despite the opposition and reservations of many developing countries.

37. After the Hong Kong conference, the new modality of plurilateral negotiations has been implemented, and a number of rounds of plurilateral negotiations has been conducted, in more than 20 sub-sectors or areas of negotiations. The course of the services negotiations shows the intense pressures that the developing countries have come under to liberalise their services sub-sectors under the Doha Work Programme. This was another attempt to stress the "market access" aspect of the Doha programme, at the expense of the development aspect.

38. The developed countries argued that they need the new approach in order to get developing countries to liberalise at a faster rate. But this goes against the principle that developing countries be able to choose their own rate of liberalisation,

which is the centrepiece of the GATS. Moreover, the developed countries themselves have moved very slowly, if at all, in the only area where most developing countries could benefit from the GATS, which is in Mode 4 or the movement of people. The offers by them have been few and of low quality. Thus, developing countries rightly argue that it is the developed countries that are not forthcoming in making services commitments, and that they should not pressurise the developing countries to liberalise faster than what they can bear. Before and at the July 2008 mini-Ministerial conference at the WTO, there were renewed attempts by the developed countries to get developing countries to agree to a declaration on services in which members agree to "bind" in their GATS schedules their existing actual level of liberalization in various service sectors. Since that meeting did not conclude with any outcome, the draft declaration was not adopted.

III. COMMENTS AND OBSERVATIONS OF THE AALCO SECRETARIAT

39. The Doha Round negotiations at the World Trade Organization were launched in 2001 with a specific purpose: to address the development concerns of the developing countries. This was reflected in the Doha Ministerial Declaration itself when it mentioned that:

> *International trade can play a major role in the promotion of economic development and the alleviation of poverty. We recognize the need for all our peoples to benefit from the increased opportunities and welfare gains that the multilateral trading system generates. The majority of WTO members are developing countries. We seek to place their needs and interests at the heart of the Work Programme adopted in this Declaration*[63].

40. But, for developing countries that began Doha round on the promise that it would address the inequities of the Current Trading System, and that it would create new opportunities for their development, the (successful?) failure of its conclusion and the resulting impasse has been frustrating and painful. Indeed a development-oriented outcome would have:

- given top priority to satisfactory conclusions on resolving the "development issues" (implementation issues and the strengthening of special and differential treatment);
- resulted in significant real reduction in domestic support and in tariffs in agriculture in developed countries, while enabling developing countries to protect and promote the interests of their small farmers;
- allowed developing countries to continue to make use of existing flexibilities in NAMA so as to promote domestic industrial development, while developed countries commit themselves to eliminating or significantly reducing their industrial tariff peaks and high tariffs and eliminating their non-tariff barriers; and
- enabled developing countries to maintain and make full use of the development flexibilities contained in the GATS and reaffirmed in the March 2001 Guidelines and Procedures for the services negotiations.

[63] WTO, The Doha Ministerial Declaration of 14 November 2001, para. 2.

41. Besides these outcomes, the developing countries also have been expecting development outcomes in relation to a number of issues that include; resolving the issues of the relationship between the TRIPS Agreement and the UN Convention on Biological Diversity (for example, by amending the TRIPS Agreement to incorporate requirements for disclosing in patent applications the source of origin of genetic materials and traditional knowledge), and providing meaningful concessions and preferences for least-developed countries.

42. Due to unrelenting pressure by the developed-country members of the WTO, led by the US and EU, the Doha Work Programme negotiations have veered from their proclaimed direction oriented to a development-friendly outcome, towards a "market access" direction in which developing countries are pressurised to open up their agricultural, industrial and services sectors. Hence, much to the collective dismay of the developing countries, the developed countries have turned the negotiations into demands for developing countries to provide greater market access in all three areas of agriculture, NAMA and services. As the (then) Indian Commerce Minister, Kamal Nath, correctly pointed out in the June-July 2006 meetings in the WTO, this was supposed to be a Development Round, but the developed countries were trying to ignore development concerns and turn it into a Market Access Round, which he found unacceptable. The distortions caused by the high levels of protection and trade distorting Subsidies in Agriculture in rich countries continue to destabilize and undermine the productive potential of many developing countries. This has been one of the most important bones of contentions between the developed and developing world and which also is responsible for creating the Doha impasse. This is an issue that has been recognized as the main problem by a number of developing countries.

43. The present impasse is a reflection of the conflict of paradigms and approaches that have been at the heart of negotiations at the WTO since its birth, and even before its birth when the Uruguay Round negotiations also faced this conflict. The developing countries by and large want the multilateral trading system to be oriented to their development needs. The developed countries want to count on the WTO negotiations to continue to produce outcomes in their favour, as they did at the Uruguay Round, with greater and greater access to developing countries' markets. However, ironically they themselves have not been able to make any genuine commitments in areas where they are protectionist, especially agriculture. It is difficult to see how the impasse will be broken unless this conflict is recognized and hopefully resolved in favour of development.

44. AALCO, as an Organization consisting of Member States from Asia and Africa would continue to monitor the developments that take place in relation to the Doha Agenda with a view to continue to assist the developing countries in their quest for a fair and equitable multilateral trading system.

ANNEX

WTO AS A FRAMEWORK AGREEMENT AND CODE OF CONDUCT FOR WORLD TRADE
(Non- Deliberated)

SECRETARIAT'S DRAFT
AALCO/ RES/ 52/ S 13
12 September 2013

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

Having considered the Secretariat Document No. AALCO/52/HEADQUARTERS (NEW DELHI)/2013/S13;

Recognizing the importance and complexities of issues involved in the successful conclusion of the WTO Doha Development Agenda;

Hoping that the Doha Round of Negotiations would conclude successfully in the near future;

1. **Encourages** Member States to successfully complete negotiations mandated under the Doha Development Agenda, taking fully into consideration the special development concerns of developing and least-developed country Members of WTO and the original purpose of the Doha agenda;

2. **Appreciates** the effort of the Centre for Research and Training (CRT) of AALCO in successfully organizing a Training Programme on 'Trade and Development Issues' from 21-25 May 2012, at AALCO Headquarters, New Delhi;

3. **Requests** the Secretary-General in consultation with Member States, subject to the availability of necessary resources, to organize seminars or workshops to facilitate the exchange of views by Member States on issues currently under negotiation within the WTO and capacity building programs; and,

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

VIII. EXPRESSIONS OF FOLKLORE AND ITS INTERNATIONAL PROTECTION

AALCO/52/ HEADQUARTERS (NEW DELHI)/2013/S 14
For Official Use Only

EXPRESSIONS OF FOLKLORE AND ITS INTERNATIONAL PROTECTION
(Non-Deliberated)

CONTENTS

EXPRESSIONS OF FOLKLORE AND ITS INTERNATIONAL PROTECTION
(Non-Deliberated)

I. INTRODUCTION

1. Folklore has always been considered a part of the common heritage of the community without individual ownership, and there were no formal or informal laws in many developing countries, which specifically bestowed ownership rights of folklore on any community or group of persons, and prohibited its exploitation without their consent. This led to widespread exploitation of folklore inside and outside the State concerned.

2. The need for a strong legal mechanism for the protection of folklore has been a subject of discussion at the national and international levels since 1960s, and the two main international fora where most of the discussions were held, are the World Intellectual Property Organization (WIPO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO). While WIPO is concerned with the intellectual property protection of folklore, UNESCO is concerned with the general protection. Apart from this, the African Intellectual Property Organization (OAPI), a regional organization reflects the collective thought of the like-minded States for the legal protection of creations of folklore.

3. It may be recalled that the WIPO General Assembly, at its Twenty-Sixth Session, held in Geneva from September 26 to October 3, 2000, established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ("the Committee" or "IGC") in order to analyse, *inter alia*, intellectual property issues that arise in the context of the protection of expressions of folklore.[64]

4. The Secretary-General of AALCO realizing the extreme importance of the work undertaken by the WIPO IGC for the Asian and African countries, and the possible role that AALCO could play in formulating an international instrument, proposed to the AALCO Member States through an Explanatory Note dated 27 April 2004, to include the item "Expressions of Folklore and its International Protection" on the Agenda of the Forty-Third Annual Session of AALCO held in Bali (Republic of Indonesia) from 21-25 June 2004. This proposal was in line with Article 1 (b) of the AALCO's Statutes which provides for exchange of views and information on matters of common concern having legal implications. The AALCO Member States welcomed the proposal and the item was deliberated at the Forty-Fifth (2006), Forty-Sixth (2007) and Forty-Ninth (2010) Annual Sessions. At the Fiftieth Annual Session (2011), the Member States through a resolution directed the Secretary-General to follow-up the developments within the WIPO IGC on "Expressions of Folklore", and to present the views of the AALCO Member States to the IGC and decided to place this agenda at the next Session.

5. At the Fiftieth Annual Session held in Colombo, Democratic Socialist Republic of Sri Lanka from 27 June to 1 July 2011, this agenda item was deliberated

[64] 1 WO/GA/26/6, paragraph 13, and WO/GA/26/10.

upon and the following Member States made their interventions, namely; Democratic Socialist Republic of Sri Lanka, Indonesia, Japan, Democratic People's Republic of Korea, Malaysia, Nepal, and Islamic Republic of Iran. The Fifty-First Annual Session of AALCO was held in Abuja, Federal Republic of Nigeria from 18 to 22 June 2012, and this agenda item was a non-deliberated item during that session.[65]

II. TWENTY-FOURTH SESSION OF THE INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE (22 APRIL – 26 APRIL 2013, GENEVA)

A. Overview

6. The subject "expressions of folklore," was first initiated by WIPO in cooperation with UNESCO in early 1978. During that time, it was considered as a subject of traditional knowledge. In 1999, WIPO and UNESCO conducted four Regional Consultations on the Protection of Expressions of Folklore, each of which adopted resolutions or recommendations with proposals for future work. Following the recommendations of the regional consultations on folklore, the WIPO General Assembly, at its Twenty-Sixth Session, held in Geneva from 26 September to 3 October 2000, established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore.

7. The Intergovernmental Committee (IGC) constituted a forum in which discussions would proceed among Member States on the three primary themes which they identified during the consultation: intellectual property issues that arise in the context of: (i) access to genetic resources and benefit sharing; (ii) protection of traditional knowledge, whether or not associated with those resources; and (iii) the protection of expressions of folklore

8. Following the recommendations of the regional consultations on folklore, the WIPO General Assembly, at its Twenty-Sixth Session, held in Geneva from 26 September to 3 October 2000, established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore.

9. The Twenty-Fourth Session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore took place between 22 April and 26 April 2013 in Geneva, Switzerland.

10. The Agenda for the Twenty-Fourth Session included, *inter alia*,
    a. The Protection of Traditional Knowledge: Draft Articles
    b. Joint Recommendation on Genetic Resources and Associated Traditional Knowledge
    c. Proposal for the Terms of Reference for the Study by the WIPO Secretariat on Measures Related to the Avoidance of the Erroneous Grant

[65] See Verbatim Record of Asian-African Legal Consultative Organization (AALCO) (2012), "Verbatim Record of Discussions: Fifty-First Annual Session, 18 – 22 June 2012, Abuja, Federal Republic of Nigeria" Document No. AALCO/51/ABUJA/2012/VR.

of Patents and Compliance with Existing Access and Benefit-Sharing Systems

d. Joint Recommendation on the Use of Databases for the Defensive Protection of Genetic Resources and Traditional Knowledge Associated with Genetic Resources

11. The discussion and revision of the Draft Articles on the Protection of Traditional Knowledge required consensus on core issues in order to streamline the text. The resulting revised version would then be sent for the WIPO for the General Assembly's consideration and decision on whether to convene a high-level meeting to complete an international convention on the protection of traditional knowledge.

B. Revision of the Draft Articles on The Protection of Traditional Knowledge

12. The Chair of the Intergovernmental Committee, Ambassador Wayne McCook of Jamaica, stated that due to the complexity of the negotiations, only four key articles were discussed: Article 1 (Subject matter of protection), Article 2 (Beneficiaries of protection), Article 3 (Scope of protection), and Article 6 (Exceptions and Limitations)

13. Changes to Article 1 include adding paragraph 1.4 referring to the limits of the protection, and mentioning that the protection should not extend to traditional knowledge in the public domain. It was also suggested by several States that this paragraph be moved to Article 6, which deals with exceptions and limitations. An additional paragraph 1.5 on the use of databases to prevent the erroneous grant of patents was also added to the revision. The inclusion of these contentious issues has partly been due to its defence and support by developed countries in the European Union and North America. Several representatives of developing countries raised issues concerning the definition of Traditional Knowledge associated with genetic resources contained in Article 1.2.

14. Article 3 retained its two major options; *firstly*, a rights-based option that focuses on the rights granted to beneficiaries; and, *secondly*, a measure-based option that focuses on measures necessary to be adopted in order to ensure the protection of traditional knowledge. Some representatives of developing States, particularly those in the African Group, were of the opinion that the two options were complimentary and should be combined. However, this view was opposed by the European Union.

15. Article 6 was modified to include two defined types of exceptions to the protection. These types were listed as 'general exceptions', and 'specific exceptions.'

16. In the text of the Draft Articles, where two words, terms or phrases are separated by a forward slash, this indicates that according to the views expressed by the Committee, two options exist regarding the language in question, and indicates that the facilitators do not consider, in view of the Committee's discussions, the choice between the two options as having any significant policy implications. Where two words, terms or phrases are square-bracketed and separated by a forward slash, the facilitators consider, the choice between the two options as having potentially significant policy implications. The revised text of the discussed Draft Articles is as follows:

ARTICLE 1

SUBJECT MATTER OF PROTECTION

Definition of Traditional Knowledge

1.1 For the purposes of this instrument, "traditional knowledge" [refers to]/[includes]/[means] know-how, skills, innovations, practices, teachings and learnings of [indigenous [peoples] and [local communities]]/[or a state or states] that are dynamic and evolving, and that are intergenerational/and that are passed on from generation to generation, and which may subsist in codified, oral or other forms.

[Traditional knowledge may be associated, in particular, with fields such as agricultural, environmental, healthcare and indigenous and traditional medical knowledge, biodiversity, traditional lifestyles and natural resources and genetic resources, and know-how of traditional architecture and construction technologies.]

Definition of Traditional Knowledge Associated with Genetic Resources

1.2 [Traditional knowledge associated with genetic resources means [substantive] knowledge of the [properties], and uses of genetic resources and their derivatives held by indigenous [peoples] and local communities [and which directly leads to a claimed invention].]

Criteria for Eligibility

1.3 Protection extends [only] to traditional knowledge that is [distinctively] associated/linked with the cultural, [and] social identity, [and] or cultural heritage of beneficiaries as defined in Article 2, that is generated, maintained, shared/transmitted in collective context, that is intergenerational/that is passed on from generation to generation [and has been used for a term as may be determined by each [Member State]/[Contracting Party] but of not less than [fifty years]] [recognizing the [cultural] diversity of the beneficiaries] recognizing that there is cultural diversity amongst beneficiaries.

1.4 [Protection does not extend to traditional knowledge that is widely known or used outside the community of the beneficiaries as defined in Article 2.1, [for a reasonable period of time], in the public domain, protected by an intellectual property right or the application of principles, rules, skills, know-how, practices, and learning normally and generally well-known.]

Databases

1.5 [Traditional knowledge that is contained in databases may be used to prevent the erroneous grant of [patents]/[intellectual property rights].]

ARTICLE 2

BENEFICIARIES OF PROTECTION

2.1 Beneficiaries of protection are indigenous [peoples] and local communities [and nations]

[who hold, maintain, use and/[or] develop] the [secret] [protected] traditional knowledge as defined in Article 1/1.3, [or any other national entity defined by national law.]

2.2 [Where [protected] traditional knowledge as defined in Article 1 is not specifically attributable or confined to an indigenous [people] or local community, [or] and it is not possible to identify the [people or] community that generated it, [Member States]/[Contracting Parties] may define [a]/[any] national entity defined by national legislation as a beneficiary.]

Optional addition

2.3 [Beneficiaries of [defensive protection] of [protected] traditional knowledge as defined in Article 1, are indigenous peoples and communities, local communities [as well as society at large].]

ARTICLE 3

SCOPE OF PROTECTION

3.1 [Member States]/[Contracting Parties]/[This instrument] [should]/[shall] confer(s) the following [exclusive] [collective] rights on the beneficiaries, as defined in Article 2:

(a) to maintain, control, [protect] and develop their [protected] [secret] traditional knowledge;

(b) [to authorize or deny the access to and use/utilization based on prior and informed consent;]

(c) to have a fair and equitable share of benefits arising from the use/utilization of their traditional knowledge in accordance with the terms set out as a condition for the prior and informed consent;

(d) [to be informed of access to their traditional knowledge through a disclosure mechanism in intellectual property applications;]

(d*bis*) [require the mandatory disclosure of the identity of the traditional knowledge holders and the country of origin, as well as evidence of compliance with prior informed consent and benefit sharing requirements, in accordance with the national law or requirements of the country of origin in the procedure for the granting of intellectual property rights involving the use of their traditional knowledge.]

3.2 [In addition to the protection provided for in Paragraph 1, users of traditional knowledge which fulfills the criteria in Article 1.3 [should]/[shall]]:

(a) acknowledge the source of traditional knowledge and attribute the beneficiary, unless the beneficiary decides otherwise; and

(b) use the knowledge in a manner that respects the cultural norms and practices of the beneficiary as well as the inalienable, indivisible and imprescriptible nature of the moral rights associated with traditional knowledge.

3.3 The beneficiaries as defined under Article 2 [should]/[shall] have the right to initiate legal proceedings where their rights under Paragraphs 1 and 2 are violated or not complied with.
[Definition of ["use"]/["utilization"]
[For the purposes of this instrument, the term ["use"]/["utilization"] in relation to traditional knowledge [should]/[shall] refer to any of the following acts:

(a) Where the traditional knowledge is a product:

(i) manufacturing, importing, offering for sale, selling, stocking or using the product beyond the traditional context; or
(ii) being in possession of the product for the purposes of offering it for sale, selling it or using it beyond the traditional context.

(b) Where the traditional knowledge is a process:

(i) making use of the process beyond the traditional context; or

(ii) carrying out the acts referred to under sub-clause (a) with respect to a product that is a direct result of the use of the process; or

(c) When traditional knowledge is used for research and development leading to profit making or commercial purposes.]

Option 2
3.1 [[Member States]/[Contracting Parties] should provide [adequate and effective] legal, policy or administrative measures, as appropriate [and in accordance with national law], to:

(a) discourage the unauthorized disclosure, use or other uses of [secret] [protected] traditional knowledge;

(b) where [protected] traditional knowledge is knowingly used outside the traditional context:

(i) [acknowledge the source of traditional knowledge and attribute its beneficiaries/holders/owners where known unless they decide otherwise];

(ii) encourage use of traditional knowledge in a manner that does not disrespect the cultural norms and practices of its beneficiaries/holders/owners;

(iii) encourage beneficiaries and users to establish mutually agreed terms;

Alternative

(iii) ensure that [where the traditional knowledge [is secret]/[is not widely known,]] traditional knowledge holders and users establish mutually agreed terms with prior informed consent addressing approval requirements and the sharing of benefits in compliance with the right of local communities to decide to grant access to that knowledge or not;

[(c) facilitate the development of national traditional knowledge databases for the defensive protection of traditional knowledge;

(d) facilitate, as appropriate, the creation, exchange and dissemination of, and access to, databases of genetic resources and traditional knowledge associated with genetic resources;

(e) provide opposition measures that will allow third parties to dispute the validity of a patent by submitting prior art;

(f) encourage the development and use of voluntary codes of conduct; and

(g) discourage information lawfully within the beneficiaries'/holders'/owners' control from being disclosed, acquired by or used by others without the beneficiaries'/holders'/ owners'[consent], in a manner contrary to fair commercial practices, so long as it is secret, that reasonable steps have been taken to prevent unauthorized disclosure, and has value.]

ARTICLE 6

EXCEPTIONS AND LIMITATIONS

6.1 [Measures for the protection of traditional knowledge should not restrict the generation, customary use, transmission, exchange and development of traditional knowledge by the beneficiaries, within and among communities in the traditional and customary context, [in accordance with national law].]

General Exceptions

6.2 [Member States]/[Contracting Parties] may adopt appropriate limitations and exceptions under national law [with the prior informed consent of the

beneficiaries] [in consultation with the beneficiaries] [with the involvement of beneficiaries], provided that the use of [protected] traditional knowledge:

(a) [acknowledges the beneficiaries, where possible;]

(b) [is not offensive or derogatory to the beneficiaries;]

(c) [is compatible with fair practice;]

(d) [does not conflict with the normal utilization of the traditional knowledge by the beneficiaries; and]

(e) [does not unreasonably prejudice the legitimate interests of the beneficiaries taking account of the legitimate interests of third parties.]

6.3 [When there is reasonable apprehension of irreparable harm related to secret and sacred traditional knowledge, [Member States]/[Contracting Parties] [may]/[shall]/[should] not establish exceptions and limitations.]

6.4 [Except for the protection of secret traditional knowledge against disclosure, to the extent that any act would be permissible under the national law of a [Member State]/[Contracting Party] for knowledge protected by patent or trade secrecy laws, such act shall not be prohibited by the protection of traditional knowledge.]

Specific Exceptions

6.5 [[Member States]/[Contracting Parties] may permit the use of [protected] traditional knowledge in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use[, provided that the beneficiaries are adequately compensated.] without consent of the traditional knowledge [holders]/[owners].

6.6 [[Member States]/[Contracting Parties] may exclude from protection diagnostic, therapeutic and surgical methods for the treatment of humans or animals.]]

6.7 [Member States]/[Contracting Parties] may adopt appropriate limitations or exceptions under national law for the following purposes:

(a) teaching, learning, but does not include research resulting in profit-marking or commercial purposes;

(b) for preservation, display and presentation in archives, libraries, museums or cultural institutions for non-commercial cultural heritage purposes.

6.8 [Regardless of whether such acts are already permitted under Paragraph 1, the following shall be permitted:

(a) the use of traditional knowledge in cultural institutions recognized under the appropriate national law, archives, libraries, museums for non-commercial cultural heritage or other purposes in the public interest, including for preservation, display, research and presentation should be permitted; and

(b) the creation of an original work of authorship inspired by traditional knowledge.]

6.9 [[There shall be no right to [exclude others] from using knowledge that:]/[The provisions of Article 3 shall not apply to any use of knowledge that:]

(a) has been independently created [outside the beneficiaries' community];

(b) [legally] derived from sources other than the beneficiary; or

(c) is known [through lawful means] outside of the beneficiaries' community.

6.10.[Protectedtraditionalknowledgeshallnotbedeemedtohavebeenmisappropriatedor misused if the protected traditional knowledge was:

(a) obtained from a printed publication;

(b) obtained from one or more holders of the protected traditional knowledge with their prior informed consent; or

(c) mutually agreed terms for access and benefit sharing apply to the protected traditional knowledge that was obtained, and were agreed upon by the national contact point.]

6.11.[Nationalauthoritiesshallexcludefromprotectiontraditionalknowledgethatisalready available without restriction to the general public.]

17. This revised version, which was the version arrived at after the deliberations by the Intergovernmental Version, was subsequently forwarded to the General Assembly of the WIPO for their consideration and based on the General Assembly's approval, these draft articles would likely constitute the basis for an international instrument on the protection of traditional knowledge.

C. Other Matters of Discussion

18. In addition to the Draft Articles three other texts were also the topics of the discussion at the Intergovernmental Committee session. These were,

a. a Joint Recommendation on Genetic Resources and Associated Traditional Knowledge;

b. a Proposal for the Terms of Reference for the Study by the WIPO Secretariat on Measures Related to the Avoidance of the Erroneous Grant of Patents and Compliance with Existing Access and Benefit-Sharing Systems; and,
a. a Joint Recommendation on the Use of Databases for the Defensive Protection of Genetic Resources and Traditional Knowledge Associated with Genetic Resources

19. The supporters of these texts presented them as a means to prevent the erroneous grant of patents, as the study would measure the costs and benefits of a mandatory disclosure requirement in patent applications that would require patent applicants to disclose the origin of genetic resources in patent applications, and in the present case, genetic resources associated with traditional knowledge.

20. However, there was fairly strong opposition to the tabling of these texts as some delegates saw them as a side-tracking of the discussions of the IGC. Brazil, speaking on behalf of the Development Agenda Group and supported by India, South Africa and China, stated that three documents have been presented before, and were taken note of during the IGC session on genetic resources (IPW, WIPO, 8 February 2013).The delegate also stated that the mandate given by the General Assembly stipulates work on the existing draft articles and that, the three new proposals would only create a parallel effort that would jeopardise discussion in the IGC. The delegate from South Africa also voiced concerns that the terms of reference of the study displayed a biased approach by focusing only on the erroneous granting of patents while failing to account for the impact of misappropriation on indigenous communities. On the text concerning databases, the African Group said databases were an important issue that could be addressed once an international binding treaty is established, which India concurred with.

21. The three documents were subsequently noted by the IGC.

III. COMMENTS AND OBSERVATIONS OF THE AALCO SECRETARIAT

22. Folklore is an extremely important aspect of the cultural traditions of any country and constitutes a deeply rooted, rich and varied resource for mankind. Traditional Knowledge and expressions of traditional knowledge also hold a place of special importance to developing countries in Asia, Africa and South America, because of the deep way in which they are embedded in the cultures of those countries and because of the vast majority of mega-diverse countries being predominantly from these regions.

23. As they are the owners of the majority of these resources, Asian-African countries need to utilize every available option within and outside the Intellectual Property system, both preventative and defensive, and national and international, to protect to seek the effective protection of the protection of folklore and traditional knowledge. This is especially important given the asymmetrical positions of developed and underdeveloped countries.

24. With the Draft Articles being forwarded to the WIPO General Assembly for consideration and to lay the foundation for a possible international instrument in the near future, participation by Asian-African States is of paramount importance to ensure that their interests and rights in folklore and traditional knowledge are protected and that the terms and provisions of the international instrument that may come out of these negotiations is beneficial to developing countries. Minding the developments in this field, it would be desirable to hold an Experts Meeting within AALCO forum in cooperation with WIPO or with any other Member State(s), to facilitate the exchange of views by Member States on the issues relevant to the protection of Expressions of Folklore.

IV. ANNEX

SECRETARIAT DRAFT
AALCO/RES/52/S 14
12 SEPTEMBER 2013

EXPRESSIONS OF FOLKLORE AND ITS INTERNATIONAL PROTECTION
(*Non-Deliberated)*

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

Considering the Secretariat Document No. AALCO/52/HEADQUARTERS (NEW DELHI)/2013/S 14;

Recognizing the importance of protection of the 'Expressions of Folklore' for the Asian-African countries;

Welcoming the World Intellectual Property Organization (WIPO) General Assembly initiative in establishing an Intergovernmental Committee (IGC) with the objective of reaching agreement on a text of an international legal instrument (or instruments) which will ensure the effective protection of Expressions of Folklore (EoF);

Also welcoming the work done by the Intersessional Working Group 1 in developing a legal instrument to protect the EoF:

1. **Expresses** the hope that the revised draft forwarded by the IGC to WIPO General Assembly would be able to adopt the agreement on a text of an international legal instrument (or instruments) which will ensure the effective protection of EoF.

2. **Requests** the Secretary-General to organize an Expert Meeting in cooperation with WIPO or with any other Member State(s), to facilitate the exchange of views by Member States on the issues relevant to the protection of EoF.

3. **Encourages** Member States to actively participate in the future work of the agenda item at all the WIPO meetings.

4. **Directs** the Secretariat to follow up the developments within the WIPO IGC on 'Expressions of Folklore', and to present the views of the AALCO Member States to the IGC, and

5. **Decides** to place the item on the provisional agenda of the Fifty-Third Annual Session.