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ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION

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

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I. INTRODUCTION

A. Background

1. The International Law Commission (hereinafter referred to as "ILC" or the "Commission") established by the United Nations General Assembly Resolution 174 (III) of 21st September 1947 is the principal organ under the United Nations system for the promotion of progressive development and codification of international law. The Commission held its Sixty-second session from 3 May to 4 June and 5 July to 6 August 2010 at Geneva.[1]

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

3. The Commission elected the following officers: Chairperson: **Ms. Hanqin Xue (People's Republic of China)** and; First Vice-Chairman: **Mr. Christopher John Robert Dugard (South Africa);** Second Vice-Chairman: Mr. Zdzislaw W. Galicki (Poland); Chairman of the Drafting Committee: Mr. Donald M. McRae (Canada); and Rapporteur: Mr. Stephen C. Vasciannie (Jamaica).

4. On 14 July 2010, the Commission elected **Mr. Huikang Huang (People's Republic of China)** to fill the casual vacancy occasioned by the resignation of Ms. Hanqin Xue who was elected to the International Court of Justice. It also elected **Mr. Nugroho Wisnumurti (Indonesia)** as Chairman for the remainder to the Session to replace Ms. Hanqin Xue.

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[1] UN, *Report of the International Law Commission* (Sixty-second session, 3 May–4 June and 5 July–6 August 2010), UN Doc. A/65/10 [Hereinafter ILC Report]. This Report has been prepared on the basis of the ILC Report.

[2] The names of ILC Members from the AALCO Member States is indicated in bold.

5. The Secretary-General of the Asian-African Legal Consultative Organization (AALCO), Prof. Dr. Rahmat Mohamad, addressed the Commission on 14 July 2010. He briefed the Commission on the recent and forthcoming activities of AALCO. An exchange of views followed. The Commission was represented by Mr. Shinya Murase at the Forty-Ninth annual session of AALCO, held in Dar es Salaam, United Republic of Tanzania from 5 to 8 August 2010, by.

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

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

7. As regards the topic **"Reservations to treaties"**, the Commission had before it addendum 2 to the fourteenth report (A/CN.4/614/Add.2) as well as the fifteenth and sixteenth reports (A/CN.4/624 and Add.1 and 2, and A/CN.4/626 and Add.1, respectively) of the Special Rapporteur.

8. Addendum 2 to the fourteenth report and the fifteenth report considered the legal effects of reservations, acceptances of reservations and objections to reservations, as well as the legal effects of interpretative declarations and reactions thereto. Following a debate in plenary on these reports, the Commission referred 37 draft guidelines to the Drafting Committee. The sixteenth report considered the issue of reservations, objections to reservations, acceptances of reservations and interpretative declarations in relation to the succession of States. Following a debate in plenary, the Commission referred 20 draft guidelines, as contained in that report, to the Drafting Committee.

9. The Commission provisionally adopted 59 draft guidelines, together with commentaries, including 11 draft guidelines which had been provisionally adopted by the Drafting Committee at the sixty-first session and which deal with the freedom to formulate objections and with matters relating to the permissibility of reactions to reservations and of interpretative declarations and reactions thereto. The Commission thus completed the provisional adoption of the set of draft guidelines.

10. Concerning the topic **"Expulsion of aliens"**, the Commission had before it document A/CN.4/617, containing a set of draft articles on the protection of the human rights of persons who have been or are being expelled, revised and restructured by the Special Rapporteur in the light of the debate which had taken place in plenary during the sixty-first session of the Commission (2009). The Commission referred the revised draft

articles 8 to 15, as contained in that document, to the Drafting Committee. The Commission also had before it the sixth report of the Special Rapporteur (A/CN.4/625 and Add.1), which considered collective expulsion, disguised expulsion, extradition disguised as expulsion, the grounds for expulsion, detention pending expulsion and expulsion proceedings. Following a debate in plenary, the Commission referred to the Drafting Committee draft articles A, 9, B1 and C1, as contained in the sixth report, and draft articles B and A1 as revised by the Special Rapporteur during the session. The Commission also had before it a new draft work plan with a view to restructuring the draft articles (A/CN.4/618), which had been presented by the Special Rapporteur to the Commission at its sixty-first session (2009), as well as comments and information received thus far from Governments (A/CN.4/604 and A/CN.4/628).

11. As regards the topic **"Effects of armed conflicts on treaties"**, the Commission commenced the second reading of the draft articles on the effects of armed conflicts on treaties (which had been adopted on first reading at its sixtieth session (2008)) on the basis of the first report of the Special Rapporteur (A/CN.4/627 and Add.1). Following a debate in plenary on the report of the Special Rapporteur, the Commission referred all the draft articles, and the annex, proposed by the Special Rapporteur to the Drafting Committee.

12. In relation to the topic **"Protection of persons in the event of disasters"**, the Commission had before it the third report of the Special Rapporteur (A/CN.4/629), dealing with the humanitarian principles of neutrality, impartiality and humanity, as well as the underlying concept of respect for human dignity. The report also considered the question of the primary responsibility of the affected State to protect persons affected by a disaster on its territory, and undertook an initial consideration of the requirement that external assistance be provided on the basis of the consent of the affected State. Following a debate in plenary, the Commission decided to refer draft articles 6 to 8, as proposed by the Special Rapporteur, to the Drafting Committee. The Commission also adopted draft articles 1 to 5, which it had taken note of at its sixty-first session (2009), together with commentaries.

13. The Commission subsequently took note of four draft articles provisionally adopted by the Drafting Committee, relating to the humanitarian principles in disaster response, the inherent human dignity of the human person, the obligation to respect the human rights of affected persons, and the role of the affected State, respectively (A/CN.4/L.776).
14.

14. As regards the topic **"The obligation to extradite or prosecute (*aut dedere aut judicare*)"**, the Commission reconstituted the Working Group. The Working Group continued its discussions with the aim of specifying the issues to be addressed to further facilitate the work of the Special Rapporteur. It had before it a Survey of multilateral conventions which may be of relevance for the Commission's work on the topic, prepared by the Secretariat (A/CN.4/630), and a working paper prepared by the Special

Rapporteur (A/CN.4/L.774) containing some observations and suggestions based on the general framework proposed in 2009 and drawing upon the survey by the Secretariat.

15. Concerning the topic **"Immunity of State officials from foreign criminal jurisdiction"**, the Commission did not consider it in the course of the present session.

16. In relation to the topic **"Treaties over time"**, the Commission reconstituted the Study Group on Treaties over time. The Study Group began its work on the aspects of the topic relating to subsequent agreements and practice, on the basis of an introductory report prepared by its Chairman on the relevant jurisprudence of the International Court of Justice and of arbitral tribunals of ad hoc jurisdiction. A variety of issues relating to the significance and role of subsequent agreements and practice in the interpretation of treaties, and possibly also in their modification, were touched upon in the discussions.

17. As regards the topic **"The Most-favoured-nation clause"**, the Commission reconstituted the Study Group on the Most-Favoured-Nation clause. The Study Group considered and reviewed the various papers prepared on the basis of the framework which had been agreed upon in 2009, including a catalogue of MFN provisions and papers on the 1978 draft articles, the practice of GATT and WTO, the work of OECD and UNCTAD on MFN, and the "Maffezini" issue, and set out a programme of work for next year.

18. In relation to the topic **"Shared natural resources"**, the Commission once more established the Working Group on Shared natural resources. The Working Group continued its assessment on the feasibility of future work on oil and gas on the basis of a working paper (A/CN.4/621). The working group considered all aspects of the matter, taking into account the views of governments, including as reflected in the working paper, as well as in light of its previous discussions. The Commission endorsed the recommendation of the Working Group that the Commission should not take up the consideration of the oil and gas aspects of the topic "Shared natural resources".

19. The Commission decided that its sixty-third session be held in Geneva from 26 April to 3 June and 4 July to 12 August 2011.

B. Specific Issues on which Comments would be of particular interest to the Commission

i. Reservations to Treaties

20. The Commission has said in its Report that it would particularly welcome comments from States and international organizations on the draft guidelines adopted this year and has drawn their attention in particular to the draft guidelines in sections 4.2 (Effects of an established reservation) and 4.5 (Consequences of an invalid reservation) of the Guide to Practice.

ii. Treaties over Time

21. The Commission, in its consideration of the topic "Treaties over time", has attempted to clarify the practical and legal significance of "subsequent agreements" and the "subsequent practice" of the parties as a means of the interpretation and application of treaties (article 31 (3) (a) and (b) of the Vienna Convention on the Law of Treaties). A detailed description of the topic "Treaties over time" is contained in Annex A to the report of the Commission on its sixtieth session (2008).[3]

22. For this purpose, the Commission in its Report has requested the States to provide it with one or more examples of "subsequent agreements" or "subsequent practice" which are or have been particularly relevant in the interpretation and application of their treaties.

23. In this context, the Commission said that it would also be interested in instances of interpretation which involved taking into account other factors arising after the entry into force of the treaty (factual or legal developments).

C. Deliberations at the Forty-Ninth Annual Session of AALCO (Dar es Salaam, United Republic of Tanzania, 2010)

24. A Thematic debate entitled "Making AALCO's Participation in the Work of International Law Commission (ILC) More Effective and Meaningful" was organized as part of the Forty-Ninth Annual Session of AALCO held in Dar es Salaam, United Republic of Tanzania, from 5 to 8 August 2010.[4] An overview of the proceedings is contained herein below:

25. **H. E. Mr. Priyasath Gerald DEP, Vice-President of the Forty-Ninth Session** recalled that the International Law Commission had been established by the United Nations General Assembly in the year 1947, and the ILC Statute provided that the "Commission shall have for its object the promotion of the progressive development of international law and its codification." Nearly, ten years later, on 15 November 1956, the Statutes for the AALCO were adopted. The founding Member States with the objective to promote the perspectives of New States of Asia and Africa laid down the statutory obligation that ordained that one of the functions and purposes of the Asian-African Legal Consultative Organization was "to examine subjects that were under the consideration by the International Law Commission; to consider the reports of the Commission and to make recommendations thereon, wherever necessary, to the Member States." The Organization had in its fifty-five years of work examined the questions under consideration of the ILC. To further, consolidate their work programme on that matter, and to ensure that there was optimal utilization of the limited resources and time available to their Organization, that thematic debate had been conceived. The Vice-President stated that the Secretary-General had constituted, in his opinion an excellent

[3] Document A/63/10, available at: http://untreaty.un.org/ilc/reports/2008/2008report.htm
[4] Excerpts from AALCO, *Summary Report of the Forty-Ninth Annual Session of the Asian-African Legal Consultative Organization* (Dar es Salaan, United Republic of Tanzania, 2010), available on AALCO's website: http://www.aalco.int

Panel for that purpose. It was a unique combination of academic wisdom with practical international legal experience.

26. **H. E. Prof. Dr. Rahmat Mohamad, Secretary-General** in his Introductory Remarks gave a background on the relation between AALCO and the ILC. He said that AALCO as an inter-governmental body with 47 Member States from the two continents of Asia and Africa was uniquely placed to serve the States of the two region in examining and formulating their responses to newly emerging challenges of international law. The expanding scope and variety of issues on AALCO's work-programme was indicative of the willingness of AALCO to keep up with the increased responsibilities of examining a wide range of newly emerging challenges of international law. Against that backdrop, he emphasized that the relationship between AALCO and ILC should be further intensified. He was confident that the two regions that AALCO represented were of great importance to the ILC, and the AALCO Secretariat was pleased to contribute to the continuing good relations between both the institutions. He recapitulated the suggestions made by the Panelists in the Commemorative Seminar on the Sixty Years of the International Law Commission on 2nd December 2008 at the AALCO Headquarters in New Delhi and also suggestions made by delegations at the Forty-Eighth Annual Session of AALCO held in Putrajaya, Malaysia, from 17 to 20 August 2009. He was of the view that ILC work should not be the concern of only foreign offices of AALCO Member States, but should also sensitize the academia in deliberating those issues along with the contemporary and specialized areas of international law, all of which found its roots in the rules and principles developed under the ILC fora.

27. Following the Introductory Remarks by the Secretary-General, the three Panellists, namely Prof. Shinya Murase, Member, International Law Commission from Japan; Dr. Roy S. Lee, AALCO's Permanent Observer at the United Nations HQ in New York who had a very distinguished career in the United Nations and had been the Member Secretary of the ILC; and Professor V. S. Mani, distinguished international law academic from India made their presentations.

28. **Prof. Shinya Murase, Member, International Law Commission**, in his presentation said that the International Law Commission valued its long relationship with AALCO and appreciated the visit by Prof. Dr. Rahmat Mohamad, Secretary-General to speak at ILC Session. The ILC believed that effective cooperation with other legal bodies, particularly AALCO, was essential for the Commission to succeed in its mandate to work towards the future codification and progressive development of international law. He briefed the gathering of the deliberation that took place at the Sixty-Second Session of the International Law Commission.

29. **Dr. Roy S Lee, Permanent Observer of AALCO to UN Headquarters, New York** stated that there were three ways to influence the ILC or provide input to the ILC in its work which were, (i) during the General Assembly and in the Sixth Committee when work of ILC were discussed. Member States could comment upon the work of the ILC; (ii) the ILC also invites UN Member States to transmit their comments on the work of ILC in the written form which must be submitted on a deadline and Governments are

asked to comment on those; and (iii) Out of 34 members of ILC, AALCO had at least 12 members who belong to AALCO Member States; they should work together and strongly influence the ILC.

30. Dr. Lee mentioned it was essential to find ways to reflect the work of AALCO in the ILC. The panelist highlighted the practical difficulties and problems for AALCO in relation to the work of ILC. The main problem of channeling the AALCO's views was that countries have different concerns; there were difficulties in relation to process of consolidation and process for collecting those ideas. He suggested that the ideas and comments from Member States in relation to the work of ILC must be collected somewhere between May and July. Therefore, it would be desirable to convene the Annual Sessions of AALCO in the first quarter of the year. Member States could also send in their views at the earliest for ensuring the inclusion of their concerns into those topics that could be deliberated upon during ILC sessions. He also stated that in order to recognize the hard work by the AALCO Secretariat, it was necessary to channelize the concerns of AALCO Member States well in advance. The other suggestion was to consider the final outcome of the work of the ILC. The formulation of draft articles involves procedures and could be considered as the product which later on becomes treaties when adopted by the States. On that aspect, it was necessary that Member States would deliberate upon those draft articles and raise their concerns. They are consolidated to be deliberated as guidelines; principles and long study then entirely incorporated into national legislations. The advantage was that once draft articles are adopted at the General Assembly they could be easily applied in national legislations. Therefore, it would be beneficial for countries to transmit their views early on draft articles prepared by the ILC.

31. **Prof. V. S. Mani, Director, School of Law and Governance, Jaipur National University, Jaipur, India** emphasized that as far as the objective of the progressive development and codification of international law was concerned, there were several international organizations that were contributing to that endeavour. He did not wish that AALCO should jump into that vast ocean; however, it ought to prioritize on the basis of the interest of its Member States, the issues on which it should work upon. Concerning the ILC, the Panelist stated that the ILC was faced from the very beginning with the question of policy loaded issues. The codification exercise performed by the Commission was an arduous process. Therefore, such exercise happened in several other fora within the UN system. In that context, he drew attention to the negotiation of the UN Convention on the Law of the Sea by the First Committee of the UN General Assembly and the treaties concerning the Outer Space by the Disarmament Committee. The contribution of AALCO, the panelist emphasized to the elaboration of the UNCLOS was highly significant. AALCO could therefore; he suggested adopt a policy of pick and choose. Referring to the remarks made by his co-panelist that the response by the Afro-Asian Members to the ILC's call for response was not very encouraging, he said that the AALCO Secretariat could be utilized to assist the Member States in that task. Referring to the proposal made by the Attorney-General of Malaysia for setting up an AALCO Working Group for ILC matters, he said that he was fascinated by that idea. The Working Group could be assisted by the AALCO Secretariat in its work.

32. **Message of Ambassdor Chusei Yamada, Special Assistant to the Minister of Foreign Affairs, Japan** was read out by the Vice-President of the Session. In his message, he encouraged more active involvement by the Member States of AALCO in the work of ILC. He believed that the Secretariat of AALCO could play a role in assisting some of the Asian and African States which faced capacity problems in digesting the report of ILC. In Europe, there existed the Committee of Legal Advisors on Public International Law (CAHDI). CAHDI obtained the annual report of ILC as soon as it was adopted and transmits it to its members. It organized a meeting of legal advisers and coordinated their positions before the debate in the Sixth Committee started. The Secretariat of AALCO could do similar or more contributions. With the assistance from Asian and African members of ILC, it could post executive summaries of ILC Report on its web-site for the Member States. It could also provide Member States with studies and recommendations on each topic. It was also entitled as an international organization recognized by the UN General Assembly to directly communicate to ILC its views and recommendations on behalf of its Member States. He expressed his hope that these measures would strengthen the position of the Member States of AALCO in the field of international law.

33. The **Delegation of India** highlighted the efforts which could be taken by the AALCO. In that regard, he mentioned that AALCO must empower the ILC members of Asian-African region. Towards that objective, the delegation would extend their full support to AALCO and made few suggestions and they were: i) to popularize the draft articles of ILC among the Member States of AALCO; ii) to create a platform for academic exercise in discussing the issues relating to ILC; iii) compilation of state practice on international law matters; iv) Legal Officers of AALCO could be exposed to ILC related matters, to have a legal expertise in order to write and comment on the reports of the ILC, and on rotational basis AALCO should send the Legal Officers to ILC; and v) AALCO Session should be held in the first quarter of every year.

34. The **Delegation of Malaysia** stated that his delegation had submitted its views with regard to the topics under consideration of the ILC to the AALCO Secretariat. On the topic of "Reservation to Treaties" the delegate stated that as it was a pivotal topic of the ILC and had a huge impact on the international community, the delegation took the opportunity to propose that this topic shall form an integral part of AALCO's Fiftieth Annual Session agenda and the Secretariat should formulate effective mechanism and platform to allow better understanding of that complex subject-matter amongst AALCO Member States. In order to make AALCO's participation in the work of ILC more effective and meaningful, the delegation proposed that a systematic and coherent method of obtaining AALCO Member States' feedback be developed. Perhaps AALCO could devise a dedicated inter-sessional meeting on ILC. This inter-sessional meeting would not only be useful to discuss the topics under the consideration of the ILC but it could also be used to discuss appropriate topics, that were of mutual benefit and relevance to the Asian and African continents, to be elaborated at the ILC. Due to the work schedule of the ILC, the delegation proposed that this inter-sessional meeting to be held early in the year before the starting of each session of the ILC. The outcome of the inter-sessional

meetings should be presented to the AALCO Annual Session for deliberation and consideration.

35. The **Delegation of Japan** pointed out that as one form of contribution which AALCO could make for the codification and progressive development of international law, it was suggested that AALCO Secretariat could compile state practices which were relevant to the subject matters on the agenda of the ILC and submit them to the UN legal department. For example, with regard to the question of "Reservations to Treaties", the Delegation pointed out that the AALCO Secretariat could collect information such as the reservations made by the Member States concerning multilateral treaties and/or their objections lodged against those made by other countries for the past one year or for the recent few years, and submit it to the UN Legal Department. The delegation suggested that the AALCO Secretariat could make Questionnaires on points which could be controversial in international law, and sent them to Member States, and compile responses there from and submit them to the UN legal department. If such action could be taken with cooperation of Member States, it could become valuable contribution to the work of ILC. If regional institutions such as the ASEAN, Arab League, and African Union could submit one uniform view on one subject item or a legal issue, state practices prevailing in the respective region could be communicated to the ILC. In such cases, AALCO Secretariat might need to coordinate activities with the ILC and/or the African Union.

36. The **Delegation of Ghana** was of the opinion that the AALCO's participation in the work of the Commission could be made more effective and meaningful by taking up the challenge to introduce new topics that reflected the needs of the Asian and African countries and by introducing topics that reflected new developments in international law and the pressing concerns of the international community as a whole.

37. The **Delegation of the People's Republic of China** while expressing appreciation on the continuous work and efforts made by the AALCO through these years stated that in order to participate in the work of the ILC more effectively and more meaningfully, AALCO needed to study relevant topics that were currently reviewed by the ILC more comprehensively. The delegation also urged AALCO to support its Member States help them do advanced research on topics of contemporary concern. In that context, the delegation suggested that, AALCO could consider holding seminars to discuss certain specific topics dealt with by ILC as well as on some new topics identified by it. The outcome documents of these seminars could possibly be transmitted to the ILC for its reference.

38. The **Delegation of the Islamic Republic of Iran**, acknowledged the outstanding contribution of the International Law Commission to the codification and progressive development of international law, and made comments on some of the substantive topics of the agenda of the International Law Commission, namely the Effect of Armed Conflicts on Treaties; Protection of Persons in the Event of Disasters; and Responsibility of International Organizations.

39. The **Delegation of the Republic of Kenya** observed that their country supported the proposal by the Secretary-General to assign Legal Officers to the Permanent Observer Missions at various UN Offices to render assistance to Asian-African Members of the ILC at the annual sessions of the Commission as well as at the annual sessions of the UN General Assembly.

40. The **Delegation of the Kingdom of Saudi Arabia** posed the query as to whether AALCO has enough human resources in such areas and address the concerns of those countries.

41. The **Delegation of Gambia** emphasized on the need for AALCO and ILC to pay attention to very important issues like that of double standards and be a responsive and dynamic body.

II. RESERVATION TO TREATIES

A. Background

1. Since 1993, the International Law Commission (ILC) has the topic "Reservations to Treaties", on its agenda for which Professor Alan Pellet was appointed as the Special Rapporteur. The logic underlying the introduction of this agenda was stated by the ILC thus: the 1969 Vienna Convention on the Law of Treaties, the 1978 Vienna Convention on Succession of States in Respect of Treaties and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, even while setting out some principles concerning reservations to treaties, do so in terms that are too general to act as a guide for State practice and leave a number of important matters in the dark. These Conventions provide ambiguous answers to the questions of differentiating between reservations and declarations of interpretation, the scope of declarations of interpretation, the validity of reservations (the conditions for the lawfulness of reservations and their applicability to another State) and the regime of objections to reservations (in particular, the admissibility and scope of objections to a reservation which is neither prohibited by the treaty nor contrary to its object and purpose). These Conventions are also silent on the effect of reservations on the entry into force of treaties, problems pertaining to the particular object of some treaties (in particular the constituent instruments of international organizations and human rights treaties), reservations to codification treaties and problems resulting from particular treaty techniques (elaboration of additional protocols, bilateralization techniques).

2. At the very early stages itself, the Commission recognized the need to not challenge the regime established in articles 19 to 23 of the 1969 Vienna Convention on the Law of Treaties, but nonetheless considered that these provisions could be clarified and developed in draft protocols to existing conventions or a guide to practice. Instead of proposing amendments to the Convention, early on the ILC decided to produce a draft set of "Guidelines" for consideration by the Sixth Committee of the UN General Assembly.

3. Till 2007 the Commission had received Twelve reports of the Special Rapporteur on the topic and after due deliberations, the Commission had adopted more than 85 draft guidelines with commentaries covering various aspects of reservations to treaties. The General Assembly during its 2008 Session, had asked States to give their views on, in particular, the specific issues identified in the ILC's 2008 Report on Reservations to Treaties and invited Governments to provide by January 2010 information to the ILC on their practice with regard to Reservations[1].

4. At its Sixtieth Session held in 2008, the Commission considered the Thirteenth report[2] of the Special Rapporteur on reactions to interpretative declarations and conditional interpretative declarations. The Commission also had before it a note by the Special Rapporteur on draft guideline 2.1.9, "Statement of reasons for reservations", which had been submitted at the end of the fifty-ninth session. At the same session, the

[1] See A/RES/63/123/, Paras 1, 3 and 4.
[2] Document A/CN.4/600

Commission referred draft guideline 2.1.9 as well as 10 draft guidelines (2.9.1 to 2.9.10) to the Drafting Committee and proceeded to provisionally adopt the 23 draft guidelines.

5. At the Sixty-First Session in 2009, the Commission had before it the Fourteenth report[3] of the Special Rapporteur. The Commission also had before it a memorandum by the Secretariat on reservations to treaties in the context of succession of States[4]. The Commission considered and provisionally adopted draft guidelines 2.8.1-2.8.11, as well as draft guidelines 2.4.0, 2.4.3 bis, 2.9.1-2.9.10 and 3.2, 3.2.1-3.2.5 and draft guidelines 3.3 and 3.3.1. The Commission also provisionally adopted the titles of sections 2.8 and 2.9. The Commission also adopted commentaries to the above-mentioned guidelines

6. It could be mentioned here that the Special Rapporteur has so far produced Sixteen Reports on the agenda item.

B. Consideration of the Topic at the Sixty-Second Session

7. At its Sixty-Second session that took place from 3rd May to 4th June and 5th July to 6th August 2010, the Commission had before it Addendum 2 to the Fourteenth report[5] as well as the Fifteenth[6] and Sixteenth reports[7] of the Special Rapporteur.

8. During the Session, the Commission had provisionally adopted 59 draft guidelines[8], together with commentaries, including 11 draft guidelines which had been provisionally adopted by the Drafting Committee at the Sixty-First session and which deal with the freedom to formulate objections and with matters relating to the permissibility of reactions to reservations and of interpretative declarations and reactions thereto. The Commission had thus completed the provisional adoption of the set of draft guidelines (chap. IV). In the following part of the Report, a brief summary of the most important provisions and draft guidelines adopted by the ILC at this Session is presented. Also mentioned are some of the comments made by the Member States on these guidelines and on the various Reports submitted by the Special Rapporteur. It needs to be reiterated here that due to the enormous amount of work dealt with by the ILC at the present Session, it can not be commented upon otherwise than in a very general way.

1. On the Draft Guidelines adopted by ILC

2.6.3 Freedom to formulate objections

> A State or international organization may formulate an objection to a reservation irrespective of the permissibility of the reservation.

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[3] Document A/CN.4/614 and Add.1.
[4] Document A/CN.4/616
[5] A/CN.4/614/Add.2
[6] A/CN.4/624 and Add. 1 and 2.
[7] A/CN.4/626 and Add 1.
[8] See the Annex, for a full list of draft guidelines provisionally adopted by the ILC at its Sixty-Second Session.

9. It is now well-established that a State or an international organization may make an objection to a reservation formulated by another State or another international organization, irrespective of the question of the permissibility of the reservation. Even though that freedom is quite extensive, it is not unlimited. It is for this reason that the ILC seemed to prefer to speak of a "freedom" rather than a "right" since this entitlement flows from the general freedom of States to conclude treaties. For the same reason, the Commission has preferred, despite some contrary opinions, to speak of a "freedom to formulate" rather than a "freedom to make" objections.

10. It needs to be reiterated here that subject to the above mentioned reservations, the *travaux préparatoires* of the 1969 Vienna Convention leave no doubt as to the discretionary nature of the formulation of objections but are not very enlightening on the question of who may formulate them.

11. In its 1951 advisory opinion, the International Court of Justice made an analogy between the permissibility of objections and that of reservations. It considered that:

> "The object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them. It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation. Such is the rule of conduct which must guide every State in the appraisal which it must make, individually and from its own standpoint, of the admissibility of any reservation[9].

12. The Commission which has endorsed this position long back has established a link between the objection and the incompatibility of the reservation with the object and purpose of the treaty, which seemed to be the *sine qua non* for permissibility in both cases.

13. A State (or an international organization) is, therefore, never bound by treaty obligations against its will. This is based on the principle of consent which underlies the reservations regime and according to which a State can not be bound without its consent. However, it needs to be stressed here that "discretionary" does not tantamount to "arbitrary" and, even though this freedom undoubtedly stems from the power of a party to exercise its own judgment, it is not absolute. It must be exercised within the limits arising from the procedural and formal constraints that are developed and set out in detail in the guidelines that follow in this section of the Guide to Practice.

2.6.8 Expression of intention to preclude the entry into force of the treaty

> When a State or international organization making an objection to a reservation intends to preclude the entry into force of the treaty as between itself and the reserving State or international organization, it shall definitely express its intention before the treaty would otherwise enter into force between them.

[9] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion of 29 May 1951, ICJ Reports 1951, p. 24.

3.4.1 Permissibility of the acceptance of a reservation

The express acceptance of an impermissible reservation is itself impermissible.

14. Unlike the case of reservations, the Vienna Conventions do not set forth any criteria or conditions for the permissibility of reactions to reservations, although acceptances and objections occupy a substantial place as a means for States and international organizations to give or refuse their consent to a permissible reservation. Such reactions do not, however, constitute criteria for the permissibility of a reservation that can be evaluated objectively in accordance with the conditions established in Article 19 of the Vienna Conventions and independently of the acceptances or objections to which the reservation has given rise.

15. They are a measure through which States and international organizations express their point of view regarding the permissibility of a reservation, but the permissibility (or impermissibility) of a reservation must be evaluated independently of the acceptances or objections to which it gave rise. Moreover, this idea is clearly expressed in guideline 3.3 (Consequences of the impermissibility of a reservation). The fact remains, however, that acceptances and objections constitute a way for States and international organizations to express their point of view regarding the permissibility of a reservation, and they may accordingly be taken into account in assessing the permissibility of a reservation.

16. This guideline is based on the idea that, in the light of the *travaux préparatoires*, the Vienna Convention does in fact establish some connection and puts forward the principle that the impermissibility of the reservation has some implications for its acceptance.

17. However, the principle put forward in guideline 3.4.1 must be accompanied by two major caveats;

18. Firstly — as the wording itself indicates — it applies only to express acceptances (which are exceedingly rare in practice) and excludes tacit acceptances.

19. Second, what the contracting parties cannot do individually they can do collectively, in that the Commission has taken the view that conversely, when all of the contracting parties accept a reservation, this unanimity creates an agreement among the parties that modifies the treaty.

3.4.2 Permissibility of an objection to a reservation

An objection to a reservation by which a State or an international organization purports to exclude in its relations with the author of the reservation the application of provisions of the treaty to which the reservation does not relate is only permissible if:

(1) The additional provisions thus excluded have a sufficient link with the provisions to which the reservation relates; and

(2) The objection would not defeat the object and purpose of the treaty in the relations between the author of the reservation and the author of the objection.

20. Guideline 3.4.2 relates solely to a very particular category of objections, frequently called those with "intermediate effect", through which a State or international organization considers that treaty relations should be excluded beyond what is provided for in article 21, paragraph 3, of the Vienna Conventions, yet does not oppose the entry into force of the treaty between itself and the author of the reservation. The Commission has noted the existence of such objections, which might be called the "third type" of objections, in the commentary to guideline 2.6.1 on the definition of objections to reservations, without taking a position on their permissibility[10].

21. While treaty practice provides relatively few specific examples of intermediate effect or "extensive" objections, some do exist.

22. While the 1969 and 1986 Vienna Conventions do not expressly authorize these objections with intermediate effect, they do not prohibit them. On the contrary, objections with intermediate effect, as their name indicates, may be entertained in that they fall midway between the two extremes envisaged under the Vienna regime: they purport to prohibit the application of the treaty to an extent greater than a minimum-effect objection (article 21, paragraph 3, of the Vienna Conventions), but less than a maximum-effect objection (Article 20, paragraph 4 (b), of the Vienna Conventions).

23. Although in principle, "a State or international organization may formulate an objection to a reservation irrespective of the permissibility of the reservation", the question arises whether objections with intermediate effect must in some cases be deemed to be impermissible.

24. Certain scholars propose to consider that "these extended objections are, in fact, reservations (limited *ratione personae*)". This analysis is to some extent supported by the fact that other States have chosen to formulate reservations in the strict sense of the word in order to achieve the same result. However, this approach has been disputed on the grounds that, by adhering to the letter of the definition of reservations, the objecting State, which typically formulates its objection only after having become a party to the treaty, would be prevented from doing so within the established time period, and would be faced with the uncertainties that characterize the regime of late reservations.

25. The Commission was not convinced by this view and considered that objections with intermediate effect, which in some ways constitute "counter-reservations" (but are certainly not reservations *per se*), should conform to the conditions for the permissibility and form of reservations and, in any event, cannot defeat the object and purpose of the treaty, if only because it makes little sense to apply a treaty deprived of its object or purpose. This is what is stated in guideline 3.4.2, paragraph 2.

[10] *Official Records of the General Assembly, Sixtieth Session, Supplement No.10* (A/60/10) , p.199, para (23) of the Commentary to guideline 2.6.1.

26. Nevertheless, it would be unacceptable and entirely contrary to the principle of consensus for States and international organizations to use a reservation as an excuse for attaching intermediate-effect objections of their choosing, thereby excluding any provision that they do not like.

27. A perusal of the practice concerning objections with intermediate effect clearly reveals that there must be an intrinsic link between the provision which gave rise to the reservation and the provisions whose legal effect is affected by the objection.

28. After asking itself how best to define this link, and having contemplated calling it "intrinsic", "indissociable" or "inextricable", the Commission ultimately settled on the word "sufficient", which seemed to it to be similar to the words just cited but had the merit of showing that the particular circumstances of each case had to be taken into account. Moreover, guideline 3.4.2 probably has more to do with the progressive development of international law than with its codification *per se*; to the majority of the Commission's members, the use of the word "sufficient" had the merit of leaving room for the clarification that might come from future practice.

29. The Commission deliberately rejected the idea of referring to the impermissibility of an objection owing to it being contrary to the rule of *jus cogens* on account of its thinking that, in reality, such a hypothesis could not arise. However, it should be reiterated that one who has initially accepted a reservation may no longer properly formulate an objection thereto. While this condition may be understood as a condition for the permissibility of an objection, it may also be viewed as a question of form or of formulation. Thus, guideline 2.8.12 (Final nature of acceptance of a reservation) states that "acceptance of a reservation cannot be withdrawn or amended". There seems to be no need to revisit the issue in the present guideline.

3.5 Permissibility of an interpretative declaration

> A State or an international organization may formulate an interpretative declaration unless the interpretative declaration is prohibited by the treaty or is incompatible with a peremptory norm of general international law.

30. The Vienna Conventions do not contain any rule on interpretative declarations as such, or, of course, on the conditions for the permissibility of such unilateral declarations.

31. From that point of view, and from many others as well, they are distinct from reservations and cannot simply be equated with them. Guideline 3.5 and the ones that follow it seek to fill in this gap in respect of the permissibility of these instruments, it being understood in this connection that "simple" interpretative declarations (guideline 3.5) must be distinguished from conditional interpretative declarations, which in this respect follow the legal regime of reservations (guidelines 3.5.2 and 3.5.3). This does not mean that reservations are involved, although sometimes a unilateral declaration presented as interpretative by its author might be a true reservation, in which case its permissibility must be assessed in the light of the rules applicable to reservations (guideline 3.5.1).

32. The definition of interpretative declarations provided in guideline 1.2 (Definition of interpretative declarations) is also limited to identifying the practice in positive terms:

> "Interpretative declaration" means a unilateral statement, however phrased or named, made by a State or by an international organization whereby that State or that organization purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions.

33. However, this definition, as was aptly noted in the commentary, "in no way prejudges the validity or the effect of such declarations and (…) the same precautions taken with respect to reservations must be applied to interpretative declarations: the proposed definition is without prejudice to the permissibility and the effects of such declarations from the standpoint of the rules applicable to them".

34. There is, however, still some question as to whether an interpretative declaration can be permissible, a question that is clearly different from that of whether a unilateral statement constitutes an interpretative declaration or a reservation. Indeed, it is one thing to determine whether a unilateral statement "purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions" — which corresponds to the definition of "interpretative declaration" — and another to determine whether the interpretation proposed therein is valid, or, in other words, whether the "meaning or scope attributed by the declarant to a treaty or to certain of its provisions" is valid. The issue of the permissibility of interpretative declarations can doubtless be addressed in the treaty itself; while this is quite uncommon in practice, it is still a possibility.

35. It is also conceivable that a treaty might merely prohibit the formulation of certain interpretative declarations to certain of its provisions. In the opinion of the Special Rapporteur, no multilateral treaty contains such a prohibition in this form. But treaty practice includes more general prohibitions which, without expressly prohibiting a particular declaration, limit the parties' capacity to interpret the treaty in one way or another. It follows that if the treaty is not to be interpreted in a certain manner, interpretative declarations proposing the prohibited interpretation are invalid.

36. The European Charter for Regional or Minority Languages of 5 November 1992 includes examples of such prohibition clauses; article 4, paragraph 4, states:

> Nothing in this Charter shall be construed as limiting or derogating from any of the rights guaranteed by the European Convention on Human Rights.

And article 5 states:

> Nothing in this Charter may be interpreted as implying any right to engage in any activity or perform any action in contravention of the purposes of the Charter of the United Nations or other obligations under international law, including the principle of the sovereignty and territorial integrity of States.

37. Similarly, articles 21 and 22 of the Framework Convention for the Protection of National Minorities of 1 February 1995 also limits the potential to interpret the Convention:
Article 21

> Nothing in the present framework Convention shall be interpreted as implying any right to engage in any activity or perform any act contrary to the fundamental principles of international law and in particular of the sovereign equality, territorial integrity and political independence of States.

Article 22

> Nothing in the present framework Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any Contracting Party or under any other agreement to which it is a Party.

38. These examples, it must be noted here, show that the prohibition of interpretative declarations in guideline 3.5 may be express as well as implicit.

39. It needs to be reiterated here that the Commission did not consider it necessary to provide in guideline 3.5 for a situation when an interpretative declaration was incompatible with the object and purpose of the treaty: that would be possible only if the declaration was considered a reservation, since by definition such declarations do not purport to modify the legal effects of a treaty, but only to specify or clarify them. This situation is covered in guideline 3.5.1.

40. In international law, the value of an interpretation is assessed not on the basis of its content, but of its authority. It is not the "right" interpretation that wins out, but the one that was given either by all the parties to the treaty — in which case it is called an "authentic" interpretation — or by a body empowered to interpret the treaty in a manner that is binding on the parties. In that regard, the instructive 1923 Opinion of the Permanent Court of International Justice in the *Jaworzina* case is noteworthy. Although the Court was convinced that the interpretation reached by the Conference of Ambassadors was unfounded, it did not approach the problem as a question of validity, but rather of opposability. The Court stated:

> And even leaving out of the question the principles governing the authoritative interpretation of legal documents, it is obvious that the opinion of the authors of a document cannot be endowed with a decisive value when that opinion has been formulated after the drafting of that document and conflicts with the opinion which they expressed at that time. There are still stronger grounds for refusing to recognize the authority of such an opinion when, as in the present case, a period of more than two years has elapsed between the day on which it was expressed and the day on which the decision to be interpreted was itself adopted[11].

[11] Advisory opinion of 6 December 1923, P.C.I.J Series B, No.8, p.38.

41. International law in general and treaty law in particular do not impose conditions for the validity of interpretation in general and of interpretative declarations in particular. It has only the notion of the opposability of an interpretation or an interpretative declaration which, as far as it is concerned, comes into full play in the context of determination of the effects of an interpretative declaration.

3.6. Permissibility of reactions to interpretative declarations

> Subject to the provisions of guidelines 3.6.1 and 3.6.2, an approval of, opposition to, or recharacterization of, an interpretative declaration shall not be subject to any conditions for permissibility.

42. The question of the permissibility of reactions to interpretative declarations — approval, opposition or recharacterization — must be considered in the light of the study of permissibility of interpretative declarations themselves. Since any State, on the basis of its sovereign right to interpret the treaties to which it is a party, has the right to make interpretative declarations, there seems little doubt that the other contracting parties also have the right to react to these interpretative declarations and that, where appropriate, these reactions are subject to the same conditions for permissibility as those for the declaration to which they are a reaction.

43. As a general rule, like interpretative declarations themselves, these reactions may prove to be correct or erroneous, but this does not imply that they are permissible or impermissible. Nevertheless, according to guideline 3.5, the same is not true when an interpretative declaration is prohibited by a treaty or is incompatible with a peremptory norm of international law. This is the eventuality envisaged in guidelines 3.6.1 and 3.6.2, which refer, respectively, to the approval of an interpretative declaration and to opposition to such a declaration. This is indicated at the start of guideline 3.6: "Subject to the provisions of guidelines 3.6.1 and 3.6.2 …".

44. The characterization of a reservation or interpretative declaration must be determined objectively, taking into account the criteria that the Commission set forth in guidelines 1.3 and 1.3.1 to 1.3.3. Guideline 1.3 states:

> The character of a unilateral statement as a reservation or an interpretative declaration is determined by the legal effect it purports to produce[12].

45. Without prejudice to the effects of these unilateral statements, it is clear that they are an important factor in determining the legal nature of the initially formulated act: in order to determine whether such statements constitute interpretative declarations or reservations, they must be taken into account as expressing the position of parties to a treaty on the nature of the "interpretative declaration" or "reservation", with all the consequences that this entails.

[12] For the draft guideline and the commentary thereon, see, *Yearbook of the International Law Commission*, 1999, Vol.II, Part Two, p. 107.

4.1 Establishment of a reservation with regard to another State or organization

> A reservation formulated by a State or an international organization is established with regard to a contracting State or a contracting organization if it is permissible and was formulated in accordance with the required form and procedures, and if that contracting State or contracting organization has accepted it.

46. The legal effects of a permissible reservation depend to a large extent on the reactions that it has received. A permissible and accepted reservation has different legal effects to those of a permissible reservation to which objections have been made. Article 21 of the Vienna Conventions establishes this distinction clearly. In its 1986 version, which is fuller in that it includes the effects of reservations and reactions from international organizations.

> "1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:
>
> (a) Modifies for the reserving State or international organization in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and
>
> (b) Modifies those provisions to the same extent for that other party in its relations with the reserving State or international organization.
>
> 2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.
>
> 3. When a State or an international organization objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State or organization, the provisions to which the reservation relates do not apply as between the reserving State or organization and the objecting State or organization to the extent of the reservation."

47. While paragraph 1 of this provision concerns the legal effects of an "established" reservation, a concept that should be clarified, paragraph 3 covers the legal effects of a reservation to which an objection has been made. A distinction should therefore be drawn between the case of a permissible and accepted reservation — that is, an "established" reservation — and that of a permissible reservation to which an objection has been made.

48. Under the terms of the *chapeau* of Article 21 of the Vienna Conventions, a reservation is established "with regard to another party in accordance with Articles 19, 20 and 23". The phrase, which at first appears clear and is often understood as referring to permissible reservations accepted by a contracting State or contracting organization, contains many uncertainties and imprecisions which are the result of a significant recasting undertaken by the Commission during the second reading of the draft articles on the law of treaties in 1965, on the one hand, and changes introduced to Article 20, paragraph 4 (b), of the Convention during the Vienna Conference in 1969.

49. It may be recalled here that in his first report on the law of treaties, Sir Humphrey Waldock took into account the condition of consent to a reservation for it to be able to produce its effects. The draft article 18 that he proposed to devote to "Consent to reservations and its effects" specified that:

> "A reservation, since it purports to modify the terms of the treaty as adopted, shall only be effective against a State which has given, or is presumed to have given, its consent thereto in accordance with the provisions of the following paragraphs of this article"

50. In its Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, the International Court of Justice also highlighted this basic principle of the law of reservations, and of treaty law as:

> "It is well established that in its treaty relations a State cannot be bound without its consent and that consequently no reservation can be effective against any State without its agreement thereto."

51. Hence, consent to the reservation is a *sine qua non* for the reservation to be considered established and to produce its effects. Yet contrary to what has been maintained by certain partisans of the opposability school, consent is not the only condition. The *chapeau* of Article 21, paragraph 1, cumulatively refers to consent to the reservation (the reference to Article 20), permissibility (Art. 19) and formal validity (Art. 23). Consent alone is thus not sufficient for the reservation to produce its "normal" effects.

52. Guideline 4.1 merely sets out the general rule and does not fully answer the question of whether a reservation is established. Article 20 of the Vienna Conventions, paragraph 4 of which specifies the implications, under ordinary law, of consent to a reservation and hence constitutes the cornerstone of the "flexible" Vienna system, does in fact contain exceptions with regard to the expression of consent to the reservation by the other contracting States and contracting organizations.

53. Article 21, paragraph 2, of the Vienna Conventions does not, strictly speaking, concern the legal effects of a reservation, but rather deals with the absence of any legal effect of a reservation on the legal relations between contracting States and contracting organizations other than the author of the reservation, regardless of whether the reservation is established or valid.

4.1.1 Establishment of a reservation expressly authorized by a treaty

> 1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States and contracting organizations, unless the treaty so provides.
>
> 2. A reservation expressly authorized by a treaty is established with regard to the other contracting States and contracting organizations if it was formulated in accordance with the required form and procedures.

54. Guideline 4.1.1 presents the exception to the general rule concerning the establishment of reservations contained in Article 20, paragraph 1, of the Vienna Conventions while establishing a link to the term “established reservation”. Indeed, since a reservation expressly authorized by the treaty is, by definition, permissible and accepted by the contracting States and contracting organizations, making it in a way that respects the rules applicable to the formulation and communication of reservations is all that is required to establish it. This makes it binding on all the contracting States and contracting organizations.

55. According to Article 20, paragraph 1, of the Vienna Conventions, expressly authorized reservations need not be accepted “subsequently” by the other contracting States and contracting organizations. However, this paragraph does not mean that the reservation is exempt from the requirement of the contracting States’ and contracting organizations’ assent; it simply expresses the idea that, since the parties have given their assent even before the formulation of the reservation, and have done so in the text of the treaty itself, any subsequent acceptance is superfluous.

56. The emphasis is on lack of precision in the Vienna Conventions on this point, a general authorization of reservations in a treaty cannot constitute *a priori* acceptance on the part of the contracting States and contracting organizations.

57. In order to determine which “expressly authorized” reservations do not require subsequent unilateral acceptance, it is thus appropriate to determine which reservations the parties have already consented to in the treaty. In this connection, it has been noted that that “where the contents of authorized reservations are fixed beforehand, acceptance can reasonably be construed as having been given in advance, at the moment of consenting to the treaty.

58. It should also be emphasized that, once it has been clearly established that a particular reservation falls under Article 20, paragraph 1, not only is its acceptance by the other parties unnecessary, but the parties are deemed to have effectively and definitively accepted it, with all the consequences that follow therefrom. One of the consequences of this particular regime is that the other parties cannot object to this type of reservation.

59. Accepting this reservation in advance in the text of the treaty itself effectively prevents the contracting States and contracting organizations from subsequently making an objection, as “[t]he Parties have already agreed that the reservation is permissible and, having made its permissibility the object of an express agreement, the Parties have abandoned any right thereafter to object to such a reservation.

4.1.3 Establishment of a reservation to a constituent instrument of an international Organization

> A reservation to a treaty which is a constituent instrument of an international organization is established with regard to the other contracting States and contracting organizations if it is permissible and was formulated in accordance with the required form and procedures, and if it has been accepted in conformity with guidelines 2.8.7 to 2.8.10.

60. It is significant to note that in relation to the acceptance of and objection to reservations, Article 20.1 of the VCLT deals with expressly authorized reservations by a treaty, 20.2 reservations to treaties with limited negotiating states and 20.3 reservations to constituent instrument of an organization and finally in cases not falling under preceding paragraphs Article 20.4 points out the rules to be followed. Hence, the third — and final — exception to the "flexible" regime set out in Article 20, paragraph 4, of the Vienna Conventions is provided for by paragraph 3 of that article and relates to constituent instruments of international organizations. Under the terms of the provision:

> When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

61. A simple perusal of this provision shows that, in order to be established, a reservation to the constituent instrument of an international organization calls for the acceptance of the competent organ of the organization. The modalities for formulating such acceptance are the subject of guidelines 2.8.7 to 2.8.11, the commentaries to which explain the meaning and describe the *travaux préparatoires* for this provision.

62. Although guideline 2.8.7 is sufficient to express the need for the acceptance of the competent organ of the organization, the Commission considered that it was worth recalling this particular requirement in the section dealing with the effects of reservations, given that the acceptance of the competent organ is the *sine qua non* for the establishment of a reservation to the constituent instrument of an international organization. Only this collective acceptance can enable the reservation to produce all its effects.

4.2.2 Effect of the establishment of a reservation on the entry into force of a treaty

> 1. When a treaty has not yet entered into force, the author of a reservation shall be included in the number of contracting States and contracting organizations required for the treaty to enter into force once the reservation is established.
>
> 2. The author of the reservation may however be included at an earlier date in the number of contracting States and contracting organizations required for the treaty to enter into force, if no contracting State or contracting organization is opposed in a particular case.

63. When applying the general rule set forth in guideline 4.2.1, a distinction must be drawn according to whether the treaty is not in force – a situation which may give rise to some fairly complex issues, which are dealt with in guideline 4.2.2 — or is in force — a much easier situation, which is addressed in guideline 4.2.3.

64. The purpose of paragraph 2, on the other hand, is to cover — without passing judgment on its merits — what is probably the predominant practice of depositaries (and is, in any case, the practice of the Secretary-General of the United Nations, described above),578 which is to consider the author of the reservation to be a contracting State or contracting organization as soon as the instrument expressing its consent to be bound has been deposited and, moreover, without giving consideration to the validity or the

invalidity of the reservation. The wording of this second paragraph is prompted by a desire to take into consideration a practice which, up until now, does not seem to have caused any particular difficulties, while not calling into question the very clear rule, scarcely open to varying interpretations, which is laid down in Article 20, paragraph 4 (c), of the Vienna Conventions.

65. The formula chosen, which is reflected in the addition of a second paragraph, merely describes the practice of certain depositaries as an alternative to the rule. The expression "may, however, be included" reflects the optional nature of this divergent practice, whereas the final qualification "if no contracting State or contracting organization is opposed in a particular case" safeguards the application of the principle established in paragraph 1 should any one contracting State or contracting organization be opposed to that inclusion.

66. The phrase "at an earlier date" seeks to preserve broad flexibility for practice in the future and, for example, the possibility of not eliminating any time lag whatsoever between the expression of the consent of the author of the reservation to be bound by the treaty and the acquisition of the status of contracting State or contracting organization. But if that were to happen, the practice would remain subject to the principle of there not being any objection.

4.2.4 Effect of an established reservation on treaty relations

> 1. A reservation established with regard to another party excludes or modifies for the reserving State or international organization in its relations with that other party the legal effect of the provisions of the treaty to which the reservation relates or of the treaty as a whole with respect to certain specific aspects, to the extent of the reservation.
>
> 2. To the extent that an established reservation excludes the legal effect of certain provisions of a treaty, the author of that reservation has neither rights nor obligations under those provisions in its relations with the other parties with regard to which the reservation is established. Those other parties shall likewise have neither rights nor obligations under those provisions in their relations with the author of the reservation.
>
> 3. To the extent that an established reservation modifies the legal effect of certain provisions of a treaty, the author of that reservation has rights and obligations under those provisions, as modified by the reservation, in its relations with the other parties with regard to which the reservation is established. Those other parties shall have rights and obligations under those provisions, as modified by the reservation, in their relations with the author of the reservation.

67. It may be mentioned here that the first paragraph sets out the principle contained in Article 21, paragraph 1 (a), of the Vienna Convention, with the requisite adjustments for the purposes of the Guide to Practice. The second paragraph explains the consequences of this principle specifically when an established reservation excludes the legal effect of certain provisions of a treaty, and the third does the same when the reservation modifies this legal effect.

68. In all three cases (and in the title of the guideline) the Commission has used the singular to describe all the consequences attendant upon the establishment of a reservation, although in reality they are diverse, out of a concern to align the wording of the guideline with that of Article 2, paragraph 1 (d), of the Vienna Conventions (as reproduced in guideline 1.1), which employs the singular.

69. In order to clarify further the content of the obligations and rights of the author of the reservation and of the State or international organization with regard to which the reservation is established, it is helpful to distinguish between, as Frank Horn terms them, "modifying reservations" and "excluding reservations"[13].

70. The distinction is not always easy to make and it can happen that one and the same reservation has both an excluding and a modifying effect. Thus, a reservation by which its author purports to limit the scope of application of a treaty obligation only to a certain category of persons may be understood equally well as a modifying reservation (it modifies the legal effect of the initial obligation by limiting the circle of persons concerned) and as an excluding reservation (it purports to exclude the application of the treaty obligation for all persons not forming part of the specified category).

71. It follows that a validly established reservation affects the treaty relations of the author of the reservation in that it excludes or modifies the legal effect of one or more provisions of the treaty, or even of the treaty as a whole, with respect to a specific aspect, and on a reciprocal basis.

72. Paragraph 2 of guideline 4.2.4 explains the consequences of an established reservation when the latter excludes the legal effect of one or more provisions of the treaty. It should be noted, moreover, that the exclusion by means of a reservation of an obligation stemming from a provision of the treaty does not automatically mean that the author of the reservation refuses to fulfill the obligation.

4.3 Effect of an objection to a valid reservation

> Unless the reservation has been established with regard to an objecting State or organization, the formulation of an objection to a valid reservation precludes the reservation from having its intended effects as against that State or international organization.

73. It needs to be noted here that unlike acceptance of a valid reservation, an objection to a reservation may produce a variety of effects as between the author of the reservation and the author of the objection. The choice is left to a great extent (but not entirely) to the latter, which can vary the potential legal effects of the reservation-objection pair. For example, it may choose, in accordance with Article 20, paragraph 4 (b), of the VCLT to preclude the treaty from entering into force as between itself and the reserving State by "definitely" expressing that intention. But the author of the objection

[13] Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties* (The Hague: TMC Asser Institute, 1988) pp. 80-87.

may also elect not to oppose the entry into force of the treaty as between itself and the author of the reservation or, to put it more accurately, may refrain from expressing a contrary intention. In that case, if the treaty does in fact enter into force for the two parties, the treaty relations between the author of the reservation and the author of the objection are modified in accordance with Article 21, paragraph 3, of the Vienna Conventions. Thus, objections to a valid reservation may have a number of effects on the very existence of treaty relations or on their content, and those effects may vary with regard to the same treaty and the same reservation.

74. Unlike an acceptance, an objection makes the reservation inapplicable as against the author of the objection. Clearly, this effect can be produced only where the reservation has not already been accepted (explicitly or tacitly) by the author of the objection. Acceptance and objection are mutually exclusive, and definitively so, at least insofar as the effects of acceptance are concerned.

75. The phrase introducing guideline 4.3 refers implicitly to the basic principle that acceptance of a reservation can not be withdrawn or amended, even if the Commission chose not to make it too heavy by including a specific reference.

4.3.5 Effect of an objection on treaty relations

> 1. When a State or an international organization objecting to a valid reservation has not opposed the entry into force of the treaty between itself and the reserving State or organization, the provisions to which the reservation relates do not apply as between the author of the reservation and the objecting State or organization, to the extent of the reservation.
>
> 2. To the extent that a valid reservation purports to exclude the legal effect of certain provisions of the treaty, when a contracting State or a contracting organization has raised an objection to it but has not opposed the entry into force of the treaty between itself and the author of the reservation, the objecting State or organization and the author of the reservation are not bound, in their treaty relations, by the provisions to which the reservation relates.
>
> 3. To the extent that a valid reservation purports to modify the legal effect of certain provisions of the treaty, when a contracting State or a contracting organization has raised an objection to it but has not opposed the entry into force of the treaty between itself and the author of the reservation, the objecting State or organization and the author of the reservation are not bound, in their treaty relations, by the provisions of the treaty as intended to be modified by the reservation.
>
> 4. All the provisions of the treaty other than those to which the reservation relates shall remain applicable as between the reserving State or organization and the objecting State or organization.

76. The potential effects of an objection are quite diverse. The outright nonapplication of the treaty between the author of the reservation and the author of the objection is the most straightforward hypothesis (objections with maximum effect, dealt with in guideline

4.3.4), but it is now infrequent, owing in particular to the reversal of the presumption in Article 20, paragraph 4 (b), of the Vienna Conventions.

77. The vast majority of objections are now intended to produce a very different effect: rather than opposing the entry into force of the treaty *vis-à-vis* the author of the reservation, the objecting State seeks to modify the treaty relations by adapting them to its own position. Under Article 21, paragraph 3, of the Vienna Conventions, bilateral relations in such cases are characterized in theory by the partial non-application of the treaty (objections with minimum effect, the consequences of which are complex and can vary depending on the content of the reservation; these are addressed in guideline 4.3.5).

78. Under the traditional system of unanimity, it was unimaginable that an objection could produce an effect other than non-participation by the author of the reservation in the treaty: the objection undermined unanimity and prevented the reserving State from becoming a party to the treaty. Since at the time that notion seemed self-evident, neither Brierly nor Fitzmaurice discussed the effects of objections to reservations, while Hersch Lauterpacht touched on them only briefly in his proposals *de lege ferenda*.

79. In the case of modifying reservations, which are the subject of paragraph 3 of guideline 4.3.5, the difference between an objection and an acceptance is very clear. Whereas the establishment of such a reservation modifies the legal obligations between the author of the reservation and the contracting parties in respect of which the reservation is established, Article 21, paragraph 3, excludes the application of all the provisions that potentially would be modified by the reservation, to the extent provided by the reservation.

80. If a State makes a reservation that purports to replace one treaty obligation with another, Article 21, paragraph 3, requires that the obligation potentially replaced by the reservation shall be excised from the treaty relations between the author of the reservation and the author of the simple objection. Neither the initial obligation, nor the modified obligation proposed by the reservation, applies: the former because the author of the reservation has not agreed to it and the latter because the author of the objection has in turn opposed it.

81. Paragraph 3 of guideline 4.3.5 highlights this difference between a reservation with a modifying effect that has been accepted and a reservation that is the subject of a simple objection. As is the case with paragraph 2, paragraph 3 must be read in conjunction with paragraph 1 of the guideline, which it is intended to clarify.

82. Paragraph 4, which is the final paragraph of the guideline, sets out a common-sense rule that can be deduced *a contrario* from the three preceding paragraphs, namely that the interaction of a reservation and an objection leaves intact all the rights and obligations arising under the provisions of the treaty, apart from those that are the subject of the reservation.

2. On the Reports Submitted by the Special Rapporteur

83. It may be recalled here that the second addendum to his fourteenth and fifteenth report was also submitted by the Special Rapporteur at this Session. The second addendum to the fourteenth and the fifteenth report dealt with a central question that was to form the subject matter of the fourth part of the Guide to Practice. At issue were the legal effects of reservations, acceptances and objections, on the one hand, and the legal effects of interpretative declarations and of reactions to such declarations on the other. The question of whether a reservation or interpretative declaration was capable of producing the intended effects depended on its formal validity and permissibility as well as on the reactions of the other States and international organizations concerned. More specifically, with regard to the effects of reservations and reactions to them, the Special Rapporteur had remained faithful to the approach endorsed by the Commission of not reopening the debate, in the absence of any compelling reasons for doing so, on the rules of the 1969 and 1986 Vienna Conventions. There were in fact no such reasons, notwithstanding a number of lacunae and ambiguities that could be found in Articles 20 and 21 of both those Conventions.

84. While introducing his Fifteenth report, the Special Rapporteur emphasized that it must be viewed as the mere continuation of the fourteenth report, and more specifically of the section devoted to the effects of reservations, acceptances and objections. As presented in the fifteenth report, draft guidelines 4.3 to 4.3.9 and 4.4.1 to 4.4.3 respectively dealt with the effects of an objection to a valid reservation and the effect of a valid reservation on extraconventional norms.

85. As to the entry into force of the treaty, the Special Rapporteur expressed some doubts as to the decision made during the Vienna Conference to reverse the traditional presumption that an objection to a reservation precluded the entry into force as between the objecting and the reserving States. Draft guidelines 4.3.1 to 4.3.4 nevertheless reflected the system eventually adopted in the Vienna Conventions. Draft guideline 4.3.1 emphasized the neutral effect that a simple objection had on the entry into force of the treaty: while it did not preclude such entry into force, an objection did not *ipso facto* result in it, contrary to the effect attached to the acceptance of a reservation.

86. The Sixteenth report which drew most of its content from a memorandum by the Secretariat, addressed the question of reservations, acceptances of reservations, objections to reservations and interpretative declarations in the context of succession of States. According to the overall plan of the Guide to Practice proposed by the Special Rapporteur in his second report, those questions would form the subject of the fifth and final part of the Guide.

C. Specific Issues on which Comments would be of particular interest to the Commission

87. The Commission noted that it would particularly welcome comments from States and international organizations on the draft guidelines adopted this year and draw their

attention in particular to the draft guidelines in sections 4.2 (Effects of an established reservation) and 4.5 (Consequences of an invalid reservation) of the Guide to Practice.

88. Having provisionally adopted the entire set of draft guidelines of the Guide to Practice on Reservations to Treaties, the Commission intends to adopt the final version of the Guide to Practice during its sixty-third session that will take place in 2011. In doing so, the Commission will take into consideration the observations of States and international organizations as well as the organs with which the Commission cooperates, made since the beginning of the examination of the topic, together with further observations received by the Secretariat of the Commission before 31 January 2011.

89. Lastly, the Commission expressed its deep appreciation for the outstanding contribution the Special Rapporteur, Mr. Alain Pellet, made to the treatment of the topic through his scholarly research and vast experience, thus enabling the Commission to provisionally adopt the complete Guide to Practice on Reservations to Treaties.

D. Summary of the Views Expressed by AALCO Member States on the Topic in the Sixth (Legal) Committee of the UN General Assembly at its Sixty-Fifth Session (2010)

90. While welcoming the provisional adoption of the complete set of guidelines constituting the Guide to Practice, the Delegate of **South Africa** stated that his delegation endorsed guideline 4.5.1 that dealt with the nullity of an invalid reservation, and that it was in line with the positions of well-known international legal scholars, the practice of States and the logic of the Vienna Conventions.

91. While pointing out that States had the sovereign right freely to enter into treaties and to make reservations that were consistent with them, he clarified that if a reservation was invalid, however, and that invalidity had been brought to the State’s attention, then it could not rely upon the reservation in its conduct. Hence, he was of the view that the approach adopted in draft guideline 4.5.2 was correct, in that it held the author of an invalid reservation to be bound by a treaty, without the benefit of the reservation, unless a contrary intention of the author could be identified.

92. Commenting on the Guide to Practice, the Delegate of **Malaysia** noted that despite some unresolved issues, the Guide to Practice promised to be useful to States in their formulation of reservation to treaties.

93. In her view, the Draft Guidelines 3.4, 3.4.1 and 3.4.2, which were to be read together, seemed intended to give legal effect to reservations through the test of permissibility of an acceptance or objection. She went on to add that since these guidelines seemed to curtail the sovereign right of States to express their opinions, the matter required further clarification.

94. As regards the draft guideline 3.5, she clarified that the conditions of permissibility of interpretative declarations should be imposed only when such declarations were expressly prohibited by a treaty, so as to avoid broad interpretations by

States, and should be applied with caution, particularly where a treaty prohibited the formulation of a reservation. In such circumstances, unless it was conclusively determined that the statement was a reservation, the conditions of permissibility under draft guidelines 3.5.1 and 3.5.2 should not be imposed, she added.

95. According to her, the Draft guideline 3.5.3 was intended to enable a treaty monitoring body to give guidance to States in crafting their interpretative declarations, so as to ensure the validity thereof. However, she was of the view that the scope and legal effect of conclusions or assessments by the treaty monitoring body should be clearly explained and agreed to by all the States parties to the treaty.

96. Regarding draft guideline 3.6, Malaysia considered that reactions to interpretative declarations should not be subjected to conditions of permissibility: States should be able to maintain their freedom to express their views. Interpretative declarations should be viewed as agreements between States exclusively in their relations with each other. While an opposition made by way of proposing an alternative interpretation was treated as an interpretative declaration by itself, a simple opposition to interpretative declarations should not be treated as such. The delegate also pointed out that a universally acceptable set of draft guidelines could be developed only if States played their part by providing comments and practical examples of the text's impact on their practice, as requested by the Commission in chapter III of its report.

97. Expressing his concerns as regards the draft guideline 4.5.2, the Delegate of **Singapore** stated that the guideline provided for a positive presumption that the author of an invalid reservation would be bound by the treaty without the benefit of the reservation unless the author's contrary intention could be identified. While acknowledging that the guideline represented the Commission's efforts to achieve a balanced compromise between the "permissibility school", which held that the validity of a reservation was objectively determined, and the "opposability school", which premised the validity of a reservation on the reactions of other parties to the treaty, he did not think that the solution was the right one.

98. His delegation fully agreed with the Commission that the author's consent to be bound by the treaty was necessarily conditioned by the reservation, as reflected in the reality of State practice in relation to a Government's participation in an international treaty.

99. The inclusion of a reservation and its terms were an inextricable part of any Government's consent to be bound by the treaty, unless otherwise indicated. It would therefore be better to use the negative presumption in guideline 4.5.2, to the effect that the consequence of an invalid reservation was that its author would not be bound by the treaty, he added.

100. As regards the form of the finalized Guide to Practice, he had a suggestion to make. Since the commentaries to many of the guidelines had indicated the fact that much of the Guide in fact represented progressive development, as a way of helping future

users of the Guide, he wanted the Commission to indicate clearly, against the text itself, which elements of the Guide represented codification and which represented progressive development.

101. While welcoming the provisional adoption of the Guide to Practice on reservations to treaties, the Delegate of **Nigeria** suggested that the Guide's user-friendliness should be further reviewed before its expected final adoption at the Commission's Sixty-Third Session. Furthermore, the terminology used in the Guide should be clearly defined so as to ensure consistent usage: specifically, a clear distinction should be made between the terms "impermissible reservation" and "invalid reservation", he added.

102. In his view, the ability to formulate a reservation to a treaty, insofar as it did not seek to undermine the object or purpose of the treaty or a part thereof, was a principle of State sovereignty. States used reservations to demonstrate their intention to be bound only to those provisions of a treaty that were either possible to implement or not inimical to or at variance with the peculiarity of the reserving State at the national level. Hence he clarified that it was a violation of the fundamental principle of the consent of States to treaty obligations to consider a reserving State to be bound by the treaty.

103. The Delegate of **Arab Republic of Egypt** supported the consensus decision taken by the Commission to ensure that the guidelines did not depart from the provisions of the Vienna Conventions. As regards the draft guideline Section 4.2 of the Guide to Practice (Effects of an established reservation), he opined that it could have far reaching consequences on the modification and acceptance of the legal effects of one or more provisions of a treaty. In his view Section 4.5 (Consequences of an invalid reservation) raised the question as to whether the reserving State would become a party to the treaty if its reservation was invalid, especially since the Vienna Conventions did not address the issue explicitly he added. He also informed that his delegation would be submitting written comments on those two sections of the guidelines in due course.

104. In his opinion, guideline 4.5.2 (Status of the author of an invalid reservation in relation to the treaty), based on its current wording, risked putting the reserving State in the unintended position of being bound by a treaty without the benefit of its reservation. The guideline dealt with the intention of the reserving State in an arbitrary and selective manner. The presumption should be that the reserving State would not have ratified the treaty if its reservation was not going to be accepted. Accordingly, he was of the opinion that the Commission should amend the language in guidelines 4.5.2 in order to indicate clearly that the invalidity of the reservation would have the effect of nullifying the ratification.

105. Commenting on the topic "Reservations to treaties", the Delegate of **Republic of Korea** noted that caution should be exercised when considering the addition of new elements to the provisions of the 1969, 1978 and 1986 Vienna Conventions. Her delegation supported article 4.7.1 which distinguished interpretative declarations from reservations and characterized the former as an element to be taken into account in interpreting treaties. In her view, as regards the draft guidelines on the consequences of

an invalid reservation, a fundamental question remained unanswered: who would judge the validity of a reservation by one State when other States had differing views on the issue? Further thought should be given to how to decide on an impartial body to assess whether or not reservations were valid, she added.

106. Commenting on the utility of the draft guidelines on reservations to treaties, the Delegate of **India** remarked that it would serve as a comprehensive manual that would provide useful guidance to States and legal advisers on the subject. However, although it had been decided early on in the Commission's work on the topic that the guidelines would serve to elucidate the relevant provisions of the Vienna Convention on the Law of Treaties, but would not introduce any changes therein, the proposed guidelines on impermissible reservations appeared to have done just that, he claimed.

107. While illustrating this, he referred to Guideline 4.5.2, in particular, which in his view, has introduced a new presumption in the case of an impermissible reservation — namely, that the reserving State would become a party to the treaty in question without the benefit of its reservation unless it clearly indicated that it did not wish to be bound by the treaty under those circumstances. His delegation was concerned that such a guideline might create uncertainty in international treaty relations.

108. His delegation was pleased that edited summary records of the Commission's proceedings had been placed on the Commission's website, which would assist Member States and other parties in following its work.

109. Commenting on the Guide to Practice, the Delegate of **Thailand** stated that the conditions for the establishment of a reservation contained in guideline 4.1, namely, that it must be permissible, formally valid and accepted by another contracting State or organization, were solidly based on Articles 19, 20 and 23 of the Vienna Convention. A valid reservation to which an objection had been made, or an invalid reservation accepted by another State, did not meet those criteria and therefore did not produce the same legal effects as an established reservation, he added.

110. His delegation also agreed with the inclusion of guideline 4.2.1 (Status of the author of an established reservation). In his view, despite the lack of uniformity in States' practice, the provisions contained in article 20, paragraphs 4 (c) and 5 of the Vienna Convention should apply as a matter of customary law. An act expressing consent to be bound by a treaty and containing a reservation was effective only when at least one other contracting State had accepted the reservation, or where there was no objection to the reservation by the end of a period of 12 months, he added.

111. He was of the considered opinion that guideline 4.5.2 which contained the rebuttable presumption that a treaty applied in full to the author of an invalid reservation, would be well served to contain the reverse proposition: that a State would rather not regard itself as bound towards a contracting State that considered the reservation to be invalid. That view better reflected the accepted principle that a State's consent to create legal obligations should be clear and should not be lightly presumed, he added. Accordingly, his delegation proposed reversing the presumption and including the words

“the reasons for the formulation of the reservations” as one of the factors listed in the second paragraph of guideline 4.5.2.

112. While congratulating the Commission for completing, on first reading, the entire set of draft guidelines on Reservations to Treaties, the Delegate of **People’s Republic of China** noted that his delegation will study the draft guidelines and commentaries in detail, and endeavour to provide its written comments to the Commission by the stipulated deadline.

113. Expressing his delegations’ significant concerns regarding draft guideline 4.5.2, which relates to the status of the author of an invalid reservation in relation to the treaty, he remarked that this draft guideline is the Commission's proposed solution to what must be one of the most controversial issues in this area. He went on to add that his delegation would even venture to say that in many ways, this draft guideline represented the culmination of the Commission's sixteen-year enterprise. The draft guideline and its commentary must therefore be carefully studied, he added.

114. Expressing his delegations’ understanding of the draft guideline 4.5.2, he stated that it provided for what is called a "positive presumption" as to the severability of an invalid reservation. In other words, the author of an invalid reservation is presumed to be bound by the treaty without the benefit of the reservation unless the author's contrary intention can be identified. He acknowledged the Commission's efforts to achieve a finely-balanced compromise between what Professor Bowett characterised as "the permissibility school", which holds that the validity of a reservation is objectively determined, and "the opposability school", which premises the validity of a reservation on the reactions of other parties to the treaty. He added that his delegation took some time to study the Commission's reasons for using the positive presumption in this draft guideline, as set out in the commentary thereto. However, he was of the opinion that the Commission's solution was the right one.

115. While fully agreeing with the Commission that "the key to [this] problem is...the will of the author of the reservation.", he remarked in this regard that his delegation noted the Commission's reading of the Strasbourg cases, which, in their view, properly contextualises those decisions. As the Commission says, the author's consent to be bound by the treaty is necessarily conditioned by the reservation. This legal fact captures the reality of State practice in relation to a Government's participation in an international treaty, he added. Various competing considerations are to be weighed and calibrated, but the inclusion of a reservation and its terms are an inextricable part of any Government’s decision to participate and, unless there is any indication otherwise, are part and parcel of its expressed consent to be bound, he clarified.

116. Hence, his delegation was of the view that the better position ought to be that the consequence of an invalid reservation was that its author was not bound by the treaty. That being so, he was of the considered opinion that the right approach was to use the negative presumption in draft guideline 4.5.2.

117. As regards the final form of the Guide to Practice, he noted that he could understand from the commentaries to many of the draft guidelines that much of the Guide to Practice represented progressive development. In this regard, he aligned himself with some other delegations to suggest that those provisions that represented progressive development be identified and indicated against the text itself. This in his view would not only, make it clear those elements of the Guide that represented progressive development and those that represented codification, but also, would be immensely useful for the future users of the Guide.

III. TREATIES OVER TIME

A. Background

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

2. At its sixty-first session which took place in 2009, the Commission established a Study Group on Treaties over Time, chaired by Mr. Georg Nolte. The Commission subsequently took note of the oral report of the Chairman of the Study Group[2]. As a basis for the discussion, the Study Group had before it the following documents:

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

3. The Study Group agreed on the following;[3]

- (a) Work should start on subsequent agreement and practice on the basis of successive reports to be prepared by the Chairman for the consideration of the Study Group, while the possibility of approaching the topic from a broader perspective should be further explored;
- (b) The Chairman would prepare for next year a report on subsequent agreement and practice as addressed in the jurisprudence of the International Court of Justice, and other international courts and tribunals of general or ad hoc jurisdiction;
- (c) Contributions on the issue of subsequent agreement and practice by other interested members of the Study Group were encouraged, in particular on the question of subsequent agreement and practice at the regional level or in relation to special treaty regimes or specific areas of international law;
- (d) Moreover, interested members were invited to provide contributions on other issues falling within the broader scope of the topic as previously outlined.

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[1] See, Official Records of the General Assembly, Sixty-Third Session, Supplement No 10, (A/63/10), para 353.
[2] See, Official Records of the General Assembly, Sixty-Fourth Session, Supplement No. 10 (A/64/10), paras 218-219.
[3] Ibid., para 226.

B. Consideration of the Topic at the Sixty-Second Session

4. At this Session, the Study Group on Treaties over time was reconstituted under the chairmanship of Mr. Georg Nolte. The Commission took note of the oral report of the Chairman of the Study Group on Treaties over time and approved the recommendation of the Study Group that a request for information be included in Chapter III of the Commission's report and also brought to the attention of States by the Secretariat.

5. The Study Group which held four meetings, began its work on the aspects of the topic relating to subsequent agreements and practice, on the basis of an introductory report prepared by its Chairman on the relevant jurisprudence of the International Court of Justice and arbitral tribunals of *ad hoc* jurisdiction.

6. The introductory report addressed a number of questions including: terminological issues; the general significance of subsequent agreements and practice in treaty interpretation; the question of inter-temporal law; the relationship between evolutionary interpretation and subsequent agreements and practice; the various elements of subsequent agreements and practice, including: the beginning and the end of the relevant period within which this phenomenon may take place, the identification of a common understanding or agreement by the parties, including the potential role of silence, questions of attribution of conduct to the State; as well as subsequent agreements and practice as a possible means of treaty modification.

7. These various questions were the subject of preliminary discussions within the Study Group. However, due to lack of time, the consideration of the section relating to a possible modification of a treaty by subsequent agreements and practice had to be deferred until next year.

8. Aspects that were touched upon during the discussions in the Study Group included: whether different judicial or quasi-judicial bodies have a different understanding of, or have a tendency to give a different weight to, subsequent agreements and practice in the interpretation of treaties; whether the relevance and significance of subsequent agreements and practice may vary depending on factors relating to the treaty concerned, such as its age, its subject-matter or its past – or future-oriented nature. It was generally felt, however, that no definitive conclusions could be drawn on these issues at this stage.

9. During the first meeting of the Study Group in May 2010, some members expressed the wish that additional information be provided on relevant aspects of the preparatory work of the 1969 Vienna Convention on the Law of Treaties. The Chairman therefore presented to the Study Group, at its third meeting, an addendum to his introductory report, dealing with the preparatory work of the Vienna Convention relating to the rules on the interpretation and modification of treaties, and on the inter-temporal law. The addendum addressed the work of the Commission concerning the elaboration, on first and on second reading, of the draft articles relating to the interpretation and modification of treaties, as well as the modifications introduced to those draft articles by

the 1969 Vienna Convention on the Law of Treaties. The addendum concluded that paragraphs (3) (a) and (b) of Article 31 of the Vienna Convention on the Law of Treaties on "subsequent agreements" and "subsequent practice" were the remnants of a more ambitious plan by the Commission to deal also with the inter-temporal law and the modification of treaties. This more ambitious plan could not be realized for various reasons, in particular the difficulties of formulating in an appropriate way a general rule on the inter-temporal law and the resistance by States during the Vienna Conference to accept an explicit rule on the informal modification of treaties by way of subsequent practice. It does not seem, however, that clear differences in substance led to the abandoning of the initial, more ambitious plan.

C. Future Work and the Request for Information

10. The Study Group also had discussions on its future work programme. It is expected that, during the sixty-third session of the Commission (2011), the Study Group will first complete its discussion of the introductory report prepared by its Chairman, and will then move to a second phase of its work on subsequent agreements and practice, namely the analysis of the jurisprudence of courts or other independent bodies under special regimes. This will be done on the basis of a report to be prepared by the Chairman of the Study Group. In parallel, other contributions are expected to be made by some members on specific issues.

11. At its meeting on 28 July 2010, the Study Group also examined the possibility that a request for information from Governments is included in Chapter III of the Commission's report on the current session, and that this request is brought to the attention of Governments by the Secretariat. It was generally felt in the Study Group that information provided by Governments in relation to this topic would be very useful, in particular with respect to the consideration of instances of subsequent practice and agreements that have not been the subject of a judicial or quasi-judicial pronouncement by an international body. Therefore, the Study Group recommended to the Commission that Chapter III of this year's report include a section containing a request for information on the topic "Treaties over time", and that this request be brought to the attention of States by the Secretariat.

D. Summary of the Views Expressed by AALCO Member States on the Topic in the Sixth (Legal) Committee of the UN General Assembly at its Sixty-Fifth Session (2010)

12. Commenting on the topic "Treaties over Time", the Delegate of **South Africa** remarked that the topic has now been rendered all the more pertinent by the dynamism of contemporary international relations. He felt that the decision of the Study Group to study the role of subsequent agreements and State practice in the interpretation of treaties would undoubtedly promote understanding of the issue. The Group's future work plan outlined in paragraph 353 of the Commission's report was also supported by his delegation, which would furthermore welcome work relating to the effects of certain acts,

events or developments on the continued existence of a treaty and to the obsolescence of certain treaty provisions over time.

13. According to him, the strength of the Vienna Convention on the Law of Treaties laid in its flexibility, consisting in recognition of the role of subsequent agreement and practice in the interpretation of a treaty pursuant to article 31, paragraphs 3 (a) and (b), thereof. Entities that had had recourse to the provisions of that article included judicial and quasi-judicial bodies, international organizations and domestic courts. Although the Commission had twice previously examined the topic, relevant subsequent agreement and practice were evidently not always well documented, often coming to light only through legal proceedings. Indeed, the current renewed interest in the topic stood as testimony to the increasingly purpose-oriented and objective interpretation of treaties by international courts, as asserted in the relevant jurisprudence of the International Court of Justice, one example being in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*. He was of the view that the effect of treaties over time on the "fragmentation" of international law had also been notably identified as another reason for considering the adaptation of international treaties to changing circumstances.

14. Commenting on the topic "Treaties over Time", the Delegate of **Sri Lanka** remarked that consideration of subsequent practice in the interpretation of treaties as they evolved on account of acts, events and developments that transpired subsequent to their conclusion, would ensure their continuing contemporary relevance, while also encouraging their practical application and longevity. In his view, taking such practice into account might, however, raise questions concerning the domestic implementation of treaties.

15. Commenting on the topic "Treaties over Time", the Delegate of **Republic of Korea** remarked that treaties were to be interpreted in accordance with the ordinary meaning to be assigned to the terms thereof within their context and in the light of the object and purpose of the treaty. He was of the view that notwithstanding the provision of article 31, paragraph 3, of the Vienna Convention on the Law of Treaties concerning subsequent agreement and practice, consideration must be given to situations where the subsequent practice was contrary to a treaty or became international customary law and to the question of whether the subsequent practice preceded the provision of a treaty as *lex posterior*.

16. Commenting on the Report of the Study Group on Treaties over Time, the Delegate of **Singapore** remarked that it was ambitious and touched on many vital issues of practical importance in treaty implementation. Noting that treaties that dealt with sensitive political issues and had wide-ranging impact on domestic laws and practices were the ones that subsisted longest over time, his delegation suggested that one of the focal points of the report should relate to the implementation of major treaties.

17. With regard to the impact of State practice on treaty implementation, he noted that the cornerstone of interpretation remained the wording of the treaty itself, and delving deeply into State practice therefore had its limitations. While flexibility and adaptation to

changing circumstances were sometimes needed, the key issue was determining what weight to accord to deviations of practice from the original wording. While practice could reflect a shared understanding among the parties of how their obligations had varied subsequent to the conclusion of a treaty, the parties could also be acting out of political expediency or engaging in a temporary departure with the intention of reverting to a state of conformity with a treaty, he opined.

18. In his opinion the State practice and the underlying motivations thereof were usually not properly recorded, making it difficult to ascertain the exact contours of such practice. Since parties almost always put in writing any agreement amending or changing the implementation of a treaty, practices should only amend a treaty provision in exceptional circumstances, he clarified.

IV. EXPULSION OF ALIENS

A. Background

1. The Commission, at its fifty-sixth session, in 2004, decided to include the topic "Expulsion of Aliens" in its current programme of work and appointed Mr. Maurice Kamto as Special Rapporteur for the topic. The General Assembly, vide its resolution 59/41 of 2 December 2004 endorsed that decision. At the fifty-seventh session of the Commission, in 2005, the Special Rapporteur introduced his preliminary report[1], in which he outlined his understanding of the subject and sought the opinion of the Commission on a few methodological issues to guide his future work. The Report was considered by the Commission at its fifty-seventh session, and it endorsed most of Special Rapporteur's choices and his draft work plan annexed to the preliminary report.

2. At its fifty-eighth Session, the Commission had before it the second report of the Special Rapporteur[2] and a study prepared by the Secretariat.[3] The Commission decided to consider the second report at its fifty-ninth session in 2007. At its fifty-ninth session (2007), the Commission considered the second and third reports[4] of the Special Rapporteur and referred to the Drafting Committee draft articles 1 and 2, as revised by the Special Rapporteur, and draft articles 3 to 7.

3. At its sixtieth session (2008), the Commission considered the fourth report of the Special Rapporteur.[5] The Commission had also decided to establish a working group, chaired by Mr. Donald M. McRae, in order to consider the issues raised by the expulsion of persons having dual or multiple nationality and by denationalization in relation to expulsion. The Commission had also approved the conclusions of the Working Group and requested the Drafting Committee to take them into consideration in its work.

4 At its sixty-first session, the Commission considered the fifth report of the Special Rapporteur.[6] At the Commission's request, the Special Rapporteur then presented a new version of the draft articles on protection of the human rights of persons who have been or are being expelled, revised and restructured in the light of the plenary debate.[7] He also submitted a new draft work plan with a view to restructuring the draft articles.[8] The Commission decided to postpone its consideration of the revised draft articles to its sixty-second session.

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[1] A/CN. 4/554.
[2] A/CN. 4/573.
[3] A/CN. 4/565.
[4] A/CN.4/573 and Corr.1 and A/CN.4/581.
[5] A/CN. 4/594.
[6] A/CN.4/611 and Corr.1.
[7] A/CN.4/617.
[8] A/CN.4/618

B. Consideration of the Topic at the Present Session

5. At the present session, the Commission had before it the draft articles on protection of the human rights of persons who have been or are being expelled, as revised and restructured by the Special Rapporteur (A/CN.4/617); the new draft work plan presented by the Special Rapporteur with a view to structuring the draft articles (A/CN.4/618); and the sixth report presented by the Special Rapporteur (A/CN.4/625 and Add.1). It considered them at its meetings. The Commission likewise had before it comments and information received from Governments.[9]

6. The Commission decided to refer to the Drafting Committee draft articles 8 to 15 on protection of the human rights of persons who have been or are being expelled, originally contained in the fifth report (A/CN.4/611), as revised and restructured by the Special Rapporteur in document A/CN.4/617.

7. The Commission decided to refer to the Drafting Committee draft articles A and 9, as contained in the sixth report of the Special Rapporteur (A/CN.4/625), and draft articles B1 and C1, as contained in the addendum to the sixth report (A/CN.4/625/Add.1), as well as draft articles B1 and C1, as contained in the addendum to the sixth report (A/CN.4/625/Add.1), as well as draft articles B and A1, as revised by the Special Rapporteur during the session.

1. Consideration of the revised and restructured draft articles on protection of the human rights of persons who have been or are being expelled

(a) Presentation of the draft articles by Special Rapporteur

8. The Special Rapporteur explained that the Commission's consideration of the fifth report on expulsion of aliens (A/CN.4/611) had revealed a lack of understanding of what he himself meant to say about protection of the human rights of persons who had been or were being expelled as a limitation of the State's right to expel aliens. The wish was expressed that draft article 8, as proposed in the fifth report, be reformulated so as to clearly state the principle that the human rights of persons who had been or were being expelled should be fully protected. In addition, changes were proposed to other draft articles on the subject. The Commission had then asked the Special Rapporteur to submit to it a new version of the draft articles, taking account of the comments made during the debate. The Special Rapporteur had acceded to this request during the sixty-first session by revising the draft articles in question and incorporating them in document A/CN.4/617 and by restructuring them into four sections dealing, respectively, with "General rules", "Protection required from the expelling State", "Protection in relation to the risk of violation of human rights in the receiving State" and "Protection in the transit State".

9. Section A, on "General rules", comprised the revised versions of draft articles 8, 9 and 10. In revised draft article 8,[10] entitled "General obligation to respect the human

[9] See A/CN.4/604 and A/CN.4/628.
[10] Revised draft article 8 read:

rights of persons who have been or are being expelled", the expression "fundamental rights" had been replaced by the broader and non-limitative term "human rights". In addition, the phrase "in particular those mentioned in the present draft articles" had been added in order to emphasize not only that there was no intention to establish a hierarchy among the human rights to be respected in the context of expulsion but also that the rights specifically mentioned in the draft articles were not exhaustive.

10. Revised draft article 9,[11] corresponded to former draft article 10 and was entitled "Obligation to respect the dignity of persons who have been or are being expelled", had been incorporated into the section on "General rules" in order to emphasize that it was general in scope. Since the right to dignity was being considered in the specific context of expulsion, paragraph 1 of former draft article 10 setting forth the general rule that human dignity was inviolable had been eliminated.

11. Revised draft article 10[12] has been incorporated into the section on "General rules" in order to emphasize that it was general in scope. The words "among persons who have been or are being expelled" had been added to take into account the comments of several members of the Commission who had stressed that, in that context, the discrimination prohibited was discrimination among aliens subject to expulsion, not discrimination between such aliens and the nationals of the expelling State.

12. Section B on "Protection required from the expelling State" comprised revised draft articles 11, 12 and 13 and a future draft article which the Special Rapporteur was planning to produce on the conditions of custody and treatment of persons who had been or were being expelled.

13. Revised draft article 11,[13] entitled "Obligation to protect the lives of persons who have been or are being expelled", combined paragraph 1 of former draft article 9 and

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Obligation to respect the human rights of persons who have been or are being expelled

Any person who has been or is being expelled is entitled to respect for his or her human rights, in particular those mentioned in the present draft articles.

[11] Revised draft article 9 read:

Obligation to respect the dignity of persons who have been or are being expelled

The dignity of a person who has been or is being expelled must be respected and protected in all circumstances.

[12] Revised draft article 10 read:

Obligation not to discriminate [Non-discrimination rule]

1. The State shall exercise its right of expulsion with regard to the persons concerned without discrimination of any kind on grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Such non-discrimination among persons who have been or are being expelled shall also apply to the enjoyment of the rights and freedoms provided for in international human rights law and in the legislation of the expelling State.

[13] Revised draft article 11 read:

Obligation to protect the lives of persons who have been or are being expelled

1. The expelling State shall protect the right to life of a person who has been or is being expelled.

2. A State may not, in its territory or in a territory under its jurisdiction, subject a person who has been or is being expelled to torture or to inhuman or degrading treatment.

paragraph 1 (which here became paragraph 2) of former draft article 11. The rearrangement was meant to respond to the strongly expressed desire of some members of the Commission to differentiate the obligations of the expelling State from those of the receiving State. The phrase “in a territory under its jurisdiction” had been added in order to take into account the concerns expressed by other members.

14. Revised draft article 12,[14] entitled “Obligation to respect the right to family life”, corresponded to former draft article 13. The reference to private life had been eliminated from the draft article, as some members of the Commission wished. Moreover, as other members had proposed, in paragraph 2 the reference to the “law” had been changed to read “international law”.

15. The purpose of revised draft article 13,[15] entitled “Specific case of vulnerable persons”, was to extend to all “vulnerable persons” the protection which the former draft article 12 had reserved for children being expelled. While paragraph 1 specified what persons were meant, paragraph 2 was new and replaced paragraph 2 of the former draft article. It stressed that where a child was involved in expulsion the child’s best interests must prevail; in some cases the child’s best interests might require the child to be detained in the same conditions as an adult so that the child was not separated from the adult.

16. Revised draft articles 14 and 15 constituted section C on “Protection in relation to the risk of violation of human rights in the receiving State”.

17. Revised draft article 14,[16] entitled “Obligation to ensure respect for the right to life and personal liberty in the receiving State of persons who have been or are being

[14] Revised draft article 12 reads:
Obligation to respect the right to family life
1. The expelling State shall respect the right to family life of a person who has been or is being expelled.
2. It may not derogate from the right referred to in paragraph 1 of the present article except in such cases as may be provided for by international law and shall strike a fair balance between the interests of the State and those of the person in question.

[15] Revised draft article 13 reads:
Specific case of vulnerable persons
1. Children, older persons, persons with disabilities and pregnant women who have been or are being expelled shall be considered, treated and protected as such, irrespective of their immigration status.
2. In particular, any measure concerning a child who has been or is being expelled must be taken in the best interests of the child.

[16] Revised draft article 14 reads:
Obligation to ensure respect for the right to life and personal liberty in the receiving State of persons who have been or are being expelled
1. No one may be expelled or returned (*refoulé*) to a State where his or her right to life or personal liberty is in danger of being violated because of his or her race, religion, nationality, membership of a particular social group or political opinions.
2. A State that has abolished the death penalty may not expel an alien who is under a death sentence to a State in which that person may be executed without having previously obtained an assurance that the death penalty will not be carried out.
3. The provisions of paragraphs 1 and 2 of this article shall also apply to the expulsion of a stateless person who is in the territory of the expelling State.

expelled", was a reformulation of former draft article 9, particularly paragraph 1 thereof. The Special Rapporteur had endeavoured to take account of the desire expressed by some members of the Commission to extend the scope of the protection of the right to life to all expelled persons. That provision, of general scope, also covered the situation of asylum-seekers, which therefore no longer required special treatment. Some members wanted the scope of the principle of non-refoulement to be extended to all persons who had been or were being expelled, whether or not they were lawfully present. The principle of non-refoulement, which had first been a fundamental principle of international refugee law, had then passed beyond the bounds of that branch of the law to become part of international humanitarian law and an integral part of the international human rights protection. In the opinion of the Special Rapporteur, the arguments drawn from various universal legal instruments and from converging regional legal regimes offered a sufficient basis for the rule set forth in draft article 14, paragraph 1.

18. Revised draft article 15,[17] entitled "Obligation to protect persons who have been or are being expelled from torture and inhuman or degrading treatment", corresponded to former draft article 11, which had been divided into two because some members of the Commission had felt the need to draw a distinction between the protection of the human rights of an alien who had been or was being expelled in the expelling State and the protection required in the receiving State. The new text of draft article 15 therefore drew on paragraphs 2 and 3 of the former draft article 11, with the addition in draft article 15, paragraph 2, of the phrase "and when the authorities of the receiving State are not able to obviate the risk by providing appropriate protection", in order to reflect the jurisprudence of the European Court of Human Rights in the case of H.L.R. v. France.[18]

19. Lastly draft article 16,[19] entitled "Application of the provisions of this chapter in the transit State", was new and sought to extend the set of provisions protecting the rights of the expelled person to the entire expulsion process and the whole of the journey from the expelling State to the receiving State.

(b) Summary of the debate

20. Several members supported the revised draft articles on protection of the human rights of persons who had been or were being expelled, in which the Special Rapporteur

[17] Revised draft article 15 read:

Obligation to protect persons who have been or are being expelled from torture and inhuman or degrading treatment

1. A State may not expel a person to another country where there is a real risk that he or she would be subjected to torture or to inhuman or degrading treatment.

2. The provisions of paragraph 1 of this article shall also apply when the risk emanates from persons or groups of persons acting in a private capacity and when the authorities of the receiving State are not able to obviate the risk by providing appropriate protection.

[18] European Court of Human Rights (Grand Chamber), *H.L.R. v. France,* judgment of 29 April 1997, paragraph 40.

[19] Revised Draft Article 16 reads:

Application of the provisions of this chapter in the transit State

The provisions of this chapter shall also apply in the transit State to a person who has been or is being expelled.

had taken into consideration most of the comments made during the discussion at the Commission's sixty-first session. It was pointed out, however, that there was still a need for caution with regard to the level of protection that should be granted to individuals in the draft articles, since the Commission was required to set forth principles of general international law and not to draw up an instrument for protecting human rights which each State would be free to accept or reject.

2. Consideration of the sixth report of the Special Rapporteur

(a) Presentation of the Special Rapporteur

21. The sixth report (A/CN.4/625 and Add.1) continued with the study of the "General rules"; addendum 1 dealt with the procedural rules for expulsion. Concerning, in particular, the analysis of national legislation, the Special Rapporteur had relied on the Secretariat's study on the topic (A/CN.4/565 and Corr.1).

22. The Special Rapporteur had first reverted to the question of collective expulsion in order to allay certain misgivings expressed by some members with regard to draft article 7, paragraph 3, proposed in the third report (A/CN.4/581) and referred by the Commission to the Drafting Committee in 2007. This provision confined the possibility of collective expulsion of foreign nationals of a State engaged in armed conflict to those who "taken together as a group, … have demonstrated hostility towards the receiving State". Having analysed the relevant provisions of the Geneva Conventions of 12 August 1949 and the 1977 Additional Protocols thereto, the Special Rapporteur had arrived at the conclusion that the provision did not contradict international humanitarian law.

23. The sixth report then addressed the issue of "disguised expulsion", a term used in that context to describe situations where a State aided or tolerated acts committed by its citizens with the intended effect of driving a person out of its territory or provoking the departure of that individual. That type of expulsion was by its nature contrary to international law because it violated the human rights of the person so expelled and did not respect the procedural rules giving the expelled person an opportunity to defend his or her rights. Paragraph 1 of draft article A[20] accordingly prohibited disguised expulsion, as defined in paragraph 2.

24. The sixth report also dealt with the issue of extradition disguised as expulsion. As part of the progressive development of international law, draft article 8[21] established the

[20] Draft article A read:
Prohibition of disguised expulsion
1. Any form of disguised expulsion of an alien shall be prohibited.
2. For the purposes of this draft article, disguised expulsion shall mean the forcible departure of an alien from a State resulting from the actions or omissions of the State, or from situations where the State supports or tolerates acts committed by its citizens with a view to provoking the departure of individuals from its territory.

[21] Draft article 8 read:
Prohibition of extradition disguised as expulsion

prohibition of that practice, which had been condemned by a number of national courts and by the European Court of Human Rights in its judgment in the Bozano case. It should be noted, however, that extradition disguised as expulsion presupposed that the main reason for expulsion was extradition; in other words, expulsion sought to circumvent the provisions of domestic law that permitted the legality of an extradition to be contested. National case law in the matter was based on the purpose of the expulsion and on the intention of the States concerned.

25. The sixth report then discussed at length the grounds for expulsion. The grounds embodied in international conventions and international case law appeared to be limited basically to public order and national security, although national legislation provided for various other grounds. In addition, international case law yielded little information about the content of the notions of public order and national security, which were very largely determined by domestic law. In those circumstances, the Special Rapporteur considered that to draw up an inventory of the grounds for expulsion that was meant to be exhaustive would be to attempt the impossible. Nevertheless, he had examined the criteria for assessing the grounds for expulsion on the basis of national, regional and international jurisprudence and doctrine.

26. In the light of those considerations, the Special Rapporteur had proposed a draft article 9[22] that dealt with various aspects of the grounds for expulsion and their assessment, which probably warranted clarification in the commentary. Paragraph 1 established the requirement that grounds must be given for any expulsion decision. Paragraph 2 designated public order and national security as grounds that might justify the expulsion of an alien, while specifying that expulsion had to be carried out in accordance with the law. Paragraph 3 stated that the ground given had to be in conformity with international law. Lastly, paragraph 4 listed certain requirements for the State's determination of the ground for expulsion: it must be done in good faith and reasonably, taking into account the seriousness of the facts and the contemporary nature of the threat to which they gave rise, in the light of the circumstances and of the conduct of the person in question.

27. The sixth report also addressed the conditions in which persons being expelled were detained. Initially, draft article B[23] had been entitled "Obligation to respect the

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Without prejudice to the standard extradition procedure, an alien shall not be expelled without his or her consent to a State requesting his or her extradition or to a State with a particular interest in responding favourably to such a request.

[22] Draft article 9 read:

Grounds for expulsion

1. Grounds must be given for any expulsion decision.

2. A State may, in particular, expel an alien on the grounds of public order or public security, in accordance with the law.

3. A State may not expel an alien on a ground that is contrary to international law.

4. The ground for expulsion must be determined in good faith and reasonably, taking into account the seriousness of the facts and the contemporary nature of the threat to which they give rise, in the light of the circumstances and of the conduct of the person in question.

[23] Draft article B, as contained in the sixth report, read:

human rights of aliens who are being expelled or are being detained pending expulsion" and had comprised four paragraphs. However, during the session the Special Rapporteur had decided to submit to the Commission a revised version of the draft article[24] in which the title was amended and paragraph 1 deleted. The purpose of those changes was to limit the scope of the provision to detention pending expulsion in order to avoid any duplication with the draft articles that set forth, in a general manner, the obligation to respect the human rights and the dignity of the person who had been or was being expelled. Draft article B codified rules that had either been expressly established in certain international legal instruments, embodied in international, albeit regional case law, or recognized by most national legislation.

28. In an addendum to his sixth report (A/CN.4/625/Add.1), the Special Rapporteur had examined the question of expulsion proceedings. In that context, he had first tackled the distinction between aliens lawfully or unlawfully present in the territory of the State, a distinction that was based, at least implicitly, on a number of international conventions and was widely established in State practice. In the opinion of the Special Rapporteur, while that distinction was indisputably relevant as far as procedural rules were concerned, it should not come into play with respect to the human rights of expelled persons.

Obligation to respect the human rights of aliens who are being expelled or are being detained pending expulsion

1. The expulsion of an alien must be effected in conformity with international human rights law. It must be accomplished with humanity, without unnecessary hardship and subject to respect for the dignity of the person concerned.

2. (a) The detention of an alien pending expulsion must be carried out in an appropriate place other than a facility in which persons sentenced to penalties involving deprivation of liberty are detained; it must respect the human rights of the person concerned.

(b) The detention of an alien who has been or is being expelled must not be punitive in nature.

3. (a) The duration of the detention may not be unrestricted. It must be limited to such period of time as is reasonably necessary for the expulsion decision to be carried out. All detention of excessive duration is prohibited.

4. (a) The decision to place an alien in detention must be reviewed periodically at given intervals on the basis of specific criteria established by law.

(b) Detention shall end when the expulsion decision cannot be carried out for reasons that are not attributable to the person concerned.

(b) The extension of the duration of the detention may be decided upon only by a court or a person authorized to exercise judicial power.

[24] The revised version of draft article B read:

Obligation to respect the human rights of an alien being detained pending expulsion

1. (a) The detention of an alien pending expulsion must be carried out in an appropriate place other than a facility in which persons sentenced to penalties involving deprivation of liberty are detained; it must respect the human rights of the person concerned.

(b) The detention of an alien who had been or is being expelled must not be punitive in nature.

2. (a) The duration of the detention may not be unrestricted. It must be limited to such period of time as is reasonably necessary for the expulsion decision to be carried out. All detention of excessive duration is prohibited.

(b) The extension of the duration of the detention may be decided upon only by a court or a person authorized to exercise judicial power.

3. (a) The decision to place an alien in detention must be reviewed periodically at given intervals on the basis of specific criteria established by law.

(b) Detention shall end when the expulsion decision cannot be carried out for reasons that are not attributable to the person concerned.

29. Since the procedures applicable to the expulsion of aliens unlawfully present in the territory of the expelling State varied considerably from one State to another, the Special Rapporteur had arrived at the conclusion that it was better to leave them to be regulated by national legislation, without prejudice to a State's right to provide such aliens with the same guarantees as those for aliens lawfully present on its territory. That was the meaning of draft article A1[25] which, subject to that proviso, restricted the scope of the subsequent draft articles to aliens lawfully present in the territory of the expelling State.

30. The guarantees set out in draft articles B1 and C1 for lawfully present aliens had been drawn from various universal and regional human rights instruments, among which special mention had to be made of article 13 of the International Covenant on Civil and Political Rights. Draft article B1[26] established the fundamental guarantee that expulsion could take place only pursuant to a decision reached in accordance with the law. That guarantee, which was embodied in universal and regional instruments and in the national legislation of several countries, also rested on the principle that the State was bound to observe its own rules (patere legem or patere regulam quam fecisti).

31. Aliens lawfully in the territory of the expelling State also enjoyed a certain number of procedural rights listed in draft article C1.[27] Most of those guarantees had their source not only in national laws, but also in treaty law. Although treaty law and international jurisprudence did not specifically provide a basis for legal aid, the right to such aid was established in the national legislation of several States and also in European

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[25] Draft article A1 read:

Scope of [the present] rules of procedure

1. The draft articles of the present section shall apply in case of expulsion of an alien legally [lawfully] in the territory of the expelling State.

2. Nonetheless, a State may also apply these rules to the expulsion of an alien who entered its territory illegally, in particular if the said alien has a special legal status in the country or if the alien has been residing in the country for some time.

[26] Draft article B1 read:

Requirement for conformity with the law

An alien [lawfully] in the territory of a State Party may be expelled therefrom only in pursuance of a decision reached in accordance with law.

[27] Draft article C1 read:

Procedural rights of aliens facing expulsion

1. An alien facing expulsion enjoys the following procedural rights:

(a) The right to receive notice of the expulsion decision.

(b) The right to challenge the expulsion [the expulsion decision].

(c) The right to a hearing.

(d) The right of access to effective remedies to challenge the expulsion decision without discrimination.

(e) The right to consular protection.

(f) The right to counsel.

(g) The right to legal aid.

(h) The right to interpretation and translation into a language he or she understands.

2. The rights listed in paragraph 1 above are without prejudice to other procedural guarantees provided by law.

Union law. It had been included in the list in draft article C1 by way of progressive development. The right to translation and interpretation could be described as a generally recognized principle in court proceedings.

32. The Special Rapporteur also announced that he had finalized a second addendum to his sixth report which would deal with the legal consequences of expulsion and could be considered by the Commission at its sixty-third session (2011).

(b) Summary of the debate

33. As far as methodology was concerned, it was suggested that consideration should be given to the possibility of reorganizing the draft articles in five parts: a first part should determine the scope of the draft articles and define "expulsion"; the second could set forth the substantive conditions that had to be met if expulsion were to be internationally lawful; a third part would cover procedural matters; a fourth part could contain provisions. Concerning the property of the expelled person; and a fifth part could be devoted to the legal obligations of the States of transit and destination.

34. Although some doubts had been expressed about the relevance of some sources and the reliability of the some of the information used in the sixth report, the wealth and representative nature of the material used were also emphasized. It was nonetheless stated that the report could have paid more attention to the practice of States in certain regions of the world and to the views they expressed in international forums. It was noted that the lack of definitive findings that could be drawn from the sources consulted showed perhaps that the subject was not yet ripe for codification. It was therefore more a matter of identifying and recommending standards adopted in reasonably unequivocal practice. The view that the subject lent itself more to political negotiation than to an exercise in codification and progressive development was also reiterated.

35. It had been pointed out that caution was needed when dealing with the practice and case law in special regimes such as refugee law, regional mechanisms for protecting human rights or European Union law. Moreover it might be advisable to introduce a saving clause into the draft articles to indicate that their purpose was not to reduce the protection afforded by special regimes.

(c) Special Rapporteur's concluding remarks

36. The Special Rapporteur reacted to a number of general comments that had been made during the debate. In response to the remark that the topic was more suited for political negotiation than for an exercise of codification and progressive development, he observed that all the topics considered by the Commission were in reality, and with no exception, possible subjects of negotiations. The Special Rapporteur recalled that the methodology adopted in his reports was firstly to examine the sources of international law recognized in article 38 of the Statute of the International Court of Justice; only in the absence of a rule derived from one or the other of those sources could domestic practice serve as a basis for proposing draft articles as a matter of progressive development.

Replying to certain criticisms of his use of sources and examples in his sixth report, the Special Rapporteur explained that he had tried to make the best use of the material available, the sources of which had always been clearly cited, and that he had expressly stated in his report that the cases cited were not comprehensive and certainly not intended to stigmatize the countries mentioned. Based on available information, the Special Rapporteur had also attempted to take into account the jurisprudence of several regions as well as the positions and practice of States belonging to various regions of the world. Finally, the consideration of old sources—some of which appeared to be unavoidable—was in no way anachronistic; it aimed at providing an account of the evolution of the topic.

37. Concerning the proposal aimed at restructuring the draft articles, the Special Rapporteur was of the view that it would be better, at this stage, to continue working on the basis of the revised workplan contained in document A/CN.4/618; once all the draft articles had been elaborated, it would be appropriate to restructure, in a coherent and logical way, the whole set of draft articles.

38. Concerning draft article A on disguised expulsion, he was not necessarily opposed to the replacement, in French, of the expression "disguised expulsion" by an equivalent of the English expression "constructive expulsion", which was well entrenched in arbitral awards, as long as the equivalent could be found. While recognizing that paragraph 2 could be deleted since it duplicated the definition of expulsion in draft article 2 proposed in his second report (A/CN.4/573), the revised version of which was sent to the Drafting Committee in 2007, the Special Rapporteur remained convinced of the need for a draft article prohibiting that form of expulsion, which violated all the procedural rules and afforded no protection to persons subject to expulsion.

39. The Special Rapporteur did not agree with those members of the Commission who thought that draft article 8, on extradition disguised as expulsion, went beyond the scope of the draft. However, in order to take account of the comments made by some members, he had proposed a revised version of that article.[28]

40. With regard to draft article 9, on grounds for expulsion, the Special Rapporteur was not in favour of the proposal to limit such grounds to public order and national security. The in-depth survey of the grounds for expulsion that he had carried out in the sixth report showed that it would be unwise to reduce all the grounds for expulsion to those two. It would be better to leave the matter open in draft article 9 by simply stating that the grounds in question must not be contrary to international law. He had taken note of the comments made about the contribution by the International Court of Justice to the clarification of the notion of national security, and the pertinent elements of that contribution would be reflected in the commentary.

[28] The revised version of draft article 8 read:

Expulsion in connection with extradition

Expulsion of a person to a requesting State or to a State with a particular interest in the extradition of that person to the requesting State may be carried out only where the conditions of expulsion are met in accordance with international law [or with the provisions of the present draft article].

41. While some members of the Commission had claimed that the wording of draft article B1 was too detailed, the guarantees set out in that provision were derived from the jurisprudence and related to the fact that expulsion and, consequently, detention with a view to expulsion, were not punitive in nature. Nevertheless, the Drafting Committee might be able to find a more general formulation.

42. Regarding the procedural guarantees relating to expulsion, the Commission had been favourable to the general outlines proposed in addendum 1 to the sixth report, including the need to differentiate between the case of aliens lawfully present in a State and that of those unlawfully present, and within the latter group, between aliens recently arrived in the expelling State and those who had been there for some time. Nevertheless, the Special Rapporteur was responsive to the desire expressed by some members of the Commission for certain procedural guarantees to be accorded to aliens unlawfully present in a State's territory, and he had subsequently prepared a revised version of draft article A1 in which a distinction was proposed concerning the extent of the procedural guarantees based on the length of the alien's presence in the territory of the expelling State.[29] Whereas paragraph 1 granted all aliens who had illegally entered the territory of the expelling State at a recent date the minimum guarantee that expulsion must take place in accordance with the law, paragraph 2 was intended to offer certain specific guarantees to an alien who was unlawfully in an expelling State but who had a special legal status in the country or had been residing there for some time (a period of six months might be envisaged for that purpose).

43. In the light of the reformulation of draft article A1, the Special Rapporteur thought it preferable not to change the text of draft article B1 through the deletion, as suggested by some members of the Commission, of the word "lawfully": it was preferable not to depart from the text of article 13 of the International Covenant on Civil and Political Rights.

44. The Special Rapporteur noted that the principle behind draft article C1 had not been challenged and that it had simply been some guarantees that had been disputed. Whereas setting out the right to legal aid was certainly part of the progressive development of international law, the right to translation and interpretation was

[29] The revised version of draft article A1 read:

Draft article A1: Procedural guarantees for the expulsion of illegal aliens in the territory of the expelling State

1. The expulsion of an alien who entered illegally [at a recent date] the territory of the expelling State [or within a period of less than 6 months] takes place in accordance with the law.

2. The expulsion of an illegal alien who has a special legal status in the country or has been residing in the country for some time [at least six months] takes place in pursuance of a decision taken in conformity with the law and the following procedural rights:

(a) The right to receive notice of the expulsion decision.
(b) The right to challenge the expulsion decision.
(c) The right to a hearing.
(d) The right of access to effective remedies to challenge the expulsion decision.
(e) The right to consular protection.

indisputably established, in the view of the Special Rapporteur, if only as a general principle of law.

45. The Special Rapporteur had taken note of the proposal to provide for appeal of an expulsion decision with suspensive effect. In his view, whereas that rule was established in European regional law, it was not part of general international law; thus, to incorporate it would be to engage in progressive development.

46. The Special Rapporteur had likewise noted the proposal to codify a rule, derived from the Human Rights Committee's interpretation of article 13 of the International Covenant on Civil and Political Rights, to the effect that the procedural guarantees that must be accorded to an alien lawfully in the territory of an expelling State also applied when the legality of the alien's presence in the territory was in dispute. Nevertheless, the Special Rapporteur considered that that point could be adequately reflected in the commentary.

C. Summary of the Views Expressed by AALCO Member States on the Topic in the Sixth (Legal) Committee of the UN General Assembly at its Sixty-Fifth Session (2010)

47. The Delegate of the **People's Republic of China** expressed the hope that the information submitted by his Government on Chinese law and practice with respect to the expulsion of aliens would serve as a source of reference for the International Law Commission in its work on that topic. In that regard, his delegation endorsed the concepts and principles embodied in the draft articles revised by the Special Rapporteur with a view to addressing concerns about the human rights of persons who had been or were being expelled. Insofar as those articles were intended to establish international legal principles rather than specific implementation standards governing the expulsion of aliens, they should neither be too detailed nor incorporate rights that were yet to be universally accepted by the international community. In particular, they must wholly exclude any possibility allowing States to make a unilateral evaluation of the judicial system and human rights situation in receiving States; such a possibility could be easily abused and result in unnecessary disagreements among States. Appropriate changes should therefore be made to revised draft article 14, paragraph 2, and revised draft article 15, paragraph 2.

48. Providing as it did a comprehensive analysis of the relevant issues on the basis of a large body of legal information and State practice, the sixth report of the Special Rapporteur (A/CN.4/625 and Add.1) was a positive contribution to the creation of an appropriate procedure for expulsion and for protection of the rights of persons who had been or were being expelled. The current text of draft article A was too general, however, and also failed to make an accurate distinction between disguised expulsion, which violated the rights and interests of aliens subject to expulsion, and legitimate administrative actions by States. The result might be to impose inappropriate constraints on the exercise of State sovereignty.

49. With regard to draft article 8 on prohibition of extradition disguised as expulsion, nothing should stand in the way of extradition of an alien to a requesting State when all conditions for expulsion had been met and the expulsion itself did not contravene international or domestic law. Given the ever-increasing complexity and sophistication of transnational crimes, States should be encouraged to identify flexible, practical and effective means of cooperation. He therefore proposed that the draft article should be deleted; failing that, it should be reworded for the purpose of reflecting that well grounded concern.

50. With respect to draft article B, on the obligation to respect the human rights of aliens who were expelled or were being detained pending expulsion, specifically subparagraphs 1 (a) and (b) thereof, the act of expulsion per se was a prescribed penalty that might well have been imposed following a due process of criminal proceedings. In such circumstances, detention of the person concerned was inevitably punitive in nature; it was neither possible nor necessary, in the light of that person's criminal identity, for the detention to be carried out in a place other than a facility in which persons sentenced to penalties involving deprivation of liberty were detained. Furthermore, capacities for a separate place of detention might be non-existent in the judicial system of expelling States. Given those considerations, he suggested a revision of the draft article with a view to building in flexibility, where appropriate.

51. As for the draft articles on the effects of armed conflicts on treaties, the definition of "armed conflict" contained in draft article 2, namely the one used by the International Criminal Tribunal for the Former Yugoslavia in the *Tadić* decision, was admittedly succinct. However, its use of the term "protracted" as a threshold for determining whether an armed conflict fell within the scope of the draft articles was not conducive to the stability of treaty relations, as any and all use of armed force might consequently be included in the category of armed conflict defined under the draft articles, irrespective of any real effects on the application of treaties. The draft article would be improved by drawing on the definition of armed conflict contained in the Geneva Conventions of 1949 and in Additional Protocol II thereto, with a view to arriving at a definition that was accurate and stringent enough to garner broad international support.

52. Concerning draft article 5, the treaties enumerated in paragraph 2 did not match those set forth in the indicative list of categories of treaties contained in the annex to the draft article, a discrepancy that could give rise to questions as to the relationship between the treaties enumerated in each case and as to the exhaustiveness of those listed in paragraph 2. The latter, for instance, could be interpreted as indicating treaties with respect to which the operation was altogether beyond the effect of armed conflict in any circumstances, although whether paragraph 2 would attract sufficient support in international practice was doubtful.

53. The draft article provided no conclusive answer concerning the specific factors that might determine the continued operation of a treaty. It was therefore equally doubtful whether the understanding and application of the draft article would be enhanced by the incorporation of paragraph 2 unless it was based on a definite conclusion and its

enumeration was exhaustive. Such an enhancement would be fostered by including in the annex an indicative list of treaties with respect to which the operation would be unaffected in the event of armed conflict, as had been done in the draft articles on first reading. His delegation looked forward to a resumption of that approach, with clarifications set out in the commentary to the effect that the list was indicative rather than exhaustive and did not constitute an absolute preclusion of termination or suspension of the operation of the listed treaties in all circumstances.

54. As to draft article 15, his delegation believed that the Charter of the United Nations and General Assembly resolution 3314 (XXIX) offered indispensable practical guidance as a legal basis for the qualification of acts of aggression. Given the disagreement concerning the inclusion of a reference to the latter for that purpose, the draft resolution should be reformulated — if that reference was to remain — in such a way as to avoid conveying the impression that the resolution had the same effect as the Charter.

55. The Delegate of the **Islamic Republic of Iran**, referring to the topic of expulsion of aliens, said that every State had the right to expel aliens living on its territory if they posed a threat to its national security or public order. It would be pointless to try to list the grounds that could be invoked by a State to justify the expulsion of aliens.

56. Nonetheless, two limitations existed on the sovereign right of the State to expel aliens, namely, collective expulsion and disguised expulsion. Regarding the first scenario, the only possible exception was during an armed conflict when aliens had shown hostility against the host State, an issue that his delegation felt should be excluded from the draft. Disguised expulsion, to be distinguished from expulsion carried out by means of incentives, covered situations where a State abetted or acquiesced in acts committed by its citizens to provoke the forced departure of aliens. Such acts were generally targeted at persons belonging to ethnic or religious minorities and were characterized by discrimination against them. That conduct was contrary to the obligations of the host State and violated international human rights law.

57. Once decided, expulsion should be conducted in such a manner that fundamental human rights were fully respected. The Commission should base its work on the provisions of universally accepted human rights instruments, such as the International Covenant on Civil and Political Rights, in order to identify the general principles applicable to the matter, without prejudice to the concepts and solutions admitted at the regional level. Even aliens awaiting deportation must be protected against any inhuman and degrading treatment. In all cases, the property rights of deportees should also be respected and guaranteed by the authorities of the host State.

58. The Delegate of the **Republic of Indonesia** speaking on the topic “Expulsion of aliens”, observed that international human rights law placed some restrictions on when and how a State might exercise its power to expel persons from its territory and afforded three types of protection to such persons: substantive protection against return if the person would face grave violations of human rights, procedural safeguards during

deportation procedures and protection with regard to the methods of expulsion. In addition to the general protection afforded to all foreigners, certain categories of foreigners, such as refugees and migrant workers, might be afforded additional protection against expulsion and/or benefit from additional procedural guarantees.

59. The Delegate of **Ghana** observed that his delegation had spoken extensively during the sixty-fourth session of the General Assembly on the topic of expulsion of aliens and was grateful to note that attempts had been made in the draft articles to address some of its concerns, in particular those relating to the need to ensure procedural guarantees and due process. Draft article C l could be strengthened, with the addition of a paragraph (i) requiring the expelling State to allow reasonable time and opportunity for the alien facing the prospect of expulsion to gather the personal belongings that he or she might have lawfully acquired while sojourning, lawfully or unlawfully, in the territory of the expelling State.

60. Under the general rules of international law, an alien was entitled to minimum national treatment, and the right to such treatment was not linked to the legal status of the alien. Thus, any strenuous attempt to draw distinctions between aliens legally resident and those who were not, or those who had been resident for some time and those who had just arrived, in the application of procedural guarantees might result in unfair discrimination. In many cases, whether or not a person was lawfully resident in the jurisdiction was itself the crux of the challenge by the alien to his or her expulsion. Any artificial time frame or threshold for determining whether aliens were entitled to exhaustion of local remedies could lead to situations where the host authorities would resort to hasty expulsions in order to prevent the aliens from being entitled to more favourable expulsion procedures by virtue of the length of their stay.

61. In revised draft article 10, the wording “among persons who have been or are being expelled” in paragraph 2 could also be inserted in paragraph 1 for the sake of consistency and the removal of ambiguity.

62. The draft articles would undermine the essence of due process if the expelling State was accorded the prerogative to expel an alien while his or her challenge against the expulsion decision was pending. The reference to “humanity” in draft article B could easily be read as mere “compassion”, and not a legal obligation to respect the dignity of the person. The draft articles should make it more explicit that the expelling State was not to subject the alien to cruel, inhumane or degrading treatment.

63. To safeguard the interests of the receiving State, the draft articles should make it clear that the mere possession, by the expelled alien, of travel documents purported to have been issued by the receiving State was only prima facie and not conclusive evidence of nationality. Thus, the expelling State must adhere to more rigorous standards in determining the nationality of an expelled alien who was challenging his presumed nationality with the full cooperation of the receiving State.

64. The draft articles should also make it clear that in certain grey areas where the grounds for expulsion were not covered under the draft articles and some discretionary power was thereby conferred on the expelling State, such power must not be exercised arbitrarily but in a reasonable and judicious manner and in good faith. States could be assured that the draft articles were not intended to take away their sovereign right under international law to determine who would enter or stay in their territory by the introduction of a saving clause to that effect.

65. In brief, the draft articles must aim at providing for more humane standards of treatment of aliens facing expulsion and require all States concerned, whether expelling, transit or receiving States, to refrain from treating such persons in an inhumane, degrading and cruel manner and to respect procedural guarantees and due process. Achieving that end could entail both progressive development and codification of international law to address any lacunae in the existing corpus of international law and State practice. It shouldnot be permissible for bilateral agreements to be concluded that directly or indirectly took away or derogated from those procedural safeguards.

66. The draft articles referred many times to the standard phrase "in accordance with the law". Given that the life of the law was experience and not logic, the draft articles, or at least the commentary thereto, should perhaps indicate that such laws were reasonable and necessary in a democratic society.

67. The Delegate of **Singapore** with regard to the topic "Expulsion of aliens", said that replacement of the expression "fundamental rights" with a reference to "human rights" in the revised version of draft article 8 was welcome; given the varied circumstances in which expulsion could occur, it had seemed imprudent to use an expression of such limited ambit as "fundamental rights". The more inclusive term of "human rights" better captured the full range of applicable rights in each situation. He nonetheless suggested that the phrase "in particular those mentioned" should be amended to read "including those mentioned" in order to make it clear that all relevant human rights of the persons concerned were to be respected, regardless of whether those rights were articulated in the draft articles. His suggested wording would also be more consistent with the fact, emphasized in paragraph 117 of the Commission's report, that the phrase was not intended to establish a hierarchy among the human rights to be respected in the context of expulsion.

68. Concerning revised draft article 14, he reiterated his delegation's position that it was unable to agree with or accept the wording now contained in paragraph 2 insofar as it suggested that a State having abolished the death penalty had an automatic and positive obligation under general international law not to expel a person sentenced to death to a State in which that person might be executed, unless it had first obtained a guarantee that the death penalty would not be carried out. The wording of paragraph 2 also suggested that that so-called obligation was one aspect of the right to life. No such obligation existed under general international law, however; as indeed observed by the Special Rapporteur when introducing his fifth report (A/CN.4/611 and Corr.1), the right to life did not imply prohibition of the death penalty. Moreover, as similarly demonstrated by

the divisive nature of discussions in the General Assembly, there was no global consensus concerning the abolition or retention of that penalty, much less any agreement that its prohibition was part of the right to life.

69. While some domestic or regional tribunals might have made certain pronouncements concerning treaty obligations that they had been asked to interpret, there was likewise no customary international law obligation to the effect that a State having abolished the death penalty was then ipso facto bound to prohibit the transfer of a person to another State where the death penalty could be imposed without the relevant guarantee being sought. Whether a State in that position chose to bind itself in that manner by undertaking specific treaty obligations was another matter distinct from a decision not to apply the death penalty at the domestic level.

70. His delegation welcomed the revised version of draft article 8, on prohibition of extradition disguised as expulsion; the earlier version would have given rise to substantial practical difficulties in that the requirement of consent on the part of the person being expelled would have almost always resulted in non-expulsion, given the likelihood that such consent would be withheld. More significantly, it would to all intents and purposes have altogether barred expulsion to a State seeking extradition in the absence of such consent, whereas extradition in and of itself could not be an absolute bar to expulsion. The real issue was whether the act of expulsion was such as to circumvent safeguards pertaining to the extradition of the person. The revised version did away with the element of consent while also safeguarding the rights of the person being expelled, therefore striking the right balance in ensuring that such expulsion was subject to the more general requirement of being “in accordance with international law”.

71. The Delegate of the **Republic of Korea** speaking on the topic “Expulsion of aliens”, said that while all States had the right to expel aliens on grounds of violating domestic regulations or damaging national interests, the human rights of such aliens must be respected in accordance with domestic and national legislation. In his country, expulsion measures were applicable only to non-nationals and non-residents, in conformity with the well-established international legal principle evidenced by numerous international human rights instruments that a State’s expulsion of its own nationals was absolutely prohibited. All persons in the Republic of Korea, including aliens, were moreover assured of human rights and dignity.

72. Emphasizing the principle of non-refoulement incorporated in paragraph 1 of revised draft article 14, his delegation proposed that the Commission should consider measures that might be taken by a State to which a person was expelled or returned in order to ensure respect for the right to life or personal liberty of such person.

73. The Delegate of **India** said that his delegation supported the reorganization of the draft articles on expulsion of aliens into five parts and the general approach to the topic adopted by the Special Rapporteur; the right of States to expel aliens must be exercised in accordance with the relevant rules of international law, including those relating to the protection of human rights and to the minimum standards for the treatment of aliens.

74. The Delegate of **Japan** said with respect to the procedural rules for such expulsion that the Commission should continue its scrutiny as to whether the distinction between aliens who were "lawfully" and "unlawfully" in the territory of a State was grounded in international instruments, international jurisprudence and national legislation and case law, as well as in the practice of the States and in their views as expressed in international forums. It should do the same in the case of procedural rights and should furthermore note that it was still expected to respond to the criticism that the topic was not yet ripe for codification. In addition, it should focus on the question of which obligations under international law prohibited a State from expelling aliens and then discuss whether, as part of the topic, it should take up the scope and content of human rights applicable to persons being expelled in an expelling State and to persons having been expelled in a receiving State. Lastly, in discussing the effects of the death penalty on the draft articles, it should bear in mind that the imposition of the death penalty in the national criminal justice system of a State was, in principle, a matter of policy for that particular State.

75. The Delegate of **Sri Lanka** said that the right of expulsion must be exercised in accordance with international law, but that over-prescriptiveness must be avoided in dealing with the topic insofar as that right essentially fell within the sovereign domain of States and was governed by their domestic laws. His delegation nonetheless broadly agreed with the cluster of draft articles produced on the topic, although the obligation to respect the dignity of persons would more appropriately be reflected in an introductory section; human dignity was not a specific human right but a general overarching principle from which all human rights flowed.

76. Concerning the advisability of draft article 8, on the prohibition of extradition disguised as expulsion, he shared the view that the inclusion of a provision more concerned with extradition than expulsion was inappropriate, given the aim of protecting the integrity of the extradition regime. The matter of its inclusion should remain open, however, until after further discussion of draft article A (Prohibition of disguised expulsion), which had been presented by the Special Rapporteur with a view to accommodating such concerns.

77. With regard to draft article 9, on grounds for expulsion, the grounds embodied in international conventions and international case law appeared to be limited to public order and national security. While particular importance should indeed be accorded to those two reasons, the various other grounds provided for in national legislation should not be excluded and emphasis should also be placed on the need for compliance with the law. Equally crucial was the need to maintain a distinction between aliens who were lawfully and those who were unlawfully present in a State's territory.

78. It was also necessary to make that same distinction in the revised version of draft article A1 concerning procedural guarantees for the expulsion of illegal aliens in the territory of the expelling State. Such guarantees must also be limited to those established in international law, including, at a minimum, the right to receive notice of the expulsion

decision and to consular protection. A right to legal aid and counsel, however, did not fall into that category. Although requiring further discussion, the revised version of the draft article was welcome in the light of those considerations.

V. EFFECTS OF ARMED CONFLICTS ON TREATIES

A. Background

1. During its fifty-sixth session (2004), the Commission decided to include the topic "Effects of armed conflicts on treaties" in its programme of work, and to appoint Sir Ian Brownlie as Special Rapporteur for the topic.

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

3. At its sixtieth session (2008), the Commission adopted on first reading a set of 18 draft articles, and an annex, on the effects of armed conflicts on treaties, together with commentaries. At the same session, the Commission decided, in accordance with articles 16 to 21 of its Statute, to transmit the draft articles, through the Secretary-General, to Governments for comments and observations.

4. At its sixty-first session (2009), the Commission appointed Mr. Lucius Caflisch as Special Rapporteur for the topic, following the resignation of Sir Ian Brownlie from the Commission.

B. Consideration of the Topic at the Sixty-Second Session

5. At the sixty-second session, the Commission had before it the first report of the Special Rapporteur (A/CN.4/627 and Add.1), containing his proposals for the reformulation of the draft articles as adopted on first reading, taking into account the comments and observations of Governments. The Commission also had before it a compilation of written comments and observations received from Governments (A/CN.4/622 and Add.1). The Commission considered the Special Rapporteur's report at its 3051st to 3056th meetings, held from 26 May to 3 June 2010, as well as at the 3058th to 3061st meetings held from 5 to 8 July 2010.

6. At its 3056th meeting, on 3 June 2010, the Commission referred draft articles 1 to 12 to the Drafting Committee. The Commission further referred draft articles 13 to 17 to the Drafting Committee, at its 3061st meeting, on 8 July 2010.

7. General support was expressed for the methodology adopted in the preparation of the first report. It was suggested that increased emphasis be given to State practice. Other members noted that State practice is scarce and, at times, contradictory. The Special

Rapporteur announced that he would endeavour to conduct additional research, with a view to identifying further State practice, when preparing the commentaries to the draft articles. He was also favourably disposed towards a proposal to organize the draft articles into a series of chapters.

Comments on the Draft Articles

Article-1[1]: Scope

8. The Special Rapporteur observed that a key issue with draft article 1 was whether the draft articles should be applied solely to inter-State conflicts or also to non-international conflicts. He recalled that a majority of the Commission had favoured including non international conflicts during the first reading, and that it had been observed, at the time, that the majority of contemporary armed conflicts fall within that category and if they were to be excluded, the draft articles would have only a limited scope. He observed that the inclusion of international organizations within the scope of the articles would require additional research which could take time and delay the Commission's work. He suggested, therefore, that the Commission follow a proposal, made by a State, that the possibility of studying the issue be reserved until after the completion of the work on the current draft articles.

9. Several members supported the inclusion of internal armed conflicts within the scope of application of the draft articles (as per draft article 2, subparagraph (b)). It was noted that it was not always possible clearly to distinguish between international and non international armed conflicts. Others expressed doubts, not because of any disagreement on the significance of such conflicts, but rather out of a concern that their effect on treaties (if any) would be different from that arising from traditional inter-State conflict. The view was expressed that the effect of internal disturbances on the operation of a treaty was adequately covered by article 61 of the Vienna Convention on the Law of Treaties, on supervening impossibility of performance.

10. He observed further that the majority of the Commission continued to favour the inclusion of non-international armed conflict despite the difficulties that potentially arose from such inclusion. The Special Rapporteur further took the opportunity to point out the various hypotheses of conflicts and parties covered by the draft article: (1) armed conflict between opposing parties, (2) armed conflict where contracting parties are allies, (3) a conflict where only one contracting party is a party to the armed conflict, and (4) a non-international armed conflict. The last two were similar but not identical. Such hypotheses were to be examined in the commentary.

[1] Draft article 1 read as follows:
Scope
The present draft articles deal with the effects of armed conflict in respect of treaties between States where at least one of these States is a party to the armed conflict.

Article 2[2]: Use of Terms

11. The Special Rapporteur observed that the central difficulty in draft article 2 was defining "armed conflict". Accordingly, while it was preferable to retain a definition, the Special Rapporteur proposed to reconsider the formulation adopted on first reading. There were two possibilities. The first was to combine article 2 of the Geneva Conventions of 1949 and article 1, paragraph (1), of the 1977 Additional Protocol II dealing with non-international armed conflicts. Such solution would offer the advantage of using the same definition of "armed conflict" in the fields of international humanitarian law and the law of treaties. The disadvantage, however, was that it would be burdensome and also to a certain extent circular. The second option, was to turn to the more contemporaneous and concise definition used in 1995 by the International Criminal Tribunal for the Former Yugoslavia, in the *Tadić* decision. The Special Rapporteur noted that it reflected a more modern understanding of the concept, and was accordingly a preferable formulation, with the exclusion of the last clause dealing with armed force between organized armed groups within a State since the draft articles clearly only applied to situations involving at least one contracting State participating in the armed conflict.

12. A majority of members expressed support for the proposed reformulation of the definition of "armed conflict" along the lines of that adopted in the *Tadić* decision. It was noted that the definition in the *Tadić* case was more modern and had largely superseded that in the Geneva Conventions and Additional Protocol II thereto. It was also said to be a suitable replacement for the definition adopted on first reading, which was considered by some to be circular in nature, and that adopting a common definition was important for the unity of international law. It was further observed that the *Tadić* definition had the benefit of including non-international armed conflicts, which was necessary since most contemporary conflicts are non-international in nature. Other members expressed a preference for the more traditional definition contained in the Geneva Conventions, as augmented by Additional Protocol II of 1977.

Article 3[3]: Absence of a rule under which, in the event of an armed conflict, treaties are *ipso facto* terminated or suspended

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[2] Draft article 2 read as follows:
Use of terms
For the purposes of the present draft articles:
(a) "Treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or
more related instruments and whatever its particular designation;
(b) "Armed conflict" means a situation in which there has been a resort to armed force between States or protracted resort to armed force between governmental authorities and
organized armed groups.

[3] Draft article 3 read as follows:
Absence of *ipso facto* termination or suspension
The outbreak of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties as:
(a) Between States parties to the treaty that are also parties to the conflict;
(b) Between a State party to the treaty that is also a party to the conflict and a State that is a third State in relation to the conflict.

13. In introducing draft article 3, the Special Rapporteur pointed out that draft articles 3 to 5, and the annex to article 5, were to be assessed in the light of, and jointly with, each other. He recalled that draft article 3 was based to a certain extent on article 2 of the resolution of the Institute of International Law of 19851282 dealing with the same issue. He pointed out that draft article 3 had been, on the whole, welcomed by Member States, even if some did try to assign to it several meanings. None had formally opposed the provision.

14. General agreement was expressed for the rule contained in draft article 3. The focus of the discussion related to its formulation and nature. Thus, a preference was expressed for not using Latin terminology ("*ipso facto*"), in line with the Commission's practice of avoiding Latin where possible. There was general agreement that the title of the provision required reformulation, and a number of alternative formulations were proposed. It was also suggested that the provision itself be reformulated in more affirmative terms. A difference of opinion emerged as to the nature of the provision. While some members considered it as establishing a presumption in favour of continuity, or a "general principle" of continuity, others were of the view that that did not reflect the content of the draft article which was more in the nature of a presumption against discontinuity as a consequence of the outbreak of armed conflict.

15. The Special Rapporteur was of the view that the title should faithfully reflect the draft article's content, and since no presumption or general principle was being established, any such reference should be avoided. He further expressed incomprehension with the aversion to the use of Latin, which remained commonly used in international law. Nonetheless, he noted that satisfactory replacements for "*ipso facto*" could be found.

Article 4[4]: Indicia of susceptibility to termination, withdrawal or suspension of treaties

16. The Special Rapporteur noted that the first reading version of draft article 4 had been the object of significant debate within the Commission. He recalled that the end result was to include a reference to the interpretation of the treaty in line with articles 31 and 32 of the Vienna Convention on the Law of Treaties, which would provide an indication of the will of the authors of the treaty. This was supplemented by the indicia of the nature and extent of the armed conflict, its effect on the treaty, the subject matter of the treaty, and the number of parties to the treaty. Contrary to what certain States seemed to believe, these were to be resorted to in addition to the will of the parties and were not an elimination of that criterion. He was of the view that the mere reference to articles 31 and 32 of the Vienna Convention on the Law of Treaties was too elliptical, and that the

[4] Draft article 4 read as follows:

Indicia of susceptibility to termination, withdrawal or suspension of treaties

In order to ascertain whether a treaty is susceptible to termination, withdrawal or suspension in the event of an armed conflict, resort shall be had to:

(a) The intention of the parties to the treaty as derived from the application of articles 31 and 32 of the Vienna Convention on the Law of Treaties; and

(b) The nature, extent, intensity and duration of the armed conflict, the effect of the armed conflict on the treaty and the number of parties to the treaty.

text could be clearer if reference were made to the intention of the parties to the treaty, as evidenced by the application of articles 31 and 32.

17. It was suggested that the relationship between draft articles 4 and 5 be clarified, since they represented opposite sides of the issue: draft article 4 dealt with the possibility of the operation of the treaty ceasing, while draft article 5 contemplated the continuation of treaties. It was also suggested that it be clarified why a reference to withdrawal was included in draft article 4, but not in draft article 3.

18. While support was expressed for resort, in subparagraph (a), to articles 31 and 32 of the Vienna Convention on the Law of Treaties in determining whether the treaty gives an answer to the question of what are the consequences of an armed conflict between the contracting States parties, opposition was expressed regarding the reintroduction of the criterion of the intention of the parties. It was recalled that that criterion had been the subject of extensive discussion during the first reading, and that it had been finally agreed to exclude any reference to it. Furthermore, it was noted that draft article 4 does not deal only with the interpretation of the treaty, but also with the question of what to do when the treaty does not provide an explicit indication as to what are the effects on the treaty of the outbreak of armed conflict. According to another view, not even a reference to articles 31 and 32 was appropriate, since such types of cross-references to other instruments should, as a rule, be avoided. It was also pointed out that those two articles did not necessarily apply to situations of armed conflict, and existed at the level of general rules; whereas the task of the Commission was to develop a set of draft articles which would operate as a *lex specialis* in relation to such general rules.

19. The view was expressed that the "subject matter" of the treaty was a useful guide and, accordingly, that it ought to be reintroduced in draft article 4, regardless of the fact that it appears in draft article 5. A similar view was that the reference to "subject matter" was the nexus between draft articles 4 and 5, and, accordingly, removing it from draft article 4 risked leading to an independent interpretation of each provision.

20. The view was further expressed that the new reference to the "intensity and duration of the conflict" did not add much as the terms were covered by the criterion of "nature and extent". It was observed that such indicia were unclear. The concern was also expressed that the reference in subparagraph (b) to the "effect of the armed conflict on the treaty" rendered the provision circular in meaning, and required explanation in the commentary.

21. The Special Rapporteur observed that there had been mixed support for his proposal to revert to an express reference to the intention of the parties to the treaties in the application of articles 31 and 32 of the Vienna Convention on the Law of Treaties. He recalled that some who had opposed it had pointed out that the application of articles 31 and 32 was not primarily aimed at determining the intention of the parties, but determining the content of the treaty. In order not to reopen the discussion on the subject, he proposed to return to the first reading formulation of the draft article. As regards the

multiple references to the "subject matter" of the treaty (in draft articles 4 and 5), he maintained the view that one reference was sufficient.

Article 5 and annex[5]: Operation of treaties on the basis of implication from their subject matter

22. The Special Rapporteur observed that draft article 5, and the annex, had elicited many comments from Governments. As a general point, he recalled that the occurrence of an armed conflict, as such, never caused a treaty to come to an end; and the effect of an armed conflict could be that a treaty continued in whole or only in part. He further recalled that the list in the annex, which was to be read together with draft article 5, was indicative in nature.

23. The Special Rapporteur noted that it had been observed that draft article 5 lacked clarity, without explanation as to why that was the case. He noted, in response to the suggestion of a Member State that the Commission identify the factors that would determine if a treaty or some of its provisions would continue to be applicable, that that was precisely the function of draft articles 4 and 5, together with the list in the annex. He also disagreed with the assertion that draft article 5 was not necessary in light of the presence of a general provision in draft article 3. Draft articles 4 and 5, together with the annex, provided exogenous and endogenous indications for determining whether a treaty was to survive (whether in whole or in part) the outbreak of an armed conflict.

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[5] Draft article 5 read as follows:

The operation of treaties on the basis of implication from their subject matter

[1.] In the case of treaties the subject matter of which involves the implication that they continue in operation, in whole or in part, during armed conflict, the incidence of an armed conflict will not as such affect their operation.

[2. Treaties relating to the law of armed conflict and to international humanitarian law, treaties for the protection of human rights, treaties relating to international criminal justice and treaties declaring, creating or regulating a permanent regime or status or related permanent rights, including treaties establishing or modifying land boundaries or maritime boundaries and limits, remain in or enter into operation in the event of armed conflict.]

Annex

Indicative list of categories of treaties referred to in draft article 5

[(a) Treaties relating to the law of armed conflict, including treaties relating to international humanitarian law;

(b) Treaties declaring, creating or regulating a permanent regime or status or related permanent rights, including treaties establishing or modifying land and maritime boundaries;]

[(c) Treaties relating to international criminal justice;]

(d) Treaties of friendship, commerce and navigation and analogous agreements concerning private rights;

[(e) Treaties for the protection of human rights;]

(f) Treaties relating to the protection of the environment;

(g) Treaties relating to international watercourses and related installations and facilities;

(h) Treaties relating to aquifers and related installations and facilities;

(i) Multilateral law-making treaties;

(j) Treaties establishing an international organization;

(k) Treaties relating to the settlement of disputes between States by peaceful means, including resort to conciliation, mediation, arbitration and the International Court of Justice;

(l) Treaties relating to commercial arbitration;

(m) Treaties relating to diplomatic and consular relations.

24. Reference was further made to a suggestion by a Member State that a second paragraph be added to draft article 5, which would expressly establish the applicability during armed conflict of treaties relating to the protection of human beings (international humanitarian law, human rights and international criminal law treaties), as well as the continued applicability of the Charter of the United Nations. While he was not necessarily opposed to the suggestion, the Special Rapporteur was of the view that it raised difficulties, relating, *inter alia*, to the delimitation of the scope of application between international humanitarian law and human rights treaties, the unclear extent of the general reference to "international criminal law", and whether it was necessary specifically to provide for the survival of the Charter of the United Nations, which by its very nature would continue in operation.

25. Concerning the content of the list, the Special Rapporteur expressed support for the inclusion of treaties which are constituent instruments of international organizations, which would encompass the Charter of the United Nations. As regards a proposal to eliminate categories from the list (treaties of friendship, commerce and navigation and analogous agreements concerning private rights; treaties relating to the protection of the environment; treaties relating to watercourses and related installations and facilities; and treaties relating to commercial arbitration), the Special Rapporteur noted that while it might be true that those categories of agreements did not always survive in their totality, the list was merely indicative and the possibility of separability of individual provisions was established by draft article 10. It was, therefore, neither necessary nor desirable to make the suggested deletions.

26. Several members expressed support for the proposed inclusion of a new second paragraph in draft article 5. Others were of the view that it would lead to complexity by establishing different rules for different categories of treaties. It was also recommended that the proposed paragraph either be included in the annex itself, or be inserted as a separate provision in the draft articles.

27. As regards the categories of treaties listed in the annex, it was recommended that emphasis be placed on including those categories which found support in State practice. Suggestions for the inclusion of additional categories included: treaties including rules of a peremptory (*jus cogens*) nature, treaties concerning international criminal jurisdiction, treaties which are constituent instruments of international organizations as well as international boundary treaties. Doubts were expressed regarding the inclusion of categories of treaties, not all of which, according to that view, would continue in operation during armed conflict. It was further suggested that the categories in the list should follow an established logic.

28. The Special Rapporteur noted that a proposal to merge the draft article with article 4, as well as a proposal to include a new second paragraph dealing with treaties relating to the protection of persons, did not enjoy the support of the majority in the Commission. He confirmed his intention to explain the relationship between articles 4, 5 and 6, as well as the meaning of the various indicia in articles 4 and 5, in the commentary.

Article 6[6]: Conclusion of treaties during armed conflict

Article 7[7]: Express provisions on the operation of treaties

29. The Special Rapporteur observed that draft article 6 contained two ideas: that the States parties to an armed conflict continued to be able to conclude agreements or treaties; and that those States could agree to put an end to treaties which otherwise would continue to apply. The amendments proposed to the first reading version were minimal. Draft article 7 gave precedence to the indication in a treaty that it continued to apply in situations of armed conflict. While admittedly obvious, the Special Rapporteur nonetheless considered it useful to include the provision, albeit as draft article 3 *bis* since it referred to a treaty rule which derogated from the mechanism of draft articles 4 and 5.

30. As regards draft article 6, support was expressed for a proposal made by a Member State that the provision be without prejudice to draft article 9. Some members expressed doubts about the reference to "lawful" agreements, in the second paragraph, and proposed that the term be replaced by a more general reference: "in accordance with the Vienna Convention on the Law of Treaties" or "in accordance with international law". It was also suggested that the double reference to "during an armed conflict" be removed by deleting the opening phrase.

31. General support was expressed for the Special Rapporteur's proposal to locate draft article 7 as draft article 3 *bis*. It was also suggested that the provision could be located as draft article 5 *bis*. The Special Rapporteur agreed with the drafting suggestions for draft article 6. He further observed that his proposal to locate draft article 7 as new draft article 3 *bis* had enjoyed general support in the Commission.

Article 8[8]: Notification of termination, withdrawal or suspension

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[6] Draft article 6 read as follows:
Conclusion of treaties during armed conflict
1. The outbreak of an armed conflict does not affect the capacity of a State party to that conflict to conclude treaties in accordance with the 1969 Vienna Convention on the Law of Treaties.
2. During an armed conflict, States may conclude lawful agreements involving termination or suspension of a treaty or part of a treaty that is operative between them during situations of armed conflict.

[7] Draft article 7 read as follows:
Express provisions on the operation of treaties
Where a treaty itself contains [express] provisions on its operation in situations of armed conflict, these provisions shall apply.

[8] Draft article 8 read as follows:
Notification of intention to terminate, withdraw from or suspend the operation of a treaty
1. A State engaged in armed conflict intending to terminate or withdraw from a treaty to which it is a party, or to suspend the operation of that treaty, shall notify the other State party or States parties to the treaty, or its depositary, of that intention.
2. The notification takes effect upon receipt by the other State party or States parties, unless it provides for a subsequent date.
3. Nothing in the preceding paragraphs shall affect the right of a party to object, in accordance with the terms of the treaty or applicable rules of international law, to termination, withdrawal from or suspension of the operation of the treaty. Unless the treaty provides otherwise, the time limit for raising an objection shall be … after receipt of the notification.

32. The Special Rapporteur recalled that draft article 8 had been introduced towards the end of the first reading, and that it had been the subject of much debate. The 2008 version could be criticized on two counts. First, contrary to article 65, paragraph 2, of the Vienna Convention on the Law of Treaties, no time frame was established for the formulation of objections to a notification. Secondly, the earlier version could have the consequence of preventing any solution being found by peaceful means that existed between the States involved in the armed conflict, particularly with third States not involved in the conflict.

33. It was recalled that the Commission had felt that it was not realistic to seek to impose a regime of peaceful settlement of disputes. However, the Special Rapporteur believed that such position could be revisited. The proposed new formulation for draft article 8 sought to deal with both issues by seeking inspiration from article 65 of the Vienna Convention on the Law of Treaties. The Special Rapporteur agreed with the view of a member State that it was not clear why the controversy between the notifying State and the objecting State should, where some means of dispute settlement was available, remain suspended to the end of the armed conflict. The matter depended also on the solution provided for the question of the introduction of a time frame for raising an objection to the notification. He recalled that article 65, paragraph 2, established a time frame of three months. He had, however, refrained from indicating a specific time frame because he felt that the time frame could be longer, since considering the fate of treaties may not be a priority for a State involved in an armed conflict.

34. As a general point, it was recommended that the provision be drafted sufficiently flexibly to allow for the possibility that in certain cases notification would not be necessary. Several members expressed support for the proposal to include a time limit in paragraph 3; suggestions for what the limit should be varied from three to six months. Other members cautioned against the inclusion of time limits.

35. The view was expressed that the inclusion of a reference to the peaceful settlement of disputes, in paragraph 4, might not entirely take into account the reality of armed conflict. Other members found it to be a useful reminder of the fact that States are not relieved of their general obligation under Article 33 of the Charter of the United Nations. Different views were also expressed regarding paragraph 5. While several members supported its inclusion, others were of the view that it was not very clear. It was observed that if what was being referred to was the general obligation to seek the resolution of a dispute, then it was similar to paragraph 4. According to a further view, referral to specific dispute settlement procedures could be difficult to require, and States ought to be allowed a margin of appreciation in the choice of means of settlement of disputes.

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4. If an objection has been raised within the prescribed time limit, the States parties concerned shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.
5. Nothing in the preceding paragraphs shall affect the rights or obligations of States with regard to the settlement of disputes insofar as they have remained applicable, pursuant to draft articles 4 to 7, despite the incidence of an armed conflict.

36. While some members expressed support for including within the scope of draft article 8 third States not parties to the conflict but contracting parties to the treaty, others expressed doubts as it would have implications for the rest of the draft articles, and could lead to abuse.

37. The Special Rapporteur observed that, in his view, draft article 8 was an important provision. However, the first reading version had been incomplete. He noted further the concern raised by some members that formal notification might not always be necessary or possible, but felt that that was a concern which could be taken care of through appropriate drafting.

38. As regards new paragraph 4, the Special Rapporteur was of the view that the obligation on Member States of the United Nations to resort to the peaceful settlement of disputes continued regardless of the outbreak of armed conflict. Nonetheless, he recalled that some members had opposed the inclusion of the provision, and expressed his willingness to accept the deletion of the proposed paragraph on the understanding that the point was covered by new paragraph 5.

39. He observed that new paragraph 5 received lukewarm support. Nonetheless, he remained disposed to retaining it, because it would be in keeping with the list of categories in the annex linked to draft article 5, which confirmed the likelihood of the survival of such obligations despite the outbreak of an armed conflict.

Article 9[9]: Obligations imposed by international law independently of a treaty
Article 10[10]: Separability of treaty provisions

40. The Special Rapporteur observed that draft article 9, as adopted on first reading, which had its origins in article 43 of the Vienna Convention on the Law of Treaties, had not been contested.

41. He also recalled that draft article 10, which was based on article 44 of the Vienna Convention on the Law of Treaties, was crucial since it dealt with the partial termination or suspension of a treaty, which could occur often in practice. The existence of draft

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[9] Draft article 9 read as follows:
Obligations imposed by international law independently of a treaty
The termination of or the withdrawal from a treaty, or the suspension of its operation, as a consequence of an armed conflict, shall not impair in any way the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of that treaty.
[10] Draft article 10 read as follows:
Separability of treaty provisions
Termination, withdrawal from or suspension of the operation of the treaty as a consequence of an armed conflict shall, unless the treaty otherwise provides or the parties otherwise agree, take effect with respect to the whole treaty except where:
(a) The treaty contains clauses that are separable from the remainder of the treaty with regard to their application;
(b) It appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and
(c) Continued performance of the remainder of the treaty would not be unjust.

article 10, as already mentioned, allowed for some flexibility in the operation of draft article 5 and the list of treaty categories related thereto. In his view, there was no reason to amend the draft article.

42. General support was expressed for draft articles 9 and 10, and for the suggestions of the Special Rapporteur. The Special Rapporteur reiterated the importance of draft article 10. Despite proposals by some States to restructure the provision, it seemed to him preferable to maintain it in a structure that followed article 44 of the Vienna Convention on the Law of Treaties.

Article 11[11]: Loss of the right to terminate, withdraw from or suspend the operation of a treaty
Article 12[12]: Resumption of suspended treaties

43. The Special Rapporteur observed that draft article 11, which was based on article 45 of the Vienna Convention on the Law of Treaties, contemplated the persistence of a modicum of good faith between the contracting parties, which was to be expected even in situations of armed conflict. Accordingly States which had explicitly accepted the continued applicability of a treaty, or which because of their behaviour or conduct were to be deemed to have acquiesced to the continuity of the treaty, would be deprived of the right to terminate, withdraw from or suspend the operation of the treaty.

44. The Special Rapporteur noted that a Member State had expressed the view that the rule in draft article 11 was too rigid and that the perceptions and matter of survival of treaties could change as an armed conflict unfolded, and that, accordingly, the circumstances that led to the loss of the right to put an end to a treaty could sometimes only be appreciated once the armed conflict had produced its effect on the treaty, which was not necessarily the case at the outbreak of the conflict. While agreeing that the effect on a treaty was sometimes best understood in hindsight, he nonetheless preferred to make that point in the commentary, while retaining the draft article in the text.

45. The Special Rapporteur was of the view that draft article 12 ought to be studied jointly with draft article 18. He recalled that draft article 12 dealt with the resumption of a suspended treaty, which was to be determined in accordance with the indicia referred to in draft article 4. Such agreements became operational again, not because of subsequent

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[11] Draft article 11 read as follows:

Loss of the right [of the option] to terminate, withdraw from or suspend the operation of a treaty

A State may no longer terminate, withdraw from or suspend the operation of a treaty as a consequence of an armed conflict if:

(a) It has expressly agreed that the treaty remains in force or continues in operation; or

(b) It can by reason of its conduct be considered as having acquiesced in the continued operation of the treaty or in its maintenance in force.

[12] Draft article 12 read as follows:

Revival or resumption of treaty relations subsequent to an armed conflict

1. Subsequent to an armed conflict, the States parties may regulate, on the basis of agreement, the revival of treaties terminated or suspended as a result of the armed conflict.

2. The resumption of the operation of a treaty suspended as a consequence of an armed conflict shall be determined in accordance with the indicia referred to in draft article 4.

agreement, but because of the disappearance of the conditions which resulted in their suspension in the first place. Draft article 18, on the other hand, enabled contracting States voluntarily to implement once again or to renew the operation of the treaty through an agreement brokered after the conflict. This amounted to a novation of the treaty. He proposed to merge the two provisions into a new draft article 12 which would spell out the difference between them. In doing so, however, the content of draft article 18 would no longer be a "without prejudice" clause.

46. While support was expressed for the Special Rapporteur's recommendations regarding draft article 11, several members expressed doubts as to the reference to an "option" to terminate, withdraw from or suspend the operation of the treaty. According to another suggestion, the two subparagraphs could be merged. The concern was further expressed that the provision was too strict; and it was recommended that it could include a *mutatis mutandis* cross-reference to article 62 of the Vienna Convention on the Law of Treaties, relating to fundamental change of circumstances.

47. General support was expressed for the Special Rapporteur's proposal to merge draft article 12 with draft article 18, subject to a refinement of the proposed formulation of the provision and its title.

48. The Special Rapporteur recalled the concern, raised by a State, that it might be difficult to determine the effect on the treaty at the moment of the outbreak of the armed conflict, and proposed that the commentary make clear that draft article 11 would be applicable to the extent that the effects of the conflict could be gauged in a definitive manner at the time the conflict took place. That would mean that draft article 11 would not be applied in situations where the length and duration of the conflict had altered the latter's effects on the treaty, which could not have been anticipated by the State upon giving its acquiescence to the continued application of the treaty.

Article 13[13]: Effect of the exercise of the right of individual or collective self-defence

49. The Special Rapporteur recalled that draft article 13 had been inspired by article 7 of the 1985 resolution of the International Law Institute. It sought to prevent the situation where compliance with a treaty deprived a State of its right to self-defence. It anticipated the possibility of suspension but not termination, and only applied in an inter-State context. The text adopted by the Institute of International Law had included a further clause anticipating the possibility that the Security Council could subsequently determine that, in fact, the possible victim State was, in reality, the aggressor, and reserved the consequences of such a finding. It was recalled that the Commission specifically considered this point during the first reading and decided to not include such an

[13] Draft article 13 read as follows:
Effect of the exercise of the right to individual or collective self-defence on a treaty
Subject to the provisions of article 5, a State exercising its right of individual or collective self-defence in accordance with the Charter of the United Nations is entitled to suspend in whole or in part the operation of a treaty to which it is a party and which is incompatible with the exercise of that right.

additional proviso. He concurred with that decision, and proposed that it be maintained during the second reading.

50. It was also recalled that a Member State had observed that the possibility of a State suspending treaties in a situation of the exercise of self-defence had to be subject to draft article 5. The Special Rapporteur was inclined to accept such clarification, although he preferred to refer to the content of both draft articles 4 and 5. He further recalled the suggestion, also by a Member State, that it be clarified in the commentary that the possibility of suspension of treaties by a State in a situation of self-defence could not include conventional rules designed to be applied in the context of international armed conflicts, such as the 1949 Geneva Conventions and Additional Protocol I of 1977.

51. Several members expressed support for the Special Rapporteur's view that draft article 13, as adopted on first reading, should be retained. Other members referred to the difficulty of determining, in practice, which side in an armed conflict was legitimately acting in self-defence. It was proposed to replace the draft article by a "without prejudice" clause, or a more general clause such as that in article 59 of the 2001 articles on the Responsibility of States for Internationally Wrongful Acts. It was also noted that Article 51 of the Charter of the United Nations was itself a saving clause and did not set out all the conditions for the exercise of self-defence, such as the requirements of proportionality and necessity. It was further stated, in support of a without prejudice clause, that the content of article 51 was less clear in light of recent developments in the law on the use of force. At the same time, it was recalled that the main purpose of the exercise was not to provide the State acting in self-defence with all the tools to do so, but rather, as per draft article 3, to preserve the stability of treaty relations in times of armed conflict.

52. Another suggestion was that the title had to be amended since it could be read as suggesting an automatic effect of the exercise of self-defence. A preference was expressed for keeping the formulation as close as possible to that in Article 51 of the Charter of the United Nations, including the phrase "individual or collective" in the title. Support was further expressed for indicating that the exercise of the right to self-defence should be "in accordance with the provisions of the Charter of the United Nations". According to another view, such a formulation was to be avoided since it left little room for customary international law rules on the exercise of self-defence. The view was also expressed that the opening phrase "[s]ubject to the provisions of article 5" was problematic, since it suggested that draft article 5 had priority over draft article 13, and by implication changed the nature of draft article 5 to a more emphatic statement that the treaties referred therein would continue regardless of the situation. It was thus suggested that the phrase either be deleted or replaced by "notwithstanding draft article 5". Others preferred to keep the cross-reference to draft article 5 as proposed by the Special Rapporteur.

53. The Special Rapporteur remarked that difficulties in identifying the State exercising the right of self-defence in accordance with the requirements under international law did not justify the deletion of the draft article. It was a useful reminder

that there were situations where the right to self-defence should hold sway over treaty obligations, but only to the extent that the treaty obligations in question restricted the exercise of such right to self-defence.

54. As regards the suggestion to subordinate the right to suspend treaty obligations to the conditions mentioned in draft articles 4 and 5, the Special Rapporteur acknowledged the difficulties caused thereby and withdrew his proposal. He also expressed a preference for the current wording "in accordance with the Charter" since it covered both self-defence provided for in the Charter of the United Nations, as well as that under customary international law. He reaffirmed his view that it was not necessary to reproduce the words "individual or collective" in the title as these words were already contained in draft article 13.

Article 15[14]: Prohibition of benefit to an aggressor State

55. The Special Rapporteur observed that draft article 15 had also been inspired by a similar provision in the 1985 resolution adopted by the Institute of International Law. It reflected the policy position that an aggressor State should not be able to relieve itself of its treaty commitments as a consequence of a conflict that it had initiated. The draft article was limited to inter-State armed conflicts. The qualification of a State as an aggressor depended on the way in which that notion was defined and, from a procedural point of view, on the Security Council. The draft article prohibited a State claiming the right to terminate, suspend or withdraw from treaties from doing so if it was qualified as an aggressor by the Security Council, and where such termination, suspension or withdrawal would be to the aggressor State's benefit, and this could be ascertained by the Security Council itself, or *ex post* by an arbitration court or international judge. He noted that while a number of Member States had approved draft article 15, there had been disagreement on the inclusion of a reference to General Assembly resolution 3314 (XXIX) of 14 December 1974.

56. It was further recalled that a Member State had expressed the concern that, according to the version adopted on first reading, once a State had been designated as an aggressor in the context of a particular conflict, it might continue to carry this stigma in subsequent conflicts. The Special Rapporteur proposed making it clearer that the armed conflict referred to in draft article 15 resulted from the aggression referred to at the beginning of the article, by adding the words "that results from". The Special Rapporteur also drew the Commission's attention to a proposal that the scope of draft article 15 be extended beyond acts of aggression to any resort to force, or threat thereof, in violation of article 2, paragraph 4, of the Charter of the United Nations. His preference was to limit draft article 15 to the consequences of aggression committed by States.

[14] Draft article 15 read as follows:
Prohibition of benefit to an aggressor State [a State that uses force unlawfully]
A State committing aggression within the meaning of the Charter of the United Nations and resolution 3314 (XXIX) of the General Assembly of the United Nations [A State using force in violation of Article 2, paragraph 4, of the Charter of the United Nations] shall not terminate, withdraw from or suspend the operation of a treaty as a consequence of an armed conflict that results from the act of aggression [from the unlawful use of force] if the effect would be to the benefit of that State.

57. Some members expressed concern regarding the difficulty in determining the existence of an act of aggression. It was asserted that the international community had not agreed on a sufficiently clear definition of aggression and that General Assembly resolution 3314 (XXIX) remained controversial. As such, it was proposed that draft article 15 be replaced by a "without prejudice" clause, or that its subject matter be covered by an appropriately expanded draft article 14. Other members preferred to retain the draft article in the affirmative drafting proposed by the Special Rapporteur. While not denying the complexity of determining the existence of an act of aggression, they nonetheless expressed support for the inclusion of a reference to resolution 3314 (XXIX), which had been supported by both case law and doctrine as a reflection of customary international law of at least a core set of possible manifestations of aggression. Different views were expressed regarding the relevance of the adoption of article 8 *bis* of the Rome Statute of the International Criminal Court, at the 2010 Review Conference to the Rome Statute held at Kampala (Uganda). According to one set of views, since the Rome Statute was concerned with the criminal responsibility of individuals, its provisions on aggression were irrelevant to the effects of armed conflicts on treaties. Others noted that resolution 3314 (XXIX) had provided the basis for the definition of aggression adopted at the Review Conference, which was proof of its universal acceptance and relevance. It was further proposed that if the reference to resolution 3314 (XXIX) were retained, the formulation of draft article 15 would have to avoid the impression that that resolution operated on the same level as the Charter of the United Nations.

58. A difference of opinion also arose over the proposal to expand the scope of draft article 15 to cover any resort to armed force in contravention of the prohibition in article 2, paragraph 4, of the Charter of the United Nations. Some members expressed support as that would, *inter alia*, avoid the divisive issue of aggression. It was recalled that the Security Council had been reluctant to determine the existence of acts of aggression even in cases of egregious breaches of the peace. A broader formulation would also more accurately serve as counterpart to draft article 13 since the right to self-defence was not limited to responses to acts of aggression. Other members expressed concern regarding the possible expansion of the scope of the provision since it would deprive the draft article of the specificity that the reference to a State committing aggression provided, making it easier for the provision to be asserted in practice and thereby increasing the possibility of abuse. Some members noted that the interpretation of Article 2, paragraph 4, of the Charter was also controversial and that this provision was not an exact counterpart to Article 51 of the Charter regarding the right to self-defence.

59. The Special Rapporteur recalled that the purpose of draft article 15 was to prevent an aggressor State from benefiting from a conflict it had triggered in order to put an end to its own treaty obligations. This led to a discussion on the definition of an act of aggression, and, in particular, on the merits of General Assembly resolution 3314 (XXIX). The Special Rapporteur reiterated his preference for retaining a reference to that resolution, in a formula that would also refer to the Charter of the United Nations, even if the two were to be placed on different levels. He furthermore opposed deleting the reference to the aggressor benefiting from the act of aggression. He also noted that the possibility of extending the scope of the provision to the violation of the prohibition on

the use of force would mean that States could more easily rid themselves of their treaty obligations.

Article 14[15]: Decisions of the Security Council
Article 16[16]: Rights and duties arising from the laws of neutrality
Article 17[17]: Other cases of termination, withdrawal or suspension

60. The Special Rapporteur observed that draft articles 14, 16 and 17 dealt with the issues not affected by the draft articles. Draft article 14 reserved the decisions taken by the Security Council under Chapter VII of the Charter of the United Nations. While some Member States had been of the view that draft article 14 was superfluous, in light of article 103 of the Charter of the United Nations, he nonetheless preferred to retain it in the draft article for the sake of clarity.

61. Draft article 16 preserved the rights and duties arising from the laws of neutrality. The Special Rapporteur recalled the suggestion that treaties establishing neutrality appear as an item in the Annex related to draft article 5, instead of appearing as a "without prejudice" clause. He pointed out that neutrality was not always established by treaty and that since the status of neutrality was typically relevant during periods of armed conflict (except "permanent" neutrality which also had effect in time of peace), a reference in the Annex related to draft article 5 was not useful.

62. Draft article 17 reserved the right of States to terminate, withdraw from or suspend the operation of treaties on other grounds recognized by international law, particularly those provided for by the 1969 Vienna Convention. The list of alternative grounds was not intended to be exhaustive. Acting on the suggestion of a Member State, the Special Rapporteur proposed an alternative, more general, formulation, although he preferred to retain the approach adopted on first reading of specifying examples of such "other grounds", including as suggested by a Member State, "the provisions of the treaty" as an additional ground.

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[15] Draft article 14 read as follows:
Decisions of the Security Council
The present draft articles are without prejudice to the legal effects of decisions of the Security Council in accordance with the provisions of Chapter VII of the Charter of the United Nations.
[16] Draft article 16 read as follows:
Rights and duties arising from the laws of neutrality
The present draft articles are without prejudice to the rights and duties of States arising from the laws of neutrality.
[17] Draft article 17 read as follows:
Other cases of termination, withdrawal or suspension
The present draft articles are without prejudice to the termination, withdrawal or suspension of treaties as a consequence of, *inter alia*: (a) the provisions of the treaty; (b) the agreement of the parties; (c) a material breach; (d) supervening impossibility of performance; (e) a fundamental change of circumstances.
[Or a general and abstract formulation:]
The present draft articles are without prejudice to termination, withdrawal or suspension of operation on other grounds recognized under international law.

63. General support was expressed for draft article 14. As regards draft article 16, the view was expressed that it should be deleted since the law of neutrality had been overtaken, to a large extent, by the Charter of the United Nations, which required compliance by States Members. Other members expressed support for retaining the provision. It was noted that the institution was still relevant despite the universal adherence to the Charter of the United Nations.

64. Regarding draft article 17, some support was expressed for the more general formulation, but most members found the reference to specific grounds to be more useful. Support was also expressed for the inclusion of a new subparagraph referring to the "provisions of the treaty", which would be consistent with article 57, paragraph (a), of the 1969 Vienna Convention. It was further observed that the other grounds identified in the provision had to be considered in light of the draft articles when being applied to cases falling within the scope of the draft articles.

65. The Special Rapporteur was of the view that draft article 14, which had enjoyed general support, could be located after draft article 15. He preferred to retain draft article 16, since he was not convinced that the Charter of the United Nations negated the concept of neutrality. As regards draft article 17, he observed that only some support had been expressed in the Commission in favour of a general formulation, and recommended that the text proposed by him be retained.

Other issues

66. The Special Rapporteur recalled that there had been a proposal to include an additional provision preserving the rules of international humanitarian law and international human rights law. Although not opposed to the idea in principle, he was of the view that the "without prejudice" clauses should be limited to what was strictly necessary in the context of the draft articles, and that such a provision was not *a priori* necessary. He noted a suggestion to include in the Annex related to draft article 5 references to the category of transport-related treaties, specifically those concerning air transport. His preference was not to do so, given the specificities of such agreements. He also recalled the view expressed by Member States that the consequences of termination, withdrawal from, or suspension of the operation of a treaty were not mentioned in the text. He was of the view that reference should be made to articles 70 and 72 of the 1969 Vienna Convention, which could be done in the commentary to draft article 8.

67. He further noted that there had been a suggestion in the Sixth Committee to clarify in the draft articles that States involved in non-international armed conflict could only demand suspension of a treaty — not termination — taking into account draft articles 4 and 5 as well as the categories in the Annex. The hypothesis that had been put forward was that the purported difference in nature and scale between international and non-international armed conflicts required a differentiation in the applicable rules. The Special Rapporteur, while expressing doubts as to such categorical analysis, sought the views of the Commission on the proposal. He also reminded the Commission that thought ought to be given to the eventual form of the draft articles.

68. General agreement was expressed with the Special Rapporteur's view that there was no need to include another saving clause covering the duty to respect international humanitarian law and human rights law. The preponderant view in the Commission was that there should not be an express distinction in the draft articles between the effects of international and non-international armed conflicts. It was noted that the effects of an armed conflict could depend as much on its scale and duration as on whether it was international or non-international in character. Nor was there strong support for the suggestion that the effects of non-international armed conflicts be limited to suspension of the operation of treaties. Other members were prepared to consider such a provision, so as to accommodate the fact that a State engaged in an internal conflict might face a unique situation where it is temporarily unable to meet the obligations of a treaty. It was suggested that the commentary clarify that the inclusion of non-international armed conflicts, and the widening of the concept of armed conflict, was not meant to expand the possibilities for States to terminate or suspend treaty relationships in the context of traditional non-international armed conflicts where a government was alone facing an insurrection on its own territory. Instead, for non-international armed conflicts to have an effect on treaties, an additional outside involvement would be required.

69. As to the possible form of the draft articles, a member expressed support for their eventual adoption as a treaty, in light of their importance to the requirement of legal security, while another was of the view that it was still too premature to consider the issue.

70. The Special Rapporteur confirmed that non-international conflicts were covered by the draft articles. The issue, however, was whether there were different effects according to whether the conflicts were international or non-international in nature. He noted that there was no strong support in the Commission for such a distinction. The effects of an armed conflict would have to be gauged by taking into account the concrete circumstances of each case.

C. Summary of Views Expressed by AALCO Member States on the Topic in the Sixth (Legal) Committee of the UN General Assembly at its Sixty-Fifth Session (2010)

71. The delegate of the **Islamic Republic of Iran** stated that his delegation noted with satisfaction that the Special Rapporteur on the topic had taken into account the comments of Member States, made during the debate or in writing. The Islamic Republic of Iran had submitted written comments, which were contained in document A/CN.4/627/Add.1. His delegation continued to deem it inappropriate to include non-international armed conflicts within the scope of the topic. The possible effects of that category of conflicts on treaties were addressed in the provisions on circumstances precluding wrongfulness in the articles on responsibility of States for internationally wrongful acts. Moreover, article 73 of the Vienna Convention on the Law of Treaties referred exclusively to the effects on treaties of the outbreak of hostilities between States. The Special Rapporteur had considered it necessary to avoid a fragmentation of international law by revising the definition of "armed conflict" adopted on first reading.

Unfortunately, the Commission had not followed the wording of article 2 common to the Geneva Conventions of 1949 and, consequently, had lost the advantage of applying the same definition of "armed conflict" in treaty law as in international humanitarian law. In determining the possibility of termination, withdrawal or suspension of the application of a treaty, the intention of the parties was of paramount importance. However, introducing the criterion of the "nature and extent" of armed conflict in determining the status of a treaty could contradict and negate the effect of the intention of the parties and undermine the principle of stability of treaty relations. That reference should therefore be deleted from the text. His delegation welcomed the inclusion in the list of treaties that remained applicable during armed conflict those which established or modified land and maritime boundaries, and interpreted the category as including treaties establishing river boundaries. However, the provision dealing with notification of intention to terminate, withdraw from or suspend the operation of a treaty appeared to apply to all treaties, including those establishing boundaries and could be interpreted as a kind of invitation to a State engaged in an armed conflict to invoke the facility provided by the provision as a basis for changing its borders. It would be more appropriate to restrict the scope of the provision so that it would not apply during hostilities

72. The delegate of the **Republic of Indonesia** was of the view that the scope of the draft articles should be limited to armed conflicts of an international character. Internal conflicts did not necessarily affect treaties concluded between two sovereign States, and each such conflict, and the circumstances surrounding it, would have to be evaluated in order to determine its impact on a particular treaty.

73. The delegate of **Ghana** stated that his delegation would be grateful if the Commission could address the question of the effect of armed conflict on the evolution of the Charter of the United Nations itself, including the emergence of the concept of peacekeeping, which had developed in response to certain conflicts and had become one of the flagship activities of the Organization.

74. The delegate of the **People's Republic of China** stated that the definition of "armed conflict" contained in draft article 2, namely the one used by the International Criminal Tribunal for the Former Yugoslavia in the Tadić decision, was admittedly succinct. However, its use of the term "protracted" as a threshold for determining whether an armed conflict fell within the scope of the draft articles was not conducive to the stability of treaty relations, as any and all use of armed force might consequently be included in the category of armed conflict defined under the draft articles, irrespective of any real effects on the application of treaties. The draft article would be improved by drawing on the definition of armed conflict contained in the Geneva Conventions of 1949 and in Additional Protocol II thereto, with a view to arriving at a definition that was accurate and stringent enough to garner broad international support. Concerning draft article 5, the treaties enumerated in paragraph 2 did not match those set forth in the indicative list of categories of treaties contained in the annex to the draft article, a discrepancy that could give rise to questions as to the relationship between the treaties enumerated in each case and as to the exhaustiveness of those listed in paragraph 2. The latter, for instance, could be interpreted as indicating treaties with respect to which the

operation was altogether beyond the effect of armed conflict in any circumstances, although whether paragraph 2 would attract sufficient support in international practice was doubtful. The draft article provided no conclusive answer concerning the specific factors that might determine the continued operation of a treaty. It was therefore equally doubtful whether the understanding and application of the draft article would be enhanced by the incorporation of paragraph 2 unless it was based ona definite conclusion and its enumeration was exhaustive. Such an enhancement would be fostered by including in the annex an indicative list of treaties with respect to which the operation would be unaffected in the event of armed conflict, as had been done in the draft articles on first reading. His delegation looked forward to a resumption of that approach, with clarifications set out in the commentary to the effect that the list was indicative rather than exhaustive and did not constitute an absolute preclusion of termination or suspension of the operation of the listed treaties in all circumstances. As to draft article 15, his delegation believed that the Charter of the United Nations and General Assembly resolution 3314 (XXIX) offered indispensable practical guidance as a legal basis for the qualification of acts of aggression. Given the disagreement concerning the inclusion of a reference to the latter for that purpose, the draft resolution should be reformulated — if that reference was to remain — in such a way as to avoid conveying the impression that the resolution had the same effect as the Charter.

75. The delegate of the **Republic of Korea** stated that “Effect of armed conflicts on treaties” was an important topic, in that armed conflicts made it difficult or impossible for parties to fulfil certain treaty obligations. The fact that States could invoke armed conflicts in which they were involved as a ground for the suspension, termination or withdrawal of treaties impaired both the stability of treaties and relations between the parties thereto. His delegation therefore supported draft article 5, on the operation of treaties on the basis of implication from their subject matter, and the inclusion of an annexed indicative list of categories of those treaties that should continue in operation during armed conflicts.

76. The delegate of **India** stated that his delegation continued to maintain that its scope should be limited to treaties concluded between States and exclude those concluded by international organizations. Furthermore, the definition of “armed conflict” should be considered independently of the effects of such conflict on treaties and limited in scope to inter-State conflicts insofar as it was States that entered into treaties, and treaty relations were not directly affected by internal conflicts. The principle of non-automatic termination or suspension enunciated in draft article 3 was useful to encouraging the stability and continuity of treaty relations. Draft article 15 on prohibition of benefit to an aggressor State also had the support of his delegation. As to draft article 5, general criteria should be identified for determining the type of treaties that would continue to apply during an armed conflict. On that score, treaties that were in no circumstances affected by armed conflict, such as international humanitarian law treaties and treaties on maritime and land boundaries, should be listed separately from treaties that continued to exist only if the parties thereto so intended.

77. The delegate of **Japan** stressed the importance of remembering that the topic was an outgrowth of the 1969 Vienna Convention on the Law of Treaties while at the same time acknowledging the significant role played by international organizations in today's international community. The United Nations Convention on the Law of the Sea, for instance, should not be excluded from the scope of the draft articles on the topic. Those comments were equally applicable to non-international conflicts, of which the Vienna Convention made no mention. On the other hand, a clear distinction between international and non-international armed conflicts was not always possible. If the latter were to be excluded, the draft articles would have only limited scope, thereby detracting considerably from their value. As to the definition of "armed conflict", objective criteria should be used to determine when such a conflict began. On that score, the commentary should state that the application of the draft articles was not dependent on the discretionary judgement of the parties in question but was automatic on fulfilment of the material conditions for which they provided. Concerning the language of draft article 3, on absence of ipso facto termination or suspension of the operation of treaties, avoidance of the negative form was desirable in the case of such a core provision.

78. The delegate of **Sri Lanka** on the topic "Effects of armed conflicts on treaties" and the proposals for reformulation of the draft articles adopted on first reading, he said that draft article 1 (Scope) gave rise to two questions: should the draft articles apply solely to inter-State armed conflict and should they apply to treaties to which international organizations were parties? Concerning the first question, given that the effect of non-international conflicts where only one State was party to an armed conflict would differ from the effect of inter-State conflicts on a treaty, the issue of how and why such cases of non-international armed conflict might affect the operation of a treaty between States should be further clarified in the commentary. The second question should be the subject of a separate study, given its complexity and the scarcity of practice in that area. For present purposes, however, the saving clause proposed in paragraph 203 of the Commission's report was helpful.

79. As to draft article 2 (Use of terms), the word "protracted" would be best retained in the definition of "armed conflict" in order to provide for a minimum threshold with respect to the elements of duration and intensity, which was an essential factor if the draft articles were to cover non-international armed conflicts. Concerning draft article 5 (Operation of treaties on the basis of implication from their subject matter), his delegation was not in favour of the selective approach of including certain categories of treaties in paragraph 2; instead it agreed with the view that to do so would inadvertently have the effect of establishing two "tiers" of categories that might be difficult to substantiate in practice. Retention of the indicative list of categories of treaties as an annex was therefore a viable compromise, provided that the list was augmented by the new categories of treaties identified by the Special Rapporteur and mentioned in paragraph 237 of the Commission's report. Draft article 8 (Notification of intention to terminate, withdraw from or suspend the operation of a treaty) must offer sufficient flexibility for taking into account the reality of armed conflict situations, insofar as formal notification of intention with respect to a treaty was not always possible. Paragraph 4 should therefore be deleted in order to avoid prescriptive rules on time limits and reflect only the obligation of States

with regard to the peaceful settlement of disputes. Lastly, his delegation supported the suggested inclusion of a reference in draft article 15 (Prohibition of benefit to an aggressor State) to General Assembly resolution 3314 (XXIX) and to the Charter of the United Nations.

VI. PROTECTION OF PERSONS IN THE EVENT OF DISASTERS

A. Background

1. It may be recalled that the Commission, at its fifty-ninth session (2007), decided to include the topic "Protection of Persons in the Event of Disasters" in its programme of work and appointed Mr. Eduardo Valencia-Ospina (Colombia) as Special Rapporteur. At the same session, the Commission requested the Secretariat to prepare a background study on the topic, initially limited to natural disasters. At the sixtieth session (2008), the Commission had before it the preliminary report of the Special Rapporteur[1] tracing the evolution of the protection of persons in the event of disasters, identifying the sources of the law on the topic, as well as previous efforts towards codification and development of the law in the area. It also presented in broad outline various aspects of the general scope with a view to identifying the main legal questions to be covered and advancing tentative conclusions without prejudice to the outcome of the discussion that the report aimed to trigger in the Commission. The Commission also had before it a memorandum by the Secretariat, focusing primarily on natural disasters[2] and providing an overview of existing legal instruments and texts applicable to a variety of aspects of disaster prevention and relief assistance, as well as of the protection of persons in the event of disasters.

2. At its sixty-first session (2009), the Commission considered the second report of the Special Rapporteur[3] analysing the scope of the topic *ratione materiae*, *ratione personae* and *ratione temporis*, and issues relating to the definition of "disaster" for purposes of the topic, as well as undertaking a consideration of the basic duty to cooperate. The report further contained proposals for draft articles 1 (Scope), 2 (Definition of disaster) and 3 (Duty to cooperate). The Commission also had before it written replies submitted by the Office for the Coordination of Humanitarian Affairs of the United Nations Secretariat and the International Federation of the Red Cross and Red Crescent Societies to the questions addressed to them by the Commission in 2008.

3. The Commission also referred the draft articles 1 to 3 to the Drafting Committee, on the understanding that if no agreement was possible on draft article 3, it could be referred back to the Plenary with a view to establishing a Working Group to discuss the draft article. Later, the Commission received the report of the Drafting Committee and took note of draft articles 1 to 5, as provisionally adopted by the Drafting Committee.[4]

B. Consideration of the Topic at the Present Session

4. At the present session, the Commission had before it the third report of the Special Rapporteur[5] providing an overview of the views of States on the work undertaken by the Commission so far, a consideration of the principles that inspire the protection of

[1] A/CN.4/598.
[2] A/CN.4/590 and Add.1 to 3.
[3] A/CN. 4/615 and Corr.1
[4] A/CN.4/L.758.
[5] A/CN.4/629.

persons in the event of disasters, in its aspect related to persons in need of protection, and a consideration of the question of the responsibility of the affected State.

5. The proposals for the three further draft articles were made in the report: draft articles 6 (Humanitarian principles in disaster response), 7 (Human dignity) and 8 (Primary responsibility of the affected State).[6]

1. Introduction by the Special Rapporteur of the Third Report

6. The Special Rapporteur explained that his third report followed from the debate held on his second report. In particular, he recalled that it had been recommended that he focus on two issues: the principles - in addition to that of consent - directly relevant to the protection of persons, including the humanitarian principles of humanity, neutrality and impartiality, and the question of the primary responsibility of the affected State for protecting persons under its territorial jurisdiction, which also raised issues concerning the fundamental principles of sovereignty and non-intervention. Both sets of issues were the subject matter of his third report.

7. As regards draft article 6, the Special Rapporteur recalled that the Secretariat had pointed out in its memorandum that the three principles of neutrality, impartiality and humanity were "core principles regularly recognized as foundational to humanitarian assistance efforts generally". This was further substantiated by recent discussions within the United Nations on the basic principles of humanitarian assistance, as well as by recent reports of the Secretary-General. He further recalled that the principles were routinely cited in General Assembly resolutions and a number of instruments dealing with

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[6] The Commission considered the third report at its 3054th to 3057th meetings, from 1 to 4 June 2010. At its 3067th meeting, on 20 July 2010, the Commission received the report of the Drafting Committee and took note of draft articles 6 to 9, as provisionally adopted by the Drafting Committee (A/CN.4/L.776). The draft articles provisionally adopted by the Drafting Committee read as follows:

Article 6

Humanitarian principles in disaster response

Response to disasters shall take place in accordance with the principles of humanity, neutrality and impartiality, and on the basis of non-discrimination, while taking into account the needs of the particularly vulnerable.

Article 7

Human dignity

In responding to disasters, States, competent intergovernmental organizations and relevant non-governmental organizations shall respect and protect the inherent dignity of the human person.

Article 8

Human rights

Persons affected by disasters are entitled to respect for their human rights.

Article 9

Role of the affected State

1. The affected State, by virtue of its sovereignty, has the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory.
2. The affected State has the primary role in the direction, control, coordination and supervision of such relief and assistance.

humanitarian response, including those adopted under the auspices of the Red Cross Movement.

8. The principle of neutrality referred to the apolitical nature of action taken in disaster response. It implied that the actors involved should refrain from committing acts which might constitute interference in the internal affairs of the domestic State, so as to ensure an adequate and effective response as required by draft article 2. It also ensured that the interests of the persons affected by a disaster continued to be the central concern of relief efforts.

9. The principle of impartiality concerned the qualitative purpose of disaster response, as elaborated in draft article 2, namely to meet the essential needs of the persons affected by a disaster, and to ensure full respect for their rights. It included three components: non-discrimination, proportionality and impartiality *per se*. Non-discrimination, which was initially developed in the context of international humanitarian law, had also become a fundamental provision in human rights law, and was reflected in Article 1, paragraph 3, of the Charter of the United Nations. Under the principle of proportionality, the response to a disaster should be in proportion to the degree of suffering and urgency. It took into account the possibility that time and resources may not be readily available, and a degree of flexibility and prioritization was necessary. As for the aspect of impartiality proper, this referred to the obligation not to draw a substantive distinction between individuals based on criteria other than need.

10. The Special Rapporteur noted that the principle of humanity was a long-standing principle of international law. In its contemporary meaning it was the cornerstone for the protection of persons in international law and it served as a meeting point between international humanitarian law and international human rights law. Accordingly, it provided the necessary inspiration for instruments on the protection of persons in the event of disasters, and was an expression of general values which provided guidance to the international system as a whole both in times of war and in times of peace. He chose to include the principle in the draft articles since it was equally applicable in times of crisis arising out of the onset of a disaster.

11. Concerning draft article 7, on human dignity, the Special Rapporteur recalled that the Commission had already had the opportunity to debate the concept in the context of its consideration of the topic of the expulsion of aliens. There seemed to be agreement that it was not a human right *per se*, but rather was posited as a fundamental principle that gave rise to all human rights. Although closely related to the principle of humanity in draft article 6, it was nonetheless distinguishable. It was recalled that human dignity was incorporated as a central element of the 1948 Universal Declaration of Human Rights, as well as in numerous human rights treaties adopted at universal and regional levels. It was also an essential pillar in the protection of human rights in domestic legal systems. By including the principle of human dignity, together with the humanitarian principles elaborated in draft article 6, the Special Rapporteur sought to provide a complete framework guaranteeing respect for the protection of human rights of persons affected by disasters, making it unnecessary to elaborate a list of specific rights.

12. Draft article 8 arose out of an understanding reached in the Drafting Committee in 2009, upon the adoption of draft article 5, that a provision on the primary responsibility of the affected State would be formulated. It reflected the principles of sovereignty and nonintervention, both of which were universally accepted as underpinning the edifice of international law. The principle of sovereignty, which was based on the fundamental concept of sovereign equality, and which was well established in international law, implied that each State was free and independent, and therefore could exercise its functions on its own territory to the exclusion of others. Closely related was the principle of nonintervention in the domestic affairs of other States, also well established in international law, which served to guarantee the maintenance of sovereign equality between States.

13. In his view, there was no doubt that an affected State had the faculty to adopt legitimate measures to guarantee protection of persons on their territory. As a consequence of this, other entities, whether international organizations or States, could not interfere in a unilateral way in the process of response. Instead, they were required to act in accordance with draft article 5 on the duty to cooperate. This did not mean that such sovereign authority should be absolute. The Special Rapporteur recalled that there existed minimum international norms, including human rights protections, which had to be respected. As such, the principles of sovereignty and non-intervention were a point of departure and not a point of conclusion, and implied both rights and obligations. He further confirmed his intention to clarify, in his next report, the scope and the limitations on the exercise of its primary responsibility by the affected State. It was further pointed out that it was well established in international law that the Government of the affected State was in the best position to assess the seriousness of an emergency situation and to implement response policies. The consequence of this was that the affected State had the primary responsibility to ensure the protection of persons in the event of disasters by facilitating, coordinating and supervising relief activities on its territory.

14. Furthermore, many international instruments had recognized either expressly or implicitly that international relief operations could only be undertaken on the basis of the consent of the affected State. Whereas the responsibility to coordinate and facilitate assistance was an internal aspect of the primary responsibility of the affected State, the requirement of obtaining that State's consent was an external matter since it governed the relations with other States and bodies. The requirement of consent was a consequence of the principles of sovereignty and non-intervention, and applied throughout the period of relief activities provided by external actors.

2. Summary of the Debate

(a) Draft article 6 (Humanitarian Principles in Disaster Response)

15. Support was expressed for the reference to the humanitarian principles applicable to disaster response. They were characterized as important safeguards for the relationship between relevant actors, while also guaranteeing that the needs of affected persons were given priority. The view was further expressed that the three principles were well

established in international law, as reflected in a number of international instruments. At the same time, it was noted that there existed possible divergences, and conflicts, political, ideological, religious or cultural, among States, which could impede efforts to deliver timely and effective assistance. According to a further view, it was not advisable to depart from the principles without good reason since they were well established. According to a contrary view, while they were important principles for the International Red Cross Movement, it was not clear that they were principles of international law.

16. The view was expressed that the principle of humanity was the cornerstone for the protection of persons in international law since it placed the affected person at the centre of the relief process and recognized the importance of his or her rights and needs. It also served as an important litmus test for the actions of those providing humanitarian assistance. According to another view, references to the "principle of humanity" were mostly found in non-binding instruments, and were largely context specific.

17. Support was also expressed for the inclusion of the principle of neutrality which obliged assisting actors to do everything feasible to ensure that their activities were not undertaken for purposes other than responding to the disaster in accordance with humanitarian principles. It was observed that the principle of neutrality was a consequence of the obligation to respect the sovereignty of States. Several members, however, expressed doubts as to the incorporation of the principle of neutrality which was traditionally asserted in the context of armed conflict. The view was also expressed that the concern about interference in the domestic affairs of the State was best covered by the principle of impartiality. Another suggestion was to replace the reference to the principle of neutrality with that of the principle of non-discrimination.

18. The view was expressed that the principle of impartiality was well established. It was also noted that directing assistance to vulnerable groups would not *per se* violate the component of non-discrimination within the broader principle of impartiality. Doubts were, however, expressed concerning the requirement of proportionality. It was stated that the linkage to the needs of the affected persons was not the only issue of relevance. Other factors, such as economic considerations relating to the capability to provide assistance, were also relevant. In other words, it was not always possible to require that the assistance offered had to be proportional to the needs. It was thus important that proportionality be assessed on a case-by-case basis, taking into account the reality on the ground. On the impartiality *per se* aspect, the view was expressed that it should be made more explicit in the provision, by including a reference to the obligation not to draw a subjective distinction according to the persons affected.

19. It was further noted that the principle of humanity did not give rise to specific obligations, which was different from the principles of neutrality (non-intervention) and impartiality (non-discrimination). Therefore, it was proposed to distinguish between the principle of humanity and the other two principles, by either replacing the phrase "shall take place in accordance with" by "is guided by" or "is based upon"; or by reflecting the principles in the preamble and providing separate articles on the content of those principles, namely non-intervention and non-discrimination. Other suggestions included

adding a reference to the principle of independence and reflecting the humanitarian principles in the preamble. The latter suggestion was opposed by a member who was of the view that including them in the operative part served to emphasize the point that the manner in which humanitarian response is managed is not only a policy consideration, but also a legal obligation.

(b) Draft article 7 (Human Dignity)

20. Support was expressed for the Special Rapporteur's proposal for draft article 7. It was recognized that human dignity was a source of human rights and not a right *per se* entailing obligations. It was recalled that the issue had been discussed in the context of the topic "expulsion of aliens" and that there was agreement in the Commission not to dwell on establishing human dignity as a right, since its focus was on the treatment of the individual which ought to respect human dignity. Some members were of the view that it was not entirely clear that the concept could be easily transposed to the situation of a disaster, which was different from the context of expulsion of aliens, where it applied to questions of process. Nor was it clear what its relationship was with draft articles 6 and 8. The doubt was expressed that the provision seemed to imply that every life should be rescued and every victim assisted, which had implications for the capacity of the affected State and the duty of other States to give assistance. A preference was thus expressed for viewing the concept in terms of a desired conduct as opposed to imposing an obligation of result.

21. It was also suggested that the recognition of human dignity could be supplemented by the obligation to respect human rights as set out in existing international instruments, so as to reinforce the applicability of rights, while also giving recognition to the fact that in such emergencies, the affected State was authorized provisionally to suspend (derogate from) certain human rights to the extent permitted by international law. It was also proposed that the reference to "relevant actors shall respect and protect Human Dignity" be clarified in terms of its relationship with existing international human rights law. According to another view, draft article 7 could be amalgamated with draft article 6.

(c) Draft article 8 (Primary Responsibility of the Affected State)

22. Several members proposed to restate the principles of sovereignty and non-intervention in the domestic affairs of a State, which constituted the primary principles on the basis of which the regime for protection of persons in the event of disasters was to be developed. It was said that such approach would properly reflect both the rights of the affected State *vis-à-vis* humanitarian assistance, as well as its responsibility for the overall rescue operations. Another view was that the implicit reference to the principles of sovereignty and non-intervention in draft article 8, paragraph 2, requiring the consent of the affected States, was inadequate. According to a different view, the approach taken in the Special Rapporteur's report lean too much in favour of the traditional view of international law as being based on sovereignty and the consent of States, and did not adequately take into account the contemporary understanding of State sovereignty. It was

considered important to balance State sovereignty with the need to protect human rights, and it was recalled that the purpose of the topic was the protection of persons in the event of disasters, and not the protection of the rights of States.

23. Several members spoke in favour of draft article 8, and of the position that under international law the primary responsibility remained with the affected State. This was considered to be an important clarification since it protected against unwarranted interference in the domestic affairs of the affected State. Accordingly, the affected State had the duty to protect individuals on its territory in accordance with the draft articles, while retaining the right to refuse assistance from abroad.

24. Several members were of the view that it had to be clarified that primary responsibility did not mean exclusive responsibility. While the affected State would be allowed a margin of appreciation, in the final analysis it bore the responsibility for its refusal to accept assistance, which could lead to the existence of an internationally wrongful act if such refusal undermined the rights of the affected individual under international law. The affected State remained subject to the duty to cooperate under draft article 5. It was suggested that a reference to the secondary responsibility of the international community be added to the provision, or that paragraph 2 could be replaced with the following clause: "article 8, paragraph 1, is without prejudice to the right of the international community as a whole to provide lawful humanitarian assistance to persons affected by a disaster if the affected State lacks the capacity or will to exercise its primary responsibility to provide humanitarian assistance". As per another view, the international community did not, under contemporary international law, enjoy a "secondary" responsibility for the protection of victims of disasters. Accordingly, the reference to the "primary" responsibility should be deleted as it implied the existence of "secondary" duties, which could lead to unwarranted intervention. It was recalled that the Commission had excluded the applicability of the concept of "responsibility to protect" from the scope of the application of the draft articles in 2009.

25. Other members expressed the view that, while emphasizing the duty of cooperation, the draft articles should recognize the sovereignty of the affected State, its responsibility towards its own nationals, its right to decide whether it requires international assistance, as it was in the best position to assess the needs of the situation, as well as its own capacity to respond, and if it accepted international assistance, the right to direct, coordinate and control such assistance within its territory. It was recalled that the notion of primary responsibility of the affected State was recognized in various General Assembly resolutions and in global and regional instruments and in various international codes of conduct and guidelines for disaster relief. As such, all offers of humanitarian assistance as response to disasters would have to respect sovereignty, independence and territorial integrity of the affected State.

26. It was suggested that the term "affected" State be defined, particularly in the context of situations of occupation or international administration. It was also recommended that it be clarified that the reference to "responsibility" was meant in the sense of "competence" and not that which arises from the commission of an

internationally wrongful act. In terms of a further suggestion, the reference to "responsibility" could be replaced by "duty", which would accord with the affected State having an obligation under international law to protect persons on its territory. It was noted that such a formulation was closer to that proposed by the Institute of International Law in its resolution of 1986.

27. Another suggestion was that paragraph 1 could be replaced with the text of operative paragraph 4 of the annex to General Assembly resolution 46/182 of 19 December 1991: "[e]ach State has the responsibility first and foremost to take care of the victims of natural disasters and other emergencies occurring on its territory. Hence, the affected State has the primary role in the initiation, organization, coordination, and implementation of humanitarian assistance within its territory".

28. Support was expressed for the requirement of consent established in paragraph 2, which was considered by some to be the central provision of the draft articles. Reference was made to General Assembly resolution 46/182 which referred to the requirement that humanitarian assistance be provided with the consent of the affected State and, in principle, on the basis of an appeal by that State. It was noted that the requirement of consent of the affected State followed from elementary considerations of sovereignty. To enter a foreign State to provide assistance against the will of that State would be a form of intervention contrary to the Charter of the United Nations. It was suggested that it be made clear that the draft articles do not permit a right of intervention in cases of disaster.

29. Other members expressed doubts as to the inclusion of the word "only". The view was expressed that prior express consent was not always required, since there could be exceptional circumstances where the affected State would be unable to give formal consent within a timescale needed to react to an overwhelming disaster. It was also suggested that consideration be given to recognizing the legal consequences of the responsibility of the affected State by stating that its consent "shall not unreasonably be withheld", without prejudice to its sovereign right to decide whether or not external assistance was appropriate.

30. The affected State would thus be placed under an obligation not to reject a *bona fide* offer exclusively intended to provide humanitarian assistance. Reference was made to the memorandum of the Secretariat which detailed some of the nuances surrounding consent. According to another view, the focus should be less on consent and more on adequate coordination of relief assistance. Others spoke out against reformulating draft article 8 so as to suggest that the affected State could be penalized for "unreasonably withholding consent" as that would be contrary to existing law.

31. Other suggestions included clarifying that consent should be explicit, and specifying whether the reference to "external" assistance imposed an international law requirement that the actions of non-governmental organizations, or other private bodies, should also be based on the consent of the affected State, or whether it was sufficient that such entities comply with the internal law of the affected State. It was also suggested that the two paragraphs in draft article 8 be reflected in separate draft articles.

3. Special Rapporteur's Concluding Remarks

32. As regards draft article 6, the Special Rapporteur recalled some of the concerns that were expressed during the debate regarding the reference to the principles of humanity, neutrality, impartiality and proportionality, which had been employed in specific areas of law, including in international humanitarian law and on the non-use of force in the Charter of the United Nations. It had been maintained that their transposition to the context of protection of persons in events of disasters was neither easy nor necessarily feasible. In his view, the applicability of a principle, which by definition was conceived in general and abstract terms, could extend to other areas of law, different from that in which the concept originated and with which it was traditionally associated.

33. The Special Rapporteur stated that he also did not believe it necessary or useful to draw up specific definitions of the principles because they were universally recognized by international law. This was as valid with regard to the humanitarian principles as it was for the principles of sovereignty and non-intervention. The fact that behaviour should be in accordance with certain principles was a sufficient standard to be guided by. He nonetheless confirmed that the specificity that some members sought would be provided in the corresponding commentaries.

34. He noted further that there had been divergent opinions about whether to keep or exclude the reference to the principle of neutrality. He preferred to retain it for the reasons put forward in the third report. He noted also the proposal to include the principle of nondiscrimination, whose modern origins were found in international humanitarian law, particularly in the first Geneva Convention. However, he reiterated his view that the fact that a specific principle such as non-discrimination was historically closely linked to international humanitarian law did not mean that that same principle could not be applicable to the protection of persons in the event of disaster. Accordingly, he could accept the principle of non-discrimination being added to the three principles contained in draft article 6.

35. With respect to draft article 7, the Special Rapporteur recalled that the Drafting Committee had recently proposed the inclusion of a similar draft article on human dignity in the context of the expulsion of aliens (not as a preambular clause), and he saw no reason why the same could not be done with the present draft articles.

36. Concerning draft article 8, the Special Rapporteur confirmed that it would be followed by other provisions that will explain the scope and limits of the exercise by an affected State of its primary responsibility to protect persons affected by a disaster. It was reiterated that delegation of draft article 8, paragraph 2 would nullify the importance attached to principles of sovereignty and non-intervention. He recalled further the proposal, made during the debate, to include specific mention of the latter two principles, and while he did not consider it strictly necessary, he would follow the prevailing opinion in the Commission to make such a reference in either draft article 6 or 8.

C. Summary of Views Expressed by AALCO Member States on the Topic in the Sixth (Legal) Committee of the UN General Assembly at its Sixty-Fifth Session (2010)

37. The Delegate of **People's Republic of China** stated that they consider the Commission's work on the topic "Protection of persons in the event of disasters" to be of great practical significance; it was a country frequently hit by natural disaster and the timely and generous international assistance provided to boost its own swift recovery and reconstruction responses on such occasions had been gratefully received by its Government and people. On that score, the humanitarian principles articulated in draft article 6 on the topic were particularly important to regulating the provision of such assistance, which should be for humanitarian purposes only; in no way should it encroach upon the national sovereignty of the affected States, interfere in their domestic affairs or come with any inappropriate strings attached.

38. With regard to the topic, the Delegate of the **Islamic Republic of Iran** stated that his delegation supported the Special Rapporteur's conclusion regarding the irrelevance of the new notion of "responsibility to protect" to the work on the topic. However, the Delegate said that the debate in the Commission, seemed to have deviated from that conclusion, and the "rights-based approach" continued to have adherents among Commission members. Such an approach implied that persons affected by natural disasters were entitled to request international relief, a position that contravened the principles of State sovereignty and non-interference in the internal affairs of States. His delegation felt that the Commission should focus only on the rights and obligations of States. It did not share the view that the refusal of a State to accept international aid could be characterized as an "internationally wrongful act" if such a refusal jeopardized the rights of victims of the disaster. It was for the affected State to determine whether receiving external assistance was appropriate or not, without its refusal triggering its international responsibility. Any suggestion to penalize the affected State would not only be expressly contrary to international law but also constitute an unprecedented step which could have adverse consequences for international relations and justify interventionism.

39. Further, there was little doubt that a State affected by natural disasters was required to cooperate with other States and relevant intergovernmental organizations under international law. Such an obligation to cooperate, however, applied only to the subjects of international law, excluding non-governmental organizations. The provision of humanitarian aid by other States and international organizations remained subject to the consent of the affected State. Once such consent was granted, the affected State should retain, in accordance with its domestic law, the right to direct, control, supervise and coordinate the assistance provided in its territory. Moreover, the humanitarian assistance should be provided in accordance with the principles of humanity, neutrality and impartiality. All principles identified by the Red Cross and Red Crescent Movement, which had been referred to by the International Court of Justice, and in the relevant resolutions of the United Nations General Assembly could be applicable.

40. The Delegate of **Pakistan** said that his delegation was pleased to note the Commission's progress on the topic "Protection of persons in the event of disasters". The Delegate pointed out that the Commission had rightly focused on the core principles of humanity, neutrality and impartiality in the response to disasters and on the primary responsibility of the affected State in the provision and coordination of relief assistance. The reference to the principle of neutrality in draft article 6 highlighted the apolitical nature of disaster relief and the obligation of foreign actors, organizations and the international community involved in disaster response to respect the sovereignty of the affected State and not to commit any act that might amount to interference in its internal affairs. The principle of impartiality excluded political considerations from the provision of humanitarian aid and implied that needs-based criteria should be used to distinguish and prioritize among individuals in the distribution of resources and relief efforts. With regard to draft article 7, his delegation agreed that human dignity might not be a human right per se, but rather a foundational principle on which the edifice of all human rights was built.

41. Concerning draft article 8 (Primary responsibility of the affected State), the Delegate noted that his delegation supported the Commission's focus on the rights and obligations of affected States vis-à-vis external actors. The primacy of the affected State in the provision of disaster relief assistance under the draft articles was based on a central principle of international law, namely, State sovereignty, and flowed from the State's obligation towards its own citizens. The affected State should take the lead in evaluating its need for international assistance and in facilitating, coordinating, directing, controlling and supervising relief operations on its territory. Such operations should be carried out only with its consent. His delegation viewed the affirmation of the primary role of the affected State as the most essential provision of the draft articles and appreciated the preference given to domestic law in stressing the primacy of the affected State in coordinating relief efforts.

42. The Delegate of **Indonesia** in their statement observed that the Government of Indonesia attached great importance to the topic of protection of persons in the event of disasters, particularly in the light of Indonesia's experience following the tsunami of 2004. Humanitarian assistance should be undertaken only with the consent of the affected country and with respect for national sovereignty, territorial integrity, national unity and the principle of non-intervention in the domestic affairs of States. The Government viewed draft article 6 (Humanitarian principles in disaster response) as a key provision of the draft articles, and considered neutrality, impartiality and humanity to be core principles in humanitarian assistance efforts. It was also important to respect the principle of non-discrimination and to take into account the needs of the particularly vulnerable, but those concerns must be seen as complementing the three core principles.

43. With regard to draft article 7, the Delegate concurred with the Commission's decision not to dwell on establishing human dignity as a right. As to the issue of primary responsibility of the affected State in draft article 8 as proposed by the Special Rapporteur, the Commission must uphold the principles of sovereignty and non-intervention. It was indisputable that the affected State had the primary duty to protect

individuals in its territory. In addition to exploring the right of the international community to provide lawful humanitarian assistance, without characterizing it as a secondary responsibility, it was important to explore ways and means of improving the coordination, effectiveness and efficiency of such assistance, particularly by strengthening partnerships between affected States and the international community and developing proactive approaches to disaster management.

44. With regard to the topic, the Delegate of **Ghana** stated that it was high time to consider codification of the many soft law principles that had been developed in General Assembly resolutions and other United Nations forums. The definition of disaster should focus on both the event and the consequences. The question of the primary responsibility of States in the event of a disaster should be interpreted not just as a right to allow or refuse assistance but as a duty to respect the right of victims, both citizens and foreign nationals, to receive assistance. That right should not be unreasonably withheld on any grounds, political or otherwise. The draft article should also emphasize the duties of neighbouring States in the event of a disaster affecting more than one State, which might involve the movement of displaced persons across borders.

45. With respect to the effect of armed conflict on treaties, his delegation would be grateful if the Commission could address the question of the effect of armed conflict on the evolution of the Charter of the United Nations itself, including the emergence of the concept of peacekeeping, which had developed in response to certain conflicts and had become one of the flagship activities of the Organization.

46. The Delegate of **Republic of Korea** mentioned that his delegation agreed with the stipulation contained in draft article 8 that the affected State had the primary responsibility to provide assistance to affected persons. The consent of the affected State should moreover be a sine qua non for the protection of persons and the provision of humanitarian assistance in its territory. It was unclear, however, from which country persons affected by disasters were able to request assistance. Furthermore, the draft article was silent as to whose responsibility it was to decide that an affected State had failed to provide disaster relief assistance, and with whom the secondary responsibility lay for providing assistance. The Commission should discuss those unresolved questions with a view to developing appropriate guidelines.

47. The Delegate of **India** stated that out of the five draft articles thus far provisionally adopted by the Commission, the Delegate welcomed draft article 4 which talk about the relationship of the articles with international humanitarian law, and the inclusion of a reference in draft article 3 to a “calamitous event”, which emphasized the grave and exceptional situations to which the draft articles would apply.

48. Concerning draft article 6, on humanitarian principles in disaster response, the cited principle of neutrality was irrelevant and would be more appropriately replaced by a reference to the principle of non-discrimination, which had also been emphasized by the International Court of Justice in the context of a case (*Nicaragua v. United States of America*) involving humanitarian assistance.

49. His delegation also welcomed the content of draft article 8, on primary responsibility of the affected State. Indeed, the latter's primacy in disaster response had been reaffirmed on numerous occasions by the General Assembly, including in the guiding principles annexed to its resolution 46/182 on strengthening of the coordination of humanitarian emergency assistance of the United Nations. Equally recognized in those same guiding principles was the relevance of the concepts of sovereignty and territorial integrity in the context of disaster response. Accordingly, at the same time as emphasizing the duty of cooperation with a view to encouraging assistance to affected persons and providing for essential human needs as a priority in emergency situations resulting from a natural disaster, the draft articles must recognize the sovereignty of the affected State, the responsibility of that State towards its own nationals and its right to decide whether it required international assistance. In short, the affected State was best placed to assess needs in such situation and its capacity to respond. It moreover had the right to direct, coordinate and control within its own territory any international assistance that it accepted.

50. The Delegate of **Japan** welcomed the Commission's continuous efforts at its most recent session to formulate draft articles aimed at codifying and elaborating rules and norms relating to disaster relief activities in order to facilitate the flow of international assistance to those in need. It also looked forward, however, to future efforts by the Commission to improve the more abstract draft articles 6, which merely listed humanitarian principles, and 8, which contained no description of foundations for rights. The aim was that they should serve as useful guidelines in individual cases.

51. He stated that his country supports the Special Rapporteur's position that the primary responsibility for the protection of disaster victims lay with the affected State, in view of its ability to gauge most accurately the situation and needs of the affected areas and people. Its decision-making role with regard to disaster-relief activities should therefore be respected by other States and also by non-State actors. That primary role of the affected State and the principle of respect for its sovereign rights should nonetheless be understood in the context of the purpose of protecting the affected people. The affected State might, for instance, be required to coordinate aid offered by other States and non-State actors. In the discussion to be based on the forthcoming fourth report of the Special Rapporteur on the topic, the Commission should continue its efforts to codify the current relevant rules of international law on the basis of the major premise of protection of people affected by disasters.

52. The Delegate of **Sri Lanka** stated that they suffered the effects of a devastating tsunami in 2004; therefore his country attached great importance to the topic "Protection of persons in the event of disasters". A legal framework that clearly articulated the rights and responsibilities of those involved would facilitate greater cooperation among States and address the current legal lacuna in the relationship between norms of international law and natural disasters.

53. With regard to the draft articles provisionally adopted on that topic by the Drafting Committee, the provision of draft article 6 on humanitarian principles in disaster

response was beyond all debate, and those contained in draft articles 7 (Human dignity) and 8 (Human rights) were of a similarly fundamental nature. Those three draft articles were therefore welcome inclusions.

54. As to the role of the affected State, the fundamental principles of sovereignty and non-intervention must be the central guide for the Commission's work and any related expansion of the law in that area. Emphasis on the sovereignty and primary role of the affected State was essential; indeed, the responsibilities entailed in sovereignty included the duty of protection set forth in draft article 9, paragraph 1. Moreover, humanitarian assistance provided by other States or non-State actors as a matter of international cooperation and solidarity must necessarily be undertaken only with the consent of the affected State and for the sole purpose of complementing domestic initiatives. Such premises were in consonance with the guiding principles annexed to the landmark General Assembly resolution 46/182 on strengthening of the coordination of humanitarian emergency assistance of the United Nations.

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

A. Background

1. The topic "Obligation to Extradite or Prosecute (*aut dedere aut judicare*)" had been listed under the planned topics since the first session of the International Law Commission (hereafter referred as "ILC") in 1949, but found its place only when it was addressed briefly in Article 8 and 9 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind. These articles set out minimum contours of the principle of *aut dedere aut judicare* and the linked principle of universal jurisdiction.

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

3. The Commission at its fifty-eighth session (2006) considered the preliminary report of the Special Rapporteur. The text report gave a detailed account of five subsections of this topic, namely: (i) universality of suppression and universality of jurisdiction, (ii) universal jurisdiction and the obligation to extradite or prosecute, (iii) sources of the obligation to extradite or prosecute, (iv) Scope of the obligation to extradite or prosecute, and (v) Methodological questions to be addressed while dealing with this topic. It also contained a general plan of action on future work by the Commission on this topic.

4. At its fifty-ninth session (2007), the Commission had considered the second report of the Special Rapporteur, which contained draft article on scope of application, as well as a proposed plan of action further development. The focus of the report was on four main issues, namely; (i) the question of the source of the obligation to extradite or prosecute; (ii) the problem of the relationship between this obligation and the concept of universal jurisdiction, and how it should be reflected in the draft; (iii) the issue of the scope of the said obligation; and (iv) the question of surrender of an alleged offender to an international criminal conduct.

5. At the sixtieth session (2008), the Commission considered the third report on obligation to extradite or prosecute (*aut dedere aut judicare*) prepared by the Special Rapporteur. The report discussed about the comments made by the member States on specific questions raised by the Commission and also proposed change in draft Article 1 and 2. At the sixty-first session, the Commission had for consideration comments and information received from Governments.

B. Consideration of the Topic at the Sixty-Second Session (2010) of the International Law Commission

6. At the sixty-second session of the Commission, on this topic it reconstituted the Working Group and had discussions with the aim of specifying the issues to be addressed to further facilitate the work of the Special Rapporteur.[1] It had before it a Survey of multilateral conventions which may be of relevance for the Commission's work on the topic, prepared by the Secretariat[2], and a working paper prepared by the Special Rapporteur[3] containing some observations and suggestions based on the general framework proposed in 2009 and drawing upon the survey by the Secretariat.

7. The "Survey of multilateral conventions" prepared by the Secretariat for the purpose of the study identified 61 multilateral instruments both at the universal and regional levels that contain provisions combining extradition and prosecution as alternative courses of action for the punishment of offenders. The study also proposes a description and typology of the relevant instruments in light of those provisions, and examines the preparatory works of certain key conventions that have served as models in the field, as well as the reservations made to the relevant provisions. It also points out the differences and similarities between the reviewed provisions in different conventions and their evolution. Part III describes the (a) relationship between extradition and prosecution in the relevant provisions; (b) conditions applicable to extradition under the various conventions; and (c) conditions applicable to prosecution under the various conventions.

8. The Conventions such as (i) 1929 Convention for the Suppression of Counterfeiting Currency and other conventions which have followed the same model; (ii) The 1949 Geneva Conventions and the 1977 Additional Protocol I; (iii) Regional conventions on extradition; and (iv) The 1970 Convention for the Suppression of Unlawful Seizure of Aircraft and other conventions which have followed the same model, that contained the relevant provisions in this regard, were considered. Based on the detailed survey, observations or the conclusive remarks were drawn, which were that:

9. It contained two main characteristics which are to ensure punishment to certain offences at international level and their use, for that purpose, mechanism combining the possibility of prosecution by the custodial State and the possibility of extradition to another State.

10. Such provisions have an element of an overall mechanism for the punishment of offenders provided for under the relevant international instruments, which usually also includes rules relating to the criminalization of certain offences, the establishment of jurisdiction, the search and arrest of alleged offenders, rules on cooperation in criminal

[1] See Report of the International Law Commission, Sixty-second session (3 May – 4 June and 5 – 6 August 2010), on *Bases for Discussion in the Working Group on the Topic "The obligation to extradite or prosecute (aut dedere aut judicare),* document no. A/CN.4/L.774.
[2] A/CN.4/630. For the Comments and Information before the Commission at its fifty-ninth (2007), sixtieth (2008) and sixty-first sessions, see A/CN.4/57 and Add.1-4, A/CN.4/599 and A/CN.4/612.
[3] A/CN.4/L.774.

matters and the regime of extradition. Such provisions must be read in totality with the international instrument and not in isolation.

11. There are fundamental distinction between, multilateral conventions on extradition, which aim at regulating international judicial cooperation on criminal matters regardless of the nature of the offence concerned, and, on the other hand, conventions concerning specific offences of international concern that aim at the criminalization of such offences and the establishment of an effective international system for that purpose. The distinction is on the emphasize on obligation to extradite and only contemplate prosecution as an exceptional alternative to avoid impunity in the former sort of conventions, while the latter focus on the conditions to ensure prosecution, mainly regulating extradition as a mechanism to ensure that the alleged offender is brought to trial, and

12. The scope of each provision need to be made on a case-by-case basis by taking into account the formulation of the provision, the general economy of the treaty in which it is contained and the relevant preparatory works undertaken to finalise the treaty.

C. Issues of Consideration for the Commission

13. The issues that are of concern for the Commission[4] are:

(i) The legal bases of the obligation to extradite or prosecute;
(ii) The material scope of the obligation to extradite or prosecute;
(iii) The content of the obligation to extradite or prosecute;
(iv) Relationship between the obligation to extradite or prosecute and other principles;
(v) Conditions for the triggering of the obligation to extradite or prosecute;
(vi) The implementation of the obligation to extradite or prosecute; and
(vii) The relationship between the obligation to extradite or prosecute and the surrender of the alleged offender to a competent international criminal tribunal ("the third alternative").

D. Summary of Views Expressed by AALCO Member States on the Topic in the Sixth (Legal) Committee of the UN General Assembly at its Sixty-Fifth Session (2010)

14. At the Sixty-fifth session of the Sixth (Legal) Committee of the UN General Assembly, the following member states of the AALCO expressed their views on this topic; namely, (i) Libyan Arab Jamahiriya, (ii) Nigeria, (iii) Sri Lanka, (iv) Thailand, (v) Republic of Korea, and (vi) India. The member states of AALCO, welcomed that the survey of multilateral conventions relevant to the topic of "the obligation to extradite or prosecute" prepared by the Secretariat and commended it to be very significant and noteworthy.

[4] See Supra n. 1, at p. 2.

15. The Delegate of the **Libyan Arab Jamahiriya** said that his country would submit in writing any comments and proposals that it wished to make after completing its examination of the valuable work achieved by the International Law Commission on various topics. Further, they also looked forward to progress on topics as "The obligation to extradite or prosecute (*aut dedere aut judicare*)".

16. The Delegate of **Nigeria** welcomed the survey prepared by the Secretariat on the multilateral conventions relevant to the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)", and emphasized that it would ultimately assist efforts to strengthen the international rule of law and promote a rules-based international order. His delegation supported the Commission's view that special rapporteurs required assistance beyond that which could currently be provided to them by the Secretariat.

17. The Delegate of **Thailand** commended the Secretariat on its impressive compilation of multilateral conventions relating to the obligation to extradite or prosecute. The delegate stated that the Commission might look into whether there was emerging or established State practice according to which, under a treaty or customary international law, a requested State was bound either to extradite an offender to the requesting State, unless objectively justifiable circumstances militated against it, or to prosecute an offender in the requested State in lieu of extradition, provided that the prosecution was not a mere sham. Another alternative was to consider whether there was some other available form of prosecution, such as in a third State with jurisdiction over the offence and/or the offender in question.

18. It was also mentioned that the conditions of extradition should also be scrutinized to ensure that they could not be abused by the requested State so as to unjustifiably shield the offender from prosecution by the requesting State. In addition, consideration could be given to the issue of surrender of the offender to a competent international criminal court or tribunal when the State concerned where the court or tribunal in question had competence, was unable or unwilling to prosecute perpetrators of genocide, crimes against humanity, war crimes and aggression.

19. The Delegate of **Sri Lanka** informed that this topic being of great current relevance, the outstanding work on them should not be delayed further.

20. The Delegate of **Republic of Korea** said that the obligation to extradite or prosecute was a duty under treaties to which a State was a party; it was not a duty under international customary law. Moreover, the principle of *aut dedere aut judicare* was neither equivalent to nor synonymous with universal jurisdiction, but inextricably they were linked to it insofar as a State signatory to a treaty incorporating that obligation might exercise jurisdiction as appropriate, including in situations where it was unconnected to the crime concerned.

21. The Delegate of **India** said that his delegation supported the objective of the obligation to extradite or prosecute wherein an offender should not be allowed to go unpunished on the basis of a technicality. Ensuring prosecution would work as a deterrent and would strengthen the cause of the administration of justice and the rule of law. In this

regard, the delegate cited that the Indian Extradition Act of 1962 and the bilateral extradition treaties to which it was a party all contained provisions concerning the duty to extradite or prosecute that were implemented in letter and spirit in respect of all extradition offences. India was also a party to several international conventions dealing with international crimes that obliged States parties to extradite persons accused of offences defined in those conventions or to prosecute them in the event that an extradition request was refused. In the absence of a bilateral extradition treaty, those conventions could serve as a legal basis for extradition.

22. The resolution[5] adopted by the Sixth Committee during its Sixty-fifth session invited the ILC to give priority to its consideration of this topic.

[5] See resolution A/65/467 adopted by the Sixth Committee on 11 November 2010.

VIII. IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

A. Background

1. The Commission, at its fifty-ninth session (2007), decided to include the topic "Immunity of State officials from foreign criminal jurisdiction" in its programme of work and appointed Mr. Roman A. Kolodkin as Special Rapporteur. At the same session, the Commission requested the Secretariat to prepare a background study on the topic.

2. At its sixtieth session (2008), the Commission considered the preliminary report of the Special Rapporteur (A/CN.4/601). The Commission had also before it a memorandum by the Secretariat on the topic (A/CN.4/596 and Corr.1). In the absence of a further report the Commission was unable to consider the topic at its sixty-first session (2009).

B. Consideration of the Topic at the Sixty-Second Session

3. At the sixty-second session, the Commission was not in a position to consider the second report of the Special Rapporteur, which was submitted to the Secretariat.

C. Summary of Views Expressed by AALCO Member States on the Topic in the Sixth (Legal) Committee of the UN General Assembly at its Sixty-Fifth Session (2010)

4. The Delegate of **Libyan Arab Jamahiriya** regrettably noted that the Commission had not yet addressed the topic "Immunity of State officials from foreign criminal jurisdiction". He stated that it was a matter of immediate practical significance and ongoing concern to African Union States that had already been taken up in numerous regional and international forums of note.

5. The Delegate of **Nigeria** said that his delegation regretted the Commission's failure to consider the topic "Immunity of State officials from foreign criminal jurisdiction" during the period under review and hoped that the Commission and its special rapporteur would give priority to that issue in the near future.

IX. THE MOST-FAVOURED-NATION CLAUSE

A. Background

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

B. Consideration of the Topic at the Sixty-Second Session (2010) of the International Law Commission

2. The present session of the Commission took note of the oral report of the Co-Chairmen of the Study Group. The report[1] considered papers on: (i) catalogue of MFN provision, (ii) the 1978 Draft Articles of the International Law Commission, (iii) MFN in the GATT and the WTO, (iv) the Work of OECD on MFN, (v) the Work of UNCTAD on MFN, and (vi) the *Maffezini* problem under investment treaties.

3. On *cataloguing of the MFN provisions*, various bilateral investment agreements (BITs) and free trade area agreements (FTAs) were considered. It includes sampling of MFN provisions in those two set of agreements, provisions under specific agreements in relation to post-establishment and pre-establishment phase, provisions of exceptions within and outside the specific MFN provision. The paper on *the 1978 Draft Articles of the International Law Commission,* dealt essentially with various factors like proliferation of bilateral investment treaties, shift in importance from trade to investment, decline in the enthusiasm of the New International Economic Order (NIEO), developments of regional integration, etc.. However, it was suggested that despite prevailing circumstances, it was required to revise the set of draft articles in order to incorporate contemporary utility and development issues as well.

4. Having underlined the relevance of the MFN clauses as the fundamental requirement of GATT/WTO agreements in terms of practice, interpretation of the WTO agreements through dispute settlement mechanism, the paper highlighted that exceptions to this provision leads to curtailment of this clause. The conclusions drawn were tentative as there was insufficient jurisprudence on the interpretation of the MFN provisions under the WTO to be too definitive. On the paper, *Work of OECD on MFN,* several instruments that were negotiated in order to adhere to the objectives of the OECD like liberalization of capital movements and free movement of goods, shows the significant role played by

[1] See Chapter XI of the Report of the International Law Commission: Sixty-second session (3 May-4 June and 5 July – 6 August 2010): Official Records Sixty-fifth session Supplement No. 10 (A/65/10) pp: 336-341.

the OECD in this regard. It also considered negotiations on the draft Multilateral Agreement on Investment (MAI) and issues raised therein, including the MFN clause whose scope covered the pre-establishment and post-establishment phases of investment, the work of the OECD on the terms "In like circumstances" and on issues such as the scope of the MFN treatment in relation to privatisation, intellectual property, investment incentives, monopolies and state enterprises, investment protection, and exceptions (general and specific) to MFN provision.

5. The two main publications of the UNCTAD were considered in order to discuss issues concerning the scope and definition of the MFN standard, the role of the MFN standard in protecting investors, different ways in which the standard has been formulated in various agreements and exceptions to the standard, including the provisions on regional economic integration organizations (REIOs), the reciprocity requirements and intellectual property considerations, and so on. This paper intends to collect and analyse state practice on this issue.

6. The paper on the *Maffezini problem under investment treaties* reviewed the development relating to the broad interpretation given by arbitral tribunals to the MFN clause in investment agreements, in a series of decisions relating to investment disputes starting with the *Maffezini* case. The main problem was whether it could be determined with any certainty, what obligations a contracting party had undertaken when including the MFN clause within an investment treaty and in particular the relationship of the MFN clause to provisions relating to dispute settlement. Correlative question was whether substantive rights and protection standards contained in a treaty with a third State, which were more beneficial to an investor, could be relied upon by such an investor to his advantage, by virtue of the MFN clause.

C. Issues of Consideration for the Commission

7. The central focus of the discussions was on the interpretation of the MFN clauses, particularly in the context of investment relations and attempt was to formulate guidelines to be used as interpretative tools in order to assure some certainty and stability in the field of investment law. The preparation of the draft articles on MFN clause or a revision of the 1978 draft articles at this stage was considered as premature. The following were the main suggestions for the future work of the Study Group.

(i) Studying issues concerning the relation between trade in services and in intellectual property, in the context of MFN in the GATT and WTO and its covered agreement, and investment;

(ii) Identifying the normative content of the MFN clauses in investment, and to undertake a further analysis of the case law, including the role of arbitrators, factors that explain different approaches to interpreting MFN provisions, the divergences, and the steps taken by States in response to the case law; and

(iii) Review the types of MFN clauses that have been applied, the types of questions that have been the subject of determination in respect of the MFN clause, as well as to examine the outcomes in the arbitral awards, in light of the rules of treaty interpretation in the Vienna Convention on the Law of Treaties.

8. The Co-Chairmen of the Study Group was asked to address the above-mentioned issues and prepare an overall report and submit along with questions for consideration for the next session.

D. Summary of Views Expressed by AALCO Member States on the Topic in the Sixth (Legal) Committee of the UN General Assembly at its Sixty- Fifth Session (2010)

9. At the Sixty-fifth session of the Sixth (Legal) Committee of the UN General Assembly, the following member states of the AALCO expressed their views on this topic; namely, (i) Libyan Arab Jamahiriya, (ii) Thailand, (iii) Sri Lanka, (iv) Republic of Korea, (v) India and (vi) Singapore.

10. The Delegate of the **Libyan Arab Jamahiriya** said that his country would submit in writing any comments and proposals that it wished to make after completing its examination of the valuable work achieved by the International Law Commission on various topics. Further, they also looked forward to progress on topics as "Most-Favoured Nation clause".

11. The Delegate of **Thailand** stated that the topic of the most-favoured-nation clause was important in an era when economic prosperity or under-development in one State could have far-reaching economic, financial, social or political effects on the rest of the international community. The delegate suggested that the Commission might wish to explore the use of such clauses in multilateral investment treaties and in bilateral treaties or free trade agreements among States, one or more of which were also parties to multilateral investment treaties, so as to see how to reconcile divergences between the two parallel regimes.

12. The Delegate of **Sri Lanka** while making observation on this topic said that it now assumed particular significance for because of proliferation of bilateral investment treaties and the consequent shift in importance with respect to such clauses from trade to investment matters. The papers prepared by members of the Study Group on the topic would undoubtedly serve as a useful basis for future discussions, culminating in the drafting of broad guidelines or model clauses designed to bring greater coherence and consistency to the operation of the most-favoured-nation clause in contemporary situations. Member States and arbitral tribunals would each benefit from such an outcome.

13. The Delegate of **Republic of Korea** opined that the Commission should consider how this topic might be examined in relation to traditional areas of international law other than trade and also whether the clause applied to both the procedural and substantive aspects of a treaty. The Delegate of **India** welcomed the work of the Study Group and

expressed the hope that the Commission would add clarity to the use and implications of most-favoured-nation clauses.

14. The Delegate of **Singapore** said that his delegation agreed that the topic needed to include issues concerning trade in services, intellectual property; and that the 1978 draft articles of the Commission on the topic required re-examination, owing to the recent explosion of most-favoured-nation clauses in free trade agreements and bilateral investment treaties. One of the perennial issues that arose in the negotiation of such instruments related to the scope of the most-favoured-nation obligation. An undesirable level of uncertainty surrounded the ambit of those clauses, given the differing approaches towards them by dispute settlement bodies. While the decision in the *Maffezini v. the Kingdom of Spain* case appeared to have been rejected by most recent tribunal decisions, others had followed the *Maffezini* decision. Consequently, countries had sought to specify in the investment-related provisions of their free trade agreements that procedural rights did not fall within the ambit of the most-favoured-nation clause, although it remained to be seen whether tribunals would interpret such provisions as intended. His delegation urged the Commission to expedite its work on the issue and provide much-needed clarity in that area of law, which would be of immediate benefit to the international community.

X. SHARED NATURAL RESOURCES

A. Background

1. The Commission, at its fifty-fourth session (2002), decided to include the topic "Shared natural resources" in its programme of work and appointed Mr. Chusei Yamada as Special Rapporteur. A Working Group was also established to assist the Special Rapporteur in sketching out the general orientation of the topic in the light of the syllabus prepared in 2000. The Special Rapporteur indicated his intention to deal with confined transboundary groundwaters, oil and gas in the context of the topic and proposed a step-by-step approach beginning with groundwaters.

2. From its fifty-fifth (2003) to its sixty-first (2009) sessions, the Commission received and considered five reports and a working paper from the Special Rapporteur. At its fifty-eighth session (2006), the Commission adopted, on first reading, draft articles on the law of transboundary aquifers, consisting of 19 draft articles, together with commentaries thereto. At its sixtieth session (2008), the Commission adopted, on second reading, a preamble and a set of 19 draft articles on the law of transboundary aquifers, with a recommendation that the General Assembly: (a) take note of the draft articles and annex them to a resolution; (b) recommend to States concerned to make appropriate bilateral or regional arrangements for the proper management of their transboundary aquifers on the basis of the principles enunciated in the draft articles; and (c) consider, at a later stage, and in view of the importance of the topic, the elaboration of a convention on the basis of the draft articles. Also between 2003 and 2009, the Commission established five working groups on shared natural resources, the first of which was chaired by the Special Rapporteur and the other four by Mr. Enrique Candioti.

B. Consideration of the Topic at the Present Session

3. At the present session, the Commission decided once more to establish a Working Group on Shared natural resources, chaired by Mr. Enrique Candioti. The Working Group had before it a working paper on oil and gas (A/CN.4/621) prepared by Mr. Shinya Murase. The Commission took note of the oral report of the Chairman of the Working Group on Shared natural resources and endorsed the recommendation of the Working Group.

1. Discussions of the Working Group

4. The Working Group continued its assessment on the feasibility of future work on oil and gas on the basis of a working paper prepared by Mr. Shinya Murase (A/CN.4/621), as well as its previous discussions on the subject.

5. The essential recommendation of the working paper by Mr. Murase was that the transboundary oil and gas aspects of the topic should not be pursued further by the Commission. It was recalled that the topic "Shared natural resources" was included in the programme of work of the Commission on the basis of a 2000 syllabus prepared by Mr.

Robert Rosenstock which sketched out the general orientation of the topic, noting that the Commission should focus "exclusively on water, particularly confined groundwater, and such other single geological structures as oil and gas". However, there was no specific syllabus concerning oil and gas resources. It was for that reason, consistent with the step-by-step approach proposed by the Special Rapporteur, Mr. Chusei Yamada, that following the completion of the work on transboundary aquifers it had become necessary to consider the feasibility of work on oil and gas.

6. In selecting a topic, the Commission was generally guided by established criteria, including: that the topic reflected the needs of States in respect of the progressive development and codification of international law; that the topic was sufficiently advanced in stage in terms of State practice to permit progressive development and codification; and that the topic was concrete and feasible for progressive development and codification.

7. An analysis of comments received from Governments, as well as statements made in the Sixth Committee, revealed three essential trends: one set of views favoured that the Commission take up work on oil and gas, while another took a middle course, advising a more cautious approach advocating that whatever final position was taken on how to proceed it should be on the basis of broad agreement. Yet another set, expressing a preponderant view, suggested that the Commission should not proceed further with the subject. In the main, the reasons that were advanced for each of these views were varied but revolved around: (a) the extent to which similarities could be drawn between oil and gas and aquifers; (b) whether the extent to which oil and gas issues were closely intertwined with the bilateral interests of the States posed particular hurdles for codification; (c) whether oil and gas issues could be separated from maritime delimitation; (d) whether oil and gas issues were suitable for codification; and (e) whether the political sensitivity and technical difficulty involved in oil and gas issues might be overcome.

8. The working paper noted that a majority of States was of the view that the transboundary oil and gas issues were essentially bilateral in nature, as well as highly political and technical, involving diverse situations. Doubts were expressed as to the need for the Commission to proceed with any codification exercise on the issue, including the development of universal rules. It was feared that an attempt at generalization would inadvertently lead to additional complexity in an area that may have been adequately addressed through bilateral efforts. Given that oil and gas reserves were often located on the continental shelf, there was also a concern that the subject had a bearing on maritime delimitation issues. Maritime delimitation, which, in political terms, was a very delicate issue for the States, would be a prerequisite for the consideration of this as sub-topic, unless the parties had mutually agreed not to deal with delimitation.

9. Furthermore, it was considered that the option of collecting and analyzing information about State practice concerning transboundary oil and gas or elaborating a model agreement on the subject would not lead to a fruitful exercise for the Commission, precisely because of the specificities of each case involving oil and gas. The sensitive

nature of certain relevant cases could well be expected to hamper any attempt at a sufficiently comprehensive and useful analysis of the issues involved.

2. Recommendation of the Working Group

10. The Working Group considered all aspects of the matter taking into account the views of Governments, including as reflected in the working paper by Mr. Murase. In light of the foregoing, it decided to recommend that the Commission should not take up the consideration of the transboundary oil and gas aspects of the topic "Shared natural resources".

C. Summary of Views Expressed by AALCO Member States on the Topic in the Sixth (Legal) Committee of the UN General Assembly at its Sixty-Fifth Session (2010)

11. The Delegate of the **Libyan Arab Jamahiriya** said that his delegation had also looked forward to the Commission's consideration of the oil and gas aspects of the topic "Shared natural resources". As stated in the working paper on the feasibility of future work on those aspects (A/CN.4/621), transboundary oil and gas issues were complex, not least in view of their link with such particularly delicate subjects as boundary delimitation and continental shelves, and the codification of general rules was likely to involve matters best dealt with by States on a case-by-case basis. His country nonetheless held that consideration of the topic by the Commission would help to alleviate the growing number of difficulties faced in that context. He therefore expressed the hope that the option of collecting and analysing information about State practice concerning oil and gas would be re-evaluated with a view to devising general guidelines applicable to all cases.

12. The Delegate of **Thailand** observed that his delegation agreed with the Commission's endorsement of the Working Group's recommendation that, owing to the sui generis nature of bilateral agreements on oil and gas reserves that straddled national land frontiers and maritime boundaries, it might not be feasible to develop or codify international law in that area, unless the Commission could find ways to exclude those sensitive issues from the scope of its deliberations.

13. The Delegate of **India** that his delegation fully subscribed to the Working Group's recommendation that the Commission should not take up the transboundary oil and gas aspect of the topic for consideration. Those issues were best dealt with at the bilateral level, bearing in mind geological features and other regional specifics. Codification attempts in that field could affect established bilateral treaty obligations and assiduously negotiated agreements at the political level.

14. The Delegate of **Singapore** that his delegation supported the recommendation that the Commission should not take up the transboundary oil and gas aspects of that topic and should focus its work essentially on transboundary aquifers. Humans depended on fresh water for survival in a way that they did not on oil and gas resources, and water

sources were more susceptible to pollution. It appeared sensible for the Commission to proceed with the draft articles focused on transboundary aquifers, which would form a useful reference point if the focus eventually turned to shared oil and gas resources.

XI. COMMENTS AND OBSERVATIONS OF THE AALCO SECRETARIAT

A. Reservations to Treaties

1. Many vexing, complicated, and important problems of international law relate in some way to reservations to multilateral treaties. It is no longer doubted that the right of States to make reservations to multilateral treaties is important to the functioning of an international legal system, a major component of which is multilateral treaties. With the development of the multilateral treaty system came the concept of reservations to treaties.

2. Under the old unanimity rule, in order for a reservation to be accepted it required the assent of all the Parties to the treaty. This has given way to a much more flexible standard which permits reservations under many circumstances. The Vienna Convention on the Law of Treaties is the authoritative instrument on the international law of treaties. Most of its provisions are thought to reflect customary international law, so that they are considered binding even on nation-states that are not formally parties to the Vienna Convention. This new regime in the Vienna Convention was designed to introduce necessary flexibility into treaty making given the rise of multinational agreements in the 20th century, and the increased number of nations involved in such agreements.

3. Conceptually, the issue of the desirability of reservations is straightforward. Most arguments in favor of the liberal use of reservations have as their cornerstone the belief that the liberal admissibility of reservations will encourage wider acceptance of treaties. As opposed to this, a contrary view is also often expressed that a legal regime which is more permissive to making reservations will simply undermine the integrity of the multilateral treaty regime.

4. Hence, when the International Law Commission included in its agenda the topic of 'reservation to treaties' it had its task cut out: to fill the gaps and ambiguities contained in the law of reservations enshrined in the Vienna Convention on the Law of Treaties 1969, Vienna Convention on Succession of States in Respect of Treaties 1978; and the Vienna Convention on the Law of Treaties between States and International Organizations of 1986. One of the most important lacunae of the Vienna Conventions was that fact that they did not have rules concerning interpretative declarations. They also did not contain rules concerning the effects of invalid reservations. They were also silent as to the legal consequences that would follow when reservations made by a State is perceived by another as being inconsistent with the object and purpose of the treaty within the meaning of Article 19 of the Vienna Convention on Law of Treaties 1969.

5. Since 1993, the International law Commission has been developing a "Guide to Practice"- draft guidelines with commentaries and, if necessary, model clauses - on the subject of reservation to treaties. This project is intended to maintain the regime of the Vienna Conventions of 1969, 1978 and 1986 while filling in gaps and clarifying the law. By systematizing practice, the International Law Commission hopes to make it easier for all concerned to agree on the scope of the obligations to which a State has consented in

accepting a treaty subject to reservations and then to clarify whether it is a Party and if so, to what extent.

6. To date the International Law Commission has provisionally adopted more than hundred draft articles covering such matters as the formulation, communication and withdrawal of reservations, interpretative declarations and other unilateral statements. It is these draft guidelines that constitute the Guide to Practice on the reservation to treaties. The Special Rapporteur on the topic Mr. Alain Pellet has submitted sixteen reports on the topic to the Commission, covering an entire gamut of issues on the law relating to reservation to treaties. The Special Rapporteur also stated that he intended to submit a final report in which he planned to make an appraisal of the topic and propose two annexes to the Guide to Practice that would deal respectively with the "reservations dialogue" and the settlement of disputes relating to reservations.

7. The draft guidelines that constitute the Guide to Practice have come out with invaluable insights on a wide range of complex legal issues relating to the law on reservations. They also command State support on a wide range of issues. Despite this, there still exist some areas of concerns. For example, the draft guideline 3.5 which deals with the permissibility of an interpretative declaration, provides that:

> A State or an international organization may formulate an interpretative declaration unless the interpretative declaration is prohibited by the treaty or is incompatible with a peremptory norm of general international law.

8. The problem here lies in its reference to the peremptory norm of general international law or otherwise known as *jus cogens*, which is mentioned in Article 53 of the Vienna Convention on Law of treaties 1969. It needs to be remembered here that no attempt has been made to define in a black letter text what norms of general international law qualify as norms of *jus cogens*. Since there is no clear criteria by which such norms could be identified, this draft guideline could give rise to disputes in practice and thereby undermine the value of the draft.

9. Similarly, the draft guide line 3.5.1 according to which unilateral statement which purports to be an interpretative declaration could be construed as a reservation, poses a problem in that who is conferred with the authority to decide whether a unilateral declaration constitutes a reservation?.

10. It has also been noticed that a substantial number of observations made by the International Law Commission in its preliminary conclusions appear to contradict the approach adopted by the Human Rights Committee's General Comment No.24 as regards the consequences of inadmissible reservations. Whose opinions are authoritative is a matter of debate. It has also been noticed that the text of the draft guidelines and their commentaries adopted on the topic are too big and too detailed that States will find it difficult to comprehend it. This has been exacerbated by the fact that a number of guidelines do not have adequate support in terms of state practice. It is indeed our hope that the Commission and Special Rapporteur would recognize these problems and take appropriate measures.

11. Undoubtedly, one of the great achievements of the International Law Commission as regards the issue of the international law on reservations, has been the adoption of the “Guide to Practice” which seeks to fill the lacunae in Articles 20 and 21 of the 1969 and 1986 Vienna Conventions. As is well known, it was not intended to provide a complete inventory of existing practice but rather to conduct a survey of existing practice and jurisprudence in order to deduce generally applicable rules and produce a non-binding instrument to guide State practice with respect to reservations. This has been accomplished efficiently and the guidelines would motivate States to clarify their intentions when issuing reservations, expressing the premises for their consent to be bound by treaty where relevant.

12. The Commission had requested comments concerning the topics of reservations to treaties and the responsibility of international organizations by January 2011**.** Although the wish to complete work on the topic was commendable, the time allowed was NOT adequate. In particular, it would be the first opportunity for States to comment on the guidelines on reservations to treaties as a whole and it would be imperative to have a longer period for reflection, something that the Commission should take into account when deciding how to proceed at its sixty-third session. Also it would be in keeping with the interests of the future users of the guide to practice that the Commission marks those part of the guide that represent mere codification and that part which represent progressive development when it is finally planned to be adopted at its next Session.

B. Treaties over Time

13. The International Law Commission, in its consideration of the topic “Treaties over time”, attempts to clarify the practical and legal significance of “subsequent agreements” and the “subsequent practice” of the parties as a means of the interpretation and application of treaties (Article 31 (3) (a) and (b) of the Vienna Convention on the Law of Treaties, 1969). Even though the evolutive method of interpretation stands codified in Article 31, paragraph 3 (a) and (b), of the Vienna Convention on the Law of Treaties, these provisions had not been analyzed in depth owing to the difficulty of identifying subsequent agreement and practice merely from studies and reports.

14. The Commission had established a Study Group in 2009 to consider the issues to be covered, working methods, and possible outcome of work on the topic. The main question had been whether the work of the Study Group should focus on subsequent agreement and practice, or whether it should follow a broader approach by also dealing with other issues such as:

> (a) the effects of certain acts or circumstances on treaties (termination and suspension, other unilateral acts, material breaches and changed circumstances);
>
> (b) the effects of supervening sources of international law on treaties (effects of successive treaties; supervening custom; *desuetudo* and obsolescence); and (c) amendments and *inter se* modifications of treaties.

15. The Group had decided that it should focus first on subsequent agreement and practice, while continuing to explore the possibility of approaching the topic from a broader perspective. In this regard it should be stressed here that the study of the Commission on this issue could be expanded to include, *inter alia,* an examination of evolutive interpretation.

16. The Chairman of the Study Group is expected to prepare a report, to be submitted in 2010, on subsequent agreement and practice as addressed in the jurisprudence of the International Court of Justice and other international courts and tribunals. It is a welcome sign the other interested members of the Study Group had been encouraged to submit contributions on the issue of subsequent agreement and practice, particularly at the regional level or in relation to special treaty regimes or specific areas of international law. Members had also been invited to provide contributions on other issues falling within the broader scope of the topic.

17. As regards the possible outcome of the Commission's work, it needs to be underlined here that the final product should provide practical guidance for States. The idea of elaborating a repertory of practice, to be accompanied by a number of conclusions, had received broad support in the Study Group, but the need to remain flexible needs to be stressed.

18. It can hardly be exaggerated that over time, treaties which are designed to preserve the agreement between parties in a legally binding form would have to contend with evolving circumstances and subsequent developments which may affect the existence, content or meaning of the said treaties. This is especially true in the context involving law-making treaties. Articles 31(3)(a) and (b) of the Vienna Convention on the Law of Treaties, merely reflect this fundamental need. It also needs to be reiterated here that this exercise should not be used as a pretext to go beyond the intention of the State Parties of the instruments concerned. Where to draw the line in a manner acceptable to all the parties to that instrument is indeed a tricky issue. In this regard, the work of the Study Group would go a long way in assisting Member States of the United Nations in approaching this delicate subject matter.

C. Expulsion of Aliens

19. The topic "Expulsion of aliens" merited serious consideration by the Commission in order to fill gaps in existing law and improve normative standards. Abuse or maltreatment of aliens was a common phenomenon and had the potential to undermine friendship and good neighbourliness and to threaten international peace and security. Aside from the question of human rights in general, the sovereign prerogative of a State to expel aliens must not be exercised arbitrarily and without reasonable or justifiable cause.

20. It was necessary to strike the right balance between a State's sovereign right to expel aliens and the need to respect the human rights of the affected individuals. Therefore, care should be taken to find a balance between the right of States to expel aliens and their obligation to respect the human rights of the persons being expelled. It

needs to be noted that the right to expel aliens was inherent in State sovereignty, although the exercise of that right must be in accordance with established principles of general international law. An alien being expelled should enjoy the protection accorded by international human rights law, and specifically those rules that were relevant, applicable and non-derogable. Therefore, it was important to strike a legal balance between the obligations of the expelling State and the receiving State, in accordance with the principles of international law. Therefore the right of States to expel aliens must be balanced with the obligation to respect human rights, taking into account the situation in the receiving State.

21. Commendable are the efforts being made in this regard by Mr. Maurice Kamto, the Special Rapporteur on the topic. Till date, the Special Rapporteur has presented six Reports and these contain a rich research work on the topic. The methodology adopted by the Special Rapporteur to firstly examine the source of international law recognized in article 38 of the Statute of the International Court of Justice; and then only in the absence of a rule derived from one or the other of those sources referring to domestic practice to serve as a basis for proposing draft articles as a matter of progressive development, clearly helps in analyzing the topic and striking the right legal balance.

D. Effects of Armed Conflicts on Treaties

22. The effect of armed conflict on treaties is an unsettled and unclear area of international law which requires elaborate research, particularly on State practice and consolidation of views and comments of the States. The AALCO Secretariat appreciates the work done by Late Sir Ian Brownlie, former Special Rapporteur for the topic and Mr. Lucius Caflisch, the current Special Rapporteur for the topic. Greater emphasis on the State practices and views and comments of the Asian-African countries are required taking into account the subject matter of the draft articles.

23. Whether the draft articles are to be applied to non-international armed conflicts is a highly debatable question. It is true that majority of contemporary armed conflicts falls within the category of non-international armed conflicts, excluding it might have an effect on the scope of the draft articles. Defining "Armed Conflict" and inclusion of non-international armed conflicts are very vital areas were AALCO Member States could have a position taking into view the potential legal issues that might arise. Defining "Armed Conflicts" itself is a challenging task. The Special Rapporteur proposed two possibilities. The definition used in 1995 by the International Criminal Tribunal for the Former Yugoslavia, in the *Tadić* decision, with the exclusion of the last clause dealing with armed force between organized armed groups within a State since the draft articles clearly applied only to situations involving at least one contracting State participating in the armed conflict or to combine article 2 of the Geneva Conventions of 1949 and article 1, paragraph (1), of the 1977 Additional Protocol II dealing with non-international armed conflicts. The *Tadić* definition had the effect of including non-international armed conflicts. Hence defining "Armed Conflicts" really needs thorough consultation and inputs of the Asian-African countries so as to make it more acceptable. Proposal for

inclusion of international organization within the scope of the draft articles also requires serious deliberations.

24. Special Rapporteur pointed out that the purpose of the draft article 15 was to prevent an aggressor State from benefiting from a conflict it had triggered in order to put an end to its own treaty obligations. This draft article requires further consultation and studies. An accepted definition on aggression is a pre-requisite to define the scope of draft article 15. Reference to UN General Assembly resolution 3314 (XXIX) of 14 December 1974 has led to some disagreement amongst Member States. It may be noted that the 2010 Review Conference to the Rome Statute held at Kampala, Uganda had adopted article 8 *bis* of the Rome Statute of the International Criminal Court. This development had created mainly two set of views: i) Since the Rome Statute was concerned with the criminal responsibility of individuals, its provisions on aggression were irrelevant to the effects of armed conflicts on treaties; and ii) Resolution 3314 (XXIX) had provided the basis for the definition of aggression adopted at the Review Conference, which was proof of its universal acceptance and relevance. Taking into account the complexities involved, these issues require more careful study on the part of the Member States.

E. Protection of Persons in the Event of Disasters

25. On the topic of "Protection of Persons in the Event of disasters", the Commission considered the third report submitted by the Special Rapporteur which provided an overview of the views of States on the work undertaken by the Commission so far, a consideration of the principles that inspire the protection of persons in the event of disasters, in its aspect related to persons in need of protection, and a consideration of the question of the responsibility of the affected State.

26. The report relates to draft articles 6 to 8 as proposed by the Special Rapporteur. Draft article 6 sets out the key humanitarian principles relevant to disaster response. It consists of three parts: the first confirms the three core humanitarian principles applicable in this topic, the second is the reference to non-discrimination, and the third a reference to the needs of the particularly vulnerable persons.

27. Draft article 7 recognizes the importance of the inherent human dignity of the human person being respected and protected during the process of responding to a disaster. Protection of human dignity needed to be read along with the difficulties and challenges in ensuring humanitarian aid to people. The reference to "States, competent inter-governmental organizations and relevant non-governmental organizations" provides an indication of the actors to which the provision is addressed. It recognizes the reality that a vast amount of disaster relief assistance is provided by assisting States and non-State actors such as international organizations and non-governmental Organizations.

28. Draft article 8 deals with the primary responsibility of the affected State. The Drafting Committee decided, for the sake of clarity, to separate into two paragraphs the obligation of the affected State to protect persons and to provide disaster relief assistance.

In addition, the Committee affirmed the primary role of the affected State in directing, controlling, coordinating and supervising disaster relief and assistance activities on its territory. The draft article also deals with the duty to ensure the protection of persons as well as to provide disaster relief and assistance. A key issue of discussion related to whether it was necessary to include a description of the origin of the duty. During the plenary debate, several members had spoken out in favour of a reference to the principle of sovereignty. Although some felt that it was not strictly necessary to make a reference to sovereignty, the Committee nonetheless decided to do so out of recognition that, in the present context, such reference was common to texts concerning disaster relief and assistance and would not be out of place in the draft.

29. As regards the primary responsibility of the affected State, the States only will have the principal responsibility for meeting the needs of victims of humanitarian crisis within their own borders and that they should decide where, when and how relief operations were to be conducted. It is a general view that States must retain the ultimate autonomy in finding the right balance between helping all human beings in dire need in a proportionate manner. The disaster relief efforts by the affected State should be respected and adhered to by the assisting States and inter-governmental Organizations.

F. Obligation to Extradite or Prosecute (*Aut Dedere Aut Judicare*)

30. There has been considerable progress on the work of this topic since its introduction in the year 2004 at the fifty-sixth session of the Commission. Before venturing into the substantial comments, it may be recalled that AALCO during its fourth session held in Tokyo, Japan from 15 to 28 January 1961 had adopted *"Final Report of the Committee on Extradition of Fugitive Offenders"* and also the *"Articles containing the Principles concerning Extradition of Fugitive Offenders*".[1] The adopted Articles in the form of guidelines were adopted on 25 February 1961 and contains 30 articles

31. Certain queries that arise after perusing the document on Survey of multilateral conventions, shows that the main concerns on this topic are legal, material scope and content of the obligation to extradite or prosecute. It is desirable to have a set of guidelines on this topic or the material scope to be limited to *certain specific categories of obligations*. State practice, including recourse to the international criminal tribunals, had shown that crimes against humanity, war crimes, and genocide constituted the subject matter of the obligation under customary law. This obligation has nexus with general principles of criminal law (*nullum crimen sine lege, nulla poena sine lege, non bis in idem*) and other principles of international law as well.

32. The linkage between obligation to extradite or prosecute and the principle of universal jurisdiction is very relevant but should not be synonymously used, considering that there must be unified approach among the Asian-African States on which the implementation of universal jurisdiction becomes more problematic, it would be beneficial to have a study on its nexus and not its application. Since the topic will have a significant impact in the internal affairs of a State therefore, the States may consider

[1] The documents are available at the official website of AALCO: www.aalco.int.

expressing their concerns for making the work of the Commission more informative by furnishing national legislations dealing with this topic, to decipher State practice. Various domestic criminal laws have comprehensively applied these obligations that are mainly treaty-based.

33. Based on the conventional practice in the field, it is necessary to understand to what extent other issues relating to the request for extradition like standard of proof, political nature of the offence, immunities, etc., have an impact on the operation of the obligation. While examining the scope of the obligation of the requested State to take proceedings against the alleged offender, including the question of prosecutorial discretion enjoyed by national judicial authorities in this respect, caution must be attached to take substantial measures on respecting human rights and adhering to the principle of non-discrimination. It would be desirable to examine, if, and to what extent, a State that surrenders an alleged offender to a competent international criminal tribunal has fulfilled its obligation to extradite or prosecute.

G. Most-Favoured Nation Clause

34. The work of the Study Group on the topic most-favoured-nation clause has been speedily progressing. One could say that this topic was decided to be a long-term programme of work only during the sixtieth session of the Commission (2008). Previously, from 1967-1978, this topic was considered and draft articles were adopted in the year 1978. The world had evolved and circumstances had changed significantly since the Commission had adopted draft articles on the most-favoured-nation clause in 1978. Such clauses now played a different but increasingly important role in inter-State relations, and especially in bilateral investment and trade agreements.

35. The most-favoured-nation clause has significant impact on developing countries because of its inclusion in many bilateral, regional and multilateral investment treaties. This clause has become a central tenet of international investment and trade policy as developing countries in order to attain economic growth and development, would be more inclined to attract foreign investment and therefore, wants international trade both liberal and fair.

36. The oral statements made by study groups on this topic are highly relevant and deal with different arenas where this clause has significant impact in terms of reference in a treaty. The areas under study by the Study Group are vast and have serious implication on the trade, investment, intellectual property, goods and services related matter. However, main task would be to catalogue the MFN provisions in different agreements and draw similarities among those treaties. In this regard, inter-state relations at bilateral and regional level and the agreements signed thereunder plays a prominent role. An important aspect that needs to be dealt with the nature of those bilateral and regional agreements entered into by developing countries, for example, it could be two-fold: (i) agreements and treaties entered into between developing countries and developed countries; and (ii) agreements and treaties entered into between developing countries and developing countries. Both these agreements have difference in their applicability, yet the

implementation of this clause remains similar. Therefore, this clause must be analysed on a case-to-case basis.

H. Shared Natural Resources

37. The decision of the Commission to not to proceed with the consideration of the transboundary oil and gas aspects is timely. Indeed, the topic had complexity and sensitivity on account of oil and gas located near boundaries. Furthermore, it involved highly technical data, politically sensitive issues and questions relating to sovereignty of States. It was appropriate that such issues were dealt through bilateral or regional arrangements and therefore the Commission's decision not to proceed with the work on this topic, in view of it not being ripe for codification at this juncture was welcome. It was imperative to note that transboundary oil and gas issues were complicated by private and commercial interests that were not present in relation to transboundary aquifers. In view of this, it is suggested that the Commission may consider surveying the practice of inter-State and private contracts in order to elucidate some general trends in practice under both public and private law.

I. Proposal for consideration of a topic on International Environmental Law

38. The proposal that the Commission should select for its future work a topic relating to international environmental law, needs to be seriously considered. International Environmental Law has now become part of the mainstream of international law. In this regard, it may be noted that although the work of the ILC on international watercourses and transboundary aquifers had produced some relevant provisions, the Commission had not taken up any topic in international environmental law since concluding its work on international liability for injurious consequences arising out of acts not prohibited by international law. The ILC was in a position to contribute a great deal towards clarifying and redefining the basic principles and rules of international environmental law. In view of the world experiencing serious environmental degradation, it was imperative that the Commission should consider taking up topic of the atmosphere, as proposed by Prof. Shinya Murase, Member, ILC, in view of the increasing degradation of the atmospheric environment today. Though there are a number of conventions which touch upon the atmosphere, in total they are a patchwork of instruments, leaving substantial gaps and loopholes in terms of geographic coverage, regulated activities and, most importantly, the applicable principles and rules. This piecemeal approach is inappropriate for the atmospheric environment which by its very nature warrants holistic treatment. The Commission can make a meaningful contribution toward more effective lawmaking and dispute settlement in this field. Therefore, the Commission should explore the possibility of drafting or elucidating rules of international law addressing aspects of environmental protection, such as protection of the atmosphere that remained to be codified.

J. Proposal for new topics

39. The Delegate of the **Republic of Korea** at the Sixth Committee said that while the Commission should be cautious in adding new topics to its agenda, it should examine some issues that were critical in dealing with current problems in society. For example, as the Internet now permeated nearly every aspect of human life, it might be useful for the Commission to consider the issue of Internet-related international crime, which might be addressed either through feasibility studies conducted by the Secretariat or the establishment of an open-ended working group. It is submitted that the proposal by Republic of Korea for consideration of the Internet-related international crime merits attention of the Commission.

K. Assistance to Special Rapporteurs

40. The need to provide assistance to Special Rapporteurs is important as they perform a special role in the working methods of the Commission. It is essential therefore that the General Assembly re-considers its decision to reduce the honoraria to Special Rapporteurs vide resolution 56/272. It should consider, as desired by the Commission restoring the payment of honorariums to support the research work of Special Rapporteurs, especially those from developing countries, otherwise it puts them at a disadvantageous position.

41. In this regard, particularly appreciable are the efforts made by a Member State of AALCO to send young officers for attachment or internship programme at ILC. However, in view of ILC Members not taking internship or attachment officers its attempt could not bear results. Therefore, if the rules of procedure governing the work of ILC Members do not prohibit such practice, then the ILC Members who were from Asia and Africa should accept attachment or internship on the recommendation of the governments.

L. Other Issues

42. Some Delegations have desired that the Report of the ILC should be made available at least one month before it comes up for consideration by the Sixth Committee. Further, it has been observed by some delegations that reliance on the website editions of the reports was not always convenient for delegations that had problems accessing them. Therefore, an early submission of the Commission's Report would facilitate in-depth deliberations at the Sixth Committee.

SECRETARIAT DRAFT
AALCO/RES/50/S 1
1 JULY 2011

MATTERS RELATING TO THE WORK OF THE INTERNATIONAL LAW COMMISSION (Deliberated)

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

Having considered the Secretariat Document No. AALCO/50/COLOMBO/2011/S 1;

Having heard with appreciation the introductory statement of the Secretary-General;

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

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

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

Commending the initiative of the Secretary-General in convening the Meeting of the Asian-African Legal Consultative Organization (AALCO) held in New York on 1 November 2010, and the fruitful exchange of views on the items deliberated during that meeting:

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

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

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

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