



**Statement by H. E. Prof. Dr. Rahmat Mohamad,**  
**Secretary-General, AALCO**  
**at the**  
**Sixty-Seventh Session of the International Law Commission (ILC)**  
**(Wednesday, 13<sup>th</sup> May 2015)**

Mr. Narinder Singh, Chairman of the International Law Commission (ILC),  
Distinguished Members of the ILC,  
Ladies and Gentlemen,

It is indeed my privilege as the Secretary-General of the Asian-African Legal Consultative Organization (AALCO) to represent the Organization at this Session of the International Law Commission (ILC). AALCO fully recognizes the immense contribution that the ILC has made, in pursuance of its mandate, to the progressive development and codification of the international law, during the past sixty years or so. This recognition, along with the need to have an enhanced and continued cooperation between our two Organizations, was expressed by many Member States at the recently held Fifty-Fourth session of AALCO at Beijing. I am honoured to be invited to address this distinguished gathering of legal luminaries.

Mr. Chairman,

As you are aware, one of the functions assigned to the Asian-African Legal Consultative Organization (AALCO) under its Statute is to study the subjects which are under the consideration of the International Law Commission (the Commission) and thereafter forward the views of the Member States to the Commission. Fulfillment of this mandate set forth in the Statute has enabled to

forge a close relationship between the two organizations. It has also become customary for AALCO and the ILC to be represented during each other's sessions. Indeed, the need on the part of the Members of ILC, who play an active and constructive role in the work of the Commission, to be present at our Annual Sessions is critical. This is due to the fact that they bring with themselves a great deal of expertise and experience that could be utilized by our Member States.

Though the Annual Sessions of AALCO in recent years have not been held before the ILC Annual Sessions, the Fifty-Fourth Annual Session of AALCO held recently at Beijing, People's Republic of China from 13<sup>th</sup> to 17<sup>th</sup> April 2015 constituted a welcoming exception. In view of the importance that the agenda items of ILC hold for the Asian-African States, considerable time is spent in discussing them at the Annual Sessions of AALCO.

At the Fifty-Fourth Annual Session, a Half-Day Special Meeting on "Some Selected Items on the Agenda of the International Law Commission" had been held focusing on four specific agenda items found in the agenda of ILC, namely *Identification of Customary International Law (CIL)*; *Expulsion of Aliens*; *Protection of Atmosphere*; and *Immunity of State Officials from Foreign Criminal Jurisdiction*. On each of these topics, a Member of the ILC had enlightened the delegates of the Member States of AALCO. The three ILC Members, namely Dr. Hussein Haussana, Prof. Shinya Murase and Mr. Narinder Singh had acknowledged their contribution to AALCO. Hence, the inputs/opinions of AALCO Member States on these agenda items of ILC as revealed at the Fifty-Fourth Annual Session would be reflected in my address.

Now, I would like to deal with the following topics that were discussed during the Fifty-Fourth Annual Session. I will offer a few general comments on them followed by the views of Member States. Then, I will offer a few concluding remarks on each of them. The topics are:

- *Identification of Customary International Law (CIL)*;
- *Expulsion of Aliens*; and
- *Protection of Atmosphere*;
- *Immunity of State Officials from Foreign Criminal Jurisdiction*

## **Identification of Customary International Law (CIL)**

Mr. Chairman,

Unlike treaties, where a country has the option to join or not, Customary International Law binds all States irrespective of their express consent. Therefore, this is the importance of the topic. As representative of Asian and African states, AALCO must have a position on this issue. Uncertainty abounds in international law and customary international law is no exception.<sup>1</sup> Not only is there uncertainty surrounding the exact nature of the two elements considered necessary for custom-formation — state practice and *opinio juris* but there are complex issues of Persistent Objector, Specially Affected States, Practice of International Organizations and so on. The work of the International Law Commission (ILC), is intended to bring certainty in the Identification of CIL, therefore is of paramount significance to AALCO Member States. They have been proactively participating in the deliberations on CIL ever since it was introduced in the proceedings of our Annual Session.

It is in furtherance of this interest that the “Informal Expert Group on Customary International Law” (hereinafter the Informal Group) was constituted at the recommendation of AALCO Eminent Persons Group (EPG) in 2014 Annual Session. It was envisaged to act as a technical expert group on identification of Customary International Law and formulate responses to the work of the ILC, including that of Mr. Michael Wood, the Special Rapporteur of the ILC on Identification of Customary International Law. In its first meeting in September 2014 during the Fifty-Third Annual Session held in Tehran, the Informal Group elected Dr. Sufian Jusoh, Senior Fellow at the Law Faculty of the National University of Malaysia as the Interim Chairman and Professor Sienho Yee of Wuhan University, China as the Interim Special Rapporteur.

Mr. Chairman,

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<sup>1</sup>JörgKammerhofer, Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems, EJIL (2004), Vol. 15 No. 3, 523–553

The Informal Group then discussed various issues including the working method, approach and schedule. There was a general consensus to focus on some fundamental issues of particular concern to the Member States of AALCO. The Informal Group then decided on which issues to address by taking account of the information received from Member States and the views of the members of the Informal Group. The general sense of the first meeting of the Informal Group gives us following considerations: firstly, the promotion of the quality in decision-making in the identification process, Secondly, the reliance on only the quality exercise of State functions, and thirdly, the representativeness of the State practice and *opinio juris* at issue.

In its second meeting of the Informal Group, at the Institute of Malaysian and International Studies (IKMAS), National University of Malaysia on 24 March 2015, Mr. Sienho Yee, the Special Rapporteur of the Group, presented his Report on Identification of Customary International Law and a series of proposed comments on that project. Upon deliberation, and taking into account comments and views made by members, the Group adopted the comments proposed by Mr. Sienho Yee, with some modifications. The secretariat has uploaded the report with comments of the expert group for the consideration of Member States.

Mr. Chairman,

During the Fifty-Fourth Annual Session of AALCO in Beijing, another Informal Consultation meeting was held on the recommendations proposed by the Group. The Delegates pointed out the short duration of time Members States had to analyze the report. The meeting was of the view that more time should be given to the Member States of AALCO to analyze the report and make recommendations thereon. They stressed the significance of a cautious approach in dealing with a highly enigmatic area of Identification of CIL. The delegates were of the view that AALCO should retain this issue on its agenda and follow closely the development within and outside related to this topic. The Chairman of the Meeting expressed serious concern about the lack of capacity on the part of AALCO Member States to promptly reply to ILC questionnaires. He said that one of the reasons for this lack of participation is the technical nature of topic. In this regard, the lack of expertise and resources on the part of Member States was highlighted. Further, a view was expressed that ILC could also potentially explore the question of “what does not

constitute CIL” in accordance with the general principle of International law and the purposes and principle of the UN Charter. In this regard, a reference was made to the provisions of Vienna Convention on Law of Treaties which elaborates on what does not constitute a treaty.

### **Comments of AALCO Member States**

Many Member States were of the view that Identification of CIL is a very important topic as CIL is a formal source of International Law recognized in the ICJ Statute. A view was expressed that hierarchy of sources of international law is not the issue and the exercise is not aimed at codifying rules for the formation of CIL. A view was expressed<sup>2</sup> that the two-element approach to CIL is consistent with the jurisprudence of international bodies, contributes to the reinforcement of well-established norms and at the same time preclude fragmentation of international law. A view was expressed<sup>3</sup> that both elements—‘state practice’ and ‘opinio juris’ should be given equal importance in the study. The practice of States from all regions should be taken into account. In this regard, the developing States, which do not publish digests of their practice, should be encouraged and assisted to submit their state practice, including their statements made in international and regional fora, and the case law etc.

A view was expressed<sup>4</sup> that in principle, practice of states contributes to the creation of customary international law. So far it reflects state practice; the practice of international organizations may on a subsidiary basis have a role in identification of rules of CIL. The UN General Assembly Resolutions may in certain circumstances provide evidence for establishing the existence of a rule or the emergence of opinio juris. But it is necessary to look at the content and conditions of the adoption of the resolution. Further, the *Legality of the threat or use of Nuclear Weapons* at para 254 and 255 illustrates the above principle. The

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<sup>2</sup> India and Iran in the Fifty-Fourth Annual Session, 2015

<sup>3</sup> India in the Fifty-Fourth Annual Session, 2015

<sup>4</sup> Iran in the Fifty-Fourth Annual Session, 2015

conduct of non-governmental organizations and individuals cannot be qualified as practice for the purpose or evidence of CIL.

A view was expressed<sup>5</sup> that the issue of specially affected states and the concept of persistent objector should be included in the work of Mr. Michael Woods, Special Rapporteur of ILC. A view was expressed<sup>6</sup> that the “specially affected states” rule is not reserved for powerful states, but applies to all states who are especially concerned with the subject matter under consideration and whose interests are especially affected by the rule under consideration. A view was expressed<sup>7</sup> that more inclusive and a cooperative approach is necessary between AALCO and ILC and due regard may be given to the views of many competent jurists from Asia and Africa who have made notable contributions to the field of international law.

To sum up, I want to say that the Member States of AALCO have shown immense interest in the topic and have highlighted the importance of the issue by their indivisible attention during the Annual Session and also by mandating AALCO to closely follow this issue. ILC special Rapporteur Mr. Michael Wood may consider including ‘specially affected states’ and ‘persistent objector’ in his work on the topic.

### **Expulsion of Aliens**

Though the expulsion of alien is a sovereign right of the State, it brings into play the right of an alien subject to expulsion and the rights of the expelling State in relation to the State of destination of the person expelled. State practice on various aspects of expulsion of aliens has been evolving for a very long time and several international treaties also contain provisions concerning one or another aspect of this topic. Nonetheless, the entire subject matter does not have a foundation in customary international law or in the provisions of international treaties of *universal* nature.

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<sup>5</sup> Iran and Japan in the Fifty-Fourth Annual Session, 2015

<sup>6</sup> Iran in the Fifty-Fourth Annual Session, 2015

<sup>7</sup> Myanmar in the Fifty-Fourth Annual Session, 2015

The 66<sup>th</sup> Session of ILC held in 2014 concluded the consideration of the item by adopting 31 draft articles at second reading which had been submitted to the Sixth Committee of the UN General Assembly for consideration. The draft articles<sup>8</sup> recognize a general right of states to expel aliens from their territory, but only “in accordance with the present draft articles and other applicable rules of international law, in particular those relating to human rights. The draft articles on the expulsion of aliens are based on the premise that every State has the right to expel aliens. However, this right is subject to general limitations, as well as specific, substantive and procedural requirements. These limitations had already been clarified in the arbitral practice before the Second World War. In addition, contemporary human rights law has had a significant impact on the law relating to the expulsion of aliens.

### **Comments of AALCO Member States**

At the 54<sup>th</sup> Session, many Member States of AALCO had welcomed the text of the draft articles and expressed their appreciation for the work of the Special

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<sup>8</sup>**Part I** of the draft articles deals with the general framework consisting of five draft articles. These include; scope of the draft articles (draft article 1); Use of Terms (d.a 2); right of expulsion (d.a.3); right to expel: requirement for conformity with law (d.a.4); Grounds for expulsion (d.a 5).

**Part II** deals with cases of prohibited expulsion accounting for 6 draft articles. These include: expulsion of refugees (d.a.6); stateless persons (d.a.7); deprivation of nationality for the purpose of expulsion (d.a.8); prohibition of disguised expulsion (d.a.10).

**Part III** deals with the protection of the rights of aliens subject to expulsion. These include inter alia : respect the human dignity and human rights of aliens (d.a.13); non-discrimination in the context of expulsion of aliens (d.a.14); special care for vulnerable persons like children, older persons, pregnant women, etc (d.a.15); protection of the right to life of an alien subject to expulsion (d.a.16); prohibition of torture, cruel and degrading treatment (d.a.17); respect for the right to family life (d.a.18); rules relating to detention of aliens (d.a.19); facilitating voluntary departure of alien (d.a. 20); state of destination of aliens subject to expulsion (d.a.23);

**Part IV** deals with specific procedural rules. These include: the procedural rules of aliens subject to expulsion (d. a 26); the right of an alien to international procedures for individual recourse (d.a.28).

**Part V** deals with the legal consequences of expulsion. The right of an alien to be re-admitted (d.a 29); international responsibility for the expelling state in cases of unlawful expulsion (d.a 30); diplomatic asylum being exercised by the state of nationality of alien (d.a.31).

Rapporteur on the topic. However, few States had voiced their concerns with specific provisions.

A view was expressed that the draft articles well capture the principles of international law on sovereign rights of states as well as the rights of an alien subject to expulsion. However, it was also felt that the draft articles, which involve the progressive development of the rules of international law on this issue, do not entirely reflect universal practices for state practices are still limited in some areas. Specifically not all the draft articles are consistent with several Asian State's current State Practice<sup>9</sup>.

Commenting on the balance between the rights of States and the rights of aliens, a view was expressed that some of the draft articles remain imbalanced. As an example draft article 12 was pointed out. This article prohibits in general terms the resort to expulsion to circumvent an ongoing extradition procedure. It was pointed out that though extradition and expulsion are both useful means for inter-state cooperation to bring perpetrators of transnational crimes to justice, they have different functions and apply to different situations in accordance with domestic law. Therefore, it was observed that means which should be adopted should be determined on the basis of the practical needs for combating transnational crimes in the specific circumstances of the case<sup>10</sup>.

Reference was also made on article 19 paragraph (2) (b) that provides that the extension of the duration of the detention may be decided only upon by a court or subject to a 'judicial review' by another competent authority. In practice, competent authorities deciding on the extension of detention duration vary from state to state and that a "one-size-fits-all" approach may not work. It is up to each individual state to decide the means and procedures, being either judicial or administrative, for safeguarding the rights of expelled aliens<sup>11</sup>.

On draft article 23 Paragraph 2 that concerns the specific prohibition to expel an alien to a State of destination where his or her life would be threatened by the

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<sup>9</sup> Thailand in the Fifty-Fourth Annual Session, 2015

<sup>10</sup> China in the Fifty-Fourth Annual Session, 2015

<sup>11</sup> China in the Fifty-Fourth Annual Session, 2015



imposition or execution of the death penalty, a view was expressed that this provision does not reflect the fact that there is no consensus on the abolition of the death penalty among states, nor does international law prohibit death penalty. Given this, every state is entitled to opt for or against death penalty vis-à-vis expulsion of aliens<sup>12</sup>.

On draft article 24 requiring the expelling State not to expel an alien to a State where there are substantial grounds for believing that he or she may be subjected to torture or to cruel, inhuman and degrading treatment, a concern was expressed that fugitives tend to misuse the judicial review process of a foreign state and that there have been instances where inter-state judicial and law enforcement cooperation including the expulsion of fugitives have been hindered by some by abusing human rights standards<sup>13</sup>.

It was also mentioned that though the draft articles are of positive significance for the enhancing of the protection of human rights, some articles over-emphasize individual rights and that they lack the support of general state practice and exceed state obligation under treaty law. They are likely to result in hampering relevant international cooperation and in impunity of criminals<sup>14</sup>.

In sum, the debate that took place at the Session reflected a divergence of views among various delegations although there was general agreement as to the major importance of the subject. It is my belief that when the topic will once more be discussed at the seventy second session of the GA, consensuses will emerge on the subject with the active participation of AALCO Member States.

### **Protection of Atmosphere**

Mr. Chairman,

Firstly, let me convey that AALCO Member States see protection of atmospheric environment as a very serious global issue requiring coordinated action by the international community.<sup>15</sup> As stated by a delegation<sup>16</sup> in the recently concluded

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<sup>12</sup> China in the Fifty-Fourth Annual Session, 2015

<sup>13</sup> China in the Fifty-Fourth Annual Session, 2015

<sup>14</sup> China in the Fifty-Fourth Annual Session, 2015

<sup>15</sup> See statements of Japan, China and India in the Fifty-Fourth Annual Session, 2015.

<sup>16</sup> China in the Fifty-Fourth Annual Session, 2015

Annual Session, since negotiations on climate change and ozone layer are at a crucial stage, the relevant work of the ILC should be carried out in a prudent and rigorous manner with a view to complementing various political and legal negotiations without creating a new forum or playing down existing treaty mechanisms. The development of guidelines should be based on common international practice and current laws. Protection of the atmosphere is a common concern of mankind and that this issue is tightly linked with political, technical and scientific considerations.<sup>17</sup>

Given its crucial nature, I congratulate Prof. Shinya Murase, the Special Rapporteur for the topic on presenting his second report. In this Second Report, he has presented the revised general draft guidelines on the definition and scope of the project as well as three additional draft guidelines on the basic principles for the protection of the atmosphere. These three basic principles: *common concern of humankind*, *general obligation of States*, and *international cooperation* are fundamentally interconnected, forming a “trinity” for the protection of the atmosphere.

The Special Rapporteur has two other definitional guidelines, one on “air pollution”<sup>18</sup> and the other on “atmospheric degradation”.<sup>19</sup>

In this regard, AALCO Secretariat is of the view that this definition which focuses on the “introduction of substances into the atmosphere”, is in line with Article 1 of the Convention on Long-Range Transboundary Air Pollution (LATAP). The reference to ‘energy’ is also to be welcomed for UNCLOS refers to energy when defining pollution in its Article 1 paragraph 1 (4).

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<sup>17</sup> China in the Fifty-Fourth Annual Session, 2015

<sup>18</sup> “Air pollution” means the introduction by human activities, directly or indirectly, of substances or energy into the atmosphere resulting in deleterious effects on human life and health and the Earth’s natural environment.

<sup>19</sup> “Atmospheric degradation”, includes air pollution stratospheric ozone depletion, climate change and any other alterations of the atmospheric conditions resulting in significant adverse effects to human life and health and the Earth’s natural environment.

Taking the limitation to the definition of “air pollution” into account the fact that a broader concept of ‘atmospheric degradation’ has been employed to cover air pollution and other alterations of atmospheric conditions such as climate change and ozone depletion is to be appreciated.

On the question of whether to include basic principles in the work of ILC on the topic, a view was expressed that resorting to basic principles of international environmental law is inevitable though the task assigned to the Special Rapporteur is not aimed at filling treaty gaps in international legal instruments applicable to state activities in the atmosphere.<sup>20</sup> It was stressed on the importance of considering and respecting the principle of ‘common but differentiated responsibility<sup>21</sup>’ (CBDR).

As regards the concept of “common concern of humankind” mentioned in Draft Guideline 3<sup>22</sup>, AALCO recognizes the fact that the notion of common concern of humankind is well established in treaty practice having been part of treaties such as the 1992 UNFCCC (that acknowledges that “change in the Earth’s climate and its adverse effects are a common concern of humankind”; the preamble to the 1992 Biodiversity Convention; the 1994 Desertification Convention). These are among the Conventions that enjoy almost universal acceptance, ratified by more than 195 States, in which virtually all States agreed that there is a strong need for international community’s collective response to tackle those global problems.

It also needs to be made clear that the principle of common concern does not create specific substantive obligations of States to protect the atmosphere. A Member State has pointed out this when it stated that it “agrees with the view of some States the precise legal implications of this new concept are difficult to define.”<sup>23</sup>.

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<sup>20</sup> Iran in the Fifty-Fourth Annual Session, 2015

<sup>21</sup> China and India in the Fifty-Fourth Annual Session, 2015

<sup>22</sup> “The atmosphere is a natural resource essential for sustaining life on Earth, human health and welfare, and aquatic and terrestrial ecosystem, and hence the degradation of the atmospheric condition is a common concern of humankind.”

<sup>23</sup> Iran in the Fifty-Fourth Annual Session, 2015

Another Member State suggested that the Rapporteur needs to adduce more legal reasoning and justification to propose the concept of atmosphere (in draft article 3) as a common concern of mankind for the concept is highly debated and less accepted in other areas of international law.<sup>24</sup> However, it certainly supplements the creation of two general obligations: one is the general obligation of States to protect the atmosphere, and the other the general obligation of States to cooperate with each other.

In conclusion, I would like to convey that the primacy ought to be given to the issue of climate change is well recognized among the Member States of AALCO. Since negotiations on the renewal of international commitments are ongoing, the Special Rapporteur's work should be in consonance with the latest developments and accepted international practice in this regard. It should be carried out in a prudent and rigorous manner with a view to complementing various political and legal negotiations without creating a new forum or playing down existing treaty mechanisms.

### **Immunity of State Officials from Foreign Criminal Jurisdiction**

This is a topic of great interest to the Asian-African States and the core issues that form an integral part of this topic have included: the scope of officials to be covered under the topic; (possible) exceptions to immunity in respect of what are called grave crimes under international law.

Within the Commission and amongst the Member States of AALCO, there has been a broad degree of consensus on the scope of officials to be covered under the topic in the light of state practice and recent judicial decisions. They are of the firm view that Heads of State, Heads of Government and Ministers of Foreign Affairs who constitute the so called "troika" of state officials enjoy personal immunity "*rationae personae*". However, views have also been expressed (in the past) in favour of extending immunity *rationae personae* to certain other high level officials representing the State in its international relations whose functions

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<sup>24</sup> India in the Fifty-Fourth Annual Session, 2015

involved a substantial amount of foreign travel on behalf of the state. There are some States which do not subscribe to this view.

At the Sixty-Sixth Session of ILC held in 2014, the Special Rapporteur (Ms. Concepcion Escobar Hernandez) submitted her Third Report on the topic that marks the starting point for the consideration of the normative elements of immunity *ratione materiae*, analysing in particular the concept of an “official”. The concept of an “official” is particularly relevant to this topic because it determines the subjective scope of the topic. Due to this important and basic reason the Third Report assumes great importance.

In her Third Report, the Special Rapporteur focuses on two issues:

- the question of who is considered an ‘official’ , and
- the subjective or personal scope of immunity *ratione materiae*<sup>25</sup>.

Based on her findings, the Special Rapporteur proposes two draft articles on the notion of ‘State official and the personal scope of immunity *ratione materiae*<sup>26</sup>. Following an analysis of relevant national and international judicial practice, treaty practice and the previous work of the Commission, the Special Rapporteur proposed two draft articles and the subjective scope of immunity *ratione materiae*.

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<sup>25</sup>She adopts a very broad definition of persons falling within the category of officials and at the same time specifies that the subjective scope of immunity *ratione materiae* extends only to those persons who “perform acts that involve the exercise of governmental authority”. According to her, not all persons who are considered to be officials benefit from immunity *ratione materiae*. Rather in order to attract immunity *ratione materiae* the exercise of governmental authority is decisive and the conduct needs to be an act performed in an official capacity during the tenure of office. The term governmental authority is to be understood in a broad sense as to include legislative, executive and judicial functions. The rank of the official is of secondary importance even though there is according to her findings, a certain correlation between immunity *ratione materiae* and the position of the official: the higher the rank, the more likely it is for the official to benefit from immunity *ratione materiae*. She points out that “it cannot be concluded that persons who have a connection with the State that allows them to be considered officials in the broad sense necessarily enjoy immunity *ratione materiae*, nor can it be concluded that only high-ranking officials enjoy such immunity.

<sup>26</sup> The report further considered a linguistic point concerning the choice of the most suitable term for designating persons who enjoy immunity, given the terminological difficulties posed by the term “official” and its equivalents in the various languages, and suggested instead that “organ” be employed.

It was envisaged that the material and temporal scope of immunity *ratione materiae* would be the subject of consideration in the Special Rapporteur's next report.

Be that as it may, the report (in the view of the AALCO Secretariat) provides some room for contending that a private military and security contractor who is hired by a state for the purpose of exercising detention functions –thus falling within the category of officials according to the broad approach –would benefit from immunity *ratione materiae* by virtue of exercising governmental authority. Similarly it could be argued that a paramilitary group acting as a *defacto* organ of a state would enjoy immunity *ratione materiae* even though no such precedent could be found in the relevant case law.

Against this background it is highly desirable for the personal scope of immunity *ratione materiae* to be understood *more narrowly* and be confined to what is actually recognized by state practice and *opinio juris*. Here the text of the draft articles provisionally adopted by the Drafting Committee seems to be more adequate. Draft article 2 entitled “Definitions” reads: For the purpose of the present draft articles: (e) ‘State official’ means any individual who represents the State or who exercises State functions”. And draft Article 5 entitled “persons enjoying immunity *ratione materiae*” reads: “State officials acting as such enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction”.

### **Comments of AALCO Member States**

A view was expressed with respect to persons enjoying immunity *ratione materiae*, that the Commission should focus its work on identifying the term “official” as such term has not yet been defined in international law, but defined differently under domestic laws of different States. Hence, the ILC should take into due consideration the practice of States emanating from their domestic laws. It would be a challenge to draw up a list of all the office or post holders who would be classified as officials that all States would agree on.<sup>27</sup>

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<sup>27</sup> Thailand in the Fifty-Fourth Annual Session, 2015

Another delegation stated that immunity *ratione materiae* should not be extended to individual or legal persons who act for the States under a contract with their governments or agencies as there is no adequate legal basis to extend the scope of the immunity to non-officials such as private contractors who are not in a position to exercise “inherently governmental authority”. Any exception to immunity must not undermine the immunity of the Head of State whose Constitutional role is merely ceremonial and who has no *de facto* authority to direct or influence an act or omission which constitutes a core crime proscribed by international law.<sup>28</sup>

According to another State, the definition of ‘state official’ as any individual who represents the State or who exercises State functions’ is a viable one for it covers both the representative and functional characteristics of such officials and that the representation by an official of a State or his exercise of state functions should be interpreted in a broad sense and on a case by case basis in accordance with constitutional system, laws and regulations and the practical situation of his state.<sup>29</sup>

It was also mentioned that High-ranking officials taking part in international exchanges and exercising functions directly on behalf of states should also be accorded immunity *ratione personae* in addition to heads of the State and Government and Foreign Ministers. On exceptions, immunity of state officials is procedural in nature and it does not exempt them from substantive liabilities. Hence, they shall be still criminally accountable without prejudice to the immunity from foreign criminal jurisdiction through measures such as prosecution by their own national courts and waiver of their immunity.<sup>30</sup>

In sum, it needs to be stressed here that the topic revolves around two major values protected by international law, namely immunity of State officials and the obligation of avoiding impunity, and that to serve the interests of the International

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<sup>28</sup> Thailand in the Fifty-Fourth Annual Session, 2015

<sup>29</sup> China in the Fifty-Fourth Annual Session, 2015

<sup>30</sup> China in the Fifty-Fourth Annual Session, 2015

Community would require a balance being struck between State sovereignty, the rights of individuals and the need to avoid impunity for serious crimes under international law. The challenge here is the need to strike an appropriate balance between several fundamental principles.

Mr. Chairman,

Barring these topics, few countries had also made comments on other agenda items of the ILC. For instance, in relation to the “*Protection of Environment in relation to Armed Conflict*” and the Preliminary Report presented by the Special Rapporteur, it was mentioned that further elaboration of environmental obligations in armed situations of armed conflicts might be warranted and that the study can provide an opportunity to fill the existing gaps in IHL concerning the protection of environment. They quoted the example of article 56 of 1977 First Additional Protocol to the Geneva Conventions. The exclusion of oil platforms and other oil production and storage facilities especially built in continental shelf has proven to run counter to the purposes of the drafters of the Protocol to protect the environment.<sup>31</sup>

The Commission needs to come up with a definition of the term “armed conflict” in order to facilitate the consideration of the work. The expansion of the scope of the definition of armed conflict so as to include non-international armed conflict seems problematic. The ILC would have to consider the legal obligations of non-state actors which may lead to expound upon a definition already fraught with ambiguities and disagreements and that such an endeavour would also entail further attempts to determine the threshold of non-international armed conflicts. Both of these require the modification of relevant provisions of international law of armed conflicts far from the purpose of the work at hand.<sup>32</sup>

While congratulating the ILC for the conclusion of the topic of “*Protection of Persons in the Event of Disaster*” and the first reading of the draft articles, it has been remarked that the term “external assistance” should be defined with great

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<sup>31</sup> Iran in the Fifty-Fourth Annual Session, 2015

<sup>32</sup> Iran in the Fifty-Fourth Annual Session, 2015



caution and that “other assisting actors” should not include domestic actors who offer disaster relief assistance or disaster risk reduction.<sup>33</sup>

Mr. Chairman,

AALCO has always attached immense importance to the work of the ILC knowing well the role that it places in the progressive development and codification of international law and the need to incorporate the viewpoints of our Member States in that process. These topics have been consistently deliberated at AALCO Meetings due to the importance attached to these topics by our Member States. We would continue to follow the work of ILC on these various items as before. That apart, we are also very keen to have Inter-Sessional Meetings on various topics that are found in the agenda of ILC with a view to have an in-depth understanding on these items, and it is my sincere wish that I will be getting the full cooperation of the Members of ILC in this endeavour. We are also of the firm belief that the Special Rapporteurs of ILC should reach out to regional institutions such as AALCO (and others) with a view to get directly the comments of their Member States. Another issue that is of critical interest is the lack of capacity on the part of Member States of AALCO to successfully participate in the questionnaire system of ILC (for various reasons). It would be highly beneficial if some other modalities too could be found that could use used to elicit the viewpoints of States.

Mr. Chairman,

I would also like to take this opportunity to convey the message that this will be my last address at the ILC (as the Secretary-General) as my tenure as the Secretary-General of AALCO comes to an end next year. During my tenure, I have tried to improve the institutional relationship between ILC and AALCO and in my humble view; I have been successful at least to a certain extent in this endeavour. For the past several years, we have had “Half-Day Special Meeting on Selected Items on the Agenda of the ILC” at our Annual Sessions (mandated by the resolution on the agenda item adopted at the 50<sup>th</sup> Annual Session held at Colombo in 2011) and we have also had few Inter-Sessional Meetings solely devoted to

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<sup>33</sup> Thailand in the Fifty-Fourth Annual Session, 2015

addressing agenda items on the ILC. I have also tried to bring the Special Rapporteurs from the ILC to attend our Half-Day Special Meetings on ILC as Panelists. These efforts too have been successful to a significant extent.

I extend my profound gratitude to all the Members of the ILC (past and present), particularly from the Asian-African region for giving me an opportunity to share the views of our Member States with you and for supporting and encouraging me all these years. I wholeheartedly acknowledge that this process of interacting with the ILC Members has in turn enriched my knowledge significantly.

Finally, let me also take this opportunity to assure you that the Organization will continue to cooperate with the Commission bearing in mind the need to reflect the views of AALCO Member States at ILC and to inject the same into the outcomes of the work of ILC.

I thank you