

**Address by H. E. Prof. Dr. Rahmat Mohamad, Secretary-General, AALCO on :
“Selected Items on the Agenda of the International Law Commission” - An
Overview of the Deliberations held at AALCO’s Fifty–First Annual Session, in
Abuja, Federal Republic of Nigeria, from 18 to 22 June 2012**

Mr. Lucius Caflisch, the Chairman of the International Law Commission, Distinguished Members of the Commission,

It is my privilege and honour as the Secretary-General of the Asian-African Legal Consultative Organization (AALCO), to address the second part of the Sixty-Fourth Session of the International Law Commission (ILC or Commission) being held in Geneva from 2 July to 3 August 2012. Since this is the first time that I address this newly constituted ILC, I extend my warm congratulations to all of you on your election/reelection and wish you the very best in the important task of progressive development and codification of international law.

The ILC and AALCO share a longstanding and mutually beneficial relationship. AALCO attaches the greatest importance to its traditional and longstanding relationship with the Commission. One of the Functions assigned to AALCO under its Statutes is to study the subjects which are under the consideration of the ILC and thereafter forward the views of its Member States to the Commission. Fulfillment of this mandate over the years has helped to forge closer 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.

In view of the importance that the agenda items of ILC hold for the Asian-African States, the Fiftieth Annual Session of AALCO held at Colombo, Sri Lanka in 2011 had mandated that the future Annual Session of AALCO should devote more time for deliberating on the agenda item relating to the work of ILC. In view of this, a Half-Day Special Meeting on “*Selected Items on the Agenda of the International Law Commission*” was convened at the recently held Fifty-First

Annual Session of AALCO at Abuja, Federal Republic of Nigeria from 18 to 22 June, 2012. The topics for deliberation at this Half-Day Special Meeting were (i) “**Protection of Persons in the Event of Disasters**”, and (ii) “**Immunity of State Officials from Foreign Criminal Jurisdiction**”. The distinguished Panelist for both the topics was Dr. A. Rohan Perera, former Member of the International Law Commission from Sri Lanka. This was followed by the comments of Prof. Djamchid Momtaz , former member of ILC from the Islamic Republic of Iran who shared some of his thoughts on the above-mentioned topics in his capacity as the Discussant.

In the following pages, I would like to give a brief overview of the Half-Day Special Meeting highlighting the essence of it.

Dr. A. Rohan Perera, former Member of the ILC from Sri Lanka presented a paper on “Protection of Persons in the Event of Disasters”. He observed that the question of protection of affected persons within the State, victims of natural disasters on the one hand and the fundamental principle of respect for sovereignty and territorial integrity on the other hand, both falls under the customary international law and under the Charter of United Nations under Article 2 (7).

The cluster of Articles 10-12, given the underlying tensions between the principles of State sovereignty and protection, was the subject of sharp divergence of views especially in relation to the idea that affected States are under or should be placed under a legal duty to seek external assistance in cases of disasters. Firstly, the Commission considered that withholding consent to external assistance was not arbitrary where a State was capable of providing, and willing to provide, an adequate and effective response to a disaster on the basis of its own resources. Secondly, withholding consent to assistance from one external source was not arbitrary if an affected State had accepted appropriate and sufficient assistance from elsewhere. Thirdly, withholding of consent was not arbitrary if the relevant offer was not extended in accordance with the present draft articles. It was also observed that humanitarian assistance must take place in accordance with principles of humanity, neutrality and impartiality, and on the basis of non-discrimination. Conversely, where an offer of assistance was made in accordance with the draft

articles and no alternate sources of assistance were available there would be a strong inference that a decision to withhold consent would be arbitrary.

Concurring with the views of Special Rapporteur with respect to Draft Article 12 on the right to offer assistance, he said that the provision of assistance was subject to the consent of the affected State. Accordingly, the offer of assistance could not, in principle, be subject to the acceptance by the affected State of conditions that represented a limitation on its sovereignty. It was also stated that offers of assistance from the international community were typically extended as part of international cooperation as opposed to an assertion of rights. The middle ground which seemed to surface from these range of views was that the ‘right’ of an affected State to seek international assistance was complimented by the duty on third States and Organization to ‘consider’ such requests, and not necessarily a duty to accede to them. It was further emphasized that, the right to the international community to offer assistance could be combined with an encouragement to the international community to make such offers of assistance on the basis of the Principle of International Cooperation and Solidarity.

Dr. A. Rohan Perera had also presented a paper on the topic “Immunity of State Officials from Foreign Criminal Jurisdiction”. While pointing out that the debate in the ILC on this topic centered around three principal issues, namely (i) the general orientation of the topic; (ii) the scope of immunity; and (iii) the question whether or not there were exceptions to immunity with regard to grave crimes under international law, he also informed that the consideration of this topic by ILC for the past few years has been of a preliminary nature and that no draft articles had so far been drafted.

Regarding the *General Orientation* of the topic, he brought attention to creation of a Working Group at the current Session as decided by the outcome of the discussions held in the Commission last year, to examine and discuss the general orientation of the topic, before the adoption of draft articles.

While highlighting the views of the States as revealed in the Sixth Committee debates on the topic, he stated that it reflected an approach which in principle endorsed the Special Rapporteur’s position of treating the *lex lata* perspective as the starting point. However, it nevertheless

underlined the need that having codified and identified the gaps, the Commission should proceed to the next stage, the *de lege ferenda* perspective. He was of the view that this is the challenging task before the Working Group and that the viewpoints of the Asian-African States on this approach would be of immense value to the Commission in determining the future direction of this topic, he added.

With regard to the *Scope of Immunity* that dealt with the question as to which officials are to be covered under the topic, he noted that there was a broad degree of consensus within the Commission in the light of State practice and recent judicial decisions that Heads of State, Heads of Government and Ministers of Foreign Affairs who constituted the so called —Troika of State officials enjoyed personal immunity *rationae personae*. In the light of the foregoing discussion, Dr. Rohan Perera observed that it was with regard to the other categories of State Officials outside the ‘Troika’ that the Commission was required to move into unsettled territory. The challenge before the Commission was to strike a delicate balance between the need to expand, albeit cautiously, the different categories of state officials to be granted jurisdictional immunities—*rationae personae*, in the light of contemporary developments in international relations on the one hand, and the need to avoid the risk of a liberal expansion of such categories, which could be conducive to an environment of impunity under the cover of immunity, on the other, he clarified.

Regarding the *Question of Exceptions to Immunity of a State Official from Foreign Criminal Jurisdiction*, Dr. Rohan Perera drew attention to the observations of the Special Rapporteur that in the case of immunity *rationae personae*, the predominant view seemed to be that such immunity was absolute and covered acts performed both in an official capacity or personal capacity and committed both while in office and prior thereto and that no exceptions thereto could be considered. The Special Rapporteur was of the opinion that the question of exceptions could only be pertinent with regard to immunity *ratione materiae* concerning acts performed in an official capacity, in the context of crimes under international law. He also drew attention to the opinion of the Special Rapporteur that the issue of exceptions to immunity fell within the sphere of progressive development of international law. Dr. Rohan Perera, however, was of the view that these issues raised serious concerns including the potentiality of the politically

motivated prosecutions, trials in absentia and evidentiary problems as a result of lack of cooperation of the State concerned. Hence, he cautioned the Commission against drafting provisions *de lege ferenda* and recommended that it should restrict itself to codifying existing law.

Dr. Rohan Perera highlighted the recent judgment of the International Court of Justice (ICJ) delivered in the “*Jurisdictional Immunities of States case*” (Germany Vs Italy - 3rd February 2012) and stated that it had clear implications for the ongoing work on the question of immunity of State officials from foreign criminal jurisdiction. In this case the ICJ upheld that there could not be a conflict between rules which are substantive in nature and rules on immunity which are procedural in nature, he clarified.

Prof. Djamchid Momtaz, Former Member of the ILC from Islamic Republic of Iran was the Lead Discussant for the topics discussed at the Special Half-Day Meeting. He reiterated the need for effective participation by Member States to the questions posed by the Commission, he cited the topic “obligation to extradite or prosecute (*aut dedere aut judicare*)”. Wherein the Special Rapporteur raised a question as to whether the practice of State regarding the question of obligation to extradite or prosecute was based on a treaty obligation or an obligation based on customary international law.

Commenting on the topic Protection of Persons in the Event of Disasters, he posed a question whether States have the duty to offer assistance. Another important issue was that the scope of the obligation on the State in whose territory the disaster has taken place was, however, limited only to the subjects of international law, excluding non-governmental organizations that were not subject of international law.

On the topic “Immunity of State Officials from Foreign Criminal Jurisdiction”, Prof. Momtaz said that distinction needs to be made between this subject and subject of accountability of state officials. The question of accountability of state officials has been dealt with in some very important texts and the most important one was the Statute of International Criminal Court and

Article 27 of the Statute does not give immunity to any Head of State, Ministry of Foreign Affairs, and any other high-ranking officials of the State.

Agreeing with the question of distinction between *lex lata* and *lex ferenda*, he stressed with a note of caution that it should focus on codifying the existing customary practice of States in international law as it exists. Regarding the decision of the International Court of Justice (ICJ) on the dispute between Germany and Italy, he said that the decision of the ICJ insisted once more on the jurisdictional immunity of States before national tribunals.

In the ensuing deliberations the delegations from **People's Republic of China, Indonesia, Japan, Islamic Republic of Iran, Malaysia, Republic of Korea, Kingdom of Saudi Arabia, State of Kuwait, and India** made their statements. I would like to highlight some of the important points that the delegations had made during the deliberations:

Firstly, in view of the fact that half of the Members of the Commission are from the Asian-African States, a number of Delegations expressed hope that their active participation in the Commission will help reflect the views/aspirations of the Asian-African States in the progressive development and codification of international law in a substantial manner. It was also stated that the new Members of the ILC would make valuable inputs into the work of the ILC and collaborate constructively with other Members of the ILC from the Asian–African region and other regions. In this regard, it was also proposed that AALCO Secretariat should arrange for an Interaction Session, via, tele-conference between the Members of ILC and its Member States.

Secondly, with regard to the follow-up of the work of ILC, one delegation observed that the codification works of ILC must be followed up by the UN General Assembly to give effect to the ILC's works. In this regard, he pointed out that his delegation would be taking up two subjects at the forthcoming session of the UN General Assembly. One is the Draft Articles on the Law of Transboundary Aquifers and another is the UN Convention on Jurisdictional Immunities of States and Their Property. As regards the introduction of new topics on the agenda of the ILC, the Delegation agreed with the three-fold criteria propounded by an academic that included; *practical* consideration; *technical* feasibility, and *political* feasibility of the topic proposed to be

included. In his view, new topics could be introduced into the agenda of ILC provided they satisfy these three parameters. The Delegation also expressed the view that, in view of the co-existence of various rules in the field of environmental law and with a view to avoid the phenomenon of the fragmentation of international law, the Commission should take up the topic of “*Protection of the Atmosphere*” in its agenda during the current Session itself.

Thirdly, with regard to the topic of ‘Protection of Persons in the Event of Disasters’, it was observed by many Delegations that humanitarian assistance should be undertaken solely with the consent of the affected country, and with utmost respect for the core principles of international law such as sovereignty, territorial integrity, national unity and non-intervention in the domestic affairs of States. One Delegation also proposed that AALCO Secretariat could initiate contact with ASEAN Secretariat on the mechanisms of disaster management and emergency response under the auspices of ASEAN Agreement on Disaster Management and Emergency Response (AADMER) and that the outcome of that contact should be disseminated to the AALCO Member States to provide a practical example of regional initiative in disaster management and emergency response.

Fourthly, with regard to the topic of ‘Immunity of State Officials from Foreign Criminal Jurisdiction’, a number of States felt that the work of ILC should focus only on *lex lata*, i.e., codifying the existing rules of international law as opposed to embarking on an exercise of progressive development.

Mr. Chairman,

Due to time constraints, I have only touched upon a few important points made by the Panelists and the Delegations at the Fifty-First Annual Session of AALCO. However, I would like to bring to your kind notice that at the recently held Fifty-First Annual Session, I, as the Secretary-General of AALCO, was unanimously re-appointed as the Secretary-General for a further four year tenure starting from 2012 to 2016. Let me assure you that AALCO would continue to actively cooperate with the ILC with a view to bringing the voice of Asia and Africa to bear on the work of ILC and to contribute substantially towards the work of the Commission.

I thank you all for giving me a patient hearing.