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ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION

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

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

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-Sixth session from 5th May -6th June and 7th July-8 August 2014 at Geneva. The Secretary-General of the Asian-African Legal Consultative Organization (AALCO), Prof. Dr. Rahmat Mohamad addressed the Commission at its Sixty-Sixth Session on 8th July 2014. He briefed the Commission on the activities and deliberations of AALCO on the agenda items found in the Commission. An exchange of views followed the address.

2. The Sixty-Sixth session of the Commission consisted of the following members:

Mr. Ali Mohsen Fetais Al-Marri(Qatar)**; Mr. Mohammad Bello Adoke**(Federal Republic ofNigeria),**Mr. Lucius Caflisch** (Switzerland); **Mr. Enrique J.A. Candioti** (Argentina); **Mr. Pedro Comissário Afonso** (Mozambique); **Mr. Abdelrazeg-El-Murtadi Suleiman Gouider (**Libya); **Mr. Dire D. Tladi** (South Africa);**Ms. ConcepciónEscobar Hernández** (Spain); **Mr. Hussein A. Hassouna**(Arab Republic of Egypt); **Mr. Mahmoud D. Hmoud**(Jordan); **Mr. Huang Huikang**(People's Republic of China)**; Ms. Marie G. Jacobsson** (Sweden); **Mr.Maurice Kamto**(Cameroon);**Mr. Mathias Forteau** (France); **Mr. Kriangsak Kittichaisaaree** (Thailand); **Mr. Ahmed Laraba** (Algeria); **Mr. Kirill Gevorgian**(Russian Federation); **Mr. Juan Manuel Gomez-Robledo** (Mexico); **Mr. Donald M. McRae** (Canada);**Mr.Shinya Murase**(Japan**); Mr. Sean D. Murphy (**United States of America**); Mr. Bernd H. Niehaus** (Costa Rica); **Mr. Georg Nolte** (Germany); **Mr. Ki Gab Park** (Republic of Korea); **Mr. Chris M. Peter** (Tanzania); (**Mr. Ernest Petric**(Slovenia); **Mr. Gilberto Vergne Saboia** (Brazil); **Mr. Narinder Singh** (India);**Mr. PavelSturma** (Czech Republic) **Mr. Eduardo Valencia-Ospina** (Colombia); **Mr.Marcelo Vázquez-Bermudez**, (Ecuador); **Mr. Amos S. Wako** (Kenya); **Mr. Nugroho Wisnumurti** (Indonesia); and **Mr. Michael Wood** (United Kingdom).

3. At the Sixty-Sixth Session of the International Law Commission, the following persons were elected: **Mr. Kirill Gevorgian (**Russian Federation); First Vice-Chairman: **Mr. Shinya Murase** (Japan); Second Vice-Chairman: **Ms. Concepcion Escobar-Hernandez** (Spain); Rapporteur: **Mr. D. Tladi** (South Africa); Chairman of the Drafting Committee**: Mr. Gilberto VergneSaboia** (Brazil).

4. There were as many as eight topics on the agenda of the aforementioned Session of the ILC. These were:

- Expulsion of aliens

- The obligation to extradite or prosecute (*aut dedere aut judicare*)
- Protection of persons in the event of disasters
- Immunity of State officials from foreign criminal jurisdiction
- Subsequent Agreements and Subsequent Practice in relation to the interpretation of treaties
- Identification of Customary International Law
- Protection of Environment in relation to armed conflicts
- Protection of Atmosphere

5. As regards the topic "**Expulsion of Aliens"**, the Third report of the Drafting Committee (which deals with the topic "Expulsion of aliens", and is contained in document A/CN.4/L.832) was presented to the Commission. The Committee had before it the entire set of draft articles on the expulsion of aliens, as adopted on first reading, together with the recommendations of the Special Rapporteur contained in his ninth report, the suggestions made during the plenary debate and the comments received from Governments and from the European Union. The Drafting Committee held eleven meetings from 14 to 27 May on this topic and the Committee was able to complete the second reading of a set of 31 draft articles on the expulsion of aliens, and decided to submit its report to the Plenary with the recommendation that the draft articles be adopted by the Commission on second reading.

6. As regards the topic "**The Obligation to Extradite or Prosecute (*Aut Dedere Aut Judicare*)",** the Commission considered the Final Report of the Working Group on the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*) the purpose of which is to summarize the conclusions and recommendations of the Working Group on the topic. The Commission reconstituted the Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*) under the chairmanship of Mr. Kriangsak Kittichaisaree. The Working Group considered several options for the Commission in deciding how to proceed with its remaining work on the topic on which the delegations had different opinions. Some delegations emphasized the continued relevance of the topic in the prevention of impunity, while others questioned the usefulness of continuing with work on the topic. After careful consideration, the Working Group deemed it appropriate that the Commission expedite its work on the topic and produce an outcome that is of practical value to the international community and further suggested that it adopt the 2013 report of the Working Group; and that it adopt this report, which addresses additional issues raised by delegations to the Sixth Committee in 2013.

7. As regards the topic, "**Protection of Persons in the Event of Disasters",** the Commission considered the seventh report of the Special Rapporteur Mr. Eduardo Valencia-Ospina on *"Protection of persons in the event of disasters"* which consisted of four sections. The first section provided a brief summary of the consideration of the topic by the Commission at its previous session and by the Sixth Committee at the Sixty-eighth session of the UN General Assembly. The second section dealt with the protection of relief personnel and their equipment and goods, which contained a proposal for an additional *draft article 14 bis*, entitled "Protection of relief personnel, equipment and goods". The third section proposed three draft articles that

contained general or saving clauses relating to the interaction of the draft articles with other rules of international law applicable in disaster situations.

8. As regards the topic, "**Immunity of State Officials from Foreign Criminal Jurisdiction"** the Special Rapporteur submitted his 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 the topic "Immunity of State officials from foreign criminal jurisdiction", because it determines the subjective scope of the topic.

9. As regards the topic. **"Subsequent Agreements and Subsequent Practice in relation to Treaty Interpretation",** the Special Rapporteur on the topic Mr. Georg Nolte presented the Second Report on subsequent agreements and subsequent practice in relation to the interpretation of treaties that covers the following aspects of the topic:

The identification of subsequent agreements and subsequent practice (II.);

- Possible effects of subsequent agreements and subsequent practice in the interpretation of treaties (III.);

- The form and value of subsequent practice under article 31 (3) (b) (IV);

- The conditions for an "agreement" of the parties regarding the interpretation of a treaty under article 31 (3) (V);

- Decisions adopted within the framework of Conferences of State Parties (VI);
- And the possible scope for interpretation by subsequent agreements and subsequent practice (VII).

10. As regards the topic, "**Identification of Customary International Law",** the focus of the brief is the Second Report of the Special Rapporteur, Sir Michael Wood, which was presented at the Sixty-Sixth Session of the International Law Commission. In the Second Report, the Special Rapporteur discusses in detail the elements of the "two-element" approach to customary international law, i.e. the objective element, which deals with the general practice of States (State practice), and the subjective element, which the Special Rapporteur refers to as "acceptance as law" as an alternative term to the more commonly used but often misunderstood term *opinion juris*. As an outcome of the Report, the Special Rapporteur suggested Draft Conclusions which incorporate his research into guidelines by which these two elements of customary international law may be identified and assessed.

11. As regards the topic, "**Protection of the Environment in relation to Armed Conflicts",** the focus of the brief is the Preliminary Report of the Special Rapporteur, Ms. Marie G. Jacobsson, which was presented at the Sixty-Sixth Session of the International Law Commission. Within the Report, the Special Rapporteur includes discussion on the purpose of the report, as well as of the scope, methodology and outcome of the topic, the use of terms, and the sources and others materials to be consulted. Additionally, the Special Rapporteur makes consideration

of the relationship with other topics addressed by the Commission and of Environmental principles and concepts, human rights and the environment, as well as of the future programme of work.

12. As regards the topic, **"Protection of Atmosphere"**, the Special Rapporteur Mr. Shinya Murase submitted his First Report on this topic. The report lays down three draft guidelines on 'definition of atmosphere' (draft Article 1), 'scope of the guidelines' (draft Article 2), and 'legal status of the atmosphere' (draft Article 3). In preparing this report, the Special Rapporteur has provided thorough background of the topic, such as its historical development and the sources of law relevant to it, as well as attempted to explain the rationale of the topic and the basic approaches, objectives and scope of the project. The report elaborates on the background for this topic containing the evolution of protection of atmosphere in international law, sources in terms of treaty practice, jurisprudence of international courts and tribunals, and customary international law.

B. DELIBERATIONS AT THE FIFTY-THIRD ANNUAL SESSION OF AALCO (TEHRAN, ISLAMIC REPUBLIC OF IRAN, 2014)

13. **Prof. Dr. Rahmat Mohamad**, Secretary-General of the AALCO introduced the agenda item on behalf of the Organization. The SG reaffirmed the longstanding and mutually beneficial relationship between the ILC and AALCO. The AALCO had been statutorily mandated by its Member States to follow and exchange views of its Member States on the subjects, which are under the consideration of the ILC. The fulfillment of this mandate has helped in forging a closer relationship between the two organizations and it was reiterated that customarily, both the Organizations have been mutually represented at their respective annual sessions. The SG emphasized the importance of the members of the ILC to be present during AALCO's Annual Sessions as they bring with themselves a great deal of expertise and experience that could be utilized by the Member States of AALCO.

14. Briefly, he stated the deliberations at the sixty-sixth session of the Commission that focused on eight topics; namely, (i) Expulsion of aliens, (ii) The obligation to extradite of prosecute (aut dedere aut judicare), (iii) Protection of persons in the event of disasters, (iv) Immunity of State Official from foreign criminal jurisdiction, (v) Subsequent Agreements and Subsequent Practice in relation to the interpretation of treaties, (vi) Identification of Customary International Law, (vii) Protection of Environment in relation to armed conflicts and (viii) Protection of Atmosphere.

15. On "Expulsion of Aliens", the SG stated that the Third report of the Drafting Committee (which deals with the topic "Expulsion of aliens") had been presented to the Commission.

16. On the topic "The Obligation to Extradite or Prosecute (Aut Dedere Aut Judicare)", the SG stated that the Commission considered the Final Report of the Working Group on the topic. The purpose of the Final Report of the Working group was to summarize the conclusions and recommendation of the Working Group on the Topic. The Working Group was reconstituted by the Commission under the chairmanship of Mr. Kriangsak Kittichaisaree on the obligation to extradite or prosecute (aut dedere aut judicare). Several options had been considered by the

Working Group for the Commission in the decision on how to proceed with its remaining work on the topic which the delegations had different viewpoints. The Working Group deemed it appropriate that the Commission expedite its work on the topic and produce an outcome that is of practical value to the international community and further suggested that it adopt the 2013 report of the Working Group.

17. On the topic "Subsequent Agreements and Subsequent Practice in relation to Treaty Interpretation", the Special Rapporteur, Mr. Georg Nolte, presented the Second Report on the subsequent agreements and the subsequent practice in relation to the topic.

18. On the topic "Protection of the Environment in relation to Armed Conflicts", the focus of the brief was on the Preliminary Report of the Special Rapportuer, Ms. Marie G. Jacobsson, which was presented at the Sixty-Sixth Session of the International Law Commission. In the Report, the Special Rapporteur included discussions on the purpose of the report, the scope, methodology and outcome of the topic, the use of terms and the sources of other materials to be consulted. In addition to that, the Special Rapporteur made the consideration of the relationship with other topics addressed by the Commission and of Environmental principle and concepts, human rights and th environment, as well as of the future programme of work.

19. The Special Rapporteur, Sir Micheal Wood, presented his second Report on the topic "Identification of Customary International Law". He discussed in detail the element of the "two-element) approach to customary international law, i.e. the objective element, which deals with the general practice of States (State practices) and the subjective element, which the Special Rapporteur referred to as "acceptance as law" as an alternative term to the more commonly used but often misunderstood term *opinion juris*. As an outcome of the Report, he suggested Draft Conclusions which incorporate his research into guidelines by which the two elements of customary international law may be identified and assessed.

20. It was decided the Special Meeting will have a focused deliberation on three topics, namely: (1) Immunity of State official from foreign criminal jurisdiction, (2) Protection of persons in the event of disasters, (3) Protection of Atmosphere.

21. On "Immunity of State Officials from Foreign Criminal Jurisdiction", the SG stated that the Special Rapporteur had submitted his Third Report on the topic, which marks the starting point for the consideration of the normative elements of immunity *ratione materiae,* analyzing in particular the concept of an "official". The concept of an "official" has been deemed relevant to the topic because it determined the subjective scope of the topic.

22. As regards the topic "Protection of Persons in the Event of Disasters", the SG mentioned that the Commission had considered the seventh report of the Special Rapporteur, Mr. Eduardo Valencia-Ospina. The report consisted of four sections; a brief summary of the consideration of the topic by the Commission at its previous session and by the Sixth Committee at the Sixty-Eighth session of the UN General Assembly, the protection of relief personnel and their equipment and goods, and three draft articles that contained general or saving clauses to the interaction the draft articles with other rules of international law applicable in disaster situations.

23. As regards the topic "Protection of Atmosphere", the SG stated that the Special Rapporteur, Mr. Shinya Murase, submitted his First Report on the topic. The report consisted of three draft guidelines on 'definition of atmosphere' (draft Article 1), 'scope of the guidelines' (draft Article 2, and 'legal statues of the atmosphere' (draft Article 3). He had also provided a thorough background of the topic, as well as the explanation of the rationale of the topic and basic approaches, objectives, and scope of the project. The report also elaborated on the background for the topic containing the evolution of protection of atmosphere in international law, sources in terms of treaty practice, jurisprudence of international courts and tribunals, and customary international law.

24. The SG stressed that the topic of "Identification of Customary International Law" has been a matter of great concern to developing countries. He mentioned that the voice of Asia and Africa was simply missing in the formation of international law. In order to make sure that this does not occur again in the context of ILC having taken it up on its agenda, the SG highlighted that the Secretariat of AALCO has decided to constitute a 'Working Group' on the topic that consists of eminent jurists from Asian-African regions who are nominated by their respective Governments.

25. He recalled that this Working Group had met on the first day of the Session (15th September) and had discussed numerous issues. They had been envisaged to perform to functions: firstly, to conduct in-depth deliberations on the various aspects of the topic (along with Member States of AALCO) with a view to identify the areas and practices where the developing countries could make contributions; secondly, the findings of the deliberations (in the form of the voice of Asia-Africa in relation to this topic) would be carried forward to the ILC with a view to assist the work of the Commission.

26. **Ambassador Kirill Gevorgian, Chairman, International Law Commission,** after extending his appreciation to the AALCO for inviting him gave a brief overview of the work of the recent session of the commission that he had the privilege of chairing. During the past session, he stated that the Commission has just started its work on the "Protection of the atmosphere" by deliberating the first report of Prof. Murase. On first reading, 21 draft articles with commentaries were adopted by the commission on the topic of "Protection of the persons in the event of disasters". He drew attention to the fact that to further the work of the Commission on themes, information and opinions of the states are highly necessary. The commission had formulated the questions and he hopes that Member States of AALCO will help the commission in this regard.

27. Turning to other topics on the agenda of the Commission, he addressed those that had been completed during the past session: apart from "Protection of the persons in the event of disasters", they are the "Expulsion of aliens" and the "Obligation to extradite or prosecute (aut dedere aut judicare). He highlighted that the three topics bear on the individual in his relations with the state in different situations: as a subject of expulsion, as a person requiring protection in disaster and as a potential perpetrator or victim of international crimes, necessitating international cooperation.

28. Ambassador Kirill Geovargian acknowledged that AALCO has given its own remarkable contribution to the questions concerning refugees and displacement has been interested in the topic, over the years, "the expulsion of aliens". He stated that this year, the Commission had adopted a second reading, a set of 31 draft articles with commentaries on this topic. The Commission had decided to recommend that the General Assembly take note of the draft articles in a resolution, to which the articles would be annexed and encourage their widest possible dissemination. The Commission also recommended that the assembly, at a later stage, consider the elaboration of a convention on the basis of the draft articles. The Commission had dedicated ten years of its work to this highly relevant topic and in his personal opinion, Ambassador Kirill Geovargian believes that they have achieved the right balance between the rights of states and aliens in the text of the draft articiles. Currently, the destiny of the articles are in the hands of the state. Ambassador Kiril Geovargian is convinced that AALCO could play a vital role in this regard.

29. In regards of the other topic, "The obligation to extradite or prosecute (aut dedere aut judicare), the Commission has concluded its work with the adoption of its report on the matter. In the report, the Commission sought to address the issues that were of interest to states as expressed by the Sixth Committee, namely (a) the customary international law status obligation; (b) gaps in the existing conventional regime; (c) the transfer of a suspect to an international or special court or tribunal as a potential alternative to extradition of preosecution; and (d) the relationship between the obligation of and *erga omnes* and *jus cogens* norms. However, he stated that the report did not aim at resolving these highly controversial issues but rather at stating faithfully the "state of affairs" in the respective areas. He expresses the Commission's hopes that the report could serve as a useful guide to the States in dealing with issues concerned the obligations.

30. Ambassador Kirill Geovargian noted that there are a number of topics in the ILC's agenda that are currently in the middle of hot discussions. The first topic he addressed to was the topic of special interest to AALCO, as informed by Dr. Mohamed – "Identification of Customary International Law". He believed that the Commission had honorably coped with the challenge as all eleven draft conclusions were considered by the Commission and sent to the drafting committee. The commission agreed with the special Rapporteur, despite certain opinions to the contrary expressed by the Academia (or *Opinio Juris*) that both elements - "a general practice" and "accepted as law" are indeed necessary for the rule of customary international law to emerge. The drafting committee formulated certain criteria of these two elements, including rules on attribution of practice and its weight, depending on its consistency. The issue of who may produce the relevant practice and *opino juris* was debated.

31. The Commission has looking into the role of international organizations in the process of formation of customary international law. The Special Rapportuer will be addressing this important and complex issue in the next session. Ambassador Kirill Geovargian stated that the challenging questions of the role of treaties and conference in the formation process of customary international law will be dealt with along with interrelationship between treaties and customary law. The Commission has continued to keep a good pace on another topic on its agenda-subsequent practice in relation to interpretation of treaties.

32. Ambassador Kirill Geovargian stated that the material and temporal scopes of such immunity will be considered in the next session. The question of what constitutes official act is crucial for further work in this topic. Accordingly, the Commission expects the assistance of states with providing of information on domestic law and practice. The Commission continues to work on the topic-"the Provisional Application of Treaties". In his Second report, the Special Rapporteur presents a substantive analysis of the legal effects of the provisional application of treaties. The Commission has also reiterated its request to states to provide information on their practices including domestic legislation.

33. In regards of the topic, "Protection of Environment in Relation to Armed Conflicts", Ambassador Kirill Geovargian stated that it is in its preliminary stages. Finally, through its study group, the Commission had begun considering its Draft Final Report on the topic "Most Favored Nation Clause". It is envisaged that a revised Draft Final Report be presented for discussion by next year. Ambassador Kirill Geovargian informs that the Commission has decided to include a new topic in its programme of work, "Crimes against Humanity" and appointed Mr. Sean D. Murphy as Special Rapporteur. The Commission has also requested states to provide information on their domestic law on practice related to the crimes against humanity. The Commission also included the topic "Jus Cogens" in its long term programme of work. Ambassador Kirill Geovargian concluded his presentation by assuring that on behalf of the Commission, it will continue its interest in the work of AALCO and views of its Member States.

34. **Dr. Hussein Hassouna, Member of the International Law Commission (ILC),** recalled the constructive role that Iran has always been playing in relation to ILC and its work and in this regard, he pointed out the contribution of Professor Momtaz, the former Chairman of the Commission, in the field of international law.

35. According to Dr. Hussein, the topic "Protection of Persons in the Event of Disasters" is one of the most important items on the agenda of the ILC. It is a subject of universal concern with a predominant Asian dimension. It is demonstrated by the human suffering resulting from disasters occurring all over the world such as the floods in Pakistan, India, Japan, China, Indonesia, Iran, to mention a few recent examples. He said that in the face of that challenge, there is an urgent need to regulate the international community's approach and respond to these dramatic situations, in accordance with the principles of solidarity and cooperation.

36. Dr. Hussein stated that as a result of its consideration of the topic at the last session, the Commission adopted on first reading a set of 21 draft articles, together with commentaries thereto. The draft Articles refer to the following main issues: the scope and purpose of the articles, the definition of a disaster, the duty of States to cooperate in various forms, the humanitarian principles applicable in disaster response, humanity, neutrality and impartiality, on the basis of non-discrimination, the obligation to respect human dignity and human rights, the primary role of the affected State in ensuring protection and providing disaster relief and assistance, the duty of the affected State to seek assistance, and the requirement of its consent to such external assistance, the right of those responding to disasters to offer assistance to the affected State, the facilitation of external assistance and the termination of personal and their equipment and goods and the relationship of the draft articles with special or other rules of international law.

37. In renaming the topic "Protection of persons" in 2008, Dr. Hussein pointed out that the Commission had clearly intended to give its treatment a markedly human rights perspective. However, according to him a protection regime often extended to the protection of property and the environment. The Commission's response to Rapporteur's request for guidance was in Art.3: a disaster was an event that caused harm not only to individuals, but also to property and the environment.

38. Dr. Hussein stated that the ILC draft fills a legal lacuna by concentrating on the basic principles that inform the rights and duties of States and other actors in the event of a disaster and will undoubtedly provide legal support for the more detailed operational guidelines under which non-State actors, in particular the IFRCS acts (International Federation of Red Cross and Red Crescent Societies). Turning to the issue of humanitarian principles in disaster response, Dr. Hussein states that they are included in draft Art.7, namely humanity, neutrality and impartiality, on the basis of non-discrimination. These principles find wide application in international humanitarian law and are referred to in many international instruments dealing with disaster situations including regional ones like the 2009 African Union Convention for the protection and Assistance of Internally Displaced Persons in Africa.

39. He stated that the principle of human dignity included in draft Art. 5 provides the ultimate foundation of human rights law. In reference to the UN Charter, he states that all universal human rights Charter on Human Rights as well as the African and European charters to Human Rights. Dr. Hussein points out the issue concerning the role and responsibility of the effected State towards the persons within its territory included in draft Article 12. In that regard, respect for the principles of sovereignty and non-intervention is paramount. He refers to the UN General Assembly Resolution 46/182 on the strengthening of the coordination of humanitarian emergency assistance of the UN, which clearly stipulates that humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal by that country.

40. He pointed out that the primary responsibility of the affected State for providing aid and protection to the victims of a disaster under draft Article 12 is a well recognized principle in international and regional legal instruments. It assumes, according to Art. 9 the primary role of that State in controlling, facilitating, coordinating and overseeing relief operations on its territory. This would also imply its responsibility in carrying out that role vis a vis the victims of the disaster. He also states that the affected State may however, receive external assistance with its consent, on the basis of cooperation with outside actors. He elaborates further that according to Draft Art. 12, it has the duty to seek assistance from States or international organizations only, whenever a disaster exceeds its national response capacity.

41. Dr. Hussein also highlighted Draft Article 14 which stipulates that the consent to external assistance by the affected State should not be withheld "arbitrarily". The Commission has also layed down certain guidelines for where consent could or could not be considered arbitrary. Draft Article 16 which concerns the right of third parties including States, international organizations or non-governmental organizations to offer assistance. It serves to acknowledge the legitimate interest of the international community to protect persons in the event of a disaster.

42. Dr. Hussein brought up the issue as to whether a State's duty to cooperate with the affected State in disaster relief matters, includes a duty on States to provide assistance when requested by the affected State. He points out that an analysis of the international practice confirms that there is currently no such legal duty and that the provision of assistance from one State to another upon the latter's request is premised on the voluntary character of the action of the assisting State. However, he also stated that although there is no duty to provide assistance upon request, there may exist a duty to give due consideration to requests for assistance from an affected State.

43. He also spoke on the issue of "responsibility to protect". The issue had not been adequately taken into account in the Special Rapporteur's proposal during the ILC debate. He highlighted that according to the UN Secretary General, in his 2008 report, implementing the responsibility to protect had indicated that the responsibility to protect applies, until Member States decide otherwise, only to the four specified crimes and violations: genocide, war crimes, ethnic cleansing and crimes against humanity. Dr. Hussein then touched on the issue of The Duty of Cooperate in Draft Article 8. He pointed out that the provision of disaster relief had to strike a balance between different aspects; (i) such a duty could not intrude into the sovereignty of the affected State, (ii) duty concerning the assisting States relates to their humanitarian conduct, (iii) the duty had to be relevant and limited to disaster relief assistance by encompassing the various specific elements that normally make up cooperation on the matter.

44. Dr. Hussein discussed on the issue of prevention, mitigation, and preparedness. He pointed out that the international community has recognized during the last decades the fundamental importance of the prevention of disasters i.e. of risk reduction. He stated that in the field of protection of persons in the event of disaster, the existence of an international legal obligation of prevention of damages is recognized by human rights law and by environmental law. He pointed out that many multilateral and bilateral agreements cover the reduction of disaster risks but pre-disaster preparedness remains very limited. He highlighted that in Art.1 includes the obligation of States to reduce the risk of disasters by taking appropriate measures, through legislation and regulations, to prevent, mitigate and prepare for disasters. On the other hand, draft article 10 extends the general duty to cooperate to the pre-disaster phase. Draft Article 18 discusses the protection of relief personnel and their equipment and goods. In relation to the concerns expressed by AALCO States on the question of sovereignty and consent of affected State to external assistance, Dr. Hussein place several clarifications on the issue, which includes:

(1) (Art.4) Use of terms -- assisting State, other assisting actors: providing assistance to that State at its request or with its consent.

(2) Art. 12: Role of affected State: The affected State, by virtue of its sovereignty, has the duty to ensure protection of persons and provision of disaster relief; and has the primary role in coordination.
(3) Art. 14: Consent of the affected State to external assistance. The provision of external assistance requires the consent of the affected State.
(4) Art.15: Conditions on the provision of external assistance. The affected state may place conditions on the provision of external assistance in accordance with

the draft articles, applicable rules of international law, and the national law of the affected State.

(5) Non-governmental organizations: In seventh report of Special Rapporteur: relevant non-governmental organizations mean any organization working impartially and with strictly humanitarian motives, and are engaged in the provision of disaster relief assistance.

45. Article in use of terms: A relevant non-governmental organization providing assistance to affected State at its request or with its consent. In the final analysis, the whole draft articles are based on the principles of solidarity and cooperation.

46. Finally, Dr. Hussein stated that he hopes that the clarifications will dispel most concerns relating to the issues of consent of the affected State and its sovereignty. Dr. Hussein continued his presentation and touched on the topic "Protection of relief personnel and their equipment and goods" (Article 18). He stated that the Commission has adopted on first reading a set of 21 draft articles, together with commentaries thereto. The Commission has decided to transmit the draft articles, through the Secretary - General of the UN, to Governments, competent international organizations, the International Committee of the Red Crescent Societies for comments and observations with the request that they be submitted to the Secretary-General by 1 January 2016. Through his view, the support of AALCO Member States to the ILC draft articles with their comments and observations will be essential for the successful completion of the ILC work on the subject by the end of the Commission's current mandate in 2016.

47. **Prof. Shinya Murase**, **Member of the International Law Commission (ILC)** spoke on the issue of the Protection of the Atmosphere. While stressing that the issue is a pressing concern of the whole world, he mentioned that there is a growing awareness of "One atmosphere" that the atmospheric problems should be treated in a comprehensive manner. Prof. Murase pointed out that he had submitted his First Report which discusses the rationale of the topic, approaches to be employed to deal with the topic, and a brief historical review of the development of international law on the atmosphere. He stated that he had make reference to a passage of Justinian Institute of the 6th century and to the Sharia law of the 8th century. He highlighted that the most important point in understanding the topic is to differentiate between the airspace and the atmosphere. The airspace is an area-based notion. The atmosphere, or air, is a fluctuating, dynamic and intangible substance that is moving around all the time.

48. In his First Report, Prof. Murase had summarized the judicial decisions by international courts and tribunals, starting from the famous Trial Smelter arbitration and the ICJ Nuclear Tests cases. He had also proposed three draft guidelines: (i) the definition of the atmosphere, (ii) the scope of the guidelines, (iii) the legal status of the atmosphere. His Second Report will be a reproduction of the guidelines proposed in the first report, basic principles (the basic obligations of State to protect the atmosphere) and protection of the atmosphere as a "common concern of humankind". He stated that his Third Report will be devoted to the basic principles of international environmental law, namely, *sic utere tuo* principle, prevention and precaution, sustainable development, equity and special circumstances and vulnerability. In his Fourth Report, he will deal with the issue of interrelationship, which will include law of the sea,

international trade law and human rights law, among others. In the Fifth and Final Report, he mentioned that he will deal with questions on compliance and dispute settlement.

49. To conclude his presentation, Prof. Murase stressed the importance of the Member States of AALCO to make their views known to the Sixth Committee of the UN General Assembly as he regrets that he does not see comparable contribution from Asian and African states in making diligent and detailed statements like the delegates from Western and other States.

50. The **Delegation of Thailand** spoke on the "Immunity of State Officials from Foreign Criminal Jurisdiction" and pointed out that the Thai domestic law and the national legislation of other States – Thailand grants immunity from criminal jurisdiction to persons entitled to such immunity under respective conventions and also accords immunity to persons covered by host country agreements between Thailand and intergovernmental organization based in Thailand. The delegates stated that Thailand wishes to reserve their position on the ILC's work on this topic until a later stage when they can determine whether the ILC's work achieves the right balance between according immunity to State Officials from foreign criminal jurisdictions on the one hand, and ending impunity of those officials on the other hand. He further stated that the Commission should not focus on identifying who is an "official" as the term has not yet been defined by international law. Therefore, the delegate also suggested that the Commission ought to take into due consideration the practice of states and their domestic law in this issue. In connection to that, the delegation of Thailand pointed out that it would be impossible to draw up a list of all offices or post holders who could be classified as "officials" that all states would agree on.

51. The delegation of Thailand pointed out that that the immunity *ratione materia* should not be extended to individual or legal persons who act for the state under a contract with their governments or agencies, as there is on sound legal basis to extend the scope of the immunity to non-officials such as private contractors who are not in a position to exercise "inherent government authority".

52. The delegation emphasized that international law must recognize the immunity granted by the domestic law of the state to government agents or law enforcement officials for their acts undertaken to maintain law and order but without intent to commit human rights violations. The delegate also pointed out that any exception to immunity which the commission will consider in the future sessions 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 from which immunity is not allowed. The delegate then moved on to comment on the topic of "Protection of persons in the event of natural disasters". The delegate suggested that the term "external assistance" defined in sub-paragraph (d) of the newly introduced draft article 4 on the "use of terms" should be defined with great caution. The delegate also noted that the "other assisting actors" in the provision shall not include any domestic actors who offer disaster relief assistance or disaster risk reduction.

53. In relation to the draft Article 20 on the "Relationship to Special or Other Rules of Law", the delegate pointed out that provision contains the reference to both "special rules" (*lex*

specialist) applied to the same subject matter of the draft articles and "other rules" applied to the matter not directly concerned but would nonetheless apply in situations covered by draft articles. The delegate suggested that besides the provisions concerns the law of treaties and the rules on responsibility of both States and international organizations exemplified in paragraph 5 of the commentary to the draft article, the "other rules" should also be illustrated.

54. While speaking on the topic of **"**Law of transboundary aquifers" **the Delegation of Japan** announced that the UN General Assembly had adopted the resolution commending to the attention of member states the draft articles on the law of tranboundary aquifers annexed to that resolution as guidance for bilateral or regional agreements for the proper management of transboundary aquifers (A/RES/68/118). The delegate moved on to touch on the issue of "Protection of the atmosphere" and stated that the ILC has a major role in the field of environmental protection and the delegation of Japan recognizes that the protection of the atmospheric environment requires coordinated action by the international community.

55. The delegate pointed out that the role of AALCO is of great important for the ILC to contribute to the promotion of the progressive development of international law and its codification. The delegate highlighted the importance of the participation of the AALCO members in the debate in the Six Committee as the ILC places high regards on it.

56. **The Delegation of India** appreciated the progress made on the topic "Immunity of State Officials from Foreign Criminal Jurisdiction" and stated that based on the analysis of the concept of "State Official" in the Special Rappouter's report, they hoped that the material and temporal scope of immunity *rational materiae* would be considered in the next report. Quoting the Appeal Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the Prosecutor V. Tihomir Blaskic case (1997), the delegate stated that the acts by officials on behalf of a State to be the acts of that State itself and should be attributed to that State and State officials should not suffer the consequences of decisions/ acts which are not attributable to them personally.

57. The delegation of India agreed that the We agree that the State Officials, viz., Heads of State, Heads of Government and the Foreign Ministers, so called *Troika,* are entitled to immunity from criminal jurisdiction of foreign States. The delegate mentioned that the same criteria may be applied to a few other high ranking officials. The delegate mentioned that the codification of rules in this area is far less developed therefore, the work on the topic may take the form of draft articles to be presented to the UNGA to help fill the gap in the immunity law.

58. In regards of the topic "Identification of Customary International Law", the delegates states that the delegation of India is generally in agreement with the approach that the Special Rapporteur, Sir Micheal Woods, has adopted in his Report. However, the delegate mentioned that the Special Rapporteur may not leave out other tribunals decisions for identifying customary international law. The delegate highlighted that the ICJ is mandated to apply CIL to settle the disputes brought before it by the States. Article 38.(1) (b) of the ICJ Statute describes CIL "as evidence of general practice accepted as law". CIL consists of "settled practice" of States and the belief that it is binding. Thus, it has objective and subjective/mental elements (opinio juris).

59. The delegate added that while conventional law is both formal and material source of international law, CIL is not considered to be material source. There is no readily available guidance or methods by which evidence of the existence or process of formation of CIL rules could be appreciated and identified. The delegate mentioned that they would like to see that both the elements 'state practice' and 'opinio juris' are given equal importance in the study and the practice of states from all regions be taken into account. The delegate also makes it a point that the developing states, which do not publish digests of their practice, should be encourages and assisted to submit their state practice.

60. The delegation of India urged the Commission to exercise caution in taking into account the arguments and positions advanced by the States before international adjudicative bodies and, should not be detached from or devoid of the context in which they were made. On the topic "Provisional Application of Treaties", the delegation of India welcomes the Special Rapporteur's intention in exploring the possibility of contracting States acquiescing to the provisional application by a third State even when a treaty did not expressly provide for provisional application, as well as undertaking a study of the practice of treaty depositories. The delegate stated that it would be relevant if the study addresses legal implications of provisional application and relations between State parties to it, including the extent of international responsibility incurred by a State vis-a-vis other State parties for violation of an obligation under a provisionally applied treaty, since the provisional application is a sort of formal application.

61. **The Delegation of the Islamic Republic of Iran** first commented on the topic "Protection of Persons in the Event of Disasters". He stated that they have difficulties in understanding why the affected State must cooperate with the ICRC and the relevant non-governmental organizations. In their view, there is a contradiction between this commentary and article 21 of the draft articles concerning the relation to international humanitarian law. The provision stipulates that "the present draft article do not apply to situations to which the rules of international humanitarian law are applicable". However, in the view of the delegation of the Islamic Republic or Iran, armed conflicts cannot extend to non-governmental organizations other than the ICRC. The delegate expresses their support to the view of the Special Rapporteru to include in the draft a provision regarding the relationship to the Charter of the UN, which will be useful to the extent that it will highlight the cardinal role played by some principles enshrined in the Charter, namely, the principles of sovereignty and territorial integrity of the affected State already acknowledged in the draft.

62. On the topic "Protection of the Atmosphere", the delegate mentioned that it seems that concerns about the topic deserves more that merely pure research. In regards of whether to include basic principles in the work of the ILC in the topic, the delegate stated that examining rights and obligations of States regarding the protection of atmosphere is impossible without expounding upon principles such as *sic mere,* polluter pays, cooperation or precautionary approach.

63. In reference to Mr. Murase's first report in which he favoured the concept 'common concern of humankind', the delegate believed that the normative content of the concept is

still unclear and controversial. While agreeing that the protection of the atmosphere is a common concern of mankind, the delegate pointed out that questions could be raised at this juncture would on the legal implication of this new concept. With reference to the advisory opinion of the ITLOS issued in 2011 regarding the obligation of States sponsoring persons and entities with respect to activities in the Area, in which the Tribunal refers to article 48 of ILC articles on State Responsibility by affirming that the responsibility of States to protect the environment of the Area creates *erga omnes* obligations the delegate mentioned that similar conclusions can be drawn regarding the protection of the atmosphere.

64. **The Delegation of Malaysia** stated that Malaysia has been studying and closely following the development of the subject "Immunity of State Officials from Foreign Criminal Jurisdiction" since the inclusion of the topic at the Commission's Fifty Eighth Session in 2006. In that regard, Malaysia reiterated its position at the Sixth Committee in 2008 that the topic should focus on the immunities accorded under international law, in particular customary international law and not under domestic law. The delegate also stated that there is no necessity to re-examine previously codified areas such as the immunities of diplomatic agents, consular officials, members of special missions and representatives of States to international organizations, these categories of persons should be excluded from any definition of "State officials" for the purpose of this study.

65. With regards to Article 2 (e), Malaysia viewed that the definition of "State officials" is broad enough to cover any individual who represents the State or who exercises the State's function. The delegate mentioned that , Malaysia is of the view that all "State officials" including those who are employed on contract basis would be covered under such definition when they undertake the official acts. However, Malaysia is of the view that since the Commission will exclude previously codified areas such as the immunities of diplomatic agents, consular officials, members of special missions and representatives of states to international organizations, these categories of persons should be excluded from the definition of "State officials".

66. The delegate highlighted that the definition of "Immunity ratione materiea" " which was defined in the previous draft article has been deleted and there was no reason given for such deletion. The delegate stressed that the definition of the term "Immunity ratione materiae" is imperative to determine in which circumstances State officials would be granted immunity from foreign criminal jurisdiction.

67. With regards to that, Malaysia agreed with the view by the Special Rapporteur in its report that the basic characteristic of "Immunity ratione materiae" can be identified as being granted to all State officials, granted in respect of acts that can be characterized as "acts performed in an official capacity", and is not time limited since "Immunity ratione materiae" continued even after the person who enjoys such immunity is no longer an official.

68. The delegate then moved on to commenting on the topic of "Protection of Atmosphere". In relation to the "Definition of Atmosphere" in the Special Rapporteur's first report, Malaysia views that there is a need to consult the scientific experts in framing a clear, comprehensive and acceptable definition of the atmosphere by all parties. On the "Scope of the Guidelines", Malaysia wishes

to seek clarification on the specific type of "human activities" intended to be covered under the draft guidelines, as to ensure that the activities propose will not overlap with "human activities" covers under the existing international regime on environmental protection. Furthermore, the delegate states that Malaysia is not familiar with the term "deleterious substances" as proposed in the First Report and whishes to seek further explanation from the Special Rapporteur on the usage of the terms "deleterious substances" and "energy", on the difference of these terms with the common terms such as "hazardous substances", "pollutants" and "waste".

69. Commenting on the "Legal Status of the Atmosphere", the delegate states that Malaysia believes that further consideration needs to be devoted to the adequacy of the legal status of the atmosphere. To conclude, the delegate mentioned that Malaysia recognizes that the issues on protection of atmosphere are a global and an imminent threat to the future of humanity and the Earth's survival and Malaysia looks forward to subsequent work on this topic and other proposals from AALCO Member States.

70. **The Delegation of Syria** acknowledged that there is a western domination on the system of international and on its items and pointed out that better awareness and cooperation by developing countries in Asia and Africa in particular is required in the effort to contribute to the development of international law on the art of these two continents. The delegate mentioned that the earlier points to regulate the delivery of humanitarian aid raises an important question of whether the ILC work for codification of law or the progressive development of the law. The delegate also stated that although some very important observations have been made by the delegations of India, Iran, Malaysia and Ira, the delegate does not agree with some of the observations of the distinguished delegate of India and Iran.

71. **The Delegation of Republic of Korea** recommended that the ILC collect extensive relevant reference, academic research, national jurisprudence and other documents not only from European countries but also from other part of the world, especially from Asian and African regions. The delegate states that Asian and African states have a strong willingness to play a leading role in the formation of new rules and international law. The delegate also suggested that Asian-African states accumulate consistent practices such as state practices to be conveyed to the ILC in due process. It also mentioned that it is desirable for the AALCO Secretariat to provide relevant reference regarding the practices of the Member States of AALCO as much as possible.

72. **The Delegation of the People's Republic of China** commented on the topic "Immunity of State Officials from foreign criminal jurisdictions" and suggested that the ILC needed to focus its attention on the summary and codification of state practices and relevant rules of customary international law, so as to form international law standards that are based on international consensus and can be applied uniformly. Referring to the difficulties to find a proper solution to the relationship between immunity and impunity, the delegate suggested that the ILC shelve this problem, rather than rush to develop relevant rules.

73. In regards of the definition of "state officials", the delegate stated that they believe the final version of the definition adopted by the ILC, i.e., any person who represents the state of exercises state functions, is too broad and needs to be further studied.

74. The delegate moved to speak about the "identification of customary international law". The delegation from China believed it is necessary to have uniform criteria of the identification, which means the criteria should not differ from one branch of international law to another or from one group of audiences to another. The delegate also stated that research on the topic needs to clarify the relationship between customary international law on one hand and treaties and general principles of law on the other. The delegate pointed out that any practice, as long as it is widespread and consistent in nature, can be seen as a practice that can serve as an evidence of the customary international law. The delegate mentioned that it should be judged on a case by case basis. Furthermore, the delegate suggested that the ILC should draft a guidebook that contains uniform and clear-cut principles to guide practitioners of international law in identifying and applying customary international law.

75. With regards to the matter of to "extradite or prosecute", the delegate stated that the Chinese side believes that it is necessary to discuss the obligation to "extradite or prosecute" regarding serious international crimes such as genocide, crimes against humanity and war crimes. The delegation of China agreed with the conclusion by ILC that the obligation to extradite or prosecute is still mainly a treaty obligation, and whether it can be seen as a rule of customary international law is still uncertain. The delegate concluded his presentation by stating that they will exercise judicial sovereignty, fight international crimes and engage in international cooperate under the guidance of relevant principles.

II. IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

A. BACKGROUND

1. At its fifty-eighth session, in 2006, the Commission, on the basis of the recommendation of a Working Group on the long-term programme of work, identified the topic "Immunity of State officials from foreign criminal jurisdiction" for inclusion in its long-term programme of work[1].

2. At its fifty-ninth session, in 2007, the Commission decided to include the topic in its programme of work and to appoint Mr. Roman A. Kolodkin as Special Rapporteur for the topic[2].

3. At the sixtieth session, in 2008, the Commission had before it the preliminary report of the Special Rapporteur[3] as well as a memorandum of the Secretariat on the topic. The preliminary report briefly outlined the breadth of prior consideration, by the Commission and the Institute of International Law, of the question of immunity of State officials from foreign jurisdiction as well as the range and scope of issues proposed for consideration by the Commission, in addition to possible formulation of future instruments. The Commission held a debate on the basis of this report which covered key legal questions to be considered when defining the scope of the topic, including the officials to be covered, the nature of acts to be covered and the question of possible exceptions. The Commission did not consider the topic at the sixty-first session.

4. At its sixty-second session in 2010, the Commission was not in a position to consider the second report of the Special Rapporteur, which was submitted to the Secretariat[4].

5. At the sixty-third session in 2011, the Commission considered the second[5] and third reports[6] of the Special Rapporteur. The second report reviewed and presented the substantive issues concerning and implicated by the scope of immunity of a State official from foreign criminal jurisdiction, while the third report addressed the procedural aspects, focusing, in particular on questions concerning the timing of consideration of immunity, its invocation and

[1]See *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 257. For the syllabus on the topic, see *ibid*., annex C.

[2]See *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 375.

[3]Document A/CN.4/601. (seeA nalytical Guide)

[4]See *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 10* (A/65/10), para. 343.

[5]Document A/CN.4/631. (seeAnalytical Guide)

[6]Document A/CN.4/646. (seeAnalytical Guide)

waiver. The debate revolved around, inter alia, issues relating to methodology, possible exceptions to immunity and questions of procedure.

6. At the sixty-fourth session in 2012, the Commission appointed Ms. Concepción Escobar Hernández as Special Rapporteur to replace Mr. Roman Kolodkin, who was no longer a member of the Commission. The Commission had before it the preliminary report of the Special Rapporteur[7].

7. At the sixty-fifth session in 2013, the Commission had before it the second report of the Special Rapporteur, in which, *inter alia*, six draft articles were presented, following an analysis of: (a) the scope of the topic and of the draft articles; (b) the concepts of immunity and jurisdiction; (c) the difference between immunity *ratione personae* and immunity *ratione materiae*; and (d) identified the basic norms comprising the regime of immunity *ratione personae.* Following the debate in plenary, the Commission decided to refer the six draft articles to the Drafting Committee. Upon consideration of the report of the Drafting Committee, the Commission provisionally adopted draft articles1, 3 and 4.

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

8. At the sixty-fifth session, the Special Rapporteur submitted a second report on the immunity of State officials from foreign criminal jurisdiction (A/CN.4/661), which examined the scope of the topic and of the draft articles, the concepts of immunity and jurisdiction, the distinction between immunity *ratione personae* and immunity *ratione materiae*, and the normative elements of immunity *ratione personae*. The report contained six proposed draft articles, dealing with the scope of the draft articles (draft articles 1 and 2), definitions (draft article 3), and the normative elements of immunity *ratione personae* (draft articles 4, 5 and 6), respectively.

9. The Sixth Committee examined the second report of the Special Rapporteur on the immunity of State officials from foreign criminal jurisdiction as part of its consideration of the report of the Commission during the sixty-eighth session of the General Assembly. States generally welcomed the report and the progress made in the work of the Commission, and commended the Commission for submitting three draft articles to the General Assembly.

10. Be that as it may, at the Sixty-Sixth Session held in 2014, the Special Rapporteur submitted his 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 the topic "Immunity of State officials from foreign criminal jurisdiction", because it determines the subjective scope of the topic. Due to this important and basic reason the Third Report assumes great importance. In the following paragraphs the salient features of this report are mentioned.

[7]Document A/CN.4/654. (seeAnalytical Guide)

i. A Summary of the Third Report of the Special Rapporteur

11. The Report of the Special Rapporteur has clearly identified that the normative elements that make up this type of immunity should be deduced from these three characteristics; based on the method followed with regard to immunity *ratione personae*, they should be identified as follows:

- The subjective scope of immunity *ratione materiae*: what persons benefit from immunity?

- The material scope of immunity *ratione materiae*: what types of acts performed by these persons are covered by immunity?

- The temporal scope of immunity *rationemateriae*: over what period of time can immunity be invoked and applied?

12. It needs to be underlined here that while there is broad consensus on the unlimited nature of the temporal scope of immunity *ratione materiae*, the material and subjective scope of such immunity is the subject of a broader discussion and still gives rise to controversy, not only in the doctrine but also in jurisprudence and practice. Determining the meanings of the expressions "official" and "acts performed in an official capacity" therefore requires detailed analysis.

13. It needs to be understood here that the analysis of the concept of an "official" poses two types of different yet complementary and interrelated questions. The first is substantive in nature and concerns the criteria used to identify persons who may be covered by immunity from foreign criminal jurisdiction. The second is primarily language related and concerns the choice of the most suitable term for designating persons who, in general, meet the above-mentioned substantive criteria. The Report deals with both the issues.

ii. Criteria for identifying persons who enjoy immunity

14. The general scope of the concept of an "official" has not been defined in international law. However, because the definition of that term (and related terms) is different in each country's legal order, national definitions are of little use in defining the concept or even in choosing the most suitable term for referring to this category of persons. The Commission has already analyzed these elements in relation to persons having immunity *ratione personae*, namely the Head of State, the Head of Government and the Minister for Foreign Affairs. In doing so, it has also identified the elements which characterize these persons and justify their being recognized as having such immunity.

15. The issue of immunity from foreign criminal jurisdiction has not been considered extensively by national criminal courts. Indeed, there are only a few criminal cases in which there has been a reference to "officials" other than a Head of State, a Head of Government or a Minister for Foreign Affairs, and these have been limited to only a handful of States. On the other hand, this limited practice in criminal proceedings is counterbalanced by more abundant practice in civil proceedings which, although outside the scope of the present topic, is of

relevance when it comes to identifying persons whom States deem to be covered by some form of immunity from jurisdiction.

16. It should be noted that in the cases where foreign officials have been afforded immunity from criminal jurisdiction *ratione materiae*, national courts have linked that immunity from jurisdiction to their status as agents of the State. As a general rule, national courts do not set out the criteria for identifying a person as an "official", except for references to the performance of public functions or to actions as an agent of the State, in its name or on its behalf.

17. Several international courts have directly or indirectly pronounced on matters involving the immunity of State officials from foreign criminal jurisdiction, notably the International Court of Justice, which has heard cases related to the issue on two occasions and has therefore had to consider the wide variety of persons holding certain State positions who could fall within the concept of an "official". In the *Arrest Warrant* case, for instance, the Court considered the immunity from foreign criminal jurisdiction of the Minister for Foreign Affairs of the Democratic Republic of the Congo and, in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*, it considered the immunity from foreign criminal jurisdiction of the President of the Republic, the *procureur de la République* and the Head of National Security of Djibouti.

18. Although the concept of an "official" is not defined in general international law, it is possible to find treaties that use the term or more broadly refer to categories of persons that might be covered by the concept. The Third Report of the Special Rapporteur focuses exclusively on a set of multilateral treaties that are particularly relevant to the topic under discussion, either because they contain provisions on the immunity from jurisdiction of a State or its officials, or because they use the concept of State official as an essential element for defining the legal regime which they establish.

19. It should also be borne in mind that the Vienna Convention on Diplomatic Relations accords particular importance to the special connection between the aforementioned categories of persons and the State, namely nationality. Although that connection is not critical for the performance of diplomatic, administrative, technical or service functions in a diplomatic mission, it has a bearing on the regime applicable to immunity from jurisdiction and is relevant to the topic discussed in the present report.

20. For instance, the Convention on Special Missions, which follows a similar pattern to the Vienna Convention on Diplomatic Relations, applies to the head of mission, the members of the diplomatic staff, members of the administrative and technical staff, and members of the service staff. It also includes the category of "representative", defined essentially by the special representative capacity conferred on that person by the State, regardless of the category into which the person falls. It should be noted that the Convention never uses the term "official".

21. The Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, adopted on 14 March 1975, sets out in its article 1 the various categories of persons who are governed by the legal regime it establishes. Among them are not only the head of mission and the head of delegation, but also other members of the mission or delegation. This category includes the members of the diplomatic staff of the

mission or delegation, the members of the administrative and technical staff, and the members of the service staff.

22. The main characteristic of the Vienna Convention on Consular Relations is that it makes a distinction between "consular officers" and "consular employees", the sole categories on which it confers immunity from jurisdiction. The term "consular officer" means: "any person, including the head of a consular post, entrusted in that capacity with the exercise of consular functions".

23. With regard to international treaties which define conduct that could constitute a crime, regardless of its connection with international relations, reference to the category of officials appears very early in treaty practice. The Convention on the Prevention and Punishment of the Crime of Genocide which was adopted on 9 December 1948, for example, expressly mentions in its article 4 "rulers, public officials or private individuals", in referring to persons who can commit the crime of genocide. Although the Convention contains no definition of these concepts, the reference to "rulers" and "public officials", as opposed to "private individuals", points to the existence of two categories of persons, the first acting in an official capacity and the second in a private capacity. Article 4 does not, however, provide any other information to help differentiate between "rulers" and "public officials", or to help deduce the criteria for determining whether they are acting in an official capacity or not.

24. The Draft Articles on Responsibility of States for Internationally Wrongful Acts contain several provisions that are germane to the present report, especially the articles in chapter II, concerning attribution to a State of conduct by persons and entities. These provisions are interesting because they refer to different categories of persons (or entities) which act in the name and on behalf of the State and which therefore fall within the concept of an "official" analysed in the present report. With this in mind, it should be noted that articles 4 and 5 of the draft articles refer to two separate categories, described respectively as "organs of a State" and "persons or entities exercising elements of governmental authority" though not organs of a State.

25. On the basis of the study of the practice existing in this area, the Report reaches to a number of conclusions as regards determining the criteria for identifying what constitutes an official for the purposes of the draft articles on immunity from foreign criminal jurisdiction, namely:

- The official has a connection with the State. This connection can take several forms (constitutional, statutory or contractual) and can be temporary or permanent. The connection can be *de jure* or *de facto*;

- The official acts internationally as a representative of the State or performs official functions both internationally and internally;

- The official exercises elements of governmental authority, acting on behalf of the State. The elements of governmental authority include executive, legislative and judicial functions.

26. These identifying criteria apply both to those State officials who enjoy Immunity *ratione personae* (Heads of State, Heads of Government and Ministers for Foreign Affairs) and to those who enjoy immunity *ratione materiae* (all other officials).

C. SUMMARY OF VIEWS EXPRESSED BY AALCO MEMBERS STATES ON THE TOPIC AT THE UN GENERAL ASSEMBLY SIXTH COMMITTEE AT ITS SIXTY-NINTH SESSION HELD IN 2014

27. While noting that in recent years there had been numerous cases of abuse of criminal prosecution against foreign State officials without regard for their immunity from criminal jurisdiction, *one Delegation* noted that such occurrences hampered normal inter-State exchanges and impaired the stability of international relations. He stressed that to maintain rule of law at the international level and promote stable inter-State relations, the international community should give careful attention to the topic and that in so doing, it should seek to codify relevant rules of international law rather than rushing to develop new rules.

28. While stating that, the definition of "State official" in draft article 2, subparagraph (e), was viable, since it covered both the representational and functional characteristics of such officials, he emphasized that the question of an official's representation of the State or his or her exercise of State functions should be interpreted in a broad sense and on a case-by-case basis in accordance with the constitutional system, laws and regulations and the practical situation of the official 's State, rather than being determined subjectively and arbitrarily by the State in which the court was located.

29. Regarding the scope of immunity *ratione personae*, as deputy prime ministers and government ministers were increasingly taking part in international exchanges and exercising functions directly on behalf of States, they should be accorded the same immunity as Heads of State and Government, Ministers for Foreign Affairs and other high government officials. As for exceptions to immunity, since immunity of State officials was procedural in nature, it did not exempt the officials concerned from substantive liabilities, he added. When the Commission considered exceptions to such immunity in the future, it should research national practices comprehensively and handle the issue of exceptions to immunity prudently, he added further.

30. While agreeing that the definition of "State official" should encompass persons who enjoyed immunity *ratione personae* as well as those who enjoyed immunity *ratione materiae*, *another delegate* also accepted the Commission's use of an open ended Definition with respect to State officials enjoying immunity *ratione personae*, rather than a definition that identified such officials *eo nomine*.

31. He had noted the Commission's view that the linkage between the State and the official for the purpose of establishing immunity *ratione materiae* could be twofold, encompassing both the concept of representation of the State and that of the exercise of State functions. All definitions were fraught with danger (*omnis definitio periculosa est*) and uncertainty, however, and his delegation therefore welcomed the commentary's elaboration of those t wo concepts. Nevertheless, work remained to be done on the definition.

32. The clarification in draft article 1 (Scope of the present draft articles), paragraph 2, regarding immunity from criminal jurisdiction under special rules of international law was welcome. It was clear that the question of immunity from the jurisdiction of international criminal tribunals, whether established by a treaty or a binding resolution of the United Nations Security Council, fell outside the scope of the draft articles. It was less clear whether State officials could rely on immunity *ratione personae* or immunity *ratione materiae* from the jurisdiction of foreign domestic courts if the alleged crime was generally regarded as an international crime. It had been argued that such immunity should not apply because it was accorded only in respect of sovereign acts, and international crimes, as violations of *jus cogens* norms of international law, could not constitute sovereign acts, he clarified. The delegate went on to add that like many other States, his State had incorporated obligations to prosecute international crimes in its domestic law.

33. *Another Delegation* noted that his delegation recognized that it was not possible to list all the individuals to whom immunity might apply and that often the assessment had to be made on a case-by-case basis and that the functional approach taken in draft article 2, subparagraph (e), reflected the realities of State practice. With regard to draft article 5, his delegation could see the merit in the doubts expressed by some members of the Commission about the need to define the persons who enjoyed immunity *ratione materiae*, since the essence of such immunity was the nature of the acts performed, not the individual who performed them. Nevertheless, the definition in draft article 5 could provide coherence in the context of the overall framework of the draft articles. His delegation preferred to keep an open mind on the matter until it had the benefit of the Special Rapporteur 's fourth report, which would deal with the material and temporal scope of immunity *ratione materiae*.

34. While stating that in recent decades, the development of international criminal law and the idea of universal jurisdiction had exerted an influence on the traditional principle of State immunity, *another delegation* noted that through the foundation of the International Criminal Court the international community had upheld the concept of the fight against impunity as a key element of international security and justice. Article 27 of the Rome Statute provided that official capacity would in no case exempt a person from criminal responsibility under the Statute when that person was alleged to have committed a serious international crime. That rule had had great impact on the modern rule of immunity. At the same time, there was a widely shared view that the notion of jurisdictional immunity greatly contributed to the stability of international relations. A balance must be struck between the effort to prevent Impunity and State sovereignty, he added.

35. Without prejudice to his Country's understanding of the notion of universal jurisdiction, he maintained that the core crimes under international law must be punished without exception and that his Country would therefore continue to pay attention to the discussion on the scope and the legal status of immunity *ratione materiae*. It strongly supported the Commission's efforts to reconcile the apparent conflict between the rule of immunity of State officials and the evolving concept of the fight against impunity, which was essential for sound international criminal justice.

36. While supporting the inclusion of a definition of "State official" in article 2 of the draft articles on the immunity of State officials from foreign criminal jurisdiction, a term which would cover individuals who enjoyed immunity either *ratione personae* or *ratione materiae*, a *delegate* supported the wording of draft article 5 (Persons enjoying immunity *ratione materiae*), which could be seen as an application *mutatis mutandis* of draft article 3 (Persons enjoying immunity *ratione personae*). She agreed with the explanation in the commentary to the draft article that, in contrast to draft article 3, which specified the individuals enjoying immunity *ratione personae*, draft article 5 did not identify persons enjoying immunity *ratione materiae*, as they had to be identified on a case-by-case basis by applying the criteria set out in draft article 2 (e), which highlighted the existence of a link between the official and the State.

37. *Another Delegation* stressed that the Commission's focus should be on the immunities accorded under international law, particularly customary international law, not under domestic law and that there was no need to re-examine previously codified areas such as the immunities of diplomatic agents, consular officials, members of special missions and representatives of States to international organizations; those categories of persons should be excluded from any definition of "State officials". His delegation further noted that the definition in draft article 2, subparagraph (e), included any individual who represented the State or who exercised State functions, including those employed on a contract basis. While he welcomed the effort to establish parameters for determining which individuals would enjoy immunity, he also found the language of the draft article ambiguous and considered the acceptability of the definition subject to further clarification by the Special Rapporteur in a future report.

38. With regard to draft article 5 (Persons enjoying immunity *ratione materiae*), no reason had been given for the deletion of the definition of "immunity *ratione materiae*". It was imperative to define the term in order to determine the circumstances in which State officials would be granted immunity from foreign criminal jurisdiction. His delegation agreed with the view that the basic feature of immunity *ratione materiae* was that it was granted to all State officials for acts performed in an official capacity and was not limited in time. Indeed, such immunity might continue even after an individual was no longer a State official.

39. *Another Delegate* noted that as a party to the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, it granted immunity from criminal jurisdiction to persons entitled to such immunity under those conventions. Although it was not a party to the Convention on Special Missions, it also accorded immunity to persons covered by host country agreements between Thailand and international organizations. Apart from cases coming under those agreements, Thai courts had little experience in dealing with immunity of foreign State officials from domestic criminal jurisdiction, he added.

40. In his view, the Commission's work on the topic should be carried out carefully and should strike the right balance between according the necessary immunity to State officials and combating impunity. With respect to persons enjoying immunity *ratione materiae*, the focus should not be on the identification of who was an "official", as the term had yet to be firmly

defined in international law and was characterized differently under the various domestic laws of countries. The Commission should take due account of State practice in that area. It would be very difficult, if not impossible, to draw up a list that would be acceptable to all States of all office- or post-holders who might be classified as "officials". The persons covered by immunity *ratione materiae* could only be determined by using identifying criteria to be applied on a case-by case basis, he added. It was his delegation's belief that there should be no exceptions to the immunity of a Head of State, particularly when his or her constitutional role was a ceremonial one that carried no de facto authority to direct or influence an act or omission that constituted a core crime proscribed by international law.

41. While stating that the topic of immunity of State officials was deeply grounded in the principle of sovereign equality of States and the premise that the State and its rulers were one and the same for the purposes of immunity, *one Delegation* was of the view that this premise held true especially with regard to Heads of State, Heads of Government and Ministers for Foreign Affairs, to whom international law attributed representational functions, which had to be taken into account in international relations. However, State officials other than the "troika" were assuming greater importance in international affairs. Some of them held sensitive political positions, which had raised concerns with regard to personal immunity in the case of officials who made frequent missions abroad as representatives of their respective States. The issue could be considered one of *de lege ferenda*. With regard to the necessary link between a State official and the respective State, nationality might be considered the main element for establishing a genuine relationship and the basis for immunity from foreign criminal jurisdiction, he added.

III. SUBSEQUENT AGREEMENTS AND SUBSEQUENT PRACTICE IN RELATION TO TREATY INTERPRETATION

A. BACKGROUND

1. At its sixtieth session, in 2008, the International Law Commission (ILC) 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 in 2009[8]. At its sixty-first session, in 2009, the Commission established a Study Group on Treaties over Time, chaired by Mr. Georg Nolte[9].

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

3. At the sixty-third session in 2011, the Commission reconstituted the Study Group on Treaties over time, which continued its work on the aspects of the topic relating to subsequent agreements and practice. The Study Group first completed its consideration of the introductory report by its Chairman on the relevant jurisprudence of the International Court of Justice and of arbitral tribunals of ad hoc jurisdiction, by examining the section of the report which addressed the question of possible modifications of a treaty by subsequent agreements and practice, and the relation of subsequent agreements and practice to formal amendment procedures, as well as a working paper on evolutionary interpretation. The Study Group then began its consideration of the second report by its Chairman on the jurisprudence under special regimes relating to subsequent agreements and practice, by focusing on certain conclusions contained therein. In the light of the discussions, the Chairman of the Study Group reformulated the text of nine preliminary conclusions on such issues as reliance by adjudicatory bodies on the general rule of treaty interpretation, different approaches to treaty interpretation, and various aspects concerning subsequent agreements and practice as a means of treaty interpretation.

4. At its sixty-fourth session, in 2012, the Commission decided to change, with effect at the next session, the format of the work on this topic and its title as suggested by the Study Group.

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

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

The Commission also decided to appoint Mr. Georg Nolte as Special Rapporteur for the topic "Subsequent agreements and subsequent practice in relation to interpretation of treaties".

5. At the sixty-fifth session in 2013, the Commission had before it the first report of the Special Rapporteur, which, *inter alia*, contained four draft conclusions relating to the general rule and means of treaty interpretation; subsequent agreements and subsequent practice as means of interpretation; the definition of subsequent agreement and subsequent practice as means of treaty interpretation; and attribution of a treaty related practice to a State. Following the debate in plenary, the Commission decided to refer the four draft conclusions to the Drafting Committee. Upon consideration of the report of the Drafting Committee, Commission provisionally adopted draft conclusions 1 to 5.

B. CONSIDERATION OF THE TOPIC AT THE SIXTH-SIXTH SESSION OF THE COMMISSION

6. At this Session held in 2014, the Special Rapporteur on the topic Mr. Georg Nolte had presented the Second report on subsequent agreements and subsequent practice in relation to the interpretation of treaties that covers the following aspects of the topic:

7. The identification of subsequent agreement s and subsequent practice (II.);

- Possible effects of subsequent agreements and subsequent practice in the interpretation of treaties (III.);
- The form and value of subsequent practice under article 31 (3) (b) (IV);
- The conditions for an "agreement" of the parties regarding the interpretation of a treaty under article 31 (3) (V);
- Decisions adopted within the framework of Conferences of State Parties (VI);
- And the possible scope for interpretation by subsequent agreements and subsequent practice (VII).

8. This report, which is contained in document A/CN.4/L.833, also reproduces the text of the draft conclusions provisionally adopted by the Drafting Committee at this Session. The Drafting Committee devoted five meetings, from 26 to 28 May and on 2 and 3 June, to its consideration of the draft conclusions regarding this topic. It examined the six draft conclusions that were presented by the Special Rapporteur in his second report (A/CN.4/671), together with a number of reformulations that were presented by the Special Rapporteur to the Drafting Committee in order to respond to concerns raised, or suggestions made, during the Plenary with respect to certain draft conclusions.

9. In the following pages a brief summary of the second Report of the Special Rapporteur is given within the scope of the titles identified above:

i. The identification of subsequent agreements and subsequent practice (II.);

10. Subsequent practice under articles 31 (3) (b) and 32 must be "in the application of the treaty" and sub sequent agreements under article 31 (3) (a) must be "regarding the interpretation of the treaty or the application of its provisions". Although there may be aspects of "interpretation" which remain unrelated to the "application" of a treaty, every application of a treaty presupposes its interpretation — even if the rule in question may appear to be clear on its face. Therefore, conduct "regarding the interpretation" of the treaty and conduct "in the application" of the treaty both imply that one or more States parties assume, or are attributed, a position regarding the interpretation of the treaty. It should be noted that an "application" of the treaty does not necessarily reflect the position of a State party that it is the only legally possible one under the treaty and under the circumstances.

11. It may be recalled here that in the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* case, the International Court of Justice held that an effort by the parties to the Agreement of 1987 (on the submission of a dispute to the jurisdiction of the Court) to conclude an additional Special Agreement (which would have specified the subject matter of the dispute) did not mean that the conclusion of such an additional agreement was actually considered by the parties to be required for the establishment of the jurisdiction of the Court. The characterization of a subsequent agreement or subsequent practice under articles 31 (3) and 32 as assuming a position regarding the interpretation of a treaty often requires a careful factual and legal analysis. This can be illustrated by examples from judicial and State practice.

12. The jurisprudence of the International Court of Justice provides a number of examples where, what at first sight may have appeared relevant, was ultimately not found to be a pertinent subsequent agreement or practice, and vice versa. Thus, on the one hand, the Court did not consider a "Joint Ministerial Communiqué" to "be included in the conventional basis of the right of free navigation" since the "modalities for cooperation which they put in place are likely to be revised in order to suit the parties." The Court has held, however, that the lack of certain assertions regarding the interpretation of a treaty, or the absence of certain forms of its application, constituted a practice, which indicated the legal position of the parties according to which nuclear weapons were not prohibited under various treaties regarding poisonous weapons.

13. When the Iran-United States Claims Tribunal was confronted with the question of whether the Claims Settlement Declaration obliged the United States to return military property to Iran, inter alia, by referring to the subsequent practice of the parties, the Tribunal found that this treaty contained an implicit obligation of compensation in case of non-return.

ii. Possible effects of subsequent agreements and subsequent practice in interpretation

14. Subsequent agreements and subsequent practice, like all means of interpretation, may have different effects on the interpretation of a treaty in a particular case, that is, in the interactive process, which consists of placing appropriate emphasis on the various means of interpretation in a "single combined operation". The taking into account of subsequent agreements and subsequent practice under articles 31 (3) and 32 may thus contribute to a clarification of the meaning of a treaty in the sense of a specification (narrowing down) of

different possible meanings of a particular term or provision, or the scope of the treaty as a whole (1. and 2. a)), or to a clarification in the sense of confirming a wider interpretation or a certain scope for the exercise of discretion by the parties (broad understanding) (1 and 2 b)). The specificity of a subsequent practice is often an important factor for its value as a means of interpretation in a particular case, depending on the treaty in question (3).

15. International courts and tribunals usually begin their reasoning in a given case by determining the "ordinary meaning" of the terms of the treaty. Subsequent agreements and subsequent practice mostly enter their reasoning at a later stage. The taking into account of subsequent agreements and subsequent practice can contribute to the identification of the "ordinary meaning" of a particular term in the sense of confirming a narrow interpretation of different possible shades of meaning of this term. This was the case, for example, in the *Nuclear Weapons Advisory Opinion* where the International Court of Justice determined that the expressions "poison or poisonous weapons".

16. On the other hand, there are also cases where variation of subsequent practice has contributed to prevent a specification of the meaning of a general term according to one or the other of different possible meanings. In the Intergovernmental Maritime Consultative Organization (*IMCO) Advisory Opinion*, for example, the International Court of Justice had to determine the meaning of the expression "eight largest ship-owning nations" under article 28 (a) of the Convention on the International Maritime Organization (IMCO Convention). Since this concept of "largest ship owning nations" permitted different interpretations (determination by "registered tonnage" or by "property of nationals"), and since there was no pertinent practice of the organization or its members under article 28 (a) itself, the Court turned to other provisions in the Convention.

17. State practice outside of judicial or quasi -judicial contexts confirms that subsequent agreements and subsequent practice can contribute to clarifying the meaning of a treaty by either narrowing the range of conceivable interpretations or by indicating a certain margin of discretion which a treaty grants to States.

iii. Form and value of subsequent practice under article 31 (3) (b)

18. The Commission has recognized that subsequent practice under article 31 (3) (b) consists of any "conduct" in the application of a treaty which may contribute to establishing an agreement regarding the interpretation of the treaty. Depending on the treaty concerned, this includes not only externally oriented conduct, such as official acts, statements and voting at the international level, but also internal legislative, executive and judicial acts, as well as practices by non-state entities which fall within the scope of what the treaty conceives as forms of its application.

19. It is clear that subsequent practice by all parties can establish their agreement regarding the interpretation of a treaty. Such practice need not necessarily be joint conduct. The International Court of Justice, has not formulated such an abstract definition of subsequent practice as a collective activity under article 31 (3) (b). The Court has rather applied this provision flexibly, without adding any further conditions.

iv. Agreement of the parties regarding the interpretation of a treaty

20. The element which distinguishes subsequent agreements and subsequent practice as authentic means of interpretation under article 31 (3) (a) and (b), and other subsequent practice as a supplementary means of interpretation under article 32, is the "agreement" of the parties regarding the interpretation of the treaty concerned. It is the agreement of the parties, which gives the means of interpretation under article 31 (3) their specific function and value for the interactive process of interpretation under the general rule of interpretation of article 31.

21. Conflicting positions expressed by different parties to a treaty exclude the existence of an agreement. This has been confirmed, inter alia, by the Arbitral Tribunal in the case of *German External Debts* which held that a "tacit subsequent understanding" could not be derived from a number of communications by administering agencies since one of those agencies, the Bank of England, had expressed a divergent position.

22. The fact that States implement a treaty differently does not, as such, permit a conclusion about the legal relevance of this divergence. Such difference can reflect a disagreement over the (one) correct interpretation, but also a common understanding that the treaty permits a certain scope for the exercise of discretion in its implementation. Treaties characterized by considerations of humanity or other general community interests, such as human rights treaties or the Refugee Convention, presumably aim at a uniform interpretation as far as they establish minimum obligations and do not leave a scope for the exercise of discretion to States. The International Court of Justice has recognized the possibility of expressing agreement regarding interpretation by silence or omission by stating in the case concerning the *Temple of Preah Vihear* that "where it is clear that the circumstances were such as called for some reaction, within a reasonable period", the State confronted with a certain subsequent conduct by another party "must be held to have acquiesced".

23. The significance of silence also depends on the legal situation to which the subsequent practice by the other party relates and on the claim thereby expressed. Thus, in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*, the Court held that:

24. *Some of these activities — organization of public health and education, policing, administration of justice — could normally be considered to be acts à titre de souverain. The Court notes, however, that, as there was a pre-existing title held by Cameroon in this area, the pertinent legal test is whether there was thus evidenced acquiescence by Cameroon in the passing of the title from itself to Nigeria.*

25. A common subsequent practice does not necessarily indicate an agreement between the parties regarding the interpretation of a treaty, but may also signify their agreement to not apply the treaty temporarily, or on a practical arrangement (modus vivendi).

C. DECISIONS ADOPTED WITHIN THE FRAMEWORK OF CONFERENCES OF STATES PARTIES

26. States use Conferences of States Parties as a form of action for the continuous process of multilateral treaty review and implementation. There is some debate regarding the legal nature of Conferences of States Parties. For some, such a conference "is in substance no more than a diplomatic conference of States". Other commentators describe them as autonomous, institutional arrangements. In any case, it can be said that Conferences of States Parties reflect different degrees of institutionalization. At one end of the spectrum are those which are an organ of an international organization (e.g. those under the Organization for the Prohibition of Chemical Weapons, WTO, and the International Civil Aviation Organization) and in which States parties act in their capacity as members of that organ. Such Conferences of States Parties are outside the scope of the present report, which does not address the subsequent practice of international organizations. At the other end of the spectrum are those Conferences of States Parties, which are provided for by treaties, which foresee more or less periodic meetings of States parties for their review. Such review conferences are frameworks for States parties' cooperation and subsequent conduct with respect to the treaty.

27. The Conference of States Parties performs a variety of acts, the legal nature and implications of which depend, in the first place, on the treaty concerned. For the purpose of the present report, the most important distinction concerns the measures which a Conference of States Parties can adopt "to review the implementation of the treaty" and amendment procedures. Specific powers to review certain provisions are spread throughout the different treaties, sometimes referring to "guidelines" to be developed and proposed by a Conference of States Parties, and sometimes establishing that Conference of States Parties shall define "rules and modalities".

28. The examples demonstrate that decisions of Conferences of States Parties may under certain circumstances embody subsequent agreements under article 31 (3) (a) and, a fortiori, subsequent practice under articles 31 (3) (b) and 32. Such decisions do not, however, automatically constitute a subsequent agreement under article 31 (3) (a) since it must always be specifically established. This is not the case where the parties do not intend that their agreement has any legal, but only political significance.

D. TEXTS AND COMMENTARIES OF DRAFT CONCLUSIONS 6 TO 10 PROVISIONALLY ADOPTED BY THE DRAFTING COMMITTEE AT THE ILC SESSION 2014

i. Draft Conclusion 6: Identification of subsequent agreements and subsequent practice

29. The identification of subsequent agreements and subsequent practice under article 31, paragraph 3 requires, in particular, a determination whether the parties, by an agreement or a practice, have taken a position regarding the interpretation of the treaty. This is not normally the

case if the parties have merely agreed not to apply the treaty temporarily or agreed to establish a practical arrangement (*modus vivendi*).

30. Subsequent agreements and subsequent practice under article 31, paragraph 3, can take a variety of forms. The identification of subsequent practice under article 32 requires, in particular, a determination whether conduct by one or more parties is in the application of the treaty.

31. Draft conclusion 6 is entitled "Identification of subsequent agreements and subsequent practice", as originally proposed. It is the first draft conclusion which addresses the ways in which subsequent agreements and subsequent practice should be approached by interpreters more specifically than through the first five draft conclusions already provisionally adopted by the Commission. Like other draft conclusions, it is not overly prescriptive and should be seen more as a practice pointer to assist the interpreter in his or hers endeavors. The purpose of draft conclusion 6 is to indicate that subsequent agreements and subsequent practice, as means of interpretation, must be identified as such. The content and structure of this draft conclusion were revisited by the Drafting Committee in light of comments made during the debate in the Plenary and consists of three paragraphs.

32. Paragraph 1 reminds the interpreter that the identification of subsequent agreements or subsequent practice, for the purpose of article 31, paragraph 3, of the Vienna Convention on the Law of Treaties requires particular consideration concerning the question whether the parties, by an agreement or practice, have taken a position regarding the interpretation of a treaty or whether their conduct has been motivated by other considerations. In the latter case, the subsequent agreement or subsequent practice would not be relevant for the purpose of article 31, paragraph 3. Only if a subsequent agreement or subsequent practice is regarding the interpretation of a treaty can it have the effects attributed to it under article 31, paragraph 3. This is the core element of paragraph 1 and it is addressed in the first sentence.

33. The purpose of paragraph 2 is to acknowledge the variety of forms that subsequent agreements and subsequent practice can take under article 31, paragraph 3. It intends to reflect the fact that the Vienna Convention has recognized that the treaties within its scope shall also be interpreted by taking into account less formal agreements and practice.

34. Paragraph 3 addresses the identification of subsequent practice under Article 32. This paragraph was added in response to the concerns expressed during the Plenary debate that dealing with subsequent practice under articles 31 and 32 of the Vienna Convention in the same provision, as originally proposed, would blur the distinction between the two articles. It was deemed important not to give the impression that subsequent practice of just one or some of the parties were comparable for purposes of treaty interpretation to subsequent agreement or subsequent practice that falls within the scope of article 31, paragraph 3. Paragraph 3 of this draft conclusion provides that in identifying subsequent practice under article 32, the interpreter is required to determine whether, in particular, conduct by one or more parties is in the application of the treaty.

ii. Draft Conclusion 7: Possible effects of subsequent agreements and subsequent practice in interpretation

35. Subsequent agreements and subsequent practice under article 31, paragraph 3, contribute, in their interaction with other means of interpretation, to the clarification of the meaning of a treaty. This may result in narrowing, widening, or otherwise determining the range of possible interpretations, including any scope for the exercise of discretion, which the treaty accords to the parties. Subsequent practice under article 32 can also contribute to the clarification of the meaning of a treaty.

36. It is presumed that the parties to a treaty, by an agreement subsequently arrived at or a practice in the application of the treaty, intend to interpret the treaty, not to amend or to modify it. The possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized. The present draft conclusion is without prejudice to the rules on the amendment or modification of treaties under the Vienna Convention on the Law of Treaties and under customary international law.

37. Draft conclusion 7 is entitled "Possible effects of subsequent agreements and subsequent practice in interpretation", as originally proposed by the Special Rapporteur. The text provisionally adopted by the Drafting Committee is based on paragraph 1 of draft conclusion 7 as proposed by the Special Rapporteur in his second report. In light of the debate in Plenary, the Special Rapporteur proposed to deal with the content of paragraph 2 of the text initially presented by him, which addressed the value of subsequent agreements and subsequent practice, in a separate draft conclusion. The text of draft conclusion 7 also contains elements of what was originally contained in draft conclusion 11.

38. Paragraph 1 of draft conclusion 7 describes the possible effects of subsequent agreements and subsequent practice in interpretation. The purpose is to indicate that subsequent agreements and subsequent practice may contribute to a clarification of the meaning of a treaty.

39. Paragraph 2 of draft conclusion 7 concerns possible effects of subsequent practice in interpretation in the context of article 32. While paragraph 2 sets out the same main idea that is contained in paragraph 1, the Drafting Committee decided to treat article 31, paragraph 3, and article 32 in two separate provisions in order to maintain the distinction between these two articles.

40. Paragraph 3 is based on paragraph 2 of draft conclusion 11 as originally proposed by the Special Rapporteur. This paragraph primarily addresses the question of how far the interpretation of a treaty can be influenced by subsequent agreements and subsequent practice in order to remain within the realm of what is considered interpretation. It is intended as a practice pointer and formulates a presumption that the parties to a treaty, by subsequent agreements or subsequent practice, do not intend to modify the treaty but to interpret it. It aims to remind the interpreter that subsequent agreements may serve to amend or modify a treaty but that such subsequent agreements fall under article 39 of the Vienna Convention and should be distinguished from subsequent agreements under article 31, paragraph 3.

iii. Draft Conclusion 8: Weight of subsequent agreements and subsequent practice as a means of interpretation

41. The weight of a subsequent agreement or subsequent practice as a means of interpretation under article 31, paragraph 3, depends, inter alia, on its clarity and specificity. The weight of subsequent practice under article 31, paragraph 3 (b) depends, in addition, on whether and how it is repeated. The weight of subsequent practice as a supplementary means of interpretation under article 32 may depend on the criteria referred to in paragraphs 1 and 2.

42. Draft conclusion 8 addresses the question how far subsequent agreements and subsequent practice demonstrate the common understanding of the parties as to the meaning of the terms of a treaty. The purpose is to provide the interpreter with an indication as to the circumstances under which subsequent agreements and subsequent practice would have more or less value as means of interpretation. Draft conclusion 8 identifies some criteria that may be useful to take into consideration in order to identify the interpretative value, or weight, which a particular subsequent agreement or subsequent practice should play in the process of interpretation in a particular case.

43. Naturally, the weight accorded to subsequent agreements and subsequent practice must be viewed in relation to other means of interpretation. The formula "common, concordant and consistent", which was employed in the text of draft conclusion 8 as originally proposed, gave rise to concern during the plenary debate as not being sufficiently well-established or having the risk of being misconceived as overly prescriptive. This formula has therefore not been retained in the draft conclusion.

44. Paragraph 1 addresses the weight of a subsequent agreement or subsequent practice under article 31, paragraph 3, thus dealing with both subparagraphs (a) and (b) of the said article from a more general point of view. Paragraph 1 specifies that the weight to be accorded to a subsequent agreement or subsequent practice as a means of interpretation depends, inter alia, on its clarity and specificity. Paragraph 2 deals only with subsequent practice under article 31, paragraph 3 (b), and specifies that the weight of subsequent practice depends on whether and how it is repeated. This formula brings in the elements of time and frequency intended to indicate to the interpreter that something more than just mere repetition of a practice may be necessary for such practice to be of interpretative value in the context of article 31, paragraph 3 (b). Paragraph 3 sets out the same main idea that is contained in paragraphs 1 and 2 and addresses the weight of subsequent practice under article 32 in treaty interpretation.

iv. Draft Conclusion 9: Agreement of the parties regarding the interpretation of a treaty

45. An agreement under article 31, paragraph 3 (a) and (b), requires a common understanding regarding the interpretation of a treaty, which the parties are aware of and accept. Though it shall be taken into account, such an agreement need not be legally binding. The number of parties that must actively engage in subsequent practice in order to establish an agreement under article 31, paragraph 3 (b), may vary. Silence on the part of one or more parties can constitute acceptance of the subsequent practice when the circumstances call for some reaction.

46. The text provisionally adopted by the Drafting Committee is based on paragraphs 1 and 2 of draft conclusion 9 as proposed by the Special Rapporteur in his second report. Draft conclusion 9 as provisionally adopted by the Drafting Committee consists of two paragraphs. Whereas paragraph 1 refers to what is general for article 31, paragraph 3 (a) and (b), paragraph 2 addresses only subsequent practice under article 31, paragraph 3 (b). While the different meaning attributed to the term "agreement" in subparagraph (a) and subparagraph (b) has already been set out in draft conclusion 4 and its accompanying commentary, paragraph 1 of draft conclusion 9 intends to capture what is common in the two subparagraphs, which is the agreement between the parties, in substance, regarding the interpretation of the treaty.

47. Paragraph 1 sets forth the principle that an "agreement" under article 31, paragraph 3 (a) and (b), requires a common understanding by the parties regarding the interpretation of a treaty; in order for that common understanding to have the effect provided for under article 31, paragraph 3, the parties must be aware of it and accept it.

48. Paragraph 2 of draft conclusion 9 is based on the second sentence of paragraph 2 of the original draft conclusion 9 and has only been slightly refined. This paragraph addresses the question of whether all the parties to a treaty must have actively engaged in a practice to give effect to article 31, paragraph 3 (b), or whether it may be sufficient if some parties have remained silent in the face of a common practice by other parties.

v. Draft Conclusion 10: Decisions adopted within the framework of a Conference of States Parties

49. 1. A Conference of States Parties, under these draft conclusions, is a meeting of States parties pursuant to a treaty for the purpose of reviewing or implementing the treaty, except if they act as members of an organ of an international organization.

50. The legal effect of a decision adopted within the framework of a Conference of States Parties depends primarily on the treaty and any applicable rules of procedure. Depending on the circumstances, such a decision may embody, explicitly or implicitly, a subsequent agreement under article 31, paragraph 3 (a), or give rise to subsequent practice under article 31, paragraph 3 (b), or to subsequent practice under article 32. Decisions adopted within the framework of a Conference of States Parties often provide a nonexclusive range of practical options for implementing the treaty.

51. A decision adopted within the framework of a Conference of States Parties embodies a subsequent agreement or subsequent practice under article 31, paragraph 3, in so far as it expresses agreement in substance between the parties regarding the interpretation of a treaty, regardless of the form and the procedure by which the decision was adopted, including by consensus.

52. Draft conclusion 10 addresses a particular form of action by States, which may result in a subsequent agreement or subsequent practice under article 31, paragraph 3, or subsequent practice under article 32, namely, decisions adopted within the framework of Conferences of

States Parties. In order to acknowledge the wide diversity of Conferences of States Parties and the rules under which they operate, paragraph 1 provides a broad definition of the term Conference of States Parties for the purpose of the draft conclusions and paragraph 2 recognizes the primacy of the respective rules that govern them. Organs of international organizations are excluded from the definition.

53. The paragraph 2 provides that the legal effect of a decision adopted within the framework of a Conference of States Parties depends primarily on the treaty in question and the rules of procedure. The word "any" was inserted by the Drafting Committee in this sentence to better clarify that rules of procedure of Conferences of States Parties will apply, if any, given that there might be situations where there are no specifically adopted rules of procedure. The aim of the second Sentence of paragraph 2 is to lay down the principle that decisions of Conferences of States Parties may indeed constitute subsequent agreement or subsequent practice for treaty interpretation under articles 31 and 32 of the Vienna Convention.

54. The purpose of paragraph 3 is to call on the interpreter to make the necessary distinction between the substance of a decision, which may or may not be regarding the interpretation of a treaty, and its form, which may or may not reflect agreement in substance. In order to address concerns relating to decisions adopted by consensus at Conferences of States Parties, the phrase "including by consensus" was introduced in order to dispel the notion that consensus would necessarily be equated with agreement in substance. While the question of consensus would be further elaborated in the commentary, the intention was not to provide a definition thereof but to describe what it entails, in principle, and the problems it can generate in the context of treaty interpretation under the Vienna Convention.

E. SUMMARY OF THE VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPIC AT THE UN GENERAL ASSEMBLY SIXTH COMMITTEE AT ITS SIXTY-NINTH SESSION HELD IN 2014

55. *One Delegate* stated that while subsequent practice could influence the interpretation of a treaty, the cornerstone of interpretation remained the wording of the treaty itself, not only because it was the most authoritative expression of the parties' intentions, but also because it reflected the often delicate balance that had been struck as a result of negotiat ions between the parties. That wording should not be easily unravelled, and subsequent practice as a means of interpretation should therefore be applied prudently. That said, his delegation acknowledged the need for flexibility and willingness to adapt to changing circumstances in order to make a treaty work over time. In such situations, it should be borne in mind that the tools of treaty interpretation were simply the means of establishing the intention of the parties.

56. In his view, the key question in relation to subsequent practice was the extent to which it might be accorded evidential value or weight and stated in this regard that draft conclusion 8 (Weight of subsequent agreements and subsequent practice as a means of interpretation) identified criteria that might be helpful in answering that question, including the clarity and specificity of the practice and whether and how it was repeated. While his delegation could see why a conscious and mindful repetition might generally be perceived as having more weight, it

was reluctant to summarily dismiss or discount the value of technical or unmindful repetitions. In some circumstances, practice might be repeated mechanically precisely because of an unquestioningly clear intention and understanding between the parties, which was the ultimate goal of treaty interpretation. His delegation appreciated the many practical examples included in the commentary on the various draft conclusions and hoped that the Commission would continue to provide such examples, which would serve as a useful guide in the application of article 31, paragraph 3, of the Vienna Convention.

57. *One Delegation* noted that in identifying and interpreting subsequent agreements and subsequent practice in relation to the interpretation of treaties it was necessary to ask, as indicated in draft conclusion 6 (Identification of subsequent agreements and subsequent practice), whether the parties had taken a position regarding the interpretation of a treaty or whether they were motivated by other considerations. Subsequent agreements and practice should be a basis for interpretation only if they were motivated by the treaty and not by other external considerations. With regard to draft conclusion 7 (Possible effects of subsequent agreements and subsequent practice in interpretation), his delegation noted the opposing views of the World Trade Organization Appellate Body and the European Court of Human Rights.

58. While his delegation agreed that the determination of whether a subsequent practice had a modifying effect should be made on the basis of the treaty provisions, it was concerned by the notion that subsequent practice of the parties could not be wholly precluded as a possibility in law. Modification or amendment of a treaty should only be done in line with articles 39 to 41 of the Vienna Convention on the Law of Treaties. His delegation was also concerned that certain general comments or general recommendations

59. Draft conclusion 8 identified some criteria that might be useful for determining the interpretative value or weight of a subsequent agreement or subsequent practice. Those criteria, however, should be subject to other rules on treaty interpretation contained in the Vienna Convention, in particular those in article 31, paragraph 1. With regard to draft conclusion 9 (Agreement of the parties regarding the interpretation of a treaty), his delegation was of the view that extreme caution should be exercised in dealing with the question of silence as acceptance and believed that the provisions of paragraph 2 should be carefully scrutinized in the light of the views of various adjudicatory bodies. As to draft conclusion 10 (Decisions adopted within the framework of a Conference of States Parties), his delegation agreed that when there existed an objection by a State, the adoption of a decision by consensus could not represent a subsequent agreement under article 31, paragraph 3(a), of the Vienna Convention; it was not sure, however, that paragraph 3 of the draft conclusion clearly translated the Special Rapporteur ’s intention to dispel the notion that a decision by consensus would necessarily be equated with agreement in substance.

60. *Another delegation* was of the view that the Commission should give a clear explanation of the relationship between article 31, paragraph 3, and article 32 of the Vienna Convention on the Law of Treaties. While stating that draft conclusions 6, 7, 8 and 10 referred to the two articles as if they both stipulated subsequent practice as a means of interpretation, his delegation was sceptical of that approach, particularly as article 32 did not mention subsequent practice. His delegation recognized that the Commission had decided during its sixty-fifth session to treat

other subsequent practice under article 32; that should not be taken to mean, however, that any type of act categorized as "other subsequent practice" could be treated the same as subsequent practice as stipulated under article 31, paragraph 3. Article 32 should be seen as complementing the rules under article 31.

61. In his view, the legal significance of silence should be studied more carefully and that although it could, as provided in draft conclusion 9 (Agreement of the parties regarding the interpretation of a treaty), constitute acceptance of subsequent practice, there was a risk of misinterpretation: inaction of a State might be considered as acceptance of the subsequent practice, even if that was not its intention. Similarly, joining in a consensus decision of a conference of States parties, as provided in draft conclusion 10, paragraph 3, did not always constitute agreement. The Commission should continue to discuss the matter. Any modification to the provisions of treaties must be made by a clear expression of intention by States, and not solely by an unclear subsequent agreement or subsequent practice he added.

62. While stating that the Vienna Convention on the Law of Treaties was the primary source of the rules of treaty interpretation as confirmed by the International Court of Justice in a number of cases, *another delegate* noted that the Commission's work on the topic should serve to complement and supplement articles 31 and 32 of the Convention and that the Commission should continue to acknowledge and promote the primacy of the Vienna Convention while at the same time contributing to the development of international law by identifying and codifying practical rules of treaty interpretation with regard to subsequent agreements and subsequent practice. His delegation therefore supported the decision to prepare draft conclusions aimed at assisting in treaty interpretation. His delegation was generally satisfied with the draft conclusions and commentaries provisionally adopted thus far, which made it clear that subsequent agreements and subsequent practice must relate specifically to the treaty being interpreted. Accordingly, if a State's treat y practice became more specific over time in subsequent treaties of the same type, such subsequent treaty practice would not have an impact on the interpretation of earlier, less specific treaties of that type. Whether or not the subsequent agreement or practice truly related to the treaty being interpreted would have to be determined on a case-by-case, he clarified.

63. In his view, the inclusion of a specific draft conclusion dealing with decisions adopted by a conference of States parties, while interesting, raised the question of whether the same principles would apply to meetings or large groups of States in other forums, such as the United Nations General Assembly or Human Rights Committee or the Organisation for Economic Co-operation and Development, which might, in some specific circumstances, make pronouncements that related to the interpretation of a treaty. With regard to the Commission's request for examples of practice, pronouncements or other actions of international bodies relating to treaty interpretation, he suggested that one would be the North American Free Trade Agreement. While it did not fall strictly within the scope of the questions posed in chapter III of the Commission's report, it was an example of a treaty providing States with the opportunity to agree to a binding interpretation of some of the norms contained therein.

64. In the view of *another Delegation*, the approach to the topic adopted by the ILC had shifted in a way that risked touching on issues distant from the Commission's original mandate

and that the shift was particularly evident in the Special Rapporteur ’s focus on interpretation of treaties rather than on determination of what conduct constituted subsequent practice in the application of a treaty. In considering the variety of forms that subsequent agreements and subsequent practice might take under article 31, paragraphs 3 (a) and 3 (b), of the Vienna Convention on the Law of Treaties, it seemed that the Commission had accorded excessive weight to silence and inaction. It went without saying that the element of consent was a prerequisite to acceptance of any kind and that silence on political grounds could not be regarded as conduct giving rise to subsequent practice, which must be established on a case-by-case basis. It should be emphasized that, as noted in the commentary, silence or inaction could be construed as acceptance of a practice only under certain circumstances, he added.

65. His delegation did not share the Commission’s conviction that both externally oriented conduct and internally oriented conduct contributed to subsequent practice under article 31, paragraph 3 (b), without the need to meet any particular formal criteria. Externally oriented conduct, including official acts, statements and voting at the international level, could clearly contribute to subsequent practice, but internal conduct such as official legislative acts or judicial decisions would have to be specifically linked to the application of a treaty in order to merit consideration as subsequent practice. Again, the particular circumstances surrounding a given conduct at the national level were an important consideration, especially in view of the different value accorded to treaties in different legal systems, he clarified.

IV. IDENTIFICATION OF CUSTOMARY INTERNATIONAL LAW

A. BACKGROUND

1. The basis of this brief is the Second Report on the Identification of Customary International Law by the Special Rapporteur, Sir Michael Wood, submitted before the International Law Commission at its Sixty-Sixth Session.[10]

2. The topic 'Formation and Evidence of Customary International Law' was placed on the ILC's programme of work in 2012 when the preliminary report of the Special Rapporteur.[11] At the Sixty-Fifth Session of the ILC in 2013, the Commission held a general debate on the basis of the Special Rapporteur's First Report[12] and on the memorandum by the Secretariat on the relevant previous work of the ILC.[13] The Commission subsequently decided to change the title of the topic to 'Identification of Customary International Law' at this session.[14]

3. From the debate and the informal consultations, the Special Rapporteur drew the following conclusions:

a. There was general support for a "two-element approach" involving: (i) an assessment of general practice; and, (ii) acceptance of that practice as law;
b. The primary reference materials for the topic would be the approach of States and international courts and tribunals, particularly the ICJ;
c. The outcome of the work should be a of a practical nature, in the form of 'conclusions', and not overly prescriptive;
d. The relationship between customary international law (CIL) and other sources of international law, particularly treaties and general principles, would have to be deal with. Additionally, there was interest in looking into "special" or "regional" CIL;
e. That *jus cogens* would not be dealt with as a part of CIL.

4. The Sixth Committee at its 2013 debate stressed the need to address the question of relative weight to be accorded to State practice and *opiniojuris*, and, while welcoming a discussion on the relationship between sources of international law noted that the question of hierarchy of sources should be a separate consideration.

5. At its 2013 session, the ILC requested States "to provide information, by 31 January 2014, on their practice relating to the formation of customary international law and the types of evidence suitable for establishing such law in a given situation, as set out in (a) official statements before legislatures, courts and international organizations; and (b) decisions of national, regional and sub-regional courts". Nine States have thus far made written contributions, and further contributions would be welcomed.

[10] A/CN.4/672
[11] A/CN.4/663, para. 1
[12] A/CN.4/663
[13] A/CN.4/659
[14] A/CN.4/SR.3186

6. While the Special Rapporteur's First Report dealt with identifying the basic materials to be consulted for the topic, the Second Report seeks to cover central questions concerning the approach to the identification of rules of "general" customary international law, in particular the two constituent elements (State practice and *opiniojuris*) and how to determine whether they are present. The draft conclusions therein concern the method(s) for identifying rules of customary international law and do not enter upon the actual substance of such rules. The Report contains detailed discussions of both constituent elements of CIL, which the Special Rapporteur thought prudent given the close relationship between them, and which will be continued in the subsequent Third Report.

B. SCOPE AND OUTCOME OF THE TOPIC

Draft Conclusion 1
Scope

1. *The present draft conclusions concern the methodology for determining the existence and content of rules of customary international law.*
2. *The present draft conclusions are without prejudice to the methodology concerning other sources of international law and questions relating to peremptory norms of international law (jus cogens).*

7. In presenting the above conclusion, the Special Rapporteur noted that the present topic aimed to offer practical guidelines, particularly to those who are called upon to identify rules of customary international law and who may or may not be specialists in public international law, in a methodological sense, and not to determine the substance of the rules of customary international law. It was also important that the work on the topic would not enter into matters relating to other sources of international law, as well as *jus cogens*, which, it was decided, would be the subject of a separate topic.

C. USE OF TERMS

Draft Conclusion 2
Use of terms
For the purposes of the present draft conclusions:

(a) "Customary international law" means those rules of international law that derive from and reflect a general practice accepted as law;
(b) "International organization" means an intergovernmental organization;
(c) ...

8. In the First Report, the Special Rapporteur had referred to Article 38.1(b) of the Statute of the ICJ when proposing a definition for "customary international law". However, this was met with some opposition from members of the Commission who felt that it might be seen as relying too heavily on the Statute, which was, in terms, only applicable to the ICJ. Consequently the Special Rapporteur proposed in the Second Report to draw upon the language of the ICJ, without directly referring to it.The advantage of this approach is that such a definition would maintain the key concepts, such as "a general practice" and "accepted as law", which has been seen to be the

basis of the approach of the ICJ, as well as other courts, tribunals, and states has been widely relied upon for nearly a century.

9. The other term the Rapporteur thought useful to define was "international organization", whereby the definition used in the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, as well as the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. The Rapporteur also felt that as the topic proceeded further terms would probably need to be defined and thus thought it desirable to include a saving clause.

D. BASIC APPROACH: TWO CONSTITUENT ELEMENTS

Draft conclusion 3
Basic approach
To determine the existence of a rule of customary international law and its content, it is necessary to ascertain whether there is a general practice accepted as law.

Draft conclusion 4
Assessment of evidence
In assessing evidence for a general practice accepted as law, regard must be had to the context, including the surrounding circumstances.

10. In pursuance of the "two element" approach, the Special Rapporteur, citing Wolfe, noted that, "Without practice (*consuetudo*), customary international law would obviously be a misnomer, since practice constitutes precisely the main *differentia specifica* of that kind of international law. On the other hand, without the subjective element of acceptance of the practice as law, the difference between international custom and simple regularity of conduct (*usus*) or other non-legal rules of conduct would disappear."[15]

11. The Special Rapporteur also noted the repeated reiteration of the presence of the two elements in various ICJ judgments.[16] Furthermore, the recognition of the elements was also present in various bilateral and multilateral treaties, as well as other tribunals and in the writings of scholars, thus cementing its importance and eliminating alternative approaches that emphasize or eliminate one constituent element. The Rapporteur noted that there have been suggestions in the literature, and occasionally echoed in practice, that in such fields as international human rights law, international humanitarian law and international criminal law, one element may suffice in constituting customary international law, namely *opinion juris*. However, the Rapporteur concluded that the better view is that this is not the case.

[15] K. Wolfke, Custom in Present International Law, pp. 40-41

[16] *Jurisdictional Immunities of the State* (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012; *North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969; *Continental Shelf* (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985; *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986; P. Tomka, "Custom and the International Court of Justice", *The Law and Practice of International Courts and Tribunals*, vol. 12, No. 2 (2013)

12. The Special Rapporteur then stated that all evidence must be considered in its context and that great care must be taken in reviewing primary evidence or by looking at subsidiary means. Particular circumstances must be prepared in determining a 'relevant practice' and different weight may be given to different evidence. Citing Treves, the Rapporteur noted, "particularly significant are manifestations of practice that go against the interest of the State from which they come, or that entail for them significant costs in political, military, economic, or other terms, as it is less likely that they reflect reasons of political opportunity, courtesy, etc",[17] while less significance may be given to off-the-cuff remarks made in the heat of the moment.

E. GENERAL PRACTICE

Draft conclusion 5
Role of practice
The requirement, as an element of customary international law, of a general practice means that it is primarily the practice of States that contributes to the creation, or expression, of rules of customary international law.

Draft conclusion 6
Attribution of conduct
State practice consists of conduct that is attributable to a State, whether in the exercise of executive, legislative, judicial or any other function.

Draft conclusion 7
Forms of practice
1. *Practice may take a wide range of forms. It includes both physical and verbal actions.*
2. *Manifestations of practice include, among others, the conduct of States "on the ground", diplomatic acts and correspondence, legislative acts, judgments of national courts, official publications in the field of international law, statements on behalf of States concerning codification efforts, practice in connection with treaties and acts in connection with resolutions of organs of international organizations and conferences.*
3. *Inaction may also serve as practice.*
4. *The acts (including inaction) of international organizations may also serve as practice.*

Draft conclusion 8
Weighing evidence of practice
1. *There is no predetermined hierarchy among the various forms of practice.*
2. *Account is to be taken of all available practice of a particular State. Where the organs of the State do not speak with one voice, less weight is to be given to their practice.*

Draft conclusion 9
Practice must be general and consistent
1. *To establish a rule of customary international law, the relevant practice must be general, meaning that it must be sufficiently widespread and representative. The practice need not be universal.*

[17] T. Treves, "Customary International Law", in *Max Planck Encyclopedia of Public International Law*, para. 30

2. *The practice must be generally consistent.*
3. *Provided that the practice is sufficiently general and consistent, no particular duration is required.*
4. *In assessing practice, due regard is to be given to the practice of States whose interests are specially affected.*

13. Turning to the objective element (practice) of the two-element approach, the Rapporteur noted that this plays an essential role in defining and limiting CIL. States are the primary subjects of international law and the conduct of States is of primary importance for the identification of CIL.

14. For the purpose of attribution of practice to a State, the actions of all branches of Government – including the executive, legislative, judicial or any other branch – may be considered relevant. The conduct of *de facto* organs of the State might also be considered. The Rapporteur also, however, noted the practical difficulty in ascertaining the practice of States, and the issues of dissemination and location of practice. He stated that this issue would be dealt with in greater detail in the Third Report.

15. The Special Rapporteur further opined that defining 'State practice' only in relation to situations falling within the domain of international relations is too narrow an approach, and instead noted, "every act of State is potentially a legislative act." Such acts could comprise both physical and verbal (either written or oral) conduct. However, the Rapporteur further stressed caution in assessing what States say as words cannot always be taken at face value, and that sources must be reliable and unequivocal, and should reflect the consistent position of the State concerned.

16. While stating that practice and its evidence takes a vast number of forms, the Special Rapporteur opined that it would be impractical to list all the numerous types of materials which reveal State practice on each of the many problems arising in international law. However, it would be helpful to indicate some of the main types of practice relied upon by States, courts, tribunals and writings. Thus, the following non-exhaustive list of categories was proposed:

a. Physical actions of States – examples include atmospheric nuclear tests, passage over territory, granting diplomatic asylum and so on;
b. Acts of the executive branch – including executive orders, official Government/State statements before national or international courts, etc.;
c. Diplomatic acts and correspondence –including protests against the practices of others States in the form of notes verbale, etc.;
d. Legislative acts –including constitutional or other legislative provisions in a comprehensive sense;
e. Judgments of national courts – these are of value as evidence of practice even if they do not otherwise serve as evidence of customary international law itself.The value of decisions varies with the highest courts carrying more weight and reversed judgments unlikely to indicate practice.
f. Official publications in fields of international law – including military manuals and instructions to diplomats;

g. Internal memorandums by State officials – these however are generally confidential and may represent personal views as much as official ones;
h. Practice in connection with treaties – including negotiation, ratification, implementation, etc., as well as other obligations taken on through legal instruments;
i. Resolutions of organs of international organizations –this concerns practice of States in connection with the adoption of resolutions by international organizations, i.e. voting, abstentions, explanations, etc.

17. However, the Special Rapporteur clarified that excessive reliance must not be placed on the decision-making processes of international organizations to identify State practice, and iterated that the matter would be dealt with in greater detail in the Third Report. In brief, the Rapporteur stated that the in assessing the practice of international organizations the distinction should be made between practice relating to the internal affairs of the organization and the practice of the organization in its relations with States, international organizations and others. The latter activity of the organizations was concluded to be the relevant one in assessing State practice. Furthermore, distinction must also be drawn between the products of the organizations' secretariats and intergovernmental organs.

18. The Special Rapporteur also made special note of international organizations such as the European Union (EU) to which member States have transferred certain exclusive competences. The Rapporteur concluded that in such cases, the actions of such organizations must be considered equivalent to State practice because denying their actions the status of State practice would effectively render the member States unable to contribute to State practice as they had transferred the relevant decision-making and action-taking powers to the organization.

19. Regarding the role of non-State actors, the Rapporteur concluded that while their roles are important in promotion and observance of international law, their actions could not be considered 'practice' for the purposes of CIL. Similarly, the decisions of international courts and tribunals cannot, by themselves, constitute 'practice' but play a role as a subsidiary means for the determination of the law.

20. The Rapporteur also pointed out that much of State practice, such as classified exchanges between Governments, is not made publicly available for some time and would consequently not contribute much to general customary international law. However, such practices could possibly contribute to the development of regional, special or local rules of CIL.

21. While stating that there is no predetermined *a priori* hierarchy of the manifestation of practice, in many instances the executive branch of Government is the primary speaker for the State in international affairs. However, different positions may be adopted by the separate branches of Government and furthermore, in federal systems there may be conflict between the practices of sub-State organs. Therefore, the approach here must be cautious.

22. In relation to the requirement of 'generality' of practice, the Special Rapporteur opined that practice does not need to be unanimous or universal, but sufficiently extensive or widespread. A "head count" type of quantitative analysis is not the answer here, but rather the answer lies in looking at whether an overwhelming majority of States has applied the practice

when given the opportunity. The prior practice of States that are especially affected by a proposed principle of CIL must also be given special consideration and weight.

23. The relevant practice of States must also be consistent to some extent, and where there is a great deal of fluctuation in the conduct of the State, the Rapporteur concluded that a rule of CIL cannot be said to arise. However, here too complete uniformity of practice is not a necessity but emphasis must be on a general consistency of practice.

F. ACCEPTED AS LAW

Draft conclusion 10
Role of acceptance as law

1. *The requirement, as an element of customary international law, that the general practice be accepted as law means that the practice in question must be accompanied by a sense of legal obligation.*
2. *Acceptance as law is what distinguishes a rule of customary international law from mere habit or usage.*

Draft conclusion 11
Evidence of acceptance as law

1. *Evidence of acceptance of a general practice as law may take a wide range of forms. These may vary according to the nature of the rule and the circumstances in which the rule falls to be applied.*
2. *The forms of evidence include, but are not limited to, statements by States which indicate what are or are not rules of customary international law, diplomatic correspondence, the jurisprudence of national courts, the opinions of Government legal advisers, official publications in fields of international law, treaty practice and action in connection with resolutions of organs of international organizations and of international conferences.*
3. *Inaction may also serve as evidence of acceptance as law.*
4. *The fact that an act (including inaction) by a State establishes practice for the purpose of identifying a rule of customary international law does not preclude the same act from being evidence that the practice in question is accepted as law.*

24. The second necessary element of CIL is of course the subjective element (*opinion juris*), or the acceptance of a general practice as law. This requires that the practice in question be motivated by a "conception [...] that such action was enjoined by law."[18] It is the requirement that the States in question believe that there is some form of legal compulsion to apply a principle or perform an action and it distinguishes mere practice or usage from custom.[19]

25. The Rapporteur noted that to identify the presence of the required subjective element, other motivating factors for an act or practice – such as courtesy, political expediency,

[18] M. O. Hudson, The Permanent Court of International Justice, 1920-1942: a Treatise (New York, Macmillan, 1943), p. 609
[19] *Case concerning Right of Passage over Indian Territory* (Merits), Judgment of 12 April 1960: I.C.J. Reports 1960, p. 6, at p. 120 (Dissenting Opinion of Judge Chagla)

convenience or tradition – must be eliminated. States must have accorded deference to a rule as a matter of legal obligation and not merely as a matter of reciprocal tolerance or comity or solely by the need to comply with treaty obligations. Actions in compliance with treaty obligations do not necessarily indicate the presence of *opinion juris*. Conversely, however, actions in compliance with the rules of a treaty by a non-Party may indicate the presence of *opinion juris.* The practice of States does not justify the formulation of any general rule of law where such States are in a position to select a practice appropriate to their individual circumstances and have thus not recognized a specific practice as obligatory.

26. Hearkening back to the history of the notion of *opinion juris* the Rapporteur stated that scholars had long wrestled with long-standing theoretical problems associated with attempting to capture in exact terms the amorphous process by which a pattern of State conduct acquires legal force. In particular, there has been some debate over whether the subjective element involves belief or merely the consent of States. There is also the seemingly paradoxical question of how a new rule of CIL can emerge if a requirement is the conviction on the part of States that the practice already has the force of law.

27. Pointing to the treatment of the subjective element of CIL by the ICJ, the Rapporteur elucidated that the court had imported notions such as, "a feeling of legal obligation", "a sense of duty" and other similar phrases. The Rapporteur thus concluded that the subjective element refers to the requirement that the practice in question has occurred in such a way as to show a general recognition that a rule of customary international law or legal obligation is involved, and that "accepted as law" may be a better and clearer term to use than *opiniojuris.*

28. The Rapporteur noted that evidencing the subjective element might depend upon the nature of the rule and the circumstances in which the rule falls to be applied. A large number of concordant acts, or the fact that such cases have been occurring over a considerable period of time won't suffice to establish its existence. These facts may give rise to the acceptance of the practice as law, but do not embody such acceptance in and of themselves.

29. While the easiest way, according to the Rapporteur, to ascertain whether a State considered a given rule to be a law is through its express statements, through a branch of the Government to that effect, evidence may be found in a variety of other ways. To this extent, the Rapporteur offered another non-exhaustive list of possible sources:

a. Intergovernmental (diplomatic) correspondence;
b. Jurisprudence of national courts;
c. Opinions of Government legal advisors;
d. Official publications in the fields of international law;
e. Internal memorandums by State officials;
f. Treaties –especially in cases where the treaty purports to be declaratory of CIL, or their status with regard to signatures, ratification, reservations etc.;
g. Resolutions of deliberative organs of international organizations;

30. As with the objective element, the Rapporteur also applied the same standards of consistency to the subjective element.

G. FUTURE PROGRAMME OF WORK

31. The Rapporteur announced that the Third Report, due in 2015, would continue the discussion of the two elements of CIL and their relationship. The Third Report would also cover aspects such as the role of treaties, resolutions of international organizations and conferences, as well as the "persistent objector" rule and "special" or "regional" CIL. The Special Rapporteur continues to aim to submit a final report in 2016, with revised draft conclusions and commentaries in light of the debates and decisions of 2014 and 2015, but acknowledged that this is an ambitious work programme.

H. SUMMARY OF VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPIC AT THE UN GENERAL ASSEMBLY AT ITS SIXTY-NINTH SESSION IN 2014

32. *One delegation* stated that the topic of the identification of customary international law entailed controversial issues in the practice and theory of international law and that the two constituent elements of rules of customary international law, "a general practice" and "accepted as law", or *opinio juris*, must be considered in a balanced manner. In his view, the argument that, in the fields of international human rights law and international humanitarian law, the element of *opinio juris* alone sufficed to establish rules of customary international law was not supported by international practice, and the formation of rules of customary international law was not possible without practice.

33. The delegation went on to add that identification of customary international law called for not only the study of the practice of legal systems and States with significant influence in international law, but also the comprehensive study of the practice of States representing other major civilizations and legal systems of the world. He also stressed that in some specific fields, due importance should be given to "specially affected States", not just major powers.
In the view of the delegation, State practice could take a wide range of forms and that (in principle) there was no hierarchy among the various forms of practice and all should be considered in a balanced manner. In particular, when a conflict arose between the physical acts of some States and the verbal acts of other States, it was necessary to study those two forms of practice holistically in order to identify general practice and its corresponding *opinio juris*, rather than give more weight to physical acts than to verbal acts, he clarified.

34. While noting that this topic dealt solely with the methodological question of such identification and did not intend to establish a hierarchy of sources of international law or codify rules for the formation of international law, *another delegation* stated that his delegation supported the so-called "two- element approach" involving general practice and opinio juris, which avoided the fragmentation of international law.

35. In his view, it was primarily the practice of States that contributed to the creation of customary international law, whereas the practice of international organizations could help in identifying customary international law to the extent that it reflected the practice of States. As had been noted by the International Court of Justice, resolutions of the General Assembly could under certain circumstances provide evidence for the existence of a rule or the emergence of an

opinio juris: it was necessary to examine the content and the circumstances of the adoption of the relevant resolution, he clarified.

36. While stating that the conduct of NGOs and individuals did not qualify as practice for the purpose of formation or evidence of customary international law, he did concede that nevertheless, they could play an important role through their actions in the promotion and the observance of international law. As for the burden of proof, the State claiming or denying a given rule of customary international law should bear that responsibility. In his view, further elaboration was needed with regard to the assertion that *opinio juris* was not synonymous with the "consent" or the desire of States, but rather meant the belief that a given practice was followed because a right was being exercised or an obligation was being complied with in accordance with international law.

37. *Another Delegation* disagreed with the statement in the Special Rapporteur 's proposed draft conclusion 7, paragraph 4, that the acts or inaction of an international organization might serve as practice. In his view, the practice of an international organization should only be applicable to the States members of that organization and that since international organizations differed in terms of their membership and structure, it should not be presumed that the acts or inaction of any of them represented the general practice of States for the purposes of establishing customary international law. Nonetheless, it was probably premature to reach any definitive conclusion as to the role of international organizations in the establishment of rules of customary international law, since that element would be dealt with in greater detail in the third report of the Special Rapporteur.

38. With respect to draft conclusion 5 (Role of practice), the stipulation that it was "primarily" the practice of States that contributed to the creation, or expression, of rules of customary international law was mean to imply that the practice of international organizations should not be overlooked. However, it was his delegation's view that widespread and consistent State practice must be given the utmost priority in determining the formation or expression of customary international law and should be the guiding principle of the work on the topic in the initial stages.

39. He was of the view that the decision to base draft conclusion (Attribution of conduct) on article 4 of the articles on the responsibility of States for internationally wrongful acts raised some concerns, as the two instruments were different in nature and that the phrase "any other function", as it pertained to conduct attributable to a State as a manifestation of State practice, needed to be clarified. Further consideration should also be given to the weight to be afforded to any other functions when they were invoked, and States' consent should be obtained for such practices to be used as a basis of customary international law. The statements in draft conclusion 7, paragraph 3, and draft conclusion 11, paragraph 3, indicating that inaction might serve as practice or evidence of acceptance as law also required further review, he added.

40. With regard to draft conclusion 10, paragraph 2, which stated that acceptance as law was what distinguished a rule of customary international law from mere habit or usage, the Commission should also identify common situations where States had acted as a result of comity and courtesy rather than *opinio juris*. Future versions of that draft conclusion should therefore

include a reference to acts performed as a result of comity and courtesy and not just habit and usage. His delegation was of the view that the programme of work proposed by the Special Rapporteur was too ambitious, especially considering that the topic contained numerous difficult questions that would require cautious and careful consideration. He also brought attention to the the Asian-African Legal Consultative Organization (AALCO), of which Malaysia was a member, which had also created a Working Group to study the topic in support of the ongoing work of the Commission.

41. *Another delegate* welcomed the formulation of a definition which borrowed from the language of Article 38, paragraph 1 (b), of the Statute of the International Court of Justice, but felt that consideration of the definition of "international organization" should be postponed until the Commission had dealt specifically with the use of terms in a comprehensive manner. In her view, draft conclusion 3 sufficiently reflected the two element approach in identifying the existence of a rule of customary international law, namely ascertaining a general practice and then determining whether that practice was accepted as law, an approach that was widely established in State practice and recognized by national and international courts and tribunals. It would be necessary in future reports to establish in more detail the meaning of the expressions "general practice" and "accepted as law (*opinio juris*)". In draft conclusion 4, which provided that in assessing evidence for a general practice as law, regard must be had to the context, including the surrounding circumstances, the words "context" and "surrounding circumstances" were unclear and could give rise to divergent interpretations. The words to be chosen should be easily understood by those responsible for assessing evidence for a general practice accepted as law, such as judges, practitioners and government legal advisers, she added.

42. Her delegation supported the view expressed in draft conclusion 5 that the conduct of States, as the primary objects of international law, contributed to the creation, or expression of rules of customary international law. In draft conclusion 6, the inclusion of the phrase "any other function" in connection with the attribution of State conduct appeared to broaden the scope of the draft conclusion unnecessarily. In view of the principle of the sovereign equality of states, her delegation had reservations about draft conclusion 9, paragraph 4, on the need to pay due regard to the practice of States whose interests were specially affected in assessing practice. Draft conclusion 10, on the role of acceptance as law, was important, as it constituted a part of the two-element approach. However, in paragraph 1, the statement that "the practice in question must be accompanied by a sense of legal obligation" did not seem sufficient to clarify the meani ng of the expression "accepted as law" or "*opinio juris*".

43. *Another Delegation* stated that, customary international law was one of the most important sources of international law and that it could therefore be expected to offer practical guidance to the judges of domesic courts who were not familiar with international law. His delegation supported the two-element approach to the topic. The draft conclusions should strike a balance between guidance and the inherent flexibility of customary international law. The topic would gain in clarity if the more commonly used term " *opinio juris*" were used in parallel with the expression "accepted as law."

44. In his view, the change in the title of the proposed draft article 6 of the Special Rapporteur, namely, "Attribution of conduct", to "Conduct of the State as State practice" in the corresponding draft conclusion 5 [6] provisionally adopted by the Drafting Committee was appropriate, as the reference to the articles on the responsibility of States for internationally wrongful acts introduced an unnecessary complexity. The articles on State responsibility used "attribution" in a sense that was not relevant to the current topic and considered some types of conduct attributable to a State that would not be considered State practice for the purpose of the formation of customary international law.

45. The notion of inaction as a form of State practice merited detailed study and explanation in the commentary in order to provide practical guidance, since not all inaction of a State was necessarily to be considered State practice for purposes of the formation of customary international law. With regard to the Special Rapporteur 's draft conclusion 9, his delegation understood the concerns expressed by some members of the Commission as to the irreconcilability of the concept of "specially affected States" with the sovereign equality of States, but nevertheless considered the concept to be useful in determining certain rules of customary international law in certain fields, and particularly in identifying regional custom. Moreover, international humanitarian law, while applying to all States, recognized the existence of "specially affected States". In his third report on the topic, the Special Rapporteur should focus on the acts of international organizations, which played a significant part in the development of modern customary international law; he should also examine carefully the interplay and temporal dimension of the relationship between the two elements of customary international law and the procedural question of burden of proof in regard to the existence of such law.

V. PROTECTION OF THE ENVIRONMENT IN RELATION TO ARMED CONFLICTS

A. BACKGROUND

1. The environmental effects of armed conflict are well known, and may be long-term and irreparable and prevent the effective rebuilding of a society. While the protection of environment in armed conflicts has traditionally been viewed through the lens of the laws of armed conflict – i.e. international humanitarian law –this may be a narrow perspective as the range of laws applicable during an armed conflict are broader than just humanitarian law. These other applicable laws include international human rights law and international environmental law, which has been recognized by the International Court of Justice (ICJ). The ICJ also famously noted, in the advisory opinion on *Legality of the Threat or Use of Nuclear Weapons*,[20] that environmental considerations must be considered in wartime. In the *Nuclear Tests* (New Zealand v. France) case the Court stated that its conclusion was "without prejudice to the obligations of States to respect and protect the natural environment."[21]

2. Consequently, at its Sixty-Third session in 2011, the Commission included the topic "Protection of the environment in relation to armed conflicts" in its work programme, on the basis of the recommendation of the working group on the long-term programme of work and appointed Ms. Marie G. Jacobsson as Special Rapporteur for the topic. After holding informal consultations at the Sixty-Fifth session, the Special Rapporteur presented an oral report to the Commission. The Commission also agreed to formulate a request to States to provide examples of international environmental law, including regional and bilateral treaties, continuing to apply in times of international or non-international armed conflict.

3. At the Sixty-Eight session of the Sixth Committee of the General Assembly, the majority of States welcomed the addition of the topic to the work programme of ILC, though concerns were raised about the scope of the topic and its ramifications beyond the topic of environmental protection in relation to armed conflict. There was also general consensus that the outcome of the work on the topic was draft guidelines in stead of draft articles.

4. This brief will seek to summarize the details discussed at the Sixty-Sixth session of the ILC which are namely, the practice of States and international organizations with regards to human rights and the environment, followed by a discussion of the relationship of the aforementioned topic with other topics addressed by the Commission, including those on the present agenda. The report will then look at relevant treaty provisions and pre-existing environmental concepts, to further facilitate the future programme of work.

[20] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996

[21] *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests* (New Zealand v. France) Case, I.C.J. Reports 1995, p. 288, para. 64.

B. THE PRACTICE OF STATES AND INTERNATIONAL ORGANIZATIONS

5. Subsequent to the Commission's request for States to provide examples of international environmental law, including regional and bilateral treaties, continuing to apply in times of international or non-international armed conflict, five countries responded, namely Botswana, Czech Republic, El Salvador, Germany and Mexico. The Special Rapporteur also obtained information through communication with States and international organizations on some of the national legislations, which seek to substantiate claims of state practice and practices of other international organizations towards harboring environmental interests even at the time of conflicts.

6. States which responded to the Commission and the Special Rapporteur's request included: Botswana, El Salvador, Mexico, Germany, the United States of America, the People's Republic of China, Denmark, Finland, Norway, and Sweden. Additionally, responses were also received from Department of Peacekeeping Operations and Department of Field Support of the United Nations, as well as the North Atlantic Treaty Organization (NATO).

7. However, the limited information obtained from States thus far with respect to the practice and policies in peacetime and during international peace operations was not enough to claim that a general universal practice exists. Nor was it possible to establish evidence of customary international law. Yet, it signals an awareness and clear ambition on the part of States and international organizations to take environmental considerations into account when planning and conducting military operations in peacetime.

C. PURPOSE OF THE REPORT

8. The aim of the Preliminary Report by the Special Rappoteur was to provide an introductory overview of phase I of the topic, namely the relevant rules and principles applicable to a potential armed conflict (peacetime obligations). Consequently, it did not address measures to be taken during an armed conflict or post-conflict measures per se.

9. In framing the report, the Special Rappoteur took into account:

a. The views expressed during the informal consultations in the Commission;
b. The views expressed by States in the Sixth Committee of the General Assembly;
c. The written information submitted by States in response to the request by the Commission included in chapter III of the report on the work of the Commission at its sixty-fifth session; and,
d. The information obtained through direct communication with States and international organizations.

10. The Report also aimed to deal with the relationship between this topic and certain topics already discussed by the Commission such as:

a. The effects of armed conflicts on treaties;
b. Non-navigational uses of international watercourses;
c. Shared natural resources;
d. Prevention of transboundary harm arising rom hazardous activities.

11. The Preliminary Report also aimed to develop the content of phase I by identifying existing legal obligations and principles arising under international environmental law that could guide preventive measures taken to reduce negative environmental effects resulting from a potential armed conflict. The Special Rapporteur, however, noted that it would be premature to attempt to evaluate the extent to which these rules may continue to apply (or be influential) in situations of armed conflict and post-armed conflict. Ultimately, it was the aim of the Special Rapporteur to confine the Report to the most important principles, concepts and obligations, rather than trying to identify which conventions continue to apply during an armed conflict.

D. REFLECTIONS ON THE SCOPE AND METHODOLOGY

12. The Special Rapporteur maintained that the topic be approached from a temporal perspective, rather than from the perspective of particular regimes of international law, such as environmental law, the law of armed conflict and human rights law. It was thus proposed that the Commission proceed to consider the topic in three temporal phases: before, during and after an armed conflict (phase I, phase II and phase III, respectively), in order to make the topic more manageable. The Special Rapporteur also maintained that the focus should be on phase I and phase III. There was some divergence of opinion within both the Commission and Sixth Committee, with variousparties opining that phase II was the most important of the three phases.

13. The Special Rapporteur also iterated that the Commission has no intention to, nor is in a position to, modify the law of armed conflict or address situations where environmental pressure contributes to the outbreak of armed conflict. It was merely proposed that the work of the Commission focus on identifying and clarifying the guiding principles and/or obligations relating to the protection of the environment which arise under international law in the context of (a) preparation for potential armed conflict; (b) the conduct of armed conflict; and (c) post-conflict measures in relation to environmental damage. Additionally, the Special Rapporteur also expressed reluctance to address protection of cultural heritage as this is a highly regulated area.

14. Furthermore, the effects of particular weapons would not be addresses, nor should be, according to the Special Rapporteur, because the laws applicable would deal with all weapons on the same legal basis. The Special Rapporteur also expressed the need for caution in approaching questions regarding refugee law, as this is an important aspect of the topic, but a particularly complex issue.

E. USE OF TERMS – DRAFT SUGGESTIONS

15. With a view to facilitate discussion via-a-vis seek approval, the special rapporteur sought to draft the following definitions:
    a. “Armed conflict”
    b. “Environment”

16. After considering the definition of “armed conflict” in the Tadić judgment of the ICTY as well as the prior definition by the Commission, the following use of the term is suggested by the Special Rapporteur:

> "Armed conflict" means a situation in which there is resort to armed force between States or protracted resort to armed force between governmental authorities and organized armed groups or between such groups within a State."

17. The Commission noted that there was no internationally accepted definition of environment, but found it useful to adopt a "working definition". The Commission had previously defined "environment" in its work on principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities as follows:

> "Environment" includes natural resources, both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors, and the characteristic aspects of the landscape."

18. As the Special Rapporteur believes that the definition contained in the principles on the allocation of loss in the case of trans boundary harm arising out of hazardous activities is a meaningful point of departure, the following definition of the term "environment" was therefore suggested based largely on the previous definition:

> "Environment" includes natural resources, both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors, and the characteristics of the landscape."

F. SOURCES AND OTHER MATERIAL TO BE CONSULTED

19. The Special Rapporteur stated that the work on this topic will necessarily draw upon, inter alia, treaty law, State and organization practice, customary international law, general principles of international law, decisions of courts and tribunals, and legal writings.

20. The Special Rapporteur had been particularly engaged in searching for scholarly writings on the topic from various diverse regions in order to form a comprehensive opinion. She thus encouraged colleagues in the Commission and delegates in the Sixth Committee of the General Assembly to provide the Special Rapporteur with information.

G. RELATIONSHIP WITH OTHER TOPICS ADDRESSED BY THE COMMISSION AND TREATY PROVISIONS

i. Convention on the Law of the Non-navigational Uses of International Watercourses (1997)

21. The Convention on the Law of the Non-navigational Uses of International Watercourses (1997) expressly provides for the protection of international watercourses and installations in time of armed conflict. Specifically, Article 29 of that Convention makes it clear that "international watercourses and related installations, facilities and other works shall enjoy the protection accorded by the principles and rules of international law applicable in international and internal armed conflict and shall not be used in violation of those principles and rules."

22. As reflected in the commentary, armed conflict may "affect an international watercourse as well as the protection and use thereof by watercourse States". In these circumstances, the rules and principles that regulate armed conflict apply. The commentary specifies examples of such rules and principles embodied in various conventions. These examples include: the Hague Convention of 1907 Concerning the Laws and Customs of War on Land; Protocol I additional to the Geneva Conventions of 12 August 1949; and the Martens clause. While these Conventions are not directly applicable in non-international armed conflicts, the Commission seemed to suggest that the obligation to protect, however unspecified, is germane in non-international armed conflict.

ii. Articles on the law of trans boundary aquifers (2008)

23. The articles on the law of transboundary aquifers also provide specific protection during armed conflict under article 18. Of particular relevance here, the article asserts that, "Trans boundary aquifers or aquifer systems and related installations, facilities and other works shall enjoy the protection accorded by the principles and rules of international law applicable in international and non-international armed conflict and shall not be used in violation of those principles and rules."

24. Importantly, both the Convention on the Law of the Non-navigational Uses of International Watercourses and the articles on the law of trans boundary aquifers are applicable in situations of both international and non-international armed conflict. Notwithstanding the fact that the law of armed conflict applies, the duty to cooperate remains. Both conventions make it clear that human needs take priority over other uses.

iii. Articles on the effects of armed conflicts on treaties (2011)

25. This work takes as its starting point the presumption that the existence of an armed conflict does not ipso facto terminate or suspend the operation of treaties, as provided for in the articles on the effects of armed conflicts on treaties (art. 3). This finding has two implications: the first is that treaties are not automatically terminated or suspended during an armed conflict. That is to say, various treaties not automatically devoid of those rights and obligations confer States that are parties to a conflict. The second is that a treaty may well be terminated or suspended.

iv. Principles on the allocation of loss in the case of trans boundary harm arising out of hazardous activities (2006)

26. The 2006 principles on the allocation of loss in the case of trans boundary harm arising out of hazardous activities define "damage" as including significant damage caused to persons, property or the environment. This includes loss or damage by impairment of the environment; the costs of reasonable measures of reinstatement of the property, or environment, including natural resources; and the costs of reasonable response measures. Relevantly, the commentary to principle 4 provides an exception to liability for prompt and adequate compensation if the damage was the result of an act of armed conflict, hostilities, civil war or insurrection.

v. Environmental principles and concepts

27. The Special Rapporteur noted that the references to environmental law principles or human rights are made for the purpose of convenience. They are not meant to assert that they are self-contained regimes. The environmental law principles and concepts that are of relevance to the present topic are imprecise and vague and seldom offer clear-cut answers and solutions. The Rapporteur then moved on to to recall the most prominent lines of development that have taken place since the adoption of the ENMOD Convention (1976) and Protocol I additional to the 1949 Geneva Conventions (1977).

Sustainable development

28. The Special Rapporteur stated that sustainable development is the necessary link between the protection of the environment and its resources and the needs of the human beings. It has a clear intergenerational element. Whatever resources are to be used, they are supposed to be used in a manner that ensures that such resources last for longer than a limited period of time, that is, for more than one generation. However, divergent views exist as to whether this concept has legal implications or mere socio-economic implications.

29. The International Court of Justice had addressed this in the Gabcíkovo-Nagymaros case (1997).The Court did not take a position on the legal status of sustainable development, but in his separate opinion Vice-President Weeramantry took the clear position that sustainable development is a legal principle and "an integral part" of international law. The World Trade Organization (WTO) Panel and Appellate Body have also remarked on the concept of sustainable development. For example, in European Communities — Conditions for the Granting of Tariff Preferences to Developing Countries, the Appellate Body noted that the concept was one of the objectives that member States may pursue in accordance with the preamble to the WTO Agreement.

Prevention and precaution

30. The Special Rapporteur noted that the principle of prevention is the fundamental tenet on which international environmental law rests with its roots tracing back to the Trail smelter case. It is closely linked to the principle of precaution. The principle of prevention is recognized as customary international law and is applied mostly in a trans boundary context. It is included in international treaties and recognized in case law (including the Pulp Mill and Gabcikovo-Nagymaros cases referred to above). For example, the European Union has codified the precautionary principle along with the preventive principle in article 191 (2) of the Treaty on the Functioning of the European Union. The WTO has dealt with the principle in several cases. In EC — Hormones, the European Community proposed that the precautionary principle should be regarded as a "general customary rule of international law or at least a general principle of law".

31. Different techniques can be applied to meet the requirements of the precautionary principle, such as prohibition of substances or techniques, applying best technology available, performing environmental impact assessments (EIAs), imposing environmental quality standards, conservation measures, or integrated environmental regulation.

Polluter pays

32. The Special Rapporteur specified that the polluter-pays principle dates back to the Trail smelter and Chorzów factory cases. It is probably an accurate reflection to state that the principle was "originally devised to allocate the cost of pollution prevention and control measures, "has matured into a formidable strategy for the protection of the environment, human health and safety, resource management and generally ensuring environmentally sustainable activities." The polluter-pays principle is applicable both in inter-State relations and in the context of civil liability regimes.

Environmental impact assessment

33. Environmental impact assessment (EIA) is part of the work to prevent environmental harm from occurring. It does not impose substantive environmental standards or indicate what results are to be achieved. Despite this, the obligation to undertake EIAs has become part of both national and international law. The Special Rapporteur noted that one of the most prominent conventions in this respect is the 1991 Convention on Environmental Impact Assessment in a Trans boundary Context.

34. These measures are to be fully integrated into the project and its costs. The case provides support for the imposition of a general requirement for an EIA under international law, as well as underscoring the increasing importance that is being placed on the duty of prevention. The requirement of EIAs has also been described as "very prevalent" in the previous work of the Commission.

Due diligence

35. The Special Rapporteur noted that due diligence is a multifaceted concept in international law that is both applicable in peacetime and in situations of armed conflict. There is a considerable amount of case law that refers to "due diligence" and its historical roots date back centuries. Its application is not merely limited to circumstances involving aliens in State territory. It is relevant in international investment law, human rights law, and even in the context of the laws of armed conflict.

36. The standard of due diligence constitutes an obligation of conduct rather than an obligation of result, as has been noted by the Commission previously in its work on the draft articles on prevention of trans boundary harm from hazardous activities, as well as by the International Law Association's Study Group on Due Diligence. In this regard, it is interesting to note that the International Tribunal for the Law of the Sea held that taking precautionary measures was a part of due diligence in their seabed mining advisory opinion.

Human Rights and the Environment

37. The Special Rapporteur emphasized that human rights cannot be enjoyed in a degraded environment. However, it does not automatically follow that there exists a customary law rule establishing an individual human right to a clean environment. The link between a clean environment and the enjoyment of human rights is indirect and secured through other established rights, such as the right to health, food and acceptable living conditions.

38. The European Convention on Human Rights does not contain a general right of protection of the environment as such, but environmental issues have been found to implicate other rights. For example, the European Court of Human Rights has previously held that certain acts constitute a violation of the right to life or health, as well as the right to respect one's home and one's private and family life. Some decisions in the context of the Inter-American system refer to the disclosure of information to the peoples concerned. Inherent in the requirement to consult the public is an obligation to disclose information. Decisions relating to the environment within the Inter-American system (Court or Commission) refer to a series of rights belonging to the American people, such as the right to property, to freedom of movement and residence, to humane treatment, to judicial guarantees, and to judicial protection. The communication of the African Commission on Human and Peoples' Rights in the Ogoniland case clarifies the obligation of States to take reasonable measures to prevent environmental harm. In addition to the obligation to avoid direct participation in the contamination of air, water and soil, the African Commission's communication also outlines the obligation to protect the population from environmental harm.

Indigenous people and environmental rights

39. The Special Rapporteur noted that indigenous people have a special relationship with their traditional land. They hold their own diverse concepts of development that are based on their traditional values, visions, needs and priorities. Therefore, it is important to note that article 16 of the International Labour Organization (ILO) Convention No. 169 (1989) deals explicitly with the displacement of indigenous peoples. One of the most important rules in the Convention is found in article 16 (1), which states that indigenous peoples shall not be removed from their lands.

40. In cases where relocation was necessary, indigenous peoples should have the right to return as soon as the reason for which they had to leave is no longer valid. For example, in the case of a war, or natural disaster, they can go back to their lands when it is over. In cases where such unavoidable relocation becomes a permanent situation, indigenous peoples have the right to lands of an equal quality, in addition to legal rights relating to the land they previously occupied. This may include rights relating to the agricultural potential of the lands and legal recognition of ownership to that land.

H. FUTURE PROGRAMME OF WORK

41. The Special Rapporteur proposed that the Second Report would focus on the law applicable during both international and non-international armed conflict and would discuss in greater detail issues of human and indigenous rights. The Special Rapporteur also proposed that the Second Report would contain proposals for guidelines, while the Third Report, due in 2016 would focus on post-conflict measures.

42. The Special Rapporteur also specifically proposed that the Third Report would focus on post-conflict measures, including cooperation, sharing of information and best practices, and reparative measures.The Special Rapporteur finally concluded by stating that it would also be of assistance if States were to provide examples of national legislation relevant to the topic and case law in which international or domestic environmental law has been applied.

I. SUMMARY OF THE VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPIC IN THE SIXTH COMMITTEE OF THE UN GENERAL ASSEMBLY AT ITS SIXTY-NINTH SESSION (2014)

43. *One delegation* stated that a further study of the environmental obligations in armed conflict might be warranted, not least because it would provide an opportunity to fill existing gaps in international humanitarian law concerning the protection of environment. An example of such a gap was the illustrative but not exhaustive list of vital infrastructure that must not be made the object of attack under article 56 of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I). In fact, the failure to mention oil platforms and other oil production and storage facilities was contrary to the intent of the drafters of the Protocol to protect the environment. Since the adoption of Protocol I, attacks on such structures with consequent environmental damage for which there was no legal remedy had revealed the gap in the law, he added.

44. In his view, the provision in article 56, paragraph 2 (b), of the Protocol allowing for the cessation of the special protection against attack accorded to nuclear electrical generating stations had been repeatedly described as inappropriate in view of the dangerous nature of nuclear installations. Advances had been made since to achieve full prohibition of such attacks, including the adoption of United Nations General Assembly resolutions 40/6 and 45/58, as well as resolutions GC(29)/RES/444 and GC(31)/RES/475 of the General Conference of the International Atomic Energy Agency. The debate on the issue since the 1985 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons and its evolution into a serious proposal — included in the final document of the 2010 Review Conference — to adopt a legally binding instrument to prohibit any military attacks on nuclear facilities dedicated to peaceful purposes suggested that the lifting of special protections as provided for in article 56, paragraph 2 (b), should be described as outdated.

45. The suggestion that the Commission should define the term "armed conflict" in order to facilitate consideration of the topic was acceptable if the definition was confined to the term "international armed conflict" and was considered merely a working definition. Expanding the scope of the definition of armed conflict to include non-international armed conflict would be problematic. The Commission would need to consider the legal obligations of non-State actors, on the basis of a definition already fraught with ambiguities and disagreements; such an endeavour would also entail further attempts to determine the threshold of non-international armed conflicts. In either case, the relevant provisions of the international l law of armed conflict would need to be changed, which was far from the purpose of the work in question. The inclusion of refugee matters, on the other hand, was clearly relevant. One of the immediate consequences of large-scale war was the displacement of persons, which could result in the mass influx of refugees. Provision for settlement in the event of a surge of refugees necessarily involved issues relating to the protection of the environment.

46. *Another Delegation* observed that the focus should be on identifying the legal issues involved in environmental protection that arose during each phase of armed conflict, with the aim of developing future guidelines or conclusions, rather than addressing issues such as internally displaced persons, refugees, cultural heritage and environmental pressure as a cause of armed conflict, or attempting to modify existing legal rules and regimes under international

humanitarian law, human rights law or international criminal law. Although those legal issues might be relevant to the topic at hand, they should be approached with caution, he added.

47. Despite the broad support for the proposal to develop working definitions of "armed conflict" and "environment" to facilitate discussion, there was no urgent need to develop a conclusive definition in the early stages. In particular, the debate on the definition of "armed conflict" should be preceded by a determination of which actors would be covered by the guidelines or conclusions and the scope of protect ion that would be afforded. ln relation to linkages between environmental principles, human rights law and armed conflict, issues such as "sustainable development", the "principle of prevention", the "polluter pays" principle and the obligation to conduct environmental impact assessments would be relevant for the development of guidelines to encourage the adoption of environmentally sound measures in military or defence planning and operations, he clarified

48. ln response to the Commission's request for State practice on the topic, his delegation noted that the measures taken by the Malaysian armed forces to protect and preserve the environment in their administrative and operational structures were generally based on domestic legislation, including the Environmental Quality Act of 1974, the National Forestry Act of 1984 and the Wildlife Conservation Act of 2010. The construction of military bases and installations by the Malaysian armed forces required compliance with the Environmental Quality Act, including the need for environmental impact assessment reports prior to such construction, the proper placement of explosives and fuel storage installations so as not to adversely affect water tables, and respect for the safety of populations and preservation of the surrounding environment.

49. *Another delegation* welcomed the temporal approach adopted by the Special Rapporteur, which allowed for the consideration of protective measures before, during and after an armed conflict. The primary focus should, in his view, however, be on protective measures during an armed conflict. True, there could not be a strict dividing line between the different temporal phases and, as the work progressed, it would become evident how the legal rules pertaining to the different phases blended into one another. Therefore, there should be no attempt to assign different weights to each phase, he added.

50. He was of the considered view that with regard to the scope of the topic, the Commission should address situations of non-international armed conflicts as well as those of international armed conflict. Even though the United Nations Educational, Scientific and Cultural Organization (UNESCO) had adopted legal instruments concerning the protection of cultural heritage, the Commission should examine the issue with a view to filling any gaps in those instruments. While supporting the principles and concepts of sustainable development, prevention, polluter pays, environmental impact assessment and due diligence, which the Commission had discussed extensively, her delegation believed that the Commission should examine them further in order to deter mine their proper applicability in the context of the topic.

51. *Another Delegation* hoped that the work of the Commission would contribute to more constructive discussion concerning the prevention of environmental degradation and that it concurred with the Special Rapporteur 's view that different problems arose and different rules

were applicable before, during and after an armed conflict but thought that it might be difficult in practice to determine exactly when the pre-conflict phase ended and the post -conflict phase began. His delegation also supported the inclusion of organized armed groups in the topic, based on the definition adopted in the Commission's previous work on the effects of armed conflict on treaties.

52. His delegation noted that the definition of "environment" had been taken from the Commission's previous discussions on the principles of the allocation of loss in the case of transboundary harm arising out of hazardous activities but considered that the concept of environment needed to be defined with reference to context. The context of hazardous activities was different from that of armed conflict; accordingly, the appropriateness of the concept should be carefully examined and constructively discussed within the Commission. The anticipated discussions during the Commission's next session on protection of the environment during the actual conflict should include a theoretical examination of the existing principles of such protection; the Commission should also focus on preventive measures and international cooperation and the development of guidelines.

VI. PROTECTION OF THE ATMOSPHERE

A. BACKGROUND

1. At the sixty-third session of the International Law Commission (2011), the Commission endorsed the inclusion of the topic "Protection of the atmosphere" in its long-term programme of work.[22]

2. The topic "Protection of the Atmosphere" was decided to be included at its sixty-fifth session of the International Law Commission in 2013. Mr. Shinya Murase was appointed as the Special Rapporteur for this topic. This topic was included in its programme on the understanding that it shall not interfere with relevant political negotiations, including on climate change, ozone depletion, and long-range trans boundary air pollution. It was the understanding that the topic shall not deal with, but is also without prejudice to, questions such as, liability of States and their nationals, the polluter-pays principle, the precautionary principle, common but differentiated responsibilities, and the transfer of funds and technology to developing countries, including intellectual property rights. Certain specific substances, such as black carbon, tropospheric ozone, and other dual-impact substances, which are the subject of negotiations among States, shall be excluded from the study. It was also agreed that this project should not attempt to "fill" gaps in the existing treaty regimes. The outcome of this project would be in the form of draft guidelines.[23]

B. CONSIDERATION OF THE AGENDA ITEM AT THE SIXTY-SIXTH SESSION OF THE COMMISSION

3. The Special Rapporteur Mr. Shinya Murase submitted his first report on this topic. The first report lays down three draft guidelines on 'definition of atmosphere' (draft Article 1), 'scope of the guidelines' (draft Article 2), and 'legal status of the atmosphere' (draft Article 3). In preparing this report, the Special Rapporteur has provided thorough background of the topic, such as its historical development and the sources of law relevant to it, as well as attempted to explain the rationale of the topic and the basic approaches, objectives and scope of the project. The report elaborates on the background for this topic containing the evolution of protection of atmosphere in international law; sources in terms of treaty practice, jurisprudence of international courts and tribunals, and customary international law are referred to.

4. At the Sixty-eighth session of the UN General Assembly (2013), vide its resolution 66/98, noted the report of the International Law Commission on the work of its sixty-third session, which inter alia, took note of the inclusion by the Commission of the topic "Protection of the atmosphere" in its long-term programme of work. There is a majority view that protection of atmosphere is a matter of growing concern for the international community despite being mindful of the ongoing political negotiations on drafting an outcome of legal nature to address commitments under the climate change regime. Some Member States of AALCO have expressed

[22] See A/66/10, annex B.
[23] See A/68/10, para. 168.

their keen interest[24] in this subject, while cautioning that the highly technical nature of this subject may render this exercise futile[25].

5. The report highlights four goals of this proposed project in the progressive development and codification of international law.

- to identify the status of customary international law, established or emerging, examining the gaps and overlaps, if any, in existing law relating to the atmosphere
- to provide appropriate guidelines for harmonization and coordination among treaty regimes within and outside international environmental law.
- to clarify a framework for the harmonization of national laws and regulations with international rules, standards and recommended practices and procedures relating to the protection of the atmosphere.
- to establish guidelines on the mechanisms and procedures for cooperation among States in order to facilitate capacity-building in the field of trans boundary and global protection of the atmosphere. The report further states that the purpose of this project was not to mould "shame and blame" matrices for potential polluters but on the contrary, to explore possible mechanisms of international cooperation to solve the problems of common concern.

Draft guideline 1
Use of terms

For the purposes of the present draft guidelines,
(a) "Atmosphere" means the layer of gases surrounding the earth in the troposphere and the stratosphere, within which the transport and dispersion of airborne substances occurs"

6. The report states that there are three core international issues concerning the atmosphere, namely, air pollution, ozone depletion and climate change. These issues relate to the troposphere and the stratosphere, even when major contributing factors may be different in each case. For example, factors such as the residence time. While traditional air pollution constituents does have a residence time of days to weeks, greenhouse gases (GHGs), such as carbon dioxide and nitrous oxide, and compounds destroying the stratospheric ozone layer, may have residence times that often exceed a century.

7. There is a need to consult the scientific experts in framing a definition of the atmosphere because the definition of atmosphere, must be clear and inclusive. A question arises as to whether to include the upper atmosphere, which comprises of the mesosphere and thermosphere, within the definition of the "atmosphere" as proposed in Draft Guideline 1. While comparing with the concept "climate change" as per the definition provided under Article 1 (2) of the United Nations Framework Convention on Climate Change (UNFCCC), it is clear that it would be incorrect to characterize the changes in temperature in the mesosphere as "climate change". While the Special Rapporteur acknowledged that the understanding of changes in the upper

[24] For detailed deliberations on this topic, See A/C.6/66/SR.27 (People's Republic of China, Nigeria and Sri Lanka). For First report on Protection of the Atmosphere in A/CN.4/667.
[25]Islamic Republic of Iran, Ibid.

atmosphere may be limited by a lack of scientific data, the absence of such data meant that an attempt to formulate a protective regime for the upper atmosphere would be overly ambitious. It is thus essential that in order to remove the reference to the troposphere and stratosphere from the definition in Draft Guideline 1, the Commentary to the same must clarify the atmosphere's relationship to outer space.

Draft guideline 2
Scope of the guidelines

(a) The present draft guidelines address human activities that directly or indirectly introduce deleterious substances or energy into the atmosphere or alter the composition of the atmosphere, and that have or are likely to have significant adverse effects on human life and health and the earth's natural environment;
(b) The present draft guidelines refer to the basic principles relating to the protection of the atmosphere as well as to their interrelationship.

8. The main concern has been, in this regard, with reference to anthropogenic environmental degradation, in other words, damage caused due to human activities to natural and human environment. It is an essential fact that to know the gravity of this subject, reference to the issues such as transboundary air pollution and climate change, is imperative. However, these issues should only be referred to in order to build an 'understanding' of the subject holistically, and should not be intended to be part of substantive discussion. It is also viewed that the principles of international environmental law that have evolved over the years through the judgments of the international courts and tribunals and customary practices of the States, focused on the 'precautionary approach' rather than the 'principle of prevention'. The need of the hour is 'to prevent' any harm to the atmosphere because the impact of atmospheric pollution could be on all levels of human existence. The reason why these principles stand significant in this topic should be read with the categorisation of 'protection of atmosphere as a common concern of humankind', which reiterates that the atmosphere is a natural resource, which is common to all, and shared by everyone, that has to be preserved. Due to its link between climate change and trans boundary air pollution, the atmosphere is also required to be accorded the legal status of a 'common concern for humankind', which is well-explained in draft guideline 3.

9. The concept "deleterious substances" is very exhaustive. And the term "energy", as it relates to the import of pollutants to the atmosphere, should include radioactive and nuclear emissions because the word "energy" not only appears in the Convention on Long-Range Trans boundary Air Pollution, but also in the UN Convention on the Law of the Sea (UNCLOS) which also defines "pollution" in Article 1, paragraph 1(4) to include "the introduction of substances **or energy** into the marine environment." Thus it is important to at least refer to the question of "energy" pollution broadly conceived. There is a close inter-linkage with other areas of international law such as law of the sea, biodiversity (desertification, forestry and wetlands), as well as international trade law and international human rights law.

Draft guideline 3
Legal Status of the Atmosphere

(a) The atmosphere is a natural resource essential for sustaining life on earth, human health and welfare, and aquatic and terrestrial ecosystems; hence, its protection is a common concern of humankind;
(b) Nothing in the present draft guidelines is intended to affect the legal status of airspace under applicable international law.

10. In order to determine the legal status of the concept atmosphere, an analysis of five concepts is necessary, namely, atmosphere as (i) airspace, (ii) shared or common natural resources, (iii) common property, (iv) common heritage and (v) common concern (common interest). The report discusses in detail various categories in which atmosphere would be considered. Therefore, atmosphere must be considered as natural resource, which ought to be preserved, and caution must be to prevent any further harm to the atmosphere. Hence, "it is not the atmosphere but rather the *protection* of the atmosphere that is a common concern." The report states that this project endeavors to establish a cooperative framework for atmospheric protection, not to establish common ownership or management of the atmosphere. This narrow application of the concept of "common concern" is consonance with existing applications of the concept in international environmental law. It reflects the understanding that it is not a particular resource, whether beyond the jurisdiction of states, such as the climate system, or within a state's territory, as in the case of biodiversity, that is common, but rather that threats to that resource are of common concern. The legal principle *sic utere* could be imported to the concept of atmospheric protection, because it was recognized in the eighth preambular paragraph of the UNFCCC, as well as in Article 2(2)(b) of the 1985 Vienna Convention on the Protection of the Ozone Layer. The import of the *sic utere* principle into international environmental law attests to the linkage between transboundary harm, and global issues surrounding atmospheric protection.

C. SUMMARY OF THE VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPIC AT THE UN GENERAL ASSEMBLY SIXTH COMMITTEE AT ITS SIXTY-NINTH SESSION HELD IN 2014

11. *One Delegation* appreciated the Commission's approach to the topic of protection of the atmosphere which recognized the complexity and sensitivity of the issues involved. He was of the view that protection of the atmosphere was a multifaceted issue, with political, legal and scientific dimensions and that the Commission's work should be carried out in a prudent and rigorous manner and be oriented towards providing a constructive complement to the various relevant mechanisms and political and legal negotiation processes under way. It should not reinvent the wheel, downplay existing treaty mechanisms or distort such major principles as equity, common but differentiated responsibilities and national capacities. The Commission might consider looking at difficulties related to capital, technology and capacity-building in the context of international cooperation for environmental protection and provide guidance from the perspective of international law for countries to draw on. Various specialized treaties and mechanisms relating to protection of the atmosphere already existed and were generally effective, particularly those i n the areas of control of chemicals and protection of the ozone

layer. Their advantage lay in their specificity and sharp focus. It was far from clear what practical effect might be achieved by seeking a general comprehensive law on protection of the atmosphere, he added.

12. He was of the considered view that the development of the draft guidelines should be based on common international practice and current laws and that the report of the Special Rapporteur (A/CN.4/667) had focused mostly on treaties of certain regions, practices of certain countries and guidelines of certain international organizations, which were of a soft law nature. Such a narrow approach could hardly meet the Commission's requirements for the codification and progressive development of international law. The Commission should consider general international practices of more regions and mechanisms and codify relevant legal rules on the basis of current laws. In the proposed draft guidelines, on which the Commission had failed to reach agreement, the Special Rapporteur had defined the protection of the atmosphere as a common concern of humankind, which seemed unrelated to the legal status of the atmosphere itself. Moreover, the term "common concern of humankind" was vague and its legal content difficult to define. He was of the view that it would therefore not be appropriate to include it in any definition or glossary of terms and that the ILC should continue to strengthen its research on relevant theories and practices in a rigorous manner, avoid using ambiguous concepts and gradually clarify relevant guidelines.

13. *Another Delegation* observed that report of the Special Rapporteur on the topic was, on the whole, well balanced and moderate in approach and that it provided useful information on the historical development of international efforts in the field of atmospheric protection. His delegation was pleased that the Commission had agreed that protection of the atmosphere was extremely important for humankind. That shared recognition must be the basis for discussion of the topic. The first report had been written in a prudent manner in order to comply fully with objectives of the understanding on the topic reached during the Commission's sixty-fifth session, in particular that work on the topic would proceed in a manner so as not to interfere with relevant political negotiations. While the first report mentioned several binding and non-binding documents on specific substances, it did so in order to elucidate the international regime on the protection of the atmosphere, not to deal with those substances per se. In his delegation's view, the report had not deviated from the Commission's understanding.

14. He was of the view, with regard to the definition of the atmosphere, as had been frequently noted, one of the difficulties in relation to the topic was its highly technical nature. His delegation concurred with the view that input was needed from scientific experts regarding the atmosphere and other technical information and welcomed the Commission's intention to hold consultations with such experts during its sixty-seventh session. As to the legal status of the atmosphere and its protection, his delegation considered the Special Rapporteur's proposal that protection of the atmosphere was a common concern of humankind to be reasonable and a good start for further deliberation. Affirming the legal status of protection of the atmosphere as a common concern of humankind — a concept that appeared in several legal and non-legal documents, including the United Nations Framework Convention on Climate Change — would not necessarily entail substantive legal norms that directly set out legal relationships among States. Rather, it should be taken to mean only that protection of the atmosphere was not an exclusively domestic matter; rather, it was inherently bilateral, regional and international in nature. As long as the connotation of the concept was limited in that way, it was acceptable to his

delegation. As protection of the atmospheric environment required coordinated action by the international community, it was to be hoped that deliberation on the topic within the Commission would continue in a cooperative and constructive manner.

15. *Another Delegation* observed that his Government was conducting internal consultations with scientific experts to assess the acceptability of the definition of "at mosphere" put forward in draft guideline 1 (Use of terms). Concerning draft guideline 2 (Scope of the guidelines), his delegation was hopeful that the Special Rapporteur would elucidate the specific types of human activities to be covered under the draft guidelines with an eye to ensuring that they would not overlap with the activities covered under the existing international regime on environmental protection. It would also welcome clarification of the ter ms "deleterious substances" and "energy" and an explanation of how their meaning differed from that of common terms such as "hazardous substances", "pollutants" and "waste". His delegation was not prepared to comment on the legal status of the atmosphere, as it was still analysing the five concepts highlighted in the Special Rapporteur's first report (A/CN.4/667), namely "airspace", "shared or common natural resources", "common property", "common heritage" and "common concern".

16. *Another Delegation* was of the view that the topic was tightly interwoven with political, technical and scientific considerations; however, that did not mean that the importance of the legal issues surrounding the topic should be downplayed. He was of the view that the task assigned to the Special Rapporteur was fraught with difficulties and that the approach adopted should be cautious and allow ample flexibility in order to fulfil the task of identifying custom regarding the topic and also identifying, rather than filling, any gaps in the existing treaty regimes. Regarding the end result of the work, while the aim was not to fill gaps in international legal instruments applicable to State activities in relation to the atmosphere, the concerns expressed about the topic would seem to warrant more than pure research; however, a less restrictive approach would require flexibility with respect to the 2013 understanding.

17. With regard to draft guideline 1 (Use of terms), the use of technical terms seemed inevitable, as defining the boundaries of the atmosphere would inevitably involve technicalities. In the interests of political expediency, the definition put forward might be regarded as an initial definition, subject to the formulation of a legal definition to be complemented by technical commentaries. As to draft guideline 2 (Scope of the guidelines), the terms used to describe the scope of the work were sufficiently precise, and the references to alteration of the composition of the atmosphere and significant adverse effects could provide an appropriate starting point. In rel ation to subparagraph (b) of the draft guideline, reference to basic principles of international environmental law would be inevitable. It would be impossible to examine rights and obligations of States regarding protection of the atmosphere without expounding upon, for example, the *sic utere*, polluter pays, cooperation and precautionary principles. Concerning draft guideline 3 (Legal status of the atmosphere), the notion of protection of the atmosphere as a common concern of humankind was, in his delegation's view, linked to the need for inter- and intra-generational equity and the special role of the developed countries in protecting the atmosphere. The Commission would undoubtedly take into account the circumstances and requirements of developing countries, especially in the light of efforts to promote sustainable development in the

framework of instruments forming the foundation of international environmental law, in particular the 1992 Rio Declaration on Environment and Development.

18. *Another Delegation* expressed the view that the work of the Commission would help enhance understanding of the nature of the atmosphere as a limited natural resource beneficial to all humankind and that it would enable the international community to prevent environmental degradation by preserving and conserving that natural resource. Her delegation supported the suggestion that the modalities of the use of the atmosphere should be considered in greater detail. Given that the deteriorating state of the atmosphere had made its protection a pressing concern for the international community, the concept of "common concern of humankind" deserved close consideration. As a legal consequence of that concept, a State could no longer claim that atmospheric problems were within its domestic jurisdiction. Although that made it difficult to establish national jurisdiction over any segment of the atmosphere, the Commission should still prepare draft guidelines on the obligations of States to prevent and protect the atmosphere from activities by States or by natural or juridical persons that had the effect of introducing deleterious substances or energy into the atmosphere. In the light of the unique characteristics of the atmosphere, efforts to protect it should also be pursued through international cooperation. It was therefore necessary that the modalities and mechanism for international cooperation should be set out and given priority in the draft guidelines.

19. Definition of the word "atmosphere" might facilitate work on the draft guidelines proposed by the Special Rapporteur in his report (A/CN.4/667). However, the current definition did not fully reflect the unique physical characteristics of the atmosphere, because it did not take into account the fact that the atmosphere moved and circulated around the Earth through atmospheric circulation. That natural characteristic should be added as a component of the definition of "atmosphere" in draft guideline 1 (Use of terms).

20. Her delegation supported draft guideline 2 (a), on the scope of the draft guidelines, which recognized that the human environment and the natural environment were the specific objects of the protection of the atmosphere and that the two issues were intrinsically interrelated. However, it had some editorial reservations regarding the words "as well as to their interrelationship" used in draft guideline 2 (b), which it found unclear. As presently drafted, draft guideline 3 (a) seemed to suggest that "the common concern of humankind" was protection of the atmosphere, rather than the deteriorating condition of the atmosphere, and the text should therefore be redrafted to reflect the correct understanding of the concept.

VII. COMMENTS AND OBSERVATIONS OF THE AALCO SECRETARIAT

A. IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

1. The topic of immunity of State officials from foreign criminal jurisdiction is of genuine practical significance, and a clear, accurate and well documented statement of the law by the Commission is likely to be very valuable. The international community should give careful attention to the topic and in so doing, however, it should seek to codify relevant rules of international law, rather than rushing to develop new rules. The Commission's work to date has encompassed elements that both reflect existing law and represent progressive development of the law. However such an approach could be successful only to the extent that the text was generally acceptable to States and that the Commission should therefore work towards an outcome that reflected a high degree of consensus. This is all the more important due to the reason that important aspects of the draft articles are yet to be developed, including those relating to possible exceptions from immunity and the procedures for asserting and waiving immunity.

2. AALCO appreciates the considerable efforts made by the Special Rapporteur Ms. Concepcion Hernandez in producing Reports on the topic. The Third Report on the topic which was submitted at the ILC's sixth-sixth session held at 2014 marks the starting point for the consideration of the normative elements of immunity *ratione materiae,* analysing in particular the concept of an "official". AALCO also welcomes the two draft articles that the ILC had adopted provisionally on the issue at its session held in 2014.

3. On the definition of the term "State official" appearing in draft article 2, subparagraph (e), it is to be pointed out that it is a viable one since it covers both the representational and functional characteristics of such officials. The functional approach taken in draft article 2, subparagraph (e), reflected the realities of State practice, for it is not possible to list all the individuals to whom immunity might apply and that often the assessment has to be made on a case-by-case basis. In other words, the definition of "State official" should encompass persons who enjoyed immunity *ratione personae* as well as those who enjoyed immunity *ratione materiae*. In this regard, even while agreeing with the Commission's use of an open ended definition with respect to State officials enjoying immunity *ratione personae,* (rather than a definition that identified such officials *eo nomine*), it must be stressed that there is also a need to interpret the term in accordance with a State's Constitution and on a case-to-case basis. That greater clarity could be achieved here needs to be considered on the part of ILC and hence the Commission should give this matter for further consideration.

4. AALCO recognizes the fact that times have changed. Today international affairs/foreign affairs is conducted by a wide range of state officials apart from the traditional state officials such as Heads of State, Heads of Government and the Minister of Foreign Affairs whose representative capacity to act at the international level and whose immunity from foreign criminal jurisdiction remains well-anchored under international law. Today's conduct of international affairs, where a wide range of state officials other than the 'troika' are regularly commissioned to represent their states in international affairs and international fora, does

demand that special attention must be given to this issue (of going beyond 'Troika') by the international community.

5. With regard to draft article 5 (Persons enjoying immunity *ratione materiae*), it is imperative to define the term in order to determine the circumstances in which State officials would be granted immunity from foreign criminal jurisdiction. In this regard, one can agree with the explanation in the commentary to the draft article that (in contrast to draft article 3, which specified the individuals enjoying immunity *ratione personae*) draft article 5 did not identify persons enjoying immunity *ratione materiae*, as they have to be identified on a case-by-case basis by applying the criteria set out in draft article 2 (e), which highlighted the existence of a link between the official and the State. Importantly, it needs to be realized that we need to wait for the fourth report of the Special Rapporteur which would deal with the material and temporal scope of immunity *ratione materiae*, to be able to make more concrete sense of the implications of this draft provision.

B. SUBSEQUENT AGREEMENTS AND SUBSEQUENT PRACTICE IN RELATION TO THE INTERPRETATION OF TREATIES

6. The topic "Subsequent Agreement and Subsequent Practice for the Interpretation of Treaties" (previously known as Treaties Overtime), raises a large number of interesting issues. The second Report of the Special Rapporteur, which incorporates within itself six draft conclusions presented by him, represents an important piece of work.

7. The Commission's work on the topic should serve to complement and supplement articles 31 and 32 of the Vienna Convention on the Law of treaties that constitute the source of the rules of treaty interpretation as acknowledged by the ICJ in some judgments. The Commission should continue to acknowledge and promote the primacy of the Vienna Convention while at the same time contributing to the development of international law by identifying and codifying practical rules of treaty interpretation with regard to subsequent agreements and subsequent practice.

8. In considering the variety of forms that subsequent agreements and subsequent practice might take under article 31, paragraphs 3 (a) and 3 (b), of the Vienna Convention on the Law of Treaties, it seems that the Commission has accorded excessive weight to silence and inaction. It has gone without saying that the element of consent is a prerequisite to acceptance of any kind and that silence on political grounds could not be regarded as conduct giving rise to subsequent practice, which must be established on a case-by-case basis. It should be emphasized that, as noted in the commentary, silence or inaction could be construed as acceptance of a practice only under certain circumstances. For these reasons, the legal significance of silence (as flowing from draft conclusion 9 (Agreement of the parties regarding the interpretation of a treaty), should be studied much more carefully.

9/ Equally important is the implication of draft conclusion 10 (Decisions adopted within the framework of a Conference of States Parties). It is agreed that where there exists an objection by a State, the adoption of a decision by consensus could not represent a subsequent agreement under article 31, paragraph 3(a), of the Vienna Convention on Law of treaties. But it is nor sure

however, that paragraph 3 of the draft conclusion clearly translates the Special Rapporteur 's intention to dispel the notion that a decision by consensus would necessarily be equated with agreement in substance. Any modification to the provisions of treaties must be made by a clear expression of intention by States, and not solely by an unclear subsequent agreement or subsequent practice.

10. Though official acts, statements and voting at the international level could potentially and do contribute to the development of subsequent practice, the case of domestic conduct (as emanating from judicial decisions or legislative provisions) presents considerable difficulties. The particular circumstances surrounding a given conduct at the national level is an important consideration, especially in view of the different value accorded to treaties in different legal systems. The Commission needs to take this fact seriously.

C. IDENTIFICATION OF CUSTOMARY INTERNATIONAL LAW

11. The Identification of Customary International Law continues to be an extremely important topic on the agenda of the ILC from the perspective of Asian-African States. Given the history of exclusion of the Asian-African region from participation in the early and formative years of international law, the undertaking of this topic by the Commission continues to provide an opportunity for the countries from the Asian-African region to be involved in the process of the development of customary international law.

12. The AALCO Secretariat acknowledges the Special Rapporteur, Sir Michael Wood's, efforts in providing his detailed analysis of what is one of the broadest and theoretically densest topics in international law, as well as the great efforts with which he has engaged in research into the volumes of literature on the topic. The outcome of Sir Michael Wood's efforts is a set of lucid and concise draft conclusions and explanations that are, for the most part, self-explanatory and would ostensibly provide a clear elucidation of this fairly esoteric topic for a non-specialist to use.

13. AALCO recognizes the so-called "two-element approach" involving general practice and *opinio juris*, as constituting the raw materials of customary international law. That this approach helps us avoid fragmentation of international law is also to be recognized. That the practice of international organizations could help in identifying customary international law to the extent that it reflected the practice of States needs to be welcomed. Though this has been noted by few judgments of the International Court of Justice, two things need to be kept in mind: first, it is necessary to examine the content and the circumstances of the adoption of the relevant resolution; secondly, it also leads to an important question: how far are we right in presuming that actions or inactions of international organizations reflect/represent the general practice of states for the purposes of establishing customary international law. In this regard, it wouldonly be pragmatic to wait till the Third Report of the Special Rapporteur that is likely to deal with issue in far greater detail. Be that as it may, one can agree with the view expressed in draft conclusion 5 that it is the conduct of States that primarily creates/ contributed to the creation, or expression of rules of customary international law.

14. It is pertinent to remind here that the Secretary-General of AALCO had created an *Informal Expert Group on Customary International Law* under the Chairmanship of Dr. Sufian Jusoh, Associate Professor UKM, and Prof. Xianhe YI, Wuhan University, People's Republic of China as its Special Rapporteur at the Tehran Session held in 2014. This Informal Group on customary international law would meet twice, to discuss the issues the wide range of issues flowing from this topic and is intending to forward the same to the Special Rapporteur of the ILC on this topic.

D. PROTECTION OF ENVIRONMENT IN RELATION TO ARMED CONFLICT

15. The inclusion of the topic of 'protection of environment in relation to armed conflict on the work programme' of the ILC is a timely one as there are currently a spate of environment-related issues currently under discussion by the ILC which may have elements of overlap between them – such as the environmental law principles of prevention, precaution, polluter pays, environmental impact assessment, etc.–which would ensure that increasing expertise in one topic will contribute to increased expertise in the others.

16. The focus of the Special Rapporteur should be on identifying the legal issues involved in environmental protection that arose during each phase of armed conflict, with the aim of developing future guidelines or conclusions, rather than addressing issues such as internally displaced persons, refugees, cultural heritage and environmental pressure as a cause of armed conflict, or attempting to modify existing legal rules and regimes under international humanitarian law, human rights law or international criminal law. Although those legal issues might be relevant to the topic at hand, they should be approached with caution. Under the topic of protection of the environment in relation to armed conflict, further study of the environmental obligations in armed conflict might be warranted, not least because it would provide an opportunity to fill existing gaps in international humanitarian law concerning the protection of environment.

17. The Rapporteur has also chosen a novel approach to the topic with the decision to follow three separate phases (phase I, II, III) corresponding to the periods before, during, and after an armed conflict. The Special Rapporteur contends that phases I and III are the most important in her opinion to be addressed which may appear counterintuitive. However, the actual period of armed conflict may itself be well covered in a legal sense due to the presence of various laws of armed conflict, including the Geneva Conventions, which regulate environmental damage during a conflict, thereby reducing the need for additional statutes or conventions. Additionally, there is the question of how such guidelines may be enforced during an asymmetrical conflict or transnational armed conflicts, where such rules or guidelines would face the same problems of enforcement that international humanitarian law is generally faced with.

E. PROTECTION OF THE ATMOSPHERE

18. Protection of the atmosphere is a topic of utmost importance for humanity as a whole. It is also an area in which much further work is needed, including from a legal point of view. It is to be hoped that the Commission's long-term work on the topic would not only raise its

visibility, but also counteract the increasing fragmentation of international environmental law through horizontal analysis and cross-cutting approaches that extended beyond individual environmental regimes. The Commission's consideration of this topic does represent an opportunity to address related issues from the perspective of general international law.

19. AALCO appreciates the Commission's approach to the topic of protection of the atmosphere, which recognizes the complexity and sensitivity of the issues involved. Protection of the atmosphere is a multifaceted issue, with political, legal and scientific dimensions. The Commission's work should be carried out in a prudent and rigorous manner and be oriented towards providing a constructive complement to the various relevant mechanisms and political and legal negotiation processes under way. It should not reinvent the wheel, downplay existing treaty mechanisms or distort such major principles advocated by the developing countries such as equity, common but differentiated responsibilities and national capacities.

20. For the protection of atmosphere, the determination of the legal status is critical and that definition of the word "atmosphere" might facilitate work on the draft guidelines proposed by the Special Rapporteur in his report. The AALCO Secretariat supports the proposition of the Special Rapporteur and considers draft guideline 3 para 1 on this topic as the core feature of this debate on legal status, which would determine the course of further research on this topic. Hence, protection of atmosphere is to be legally classified as a "common concern of humankind". AALCO also supports the considered view of the draft guideline 2 (a), on the scope of the draft guidelines, which recognizes that the human environment and the natural environment are the specific objects of the protection of the atmosphere and that the two issues are intrinsically interrelated. This is because we are dependent in the short and long run, on the up-keeping of life on earth for our survival. We must thus acknowledge that all biological processes allowing life on earth should be preserved because once destroyed they can not be recreated in a vacuum. This points to the human kind's dependence on the existence of life on earth and the necessity to take into account the limited availability of some natural resources or the limited land surface capable of sustaining human life.

ANNEX I: STATEMENT BY H. E. PROF. DR. RAHMAT MOHAMAD, SECRETARY-GENERAL, AALCO AT THE SIXTY-SIXTH SESSION OF THE INTERNATIONAL LAW COMMISSION (ILC) (TUESDAY, 8TH JULY 2014)

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

It is a privilege for me as the Secretary-General of the Asian-African Legal Consultative Organization (AALCO) to represent the Organization at this Session of the International Law Commission. The role of the ILC towards the progressive development and codification of international law alongside the efforts of the United Nations is well-recognised and I am honoured to be invited to address this distinguished gathering of legal luminaries.

Mr. Chairman,

The AALCO was envisaged towards making effective contributions in the field of international law. In pursuance of which, AALCO was statutorily mandated to follow the work and agenda items of the Commission. Accordingly, 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.

Though the Annual Sessions of AALCO ideally should precede the Annual Sessions of ILC, in certain years due to unavoidable circumstances, the AALCO Sessions are convened after the ILC Annual Sessions. 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. Thus, at the Fifty-Third Annual Session of AALCO which is scheduled to take place in Tehran, Islamic Republic of Iran in September 2014, a Half-Day Special Meeting on "Some Selected Items on the Agenda of the International Law Commission" is scheduled to be held in conjunction with the Annual Session. Hence, the inputs/opinions of AALCO Member States on certain agenda items of ILC, would be reflected on the basis of the views, raised by our Member States at other international fora, such as the Sixth Committee of the United Nations, or other international metings. The topics that I shall delve upon are:

- *Identification of Customary International Law (CIL);*
- *Protection of Atmosphere;*
- *Protection of Persons in the Event of Disaster; and*
- *Immunity of State Officials from Foreign Criminal Jurisdiction*

A. Identification of Customary International Law (CIL)

Mr. Chairman,
Allow me to begin with the topic Identification of Customary International Law (CIL). At AALCO's Fifty-Second Annual Session, held in New Delhi in September 2013; a Half-Day Special Meeting on "Selected Items on the Agenda of the International Law Commission" was convened. At that meeting delegates from Member States of AALCO expressed their interest in the ILC's work on this topic, as well as lauded the work that has already been done by the Commission thus far. These States also encouraged each other to continue compiling evidence of their State practice and *opinio juris*, as well as answer the questionnaires submitted by the Commission in order to expedite the process of identifying customary principles of international law.

It was noted that this topic is particularly relevant and important due to the difficulty inherent in identifying existing rules of customary international law and applying them, particularly by domestic and national courts and other parties, such as judges, lawyers, arbitrators and legal advisors who may not have any formal training in international law. The work on this subject, is intended to simplify and expedite, the process by which customary principles of international law will become identifiable not only to legal scholars, but other persons who work in related fields of great importance to AALCO Member States.

Mr. Chairman,
The questions relating to the formation and evidence of customary international law, now renamed as Identification of Customary International Law, continue to be of great interest to the Member States of AALCO. Given the history of the Asian-African region as well as the notable lack of their participation in formative years of international law, the undertaking of this topic by the Commission provides a unique opportunity for inclusiveness of the practices of the Asian-African countries in the process of the development of customary international law. AALCO commends the Special Rapporteur, Sir Michael Wood, for his initiative in identifying and outlining all the areas that need to be addressed and deliberated upon in order to achieve a comprehensive understanding of customary international law. Several of these areas are of particular interest to Asian-African countries, some of them being:

> ***Firstly,*** the question of a heirarchy of sources of international law and the relationship between these sources, such as international tribunals and domestic courts. The focus of judgment-based evidence of CIL has historically been on the decisions of international tribunals, but while the task may be onerous, a truer sense of State positions on questions of CIL may be arrived at through the examination of their domestic legal practices as well as the decisions of regional and sub-regional courts. Additionally, within the decisions of the international tribunals, the importance of dissenting opinions and separate opinions is also an important question.
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> ***Secondly ,***the importance of statements delivered by Member States in international fora, as well as resolutions adopted by international and intergovernmental organizations. Statements made by Member States, as well as resolutions that they have voted on, may

help in providing an accurate picture regarding the position of a State or States on a particular question of international law.

Thirdly, the notion of flexibility within the context of the identification of CIL is an important one. The recognition of the constantly evolving nature of custom and practice and any set of rules for the identification must be flexible enough to account for this.

Mr. Chairman,
Some of the major comments and suggestions presented by Member States of AALCO, on this topic, during the Fifty-Second Annual Session of AALCO held last year (2013) were:

(1) As to whether the Special Rapporteur considered resolutions of international and regional organizations as customary international law and State practice **(Iran)**;
(2) The need to reflect upon the contributions of 'separate and dissenting opinions' of international courts and tribunals which also constituted customary international law **(Iran)**;
(3) The concept of *jus cogens* should be separated from the scope of the study **(India and China)**;
(4) That the AALCO Member States have to compile evidence of their State practice and *opinion juris*on the ILC agenda, as well as answer the questions posed by the ILC **(Japan)**;
(5) that the draft conclusions should be reflective of State practices from all principal legal systems of the world and from all regions and should be able to give guidance to international tribunals and practitioners as well as domestic courts and judges **(Malaysia)**;
(6) That the Commission could discuss the relationship between customary international law and treaties, as well as customary international law and general principles of law **(China)**;
(7) That a unified and clear guiding principle might serve the purpose and agreed for striking a balance between certainty and flexibility **(China)**.

The original timeline of work, which has been proposed by the Special Rapporteur Sir Michael Wood, may prove to be a challenging task, mainly because compiling the requisite information from States, regarding questions of State practice and *opinion juris*, and later on analyzing that information is likely to be an arduous and lengthy process.

Mr. Chairman,

In November 2013, the AALCO Secretariat had organised a two-day Workshop, jointly with the National University of Malaysia (UKM) in Bangi-Putrajaya, Malaysia, on selected agenda items of ILC. The Workshop witnessed participation from Member States, academia and students from the Universities in Malaysia. At the AALCO-UKM Workshop, three current members of the ILC reviewed the work of the ILC on three topics. At the Workshop, we had the privilege of listening to the views of three current ILC members - Prof. Shinya Murase, the Special Rapporteur for the topic Protection of Atmosphere; Dr. Hussein Hassouna from Egypt on the topic Protection of Persons in the Event of Disasters; and Mr. Narinder Singh from India on the Immunity of State Officials from Foreign Criminal Jurisdiction.

On behalf of AALCO, I would like to express our sincere gratitude to the three current members of the ILC for their presentation and participation at the Workshop.

Apart from me, the other distinguished speaker for the Workshop was Prof. Chia-Jui Cheng, Secretary-General of the Curatorium, Asian Xiamen Academy of International Law. The Working Sessions were on:

(i) the ILC and its relationship with AALCO,
(ii) Formation and Evidence of Customary International Law/Identification of Customary International Law,
(iii) Protection of Atmosphere,
(iv) Protection of Persons in the Event of Disasters, and
(v) Immunity of State Officials from Foreign Criminal Jurisdiction.

The workshop was very successful, as these two institutions have agreed to host this Workshop annually, and to establish a Working Group to frame views on the agenda item "Formation and Evidence of Customary International Law". The Working Group on the topic "Identification of Customary International Law", as renamed by the Commission, is designed to facilitate the work of the Special Rapporteur Sir Michael Wood and more importantly recall the contributions of Asian-African States in the progressive development of International Law thus unearthing the repository of their contributions in customary international law. It would also be our endeavour to transmit the recommendations of AALCO Member States which includes their state practice and customary practices on various important issues that are raised by the Special Rapporteur.

Mr. Chairman,
AALCO, on its own part, has instituted a Working Group on the Identification of Customary International Law, whose purpose is to provide recommendations on this subject to the Special Rapporteur to be incorporated in the Work of the Commission.

The ultimate Objective of this Working Group is to evince a clear and coherent Asian-African stance that would reflect the custom and practices of AALCO Member States in international law, in order for them to be represented adequately in the work of the Commission. Considering the very short time left to achieve this, it was essential to bring together the best of minds and efforts for this purpose. The Working Group, which consists of several representative legal scholars of AALCO Member States, is scheduled to meet at AALCO's forthcoming Annual Session this year in order to discuss, in particular, the questions pertaining to State Practice and the interaction between Treaties and Customary International Law.

The AALCO Secretariat is currently engaged in preparing a background paper to assist the Working Group in achieving its objectives. This background paper will delve into the topics proposed by the Special Rapporteur for the forthcoming Report, particularly the evidence and identification of State practice and *opinion juris*, as well as the effect of treaties on CIL. The objective of this background paper is to provide a foundation in the existing literature for the use of the Working Group and to inform its recommendations to the ILC.

(i) Protection of Atmosphere

Mr. Chairman,

Allow me to congratulate Prof. ShunyaMurase, the Special Rapporteur for the topic on Protection of Atmosphere on presenting the First Report. The first report lays down **three draft guidelines on 'definition of atmosphere' (draft Article 1), 'scope of the guidelines' (draft Article 2), and 'legal status of the atmosphere' (draft Article 3).** There is a majority view that protection of atmosphere is a matter of growing concern for the international community despite being mindful of the ongoing political negotiations on drafting an outcome of legal nature to address commitments under the climate change regime. Some Member States of AALCO have expressed their keen interest (People's Republic of China, Nigeria and Sri Lanka) in this subject, while cautioning that the highly technical nature of this subject may render this exercise futile (Iran).
The report elaborates on the background for this topic containing the evolution of protection of atmosphere in international law; sources in terms of treaty practice, jurisprudence of international courts and tribunals, and customary international law are referred to. The concept "atmosphere" is defined in **draft Guideline 1**, which reads thus:

"the layer of gases surrounding the earth in the troposphere and the stratosphere, within which the transport and dispersion of airborne substances occurs."

With regard to the definition of atmosphere, the AALCO Secretariat views that this could be elaborated upon by including an 'Explanation' clause to this draft guideline. This explanation could consist of details of the atmospheric layers above the earth, and other gaseous substances forming part of the atmosphere. However, this could be added while elaborating upon the guidelines.

Mr. Chairman,

It is an essential fact that to know the gravity of this subject, reference to the issues such as transboundary air pollution and climate change, is imperative. However, these issues should only be referred to in order to build an 'understanding' of the subject holistically, and should not be intended to be part of substantive discussion. It is also viewed that the principles of international environmental law that have evolved over the years through the judgments of the international courts and tribunals and customary practices of the States, focused on the 'precautionary approach' rather than the 'principle of prevention'. The need of the hour is 'to prevent' any harm to the atmosphere because the impact of atmospheric pollution could be on all levels of human existence. Thus, in order to prevent such disasters, the AALCO Secretariat views that international cooperation, alongside other key principles in international environmental law such as the no-harm principle, principle of equity, sustainable development and common but differentiated responsibility (CBDR) must be the foundations on which this work should progress.

Mr. Chairman,

The reason why these principles stand significant in this topic should be read with the categorisation of '*protection* of atmosphere as a common concern of humankind', which reiterates that the atmosphere is a natural resource, which is common to all, and shared by everyone, that has to be preserved. Due to its link between climate change and transboundary air pollution, the atmosphere is also required to be accorded the legal status of a 'common concern for humankind', which is well-explained in draft guideline 3. Hence, the AALCO Secretariat supports the proposition of the Special Rapporteur and considers draft guideline 3 para 1 on this topic as the core feature of this debate on legal status, which would determine the course of further research on this topic. The guideline reads thus:

"3 (a): The atmosphere is a natural resource essential for sustaining life on earth, human health and welfare, and aquatic and terrestrial ecosystems; hence, its protection is a common concern of humankind;"

Hence, protection of atmosphere is to be legally classified as a "common concern of humankind".

B. Protection of Persons in the Event of Disasters

Mr. Chairman,

At the outset, may I thank the Special Rapporteur for this topic Mr. Eduardo Valencia-Ospina, on presenting the Seventh Report on the "Protection of Persons in the Eventof Disasters". The report highlights the rationale for four draft articles (draft articles 14 *bis*, 17, 18 and 19). ***Draft article 14 bis***deals with the inclusion of *protection of relief personnel, equipment and goods*, which is a welcome measure. The Special Rapporteur explains in detail the need to extend protection to these relief personnel, equipment and goods, foreseeing the event of breakdown of the law and order situation in the affected State during the outbreak of a disaster. It is stated:

"A disaster can lead to a temporary breakdown in law and order in the affected State, thus raising the security threats posed for disaster relief personnel. Besides, the considerable value of equipment and goods belonging to international actors engaged in relief operations represents a tempting target for common criminals".

Taking into view this concern, this additional draft article has been incorporated within draft Article 14, which speaks about the duties of the affected State with regard to the 'facilitation of external assistance'. The categorisation of those relief personnel, equipment and goods that need protection, is in accordance with certain universal, regional, bilateral and non-binding legal instruments dealing with disaster relief. However, the AALCO Member States have been apprehensive about the term 'international organizations', and 'international non-governmental organizations' engaged in relief operations, with respect to their credentials and credibility.

The AALCO Secretariat appreciates the Report, which discusses the most recent and comprehensive treaties adopted at a regional level: (i) the 2005 ASEAN Agreement on Disaster Management and Emergency Response, and (ii) the SAARC Agreement on Rapid Response to Natural Disasters of 2011. The importance has been discussed with respect to ***draft Article 17*** on the "Relationship with Special Rules of International Law" which states that the special rules of international law applicable in disaster situations shall supersede this draft Article in the event of inconsistency. ***Draft Article 18*** is a paramount feature, which deals with "Matters related to disaster situations not regulated by the present draft articles". This provision presupposes that rules of international law shall be the governing rules during disaster situations. Thus, it is evident that the general principles of international law governing respect for sovereignty, territorial integrity and political independence of the affected State, shall be given primacy and shall remain inviolable.

On these notes, the deliberations at the AALCO Annual Session on this agenda item of the ILC, has witnessed the concerns raised by the Asian-African countries, in terms of the need for respect for the territorial integrity and the political independence of the affected States while extending external assistance. It was contended by the Member States during the deliberations, that there was no obligation on the affected State to seek assistance, and even if the affected State sought external assistance, due respect of its territorial integrity and political independence must be accorded.

The proposed draft Article 19 speaks of the relationship and interaction of these draft Articles with the Charter of the United Nations and reads that they are without prejudice to the Charter of the UN.

Mr. Chairman,
I believe that these proposed draft articles shall be deliberated at length at the forthcoming Annual Session and the combined views shall be transmitted to the Commission therafter.

C. Immunity of State Officials from Foreign Criminal Jurisdiction

Mr. Chairman,

During its Sixty-fifth session (2013), the International Law Commission (ILC) continued its consideration of the topic "Immunity of State Officials from Foreign Criminal Jurisdiction" by discussing the second report of the Special Rapporteur, Concepción Escobar Hernández. The Special Rapporteur had indicated that "owing to the difficult and sensitive nature of the topic, it seems more appropriate to begin with *lexlata* considerations and, at a later date, to consider whether it is necessary and possible to formulate proposals *de legeferenda*." Further, she intends to maintain the distinction between immunity *rationae personae* (status-based immunity) and immunity *rationaemateriae* (functional immunity).

The second report (2013) proposed six draft articles, which were reworked and consolidated in the course of the sixty-fifth session, resulting in the preliminary adoption of three draft articles.[26]

26. Draft article 1 indicates the intended scope of the draft articles. It provides that the present draft articles apply to the immunity of State officials from the criminal jurisdiction of another State and that the present draft

On that note, the Commission requested information from States "on the practice of their institutions, and in particular, on judicial decisions, with reference to the meaning given to the phrases 'official acts' and 'acts performed in an official capacity' in the context of the immunity of State officials from foreign criminal jurisdiction.

During the 52nd Annual Session of AALCO (2013), these were the views of the Member States.

The topic must be approached from both lex*lata (*law as it is*)* and *lexferanda (*as it ought to be*)* and that (in his opinion), many states have endorsed the methodological approach adopted in the study which allows extending immunity beyond *Troika.* As regards the question of immunity *rationae personae,* granting immunity only to Heads of States, Heads of Government and Minister of Foreign Affairs, a delegate requested the Commission to take a special mission approach and in his view adopting such an approach had some grounding. He also highlighted the fact that in some judicial practices, some countries have granted immunity *rationae personae* to senior officials of government. He also substantiated this through reference to the ICJ decision given in the *Arrest Warrant* case which had favoured this approach (**Islamic Republic of Iran).**

Due to their representational capacity of the State, some high-ranking State Officials, viz., Heads of State, Heads of Government and the Foreign Ministers, so called *Troika*, were entitled to immunity from criminal jurisdiction of foreign States, Thus, a similar logic could be extended to some other high-level state officials, especially, Ministers of Defence and Ministers of International Trade who also have come to represent States **(India and People's Republic of China)**.

The topic should focus on the immunities accorded under international law, in particular customary international law and not domestic law. With regard to draft Article 2, a delegate stated that criminal immunities granted in the context of diplomatic or consular relations, headquarters agreements or other treaties or similar arrangement should be excluded from the scope of the topic as they are settled areas of law **(Malaysia)**.

With regard to draft Article 3(d), the delegate viewed that all State officials should receive immunity and the word "certain" should be removed. While stating that "Official acts" should also be carefully defined, the delegate pointed out that with regard to Article 4, the sovereign rulers who act as Head of State in addition to the head of Government such as Prime Minister or President should be included under the definition of Heads of State or Heads of Government. With regard to the need to define the term "official" within the larger term "certain State officials", the delegate made the point that he was of the view that all State officials should be covered under the definition of the term "official". **(Malaysia)**

Mr. Chairman,
The AALCO Secretariat is of the view that there is a need to evolve a precise definition of the term "official" which is critical for the Commission. This is critical because this definition would

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articles are without prejudice to the immunity from criminal jurisdiction enjoyed under special rules of international law, in particular by persons connected with diplomatic missions, consular posts, special missions, international organizations and military forces of a State. Draft article 3 commences the treatment of immunity ratione personae and addresses which officials should receive such immunity. Draft article 4 addresses the temporal scope of immunity ratione personae and whether it relates to both official and private acts.

have a great bearing to the definition of "official act" or "act performed in official capacity", the only acts covered by immunity *ratione materiae*. In this regard AALCO looks forward to the Third Report of the Special Rapporteur that would deal with this issue in the context of determining the normative elements of immunity *ratione materiae*.

AALCO also recognizes the fact that times have changed. Today international affairs/foreign affairs are conducted by a wide range of state officials apart from the traditional State officials such as Heads of State, Heads of Government and the Minister of Foreign Affairs whose representative capacity to act at the international level and whose immunity from foreign criminal jurisdiction remains well-anchored under international law[27]. Today's conduct of international affairs, where a wide range of State officials other than the '*troika'* are regularly commissioned to represent their states in international affairs and international fora, does demand that special attention and cautious approach must be given to this issue (of going beyond 'Troika') by the international community.

AALCO also recognizes that international law has not advanced to the point where the scope of immunity *ratione personae* could be understood to include other high-ranking officials per se. Hence, bearing in mind the evolution of international relations, and the fact that States are no longer represented by the "troika" alone, the Commission should explore, through consultation with States, whether such immunity is indeed limited to the "troika" or could it be extended to other senior officials. In any such exercise, a number of factors have to be taken into account that include the current State practice prevailing in various parts of the world in this area, the judicial opinion emanating from domestic jurisdictions, the opinion of scholars etc. In closing, the question of whether immunity applies only to Heads of State, Heads of Government and Ministers for Foreign Affairs requires further consideration and analysis.

Ladies and Gentlemen,
These topics have been consistently deliberated at AALCO Meetings due to the importance attached to these topics by the Member States. Moreover, AALCO, as always, has regarded the work of the Commission as pertinent and will continue to follow the work of ILC as these agenda items pave the way for the progressive development and codification of international law. On behalf of AALCO, let me 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 in the field of international law.

I thank you.

27. Indeed it is a well-established rule of international law that the Head of State, the Head of Government and the Minister for Foreign Affairs are deemed to represent the State merely by virtue of exercising their functions. See, Armed Activities on the Territory of the Congo (New application: 2002) (Dem. Rep. Congo v. Rwanda), 2006 I.C.J.R EP. 6, para.46 (Feb. 3).

ANNEX II

SECRETARIAT'S DRAFT
AALCO/RES/DFT/54/SP 1
17 APRIL 2015

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

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

Having considered the Secretariat Document No. AALCO/54/BEIJING /2015/SD/SP1,

Having heard with appreciation the introductory statement of the Secretary-General and the views expressed by the panelists and the statements of the Member States during the Special Half-Day Meeting on "Selected Items on the Agenda of the International Law Commission", held on 16th April 2015 at Beijing, People's Republic of China,

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 statements made by the Representatives of the ILC on its work,

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

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. **Approves** in appreciation the Report on Customary International Law submitted by the Informal Expert Group on Customary International Law, and directs the Secretary-General to submit the Report in due course to the International Law Commission for its consideration and reference;

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

4. **Also requests** the Secretary-General to bring to the attention of the ILC the views expressed by Member States during the Annual Sessions of AALCO on the items on its agenda;

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