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ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION

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

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I. REPORT ON MATTERS RELATING TO THE WORK OF THE INTERNATIONAL LAW COMMISSION AT ITS SIXTY-SEVENTH 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-Seventh session from 4th May -5th June and 6th July-7th August 2015 at Geneva, Switzerland. The Secretary-General of the Asian-African Legal Consultative Organization (AALCO), Prof. Dr. Rahmat Mohamad addressed the Commission at its Sixty-Seventh Session on 13th May 2015. 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-Seventh session of the Commission consisted of the following members:

Mr. Mohammed Bello Adoke (Nigeria); **Mr. Ali Mohsen Fetais Al-Marri** (Qatar); **Mr. Lucius Caflisch** (Switzerland); **Mr. Enrique J.A. Candioti** (Argentina); **Mr. Pedro Comissário Afonso** (Mozambique); **Mr. Abdelrazeg El-Murtadi Suleiman Gouider** (Libya); **Ms. Concepción Escobar Hernández** (Spain); **Mr. Mathias Forteau** (France); **Mr. Juan Manuel Gómez-Robledo** (Mexico); **Mr. Hussein A. Hassouna** (Egypt); **Mr. Mahmoud D. Hmoud** (Jordan); **Mr. Huikang Huang** (China); **Ms. Marie G. Jacobsson** (Sweden); **Mr. Maurice Kamto** (Cameroon); **Mr. Kriangsak Kittichaisaree** (Thailand); **Mr. Roman A. Kolodkin** (Russian Federation); **Mr. Ahmed Laraba** (Algeria); **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 Maina Peter** (United Republic of Tanzania); **Mr. Ernest Petrič** (Slovenia); **Mr. Gilberto VergneSaboia** (Brazil); **Mr. Narinder Singh** (India); **Mr. Pavel Šturma** (Czech Republic); **Mr. Dire D. Tladi** (South Africa); **Mr. Eduardo Valencia-Ospina** (Colombia); **Mr. Marcelo Vázquez-Bermúdez** (Ecuador); **Mr. Amos S. Wako** (Kenya); **Mr. NugrohoWisnumurti** (Indonesia); **Mr. Michael Wood** (United Kingdom of Great Britain and Northern Ireland)

3. At the Sixty-Seventh Session of the International Law Commission, the following persons were elected: Chairman: **Mr. Narinder Singh** (India); First Vice-Chairman: **Mr. Amos S. Wako** (Kenya); Second Vice-Chairman: **Mr. Pavel Šturma (Czech Republic)**; Rapporteur: **Mr. Marcelo Vázquez-Bermúdez** (Ecuador); Chairman of the Drafting Committee: **Mr. Mathias Forteau** (France).

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

- Protection of the atmosphere.
- Crimes against humanity

- Jus Cogens[1].
- Protection of the environment in relation to armed conflicts.
- Immunity of State officials from foreign criminal jurisdiction.
- Provisional application of treaties.
- Identification of customary international law.
- The Most-Favoured-Nation clause.
- Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties.

5. As regards to the topic "**Protection of the Atmosphere**", the Commission had before it the second report of the Special Rapporteur (A/CN.4/681 and Corr.1 (Chinese only)), which, upon a further analysis of the draft guidelines submitted in the first report, presented a set of revised draft guidelines relating to the use of terms, the scope of the draft guidelines, and the common concern of humankind, as well as draft guidelines on the general obligation of States to protect the atmosphere and on international cooperation. Following its debate on the report, the Commission decided to refer draft guidelines 1, 2, 3 and 5, as contained in the Special Rapporteur's second report, to the Drafting Committee, with the understanding that draft guideline 3 be considered in the context of a possible preamble. Upon consideration of the report of the Drafting Committee (A/CN.4/L.851), the Commission provisionally adopted draft guidelines 1, 2 and 5 and four preambular paragraphs, together with commentaries thereto.

6. As regards to the topic "**Crimes Against Humanity**", the Commission considered the first report of the Special Rapporteur (A/CN.4/680), which contained, inter alia, two draft articles relating respectively to the prevention and punishment of crimes against humanity and to the definition of crimes against humanity. Following the debate in Plenary, the Commission decided to refer the draft articles proposed by the Special Rapporteur to the Drafting Committee. Upon consideration of the report of the Drafting Committee (A/CN.4/L.853), the Commission provisionally adopted draft articles 1 to 4, together with commentaries thereto.

7. As regards **"Jus Cogens",** in 2014 the Commission's Working Group on the Long-Term Programme of Work submitted a recommendation by Mr. Dire D. Tladi to the Commission to include the topic of *jus cogens* on the Commission's current Work Programme. This recommendation was accepted by the Commission in 2015 and Mr. Tladi was appointed Special Rapporteur for the topic. The topic has also been included on the Commission's Provisional Agenda for its Sixty-Eight Session (2016) where the Commission will in all likelihood consider the First Report of the Special Rapporteur.

8. As regards to the topic "**Protection of the Environment in Relation to Armed Conflicts**", the Commission had before it the second report of the Special Rapporteur (A/CN.4/685), which, inter alia, identified and examined existing rules of armed conflict directly relevant to the protection of the environment in relation to armed conflict. The report contained

[1] Despite the fact that only eight topics were dealt with by the ILC at its Session held in 2015, this Report of the AALCO Secretariat focuses also on another important topic that has been added to the agenda of the Commission, namely Jus Cogens. The topic of Jus Cogens will be one of the subjects of deliberations at the Half-Day Special Meeting on Selected Items to be held during the Fifty-Fifth Annual Session of AALCO.

five draft principles and three draft preambular paragraphs relating to the scope and purpose of the draft principles as well as use of terms. Following the debate in Plenary, the Commission decided to refer the draft preambular paragraphs and the draft principles, as contained in the report of the Special Rapporteur, to the Drafting Committee, with the understanding that the provision on use of terms was referred for the purpose of facilitating discussions and was to be left pending by the Drafting Committee. The Commission subsequently received the report of the Drafting Committee (A/CN.4/L.870), and took note of the draft introductory provisions and draft principles I-(x) to II-5, provisionally adopted by the Drafting Committee.

9. As regards to the topic "**Immunity of State Officials from Foreign Criminal Jurisdiction**", the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/686), which was devoted to the consideration of the remaining aspects of the material scope of immunity *ratione materiae*, namely what constituted an "act performed in an official capacity", and its temporal scope. The report contained proposals for draft article 2, subparagraph (f), defining an "act performed in an official capacity" and draft article 6 on the scope of immunity *ratione materiae*. Following the debate in Plenary, the Commission decided to refer the two draft articles to the Drafting Committee. The Commission subsequently received the report of the Drafting Committee (A/CN.4/L.865), and took note of draft articles 2, subparagraph (f), and 6, provisionally adopted by the Drafting Committee.

10. As regards the topic "**Provisional Application of Treaties**", the Commission had before it the third report of the Special Rapporteur (A/CN.4/687), which considered the relationship of provisional application to other provisions of the Vienna Convention on the Law of Treaties of 1969, and the question of provisional application with regard to international organizations. The Commission also had before it a memorandum (A/CN.4/676), prepared by the Secretariat, on provisional application under the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986. The Commission referred six draft guidelines, proposed by the Special Rapporteur, to the Drafting Committee. The Commission subsequently received an interim oral report, presented by the Chairman of the Drafting Committee, on draft guidelines 1 to 3, provisionally adopted by the Drafting Committee, and which was presented to the Commission for information only.

11. As regards the topic "**Identification of Customary International Law**", the Commission had before it the third report of the Special Rapporteur (A/CN.4/682), which contained, *inter alia*, additional paragraphs to three of the draft conclusions proposed in the second report and five new draft conclusions relating respectively to the relationship between the two constituent elements of customary international law, the role of inaction, the role of treaties and resolutions, judicial decisions and writings, the relevance of international organizations, as well as particular custom and the persistent objector. Following the debate in Plenary, the Commission decided to refer the draft conclusions contained in the third report to the Drafting Committee. The Commission received the report of the Drafting Committee (A/CN.4/L.869), and took note of draft conclusions 1 to 16 [15] provisionally adopted by the Drafting Committee at the Sixty-Sixth and Sixty-Seventh sessions.

12. As regards the topic "**The Most-Favoured-Nation clause**", the Commission received and welcomed with appreciation the final report on the work of the Study Group on The Most-Favoured-Nation clause and endorsed the summary conclusions of the Study Group. The Commission commended the final report to the attention of the General Assembly, and encouraged its widest possible dissemination. The Commission thus concluded its consideration of the topic.

13. As regards the topic **"Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties"**, the Commission had before it the Third Report of the Special Rapporteur (A/CN.4/683), which offered an analysis of the role of subsequent agreements and subsequent practice in relation to treaties that are the constituent instruments of international organizations and which proposed draft conclusion 11 on the issue. In particular, after addressing Article 5 of the Vienna Convention on the Law of Treaties (Treaties constituting international organizations and treaties adopted within an international organization), the Third Report turned to questions related to the application of the rules of the Vienna Convention on treaty interpretation to constituent instruments of international organizations. It also dealt with several issues relating to subsequent agreements under article 31, paragraph 3 (a) and (b), as well as article 32, of the Vienna Convention on the Law of Treaties, as a means of interpretation of constituent instruments of international organizations. The Commission considered the report and decided to refer draft conclusion 11 on Constituent instruments of international organizations, as presented by the Special Rapporteur, to the Drafting Committee. Subsequently, the Commission received the report of the Drafting Committee and provisionally adopted draft conclusion 11.

B. DELIBERATIONS AT THE FIFTY-FOURTH ANNUAL SESSION OF AALCO (BEIJING, PEOPLE'S REPUBLIC OF CHINA, 2015)

14. **The Secretary-General Prof. Dr. Rahmat Mohamad** delivered the introductory statement on the subject and stated that the International Law Commission (ILC) and AALCO have shared a long-standing and mutually beneficial relationship and that one of the functions designated 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.

15. Explaining the deliberations held at the Sixty-Sixth session of the Commission, he pointed out that they focused on eight topics, namely: 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, and Protection of Atmosphere. He went on to give a brief summary of how each one of them was dealt with.

16. While stressing that the Special Meeting would focus on three topics, i.e., Immunity of State Officials from Foreign Criminal Jurisdiction, Expulsion of Aliens and Protection of Atmosphere, he also observed that the topic of the "Identification of Customary International

Law" has been a matter of great concern to developing countries on account of the reason that the voice of Asian and African States were not simply present in the international law discourse. He also brought attention to the fact that the Secretariat of AALCO had proposed and received approval at the Fifty-Third Annual Session to constitute an "Informal Expert Group of Customary International Law', that has held two meetings so far.

17. **Amb. Dr. Hussein Hassouna**, **Member of ILC** was the first panelist on this Special Meeting who spoke on the topic "Expulsion of Aliens". His presentation then focused on four aspects of the topic, namely historical background, general approach of the ILC on the Draft Articles, Analysis of the ILC draft Articles, debates on the Draft Articles held at the UN Sixth Committee.

18. On the historical aspects, he stated that from 2005 to 2014 the Commission received and considered nine reports by the Special Rapporteur and that in his last report submitted in 2014 he submitted his proposals for reformulating the draft articles adopted on first reading in the light of the comments and observations received from Governments. On the general approach adopted by the Commission, he pointed out that though expulsion of aliens is a sovereign right it also involves the question of respect for the rights of aliens.

19. Commenting on the draft articles adopted by the ILC, he explained that they are divided into five parts and that while parts I and II dealt with general framework and cases of prohibited expulsion, Parts II and IV dealt with protection of the rights of aliens subject to expulsion, Part IV dealt with procedural rules. The last Part dealt with the legal consequences of expulsion, he added.

20. On the debate over the draft articles that took place at the United Nations General Assembly, analyzing ILC draft articles, he observed that it reflected a divergence of views among the various delegations especially as regards their potential impact on their national policies and immigration laws.

21**.** **Prof. Shinya Murase, Member of the ILC** made a statement on the topic "Protection of the Atmosphere", referring to his second report. He recalled an extremely lively discussion on the topic in the Sixth Committee of the General Assembly, wherein many Asian and African States participated. He provided a working definition of "Atmosphere" and also mentioned two new terms, namely "air pollution and atmospheric degradation". He stated that the final draft guideline flow from the concept of common concern of humankind, that is, the principle of international cooperation. He explained that he reviewed the global and regional treaty practice, previous ILC articles, ICJ jurisprudence, relating to international cooperation. He stated that finally in his second report he touched upon the principle of good faith. He also discussed his future plan and tentative work schedule as a Special Rapporteur of ILC on the topic.

22**.** **Mr. Narinder Singh, Member of the ILC** made a statement on the topic "Immunity of State Officials from Foreign Criminal Jurisdiction". He explained the three elements of the topic namely persons enjoying immunity, jurisdiction affected by immunity, and domain of such jurisdiction. He exemplified the topic with the help of ICJ jurisprudence on the issues of

diplomatic and counsellor relations, privileges and immunities etc. He relied on the Arrest Warrant Case and other cases to drive home the point that a Head of States (HOS), Head of Government (HOG) and Minister for Foreign Affairs, enjoy immunities from jurisdiction in foreign states, both civil and criminal. He said that this view is also supported by Customary International Law relating to treatment of Foreign Minister. He also explained Immunity *rationae materiae and rationae personae* with reference to Draft Articles of the ILC on the topic. He said that the same reasoning would apply to the Head of State (HOS) and Head of Government (HOG) also.

23. ***Report of the Chairman of the Informal Consultation on the Work of the Informal Expert Group on Customary International Law***

The report was presented by the Chairman of the Group, **Ambassador Dr. Hussein Hassouna** who stated that the ILC Special Rapporteur on the topic of "Identification of Customary International Law" had already presented three reports on the topic. He went on to highlight the conclusions that had been reached at the meeting of the informal consultation on the Work of AALCO Expert Group on Customary International Law that took place on 15th April 2015. The conclusions included: taking note of the informal expert group recommendations available on AALCO website and appreciating the sterling work of Prof. Yee as AALCO Special Rapporteur on the topic; the need to give more time to the Member States of AALCO to analyse the report and make recommendations thereon; that AALCO should retain this issue on its agenda and have more consultation on the topic to have a more in-depth input; that Member States should send their comments on the recommendation made by the AALCO Expert Group in an expeditious manner and that Secretary-General should refer in general to the AALCO Informal Group recommendations and Prof. Yee's report when addressing the ILC in Geneva later this year.

24**.** **The Delegate of Japan** discussed three important points. Firstly, he talked about strengthening the role of the International Law Commission (ILC) with the International Court of Justice (ICJ). While noting that the ILC is the main body with the role of promoting the progressive development of international law and its codification in the UN system, he stated that ILC has assumed a critical role over the years and that in order to make ILC more appealing to Member States, it is important to promote and strengthen an interaction between ILC and ICJ.

25. These days when the governments are faced with some issues related to international law, the first thing they refer to is the judgments of ICJ and other international tribunals and thus they are critical references for us, he added. While emphasizing that in the development of international law, judgments by international tribunals play an important part, he added that as the body consisting of persons of recognized competence in international law, ILC can play a role as a "good critic" of ICJ. Even though there already exists dialogue between ICJ President and the ILC members, the Commission should seek further opportunities for such talks, he added.

26. Secondly, on the topic of "Protection of the Atmosphere", he brought attention to the Second Report of the Special Rapporteur, Mr. Shinya Murase, that will be deliberated in the Sixty-Seventh session of ILC. He observed that the ILC has a major role in the field of

environmental protection and Japan recognized that the protection of the atmospheric environment requires coordinated action by the international community. In that sense, it strongly hoped that the next deliberation by the ILC over the second report will be constructive as the last session in accordance with the understanding that protection of atmospheric environment is a very serious issue facing Asia and Africa.

27. Thirdly, on the Cooperation between ILC and AALCO, he welcomed the informal exchange of views on the development and making of international law among legal advisors of delegations to UN Organized by the Permanent Observer of AALCO in New York, Dr. Roy Lee. While informing that participants of the meeting exchanged their views on issues to be resolved such as current situation of the Sixth Committee and its revitalization as well as cooperation with ILC, he stated that the Japanese delegation also attended the meeting and expressed its views on a method of work for the topic of the report of ILC.

28**.** **The Delegate of Thailand** made his comments on three topics, viz, "Expulsion of Aliens", "Protection of Persons in the Event of Disasters", and "Immunity of State Officials from Foreign Criminal Jurisdiction".

29. On the topic "Expulsion of Aliens", the delegate commended Mr. Maurice Kamto, the Special Rapporteur for his outstanding contribution to the draft articles and congratulated the Commission for the completion of the second reading of the draft articles. The delegate shared the view that the draft articles well capture the principles of international law on sovereign rights of States as well as the rights of an alien subject to expulsion and the rights of the expelling State in relation to the State of destination of the person expelled. Nevertheless, he was of the view that the articles did not entirely reflect universal practices, as State practices are still limited in some areas. The draft articles involved the progressive development of the rules of international law on this issue and those that relate extensively to the sovereign rights of States, which could be somewhat sensitive. In particular, not all the draft articles were consistent with his Country's and several other Asian States' current State practices, he added.

30. On the topic of "Protection of Persons in the Event of Disasters", the delegate congratulated the Commission for the conclusion of the topic and the first reading of the draft articles. Thereafter he touched upon the definition of the terms "external assistance' under subparagraph (d) of the draft Article 4 on "Use of Terms". In his view the term "external assistance" should be defined with great caution. In particular, the "other assisting actors" shall not include domestic actors offering disaster relief assistance or disaster risk reduction. He also went on to reiterate that the draft Article 20 on "Relationship to Special or Other Rules of International Law" which clarifies the way in which draft articles should interact with certain rules of international law.

31. Turning to the topic of "Immunity of State Officials from Foreign Criminal Jurisdiction", he stated that as a State Party to the Vienna Convention on Diplomatic Relations of 1961 and the Vienna Convention on Consular Relations of 1963, his Country granted immunity from criminal jurisdiction to persons entitled to such immunity under the respective Conventions and that his Country also accorded immunity to persons covered by host country agreements between Thailand and intergovernmental organizations based in Thailand. He further clarified that apart

from the obligations under the above-mentioned agreements, Thailand is not party to the Convention on Special Missions. He went on to add that therefore, Thailand wished to reserve its position on this topic until a later stage when it could determine whether the ILC's work achieves the right balance between according immunity to state officials from foreign criminal jurisdiction on one hand and ending impunity of those officials, on the other hand. He was of the further view that with respect to persons enjoying immunity *ratione materiae,* the Commission should focus its work on identifying the term 'official' as such term has not yet been defined in international law but is defined differently under the domestic laws of different States. Hence, the Commission ought to take into due consideration the practice of States in their domestic laws, he added. He was of the view that the persons covered by immunity *ratione materiae* can only be determined using identifying criteria which are applied on a case-by-case basis.

32. **The Delegate of the People's Republic of China** stated at the outset that as an important institute for international law study within the UN system, the ILC plays an important role in the codification and progressive development of international law and that over the years, the AALCO Annual Session has considered items of the ILC and has maintained regular exchanges with the latter, helping rules of international law to reflect concerns of Asian-African countries. The delegate supported these exchanges and will continue to work together with other AALCO members to enhance the voice and visibility of developing countries in the international law-making process through this organization and other international forums.

33. Commenting on the topic "Expulsion of Aliens", he brought attention to the work of the ILC on the issue culminating in the adoption of 31 draft articles that had been submitted to the UNGA Sixth Committee. He was of the view that the draft articles of "Expulsion of Aliens" should strike a reasonable balance between the right of expulsion as an inherent sovereign right of a State and the basic human rights of aliens subject to expulsion. He appreciated the unremitting efforts made by the Commission and Mr. Kamto, the Special Rapporteur in this regard. At the same time, he also brought attention to some of the imbalances existing in them.

34. On draft Article 12 which provides that "a State shall not resort to the expulsion of an alien in order to circumvent an ongoing extradition procedure", this delegation was of the view that extradition and expulsion are useful means for inter-State cooperation to bring perpetrators of transnational crimes to justice, but have different functions and apply to different situations. Therefore which means should be adopted should be determined on the basis of practical needs for combatting transnational crimes in the specific circumstances of the case and in accordance with domestic law. On paragraph 2(b) of draft Article 19, which provides that "the extension of the duration of the detention may be decided upon only by a court or, subject to judicial review, by another competent authority" , he was of the view that competent authorities differ from State to State and that a "one-size-fits-all" approach might not work.

35. On Paragraph 2 of draft Article 23 which provides that " a State that does not apply the death penalty shall not expel an alien to a State where the alien has been sentenced to the death penalty or where there is a real risk that he or she will be sentenced to death", he pointed out that while the draft article reflects the recognition of and respect for human rights of aliens to be expelled, we have to acknowledge the fact that there is no consensus on abolition of death

penalty among States, nor does international law prohibit death penalty. Every State is entitled to opt for or against death penalty vis-à-vis aliens, he added.

36. On draft Article 24 which provides that "a State shall not expel an alien to a State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture or to cruel, inhuman or degrading treatment or punishment", he was of the view that fugitives tended to misuse the judicial review process of a foreign State or challenge from time to time, decisions of repatriation or expulsion by a competent authority as is detrimental to justice. He also brought attention to the regrettable instances where inter-State judicial and law enforcement cooperation's including the expulsion of fugitives have been hindered by some in the pretense of human rights protection. In general, the draft articles were of positive significance to enhancing the protection of human rights though some articles overemphasize individual rights. They lack the support of general State practice and exceed State obligation under treaty law, and are thus likely to result in hampering relevant international cooperation, he added.

37. On the topic, "Immunity of State Officials from Foreign Criminal Jurisdiction", the delegate pointed out the work of the ILC carried out in the 66th Session on the topic. While the ILC defines "State Official" as any individual who represents the State or who exercise State functions, (on the whole) China believed that it is a viable definition since it covers both the representative and functional characteristics of such officials. It must be emphasized that the representation by an official or a State or his exercise of State functions should be interpreted in a broad sense and on a case-by-case basis in accordance with the constitutional system, laws and regulations and the practical situation of his State, he added. On the scope of immunity *ratione personae*, he reiterated that high-ranking officials taking part in international exchanges and exercising functions directly on behalf of States should also be accorded immunity *ratione personae* in addition to heads of State and government and foreign ministers. On the exceptions to immunity of State officials, the Chinese delegation believed that since immunity of State officials is procedural in nature, it does not exempt them from substantive liabilities and that these officials can still be held liable criminally without prejudice to the immunity from foreign criminal jurisdiction through measures such as prosecution by their own national from foreign criminal jurisdiction through measures such as prosecution by their own national courts, waiver of their immunity.

38. On "protection of the atmosphere", the delegate believed that protection of the atmosphere is a global issue and also a multi-faceted issue with political, legal and scientific dimensions. The Chinese delegation was of the view that since negotiations on climate change and ozone layer are at a crucial stage, the relevant work of the ILC should be carried out in a prudent and rigorous manner, with a view to complementing various political and legal negotiations, without creating a new forum or playing down existing treaty mechanisms. He was of the view that principles of equity and CBDR should be enshrined and that development of the guidelines should be based on common international practice and current laws.

39. The Delegation of India made comments on three topics on the agenda of the Commission. On the topic of "Identification of Customary International Law", he commended the Special Rapporteur, Sir Michael Wood for his second report containing eleven draft conclusions. While conventional law is both formal and material source of international law,

customary international law is not considered to be material source and that unlike the treaty provisions it is not so easy to find out what the applicable customary international law is in a given case or situation, he noted. In his view, the amount of evidence that needs to be produced or examined and the relative weight or importance to be given to the objective or subjective elements to identify or for formation of customary international law are tough calls. According to him, there is no readily available guidance or methods by which evidence of the existence or process of formation of customary international law rules could be appreciated and identified. While expressing his wish that both elements the 'State practice' and '*opinio juris'* should be given equal importance in the study, he stated that the practice of States from all regions should be taken into account. In this regard, he was of the further view the developing States, which do not publish digests of their practice, should be encouraged and assisted to submit their State practice, including their statements made at international and regional fora, and the case-law, etc.

40. On the topic, "Protection of the Environment in Relation to Armed Conflicts", he thanked the Special Rapporteur, Ms. Marie Jacobsson for her preliminary report that provided an overview of the topic and examined the aspects relating to scope and methodology. It is his understanding that the Special Rapporteur will focus her work to clarify the rules and principles of international environmental law applicable in relation to armed conflict situations. He then brought attention to the ill-effects of armed conflicts on environment. Throwing light on the Trail Smelter Arbitration case, he stated that it was held in this case that, under international law, no State has the right to use or permit the use of its territory in such a manner as to cause injury to the territory of another State. He was of the further view that while dealing the topic, it will be relevant to see the existing international legal framework, including the areas of international humanitarian law, international human rights law, international refugee law, and international environmental law, as they provide legal obligations that either directly or indirectly have a bearing on the protection of the environment in relation to armed conflict.

41. On the topic of "Protection of Atmosphere", the delegate congratulated the Special Rapporteur, Prof. Shinya Murase, for his first report that had proposed three guidelines. He was of the considered view that the proposed three guidelines of the Special Rapporteur need an in depth analysis since they involve technical, scientific and legal issues. With regard to the concept of atmosphere as a common 'concern' of mankind, dealt in the Draft Guideline 3 on legal status of atmosphere, the delegate stated that the Special Rapporteur need to explore more legal reasoning and justification to propose such a concept for this topic, as the concept is highly debated and less accepted in other areas of international law. While formulating the future guidelines, the Special Rapporteur needs to ensure that the interests of developing countries are protected and in case of any obligations 'the principle of common but differentiated responsibility' need to be considered and respected. The Special Rapporteur might also focus more on cooperative mechanisms to address issues of common concern, and this aspect should be given priority, he added.

42**.** **The Delegation of the Islamic Republic of Iran** expressed his appreciation to the useful explanations provided by the three Panelists who are Members of the International Law Commission (ILC) on the three topics under discussion. On the topic of "Identification of Customary International Law", as the Special Rapporteur, Sir Michael Wood underlined in his second report, solely methodological question of the identification of customary international

law is dealt with and the hierarchy of sources of international law is not the issue. Thus, the exercise is not aimed at codifying rules for the formation of customary international law he stated. The question of adopting different approaches to the identification of rules of customary international law in different fields of international law has faced almost unanimous reactions by Member States at the Sixth Committee of the General Assembly. The delegation observed that his country like the majority of Member States, supported the two-element approach which can be consistent with the jurisprudence of international bodies, contribute to the reinforcement of well-established norms and at the same time preclude fragmentation of international law.

43. Further the delegation also reiterated that in principle, the practice of States contributes to the creation of customary international law and in so far as it reflects State practice, the practice of international organizations might on a subsidiary basis have a role in the identification of rules of customary international law. He also brought attention to the UN General Assembly resolutions in ICJ's terms that could in certain circumstances provide evidence for establishing the existence of a rule or the emergence of the *opinio juris*. He cited the jurisprudence of ICJ emanating from the legality of the Threat or use of Nuclear Weapons of 1996. He also added that the conduct of non-governmental organizations and individuals cannot be qualified as practice for the purpose of the formation or evidence of customary international law (nevertheless the ICJ could rely on "the teaching of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of law").

44. Finally, the delegation appreciated the work done by Mr. SienhoYee, the Special Rapporteur of AALCO's Informal Expert Group on Customary International Law and shared his view concerning "specially affected states" and the importance of inclusion of the concept of "persistent objector" in the work of the ILC. Like Mr. Sienho, the delegation was also of the conviction that "specially affected States" is not reserved for big and powerful States but applies to all States who are especially concerned with the subject matter under consideration and whose interests are specially affected by the rule under consideration.

45. On the topic of "Protection of Environment in relation to Armed Conflicts" and the preliminary report presented by the Special Rapporteur, Ms. Marie Jacobsson on its scope, the delegation shared the view of some of the members of the Commission that further elaboration of environmental obligations in armed conflicts might be warranted. He also believed that the study can provide an opportunity to fill the existing gaps in international humanitarian law concerning the protection of environment. An example thereof was the illustrative and not exhaustive list of vital infrastructure excluded from military targets in Article 56 of the 1977 first Protocol Additional to the Geneva Conventions. The exclusion of oil platforms and other oil production and storage facilities especially those built in the continental shelf has proven to run counter to the purpose of the drafters of the protocol to protect the environment; the conflicts inflicting considerable damage to such constructions and the consequent environmental damage since the adoption for the protocols and lack of legal remedy to that effect is indicative of this gap, he clarified.

46. The delegation was of the view that the ceasing of special protection accorded to nuclear electrical generating stations in Article 56 (2) (b) has been repeatedly described as inappropriate given the dangerous nature of nuclear installations and the advances made to attain full

prohibition at the international level including *inter alia* by adopting UN General Assembly Resolution A/RES/40/6 (dated 1 November 1985) condemning in the strongest terms "all military attacks on all nuclear installations dedicated to peaceful purposes" and the UN General Assembly Resolution 45/58 (dated 4 December 1990) on "prohibition of attacks on nuclear facilities" and IAEA General Conference Resolutions GC (XXVII)/407 (dated 9 November 1983) and GC (XXIX) RES/444 (dated 27 September 1985) on the "Protection of Nuclear Installations Devoted to Peaceful Purposes against Armed Attacks" and GC (XXXI)/RES/475 (dated 5 October 1987) on the "Protection of Nuclear Installations against Armed Attacks".

47. In his view the Commission needed to come up with a definition of the term "armed conflict" in order to facilitate the consideration of the work at hand and that this would be an appropriate approach on the condition that the Commission confines the definition of the term to "international armed conflict' and considers it just a working definition. He further added that expansion of the scope of the definition of armed conflict to include non-international armed conflict would seemed to be problematic and that the Commission needed to consider the legal obligation of non-State actors, which might lead to expound upon a definition already fraught with ambiguities and disagreements.

48. On the issue of "Protection of the Atmosphere", the delegation pointed out that is a topic having close linkages with political, scientific and other considerations and that however, this did not mean that the importance of the legal issues surrounding the topic should be downgraded. While stating that the task assigned to Mr. Murase, the Special Rapporteur, to that end is fraught with difficulties, he opined that therefore, the approach adopted should be applied with caution and ample flexibility to meet the expected purposes. This is justified by the mere fact that the Commission's task, as stated in the report, consists in "identifying custom, whether established or emerging […] and identifying, rather than filling any gaps in the existing treaty regimes", he added.

49. On the question of whether to include basic principles in the work of the ILC on the topic, sub-paragraph (b) of draft guideline (2), he was of the view that having resort to basic principle of international environmental law is inevitable and that examining rights and obligations of States regarding the protection of atmosphere is impossible without expounding upon principles such as *sic utere*, polluter pays, cooperation or precautionary approach. While stating the Mr. Murase, the Special Rapporteur on the topic favoured using the concept of "common concern of humankind", he shared his concern (also expressed by many States) that the precise legal implications of this concept are unclear.

50**.** **The Delegation of Myanmar** agreed fully with Professor Shinya Murase that airspace and atmosphere are entirely different drawing an analogy from Air and Space Law. On the topic of "Expulsion of Aliens", the delegate drew reference to international economic law and stated that there are many standards in international economic law and one of the most important was the principle of Fair and Equitable Treatment and this needed to be considered in future. On the issue of 'customary law', he mentioned that the more complex an international issue is, the more complex the legal norm is. It required more inclusiveness that means togetherness, cooperation and inclusiveness is absolutely vital. As a result of that in the matter of custom there are so many kinds of principles. In this regard, he brought attention to the three different schools of thought.

51. **The Delegation of Malaysia** thanked the eminent Members of the ILC for making informative presentations on the three topics that were the major focus of deliberation at the Session. While appreciating the current work of the Special Rapporteur Prof. Shinya Murase on the important matter on 'Protection of Atmosphere', the delegation stated that at the time of preparing comments for the annual session, his delegation only had the benefits of scrutinizing Prof. Murase's first report, and that they had taken steps to discuss and consult with our relevant agencies and departments on the first report of the Special Rapporteur. While noting the draft second report, the delegation stated that he had noted the reformulation of draft guidelines 1-5 in Prof. Murase's second report. On the draft guideline 1 on use of terms he had pointed out that whilst the first report proposed the definition of atmosphere to reflect the most effective layers of atmosphere that critically need to be protected i.e. troposphere and stratosphere and dispersion of substances that occur therein, in the latest reformulation Prof. Murase has taken away the references to troposphere and stratosphere.

52. On draft guideline 2 on the scope of guidelines, the delegation reiterated his concern regarding the specific type of human activities intended to be covered under the draft guidelines. He went on to add that this was to ensure that the activities proposed will not overlap with human activities covered under existing international regimes on environmental protection whilst at the same time in line with the ILC's understandings at its 65th session that this topic will not deal with specific substances or to fill the gaps in the existing treaty regime. He also mentioned that his delegation would follow closely Prof. Murase's detailed works on this very important concept. On draft guideline 3, the delegation noted the significant reformulation of the same in the draft second report. In his view, it formally related to legal status of the atmosphere, but now has been changed to common concern of human kind. He went on to note that the concept of common concerns as proposed applied to protection itself not concerning to the jurisdiction or territory of State to atmosphere. In this regard he reiterated his country's position that it has been reiterating in previous AALCO sessions that further consideration needed to be devoted to the adequacy of the legal status of the atmosphere. He was of the view that the concepts of air space, shared and common natural resources, common property, common heritage and common concern must be scrutinized further prior to determination of the legal status of atmosphere.

53. The delegation drew the special attention of Prof. Murase to the sovereignty, jurisdiction and rights of States toward maritime airspace as provided under UNCLOS in his reformulation of this particular draft guideline. While noting the Special Rapporteur's formulation of draft guideline 2(c), he was of the considered view that it would be clearer if certain fundamental international law aspects are addressed. On the topic of the customary international law the delegation appreciated the brief introduction by Mr. Hassouna, noted the report of the Informal Working Group, and appreciated the work of Prof. Sufian and Prof. Yee on this very important topic. Due to the fact that his delegation only received the report of the Informal Working Group on the final days before its delegation departed for Beijing, he stated that he reserved his delegations comments on the very detail, initial views in that report to a future date.

54**.** **The Delegate of Pakistan** appreciated and offered compliments to the distinguished Panelists for giving incisive presentations. He also complimented the distinguished delegate from the Islamic Republic of Iran for making lucid comments, which in his view needed to be given serious consideration. On the topic of "Expulsion of Aliens", he pointed out a practical difficulty

which an alien is exposed to when faced with expulsion. This was a question of legal and economic existence. He believed that this issue needs to be addressed in the draft legislation. He also noted that other issues similar to this have been highlighted by the distinguished delegate from China and Thailand. On the topic of Protection of Atmosphere", he observed that we need to identify climate and biological diversity which is brought about from the obnoxious emission from industry and deforestation. We need to further elaborate on these issues. And on the question of "Immunity of State Officials", he was of the view that we need to bring clarity and certainty as to who is entitled to immunity. We also need to give immunity to high ranking officials even when they leave office, he added. On the question of Customary International Law he suggested that AALCO set up a Permanent Sub-Committee with a mandate to compile and comment on various judgments, various treaties rendered in international tribunals by admissions and the national courts as well. In his view, they can cover topics such as sovereign immunity, environment, law of seas, trade law and various other aspects of international law.

55**.** **The Observer Delegate of Russia** thanked the panelists for their insights into the work of the Commission and stated that many of the views expressed by the Members of AALCO and also those reflected in the report of its Secretariat were quite close to the position of the Russian Federation.

56. On the topic of Customary International Law, she expressed her support to the views expressed in the paper prepared by the Special Rapporteur of AALCO and its Working Group on this topic. As for the practice of States that need to be taken into account, she noted (supporting the view point of the Special Rapporteur of AALCO) that it should not be just any practice but should be the practice in the area of foreign relations. The delegate also supported the idea that due considerations should be given to the practice of specially concerned States. She was of the considered view that rigorous criteria should be established by the Commission for a practice of States to qualify and pass the test of being customary international law. On the position of the Special Rapporteur of the Commission that he did not have an intention to address the issue of a hierarchy of different sources of international law, she stated that this issue could not be totally excluded from the work of the Commission. Commenting on the future work of the Commission on the issue, she stated that Russian Federation was keenly looking forward to see how the ILC would address a number of issues such as: the role of practice of international organizations in the formation of customary international law; the role of generally recognized principles of international law in the formation of customary law, etc. The delegate also stressed that it is very important to set out rules related to the so called persistently objecting states and the influence of their behavior on the customary international law. In conclusion she had suggested that it would be advisable for the Commission to actually slow down the pace of its work so that all States have an opportunity to study the topic to present their views and those views can be taken into account.

57. On the topic of "Immunity of State Officials from Foreign Criminal Jurisdiction", the delegate stated that the Commission has been successful so far in reflecting customary rules of international law existing in this area. In this regard, she stated that at an appropriate time in would be advisable to go back to the issue as to whether the other high ranking officials apart from troika enjoy privileges and immunities based on their functions. It might be that Minister of Defense and the Head of Parliament are two positions that should be considered in this regard.

She also went on to add that in her view there is currently no practice of States that would substantiate the idea that there are exceptions to the immunity of State officials for certain crimes and that she believed that progressive development of law in this area would also not be useful and would even undermine the stability of international relations.

58. **Dr. Roy Lee, Permanent Observer of AALCO to the United Nations** pointed out the need of AALCO Member States to contribute more to the work of the Commission. In this regard, he brought attention to two problems at two different stages that prevail in practice: one is at the formation stage in the ILC itself and then the second stage is when the work of the ILC or report come to the General Assembly at the decision stage whether the report should be adopted and what decision should be taken. In his view there are factors affecting both stages. While stating that even though the topics of the ILC are highly scientific and complicated legal issues they (indeed all of them) do have political implications. As an example, he cited the topic of 'Expulsion of Aliens' that in his view is being treated differently by different countries depending upon their different national interests.

59. The first problem in his view related to the lack of sufficient response to the requests of ILC on the part of Member States. While noting that the Special Rapporteur relies on the contribution from Member States in order to prepare his report, our Member States have not been able to do so for various reasons. This meant that at the formation stage Asian-African positions and interests might not effectively get reflected in the report. In this regard, he brought attention to some of the problems that prevent the Member States from doing so.

60. Turning to the second problem, he stated that when the ILC has presented the report or has produced its final product then, it is considered by the Sixth Committee. Here, the main problem is that the ILC report usually becomes available only at the beginning of September and then the Sixth Committee takes the report up in end of October or November. So there is only two months period for the countries to review the report and it has been widely felt that there is not enough time to give adequate consideration to the ILC report. The fact that there is insufficient time available to Members to reflect on the report of ILC or its final product on any given issue has undermined their efforts to come up with a detailed analysis and response, he clarified. In this regard he wanted the Member States to consider different ways of increasing their contributions to ILC's report and work.

II. 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.

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 transboundary 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[2].

B. CONSIDERATION OF THE TOPIC AT THE SIXTY-SEVENTH SESSION OF THE COMMISSION (2015)

3. At this Session, the Commission considered the Second Report on the protection of the atmosphere submitted by the Special Rapporteur, Shinya Murase (Japan)[3]. The report had proposed five draft guidelines relating to: "use of terms"; "scope of the guidelines"; "common concern of humankind"; "general obligation of States to protect the atmosphere" and "international cooperation."

4. During the course of the debate, members raised some concerns about these guidelines, such that the third guideline was sent to the Drafting Committee on the understanding that it would be placed in a preamble, while the fourth guideline was not sent to the drafting committee at all.

5. The problem with the third draft guideline was that it sought to use the concept of "common concern of humankind" in a legally operative way, but that term has enjoyed very limited use in treaties (appearing only in the preamble of the Climate Change Convention and the Convention on Biological Diversity, both from 1992), and has been interpreted in creative and doubtful ways in the literature. Ultimately, the Commission provisionally adopted a preamble

[2]See A/68/10, para. 168.

[3]See International Law Commission, Second Report on the Protection of the Atmosphere, UN Doc. A/CN.4/681 (Mar. 2, 2015) (Prepared by Special Rapporteur Shinya Murase).

(which is a work-in-progress) that makes a factual statement that protection of the atmosphere is a "pressing concern of the international community as a whole." The report of the chairman of the drafting committee indicates that this phrase was proposed by the Special Rapporteur to allay the concerns of those members who preferred to avoid the phrase "common concern of humankind", and to choose instead an expression that the Commission itself had used as a criterion for determining which topics should be brought onto its programme of work, as cited in the ILC Yearbooks of 1997 and 1998, and from which it was agreed among the members of the Committee that no legal consequences arise on their own[4].

6. Consistent with that outcome, the Commission's commentary to the preamble indicates that it "was considered appropriate to express the concern of the international community as a matter of factual statement, and not as a normative statement, as such, of the gravity of the atmospheric problems."

7. The Commission also adopted draft guidelines 1, 2 and 5. Draft guideline 1 is on "use of terms"[5]. Even though no definition has been given to the term "atmosphere" in the relevant international instruments, the ILC, however, considered it necessary to provide a working definition for the present draft guidelines, and the definition given in paragraph (a) is inspired by the definition given by a working group of the Intergovernmental Panel on Climate Change (IPCC). Paragraph (b) defines "atmospheric pollution" and addresses transboundary air pollution, whereas paragraph (c) defines "atmospheric degradation" and refers to global atmospheric problems. By stating "by humans", both paragraphs (b) and (c) make it clear that the draft guidelines address "anthropogenic" atmospheric pollution and atmospheric degradation.

8. Draft Guideline 2 is on "scope of the guidelines".[6] Uncertainty as to whether these "guidelines" ultimately would solely identify legal principles or would be broader in nature led

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[4]International Law Commission, Statement of the Chairman of the Drafting Committee, Mr. Mathias Forteau, "Protection of the Atmosphere," at 10–11 (June 2, 2015), *available at* http://legal.un.org/docs/?path=../ilc/documentation/english/statements/2015_dc_chairman_statement_atmosphere.pdf&lang=EF.

[5] For the purposes of the present draft guidelines,

a) "Atmosphere" means the envelope of gases surrounding the Earth;

b) "Atmospheric pollution" means the introduction or release by humans, directly or indirectly, into the atmosphere of substances contributing to deleterious effects extending beyond the State of origin, of such a nature as to endanger human life and health and the Earth's natural environment;

c) "Atmospheric degradation" means the alteration by humans, directly or indirectly, of atmospheric conditions having significant deleterious effects of such a nature as to endanger human life and health and the Earth's natural environment.

[6] Guideline 2 Scope of the guidelines

1. The present draft guidelines [contain guiding principles relating to] [deal with]18 the protection of the atmosphere from atmospheric pollution and atmospheric degradation.

2. The present draft guidelines do not deal with, but are without prejudice to, questions concerning the polluter-pays-principle, the precautionary principle, common but differentiated responsibilities, the liability of States and their nationals, and the transfer of funds and technology to developing countries, including intellectual property rights.

3. The present draft guidelines do not deal with specific substances, such as black carbon, tropospheric ozone, and other dual-impact substances, which are the subject of negotiations among States.

4. Nothing in the present draft guidelines affects the status of airspace under international law nor questions related to outer space, including its delimitation.

to bracketed text in paragraph 1, while paragraphs 2-4 sought to capture aspects of the "understanding" developed by the Commission in 2013 regarding this topic[7]. Paragraph 1 defines the scope of the draft guidelines on the basis of the definitions contained in paragraphs (b) and (c) of draft guideline 1. It deals with questions of the protection of the atmosphere in two areas, atmospheric pollution and atmospheric degradation. The draft guidelines are concerned only with anthropogenic causes and not with those of natural origins such as volcanic eruptions and meteorite collisions. The focus on transboundary pollution and global atmospheric degradation caused by human activity reflects the current realities, which are supported by the science.

9. Draft guideline 5 addresses "international cooperation",[8] meaning cooperation among States and with relevant international organizations. International cooperation, which is at the core of the whole set of draft guidelines on the protection of the atmosphere, is found in several multilateral instruments relevant to the protection of the environment. Both the Stockholm Declaration on the Human Environment and the Rio Declaration on Environment and Development, in principle 24 and principle 27, respectively, stress the importance of cooperation. In addition, in the *Pulp Mills* case, the International Court of Justice emphasized linkages attendant to the obligation to inform, cooperation between the parties and the obligation of prevention

10. A detailed future plan of work was also presented, growing out of the comments presented in the Commission in 2014 asking for such a plan. The Special Rapporteur estimated, on a tentative basis, that work on the topic could be completed in 2020, following a consideration of such issues as the principle of *sicutere tuo ut alienum non laedas*, the principle of sustainable development (utilization of the atmosphere and environmental impact assessment), the principle of equity, special circumstances and vulnerability, in 2016; prevention, due diligence and precaution, in 2017; principles guiding interrelationships with other fields of international law, in 2018; compliance and implementation, and dispute settlement, in 2019.

C. SUMMARY OF THE VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPICS AT THE UN GENERAL ASSEMBLY SIXTH COMMITTEE AT ITS SEVENTIETH SESSION HELD IN 2015[9]

11. *Many delegations* had welcomed the second report of the Special Rapporteur Mr. Shinya Murase submitted this year and expressed their appreciation to the initiative of the Special Rapporteur to have organized a dialogue with the scientific community on the subject at

[7]Report of the International Law Commission on the Work of Its Sixty-Fifth Session, UN GAOR, 68th Sess., Supp. No. 10, at 115, para.168, UN Doc.A/68/10 (2013) [hereinafter 2013 Report].

[8] Guideline 5 International cooperation

1. States have the obligation to cooperate, as appropriate, with each other and with relevant international organisations for the protection of the atmosphere from atmospheric pollution and atmospheric degradation.

2. States should cooperate in further enhancing scientific knowledge relating to the causes and impacts of atmospheric pollution and atmospheric degradation. Cooperation could include exchange of information and joint monitoring.

[9] Most of the Statements that are mentioned here as having been made by the Member States of AALCO at the UN General Assembly Sixth Committee in 2015 are available from: http://www.un.org/press/en/2015/gal3507.doc.htm.

the Commission. These delegations were of the view that the topic of "protection of the atmosphere" could not be properly discussed or developed in isolation from the scientific community because this topic straddles law and science. Many delegations expressed the opinion that the Commission should consider the priorities of developing countries in its treatment of this topic and that it should, among other things, consider developing countries' priorities and their capacity-building in addressing atmospheric pollution.

12. While pointing out changes made in the draft guideline 1 regarding the "use of terms", *one delegation*[10] noted that the definition of 'atmosphere' (as contained in second report) has been amended and shortened (from the first report). He illustrated this by pointing out that the specific references to 2 layers of gases i.e, troposphere and stratosphere stood eliminated in the second report. While stating that the proposed definition by the Commission should not by any means alter or narrow the existing scientific interpretation of the atmosphere, the delegate sought clarification on the status of other elements that are not covered by the proposed definition. On the definition of "atmoshpheric degradation" occurring in paragraph 3, the delegate went on to add that his country is not familiar with the term, and that, there is a need to consult the technical and scientific experts in framing a clear, comprehensive and acceptable definition of "degradation".

13. Commenting on the draft guideline 5 that imposes an 'Obligation of International Cooperation', *one delegation* noted that it was one of the most important outcomes of the Commission's discussion on the issue and that, obligating States to cooperate with each other and with relevant international organizations for the protection of the atmosphere, was a necessary rule for inclusion in the guidelines given the wide range of economic and other activities that could cause transboundary air pollution or global climate change. A number of delegations, however, pointed to the need for further improvement in the language of that draft guideline.

14. It was pointed out by *another delegation* that the Commission's work on protection of the atmosphere should include study on all sources of pollutants and substances detrimental to the atmosphere, in particular radioactive and nuclear emissions. As regards the omission of specific substances in guideline 2, paragraph 3, (the objective of which was not to interfere with ongoing negotiations among Member States), the delegate was of the view that it would have been preferable to include a "without prejudice" clause. The delegate also added that the replacement of the phrase "common concern of mankind" with some related paragraphs in the preamble was appropriate. On the issue of cooperation, he noted that the obligation to cooperate was a vague and undefined legal concept. The delegate also went on to add that the development of an international legal regime on the protection of the atmosphere would be feasible only if due consideration were given to well-established concepts in the field, namely intra-and intergenerational equity, as well as the special needs and priorities of developing countries.

15. *One delegation* agreed with the Commission's approach to the topic that its work should not interfere with political negotiations and without prejudice to existing international law

[10] Available at : https://papersmart.unmeetings.org/media2/7654633/malaysia.pdf

principles, such as the polluter-pays principle, the precautionary principle and the principle of common but differentiated responsibility. While welcoming the provisional adoption of draft guidelines, including a preamble, the delegation went on to welcome in particular, the inclusion of cooperation in enhancing scientific knowledge relating to the causes and impacts of atmospheric pollution and atmospheric degradation. The delegation encouraged the Commission to continue distilling existing international law principles relating to protection of the atmosphere to serve as an accessible, understandable and coherent backdrop against which the political processes of creating new norms could take place more expediently.

16. *One delegation* voiced his support for the Commission's work on protection of the atmosphere by stating that it raised the visibility of the issue. While pointing out that the protection of atmosphere required coordinated actions by the international community, the delegation went on to add that the Commission should continue its work on the matter in a constructive manner with flexibility, given the different views and approaches expressed by different countries.

17. Underscoring the need to address the depletion of the atmosphere, *another delegation* expressed approval for the newly adopted third paragraph of the preamble to the draft guidelines which recognized that the protection of the atmosphere from transboundary atmospheric pollution and atmospheric degradation was a "pressing concern of the international community as a whole". The delegation also welcomed as well the Commission's emphasis on international cooperation under guideline 5. The delegation also agreed with decision of the Commission to address the subject matter of draft guideline 3(on common concern of humankind) in the preambular part, and the reasons given for that in commentary.

18. While noting that the purpose and scope of this project should be further clarified by the Commission, *one delegation* pointed out that the Commission has incorporated both in the preamble and guideline 2 the relevant understanding reached in 2013 on this topic, viz., the draft guidelines will not interfere with relevant political negotiations, including those on climate change, ozone depletion and long-range transboundary air pollution, and they will not seek to "fill" gaps in treaty regimes, nor will they deal with relevant basic principles of international environmental law. In the view of the delegate, this will help ease the concerns voiced by quite a number of delegations on the relationship between the work of ILC and the relevant existing political and legal regimes. At the same time, the delegate also pointed out that the commentary of guideline 1 (which says that this topic calls attention to such questions as transboundary air pollution, ozone depletion and climate change) takes the concept of "long-range air pollution" directly from the relevant regional conventions. He was of the opinion that this seemed to contradict the afore-mentioned language in the preamble and guideline 2, which makes it difficult to understand the scope and purposes of the guidelines.

19. While stating that some crucial terms need to be defined more clearly, the delegate observed for example, that the major difference between atmospheric pollution and atmospheric degradation seems to stem from the "deleterious effect" and the "significant deleterious effect" they produce. But the distinction between the two is still not very clear. Giving another example, he mentioned that the "atmospheric degradation" referred to in the commentary of the draft guidelines means "worldwide atmospheric problems", and that one may therefore consider

inserting the word "global" in front of the phrase "atmospheric conditions" in the definition of "atmospheric degradation" in guideline 1 (c), so as to make clear that the "atmospheric degradation" in the draft specifically means the alteration of atmospheric conditions that produces deleterious effect on the world. The delegate went on to suggest that distinction be made among different types of atmospheric pollution and corresponding rules owing to the fact that some types of atmospheric pollution might cause deleterious effect only to specific countries or regions, while others might cause deleterious effect on the international community as a whole, rather than certain countries. A "one-size-fits-all" approach cannot meet the need of the world today, he added.

20. *One delegation* welcomed the narrow definition of "atmospheric pollution", in line with existing treaty practice, and appreciated the efforts to define "energy" for the purpose of further clarification. While the delegation considered draft guideline 5, with its emphasis on international cooperation, as core to the entire set of draft guidelines, he expressed doubt about the expression "States have an obligation to cooperate", noting that "States shall cooperate" was more frequently used in other treaties.

D. COMMENTS AND OBSERVATIONS OF AALCO SECRETARIAT

21. The Secretariat of AALCO appreciates the Special Rapporteur of this topic Prof. Shinya Murase for his informative Second Report that was considered at the 2015 Session. The AALCO Secretariat also appreciate him for organizing informal exchanges (dialogues) with scientists at this Session, which has shown the rigorous approach adopted by the Commission in dealing with highly scientific topics like the protection of the atmosphere.

22. AALCO is pleased to note the progress made in the preparation of the draft guidelines on this topic, including preambular paragraphs and commentaries. As regards the relationship between draft articles on the subject and the relevant existing political and legal regimes, the Commission has rightly incorporated both in the preamble and guideline 2 the understanding that the draft guidelines will not interfere with relevant political negotiations, including those on climate change, ozone depletion and long-range transboundary air pollution, and that they will not seek to "fill" gaps in treaty regimes, nor will they deal with relevant basic principles of international environmental law. This is considered important because the relationship between the two has been, to a large extent, a matter of speculation.

23. Likewise, the Secretariat is happy to see the contours of the scope of application of the guidelines as clearly delineated in guideline 2, together with the decision to give further consideration to the bracketed language in paragraph 1. On the matter of international cooperation, AALCO finds that guideline 5, on "International cooperation", as corroborated in its commentary, appropriately reflects and adjusts this key general principle of international law to the protection of the atmosphere. To that end, AALCO subscribes to the language contained in paragraph 2 of guideline 5 including the enhancement of scientific knowledge in the field within the scope of international cooperation. Given the fact that a wide range of activities could cause transboundary air pollution or global climate change, obligating States to cooperate with each other and with relevant international organizations for the protection of the atmosphere is a welcome rule to be included in the guidelines. What is also required however is that the

Commission should, among other things, clearly spell out and consider the special needs and priorities of developing countries, including capacity building, in addressing atmospheric pollution.

24. AALCO notes with appreciation the future plan of work on the topic presented by the Special Rapporteur as reflected in paragraph 47 of the ILC Report. AALCO would also like the Commission to continue to strengthen its research on relevant theories and practices in a rigorous manner and gradually clarify relevant guidelines. Conceptual clarity is needed on few issues. For example, even while welcoming the fact that draft guideline 3 has incorporated the phrase "the common concern of mankind", it needs to be pointed out that the legal consequences of the concept has remained unclear. Clarity is needed here in the work of the Commission in future. For the above reasons, a careful and patient manner as indicated by the Special Rapporteur in dealing with this topic is welcomed.

III. CRIMES AGAINST HUMANITY

A. BACKGROUND

1. In international criminal jurisprudence, three core crimes have emerged—genocide, war crimes and crimes against humanity. War crimes have been codified by means of the "grave breaches" provisions of the 1949 Geneva Conventions and Protocol I. Genocide has been codified by means of the 1948 Genocide Convention. Yet no comparable treaty exists concerning crimes against humanity, even though the perpetration of such crimes remains an egregious phenomenon in numerous conflicts and crises worldwide.

2. The first international reference to the crime was found in the Hague Conventions. The "Martens Clause" of the 1899/1907 Hague Conventions made reference to the "laws of humanity and the ... dictates of public conscience" in the crafting of protections to persons in time of war. Later, the tribunals established at Nuremberg and Tokyo in the aftermath of the Second World War included as a component of their jurisdiction "crimes against humanity". The principles of international law recognized in the Nuremberg Charter were reaffirmed in 1946 by the General Assembly, which also directed the International Law Commission to "formulate" those principles. The Commission then studied and distilled the Nuremberg principles in 1950, defining crimes against humanity as:

> "murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime."

3. In 1993, the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) included "crimes against humanity" as part of its jurisdiction, as did the Statute for the International Criminal Tribunal for Rwanda in 1994. In 1996, the Commission defined "crimes against humanity" as part of its 1996 draft code of crimes against the peace and security of mankind, a formulation that would heavily influence the incorporation of the crime within the 1998 Rome Statute establishing the International Criminal Court (ICC).

4. The Rome Statute is the primary means of investigating this crime at the international level. However, the exercise of exploring the viability of an international convention on crimes against humanity was deemed to be a possibly useful endeavor by the International Law Commission for its purported utility in assisting the process of investigation and prosecution of crimes against humanity at the national level, thereby enhancing the complementarity of the ICC and domestic legal systems as well as promoting inter-State cooperation, which is not addressed by the Rome Statute.

5. The Commission, at its Sixty-Fifth Session (2013), therefore decided to include the topic "Crimes against humanity" in its long-term programme of work, and at its Sixty-Sixth Session (2014) included the topic on its current programme of work with Mr. Sean D. Murphy as its

Special Rapporteur – a development which was taken note of by the UN General Assembly following debates within the Sixty-Ninth Session (2014) of the UNGA Sixth Committee.

6. The following part will summarize the Special Rapporteur's First Report, then examine the draft articles and commentaries attached therewith, which were provisionally adopted by the Commission at its Sixty-Seventh Session, before reproducing the relevant comments made by AALCO Member States on this topic at the UNGA Sixth Committee's Seventieth Session (2015) and providing the observations of the AALCO Secretariat.

B. CONSIDERATION OF THE TOPIC AT THE SIXTY-SEVENTH SESSION OF THE COMMISSION (2015)

7. The Special Rapporteur, Mr. Sean D. Murphy, divided his First Report that was submitted in 2015 into seven sections. Section I contained an introduction to the report; Section II addressed the objectives of the prospective convention on crimes against humanity as well as its relationship to existing treaties such as the Rome Statute; Section III addressed the historical and conceptual basis of crimes against humanity; Section IV examined existing multilateral treaties that could possibly serve as templates or important points of reference for a new convention addressing crimes against humanity; Section V dealt specifically with the existing legal jurisprudence of the general obligation to prevent and punish crimes against humanity; Section VI examined the definition of crimes against humanity; and, Section VII proposed a future programme of work.

8. Mr. Murphy's Report also included an annex containing proposals for two Draft articles; one dealing with the prevention and punishment of crimes against humanity, and the other advancing a definition of crimes against humanity.

9. In Section II of his Report, the Special Rapporteur assessed the potential benefits of a convention on crimes against humanity which advocates the adoption of national laws criminalizing such crimes and which provide for a broad ambit of jurisdictional powers to prosecute offenders in the territory of a State party. Additionally the Rapporteur also envisioned provisions obligating States to prevent such crimes, in additional to prosecuting them, and to cooperate in the investigation, prosecution and extradition of offenders through mutual legal assistance. Mr. Murphy reiterated that the convention would enhance the complementarity system that forms the basis of the ICC, by reinforcing the notion that domestic courts are the appropriate courts of first instance, in addition to enhancing the "horizontal" relationship of inter-State cooperation as well as the "vertical" relationship between the ICC and States.

10. In Section III of his Report, the Special Rapporteur provided the conceptual and historical background of crimes against humanity, including its shift away from being a concept associated with international armed conflicts to a crime that requires only the presence of a widespread or systematic attack against civilian populations in order to be invoked. This Section also dealt with the application of the law by international criminal tribunals including the ICC and, while examining the status of States' adoption of national laws dealing with the crime, came to the conclusion that currently there are a dearth of harmonized national laws dealing with crimes against humanity – a situation that negatively affects inter-State cooperation in this area.

11. In Section V of the Report, Mr. Murphy specifically addressed the obligation of States towards both the prevention and punishment of crimes against humanity and propounded the need for articles within the new convention that dealt with measures to prevent crimes against humanity. He addressed the broad provisions such as that present in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide which obligates States to "prevent and to punish" the crime of genocide. The Special Rapporteur felt that obligations phrased in this manner obliged States to not commit such acts through their own organs and to "employ the means at their disposal" to prevent persons not under their authority from committing such crimes. The breach of this obligation possibly made the commission of such crimes attributable to the State based on the rules of State Responsibility. Mr. Murphy also addressed specific measures contained in some conventions relating to training programmes within administrative, judicial, and executive bodies to create awareness and thereby prevent such crimes from being committed. The Special Rapporteur also substantiated his claims for the need for a clause requiring the prevention of crimes against humanity by citing UNGA resolutions, international tribunal judgments, and various treaties, such as the Convention Against Torture, and the afore-mentioned Genocide Convention, which have contributed to the international jurisprudence on the need for measures to be taken to prevent heinous crimes.

12. Based on the above rationale the Special Rapporteur proposed a draft article which included one clause confirming States' recognition of crimes against humanity, a second clause entreating them to take effective legislative, administrative, judicial or other measures to prevent these crimes in territories under their jurisdiction, and a non-derogation clause.

13. In Section VI of his Report, the Special Rapporteur addressed the definition of crimes against humanity contained within Article 7 of the Rome Statute. Mr. Murphy asserted that Article 7 of the Rome Statute represents the most broadly supported and comprehensive definition of the crime available in international law and also noted that all States' comments made at the Sixth Committee's Sixty-Ninth Session maintained that the Commission should not adopt a definition of "crimes against humanity" that differs from Article 7 of the Rome Statute in order to minimize undesirable fragmentation of the international law in this area. The Special Rapporteur then reproduced the Rome Statute's definition along with a detailed examination of the jurisprudence concerning elements of the crime relating to "widespread or systematic attack", "directed against any civilian population", non-State actors, "with knowledge of the attack", and the types of prohibited acts. Mr. Murphy reproduced the Rome Statute definition verbatim as his proposed draft article, save for three non-substantive changes; these changes merely modified the wording to apply it to the current draft articles and Statute rather than the Rome Statute and the ICC.

14. In Section VII of his Report, the Special Rapporteur focused on the likely contents of his Second Report, which be submitted in 2016. Within in, Mr. Murphy proposed to address the obligations of State parties to take necessary measures to ensure the implementation of provisions criminalizing crimes against humanity within national laws, obligations to take measures to establish the State's competence to exercise jurisdiction over an offence, obligations to take alleged offenders in into custody and to perform investigations, obligations to extradite for prosecution, and the entitlement of alleged offenders to fair trials and treatment. A proposed Third Report (2017) could address obligations to investigate offences when the alleged offender

is not present, rights and obligations applicable to extradition, and rights and obligations applicable to mutual legal assistance in connection with criminal proceedings, and a Fourth Report (2018) could deal with dispute settlement and any other leftover issues. The Special Rapporteur also anticipated the conclusion of the work by the year 2020, including a first reading of the entire set of draft articles in 2018 and a second reading in 2020.

i. Draft Article 1 (Scope)

15. Regarding Draft Article 1 (Scope), the Commission reiterated that the draft articles apply to both the prevention and the punishment of crimes against humanity as a conscious response to the prevailing focus on the punishment but not the prevention of such crimes. Furthermore, it was reiterated that the present draft articles are solely concerned with crimes against humanity, that these crimes are grave international crimes wherever they occur, and that the draft articles will avoid conflicts with relevant existing treaties, as well as other existing State obligations such as those under constituent instruments of international or "hybrid" courts, while simultaneously distinguishing itself from these prior instruments by focusing on prevention and implementation at the domestic level.

ii. Draft Article 2 (General Obligation to Prevent and Punish

16. Regarding Draft Article 2 (General Obligation to Prevent and Punish), the Commission began by stating that the contents of this general obligation will be elaborated upon and addressed in future more specific draft articles beginning with Draft Article 4. The Commission reiterated that Draft Article 2 recognizes crimes against humanity as "crimes under international law" and that they have been recognized since the Charter of the International Military Tribunal at Nurnberg was established. The Commission further noted that characterizing crimes against humanity as "crimes under international law" denotes that these crimes will be considered crimes regardless of whether such activities have been criminalized under national law. Furthermore, according to the Commission, the prohibition of crimes against humanity have been clearly accepted and recognized as a peremptory norm of international law.

17. The Commission also drew attention to the fact that Draft Article 2 identifies crimes against humanity under international law whether or not they are committed in times of armed conflicts. The reason for this was that although crimes against humanity have been historically linked, by tribunals from the Nürnberg tribunal (IMT) to the International Criminal Tribunal for the former Yugoslavia (ICTY) with the existence of an armed conflict of either an international or a non-international nature. In fact the appeals chamber of the ICTY has itself clarified that there is no need for a link with an armed conflict to be proved in order for a crime to be classified as a crime against humanity.[11] The Rome Statute itself does not contain a reference to armed conflicts in relation to crimes against humanity under Article 7, thus confirming the dissociation of crimes against humanity from armed conflicts.

iii. Draft Article 3 (Definition of Crimes Against Humanity)

18. Regarding Draft Article 3 (Definition of Crimes Against Humanity), the Commission reiterated that it had not made any changes to the text of Article 7 of the Rome Statute of the

[11] *Prosecutor v. Tadić*, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, Appeals Chamber, Case No. IT-94-1-AR72, 2 October 1995, para. 140.

International Criminal Court, save 3 non-substantive changes regarding the applicability and purposes of the instrument.

19. The Commission examined some of the previous definitions and references to crimes against humanity, such as the ones found in the Nürnberg Charter, Principle VI(c) of the Commission's 1950 "Principles of International Law recognized in the Charter of the Nürnberg Tribunal", the Commission's 1954 Draft Code of Offences against the Peace and Security of Mankind, Article 5 of the ICTY Statute, Article 3 of the Statute of the International Criminal Tribunal for Rwanda (ICTR) and Article 7 of the Rome Statute. The Commission particularly contrasted the ICC's approach with that of the ICTY and the ICTR; unlike the Statute of the ICTY, the Rome Statute does not require a nexus to an armed conflict and, unlike the Statute of the ICTR, the Rome Statute does not require the presence of discriminatory intent.

20. The Commission also examined the constituent elements of crimes against humanity such as "widespread or systematic attack", "directed against any civilian population", "with knowledge of the attack".

21. With regards to the "widespread or systematic element", the Commission examined the jurisprudence of the element beginning with its inception in the ICTR Statute. The Commission reaffirmed that the terms "widespread" and "systematic" have a disjunctive relationship, meaning that the attack muse be *either* widespread *or* systematic attack, and it is not necessary to prove that the attack is both widespread and systematic. Both widespread and systematic in this context denotes that there is a "multiplicity of victims" and excludes isolated attacks of violence directed against individuals by isolated individuals who are not acting as part of a broader initiative. Widespread has also been defined to include geographical dimensions, meaning that such attacks may be spread over different locations, and systematic denotes that there is an organized nature to the attacks.

22. The commission in looking at the element of "directed against any civilian population" focused on Draft article 3, paragraph 2(a), which defines "attack directed against any civilian population" for the purpose of paragraph 1 as "a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack." The important terms here noted by the Commission are: "directed against", "any", "civilian", "population", "a course of conduct involving the multiple commission of acts", and "State or organizational policy."

23. "Directed against" requires that civilians are the intended targets and not incidental victims. "Any" provides for the term "civilian population" to be interpreted in a broad and inclusive manner and that the term "civilian" must be interpreted in a manner consistent with prevailing rules of international humanitarian law, regardless of any nationality, ethnicity, or any other feature. "Population" implies that the crime is committed against a group of multiple victims, but not necessarily against the entire population of a geographical region. "Couse of conduct involving the multiple commission of acts" too denotes that an isolated attack upon an individual does not constitute a crime against humanity, but there needs to multiplicity to invoke the crime.

24. Finally, "State or organizational policy" was inserted as an element by the Rome Statute though it was not present in the Statutes of the ICTR or ICTY. The Commission pointed to the judgment of the ICTY Trial Chamber in the *Tadić* trial which decreed that there needs to be a level of organization to the nature of the attacks and that it cannot be the work of isolated individuals alone. The Commission also pointed to the *Katanga* judgment of the ICC Trial Chamber that stressed that the "policy" factor should not be conflated with "systematic", but rather it must merely established that the State or organization meant to commit an attack against a civilian population. The policy requirement does not require formal designs or pre-established plans; it can be denoted by action or inaction and can be inferred from circumstances such as repetition of acts, preparatory activities, or collective mobilization.

25. Additionally, the "policy" in question can be that of the State or any of its organs, or of any non-State organization or group with the capacity and resources to plan and carry out a widespread or systematic attack.

26. The next element examined was that of "knowledge of the attack" which requires that it be proved that the perpetrator had knowledge of an ongoing attack on the civilian population and also knowledge of the fact that his or her action was part of the attack. However, the Commission qualified this by reiterating that the perpetrators knowledge of the attack need not be extensive, and it is only necessary to show that the knowledge is that such an attack exists.

27. The Commission also emphasized Paragraph 4 of Draft Article 3 which states that the Draft Article is without prejudice to any broader definition of any crime constituting a crime against humanity provided for in any other international instrument or national law. This takes into account the existence of instruments such as the 1992 Declaration of Protection of All Persons from Enforced Disappearances which contains a definition of "enforced disappearance of persons" that does not include the constraints of "with the intention of removing them from the protection of law" or "for a prolonged period of time" which are contained within the Rome Statute and Draft Article 3, thus giving them greater breadth and ostensibly a wider scope of protection. Paragraph 4 of Draft Article 3 would also allow States to define the constituent crimes of crimes against humanity in a broader manner, thereby giving civilians greater protection than the proposed Draft Article.

iv. Draft Article 4 (Obligation of Prevention)

28. The Commission examined other treaties addressing acts that may constitute crimes against humanity and found that obligation of prevention set forth in those treaties extends as well to prevention of the acts in question when they also qualify as crimes against humanity. The Commission found that the obligation of prevention has been a feature of most multilateral treaties dealing with crimes since the 1960's. These included: Convention for the suppression of unlawful acts against the safety of civil aviation; Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents; Convention on the Prevention and Punishment of the Crime of Apartheid; Convention against the taking of hostages; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and many more. The Commission also found that several multilateral human rights

treaties that aren't focused on the prevention and punishment of crimes contained obligations to prevent and suppress human rights violations.

29. Additionally, the Commission referenced the International Court of Justice (ICJ), in its judgment in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*,[12] which found that the obligation to prevent genocide is normative and compelling and is not merged with the duty to punish. The Court also found that States were obligated to do all in their power to prevent the commission of any such acts [of genocide] in the future.

30. Using this jurisprudence, along with the well-settled acceptance by States that crimes against humanity are crimes under international law, the Commission concluded that there was a very strong indication that States have undertaken an obligation to prevent crimes against humanity.

31. According to the Commission, the obligation of prevention contains four elements. *Firstly*, that States have an obligation to not commit crimes against humanitu through their organs or persons under their authority and whose conduct is attributable to the State. This would not be limited to acts within the territory of the State. However, the Commission that the breach of the obligation to prevent crimes against humanity is not a criminal violation by the State itself, but rather that it concerns a breach of international law that engages State responsibility.

32. *Secondly*, States would have an obligation to employ the means at their disposal to prevent persons that are not directly under their authority from committing the crimes in question. The Commission applied a due diligence standard here to the application of the State parties' best efforts in this matter. The Commission also qualified this standard by taking into account the State's geographic, political and other links to the persons or groups in question. Furthermore, the State can only be held responsible for crimes that have actually been committed.

33. *Thirdly*, the Commission noted that States would be obliged to be proactive in taking "effective legislative, administrative, judicial, or other preventative measures" to prevent the commission of crimes against humanity in fulfilling its obligation to prevent. The specific measures that States would be obliged to adopt would include at least: 1) adopting of national laws and policies to establish awareness and promote early detection of crimes against humanity; 2) keeping laws and policies under review and to revise them if found deficient; 3) educating governmental officials on the State's obligations vis-à-vis crimes against humanity; 4) implementing training programmes for police, military, militia and other relevant personnel to prevent their commission of such crimes; 5) fulfilling obligations to investigate, prosecute or extradite offenders once an act has been committed, since the effective legal prosecution of the act has a deterrent effect on its recurrence.

34. *Fourthly*, according to the Commission, the obligation to prevent also includes the obligation for States to pursue certain forms of cooperation with each other as well as

[12] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007

organizations such as the United Nations, International Committee of the Red Cross (ICRC) and other similar organizations. This, the Commission noted, arose out of the obligations of States contained within the UN Charter, such as: Article 1 Paragraph 3, which encourages the achievement of international cooperation in solving international problems of a humanitarian character and promoting and encouraging respect for human rights and fundamental freedoms; Article 55 and 56 which calls on States to take joint and separate action in cooperation with the UN in the achievement for the achievement of, *inter alia*, the universal respect for and observance of human rights and fundamental freedoms. The UNGA in its 1973 Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War crimes and Crimes Against Humanity also noted a general responsibility for inter-State cooperation and action to prevent the commission of crimes against humanity.

35. Finally, in Paragraph 2 of Draft Article 4, the Commission notes that there may be no circumstances, no matter how exceptional, to justify the commission of crimes against humanity. These include armed conflict, internal political instability or other public emergencies. The Commission pointed out that similar language is also present in other treaties such as the Convention against Torture. Additionally, the Commission stressed that the provision, in the way it is written, would also be flexible enough to speak to the conduct of both States and non-State actors. However, this obligation applied only to the context of prevention and not to defences against charges of the commission of crimes against humanity.

C. SUMMARY OF VIEWS EXPRESSED BY AALCO MEMBER STATES AT THE SEVENTIETH SESSION (2015) OF THE SIXTH COMMITTEE OF THE UN GENERAL ASSEMBLY[13]

36. The introduction of the topic of Crimes Against Humanity into the work agenda of the Commission was for the most part welcomed by the delegates representing AALCO Member States at the Seventieth Session of the Sixth Committee. *Several delegates* voiced their opinion that the work of the Commission, particularly on the prevention of crimes against humanity and the promotion of inter-State cooperation, would serve to fill key lacunae in the existing framework of protection against this crime. The delegates also stressed on the need for the new draft articles to not conflict with existing law or to unnecessarily duplicate existing protections.

37. *One delegation*, however, was of the view that working towards a new convention on crimes against humanity was premature and required serious consideration. The reason given for this was that due to the fact that the Statute of the ICC, among others, has already defined crimes against humanity and there was not a pressing need for a new instrument. *A few delegates* also voiced the opinion that more attention needs to be paid to reasons why, for example, implementation of domestic legislation concerning crimes against humanity had not already occurred and that there needed to be further comprehensive study into State practice in this regard.

38. *One delegate* was also of the view that emphasis had been placed by the Commission on the judgments of international tribunals and the existence of treaties, but that there needed to be

[13]The statements made by Member States can be downloaded from < https://papersmart.unmeetings.org/en/ga/sixth/70th-session/agenda/>.

more comprehensive inspection of customary international law and of the general *opinio juris* surrounding crimes against humanity; this, the delegate pointed out, must be ascertained by examining the status of ratification and reasons for non-ratification of existing treaties by States. This issue is particularly relevant to the definitions of certain crimes and the listing of specific crimes, such as genocide and war crimes, which *several delegates* stressed, did not have universal agreement and which was a sticking point during the negotiation of the Rome Statute.

39. *Some delegates* also pointed out that harmonization under the current draft articles' provisions might be problematic for several reasons. One reason given was that some of the obligations imposed on States would be considered too broad and not amenable to many States. This is also compounded by the differences in national legal systems. Another reason given for possible problems in harmonization involved the provision in the draft articles allowing States to define crimes against humanity in broader terms than the draft articles, which might lead to inconsistent domestic protection regimes.

40. More specific issues with the Commission's draft were also raised. *One delegate* asked that the basis in international law for the obligation to cooperate with international organizations be clarified. *Another delegate* asked for clarification on the issue of how State responsibility would be incurred for the failure to prevent crimes against humanity from occurring.

41. *One delegate* finally noted that the future programme of work provided by the Special Rapporteur would be of fundamental importance in elaborating on, *inter alia*, the obligations of States to prevent crimes against humanity and the fair treatment and trial of alleged offenders, something which the delegate felt would necessitate the realignment of the provisions on protection and prevention.

D. COMMENTS AND OBSERVATIONS OF THE AALCO SECRETARIAT

42. Crimes against humanity occur on nearly every continent. Historic examples include the death of an estimated 1.7 to 2.5 million Cambodians, out of a total population of 7 million, at the hands of the Khmer Rouge regime. Although these atrocities are often referred to as genocide, proving genocide is often legally difficult. In Cambodia, for example, the Khmer Rouge generally killed, tortured, starved or worked individuals to death not because of their appurtenance to a particular racial, ethnic, religious or national group – the categories to which the Genocide Convention applies – but because of their political or social class or the fact that they could be identified as intellectuals. Although in the wake of the wars in the former Yugoslavia and the Rwandan genocide, *Ad hoc* criminal tribunals were established, the international community could not agree upon the definition of crimes against humanity, leading to differing texts in the statutes of the ICTY and the ICTR. With the adoption of the Rome Statute in 1998, crimes against humanity were finally defined in an international treaty. However, The Rome Statute neither requires State Parties to adopt internal legislation on crimes against humanity nor provides a vehicle for inter-State cooperation. It has therefore become imperative that a comprehensive treaty on crimes against humanity should come into force to effectively address myriad gaps in the existing legal framework.

43. The prospective creation of a future convention on crimes against humanity is a particularly interesting concern to Asian-African States especially in light of the reservations that some States have towards ratification of the Rome Statute. The work of the Commission provides a possible opportunity for these States to become a part of the international regime on the prohibition of crimes against humanity without necessarily acceding to the jurisdiction of the ICC. Defining and prosecuting crimes against humanity is an important modern concern, with particular relevance to the spread of violent extremism and the crimes committed by violent extremist groups, and therefore a convention that, *inter alia*, emphasizes inter-State cooperation would be of particular utility to States in the Asian and African regions.

44. However, many of the concerns voiced by delegates at the Sixth Committee are important to consider. Chief among these are the definitions and listing of certain types of crimes, and the breadth of obligations imposed on States. Due to the vast diversity of legal systems and philosophies prevalent in the Asian and African regions it would be difficult to harmonize the definitions of certain crimes that are and will be included in the draft articles of the Commission. While ancillary political problems with the ICC would be eliminated by the creation of a new instrument that closely reflects the Rome Statute, more fundamental questions regarding the definitions of crimes and the implementation of protections against these crimes within domestic legal systems would not.

45. Additionally, while the Commission has stressed that the measures included in the obligation to prevent crimes against humanity is an ongoing work in progress, States in Asia and Africa will no doubt be especially concerned with the scope and breadth of measures they will be obligated to implement as the Commission moves forward with its work on this topic. The inclusion of State responsibility for breaches in these obligations will also likely be a cause for States to give pause, as the application of this concept to the draft articles that will require further elaboration and explanation by the Special Rapporteur and Commission.

46. However, despite these possible concerns for Asian and African States, the work of the Commission in drafting articles relating to crimes against humanity has great potential. The work of the Special Rapporteur and the Commission aim at filling lacunae in the existing legal framework that prohibits crimes against humanity, particularly by promoting of domestic implementation of provisions and processes to prevent and punish the commission of these heinous crimes and by creating a transnational framework for inter-State cooperation and protection from crimes against humanity. This latter goal is certainly one that has universal appeal, and the main concern going forward will likely be finding amenable compromise solutions to the minutiae of the process and end product.

IV. JUS COGENS

A. BACKGROUND

1. *Jus cogens*, whose meaning in Latin is "compelling law", is also known by the term "peremptory norm" of international law, and refers to those norms of international law from which no derogation is ever permitted. While the concept of *jus cogens* is rooted in theories of natural law, it was described typically for the first time in an international instrument in Articles 53 of the 1969 Vienna Convention on the Law of Treaties.[14] It has been said that the concept of *jus cogens* is based upon "the acceptance of fundamental and superior values within the system and in some respects is akin to the notion of public order or public policy in domestic legal order."[15] However, despite the fact that there exists a two-stage process for identifying *jus cogens* norms – "first, the establishment of the proposition as a rule of general international law and, secondly, the acceptance of that rule as a peremptory norm by the international law community of States as a whole"[16] – there is little definitive agreement on what the content of *jus cogens* norms are.

2. It was therefore suggested in 2014 by the International Law Commission's Working Group on the long-term work programme of the Commission that *jus cogens* be included in the work programme of the Commission, and subsequently, at its Sixty-Seventh session, in 2015, the International Law Commission decided to include the topic "*Jus cogens*" in its programme of work, and also to appoint Mr. Dire D. Tladi as Special Rapporteur for the topic.

3. This development is particularly relevant given the nature of the Commission's ongoing study and examination of topics related to the sources of international law, such as customary international law and subsequent agreements and subsequent practice in relation to treaty interpretation. The following part will therefore deal with the 2014 recommendation of the Working-Group on the long-term programme of work whose annex contained the proposal by Mr. Tladi, and upon the strength of which the topic was included in the Commission's programme of work.[17]

B. CONSIDERATION OF THE TOPIC AT THE SIXTY-SEVENTH SESSION OF THE COMMISSION (2015)

4. The proposal by Mr. Tladi was divided into 4 major sections. Section 2 examined the previous consideration of *jus cogens* by the Commission; Section 3 examined the elements of *jus cogens* judicial decisions; Section 4 delineated the legal issues intended to be studied by Mr.

[14] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331
Article 53: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character"; See also Article 53 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.
[15] Malcolm Shaw, *International Law* 5th Ed. (Cambridge University Press, 2003), p. 117.
[16] *Id.*, at p. 118.
[17] A/69/10.

Tladi within this topic; and Section 5 elaborated on manner in which the topic of *jus cogens* met the Commission's requirement for the selection of new topics.

5. In Section 2, while looking at the Commission's past work on the topic, Mr. Tladi contended that despite the Commission's inclusion of *jus cogens* provisions in Articles 53 and 64 of the 1969 Vienna Convention, the contours and legal effects of *jus cogens* remain contentious. Its existence is not controversial, but its precise nature, norms that qualify as *jus cogens*, and the consequences of *jus cogens* remain unclear. However, the Commission had, in 1993, declined to undertake work on the topic of *jus cogens* due to its view that very little practice existed and its doubts that consideration of the topic would have a useful purpose.

6. However, Mr. Tladi asserted that in the period since 1993 various national and international courts had referred to *jus cogens* thereby contributing to the growth of practice. Furthermore, States and the Commission itself, such as in Article 26 of the Draft Articles on State Responsibility, also made reference to *jus cogens* and had developed a non-exhaustive list of what may be considered *jus cogens* norms. These developments, to Mr. Tladi, represented the fact that topic had now seen enough practice to merit serious consideration by the Commission.

7. Mr. Tladi then turned his attention to *jus cogens* in judicial decisions in Section 3 of his proposal. While noting the basic elements of *jus cogens* norms,[18] and while recognizing that the formulation provided by the Vienna Convention codified the requirement of acceptance by States as a whole, Mr. Tladi contended that there is no specification for the process by which general norms become peremptory norms nor how they can be identified. Furthermore, while *jus cogens* had been referred to by the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ), in early cases such as the *Military and Paramilitary Activities in Nicaragua* case,[19] the ICJ had been reluctant to clarify the nature, requirements, contents or consequences of *jus cogens*. However, Mr. Tladi also suggested that later cases, such the *Obligation to Prosecute or Extradite* case[20] among others, found the court more willing to delve into the intricacies of *jus cogens* and to characterize certain norms, such as the prohibition of torture and genocide, as *jus cogens* norms.

8. Mr. Tladi then outlined the elements that he felt the consideration of the topic should focus on, namely: i) the nature of *jus cogens*; ii) requirements for the identification of a norm as *jus cogens*; iii) an illustrative list of norms which have achieved the status of *jus cogens*; and iv) consequences and effects of *jus cogens*.

9. While briefly describing the nature of *jus cogens*, Mr. Tladi noted that it is conceptualized in the Vienna Convention and by the ICJ as a norm of positive law founded on consent, which is in contrast to its earlier understanding rooted in natural law thinking. He proposed that studying the nature of *jus cogens* would allow the Commission to examine

[18] According to Article 53 of the Vienna Convention, the basic elements of *jus cogens* norms are that they are:
1) Norms;
2) accepted and recognized by the international community as a whole;
3) from which no derogation is permitted.

[19] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)*, 1986 ICJ Reports 14.

[20] *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment of 20 July 2012, ICJ Reports 2012.

recognized *jus cogens* norms for common attributes while also touching upon its relationship with customary international law and other possibly related concepts. Regarding the requirements for identification of *jus cogens* norms, Mr. Tladi noted that while the requirements are codified in the Vienna Convention, studying the topic more closely, by looking into the judgments of courts and tribunals and the previous work of the Commission for example, may illuminate other elements that could be used to identify *jus cogens* norms as well as help identify and compile an illustrative list of recognized *jus cogens* norms. He also took care to mention that the list would not be exclusive and that the commentary should be sufficiently clear on this point.

10. With respect to the consequences and effects of *jus cogens*, Mr. Tladi proposed that the work on the topic would include an examination of the legal effect of *jus cogens* on other rules of international law, similar to how Articles 53 and 64 of the Vienna Convention specifies the effect that *jus cogens* has on the validity of treaties. Areas of possible intersection mentioned by Mr. Tladi include, *inter alia*: State and official immunity, procedural and secondary rules of international law, effects of statutes of limitations, and immunity of international organizations.

11. Finally, Mr. Tladi addressed the question of the topic meeting the requirement of selection set by the Commission and asserted that the topic of *jus cogens* meets these requirements as it reflects the needs of States in respect of codification and progressive development, there is enough State practice to permit progressive development, and that codification of these rules could be concrete and feasible. Mr. Tladi concluded by stating that the outcome of the work would likely take the form of draft conclusions with commentaries, similar to the work on customary international law, and would have to be drafted in such a way so as not to arrest the development of *jus cogens* or hinder its normative effect.

C. SUMMARY OF VIEWS EXPRESSED BY AALCO MEMBER STATES AT THE SEVENTIETH SESSION (2015) OF THE SIXTH COMMITTEE OF THE UN GENERAL ASSEMBLY[21]

12. *Most delegates* welcomed the addition of *jus cogens* to the work programme of the Commission and stated that they looked forward to the Commission's deliberation and elucidation on this topic. These delegates also felt that *jus cogens* is an important topic and that the study of the topic by the Commission would be of interest to all States.

13. *Some delegates* however recalled that the topic of *jus cogens* was not taken up by the Commission in 1993 due to the belief that there was not enough State practice to support work on this topic by the Commission. *These delegates* stated that they believed that this situation had not changed appreciably and urged the Commission to collect and study State practices in order to ascertain the viability of the Commission's work in this regard and also noted that they looked forward to elaboration on the changed situation with respect to State practice.

14. *One delegate* also pointed out that the 1969 Vienna Convention on the Law of Treaties and the Draft Articles on the Responsibility of States for Internationally Wrongful Acts did not aim to elaborate on the nature of *jus cogens* although they did mention the concept. Additionally,

[21] All statements by Member States can be found at < https://papersmart.unmeetings.org/en/ga/sixth/70th-session/statements/>.

the ICJ had been cautions in elaborating upon the subject of *jus cogens*. Therefore this delegation and a few others preached caution and prudence in the work of the Commission.

D. COMMENTS AND OBSERVATIONS OF THE AALCO SECRETARIAT

15. The AALCO Secretariat commends the International Law Commission for including the topic of *jus cogens* into its work programme and welcomes its future work on this topic. *Jus cogens* norms are by definition one of the most important aspects of international law due to the grave importance and non-derogable nature of these norms. Peremptory norms are an implicit validation of the importance and normative value of certain aspects of international law. Much like customary international law however, the concept of *jus cogens*, as it is currently understood, is controversial in its applicability to international affairs due to its inherently abstruse and intangible nature. The creation of draft conclusions will likely be of immense help as a guide for the subjects and practitioners of international law and will enable a coherent and synchronous system of application of this important aspect of international law.

16. The topic should also continue to be of great interest to AALCO Member States for similar reasons to the Commission's work on customary international law. In the case of CIL, Asian and African interests and opinions had historically been ignored in its creation and the Commission adding the topic to its work programme proved to be an unprecedented avenue for States in these regions to participate in the process of codification and progressive development by sharing their opinions and practices with the Commission.

17. Therefore, the AALCO Secretariat urges the Member States of AALCO to cooperate and facilitate the Commission's work through the sharing of its practices, as evinced by judicial and quasi-judicial decisions of national courts and tribunals, legislations and legal provisions, and other relevant documentation and official statements.

18. The AALCO Secretariat also reserves its comments on substantive matters relating to *jus cogens* at this point due to the very preliminary nature of the work done on the topic. However, the Secretariat looks forward to the First Report of Mr. Tladi and sees it as an opportunity for greater involvement of Asian and African States in the progressive development and codification of international law.

V. PROTECTION OF THE ENVIRONMENT IN RELATION TO ARMED CONFLICTS

A. BACKGROUND

1. At its Sixty-Third session held in 2011, the Commission included the topic "Protection of the Environment in Relation to Armed Conflicts" in its work program, on the basis of the recommendation of the working group on the long-term program 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.

2. 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 program 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 instead of draft articles.

3. The Commission, at its Sixty-Sixth session (2014), considered the preliminary report of the Special Rapporteur (A/CN.4/674 and Corr.1).

B. CONSIDERATION OF THE TOPIC AT THE SIXTY-SEVENTH SESSION OF THE COMMISSION (2015)

4. The Commission, at this particular session, had the Second Report of the Special Rapporteur (A/CN.4/685), which it considered at its meetings, from 6thto 10thJuly and on 14th July 2015.

5. On 14thJuly 2015, the Commission referred the preambular paragraphs and draft principles 1 to 5, as contained in the Second Report of the Special Rapporteur, to the Drafting Committee, with the understanding that the provision on "use of terms" was referred for the purpose of facilitating discussions and to be left pending by the Drafting Committee at this stage.

6. At its meeting on 30thJuly 2015, the Chairman of the Drafting Committee presented the report of the Drafting Committee on "Protection of the environment in relation to armed conflicts", which was eventually adopted provision by provision by the Drafting Committee at the Sixty-Seventh session (A/CN.4/L.870). The Commission has taken note of the draft introductory provisions and draft principles as presented by the Drafting Committee. The commentaries to the draft principles will be most probably considered at the next session of the Committee.

7. The Second Report of the Special Rapporteur particularly is aimed at identifying existing rules of armed conflict directly relevant to the protection of the environment in relation to armed conflict and included an examination of such rules. The suggested articulations on "armed

conflict" and "environment" had been submitted in the preliminary report itself. The Second Report consists of a preamble and five draft principles.

8. Draft principle 1 is dealing with the protection of the environment during armed conflict and was relatively more general in nature. Draft principle 2 deals with the application of the law of armed conflict to the environment and draft principle 3 addresses the need to take into account especially environmental considerations when assessing what is necessary and proportionate in the pursuit if military objectives. Draft principle 4 contains a prohibition on attacks against the environment by way of reprisals and draft principle 5 is concerned with the designation of areas of major ecological importance as demilitarized zones. The Second Report also provides a brief recapitulation of the discussions within the commission during the previous session, as well as information on views and practice of States and of selected relevant case law.

9. There were two other conclusions also that were worth highlighting: first the majority of regulations on peacetime military obligations was of recent date and that multilateral operations were increasingly undertaken within a framework of relatively newly adopted environmental regulations. The Second Report is mainly concerned with the law applicable during armed conflict. It dealt with the analysis of the directly applicable treaty provisions and relevant principles of the law of armed conflict, such as the principles of distinction, proportionality and precaution in attack. The report has also avoided the analysis of the operational interpretations of such provisions. It was limited to establishing whether or not the application of the provisions also covered measures aimed at protecting the environment.

10. The other topics that the report dealt with were protected zones and areas, legal framework with respect to demilitarized zones, nuclear-weapon-free zones and natural heritage zones and areas of major ecological importance in relation to the topic.

11. The conclusion that the Special Rapporteur reached was with respect to the proposed future work of the program. She specifically in this section dealt with the additional issues that the Third Report would deal with like proposals on post-conflict measures like cooperation, information sharing and best practices, as well as reparative measures.

12. In light of the First and the Second reports, introductory provisions proposed by the Special Rapporteur, along with a series of draft "principles[22]," were referred to the Drafting Committee, which completed work on them during the Sixty-Seventh session (there was,

[22]The Commission has adopted a project consisting of "principles" on only three prior occasions. In 1950, the Commission completed seven Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, with commentaries, which were designed to influence the future development of a draft code and creation of an international criminal court. *See* 1950 Report, *supra* note 14, at 374–78. In 2006, the Commission adopted the Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities, with commentaries, in an effort to promote (but not compel) harmonization of national laws through recommendations rather than hard law. *See* Report of the International Law Commission on the Work of its Fifty-Eighth Session, UN GAOR, 61st Sess., Supp. No. 10, at 110, para. 67, UN Doc. A/61/10 (2006) [hereinafter 2006 Report]; *see also* Report of the International Law Commission on the Work of its Fifty-Sixth Session, UN GAOR, 59th Sess., Supp. No. 10, at 160(14), UN Doc. A/59/10 (2004). Also in 2006, the Commission transformed what had originally been envisaged as draft articles into the Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, with commentaries. *See* 2006 Report, *supra*, at 369, para. 177.

however, insufficient time for the Commission to approve these provisions with commentaries). An initial provision on "scope" simply provides: "The present draft principles apply to the protection of the environment before, during or after an armed conflict." A second provision on "purpose" states: "The present draft principles are aimed at enhancing the protection of the environment in relation to armed conflict, including through preventive measures for minimizing damage to the environment during armed conflict and through remedial measures[23].

13. The actual principles then begin in Part One on "Preventive Measures" with an initial principle I-(x) on "Designation of protected zones," which reads: "States should designate, by agreement or otherwise, areas of major environmental and cultural importance as protected zones." There are as yet no other principles in this Part I, but it is expected that the Special Rapporteur in her Third Report will propose additional principles, perhaps drawing upon proposals that were contained in her First Report.

14. Part Two on "Draft principles applicable during armed conflict" contains at present five draft principles.

*The Draft principle II-1*talks about the general protection of environment during armed conflict[24]. Whereas some members supported draft principle 1, several members expressed concern over the labelling of the environment as a whole as "civilian in nature", which they considered was too broad and ambiguous. The proposition seemed to imply an equation between the environment as a whole with the concept of a "civilian object", which would lead to significant difficulties when applying the principle of distinction. It was pointed out that the law of armed conflict did not address protection of persons or things in the abstract. It would therefore be more appropriate to express the rule of environmental protection in terms of its specific parts or features. It was also suggested that it be defined as a civilian object.

15. Draft principle II-2 deals with the application of the law of armed conflict to the environment[25]. On this, members agreed in general with the thrust of draft principle 2, though concern over the formulation "strongest possible" protection was also voiced. It was pointed out that the expression did not accurately reflect the requirement under international humanitarian law, which sets forth an obligation of taking feasible precautions to avoid and in any event

[23]International Law Commission, Statement of the Chairman of the Drafting Committee, Mr. Mathias Forteau, "Protection of the environment in relation to armed conflicts," annex (July 30, 2015), *available at* http://legal.un.org/docs/?path=../ilc/documentation/english/statements/2015_dc_chairman_statement_peac.pdf&lang=EF.

[24]***Draft principle II-1***
General protection of the [natural] environment during armed conflict
1) The [natural] environment shall be respected and protected in accordance with applicable international law and, in particular, the law of armed conflict.
2) Care shall be taken to protect the [natural] environment against widespread, long-term and severe damage.
3) No part of the [natural] environment may be attacked, unless it has become a military objective.

[25]***Draft principle II-2***
Application of the law of armed conflict to the environment
The law of armed conflict, including the principles and rules on distinction, proportionality, military necessity and precautions in attack, shall be applied to the [natural] environment, with a view to its protection.

minimize damage, excessive to the concrete military advantage. Furthermore, it was noted that the wording did not seem to recognize that in certain circumstances it would not be possible to satisfy such standard for both the protection of civilians and the environment.

16. Draft principle II-3dwells on the environmental considerations that need to be taken into account[26]. Several members supported draft principle 3, which they observed had been drawn from the International Court of Justice's advisory opinion on *Nuclear Weapons*. However, the view was also expressed that the Court seemed to have addressed the issue of environmental considerations in relation to *jus ad bellum* and not *jus in bello*, which would render the proposition in draft principle 3 problematic. The counter point was also made that reference in the opinion was to *jus in bello*. Attention was also drawn to the fact that there may be situations in which environmental considerations were simply not relevant; the provision should include a caveat to acknowledge this.

17. Draft principle II-4deals with the prohibitions of reprisals[27]**.** Several members noted that draft principle 4 mirrored the provision laid down in article 55, paragraph 2, of Additional Protocol I and expressed support for its inclusion. An absolute prohibition seemed appropriate; if the environment, or part thereof, became a military objective other rules applied concerning attacks against it. Anything less than an absolute prohibition therefore did not seem warranted. It was further observed that the fact that the prohibition may exist only as a treaty obligation and not as a customary rule could be explained in the commentaries; the task of the Commission was not to produce a catalogue of customary rules. However, some other members considered highly pertinent the fact that the prohibition against reprisals was not generally accepted as a rule under customary international law and should be reflected as such in the draft principle.

18. It is to be highlighted here that the word "natural" (occurring in Draft principle II-4) is in brackets for the time being because that word is used in relevant treaties on the law of armed conflict, but often is not used in more general treaties addressing international environmental law. Perhaps the most controversial of these principles is draft principle II-4 on reprisals, which repeats verbatim Article 55, paragraph 2, 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).72 The 174 states parties to Protocol I that have not filed a reservation or declaration relating to this provision are bound to such a rule, but several states parties reserved their position on this provision, such as the United Kingdom.

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[26] ***Draft principle II-3***
Environmental considerations
Environmental considerations shall be taken into account when applying the principle of proportionality and the rules on military necessity.

[27] ***Draft principle II-4***
Prohibition of reprisals
Attacks against the [natural] environment by way of reprisals are prohibited.

19. States that are not a party to Protocol I, such as India, Iran, Israel, Pakistan, Turkey, and the United States, are not bound to Article 55, paragraph 2, and the United States has repeatedly stated that it does not regard the rule to be a part of customary international law[28].

20. In the *Nuclear Weapons* Advisory Opinion, the International Court recognized that "Articles 35, paragraph 3, and 55 of Additional Protocol 1 provide additional protection for the environment," and that one of those protections was "the prohibition of attacks against the natural environment by way of reprisals."[29] Yet the Court cautiously concluded its statement by saying that: "These are powerful constraints *for all the States having subscribed to these provisions*."[30] Among other things, the ICRC's study of customary international humanitarian law, reflecting on Articles 52 to 56 of Protocol I and on the practice of a variety of states, asserts:

21. *While the vast majority of States have now specifically committed themselves not to take reprisal action against such [protected] objects, because of existing contrary practice, albeit very limited, it is difficult to conclude that there has yet crystallised a customary rule specifically prohibiting reprisals against these civilian objects in all situations.*

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[28]For the United States, see Michael J. Matheson, Deputy Legal Adviser, U.S. Dep't of State, *Remarks at the Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law, The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, *in* 2 AM. U. J. INT'L L. & POL'Y 419, 426 & n.33 (1987) ("On the other hand, we do not support the prohibition on reprisals in article 51 and subsequent articles, again for reasons that Judge Sofaer will explain later, and do not consider it a part of customary law."); Abraham D. Sofaer, Legal Adviser, U.S. Dep't of State, Position of the United States on Current Law of War Agreements, 2 AM. U. J. INT'L L. & POL'Y 460, 469(1987). In 1995, the United States also described the prohibition on reprisals against the natural environment as "among the new rules established by the Protocol" and that "Additional Protocol I to the 1949 Geneva Conventions contains a number of new rules on means and methods of warfare, which of course apply only to States that ratify Protocol I. (For example, the provisions on reprisals and the protection of the environment are new rules that have not been incorporated into customary law.)" Written Statement of the Government of the United States of America, June 20, 1995, at 25, 31, *in* Legality of the Threat or Use of Nuclear Weapons, http://www.icjcij.org/docket/files/95/8700.pdf. The 2015 U.S. Department of Defense *Law of War Manual*, with respect to Articles 35(3) and 55 of Additional Protocol I, states that: "The United States has not accepted these provisions and has repeatedly expressed the view that these provisions are 'overly broad and ambiguous and 'not a part of customary law.'') U.S. DEP'T OF DEF., LAW OF WAR MANUAL 354 (§ 6.10.3.1) (2015). Further, the *Manual* asserts that "API's provisions on reprisal are counter-productive and that they remove a significant deterrent that protects civilians and war victims on all sides of a conflict." *Id*. at 1098.

[29] Legality of the Threat or Use of Nuclear Weapons, *supra* note 11, at 242, para. 31.

[30]*Ibid*.; *see also* UN Security Council, Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), at 19 (§ 66), UN Doc. S/1994/674 (1994) ("In international armed conflicts to which the four Geneva Conventions and Additional Protocol I apply, lawful reprisals…must be directed exclusively against combatants or other military objectives subject to the limitations contained in the Geneva Conventions, Protocol I and customary international law of armed conflicts. *In international armed conflicts where Additional Protocol I does not apply*, reprisals may be directed against a much wider category of persons and objects, but subject to the limitations of customary international law of armed conflicts.") (emphasis added); Fausto Pocar, *To What Extent is Protocol I Customary International Law?*, *in* LEGAL AND ETHICAL LESSONS OF NATO'S KOSOVO CAMPAIGN 337, 349 (Andru E. Wall ed., 2002) (Naval War Coll., International Law Studies vol. 78, 2002):

It is well known that the controversy on this matter has been and still is important, and different views have been expressed both at the Geneva Diplomatic Conference where Protocol I was negotiated and subsequently. The dominant view is probably that the provisions of Protocol I [on reprisals] neither reflect pre-existing customary law nor have subsequently reached that nature, but contain significant developments in this regard.

22. Principle II-5talks about protected zones[31].While several members expressed support for the thrust of draft principle 5 (which concerned the designation of areas of major ecological importance as demilitarised zones prior to an armed conflict or at its outset), they observed that it raised several important questions that required further examination, both with regard to the practical application of such a provision and its normative implications. A doubt was nevertheless also expressed with regard to the legal foundation of this draft principle and to its realisation.

23. Further, to the extent that the Commission's draft principles are addressing all armed conflict, including non-international armed conflict, it must be noted that there is no specific prohibition on belligerent reprisals in either common Article 3 to the 1949 Geneva Conventions or in the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II). Presumably in light of such factors, the special rapporteur in her concluding remarks to the Commission's plenary on the issue of reprisals "stressed that the purpose of the topic was not to establish customary rules but to set a standard."

24. The Special Rapporteur's Third Report in 2016 is expected to focus on post-conflict measures, such as cooperation, sharing of information, and best practices, as well as reparative measures, but will also likely attempt to fill out all the remaining provisions for this project.

C. SUMMARY OF THE VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPICS AT THE UN GENERAL ASSEMBLY SIXTH COMMITTEE AT ITS SEVENTIETH SESSION HELD IN 2015[32]

25. In relation to the topic 'Protection of Environment in relation to Armed Conflicts', *many delegations* expressed their appreciation to the Special Rapporteur Ms. Jacobsson for the work undertaken in her Second Report submitted in the 2015 Session.

26. *One Delegation*[33] highlighted her concern with regard to the terms "armed conflict" and "environment". Pertaining to the definition of "armed conflict", the delegation observed that the Special Rapporteur had quoted the definition of "armed conflict" under Article 2 of the Effects of Armed Conflicts on Treaties and that with regard to the definition "environment", the Special Rapporteur had adopted Principle 2(b) of the draft principles on the Allocation of Loss in the case of Transboundary Harm Arising out of Hazardous Activities. On this, the delegation supported the views by the members of the Commission that it was impossible to borrow a definition from an instrument dealing with peacetime situations and merely transposing it to situations of armed conflict. Hence, the delegate stated that alternative definitions should be proposed for further deliberation by the members of the Commission. While working definitions

[31] ***Principle II-5***
Protected zones
An area of major environmental and cultural importance designated by agreement as a protected zone shall be protected against any attack, as long as it does not contain a military objective.

[32] Most of the Statements that are mentioned here as having been made by the Member States of AALCO at the UN General Assembly Sixth Committee in 2015 are available from: http://www.un.org/press/en/2015/gal3507.doc.htm.

[33] Available at : https://papersmart.unmeetings.org/media2/7654633/malaysia.pdf

on these terms may be useful, the delegate reiterated that there is no urgent need to achieve a conclusive definition of these terms at such an early stage and that the debate on the definition of "armed conflict" should be preceded by a determination of which actors the intended draft principles would cover, and the specific scope of such draft principles itself. While pointing out that the draft principles1-5 are diverged from adopted draft principles by the drafting Committee, the delegate hoped that commentaries and a detailed analysis with regard to the changes made to draft principles 1-5 needs to be provided by the Commission in future. This, in the view of the delegation, would assist the members in further understanding these matters.

27. While noting that protection of the environment in modern times is considered as a common concern of the international community, *one delegation*[34] stated that the most fundamental principles of the law of armed conflict, namely principle of distinction, principle of proportionality and the precaution in attacks and the rule of military necessity must be taken into account in any kind of armed conflict. The delegation further stated that the Commission should attempt to strike a proper balance between safeguarding legitimate rights of a State and protection of environment in relation to armed conflict. The delegate also went on to add that all weapons including weapons of mass destruction which are not able to make distinction between military and civilian objects and have widespread and long-standing effect on the environment should be included in ILC's consideration. Specially, the delegation wanted nuclear weapons and all weapons consisting in depleted uranium that could cause unnecessary suffering to civilians to be considered seriously.

28. While welcoming the decision of the Special Rapporteur to include the issue of "protected zones and areas" (in particular the establishment of nuclear-weapon free zones) in the consideration of the topic, the delegation shared the same view with the Special Rapporteur that it is not uncommon for physical areas to be assigned special legal status as a mean to protect and preserve the area. Since the Special Rapporteur has decided to address the topic from a temporal perspective, the delegation was of the view that some important issues needed to be considered by the Commission in future. In the delegation's view these included: rehabilitation of the environment after the ending of hostile activity; responsibility of the States concerned to address pollution caused by conventional or chemical weapons, etc.

29. While reminding that different manuals on international law apply to armed conflicts, the delegation stated that these manuals can not replace treaty-based provisions and state practice though in some cases their provisions might reflect well-established rules of customary international law. While mentioning that his country has suffered severe damages to the environment resulting from attacks to offshore installations and pipelines situated on continental shelf in the Persian Gulf, the delegation observed that it believed that the list provided in Additional Protocol I, Paragraph 56 and Additional Protocol II, Paragraph 15 lacks oil and gas platforms as these might cause the release of dangerous forces causing severe losses to environment in the event of an attack. He was of the view that these installations must be protected during armed conflict, in conformity with the Security Council resolutions that have condemned the targeting of oil installations. On the issue of cultural and natural heritage, the delegation stated that the Security Council in numerous occasions addressed the necessity to

[34]Available at: https:papersmart.unmeetings.org/mediaz/7655145/iran.pdf.

protect cultural heritage in the context of armed conflict and that the wanton destruction of cultural heritage in the Middle east shocked the conscience of humanity.

30. *Another Delegation* observed that the most productive approach to the topic "protection of environment in relation to armed conflicts" would be to focus on identifying how existing international humanitarian law related to the environment, rather than introducing principles of international environment law or human rights law, which (in his view) complicated the issue. Expressing agreement with the Special Rapporteur, the delegation said that it was not the commission's task to revise the law of armed conflict. Touching on the various aspect of draft principle the delegation suggested that paragraph 2 of draft principles II-1 and draft principles II-4 be phrased in less absolute terms, noting that draft principles were not generally accepted as rules under international customary law. He added that non -binding draft guidelines could be the most appropriate outcome on the subject matter.

D. COMMENTS AND OBSERVATIONS OF THE AALCO SECRETARIAT

31. The Secretariat of AALCO would like to express its appreciation to Ms. Jacobsson, the Special Rapporteur on the topic "Protection of the Environment in relation to Armed Conflicts" for her Second Report, which was considered by the Commission at its Session in 2015.

32. As regards the definitions of the terms "armed conflict" and "environment", it can be observed that the Special Rapporteur has quoted the definition of "armed conflict" under Article 2 of the Effects of Armed Conflicts on Treaties and that for the definition of "environment", the Special Rapporteur had adopted Principle 2(b) of the draft principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities. While working definitions on these terms may be considered useful, AALCO wishes to echo the view that there is no urgent need to achieve a conclusive definition of these terms at such an early stage. In particular, the debate on the definition of "armed conflict" should be preceded by a determination of which actors the intended draft principles would cover and the specific scope of such draft principles itself.

33. The AALCO Secretariat discerns that draft principles 1-5 diverge from the draft principles adopted by the Drafting Committee. Nevertheless, it is noted that commentaries on the draft principles will be considered in 2016. In this regard, it is hoped that such commentaries will provide a detailed analysis particularly with regard to the changes made to draft principles 1-5. It is anticipated that the upcoming commentaries to the draft principles would assist the members in further understanding these matters.

VI. IMMUNITY OF STATE OFFICALS 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.[35]At its Fifty-Ninth session, in 2007, the Commission decided to include the topic in its programme and appointed Mr. Roman A. Kolodkin as Special Rapporteur for the topic.[36]

2. At the Sixtieth session, in 2008, the Commission had before it the preliminary report of the Special Rapporteur[37] 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.

3. 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.[38]At the Sixty-Third session in 2011, the Commission considered the Second[39] and Third Reports[40] 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 waiver. The debate revolved around, *inter alia*, issues relating to methodology, possible exceptions to immunity and questions of procedure.

4. 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.[41]

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[35]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.
[36]See *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 375.
[37]Document A/CN.4/601. (see Analytical Guide)
[38]See *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 10* (A/65/10), para. 343.
[39]Document A/CN.4/631. (see Analytical Guide)
[40]Document A/CN.4/646. (see Analytical Guide)
[41]Document A/CN.4/654. (see Analytical Guide)

5. 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.

6. The Commission received and considered the preliminary report of the Special Rapporteur at the same session (2012), the second report during the Sixty-Fifth Session (2013) and the third report during the Sixth-Sixth Session (2014).[42] On the basis of the draft articles proposed by the Special Rapporteur in the Second and Third reports, the Commission has thus far provisionally adopted five draft articles, together with commentaries thereto. Draft article 2 on the use of terms is still a developing text.[43]

B. CONSIDERATION OF THE TOPIC AT THE SIXTY-SEVENTH SESSION OF THE COMMISSION (2015)

7. The Commission considered the Fourth Report on the "immunity of State officials from foreign criminal jurisdiction" by its second Special Rapporteur for this topic, Concepción Escobar Hernández (Spain). The Fourth Report represented a continuation of the analysis, commenced in the Third Report (A/CN.4/646), of the normative elements of immunity *ratione materiae*. Since the subjective scope of such immunity (who are the beneficiaries of such immunity) was already addressed in the Third Report, the Fourth Report was devoted to consideration of the remaining material scope (an "act performed in an official capacity") and the temporal scope. As a consequence of the analysis, the report also contained proposals of draft article 2 (f) defining, for the general purpose of immunity, an "act performed in an official capacity" and draft article 6 on the material and temporal scope of immunity *ratione materiae*, which contains a specific reference to the application of immunity *ratione materiae* to former Heads of State, former Heads of Government and former Ministers for Foreign Affairs.

8. In her introduction of the report, the Special Rapporteur noted that it had to be read with previous reports, as together these reports constituted a unitary whole. It was noted that the present report, like the previous treatment of immunity *ratione personae*, did not address directly the question of limitations and exceptions to immunity, a matter which would be addressed in her Fifth Report in 2016.

[42] A/CN.4/654 (preliminary report); A/CN.4/661 (second report) and A/CN.4/673 and Corr.1 (third report).

[43] Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10 (A/68/10), paras. 48 and 49. At its 3174th meeting, on 7 June 2013, the Commission received the report of the Drafting Committee and provisionally adopted draft articles 1, 3 and 4 and at its 3193rd to 3196th meetings, on 6 and 7 August 2013, it adopted the commentaries thereto. Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10 (A/69/10), paras. 48 and 49. At its 3231st meeting, on 25 July 2014, the Commission received the report of the Drafting Committee and provisionally adopted draft articles 2 (e) and 5 and at its 3240th to 3242nd meetings, on 6 and 7 August 2014, it adopted the commentaries thereto.

9. The Fourth Report submitted by the Special Rapporteur, when dealing with the normative elements of immunity *ratione materiae*, started by highlighting the basic characteristics of this type of immunity, namely that it is granted to all State officials, that it is granted only in respect of "acts performed in an official capacity" and that it is not time-limited. As to the normative elements of immunity *ratione materiae*, the subjective scope having been dealt with in the Third Report, the Fourth Report was focused on the material and temporal scope, as indicated above.

10. The concept of an "act performed in an official capacity" was first the subject of some general considerations which emphasized the importance of this concept in the context of immunity *ratione materiae*. Such importance derives from the functional nature of this type of immunity. The report then approached the distinction between "acts performed in an official capacity" and "acts performed in a private capacity". The study of this distinction led, among other things, to the conclusion that it was not equivalent to the distinction between *acta iure imperii* and *acta iure gestionis*, or to the distinction between lawful and unlawful acts.

11. The report then focused on providing criteria for identifying an "act performed in an official capacity", which involves the successive analysis of judicial practice (international and national), treaty practice and previous work of the Commission. The analysis of international judicial practice emphasized the significance of various judgments issued by the International Court of Justice, the European Court of Human Rights and the International Criminal Tribunal for the former Yugoslavia. The study of national judicial practice was based on a large number of national cases referring to several aspects of immunity *ratione materiae*, and took into consideration both criminal and civil proceedings as the forms of conduct that could be identified with "acts performed in an official capacity" manifested themselves in both types of proceedings and elements common to such acts could be inferred from them.

12. The Special Rapporteur noted that the report was patterned on the Third Report in terms of the methodological approach taken, essentially basing the analysis of the issues on the judicial (international and national) and treaty practice, as well as previous work of the Commission. Account was also taken of comments received from Governments in 2014 and 2015, which were taken into account as appropriate as at the time of submission, as well as the observations contained in the oral statements made by delegates in the Sixth Committee of the General Assembly.

14. The report centred on the analysis of the concept of an "act performed in an official capacity". The Special Rapporteur noted that the analysis of the temporal element was brief because the matter was mostly uncontroversial in nature; there was broad consensus in the practice and doctrine on the "indefinite" or "permanent" nature of the immunity *ratione materiae*. She nevertheless pointed to the need to analyse what the nature of that element (limit or condition) was, as well as the critical dates which were to be taken into account for the purposes of determining if the temporal element was met; whether it was at the time of commission of the act or when the claim of immunity was made.

15. The Special Rapporteur highlighted that the core of the report was the analysis of the material scope of immunity *ratione materiae*. It therefore constituted a study of an "act performed in an official capacity", which in turn addressed the distinction between "acts

performed in an official capacity" and "acts performed in a private capacity", offered the identifying criteria of an "act committed in an official capacity" and the characteristics thereof, concluding with a draft article on the definition of this category of acts. Draft article 6, paragraph 2, for its part, referred to acts performed in an official capacity as the only acts performed by State officials that are covered by immunity *ratione materiae*.

16. It was noted that the concept of "act performed in an official capacity", which is a central issue to the topic as a whole, has special significance to immunity *ratione materiae*; only acts performed by State officials in their official capacity were under the cover of immunity from foreign criminal jurisdiction. The Special Rapporteur observed that the expression had not been defined in contemporary international law. It was often interpreted in opposition to an "act performed in a private capacity", which itself was an undefined category. However, on the basis of an analysis of the relevant practice, the Special Rapporteur offered certain discernible criteria for identifying acts performed in an official capacity.

17. In particular, it was observed that:

(a) the acts were *inter alia* connected with a limited number of crimes, including crimes under international law, systematic and serious violations of human rights, certain acts performed by the armed forces and law enforcement officials and acts related to corruption;

(b) some multilateral treaties link the commission of certain acts to the official capacity of the perpetrators of such acts;

(c) an act was considered to have been performed in an official capacity when committed by a State official acting on behalf of the State, exercising prerogatives of public power or performing acts of sovereignty;

(d) immunity was generally denied in corruption-related cases, by national courts, the logic advanced being that officials cannot benefit from immunity for activities that are closely linked to private interest and whose objective is the personal enrichment of the official and not the benefit of the sovereign;

(e) what was meant by "exercising the prerogatives of public power" or "sovereign acts" was not easily defined. Courts, however, have considered as falling into that category activities such as policing, activities of the security forces and of the armed forces, foreign affairs, legislative acts, administration of justice and administrative acts of diverse content;

(f) the concept of an act performed in an official capacity did not automatically correspond to the concept of *acta jure imperii*. Far from that, an "act performed in an official capacity" may exceed the limits of an *acta iure imperii*, and may also refer to some *acta iure gestionis* performed by State officials while fulfilling their duties and exercising State functions.

(g) the concept bore no relation to the lawfulness or unlawfulness of the act in question; and

(h) for the purposes of immunity, the identification of such an act was always done on case by case basis.

18. In view of the foregoing criteria, the Special Rapporteur, highlighted the following as the characteristics of an act performed in an official capacity: (a) it was an act of a criminal nature; (b) the act was performed on behalf of the State; and (c) it involved the exercise of sovereignty and elements of governmental authority.

19. After debating the fourth report, the Commission's Drafting Committee provisionally adopted draft Article 2(f), which defines *act performed in an official capacity* tomean "any act performed by a State official in the exercise of State authority," and draft Articleon "Scope of immunity *ratione materiae*," which reads as follows:

1) State officials enjoy immunity *ratione materiae* only with respect to acts performed in an official capacity.

2) Immunity *ratione materiae* with respect to acts performed in an official capacity continues to subsist after the individuals concerned have ceased to be State Officials.

3) Individuals who enjoyed immunity *ratione personae* in accordance with draft article 4, whose term of office has come to an end, continue to enjoy immunity with respect to acts performed in an official capacity during such term of office.

In her Fifth Report, the Special Rapporteur intends to address "limits and exceptions to immunity of State officials from foreign criminal jurisdiction." A subsequent and final report will then consider the procedural aspects of the topic.

C. SUMMARY OF THE VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPICS AT THE UN GENERAL ASSEMBLY SIXTH COMMITTEE AT ITS SEVENTIETH SESSION HELD IN 2015[44]

20. On the topic "Immunity of State Officials from Foreign Criminal Jurisdiction" *many delegations* expressed their appreciation to the Fourth Report of the Special Rapporteur Ms. Concepción Escobar Hernández that was discussed at the 2015 Session of the Commission and which contained proposals for draft article 2, subparagraph (f), defining an "act performed in an official capacity" and draft article 6 on the scope of immunity *ratione materiae*.

21. One delegation[45] noted that her country was particularly interested in the subject matter as the Special Rapporteur has proposed two new draft articles which captured the key issues pertaining to the normative elements of immunity *ratione materiae*. While welcoming the

[44] Most of the Statements that are mentioned here as having been made by the Member States of AALCO at the UN General Assembly Sixth Committee in 2015 are available from: http://www.un.org/press/en/2015/gal3507.doc.htm.
[45]Available at : https://papersmart.unmeetings.org/media2/7654633/malaysia.pdf

proposed draft articles the delegation stated that her country would continue to conduct an in depth study of the draft articles. On the question of how far a State may determine the range of activities which it considers as constituting acts performed in an official capacity, the delegation agreed with the Commission's suggestion for the Special Rapporteur to explore the question further in the future reports.

22. The delegation clarified that the acceptability of draft Article 2(f) as adopted by the Drafting Committee is subject to further clarification by the Special Rapporteur on this issue. While noting the adoption of draft Article 6 by the drafting committee which provides the scope of immunity *ratione materiae*, the delegation had recalled that her country had previously highlighted that the definition of the terms "Immunity *ratione materiae*" is imperative to determine in which circumstances State officials would be granted immunity from foreign criminal jurisdiction. She also pointed out that the definition of "Immunity *ratione materiae*" which was defined in the previous draft article has been deleted without reasons. The delegation agreed with the view propounded by the Special Rapporteur in her report that the basic characteristic of immunity *ratione materiae* can be identified as being granted to all State officials, granted only in respect of "acts performed in an official capacity", and is not time limited since immunity *ratione materiae* continued even after the person who enjoys such immunity ceases to be a State official.

23. *Another delegation*[46] stated that immunity of State officials from foreign criminal jurisdiction while they perform official acts is a consequence of the principle of sovereign equality and has been well-recognized in international law. While welcoming the efforts made by the Special Rapporteur to provide some solid elements in defining the concept of "act performed in official capacity", the delegation pointed out that as this concept has not been defined in international law, there are few issues regarding definition that deserve closer attention of the Special Rapporteur in future. Explaining his country's position, the delegation clarified that the concept of "State Officials" consists of all individuals who are in the position to exercise State function in all forms, represent States or act on behalf of States. This being the case, the concept of "act performed in official capacity" should comprise all functions by the State official in their official capacity. The main point here is that the "act performed" ought to be regarded as an official "governmental" act without distinction between the capacities in which one acted. While stating that in the definition of the concept "act performed in official capacity", insights could be taken from the jurisprudence of international judicial bodies, the delegation observed that national case-laws and practices of national courts cannot be given the same weightage as the former and that (as noted by the Special Rapporteur), resort to national legislation of some States in defining the concept "act performed in official capacity" is irrelevant. The delegation was of the opinion that the review of judgments of international judicial bodies clarified the mere fact that criminal nature of the acts cannot constitute sufficient basis to exclude them from being an official act and consequently exclude from the scope of the immunity. Therefore, he maintained that all such activities derived from the exercise of elements of governmental authority shall be subject of immunity. Furthermore, the delegation pointed out that extension of the number of State officials who enjoy immunity *ratione personae* other than Heads of State, Heads of Government and Ministers for Foreign Affairs could be a matter of progressive development of

[46] Available in : https: papersmart.unmeetings.org/media2/7655145/iran.pdf

international law. In taking a decision on this count, it is of paramount importance that the present day realities of international relations need to be kept in mind, he added.

24. *Another delegation* stated that while she agreed that the temporal scope of immunity *ratione materiae* was not controversial, the material scope would still benefit from further study. While noting that the Drafting Committee's provisional draft, which provided that such acts were "any act performed by a state official in exercise of state authority", was a worktable definition, the delegation added that it offered a way of addressing the question of scope of immunity *ratione materiae* vis-a-vis certain acts such as ultra vires acts, *acta jure gestionis* and acts performed in official capacity but exclusively for personal benefit.

D. COMMENTS AND OBSERVATIONS OF AALCO SECRETARIAT

25. The Secretariat of AALCO has always recognized the genuine practical significance of this topic. The Secretariat of AALCO welcomes the Fourth Report of the Special Rapporteur Ms. Concepcion Escobar Hernandez, which was submitted at the 2015 Session and which deals with the material and temporal scope of immunity *ratione materiae,* the wealth of materials reviewed, and the provisional adoption by the Drafting Committee of draft article 2 defining the term "act performed in an official capacity", as well as draft article 6 defining the scope of immunity *rationae materiae.*

26. Because the concept of an "act performed in an official capacity", is central to this topic as a whole, there is a great need to include a definition of this term whilst at the same time recognizing the importance of well-crafted commentaries in capturing the subtleties involved in such a definition. As this concept has not been defined in international law, there are few issues regarding definition that deserve closer attention of the Special Rapporetur in future.

27. For example, that there is a close linkage between this concept and the concept of State official needs to be understood. Very broadly, the concept of "State Officials" consists of all individuals who are in the position to exercise State function in all forms, represent States or act on behalf of States. This being the case, the concept of "act performed in official capacity" should comprise all functions by the State official in their official capacity. The main point here is that the "act performed" ought to be regarded as an official "governmental" act without distinction between the capacities in which one acted. Moreover, in the definition of the concept "act performed in official capacity", insights could be taken from the jurisprudence of international judicial bodies.

28. Extension of the number of State officials who enjoy immunity *ratione personae* other than Heads of State, Heads of Government and Ministers for Foreign Affairs could be a matter of progressive development of international law. In taking a decision on this count, it is of paramount importance that the present day realities of international relations or the current practice need to be kept in mind while bearing in mind the inescapable need for a clear and strict standard to expand immunity *rationae materiae* beyond the Troika.

29. The AALCO Secretariat endorses the basic characteristics of immunity *rationae materiae* adopted by the Special Rapporteur. Immunity *rationae materiae* must be guaranteed to all State

Officials in respect of acts defined as acts performed in official capacity whether they are in the office or has left the office. However, it also needs to be pointed out that the question of how far a State may determine the range of activities which it considers as constituting acts performed in an official capacity has not been fully explored by the Special Rapporteur in the current report. This might as well be further explored in the future.

30. As regards draft article 6 defining the scope of immunity *rationae materiae,* it needs to be made clear that the definition of the terms "Immunity *ratione materiae*" is imperative to determine in which circumstances State officials would be granted immunity from foreign criminal jurisdiction. In this regard, the Secretariat agrees with the view by the Special Rapporteur in her report that the basic characteristic of immunity *ratione materiae* can be identified as being granted to all State officials, granted only in respect of "acts performed in an official capacity", and is not time limited since immunity *ratione materiae* continued even after the person who enjoys such immunity ceases to be a State official.

31. Given the fact that commentaries on the above draft articles will be considered at the next Session of the Commission, the Secretariat of AALCO looks forward to the commentaries to enable a better understanding of the purpose, intention and nuances of the draft articles.

VII. PROVISIONAL APPLICATION OF TREATIES

A. BACKGROUND

1. At its Sixty-Fourth Session (2012), the Commission decided to include the topic "Provisional application of treaties" in its programme of work and appointed Mr. Juan Manuel Gómez-Robledo as Special Rapporteur for the topic. At the same Session, the Commission took note of an oral report, presented by the Special Rapporteur, on the informal consultations held on the topic under his chairmanship. The General Assembly subsequently, in resolution 67/92 of 14 December 2012, noted with appreciation the decision of the Commission to include the topic in its programme of work.

2. At its Sixty-Fifth Session (2013), the Commission had before it the First Report of the Special Rapporteur (A/CN.4/664) which sought to establish, in general terms, the principal legal issues that arose in the context of the provisional application of treaties by considering doctrinal approaches to the topic and briefly reviewing the existing State practice. The Commission also had before it a memorandum by the Secretariat (A/CN.4/658), which traced the negotiating history of article 25 of the 1969 Vienna Convention on the Law of Treaties ("1969 Vienna Convention") both in the Commission and at the Vienna Conference of 1968-69, and included a brief analysis of some of the substantive issues raised during its consideration. At its sixty-sixth Session (2014), the Commission considered the Second Report of the Special Rapporteur (A/CN.4/675) which sought to provide a substantive analysis of the legal effects of the provisional application of treaties.

B. CONSIDERATION OF THE TOPIC AT THE SIXTY-SEVENTH SESSION OF THE COMMISSION (2015)

3. The Commission had before it the Third Report of the Special Rapporteur (A/CN.4/687), Juan Manuel Gómez-Robledo (Mexico) which continued the analysis of State practice, and considered the relationship of provisional application to other provisions of the 1969 Vienna Convention, as well as the question of provisional application with regard to international organizations. The report included proposals for six draft guidelines on provisional application.

4. In introducing his Third Report, the Special Rapporteur recalled the work carried out by the Commission at previous Sessions, and the content and purpose of his first two reports. In particular, he recalled his assessment that, subject to the specific characteristics of the treaty in question, the rights and obligations of the State which had consented to provisionally apply a treaty were the same as the rights and obligations that stemmed from the treaty itself as if it were in force; and that a violation of an obligation stemming from the provisional application of a treaty activated the responsibility of the State.

5. Approximately twenty Member States had provided comments on their practice. While he noted that the practice of States was not uniform, the Special Rapporteur continued to be of the opinion that it was not necessary to carry out a comparative study of internal laws. He noted that the number of treaties that provided for the provisional application of treaties and which had been applied provisionally was relatively high.

6. His Third Report focused on two major issues: first, the relationship with other provisions of the 1969 Vienna Convention, and, second, the provisional application of treaties with regard to the practice of international organizations. As regards the former, his analysis, which had not been intended to be exhaustive, focused on articles 11 (Means of expressing consent to be bound by a treaty), 18 (Obligation not to defeat the object and purpose of a treaty), 24 (Entry into force), 26 (*Pacta sunt servanda*) and 27 (Internal law and observance of treaties). Those provisions were chosen because they enjoyed a natural and close relationship with provisional application.

7. As regards the provisional application of treaties between States and international organizations, or among international organizations, the Special Rapporteur observed that the Secretariat's memorandum had clearly indicated that the States took as valid the formulation adopted in the 1969 Vienna Convention. Nonetheless, the Special Rapporteur reiterated his view that an analysis of whether article 25 of the 1969 Vienna Convention reflected customary international law would not affect the general approach to the topic.

8. Chapter IV of the report focused on several aspects: (1) international organizations or international regimes created through the provisional application of treaties; (2) the provisional application of treaties negotiated within international organizations, or at diplomatic conferences convened under the auspices of international organizations; and (3) the provisional application of treaties of which international organizations were parties. As regards the creation of the international organizations or international regimes, the Special Rapporteur clarified that he was referring to those international bodies created by treaties, and which played a significant role in the application of the treaty, even though they were not designed to become fully fledged international organizations.

9. In his view, the task before the Commission was to develop a series of guidelines for States wishing to resort to the provisional application of treaties, and he proposed that the Commission could also consider within those guidelines the preparation of model clauses to guide negotiating States. He noted that the six draft guidelines on the provisional application of treaties were the outcome of the consideration of the three reports which had to be read each in the light of the other. The starting point for their drafting was article 25 of both the 1969 and 1986 Vienna conventions.

10. At the 2015 ILC Session, after debate in the plenary, all six proposed guidelines were sent to the Drafting Committee, which only had sufficient time to adopt provisionally three draft guidelines. Draft guideline 1 on the "scope" states that the "present draft guidelines concern the provisional application of treaties.[47]" On this guideline, several drafting suggestions were made with a view to bringing the provision more into line with article 25 of the 1969 Vienna Convention. For example, it was noted that the reference to internal law not prohibiting provisional application did not appear to be in accordance with article 25, and needed to be deleted since it suggested that States could turn to their internal laws to escape an obligation to

[47] **Draft guideline 1**

States and international organizations may provisionally apply a treaty, or parts thereof, when the treaty itself so provides, or when they have in some other manner so agreed, provided that the internal law of the States or the rules of the international organizations do not prohibit such provisional application.

provisionally apply a treaty. It was also suggested that the draft guideline could be coupled with another on the scope of the draft guidelines.

11. Draft guideline 2 on "purpose" provides: "The purpose of the present draft guidelines is to provide guidance regarding the law and practice on the provisional application of treaties, on the basis of Article 25 of the Vienna Convention on the Law of Treaties and other rules of international law.[48]" Concerning draft guideline 2, it was proposed that the reference to a resolution by an international organization be clarified. The view was expressed that resolutions in many cases could not be equated with an agreement establishing provisional application. It was also suggested that reference be made to other forms of agreement such as an exchange of letters or diplomatic notes.

12. Draft guideline 3 sets forth the "general rule," providing that a "treaty or a part of a treaty may be provisionally applied, pending its entry into force, if the treaty itself so provides, or if in some other manner it has been so agreed.[49]" On this guideline, it was suggested, *inter alia*, that the provision could be simplified; and that reference be made to the fact that provisional application only occurred prior to the entry into force of the treaty for the relevant party. It was suggested that the elements of the means of expressing consent, and the temporal starting point of provisional application, could be separated into two draft guidelines.

13. The Draft guideline 4 talks about a most important issue, namely that of the legal effects of a treaty that is provisionally applied[50]. On this guideline it was suggested that the term "legal effects" be clarified and the provision further developed, since it remained the key provision of the draft guidelines. For example, it could be considered whether the obligations of provisional application extended to the whole treaty or only to select provisions. Another possibility was to indicate that the legal effect of provisional application of a treaty could continue after its termination. It was also suggested that the provision could be drafted taking into account the formulation of article 26 of the 1969 Vienna Convention, and that it could be specified that the provisional application of a treaty could not result in the modification of the content of the treaty.

14. Draft guideline 5 relates to the obligations flowing from the provisional application of the treaty[51]. On this it was suggested that it be clarified that the effects of obligations arising from provisional application depended on what States had provided for when they agreed upon the

[48] **Draft guideline 2**
The agreement for the provisional application of a treaty, or parts thereof, may be derived from the terms of the treaty, or may be established by means of a separate agreement, or by other means such as a resolution adopted by an international conference, or by any other arrangement between the States or international organizations.

[49] **Draft guideline 3**
A treaty may be provisionally applied as from the time of signature, ratification, accession or acceptance, or as from any other time agreed by the States or international organizations, having regard to the terms of the treaty or the terms agreed by the negotiating States or negotiating international organizations.

[50] **Draft guideline 4**
The provisional application of a treaty has legal effects

[51] **Draft guideline 5**
The obligations deriving from the provisional application of a treaty, or parts thereof, continue to apply until: (i) the treaty enters into force; or (ii) the provisional application is terminated pursuant to article 25, paragraph 2, of the Vienna Convention on the Law of Treaties or the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, as appropriate.

provisional application. Furthermore, it was necessary to take into account which entry into force of a treaty was being referred to, i.e., that of the treaty itself or of the entry into force for the State itself. It was observed that when a multilateral treaty entered into force, provisional application terminated only for those States that had ratified or acceded to the treaty.

15. Draft guideline 6 deals with the breach of an obligation deriving from the provisional application of a treaty[52]. On this it was pointed out that the draft guideline omitted the question of whether the unilateral suspension or termination of provisional application, under the law of treaties, was wrongful under international law, thereby triggering the rules of international law on the responsibility of States for internationally wrongful acts.

C. SUMMARY OF THE VIEWS EXPRESSED BY AALCO MEMBER STATES AT THE UN GENERAL ASSEMBLY SIXTH COMMITTEE AT ITS SEVENTIETH SESSION HELD IN 2015[53]

16. On the topic "Provisional Application of Treaties" *few delegations* commended the efforts of the Special Rapporteur Mr. Juan Manuel Gomez-Robledo in the preparation of his Third Report that was presented in 2015 at the Commission.

17. *One delegation*[54] mentioned that the Third Report had managed to elucidate several scenarios within which the provisional application of treaties might operate and that the relationship between provisional application and other provisions of the 1969 Vienna Convention on the Law of Treaties (VCLT) and the provisional application of treaties with regard to the practice of international organizations should be discerned with great care and caution. While noting the proposals for six draft guidelines on provisional application of treaties, the delegation was of the view that due consideration must be given as to the issues of doubt on some parts of the guidelines and that the draft guidelines must provide a clear understanding and interpretation taking into account the practice and internal laws of States. In this regard, the delegation had raised his concern on several issues, on its domestic law and practice on the signing and ratifying of treaties.

18. *Firstly*, in relation to draft guideline 1, the delegate stated that his country's domestic law does not provide for any express provision that prohibits or allows for the provisional application of treaties and that his country has been very conscientious in ensuring obligations in the treaty are carried out immediately upon ratifying a treaty by ensuring that its domestic legal framework are in place before the treaty is binding upon it.

19. *Secondly*, in relation to draft guideline 2, the delegation was of the view that at this juncture, the agreement for the provisional application of a treaty must either be expressly provided in the terms of the treaty itself or may be established by means of a separate agreement as both means have legal effect. In this regard he highlighted the risk of agreeing to the

[52] **Draft guideline 6**
The breach of an obligation deriving from the provisional application of a treaty, or parts thereof, engages the international responsibility of the State or international organization.

[53] Most of the Statements that are mentioned here as having been made by the Member States of AALCO at the UN General Assembly Sixth Committee in 2015 are available from: http://www.un.org/press/en/2015/gal3507.doc.htm.

[54] Available at : https://papersmart.unmeetings.org/media2/7654633/malaysia.pdf

provisional application of a treaty by way of a resolution adopted by an international conference, or by any other arrangement between the States or international organizations as some of the States may not be directly involved during the negotiation of the resolution concerning the provisional application of a treaty at the international conference. He also added that with a few exceptions, it is recognized that resolutions are normally not binding in themselves and therefore it is unacceptable that such resolutions be given the same legal effect as a legally binding treaty.

20. *Thirdly*, in relation to draft guideline 3, the delegation pointed out that a similar provision is stipulated in Article 11 of the VCLT whereby it explains the methods of giving consent to be bound by a treaty. Consent can be given either by way of signature, ratification, acceptance, approval or accession or by any other means, if so agreed. He clarified that his country takes a non-committal position as the consent to be bound by a treaty is subject to its legal framework whereby subsequent act of ratification by domestic legislations is required. On this point, the delegation was particularly concerned on the effects of the provisional application of treaties especially on the rights and obligations of States who agree to apply a treaty provisionally. Therefore, he proposed that draft guideline 3 should be further deliberated by taking into consideration the rights and obligations of States which arise in a provisionally applied treaty.

21. *Fourthly*, in relation to draft guideline 4, the delegation was of the view that this draft guideline is to be read together with draft guideline 3 as they are interrelated and that a provisionally applied treaty is only morally and politically binding. However, he also went on to add that his country is nevertheless guided by Article 18 of the VCLT which spells out that States shall refrain from acts which may defeat the object and purpose of a treaty. In this context, the term "legal effects" should be clarified and further developed but at the same time it must be ensured that the definition of legal effect should be within the context of Article 18 of the VCLT and not go against it, he added. Reiterating his concerns on the rights and obligations of States in a provisionally applied treaty, the delegation pointed out (in the light of the domestic law and procedural law in signing and ratifying treaties obtaining in his country) that extreme caution should be exercised in determining whether draft guideline 4 is acceptable as it has significant legal obligations.

22. *Fifthly*, in relation to draft guideline 5, the delegation was of the view that his country is mainly guided by paragraph (2) of Article 25 of the VCLT on the termination of the provisional application of a Treaty and that this issue must be addressed by the Special Rapporteur and that the termination of the provisional application and its obligations must be clearly stated to prevent issues of doubt.

23. *Sixthly*, in relation to draft guideline 6, the delegation was of the view that the proposed draft guideline 6 is vague as the term "international responsibility" was not explained in the draft guideline and that draft guideline 6 did not discuss on the extent of the applicability of international responsibility of a State that applies a treaty provisionally. As the provisional application of a treaty may only apply to a certain part of a treaty, the delegation proposed that the Special Rapporteur deliberate and provide further clarification on draft guideline 6 to address the issue of remedy in the event of a breach, bearing in mind that the enforcement provision of the treaty may not yet come into force. The delegation also suggested that reference should be

made to the Draft Articles on Responsibility of States and Draft Articles on Responsibility of International Organizations to address the issue of international responsibility of a State.

24. Finally, while pointing out that in the context of his country's experience and practice the signing of a treaty does not necessarily create a legal obligation when the treaty further requires ratification, accession, approval or acceptance processes, unless the treaty otherwise provides, the delegation noted that prior to signing or becoming a Party to a treaty, his country will ensure that its domestic legal framework is in place and ready in order to implement the treaty. Furthermore, the delegation reiterates his view that it is crucial to discern the provisional application of the treaties from the source of obligations as provided by the treaty provision itself and that if recourse to alternative sources should be had, the analysis of legal effect should be guided and determined by the result of an unequivocal indication by the State that it accepts the provisional application of treaty, as expressed via a clear mode of consent.

25. *Another delegation*[55] expressed their support for the role of the provisional application of treaties in acceleration of the acceptance of international law. While sharing the viewpoint of the Special Rapporteur that the primary beneficiary of the provisional application is the treaty itself (since it is allowed to be applied without being in force), he was of the view that the more important beneficiaries are the negotiating States who could partake in the provisional application and benefit from the rights stipulated in the treaty. The delegation believed that in a case when a treaty already entered into force, a State may decide to apply such treaty provisionally. On the work of the Commission on this topic, the delegation stated that it is fraught with difficulties since only a limited number of States have regulated provisional application of treaties in their domestic laws or Constitutions. In this regard, he pointed out that there is no provision concerning the provisional application of treaties in its own Constitution. The delegation also believed that the concept of provisional application of treaties is confined to multilateral instruments and that it has no application in relation to bilateral treaties. He also added that provisional application of a treaty does not prejudice the right of States to apply reservations on the same treaty at the time of ratification, acceptance, approval or accession.

26. While agreeing with the general thrust of the Commission's discussions *another delegation* noted that it would be beneficial to have further substantiation on the conclusion that legal effects of provisional application were same as those after entry into force of the treaty. Although the provisional application of the treaty was capable of giving rise to legal obligations as if the treaty were itself in force, questions remained, including whether that would be the case at all times and what factors would have to subsist, he pointed out. It would be useful to study whether the various "processes" for treaties that had been provisionally applied and for treaties that had entered into force would be the same, he observed.

D. COMMENTS AND OBSERVATIONS OF AALCO SECRETARIAT

27. The Secretariat of AALCO welcomes the work of the International Law Commission in this area and reiterates its interest in the important role played by the ILC in the progressive development of International law and its codification. The Secretariat of AALCO commends the Special Rapporteur Mr. Juan Manuel Gomez-Robledo for his Third Report and in particular for

[55] Available at: https: //papersmart.unmeetings.org/media2/7655145/iran.pdf.

the detailed comparative analysis contained therein. The multiple examples provided of the provisional application of treaties in a variety of scenarios are very helpful in contextualizing the discussions on the subject. The twin focus of this years' report on the relationship of provisional application to other provisions of the Vienna Convention on the Law of Treaties (VCLT, 1969), and on provisional application with regard to international organizations are appreciated. The AALCO Secretariat finds the summary of the relationship of provisional application to other provisions of the VCLT, 1969 to be valuable and look forward to further work in this regard.

28. The Secretariat of AALCO agrees that the issue of legal effects of provisional application of a treaty articulated in draft guideline 4 is the key provision of the draft guidelines. It also has implications for the consideration of the consequences of breach of obligation deriving from provisional application. While appreciating the fact that this issue was discussed at the present Session, the AALCO Secretariat is of the view that draft guideline 4 merits further consideration and in particular, elaboration of the meaning of "legal effects" is encouraged. This is at least for two reasons.

29. *First*, although the provisional application of a treaty is capable of giving rise to legal obligations as if the treaty were itself in force, questions remain, including whether that would be the case at all times, and what factors would have to subsist. It would be useful to study whether the various "processes" for treaties that had been provisionally applied and for treaties that had entered into force would be the same. In addition the question of what are the effects of the provisional application of treaties on the rights and obligations of States who agree to apply a treaty provisionally is something that needs to be explored at length by the Commission. This is important because the proposed draft guideline 6 is vague, as the term "international responsibility" has not been explained in the draft guideline. Furthermore, draft guideline 6 does not discuss on the extent of the applicability of international responsibility of a State that applies a treaty provisionally. Hence, the AALCO Secretariat is of the view that the Special Rapporteur could provide further clarification on these two draft guidelines including addressing the issue of remedy in the event of a breach, bearing in mind that the enforcement provision of the treaty may not yet come into force.

VIII. IDENTIFICATION OF CUSTOMARY INTERNATIONAL LAW

A. BACKGROUND

1. The topic "Formation and Evidence of Customary International Law" was placed on the ILC's programme of work in 2012 on the basis of the Preliminary Report of the Special Rapporteur, Mr. Michael Wood. 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 and on the memorandum by the Secretariat on the relevant previous work of the ILC. The Commission subsequently decided to change the title of the topic to "Identification of Customary International Law" at this Session.

2. The Second Report of the Special Rapporteur covered central questions concerning the approach to the identification of rules of "general" customary international law, in particular the two constituent elements (State practice and *opinio juris*) and how to determine whether they are present. After its debates at the Sixty-Sixth Session (2014), the Commission confirmed general support for the "two element" approach while highlighting areas such as the significance of inaction and relevance of international organizations to the identification of CIL as requiring further analysis and discussion.

3. The Committee also provisionally adopted 8 of the 11 draft conclusions proposed by the Special Rapporteur. The eight draft conclusions provisionally adopted by the Drafting Committee in 2014 are divided into three parts: a) introduction; b) basic approach; and, c) a general practice. It was proposed that a fourth part, to include the draft conclusions from the Second Report not yet discussed would be entitled "Acceptance as Law (*opinion juris*)"

4. At its Sixty-Seventh Session (2015), the Commission had before it the Third Report of the Special Rapporteur,[56] which it considered at its 3250th to 3254th meetings. The Commission thereafter referred the draft conclusions contained within the Third Report to the Drafting Committee, and took note of the report of the Drafting Committee, containing conclusions 1 to 16, at its 3288th meeting.

5. The Commission requested that the Secretariat prepare a memorandum concerning the role of decisions of national courts in the case-law of international courts and tribunals for the purpose of determining customary international law.

6. The following part will focus on the work by the AALCO Informal Expert Group on CIL, the discussion of the Special Rapporteur's Third Report at the Sixty-Seventh Session of the International Law Commission, and the comments of AALCO Member States made at the Seventieth Session of the UNGA Sixth Committee.

[56] A/CN.4/682

B. AALCO INFORMAL EXPERT GROUP ON CUSTOMARY INTERNATIONAL LAW

7. In furtherance of AALCO's interest in the ILC's work on customary international law, the "Informal Expert Group on Customary International Law" was constituted at the recommendation of AALCO Eminent Persons Group (EPG) in 2014 Annual Session. It was envisaged to act as a technical expert group on identification of customary international law and formulate responses to the work of the ILC, including that of Mr. Michael Wood, the Special Rapporteur of the ILC on the topic of Identification of Customary International Law.

8. In its first meeting in September 2014 during the Fifty-Third Annual Session held in Tehran, the Informal Expert Group elected Dr. Sufian Jusoh, Senior Fellow at the Law Faculty of the National University of Malaysia as the Interim Chairman and Professor Sienho Yee of Wuhan University, China as the Interim Special Rapporteur. The Informal Expert Group then discussed various issues including the working method, approach and schedule. There was a general consensus to focus on some fundamental issues of particular concern to the Member States of AALCO. The first meeting of the Informal Expert Group gave us following considerations: *firstly*, the promotion of the quality in decision-making in the identification process; *secondly*, the reliance on only the quality exercise of State functions; and *thirdly*, the representativeness of the State practice and *opinio juris* at issue.

9. In its second meeting at the Institute of Malaysian and International Studies (IKMAS), National University of Malaysia on 24 March 2015, Mr. Sienho Yee, the Special Rapporteur of the Group, presented his Report on Identification of Customary International Law and a series of proposed comments on that project. The Commission's Special Rapporteur on the topic, Mr. Michael Wood, was also in attendance at this meeting. Upon deliberation, and taking into account comments and views made by members, the Informal Expert Group adopted the comments proposed by Mr. Sienho Yee, with some modifications. The Secretariat has uploaded the report with comments of the Informal Expert Group for the consideration of Member States.

10. During the Fifty-Fourth Annual Session of AALCO in Beijing, another Informal Consultation meeting was held on the recommendations proposed by the Group. The delegates pointed out the short duration of time Members States had to analyze the report. The meeting was of the view that more time should be given to the Member States of AALCO to analyze the report and make recommendations thereon. They stressed the significance of a cautious approach in dealing with a highly enigmatic area of Identification of CIL.

11. The delegates were also of the view that AALCO should retain this issue on its agenda and follow closely the development within and outside related to this topic. The Chairman of the Meeting expressed serious concern about the lack of capacity on the part of AALCO Member States to promptly reply to ILC questionnaires on the topic. He said that one of the reasons for this lack of participation is the technical nature of topic. In this regard, the lack of expertise and resources on the part of Member States was highlighted. Further, a view was expressed that ILC could also potentially explore the question of "what does not constitute CIL" in accordance with the general principle of international law and the purposes and principle of the UN Charter. In

this regard, a reference was made to the provisions of Vienna Convention on Law of Treaties, which elaborates on what does not constitute a treaty.

C. CONSIDERATION OF THE TOPIC AT THE SIXTY-SEVENTH SESSION OF THE COMMISSION (2015)

12. The Third Report by the Special Rapporteur, Mr. Michael Wood, that was submitted in 2015 at the Commission focused on 7 major issues. Section II revisited on the relationship between the constituent elements: State practice and *opinio juris*. Section III discussed inaction as practice or evidence. Section IV looked at the role of treaties and resolutions adopted by international organizations and at international conferences. Section V of the Report examined judicial decisions and writings as sources of CIL. Section VI discussed the relevance of international organizations. Section VII studied particular custom, and Section VIII discussed the issue of persistent objectors.

13. *Vide* the Third Report, the Special Rapporteur also proposed amendments to three existing draft conclusions (draft conclusion 3[4], 4[5] and 11) and proposed five new conclusions (draft conclusion 12-16).

14. The Special Rapporteur also acknowledged concurrent and related developments pertaining to the identification of customary international law that had taken place between the Second Report and Third Report, particularly the deliberations and comments of AALCO's Informal Expert Group, the decisions of international tribunals and courts, and various academic writings.

15. In Section II of the report, Mr. Wood, addressed questions relating to the interconnectedness of State practice and *opinio juris*. He stressed that while the two elements of customary international law are inseparable and cannot exist without the other, in seeking to ascertain whether a rule of customary international law has emerged, it is necessary to consider and verify the existence of each element separately. When seeking to identify the existence of a rule of customary international law, evidence of the relevant practice should therefore generally not serve as evidence of *opinio juris* as well. Such "double counting" is to be avoided. The Special Rapporteur thereafter proposed a second paragraph to Draft Conclusion specifying that each element of CIL must be assessed separately with specific evidence.[57]

16. While examining the Rapporteur's report on the relationship between the constituent elements, some members of the Commission indicated that the topic would benefit from further exploration of the respective weight of the two elements in different fields. There was support expressed for the Rapporteur's conclusion that each element was to be separately ascertained but also that the same material could sometimes be used as evidence for both elements.

[57] **Draft conclusion 3 [4]:** Assessment of evidence for the two elements

[…]

2. Each element is to be separately ascertained. This generally requires an assessment of specific evidence for each element. [FOOTNOTE]

17. In Section III of his report, Mr. Wood elaborated upon inaction as a basis for State practice. Mr. Wood reiterated his position that inaction is an accepted form of practice which has in the past been seen in situations where States refrain from exercising protection, abstain from the threat or use of force against other States, and abstain from instituting criminal proceedings in certain circumstances. He also noted that inaction might serve as evidence of *opinio juris* when it represents concurrence in a certain practice. However, Mr. Wood stressed that contextual circumstances surrounding an instance of inaction must be examined in order for it to be used as evidence of custom; reasons such as the practical inability of a State to act or failed to act due its lack of awareness of a situation demanding action, for instance, should be eliminated before an instance of inaction can be used as evidence. Thereafter Mr. Wood proposed a third paragraph of Draft Conclusion 11 explaining that inaction may serve as evidence of acceptance as law, provided that the circumstances call for some reaction.[58]

18. The Commission welcomed the analysis of the Rapporteur with respect to the relevance of inaction, but some members pointed out the practical difficulties of qualifying inaction for the purpose of identifying CIL. The Commission also expressed the need to clarify the specific circumstances under which inaction was relevant, especially in the context of the assessment of *opinio juris*.

19. In Section IV, Mr. Wood turned to the role of treaties and resolutions. In examining the role of treaties in the identification of customary international law, the Special Rapporteur stressed that while treaty provisions do not necessarily constitute rules of CIL, these provisions, as an explicit expression of the will of States, offer evidence of the existence, or lack thereof, of the contents of customary rules. According to him, treaty rules may: a) codify an existing rule; b) lead to the crystallization of an emerging rule; or c) lead to a general practice accepted as law, such that a new rule of CIL comes into being. However, Mr. Wood preached caution by pointing out that a treaty declaring itself a codification of CIL is not enough to establish its status as such; customary practices may change over time even after having been declared by a treaty, treaty provisions may be wrong about the rule in question or be only a partial enunciation of the rule, and such provisions may jeopardize the rights of non-Parties to the treaty in question. Therefore, a provision claiming to be declarations of a customary rule need to be examined from the perspective of relevance, widespread effect and reservations against it.[59]

20. It was suggested by some members of the Commission that references to the effect of treaties on the formation of customary rules be set aside and that focus be placed on their evidentiary value exclusively. The view was expressed that, for the purpose of the topic, there was no difference between the crystallization of a customary rule and the generation of a new

[58] **Draft conclusion 11:** Evidence of acceptance as law

[…]

3. Inaction may also serve as evidence of acceptance as law, provided that the circumstances call for some reaction.

[59] **Draft conclusion 12:** Treaties

A treaty provision may reflect or come to reflect a rule of customary international law if it is established that the provision in question:

(a) at the time when the treaty was concluded, codifies an existing rule of customary international law;

(b) has led to the crystallization of an emerging rule of customary international law; or

(c) has generated a new rule of customary international law, by giving rise to a general practice accepted as law.

rule through the adoption of a treaty. Some members also noted that all treaty provisions are not equally relevant as evidence of rules of CIL and that only treaty provisions of a fundamentally norm-creating character could generate such rules.

21. With regard to the resolutions of international organizations and conferences, Mr. Wood primarily examined the resolutions of the UNGA and noted that while such resolutions cannot in and of themselves create customary international law, they may sometimes have normative value in providing evidence of existing or emerging law. He also stressed on the fact that it is always necessary to consider what states actually mean when they vote for or against certain resolutions in international fora to ascertain the context in which a State is agreeing to or supporting a resolution. He reiterated that States themselves often stress that the UNGA is a political organ and it is far from clear that its acts carry juridical significance. Citing the International Court of Justice, Mr. Wood noted that "it is necessary to look at [a resolution's] content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule."[60] The Special Rapporteur thereafter proposed draft conclusion 13[61] to reflect this.

22. The Commission generally agreed with the Special Rapporteur's analysis of the resolutions of international organizations and conferences and reiterated that caution be taken when assessing their evidentiary value, and that resolutions could not, in of themselves, constitute sufficient evidence of the existence of a customary rule.

23. In Section V, Mr. Wood turned his attention to judicial decisions and writings as subsidiary means for the determination of rules of international law as per Article 38 paragraph (1) clause (d) of the Statute of the ICJ. With respect to judicial decisions of national courts, the Special Rapporteur found that these indicate not only State practice but might also help determine rules of CIL. He also posited that decisions of international courts and tribunals cannot be said to be conclusive for the identification of rules of CIL due to the lack of a doctrine of *stare decisis* in international law. With respect to writings, Mr. Wood maintained that they remain a useful source of information and analysis for application to the identification of rules of CIL as they constituted "trustworthy evidence for what the law really is". He then proposed the draft conclusion 14.[62]

24. The Members of the Commission made the suggestion that judicial decisions and writings did not have the same character or role and therefore should be dealt with in different conclusions. While the Commission emphasized the special importance of judicial decisions, there was also the opinion that the decisions of national courts be addressed separately from the

[60] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226, at p. 255, para 70.

[61] **Draft conclusion 13:** Resolutions of international organizations and conferences

Resolutions adopted by international organizations or at international conferences may, in some circums tances, be evidence of customary international law or contribute to its development; they cannot, in and of themselves, constitute it.

[62] **Draft conclusion 14:** Judicial decisions and writings

Judicial decisions and writings may serve as subsidiary means for the identification of rules of customary international law.

ICJ. Furthermore, the Commission affirmed that the selection of relevant writings could not amount to preference for writers from specific regions but had to be universal.

25. In Section VI, the Special Rapporteur examined the relevance of international organizations. Mr. Wood recognized that even though States are the primary subjects of international law and States for the most part create, control and empower international organizations to perform their functions as separate legal entities. He however qualified the role of international organizations by noting that a distinction must be made between the practice of States within international organizations and the practice of the organization itself. Another distinction Mr. Wood made related to the conduct of the organization in relation to its internal operation (internal practice) and the conduct of the organization in relation to States and other organizations (external practice). He posited that the latter is more important to the formation and identification of CIL.

26. The Special Rapporteur reiterated that resolutions of organs composed of States reflect the views expressed and the votes cast by States within them, and may thus constitute State practice or evidence of *opinio juris*. Similarly, policies adopted by international organizations and acts performed by them are often closely considered and/or endorsed by their Member States. Additionally, the work of international organizations on the international plane may prompt reactions by States, which may count as practice or attest to their legal opinions. Moreover, the activities and programmatic work of organizations, when endorsed and supported by the States may also indicate *opinio juris*. Furthermore, when, as in the case of the European Union, the international organization replaces, in whole or in part, its Member States in international relations, its practice may be equated with the practice of States. Mr. Wood did not submit a draft conclusion to change the existing conclusion, but rather included an amendment about non-State actors that are not intergovernmental organizations.[63]

27. A number of members of the Commission pointed out that the practice of international organizations could contribute to the formation or expression of rules of customary international law, and that the importance of the practice of international organizations in some areas had to be emphasized. Other members stressed that this could be the case only if the practice of an international organization reflected the practice or conviction of its Member States or if it would catalyse State practice, but that the practice of international organizations as such was not relevant for the assessment of a general practice. Some members of the Commission considered the proposed draft conclusion to be too strict, in particular in the light of the importance of the practice of certain non-State actors, such as the International Committee of the Red Cross, as well as in view of the importance of activities involving both States and non-State actors.

28. While addressing Particular Custom in Section VII of the Report, the Special Rapporteur recalled the ICJ's recognition that certain customary rules might be binding only on certain States. Ascertaining these "special" or "particular" customary rules, which may be limited to a region or to a bilateral arrangement then the practice of the State concerned is the only one to be

[63] **Draft conclusion 4 [5]:** Requirement of practice

[…]

3. Conduct by other non-State actors is not practice for the purposes of formation or identification of customary international law.

examined, rather than the general practice of multitudes of States. Draft conclusion 15[64] was then proposed by Mr. Wood and recommended to be placed in a new part six of the draft conclusions entitled "Exceptions to the general application of rules of customary international law."

29. While a number of members of the Commission supported the draft conclusion proposed by the Special Rapporteur, some members of the Commission expressed the view that the question did not fall within the scope of the topic. Questions were also raised regarding the most appropriate terminology to designate such specific category of rules of customary international law, which had been referred to as "regional", "local" or "particular" customs. According to some members, it followed that a stricter standard existed for particular custom than for general or universal custom. Some other members, however, indicated that all rules of customary international law were subject to the same conditions. A view was expressed that by envisaging the existence of a particular custom among a widely dispersed group of States having no geographical nexus, the proposed draft conclusion invited confusing claims as to the existence of such custom and risked fragmenting customary international law, without any basis in practice.

30. Which regard to Persistent Objectors, the Special Rapporteur reaffirmed that a State that has persistently objected to an emerging rule of customary international law, and maintains its objection after the rule has crystallized, is not bound by it. He noted that this was to ensure that international law was not the domain of the powerful States to force their will on unwilling States. It was thereafter proposed that draft conclusion 16 be placed in part six of the draft conclusions.[65]

31. Some members of the Commission considered that this was a controversial theory not supported by sufficient State practice and jurisprudence, and which could lead to the fragmentation of international law. It was suggested that concrete examples be provided in the commentary to substantiate the rule, which was, according to some members, largely accepted in the literature. It was also suggested that, in any case, even if such a rule existed, it could not be applicable to obligations *erga omnes* or rules having a peremptory character (*jus cogens*).

32. The Special Rapporteur's stated plan was to finish the work on the topic at the Commissions Sixty-Eighth Session (2016) if possible, following a detailed and thorough review and revision at the Session of the text of the draft conclusions and commentaries as adopted in 2015. The Special Rapporteur also proposed to consider, in his Fourth Report, and in addition to the draft conclusions and commentaries, practical means of enhancing the availability of materials on the basis of which a general practice and acceptance as law may be determined.

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[64] **Draft conclusion 15:** Particular custom

1. A particular custom is a rule of customary international law that may only be invoked by and against certain States.

2. To determine the existence of a particular custom and its content, it is necessary to ascertain whether there is a general practice among the States concerned that is accepted by each of them as law (*opinio juris*).

[65] **Draft conclusion 16:** Persistent objector

A State that has persistently objected to a new rule of customary international law while that rule was in the process of formation is not bound by the rule for so long as it maintains its objection.

33. The Commission welcomed the Rapporteur's plan to consider the practical means of enhancing availability of material and it was also suggested by some members that Mr. Wood consider and study the question of change of customary international law over time.

34. It was eventually suggested by the Special Rapporteur that, in light of the debates, a first reading of the draft conclusions and commentaries, which he said he would begin preparing in the interim, could be completed by the end of the Sixty-Eighth Session (2016).

D. SUMMARY OF THE VIEWS EXRESSED BY AALCO MEMBER STATES ON THE TOPIC AT THE SEVENTIETH SESSION (2015) OF THE UN GENERAL ASSEMBLY SIXTH COMMITTEE[66]

35. The delegates of AALCO Member States unanimously recognized the work done by the Special Rapporteur Mr. Michael Wood and the efforts taken by him in writing the reports for the topic.

36. *One delegate* addressed the question of treaty provisions reflecting customary international law and asserted that the criteria of objectivity and impartiality should be applied and that the investigation should be based strictly on general practice and *opinio juris*. Due consideration should be given to the extent of ratification, accession and acceptance of the treaty by States.

37. *Several delegates* also asserted that comprehensive assessments of judicial rulings and writings from various parts of the world need to be done and not just selective ones focusing on the jurisprudence of international courts and certain regions. Similar sentiments were echoed by *a delegate* who asserted that the State practice and *opinio juris* must be given equal importance and that developing States should be encouraged to submit their State practice and their State practice must be given equal importance. Additionally, *some delegates* suggested that the Commission examine its own role and weight of influence in the identification of CIL.

38. *A few delegates* expressed concerns about "persistent objectors" and whether this contentious concept could lead to the fragmentation of international law or thwart the establishment of a rule of CIL. This view however, had some opposition as *several other delegates* affirmed their support for the inclusion of "persistent objectors" as a necessary means of protecting the consensual nature of international law. The delegate also stressed that with regard to the concept of "regional custom" any State invoking the existence of a regional custom will be required to bear the burden of proving its existence.

39. *A few delegates* raised concerns about whether the role of non-State actors had been addressed to a sufficient degree by the Special Rapporteur's report and asked that additional clarification and details be included in the commentary to the exclusionary clause of draft conclusion 4 paragraph 3.

40. Regarding the question of inaction, *several delegations* stated its belief that inaction in respect of a violation of a rule of international law cannot be seen as relevant practice in the

[66] The statements made by Member States can be downloaded from < https://papersmart.unmeetings.org/en/ga/sixth/70th-session/agenda/>.

formation of customary international law. Inaction, *these delegates* asserted, shall not prejudice the validity and value of an existing rule. *Delegates* also expressed the need for caution in treating inaction as evidence due to the practical difficulties of distinguishing clearly the reasons for inaction without the clear expression of intentions.

41. *Many delegates* agreed that a high threshold is to be set on the evidentiary value of resolutions of international organizations and that the adoption of resolution should not be equated with the acceptance of its content as customary international law.

E. COMMENTS AND OBSERVATIONS OF THE AALCO SECRETARIAT

42. The Identification of Customary International Law is of particular interest to AALCO and its Member States due to AALCO's *raison d'être* as an advocate for the participation of formerly marginalized States in the development of international law. State practice and *opinio juris* are difficult things to identify and despite rapid advancement having been made over the second half of the twentieth century in the inclusion of analyses of Asian and African States' practices and opinions, customary international law still carries a notable slant towards Euro-centricism. However, through AALCO's intimate involvement in the studies conducted by the Special Rapporteur Mr. Michael Wood, as well as his numerous instances of involvement in AALCO events, the conclusions drafted by the Special Rapporteur could be said to have largely represented and catered to Asian and African interests in a generally satisfactory manner.

43. The Asian and African regions are far from monolithic in their own approaches to international law and *opinio juris* concerning possible norms of customary international law, and this is especially reflected in opinions voiced by Member States regarding the concept of "persistent objectors" and inaction as evidence of State practice. In particular, the concept of "persistent objectors" is a controversial one, but one that has, as was shown by the Special Rapporteur, a large body of academic work supporting its existence. While there is concern that such exceptions to norm-creation run the risk of fragmenting international law, they are also necessary exceptions due to the still-disparate and diverse nature of the recognition of customary norms around the world. As such, the concept of "persistent objectors" is a possibly valuable one to Asian and African States.

44. The draft conclusions of the Special Rapporteur are broad enough that their application is largely universal and without prejudice to the interests of Asian and African States. The continued comments of AALCO Member States regarding the content of the specific conclusions is a necessary part of the process of ensuring that these conclusions will eventually form the basis of a useful and practical system of identification for customary international law with a broad geographic scope of application. To this end, the AALCO Secretariat calls upon its Member States to continue being engaged in the work of the Special Rapporteur until the possible completion of the work at the ILC's Sixty-Eighth Session (2016).

IX. THE MOST-FAVOURED-NATION CLAUSE

A. BACKGROUND

1. The topic "The Most-Favoured-Nation clause" was included at the Sixtieth Session (2008) of the Commission in its programme of work. The Commission also decided to establish a Study Group on this particular topic at its Sixty-First session.

2. The Study Group established at the Sixty-First session of the Commission was co-chaired by Mr. Donald M. McRae and Mr. A. Rohan Perera and was re-constituted at the Sixty-Second (2010) and Sixty-Third session (2011) as well, under the same co-chairmanship. The Study Group was reconstituted at the Sixty-Fourth (2012), Sixty-Fifth (2013) and Sixty-Sixth (2014) sessions, under the chairmanship of Mr. Donald M. McRae. Mr. Mathias Forteau served as the chairman of the Study Group in the absence of Mr. McRae during the 2013 and 2014 sessions.

B. CONSIDERATION OF THE TOPIC AT THE SIXTY-SEVENTH SESSION OF THE COMMISSION (2015)

3. The Commission, at its meeting held on 12th May 2015, reconstituted the Study Group on 'The Most-Favoured-Nation clause', under the chairmanship of Mr. Donald M. McRae. (Canada). The Study Group undertook and completed a substantive and technical review of the draft final report during the two meetings of the group on 12thMay and 16thJuly 2015.

4. The ILC received the final report of the Study Group at meetings on 6th and 23rdJuly 2015, respectively. This report summarizes the work that the Study Group has undertaken on this topic since 2009. The Commission noted that the final report has 5 parts in all. Part I deals with background information on the origins and purpose of the work of the Study Group. This part also dealt with the prior work of the Commission on the 1978 draft articles on the most-favoured-nation (MFN) clause, and of developments subsequent to the completion of the 1978 draft articles.

5. Part II of the Report deals with the present-day relevance of MFN clauses and the controversies around their interpretation. It deals with the types of MFN provisions in bilateral investment treaties (BIT) and flags the interpretative controversies that have arisen in relation to the MFN clauses in BITs like defining the beneficiary of an MFN clause, defining the necessary treatment, and defining the scope of the MFN clause.

6. Part III of the Report analyses namely: (a) the policy considerations in investment relating to the interpretation of investment agreements, taking into account questions of asymmetry in BIT negotiations and the specificity of each BIT; (b) the implications of investment dispute settlement arbitration as "mixed arbitration"; and (c) the contemporary relevance of the 1978 draft articles to the interpretation of MFN provisions.

7. Part IV deals with proper application of the principles of treaty interpretation to MFN clauses. It particularly discusses that whether an investor to obtain a more favorable dispute resolution provision existing in a comparator treaty may invoke an MFN clause in a treaty. In

that regard, the case law *Maffezini* v. *Spain* of 2000 is also discussed. The final report does not per say declare that the *Maffezini* decision (which allowed an MFN clause to be invoked to obtain a more favorable dispute resolution provision) was correct or incorrect but rather says that it lays down a number of issues that should be kept in mind while analysing an MFN clause for such a purpose. The report, for example, says that the text and context of the MFN clause in the agreement may change our analysis in a number of ways and thus it should be carefully examined. This part also lays down the various ways in which nation States have reacted in their treaty practice to the *Maffezini* decision: (a) specifically stating that the MFN clause does not apply to dispute resolution provisions; (b) specifically stating that the MFN clause does apply to dispute resolution provisions; or (c) specifically enumerating the fields to which the MFN clause applies.

8. Part V of the Report contains the conclusions that the Study Group has reached. It particularly underlined the importance and relevance of the Vienna Convention of the Law of Treaties (VCLT), as a point of departure, in the interpretation of investment treaties. The report concluded that the interpretation of the MFN clauses should be undertaken on the basis of the rules, which are laid down in the VCLT.

9. On the meeting of ILC that took place on 23rd July 2015, the Commission welcomed with appreciation the work of the Study Group. The Commission also went ahead and commended the final report to the General Assembly for its consideration and possibly further distribution as well.

10. At its meeting, on 23rdJuly 2015, the Commission adopted the following summary conclusions:

- The Commission notes that MFN clauses remain unchanged in character from the time the 1978 draft articles were concluded. The core provisions of the 1978 draft articles continue to be the basis for the interpretation and application of MFN clauses today. However, they do not provide answers to all the interpretative issues that can arise with MFN clauses;

- The Commission underlines the importance and relevance of the Vienna Convention of the Law of Treaties (VCLT), as a point of departure, in the interpretation of investment treaties. The interpretation of MFN clauses is to be undertaken on the basis of the rules for the interpretation of treaties as set out in the VCLT;

- The central interpretative issue in respect of the MFN clauses relates to the scope of the clause and the application of the *ejusdem generis* principle. That is, the scope and nature of the benefit that can be obtained under an MFN provision depends on the interpretation of the MFN provision itself;

- The application of MFN clauses to dispute settlement provisions in investment treaty arbitration, rather than limiting them to substantive obligations, brought a new dimension to thinking about MFN provisions and perhaps consequences that had not

been foreseen by parties when they negotiated their investment agreements. Nonetheless, the matter remains one of treaty interpretation;

- Whether MFN clauses are to encompass dispute settlement provisions is ultimately up to the States that negotiate such clauses. Explicit language can ensure that an MFN provision does or does not apply to dispute settlement provisions. Otherwise the matter will be left to dispute settlement tribunals to interpret MFN clauses on a case-by-case basis.

11. The Commission highlighted that the interpretative techniques reviewed in the report of the Study Group are designed to assist in the interpretation and application of MFN provisions.

C. SUMMARY OF THE VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPICS AT THE UN GENERAL ASSEMBLY SIXTH COMMITTEE AT ITS SEVENTIETH SESSION HELD IN 2015[67]

12. *Many delegations* noted their appreciation that under the Chairmanship of Professor Donald McRae of Canada the Study Group submitted its final report and the summary conclusions which were adopted by the Commission. They also acknowledged the valuable contribution made by Dr. Rohan Perera and Mr. Mathias Forteau forco-chairing the Study Group from 2009 to 2011 and 2013 and 2014 respectively. They were of the view that the report could provide a useful contribution to a still complex and open debate in international law and could guide the States, arbitral tribunals and other relevant actors in the field.

13. While agreeing with the conclusions of the Commission that the 1969 Vienna Convention on the Law of Treaties should be the basis and point of departure in the interpretation of investment treaties including the MFN clauses in those treaties, *one delegation*[68] clarified that this would avoid the selective interpretative methodologies adopted by the arbitral tribunals dealing with investment disputes which had in the past led to inconsistent decisions. The delegation was of the view that the recent decisions of the arbitral tribunals to apply the MFN clauses to the dispute settlement provisions also added a new dimension. In the light of this he welcomed the summary conclusions of the Commission that it is for the States, while negotiating the BITs, to determine the scope of application of MFN clauses, i.e, whether to confine application of the MFN clause to the substantive obligations and to exclude in explicit and unambiguous terms the dispute settlement provisions from its scope.

14. *Another delegation* noted that, while the Most-Favoured-Nation clause had assumed particular relevance as a core principle of bilateral investment treaties, it had also become one of the most vexing interpretative issues under those treaties and remained at the heart of current controversies in the field. The report's guidance on the consequences that could arise from particular wording in the clauses would be of great value to States in considering how their investment agreements might be interpreted and what they might take into account in negotiating

[67] Most of the Statements that are mentioned here as having been made by the Member States of AALCO at the UN General Assembly Sixth Committee are available from: http://www.un.org/press/en/2015/gal3507.doc.htm
[68] This is available at : https://www.pminewyork.org/pages.php?id=2312

new bilateral investment treaties. Expressing agreement with several of the Study Group's conclusions, the delegate said the clauses' application to dispute settlement provisions in investment treaty arbitration, rather than limiting them to substantive obligations, had brought about a new dimension to thinking about the provisions and, perhaps, consequences that had not been foreseen by parties when they negotiated their investment treaties. He pointed out that, unless it was clearly worded or there were particular contextual circumstances, a Most-Favoured-Nation provision could not alter the conditions of access to dispute settlement.

15. *Another delegation* stated that in today's interdependent world, international economic agreements — bilateral investment treaties or free trade agreements — played an important role in foreign relations and that analysis and useful guidance on the interpretation of Most-Favoured-Nation Clause provisions — key stipulations in trade and investment treaties — would provide greater clarity for policymakers, negotiators and practitioners in the field. As a point of departure, he continued, the Vienna Convention on the Law of Treaties posed particular challenges in the interpretation of investment agreements when considering investor-State arbitration. To avoid dispute settlement tribunals that interpreted the Most-Favoured-Nation clauses on a case-by-case basis, States should clarify in treaty language whether those clauses encompassed dispute settlement provisions, he added.

16. *Another delegation* stated he endorsed the Study Group's objective to identify trends in the interpretation of Most-Favoured-Nation Clauses that would provide guidance for treaty negotiators, policy makers and practitioners in the area of investment. The inconsistencies in interpreting those clauses in bilateral investment treaties were of such concern to his country that it no longer considered their provisions as core to bilateral investment treaties, even while they were a necessary part of managing relations between States at the level of multilateral trade. Bilateral investment treaties were public international law instruments rather than contractual arrangements. Therefore, the policy choices of States in concluding such treaties should be respected by investment arbitration tribunals. At the same time, States must be able to understand the consequences that might attach to particular wording in Most-Favoured-Nation clauses to accurately express their policy choices in treaties, he added.

D. COMMENTS AND OBSERVATIONS OF THE AALCO SECRETARIAT

17**.** Owing to the contemporary relevance and importance of Most Favoured Nation Clauses in the trade and investment treaties, the topic of Most Favoured Nation Clause holds immense significance to the Member States of AALCO. Hence, the Secretariat of AALCO follows the deliberations on this topic at the ILC and other fora with keen interest. The Secretariat has studied with appreciation the report of the Study Group on the Most-Favoured-Nation Clause and the interpretative techniques reviewed therein, and also the Commission's summary conclusions which were submitted at the Sixty- Seventh Session of ILC held in 2015. The AALCO Secretariat believes that the report can provide a useful contribution to a still complex and open debate in international law and assist in the interpretation and application of MFN clauses.

18. Furthermore, the Secretariat of AALCO regards such a contribution as an important complement to the Draft Articles adopted in 1978 on the same topic. The latter remains a valuable term of reference, with special regard to the *ejusdem generis* principle, as a guardian for the appropriate interpretations of MFN clauses in full compliance with the principle of State consent as the main source of treaty rights and duties. The Secretariat of AALCO shares the conclusions on the topic adopted by the Commission at this Session with special regard to the emphasis placed on the importance that the interpretation of MFN clauses be made consistently with the relevant provisions of the Vienna Convention on Law of Treaties (VCLT, 1969) concerning treaty interpretation. Put differently, the VCLT, 1969 should be the basis for the interpretation of investment treaties, including Most Favoured Nation clauses in those treaties. This has the potential to avoid the selective interpretative methodologies that could be (and indeed has been) adopted by the arbitral tribunals dealing with investment disputes that led to inconsistent decisions. The report's guidance on the consequences that could arise from particular wording in the clauses would be of pragmatic value to States in considering how their investment agreements might be interpreted and what they might take into account in negotiating new bilateral investment treaties or amending the current ones. The conclusion that it is for States to determine the scope of application of such clauses when negotiating bilateral investment treaties, also needed to be welcomed.

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

A. INTRODUCTION

1. The Commission, at its Sixtieth Session held in 2008 decided to include the topic "Treaties over time" in its programme of work and to establish a Study Group on the topic at its Sixty-First session. At its Sixty-First session held in 2009[69], the Commission established the Study Group on Treaties over time, chaired by Mr. Georg Nolte. At that session, the Study Group focused its discussions on the identification of the issues to be covered, the working methods of the Study Group and the possible outcome of the Commission's work on the topic[70].

2. From the Sixty-Second to the Sixty-Fourth session (2010-2012), the Study Group was reconstituted under the chairmanship of Mr. Georg Nolte. The Study Group examined three reports presented informally by the Chairman, which addressed, respectively, the relevant jurisprudence of the International Court of Justice and arbitral tribunals of *ad hoc* jurisdiction[71];the jurisprudence under special regimes relating to subsequent agreements and subsequent practice[72];and subsequent agreements and subsequent practice of States outside judicial and quasi-judicial proceedings[73].

3. At the Sixty-Fourth session held in 2012, the Commission, on the basis of a recommendation of the Study Group[74], decided (a) to change, with effect from its Sixty-Fifth session (2013), the format of the work on this topic as suggested by the Study Group; and (b) to appoint Mr. Georg Nolte as Special Rapporteur for the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties"[75].

4. At the Sixty-Fifth session held in 2013, the Commission considered the First Report of the Special Rapporteur (A/CN.4/660) and provisionally had adopted five draft conclusions. At the Sixty-Sixth session held in 2014, the Commission considered the Second Report of the Special Rapporteur (A/CN.4/671) and provisionally adopted five draft conclusions.

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[69]At its 2997th meeting, on 8 August 2008. See *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 353. For the syllabus of the topic, see *ibid.*, annex A. The General Assembly, in paragraph 6 of resolution 63/123 of 11 December 2008, took note of the decision.

[70]See *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), paras. 220-226.

[71]*Ibid.*,*Sixty-fifth Session, Supplement No. 10* (A/65/10), paras. 344-354; and *ibid.*,*Sixty-sixth Session, Supplement No. 10* (A/66/10), para. 337.

[72]*Ibid.*,*Sixty-sixth Session, Supplement No. 10* (A/66/10), paras. 338-341; and *Sixty-seventh Session, Supplement No. 10* (A/67/10), paras. 230-231.

[73]*Ibid.*,*Sixty-seventh Session, Supplement No. 10* (A/67/10), paras. 232-234. At the sixty-third session (2011), the Chairman of the Study Group presented nine preliminary conclusions, reformulated in the light of the discussions in the Study Group (*ibid., Sixty-sixth Session, Supplement No. 10* (A/66/10), para. 344). At the sixty-fourth session (2012), the Chairman presented the text of six additional preliminary conclusions, also reformulated in the light of the discussions in the Study Group (*ibid., Sixty-seventh Session, Supplement No. 10* (A/67/10), para. 240). The Study Group also discussed the format in which the further work on the topic should proceed and the possible outcome of the work. A number of suggestions were formulated by the Chairman and agreed upon by the Study Group (*ibid.*, paras. 235-239).

[74]*Ibid.*,*Sixty-seventh Session, Supplement No. 10* (A/67/10), paras. 226 and 239.

[75]*Ibid.*, para. 227.

B. CONSIDERATION OF THE TOPIC AT THE SIXTY-SEVENTH SESSION OF THE COMMISSION (2015)

5. At the present session, the Commission had before it the Third Report of the Special Rapporteur, Mr Georg Nolte (A/CN.4/683), which offered an analysis of the role of subsequent agreements and subsequent practice in relation to treaties that are the constituent instruments of international organizations, and which proposed draft conclusion 11 on the issue.

6. In particular, after addressing Article 5 of the Vienna Convention on the Law of Treaties (Treaties constituting international organizations and treaties adopted within an international organization), the Third Report turned to questions related to the application of the rules of the Vienna Convention on treaty interpretation to constituent instruments of international organizations. It also dealt with several issues relating to subsequent agreements under article 31, paragraph 3 (a) and (b), as well as article 32, of the Vienna Convention on the Law of Treaties, as a means of interpretation of constituent instruments of international organizations.

7. The Commission decided to refer draft conclusion 11 to the Drafting Committee. The Drafting Committee examined this draft conclusion, together with a reformulation that was presented by the Special Rapporteur to the Drafting Committee in order to respond to suggestions made, or concerns raised, during the Plenary with respect to that draft conclusion. Further to the presentation of the Report of the Drafting Committee (A/CN.4/L.854), the Commission provisionally adopted draft conclusion 11, as well as the commentary thereto, which are reproduced in the Report of the Commission. Draft conclusion 11[76]refers to a particular type of treaty, namely constituent instruments of international organizations, and the way in which subsequent agreements or subsequent practice shall or may be taken into account in their interpretation under articles 31 and 32 of the Vienna Convention on the Law of Treaties. Constituent instruments of international organizations are specifically addressed in article 5 of the Vienna Convention on the Law of Treaties. As a general matter, article 5, by stating that the Vienna Convention applies to constituent instruments of international organizations without prejudice to any relevant rules of the organization, follows the general approach of the Convention according to which treaties between States are subject to the rules set forth in the Convention "unless the treaty otherwise provides". Draft conclusion 11 only refers to the interpretation of constituent instruments of international organizations.

[76] **Conclusion 11 Constituent instruments of international organizations**

1. Articles 31 and 32 apply to a treaty which is the constituent instrument of an international organization. Accordingly, subsequent agreements and subsequent practice under article 31, paragraph 3, are, and other subsequent practice under article 32 may be, means of interpretation for such treaties.

2. Subsequent agreements and subsequent practice under article 31, paragraph 3, or other subsequent practice under article 32, may arise from, or be expressed in, the practice of an international organization in the application of its constituent instrument.

3. Practice of an international organization in the application of its constituent instrument may contribute to the interpretation of that instrument when applying articles 31, paragraph 1, and 32.

4. Paragraphs 1 to 3 apply to the interpretation of any treaty which is the constituent instrument of an international organization without prejudice to any relevant rules of the organization.

8. While it is important to understand that draft conclusion 11 refers to a particular kind of treaty, namely constituent instruments of international organizations, it needs to be explained here (as the commentary does) that paragraph 1 of draft conclusion 11 is intended to recognize that the rules on interpretation contained in VCLT articles 31 and 32, including their elements relating to subsequent agreements and subsequent practice, fully apply to a treaty that serves as the constituent instrument of an international organization. Paragraph 2 of draft conclusion 11, by referencing subsequent agreements and subsequent practice under VCLT article 31, paragraph 3, signals that it is referring to such subsequent agreements and subsequent practice *with respect to the states parties to the treaty*. The commentary indicates that such subsequent agreements and subsequent practice may arise either from the States parties' reactions to the practice of an international organization or from their conduct in applying the treaty, such as when the States parties vote for a resolution that explicitly or implicitly interprets the treaty.

9. Paragraph 3 of draft conclusion 11, by contrast, is referring to the practice *of the international organization itself* (as opposed to the practice of Member States) in applying the treaty. Such practice does not fall within VCLT article 31, paragraph 3, but rather under VCLT article 31, paragraph 1, or article 32. According to the commentary, the practice of the international organization as such "can, at a minimum, be conceived as a supplementary means of interpretation under article 32," but writers also largely agree that it can be "relevant for the determination of the object and purpose of the treaty, including the function of the international organization concerned. Paragraph 4 states that paragraphs 1 to 3 are without prejudice to any "relevant rules of the organization," a point that reflects VCLT article 5.

10. In addition, the Commission requested States and international organizations to provide it with: (a) any examples of decisions of national courts in which a subsequent agreement or subsequent practice has contributed to the interpretation of a treaty; and (b) any examples where pronouncements or other action by a treaty body consisting of independent experts have been considered as giving rise to subsequent agreements or subsequent practice relevant for the interpretation of a treaty.

C. SUMMARY OF THE VIEWS EXPRESSED BY AALCO MEMBER STATES ON THE TOPICS AT THE UN GENERAL ASSEMBLY SIXTH COMMITTEE AT ITS SEVENTIETH SESSION HELD IN 2015[77]

11. One *Delegation* reiterated her concern regarding the modifying effect of a subsequent agreement and subsequent practice in particular when it resulted in altering the provisions of the treaty or providing too broad interpretation of treaty provisions. The modification or amendment of a treaty should only be done in line with the provisions of the Vienna Convention, she underlined. Furthermore, she encouraged the Special Rapporteur to explore the applicability of the provisions of the Vienna Convention for the interpretation of treaties adopted within international organizations.

[77] All the three statements that we have mentioned here as having been made by the Member States of AALCO at the UN General Assembly Sixth Committee are available from: http://www.un.org/press/en/2015/gal3510.doc.htm.

12. *Another Delegation* stated referring to draft conclusion 11, that particular attention needed to be given to the constituent instruments of international organizations and that Article 5 of the Vienna Convention could act as a starting point for dealing in the interpretation of such instruments. He was of the view that it was not always easy to identify whether States meeting in a plenary of an international organization were acting as members of that organization or as State parties to its constituent instruments. The most important factor was the intention of the States concerned. With regard to an international organization's own practices, evaluation should be undertaken on a case-by-case basis, the delegation clarified.

13. *Another Delegation* pointed out that the work of the Commission should not exceed the limits of principles elaborated in articles 31 to 33 of the 1969 Vienna Convention and that it should be consistent with the object and purpose of the 1969 Convention. With respect to the subsequent practice of parties to constituent instruments of international organizations, the delegation stated that interpretation of the instrument should be the very intent of the parties to it and that a proper interpretation of constituent instruments of international organizations should be coupled with consideration not only of the intention and will of negotiators of the original instrument but also of its actual practice and the intentions of all Member States to modify the original mandate.

D. COMMENTS AND OBSERVATIONS OF THE AALCO SECRETARIAT

14. The Secretariat of AALCO appreciates the Special Rapporteur on the subject Mr. George Nolte and the Commission for developing further the work on the topic Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation (by way of the adoption of Third Report) and (also) for provisionally adopting draft conclusion 11 on constituent instruments of international organizations. AALCO Secretariat appreciates the fact that this is an issue which could be complicated due to the variety of international organizations and the numerous ways where they could operate. The Secretariat also welcomes the careful drafting of draft conclusion 11, which conforms to the terms of article 5 of the Vienna Convention.

15. Draft conclusion 11 refers to a particular type of treaty, namely constituent instruments of international organizations, and the way in which subsequent agreements or subsequent practice shall or may be taken into account in their interpretation under articles 31 and 32 of the Vienna Convention on the Law of Treaties. This is in tune with the understanding propounded by the International Court of Justice (ICJ) since it has recognized that article 31 (3) (b) of the VCLT is applicable to constituent instruments of international organizations. In its advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, after describing constituent instruments of international organizations as being treaties of a particular type, the ICJ introduced its interpretation of the Constitution of the World Health Organization (WHO) by stating:

"According to the customary rule of interpretation as expressed in Article 31 of the 1969 Vienna Convention on the Law of Treaties, the terms of a treaty must be interpreted 'in their context and in the light of its object and purpose' and there shall be 'taken into account, together with the context:

[…] (b) any subsequent practice in the application of the treaty which establishes the agreement of the Parties regarding its interpretation[78]*"*

16. In its advisory opinion on this case the ICJ had also recognized the possibility that the practice of an organization may reflect an agreement or the practice of the Member States as parties to the treaty themselves, but found that the practice in that case did not "express or amount to" a subsequent practice under article 31 (3) (b) of the VCLT.

17. However, draft conclusion 11 does not address a host of issues: for instance, it does not address every aspect of the role of subsequent agreements and subsequent practice in relation to the interpretations of treaties involving international organizations. Specifically, it does not apply to the interpretation of treaties adopted within an international organization or to treaties concluded by international organizations which are not themselves constituent instruments of international organizations. In addition, draft conclusion 11 does not apply to the interpretation of decisions by organs of international organizations as such, including to the interpretation of decisions by international courts. Also missing in the draft conclusion is the issue of pronouncements by a treaty monitoring body consisting of independent experts.

18. Clarification of these issues is critical, For example the work of the UN human rights treaty bodies greatly contributes to the development of international human rights law – not only through their jurisprudence, following consideration of many individual cases, but also through important general comments. The Secretariat of AALCO would like to point to the need for an interpretation of the individual treaty establishing an international organisation, and assessment of the conduct of that particular organisation, in order to establish the legal effects of such subsequent agreement or practice. Jurisprudence from the International Court of Justice has confirmed this. In this regard, the future work of ILC is eagerly awaited.

[78] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I. C.J. Reports 1996*, p. 66, at p. 75, para. 19.

ANNEX I: STATEMENT BY H. E. PROF. DR. RAHMAT MOHAMAD, SECRETARY-GENERAL, AALCO DELIVERED AT THE SIXTY-SEVENTH SESSION OF THE INTERNATIONAL LAW COMMISSION (ILC) ON WEDNESDAY, 13TH MAY 2015

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

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

Mr. Chairman,
As you are aware, one of the functions assigned to the Asian-African Legal Consultative Organization (AALCO) under its Statute is to study the subjects which are under the consideration of the International law Commission (the Commission) and thereafter forward the views of the Member States to the Commission. Fulfillment of this mandate set forth in the Statute has enabled to forge a close relationship between the two organizations. It has also become customary for AALCO and the ILC to be represented during each other's sessions. Indeed, the need on the part of the Members of ILC, who play an active and constructive role in the work of the Commission, to be present at our Annual Sessions is critical. This is due to the fact that they bring with themselves a great deal of expertise and experience that could be utilized by our Member States.

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

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

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

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

Identification of Customary International Law (CIL)

Mr. Chairman,
Unlike treaties, where a country has the option to join or not, Customary International Law binds all States irrespective of their express consent. Therefore, this is the importance of the topic. As representative of Asian and African states, AALCO must have a position on this issue. Uncertainty abounds in international law and customary international law is no exception.[79] Not only is there uncertainty surrounding the exact nature of the two elements considered necessary for custom-formation — state practice and opinio juris but there are complex issues of Persistent Objector, Specially Affected States, Practice of International Organizations and so on. The work of the International Law Commission (ILC), is intended to bring certainty in the Identification of CIL, therefore is of paramount significance to AALCO Member States. They have been proactively participating in the deliberations on CIL ever since it was introduced in the proceedings of our Annual Session.

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

Mr. Chairman,

The Informal Group then discussed various issues including the working method, approach and schedule. There was a general consensus to focus on some fundamental issues of particular concern to the Member States of AALCO. The Informal Group then decided on which issues to address by taking account of the information received from Member States and the views of the members of the Informal Group. The general sense of the first meeting of the Informal Group gives us following considerations: firstly, the promotion of the quality in decision-making in the

[79]Jörg Kammerhofer, Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems, *EJIL* (2004), Vol. 15 No. 3, 523–553.

identification process, Secondly, the reliance on only the quality exercise of State functions, and thirdly, the representativeness of the State practice and *opinio juris* at issue.

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

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

Comments of AALCO Member States

Many Member States were of the view that Identification of CIL is a very important topic as CIL is a formal source of International Law recognized in the ICJ Statute. A view was expressed that hierarchy of sources of international law is not the issue and the exercise is not aimed at codifying rules for the formation of CIL. A view was expressed[80] that the two-element approach to CIL is consistent with the jurisprudence of international bodies, contributes to the reinforcement of well-established norms and at the same time preclude fragmentation of international law. A view was expressed[81] that both elements—'state practice' and 'opinio juris' should be given equal importance in the study. The practice of States from all regions should be taken into account. In this regard, the developing States, which do not publish digests of their practice, should be encouraged and assisted to submit their state practice, including their statements made in international and regional fora, and the case law etc.

[80] India and Iran in the Fifty-Fourth Annual Session, 2015.
[81] India in the Fifty-Fourth Annual Session, 2015.

A view was expressed[82]that in principle, practice of states contributes to the creation of customary international law. So far it reflects state practice; the practice of international organizations may on a subsidiary basis have a role in identification of rules of CIL. The UN General Assembly Resolutions may in certain circumstances provide evidence for establishing the existence of a rule or the emergence of opinio juris. But it is necessary to look at the content and conditions of the adoption of the resolution. Further, the *Legality of the threat or use of Nuclear Weapons* at para 254 and 255 illustrates the above principle. The conduct of non-governmental organizations and individuals cannot be qualified as practice for the purpose or evidence of CIL.

A view was expressed[83] that the issue of specially affected states and the concept of persistent objector should be included in the work of Mr. Michael Woods, Special Rapporteur of ILC. A view was expressed[84] that the "specially affected states" rule is not reserved for powerful states, but applies to all states who are especially concerned with the subject matter under consideration and whose interests are especially affected by the rule under consideration. A view was expressed[85]that more inclusive and a cooperative approach is necessary between AALCO and ILC and due regard may be given to the views of many competent jurists from Asia and Africa who have made notable contributions to the field of international law.

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

Expulsion of Aliens

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

The 66th Session of ILC held in 2014 concluded the consideration of the item by adopting 31 draft articles at second reading which had been submitted to the Sixth Committee of the UN General Assembly for consideration. The draft articles[86] recognize a general

[82] Iran in the Fifty-Fourth Annual Session, 2015.
[83] Iran and Japan in the Fifty-Fourth Annual Session, 2015.
[84] Iran in the Fifty-Fourth Annual Session, 2015.
[85]Myanmar in the Fifty-Fourth Annual Session, 2015.
[86]**Part I** of the draft articles deals with the general framework consisting of five draft articles. These include; scope of the draft articles (draft article 1); Use of Terms (d.a 2); right of expulsion (d.a.3; right to expel: requirement for conformity with law (d.a.4); Grounds for expulsion (d.a 5).
Part II deals with cases of prohibited expulsion accounting for 6 draft articles. These include: expulsion of refugees (d.a.6); stateless persons (d.a.7); deprivation of nationality for the purpose of expulsion (d.a.8); prohibition of disguised expulsion (d.a.10).

right of states to expel aliens from their territory, but only "in accordance with the prese nt draft articles and other applicable rules of international law, in particular those relating to human rights. The draft articles on the expulsion of aliens are based on the premise that every State has the right to expel aliens. However, this right is subject to general limitations, as well as specific, substantive and procedural requirements. These limitations had already been clarified in the arbitral practice before the Second World War. In addition, contemporary human rights law has had a significant impact on the law relating to the expulsion of aliens.

Comments of AALCO Member States

At the 54th Session, many Member States of AALCO had welcomed the text of the draft articles and expressed their appreciation for the work of the Special Rapporteur on the topic. However, few States had voiced their concerns with specific provisions.

A view was expressed that the draft articles well capture the principles of international law on sovereign rights of states as well as the rights of an alien subject to expulsion. However, it was also felt that the draft articles, which involve the progressive development of the rules of international law on this issue, do not entirely reflect universal practices for state practices are still limited in some areas. Specifically not all the draft articles are consistent with several Asian State's current State Practice[87].

Commenting on the balance between the rights of States and the rights of aliens, a view was expressed that some of the draft articles remain imbalanced. As an example draft article 12 was pointed out. This article prohibits in general terms the resort to expulsion to circumvent an ongoing extradition procedure. It was pointed out that though extradition and expulsion are both useful means for inter-state cooperation to bring perpetrators of transnational crimes to justice, they have different functions and apply to different situations in accordance with domestic law. Therefore, it was observed that means which should be adopted should be determined on the basis of the practical needs for combating transnational crimes in the specific circumstances of the case[88].

Reference was also made on article 19 paragraph (2) (b) that provides that the extension of the duration of the detention may be decided only upon by a court or subject to a 'judicial review' by another competent authority. In practice, competent authorities deciding on the extension of detention duration vary from state to state and that a "one-size-fits-all" approach may not work.

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

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

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

[87] Thailand in the Fifty-Fourth Annual Session, 2015

[88] China in the Fifty-Fourth Annual Session, 2015

It is up to each individual state to decide the means and procedures, being either judicial or administrative, for safeguarding the rights of expelled aliens[89].

On draft article 23 Paragraph 2 that concerns the specific prohibition to expel an alien to a State of destination where his or her life would be threatened by the imposition or execution of the death penalty, a view was expressed that this provision does not reflect the fact that there is no consensus on the abolition of the death penalty among states, nor does international law prohibit death penalty. Given this, every state is entitled to opt for or against death penalty vis-à-vis expulsion of aliens[90].

On draft article 24 requiring the expelling State not to expel an alien to a State where there are substantial grounds for believing that he or she may be subjected to torture or to cruel, inhuman and degrading treatment, a concern was expressed that fugitives tend to misuse the judicial review process of a foreign state and that there have been instances where inter-state judicial and law enforcement cooperation including the expulsion of fugitives have been hindered by some by abusing human rights standards[91].

It was also mentioned that though the draft articles are of positive significance for the enhancing of the protection of human rights, some articles over-emphasize individual rights and that they lack the support of general state practice and exceed state obligation under treaty law. They are likely to result in hampering relevant international cooperation and in impunity of criminals[92].

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

Protection of Atmosphere

Mr. Chairman,

Firstly, let me convey that AALCO Member States see protection of atmospheric environment as a very serious global issue requiring coordinated action by the international community.[93] As stated by a delegation[94] in the recently concluded Annual Session, since negotiations on climate change and ozone layer are at a crucial stage, the relevant work of the ILC should be carried out in a prudent and rigorous manner with a view to complementing various political and legal negotiations without creating a new forum or playing down existing treaty mechanisms. The development of guidelines should be based on common international practice and current laws. Protection of the atmosphere is a common concern of mankind and that this issue is tightly linked with political, technical and scientific considerations.[95]

[89] China in the Fifty-Fourth Annual Session, 2015
[90] China in the Fifty-Fourth Annual Session, 2015
[91] China in the Fifty-Fourth Annual Session, 2015
[92] China in the Fifty-Fourth Annual Session, 2015
[93] See statements of Japan, China and India in the Fifty-Fourth Annual Session, 2015.
[94] China in the Fifty-Fourth Annual Session, 2015
[95] China in the Fifty-Fourth Annual Session, 2015.

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

The Special Rapporteur has two other definitional guidelines, one on "air pollution"[96] and the other on "atmospheric degradation".[97]

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

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

On the question of whether to include basic principles in the work of ILC on the topic, a view was expressed that resorting to basic principles of international environmental law is inevitable though the task assigned to the Special Rapporteur is not aimed at filling treaty gaps in international legal instruments applicable to state activities in the atmosphere.[98] It was stressed on the importance of considering and respecting the principle of 'common but differentiated responsibility[99]' (CBDR).

As regards the concept of "common concern of humankind" mentioned in Draft Guideline 3[100], AALCO recognizes the fact that the notion of common concern of humankind is well established in treaty practice having been part of treaties such as the 1992 UNFCCC (that acknowledges that "change in the Earth's climate and its adverse effects are a common concern of humankind"; the preamble to the 1992 Biodiversity Convention; the 1994 Desertification Convention). These are among the Conventions that enjoy almost universal acceptance, ratified by more than 195 States, in which virtually all States agreed that there is a strong need for international community's collective response to tackle those global problems.

[96] "Air pollution" means the introduction by human activities, directly or indirectly, of substances or energy into the atmosphere resulting in deleterious effects on human life and health and the Earth's natural environment.

[97] "Atmospheric degradation", includes air pollution stratospheric ozone depletion, climate change and any other alterations of the atmospheric conditions resulting in significant adverse effects to human life and health and the Earth's natural environment.

[98] Iran in the Fifty-Fourth Annual Session, 2015.

[99] China and India in the Fifty-Fourth Annual Session, 2015.

[100] "The atmosphere is a natural resource essential for sustaining life on Earth**,** human health and welfare, and aquatic and terrestrial ecosystem, and hence the degradation of the atmospheric condition is a common concern of humankind."

It also needs to be made clear that the principle of common concern does not create specific substantive obligations of States to protect the atmosphere. A Member State has pointed out this when it stated that it "agrees with the view of some States the precise legal implications of this new concept are difficult to define."[101]. Another Member State suggested that the Rapporteur needs to adduce more legal reasoning and justification to propose the concept of atmosphere (in draft article 3) as a common concern of mankind for the concept is highly debated and less accepted in other areas of international law.[102] However, it certainly supplements the creation of two general obligations: one is the general obligation of States to protect the atmosphere, and the other the general obligation of States to cooperate with each other.

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

Immunity of State Officials from Foreign Criminal Jurisdiction

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

Within the Commission and amongst the Member States of AALCO, there has been a broad degree of consensus on the scope of officials to be covered under the topic in the light of state practice and recent judicial decisions. They are of the firm view that Heads of State, Heads of Government and Ministers of Foreign Affairs who constitute the so called "troika" of state officials enjoy personal immunity *"rationae personae"*. However, views have also been expressed (in the past) in favour of extending immunity *rationae personae* to certain other high level officials representing the State in its international relations whose functions involved a substantial amount of foreign travel on behalf of the state. There are some States which do not subscribe to this view.

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

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

[101] Iran in the Fifty-Fourth Annual Session, 2015.
[102] India in the Fifty-Fourth Annual Session, 2015.

- the question of who is considered an 'official' , and
- the subjective or personal scope of immunity *ratione materiae*[103].

Based on her findings, the Special Rapporteur proposes two draft articles on the notion of 'State official and the personal scope of immunity *ratione materiae*[104]. Following an analysis of relevant national and international judicial practice, treaty practice and the previous work of the Commission, the Special Rapporteur proposed two draft articles and the subjective scope of immunity *ratione materiae*. It was envisaged that the material and temporal scope of immunity *ratione materiae* would be the subject of consideration in the Special Rapporteur's next report.

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

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

Comments of AALCO Member States

A view was expressed with respect to persons enjoying immunity *ratione materiae,* that the Commission should focus its work on identifying the term "official" as such term has not yet been defined in international law, but defined differently under domestic laws of different States. Hence, the ILC should take into due consideration the practice of States emanating from their

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

[104] The report further considered a linguistic point concerning the choice of the most suitable term for designating persons who enjoy immunity, given the terminological difficulties posed by the term "official" and its equivalents in the various languages, and suggested instead that "organ" be employed.

domestic laws. It would be a challenge to draw up a list of all the office or post holders who would be classified as officials that all States would agree on.[105]

Another delegation stated that immunity *ratione materiae* should not be extended to individual or legal persons who act for the States under a contract with their governments or agencies as there is no adequate legal basis to extend the scope of the immunity to non-officials such as private contractors who are not in a position to exercise "inherently governmental authority". Any exception to immunity must not undermine the immunity of the Head of State whose Constitutional role is merely ceremonial and who has no *de facto* authority to direct or influence an act or omission which constitutes a core crime proscribed by international law.[106]

According to another State, the definition of 'state official' as any individual who represents the State or who exercises State functions' is a viable one for it covers both the representative and functional characteristics of such officials and that the representation by an official of a State or his exercise of state functions should be interpreted in a broad sense and on a case by case basis in accordance with constitutional system, laws and regulations and the practical situation of his state.[107]

It was also mentioned that High-ranking officials taking part in international exchanges and exercising functions directly on behalf of states should also be accorded immunity *ratione personae* in addition to heads of the State and Government and Foreign Ministers. On exceptions, immunity of state officials is procedural in nature and it does not exempt them from substantive liabilities. Hence, they shall be still criminally accountable without prejudice to the immunity from foreign criminal jurisdiction through measures such as prosecution by their own national courts and waiver of their immunity.[108]

In sum, it needs to be stressed here that the topic revolves around two major values protected by international law, namely immunity of State officials and the obligation of avoiding impunity, and that to serve the interests of the International Community would require a balance being struck between State sovereignty, the rights of individuals and the need to avoid impunity for serious crimes under international law. The challenge here is the need to strike an appropriate balance between several fundamental principles.

Mr. Chairman,
Barring these topics, few countries had also made comments on other agenda items of the ILC. For instance, in relation to the "***Protection of Environment in relation to Armed Conflict***" and the Preliminary Report presented by the Special Rapporteur, it was mentioned that further elaboration of environmental obligations in armed situations of armed conflicts might be warranted and that the study can provide an opportunity to fill the existing gaps in IHL concerning the protection of environment. They quoted the example of article 56 of 1977 First Additional Protocol to the Geneva Conventions. The exclusion of oil platforms and other oil

[105] Thailand in the Fifty-Fourth Annual Session, 2015.
[106] Thailand in the Fifty-Fourth Annual Session, 2015.
[107] China in the Fifty-Fourth Annual Session, 2015.
[108] China in the Fifty-Fourth Annual Session, 2015.

production and storage facilities especially built in continental shelf has proven to run counter to the purposes of the drafters of the Protocol to protect the environment.[109]

The Commission needs to come up with a definition of the term "armed conflict" in order to facilitate the consideration of the work. The expansion of the scope of the definition of armed conflict so as to include non-international armed conflict seems problematic. The ILC would have to consider the legal obligations of non-state actors which may lead to expound upon a definition already fraught with ambiguities and disagreements and that such an endeavour would also entail further attempts to determine the threshold of non-international armed conflicts. Both of these require the modification of relevant provisions of international law of armed conflicts far from the purpose of the work at hand.[110]

While congratulating the ILC for the conclusion of the topic of ***"Protection of Persons in the Event of Disaster"*** and the first reading of the draft articles, it has been remarked that the term "external assistance" should be defined with great caution and that "other assisting actors" should not include domestic actors who offer disaster relief assistance or disaster risk reduction.[111]

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

Mr. Chairman,

I would also like to take this opportunity to convey the message that this will be my last address at the ILC (as the Secretary-General) as my tenure as the Secretary-General of AALCO comes to an end next year. During my tenure, I have tried to improve the institutional relationship between ILC and AALCO and in my humble view; I have been successful at least to a certain extent in this endeavour. For the past several years, we have had "Half-Day Special Meeting on Selected Items on the Agenda of the ILC" at our Annual Sessions (mandated by the resolution on the

[109] Iran in the Fifty-Fourth Annual Session, 2015.
[110] Iran in the Fifty-Fourth Annual Session, 2015.
[111] Thailand in the Fifty-Fourth Annual Session, 2015.

agenda item adopted at the 50th Annual Session held at Colombo in 2011) and we have also had few Inter-Sessional Meetings solely devoted to addressing agenda items on the ILC. I have also tried to bring the Special Rapporteurs from the ILC to attend our Half-Day Special Meetings on ILC as Panelists. These efforts too have been successful to a significant extent.

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

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

I thank you.

ANNEX II

SECRETARIAT'S DRAFT
AALCO/RES/DFT/55/SP 1
20 MAY 2016

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

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

Having considered the Secretariat Document No. AALCO/55/HEADQUARTERS(NEW DELHI) /2016/SD/SP 1,

Having heard with appreciation the introductory statement of the Secretary-General and the views expressed by the Member States during the Half-Day Special Meeting on "Selected Items on the Agenda of the International Law Commission" held on 19th May 2016 at New Delhi,

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),

Recognizing the significant contributions 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. **Recalls** with appreciation the work of the Informal Expert Group on Customary International Law, and the fact that its final report has been sent to the ILC for the consideration of its Special Rapporteur on the subject Mr. Michael Wood;

3. **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 during its Fifty-Fifth Annual Session;

4. **Also requests** the Secretary-General to continue convening AALCO-ILC meetings in future; and

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