

**SUMMARY RECORD OF THE
FOURTH GENERAL MEETING
HELD ON THURSDAY,
6TH APRIL 2006, AT 2: 30 PM**

**H. E. Mr. Narinder Singh President of the
Forty-Fifth Session in the Chair.**

**Report on the work of the International
Law Commission at its Fifty-seventh
Session**

1. **Amb. Dr. Wafik Z. Kamil**, Secretary General of AALCO introduced the item on the topic contained in the Document No. AALCO/45/HEADQUARTERS SESSION (NEW DELHI)/2006/SD/S 1.

2. The Secretary General welcomed Professor Djamchid Momtaz, Chairman of the International Law Commission and Amb. Yamada, Member of the ILC. He said that the AALCO and the ILC had a long-standing tradition of being represented at each other's annual sessions. He brought to the attention of the Delegates that the AALCO and the ILC held a joint meeting in conjunction with the Meeting of the Legal Advisers of AALCO Member States in New York on 31 October 2005. The Chairman and eminent members of the ILC took part in this meeting and views were exchanged on some of the topics that were on the agenda of the Commission.

3. He informed that there were eight topics on the agenda of the fifty-seventh session of the Commission. On the topic of "Reservations to Treaties", the Commission considered part of the Special Rapporteur's tenth report and referred seven draft guidelines dealing with validity of reservations and the definition of object and purpose of the treaty to the Drafting Committee. The Commission also adopted two draft guidelines dealing with the definition of objections to reservations and the definition of objection to the late formulation or widening of the scope of a reservation together with commentaries.

4. As regards the topic "Diplomatic Protection", the Commission considered the Special Rapporteur's sixth report dealing with clean hands doctrine. On the topic of "Unilateral Acts of States" the Commission considered the eighth report of the Special Rapporteur, which contained the analysis of 11 cases of State practice and conclusions thereof. A Working Group on Unilateral Acts was reconstituted and its work focused on the study of State practice and on the elaboration of preliminary conclusions on the topic, which the Commission would consider at its next session.

5. He said that as regards the topic "Responsibility of International Organizations", the Commission considered the Special Rapporteur's third report proposing nine draft articles dealing with the existence of a breach of an international obligation by an international organization and the responsibility of an international organization in connection with the act of a State or another international organization. Further, the Commission adopted nine draft articles together with commentaries.

6. With regard to the topic "Fragmentation of International Law", the Commission held an exchange of views on the topic on the basis of a briefing by the Chairman of the Study Group on the Status of work of the Study Group. The Study Group envisaged that it would be in a position to submit a consolidated study, as well as a set of conclusions, guidelines or principles to the fifty-eighth session of the Commission in 2006.

7. As regards the topic "Shared Natural Resources", the Commission considered the third report of the Special Rapporteur, which contained a complete set of 25 draft articles on the law of transboundary aquifers. The Commission also established a Working Group on Transboundary Groundwaters, chaired by Mr. Enrique Candioti to review the draft articles presented by the Special Rapporteur taking into account the debate in the

Commission on the topic. The Working Group reviewed and revised 8 draft articles and recommended that it be reconvened in 2006 to complete its work.

8. The Commission has taken up consideration of two new topics from this year onwards. These are: Effects of Armed Conflicts on Treaties and Expulsion of Aliens. On the topic “ Effects of Armed Conflicts on Treaties” the Commission considered the first report of the Special Rapporteur on the topic, presenting an overview of the issues involved in the topic together with a set of 14 draft articles in order to assist the Commission and Governments with commentaries including providing State practice. The Commission also considered the Special Rapporteur’s preliminary report on Expulsion of Aliens.

9. Before concluding he drew attention of the delegates to the information requested by the ILC on many of its agenda items. The information provided by States would be of significant help to the Commission in formulating its work. The feedback and information on State practice of AALCO Member States could be of immense help in enabling the Commission to take into consideration the views of different legal systems. Thus, he requested the Delegations to submit specific comments and observations on the agenda items to facilitate the work of the Commission.

10. **Prof. Djamchid Momtaz**, Chairman of the ILC presented the report of the ILC on the work done by it during the second part of its 57th Session held in Geneva from 11 July to 5 August 2005. He informed that there were five substantive topics on the agenda of this part of the 57th session. These included: Diplomatic protection; Expulsion of Aliens; Unilateral acts of State; Reservations to Treaties, and Fragmentation of International Law: difficulties arising from the diversification and expansion of International Law. He then briefly highlighted each of these topics.

11. Regarding the topic of Diplomatic protection, the Special Rapporteur John Dugard introduced his sixth report during this part of session on his sixth report on clean hands doctrine. The Special Rapporteur noted in his report that relatively few cases could be cited in favour of the applicability of the clean hands doctrine in the context of diplomatic protection. He noted that while the importance of the clean hands doctrine in international law could not be denied, the question before the Commission was whether it was sufficiently closely linked to the topic of diplomatic protection to warrant the inclusion in the draft articles on the topic. His conclusion was that it did not obviously belong to the field of diplomatic protection and that it should therefore not be included in the draft articles. General support was expressed for the Special Rapporteur’s conclusion.

12. Prof. Momtaz informed that during the debates on the topic, the question had been raised whether a State was under an obligation to pay over to injured individual money that it had received by way of compensation for a claim based on diplomatic protection. On the basis of a well-established rule, the State was not obliged to transfer money to the injured person. The Special Rapporteur had not detected a general willingness on the part of the Commission to engage in progressive development in respect of the payment of monetary compensation received by State. His preference, therefore was neither to expressly codify what he regarded as an unfortunate principle nor to attempt to progressively develop a new principle that would be unacceptable to States, but rather to leave the matter open in the draft articles so as to allow for further development in the law.

13. On the topic on Expulsion of aliens, Prof. Momtaz apprised that the Commission had before it the preliminary report of the Special Rapporteur. In the Special Rapporteur’s views, the concept of the “right to expel was a customary international

law right inherent in the sovereignty of States". The central problem of the subject concerned reconciling the right to expel with the requirement of international law, in particular with the rules of human rights law. The concept of aliens would include persons residing in the territory of a State of which they did not have nationality. The topic would also cover refugees, asylum seekers, stateless persons and migrant workers in the definition of aliens. As regards questions to be excluded from the topic, it was suggested that the issues of refoulement, non-admission of asylum seekers or refusal of admission for regular aliens should not be considered. It was maintained that an attempt by the Commission to address questions relating to immigration or immigration policy would negatively affect the prospects of Commission's work. Nevertheless, some members of the Commission proposed to include in the study this question of the expulsion of aliens in an irregular situation, specifically those who had been residing for a long time in a territory of a State seeking to expel them. Regarding grounds used to justify expulsion, many municipal systems provided that the authorities of a State could deport without having to provide reasons. The Special Rapporteur indicates in his report that the State resorting to expulsion was bound to invoke the grounds used to justify it. Doubts were expressed as to this requirement by some members of the Commission.

14. On the topic of Unilateral Acts of States, Prof. Momtaz informed that the Special Rapporteur presented his eighth Report. He mentioned the difficulties of identifying unilateral act as source of international law. It went without saying that there were political acts, which States did not intend to enter into legal obligations. For this reason, reaching a common position on the definition of unilateral act did not seem easy.

15. The first part of the Report offered a fairly detailed presentation of 11 examples

or types of unilateral acts. The second part of the Report presented the conclusion drawn from the cases discussed. The Special Rapporteur concluded by suggesting that he would submit general conclusions on the topic in 2006. The starting point of such conclusions could be that international law attributed certain legal effects to acts freely undertaken by States without other State necessarily being involved. The conclusion could also address the form of unilateral acts, their effects, their considerable variety, their relationship to the principle of good faith, when they produce legal consequences.

16. Regarding the topic Reservations to Treaties, Prof. Momtaz reported that the second part of the Report addressed the question of the validity of reservations and the concept of the object and purpose of the Treaty. The Chapeau of article 19 of the Vienna Convention on the Law of Treaties established the general principle that the formulation of reservation was permitted. However, the freedom to formulate a reservation was not an absolute right. In case where the treaty did not prohibit the reservation, the criterion of compatibility with the object and purpose of the treaty would limit the freedom to formulate reservations under article 19.

17. Prof. Momtaz said that the Special Rapporteur believed that the object and purpose were one and not two separate concepts and it was a customary norm of international law. The definition of the concept of the object and purpose was without doubt one of the most sensitive issues of the law of treaties and a highly subjective one. The Special Rapporteur believed that the object and purpose of the treaty were not fixed at the time the treaty was concluded and that the subsequent practice of the Parties should be borne in mind. This view had not been endorsed by the Commission.

18. Prof. Momtaz drew the attention of the delegations to two guidelines proposed by the Special Rapporteur.

Guideline 3.1.5.

“For the purpose of assessing the validity of reservations, the object and purpose of the treaty means the essential provisions of the treaty which constitute its *raison d’être*”.
End of quotation.

The Special Rapporteur did not believe that it was possible to go much further. Some members of the Commission argued that it was the object and purpose of the treaty that made it possible to say what the essential provisions of the treaty were and not vice versa.

Guideline 3.1.7 regarding vague and general reservation:

“A reservation worded in vague, general language which does not allow its scope to be determined is incompatible with the object and purpose of the treaty”.

19. Prof. Momtaz further mentioned that some States consider that the reservation made by the Muslim countries regarding the compatibility of the provisions of human rights treaty with the Sharia was considered to be vague and general.

20. On the topic of Fragmentation of International Law Prof. Momtaz noted that the Study Group continued the examination of a series of studies. The Study Group reaffirmed its approach to focus on the substantive aspects of fragmentation in the light of the Vienna Convention on the Law of Treaties, while leaving aside institutional fragmentation. The Group reiterated its intention to attain an outcome that would be concrete and of practical value, especially for legal experts in foreign offices and international organizations. The Study Group reaffirmed its intention to prepare for adoption by the Commission in 2006 a collective document consisting in two parts. The first part would consist of a description and analysis of the topic from the point of view of the Vienna Convention on the Law of Treaties on the basis of the individual study submitted by individual members of

the Study Group. The second part would present a set of practical guidelines to help thinking about and dealing with the issue of fragmentation in legal practice. This document would be helpful in providing resources for judges and administrators coping with questions such as conflicting or overlapping obligations emerging from different legal sources.

21. Prof. Momtaz informed that the Commission decided that the topic “The obligation to extradite or prosecute (*aut dedere aut judicare*), which was already included in the Commission’s long-term program of work, be included in its program. The Commission decided to appoint Mr. Zdzislaw Galicki as the Special Rapporteur for this topic.

22. The Meeting was thereafter adjourned.

23. The Delegates thereafter proceeded for the Inauguration of the new Permanent Headquarters Building of the Asian-African Legal Consultative Organization. His Excellency Mr. Anand Sharma, Minister of State for External Affairs, Government of India, inaugurated the Building. Mr. Sharma and Secretary-General Amb. Kamil made an address on the occasion.