STATEMENT OF H. E. AMB. DR. WAFIK ZAHER KAMIL, SECRETARY-GENERAL OF THE ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION (AALCO), DURING THE FIFTY-NINTH SESSION OF THE INTERNATIONAL LAW COMMISSION (ILC).

JULY 2007

Mr. Chairman, Distinguished Members of the Commission, Ladies and Gentlemen,

1. It is indeed my privilege and honour to address the Fifty-Ninth Session of the International Law Commission (ILC), which is also the first session of this quinquennium.

2. At the outset I take this opportunity to congratulate all the Members of the ILC on their election and reelection to this august body of distinguished jurists. It is also a matter of pride for the Organization that I represent as 12 out of 34 members of the Commission are coming from its Member States.

3. Mr. Chairman, further I would like to avail myself of this opportunity to extend heartiest congratulations on behalf of the AALCO and on my own behalf on your election as the Chairman of this august body for the present session. Mr. Chairman, I am confident that under your able leadership and with your vast experience, the current session will preserve and uphold the traditions and fulfill the functions of the Commission towards the progressive development and codification of international law.

4. The AALCO continues to attach great importance to its traditional and longstanding relationship with the Commission. Mr. Chairman, it is the statutory obligation for AALCO to examine those subjects that are under the consideration

of the Commission and thereafter to forward the views of the Member States to the Commission. Fulfillment of this mandate over the years has helped to forge closer relationship between the two organizations. It has also become customary to represent each other during our respective annual sessions.

5. Mr. Chairman, please allow me to express my sincere appreciation and gratitude on behalf of the AALCO for the presence of Mr. Narinder Singh, who is also the former President of AALCO, as the representative of the ILC at the Forty-Sixth Annual Session of our Organization and apprising the work of the Commission. Mr. Chairman, the AALCO on its part will always appreciate the representation of the Commission at our annual sessions.

6. Mr. Chairman, since I last addressed the Commission in July 2006, AALCO undertook several activities in the field of international law. However, due to paucity of time I just briefly mention about the Forty-Sixth Annual session of AALCO. The Forty-Sixth Annual Session of AALCO took place in Cape Town, South Africa from 2 to 6 July 2007. The Session elected H. E. Ms. Brigitte Sylvia Mabandla, Minister for Justice and Constitutional Development, Government of the Republic of South Africa as its President and Mr. Eddy Pratomo, Director General of the Legal Affairs and International Treaties, Ministry of Foreign Affairs, Republic of Indonesia, as Vice President. Along with deliberations on agenda items, two half day special meetings took place on two different topics.

7. During the deliberations many delegations offered elaborate comments on the work of the Commission. The Session had also mandated me to bring to the attention of the Commission the views expressed by AALCO Member States on the work of the Commission.

8. Thus, Mr. Chairman, I will now begin with the topic '**Diplomatic Protection**'. There was a general appreciation for the work of the Commission which resulted in the adoption of then draft articles on second reading. While offering specific comments one Delegate made the following observations.

-The draft Articles on Diplomatic Protection were concerned only with the rules governing the circumstances in which diplomatic protection might be exercised and the conditions that must be met before it could be exercised. They did not seek to determine the ways through which a person might acquire the nationality of a State. Also it had not been the Commission's mandate to enumerate the factors establishing nationality.

-In the draft Article 4, the Commission had eloquently stated the right of States to determine who their nationals were. He said that his Delegation believed that States, in exercising this right, should avoid adopting laws, which increase the risk of dual nationality, multiple nationality or statelessness.

-Regarding draft Article 7, he said that determination of nationality of a person was a predominant one and a subjective question too. There were no objective criteria for such determination as confirmed by the Commission in Paragraph 5 of the commentary to the Article. There were no decisive factors, to be taken into account in deciding which nationality was predominant. This Article was not based on customary international law. It was, rather, a premature step for progressive development of International law. In his Delegation's opinion, customary international law recognized the rule of non-opposability of the diplomatic protection against a State in respect of its own nationals.

-He informed that the report of the Commission had invoked the awards of the Iran-United States Claims Tribunal as recent sources for demonstration of the

evolution of the rules of international law in the field of diplomatic protection. He said that as reiterated before, they did not share this opinion. The awards of the majority of that arbitration body in dual nationality matters concerned principally; the law of treaties and the interpretation of the Algerian Declaration signed by two Governments in 1981 rather than diplomatic protection. Moreover, most disputes before this tribunal including all of those brought by claimants having dual nationality involve a private party on one side and a Government or a Government-controlled entity on the other, and many involved primarily; issues of municipal law and general principles of law. Consequently, the inclusion of such a controversial Article in the final text yielded in depriving more interested States from approving the outcome instrument on this topic.

-Extending diplomatic protection to corporations as mentioned in chapter III in most cases was not necessary as the circumstances in which the corporations perform their activities and the procedures for settlement of disputes was largely regulated by the bilateral and multilateral treaties signed between and among States.

-About the undue delay referred to in Article 15 Subparagraph (b), he believed that sluggish proceeding might not *ipso facto* be considered as a reason for the exception of the exhaustion of local remedies. In some countries, due to various unavoidable grounds, judicial proceedings were more time-consuming in comparison to other countries. The Judicial authorities of a State could not and should not treat their own citizens and foreign nationals differently while rendering justice, as equity before the law a nd non-discrimination principles were generally accepted.

9. Another Delegate welcomed the adoption of 19 draft articles on diplomatic protection on second reading by the ILC at its fifty-eighth Session. He said that in

their view, the draft articles had summarized and further developed international law, and they were generally satisfied with the draft articles. Their Delegation had also taken note that some elements of the draft were not yet corroborated by State practice. He was of the opinion that time was not ripe now to adopt a legally binding legal instrument based on those draft articles.

10. One Delegate welcomed the Special Rapporteur's conclusion that the clean hands doctrine should not be included in the draft articles of Diplomatic Protection.

11. Another Delegate said that the scope of draft Article 19 (the rule on the exhaustion of local remedies, actions or procedures other than diplomatic protection and recommended practice) was of great concern. He expressed the hope that draft Article 19 would be excluded from the set of draft articles, whilst bearing in mind that it was the consistent practice of his country to respond to legitimate requests for diplomatic protection from its nationals abroad.

12. On the topic of '**Reservation to Treaties**', one Delegate observed that the draft guidelines adopted so far by the ILC were a significant contribution to the codification and progressive development of international law. He said that his delegation held the view that sovereign states had the right to make reservations, which was stipulated by the Vienna Convention on Law of Treaties. Forbidding reservations was only an exception to general rule of allowing reservations. The practice of restricting reservations in certain regions could not be universally applied. There should be a balance between the legal security of treaty relations and the freedom to conclude treaty.

13. Another Delegate also supported the work of the Commission with regard to the topic of reservations to treaties. He, however, opined that in view of the

complexity of the issues involved they would prefer that the position in the Vienna Convention be maintained, namely that it was the prerogative of the Signatory States to accept or reject the reservation and this was a sovereign decision for each State to determine. If Signatory States did have queries regarding the validity of the reservation these could be raised through the diplomatic channel.

14. On the topic of '**Unilateral Acts of States**' one Delegate observed that they supported the codification of the topic as a means of providing the international community with guidelines concerning the extent to which States might be considered bound by their own voluntary commitments. In order to be proactive on the issue, the Commission might have to consider limiting its scope by concentrating on certain categories of acts, rather than to proceed on the codification of "Unilateral Acts of States" in general.

15. On the topic '**Responsibility of International Organizations**', one Delegate offered comments on draft articles of chapter V (Articles 17-24) on circumstances precluding wrongfulness.

-He said that although the Special Rapporteur had pointed out in paragraph 5 of the report that the present analysis followed the general pattern adopted in the articles on responsibility of states under the heading "circumstances precluding wrongfulness", he said that his Delegation believed that, in spite of some similarities, the position and functions of the international organizations and States should be differentiated in general. Accordingly, circumstances precluding wrongful acts of the State and that of the international organizations should be distinguished from each other.

-On draft article 17, he raised a question on the elements constituting "valid consent". Validity of the consent of a State or an international organization should

be based on their will and without any pressure and/or violation of its sovereignty and independence. It goes without saying that every consent should be principally taken as valid. Also it was significant to determine the limits of consent in objective manner.

-The Delegate observed that considerable inconsistencies exist in section on self-defense which should be corrected; for example, draft Article 18 did not completely reflect the content of paragraphs 15-17 of the report. He said that his Delegation was of the view that a clear distinction must be made between "self-defense" and "lawful use of force" in reasonable implementation of the purposes of a given mission. Furthermore, draft article 18 appeared to be limited to self-defense as used in Article 51 of the United Nations Charter. In fact the latter Article was exclusively related to States and it didn't concern international organizations in any way. To put it another way, the draft article on self-defense seemed to contain elements of progressive development of International law, since no one had ever mentioned or suggested that customary law referred in any way to the activities of international organizations. Given that, the reference, even indirectly, to Article 51 would not be necessary.

-As regards the principle of necessity, draft article 22 articulated an overall approach that necessity might not be invoked by international organizations for precluding the wrongfulness. However, he said, in their view, there were ambiguities in some terms such as "essential interest" or "international community". In other words, the special Rapporteur's elaboration in paragraphs 35-42 could not give any objective definition to or decisive factor for determination of above said concepts.

-He said they agree with the Commission in draft article 23 on compliance with peremptory norms of international law. Having considered peremptory norms as obligatory norms, international organizations should comply with them.

-About the first question on paragraph 28 of the ILC report, he said they were of the view that, when an organization was not in a position to provide compensation to the injured party for its internationally wrongful act, the States parties to the concerned organization, to the extent affecting the decision resulting the wrongful act, should try to offer the due compensation, taking into account the respective rules and regulations of the organization.

16. Another Delegate expressed strong support for the work of the Commission on the responsibility of international organizations. Successful completion of this work would be comparable to the Commission's accomplishments in the Vienna Conventions on the Law of Treaties, which established a single system of inter-State treaties, as well as treaties allowing for the participation of international organizations.

-He said that the responsibility of international organizations and State responsibility were the two pillars of international responsibility for internationally wrongful acts. He believed that the responsibilities of States and international organizations vis-à-vis internationally wrongful acts should be determined within a basically uniform system, analogous to the relationship between inter-State treaties and treaties between States and international organizations or between international organizations. Hence, he said, we must adhere to the basic framework of common headings and provisions, paralleled by revisions to and addition of provisions reflecting the distinctive qualities of each international organization. The four reports on the responsibility of international organizations preserve this primary structure,

but, he said, we could not rule out the possibility that this uniformity might eventually be undermined. He urged the ILC to be aware of this possibility and do its best to avoid it.

17. Another Delegate welcomed the draft articles on "circumstances precluding wrongfulness" or the "waiver article" by the ILC at its Fifty-eighth Session. The delegation in general endorsed the draft articles and at the same time, believed that the Member States that had exercised the key influence on the international organization to commit wrongful acts should be held accountable for such acts and the responsibility due from Member States should not be shifted simply to International Organizations. International Organizations should not use the term "necessity" as an excuse for waiver of its responsibility. An international Organization and its Member State should be held responsible jointly for the wrongful acts, which the former authorizes the latter to commit.

18. On the topic '**Shared Natural Resources**', one Delegate said his government welcomed the timely completion of the first reading of the set of 19 draft articles on the law on transboundary aquifers by the Commission last year and could generally support the principles embodied in these draft articles.

19. Another Delegate while welcoming the adoption by the ILC of the draft articles of "The Law of Transboundary Aquifers" on the first reading, observed that it was better not to prejudge the final form of the draft articles at the present stage, and the ILC should be cautious regarding the study of oil and natural gas.

20. As regards the topic '**Effects of Armed Conflicts on Treaties**', one Delegate offered a few comments on the second report and seven draft Articles presented by the special Rapporteur. He said that it should be noted that there were several conventions and legal instruments which were related to the present topic such as,

the 1969 Vienna Convention on the Law of Treaties, the 1986 Vienna Convention on the law of Treaties between States and International Organizations or between International Organizations, and draft Articles on Responsibility of States for Internationally Wrongful Acts adopted by the Commission at its fifty-third session (2001). Given that, the Commission's mandate in this regard, was to supplement the existing international instruments.

-He stated that they approve the point made by special Rapporteur in Paragraph 4 of his second report, generally supported by States, that the topic was not part of law relating to the use of force. He believed, rather, that the topic was in the realm of several domains of international law, including law of treaties, international humanitarian law, state responsibility and self-defense.

-Non-international armed conflicts, he said, might adversely affect the ability of the concerned States to fulfill their treaty obligations. However, due to the purposes of the present topic, the inclusion of internal conflicts in draft Article 2 Subparagraph (b) would broaden the scope of the term "armed conflict". It was noteworthy that draft Articles on Responsibility of States for Internationally Wrongful Acts had provided provisions in this regard in Chapter V relating to circumstances precluding wrongfulness.

-The issue of military occupation and its effects of the treaties was a subject on which he appreciated the Special Rapporteur to pay attention to in his reports. However, it was not something to be covered in the definition of term "armed conflict".

-He said they confirm the inclusion of intention referred to in draft Article 4**.** The intention of the State parties to a specific treaty at the time of its conclusion was a fundamentally important factor in determining the validity of a treaty in case of an

armed conflict. The intention of parties at the time when the treaty was concluded might be understood through the text of the treaty including its preamble and annexes, and also from *travaux preparatoires* of the treaty and circumstances of its conclusion.

-The indicia of susceptibility to termination or suspension of treaties in case of armed conflict in draft Article 4**,** did not make any distinction between the State resorting to unlawful use of force contrary to the Charter of United Nations and the State which exercised the inherent right of self-defense. To put the State using force unlawfully and the State defending itself on an equal footing would be tantamount to recognizing an unlawful act. As the Institute of International Law had rightly put in Article 7 of the resolution adopted on 28 August 1985 about "The Effects of Armed Conflicts on Treaties", the States should be entitled to suspend, in whole or in part, the operation of a treaty that was incompatible with their inherent right of self-defense. Such a distinction should be taken into account in the whole draft articles.

-He said that it was their firm belief that the integrity and continuity of international treaties were the two basic principles of law of treaties that should be taken into account in dealing with the present topic. That is why they insisted that the draft Article 6 should be sustained. He said they took note of the Special Rapporteur's proposal to delete the draft Article 6 from the proposed set of draft Articles. However, he said they believed that the Article could either be saved intact or incorporated into draft Article 4 in redrafting.

-With regard to draft Article 7, the enumerated categories of treaties might be reexamined with a view to extracting common criteria for determining the treaties that should be continued in operation during an armed conflict. One such criterion was *erga omnes* obligations; treaties that encompass *erga omnes* obligations of

States should be sustained during and after armed conflict and could not be suspended or terminated in such a case. Therefore, he said that this be inserted in the draft Article 7.

21. Another Delegate observed that the question of the effects of armed conflicts on treaties was an unsettled and unclear area of international law. The Vienna Convention on the Law of Treaties made it clear by its Article 73 that it shall not prejudge the question. Accordingly, expeditious formulation of draft articles that would provide practical guidelines to make a decision whether a particular treaty continued to operate as a whole or in part in time of an armed conflict was called for. He said that his government recognized that the question of effects of armed conflicts on treaties was an extremely difficult one. The doctrines and State practices before the Second World War were no longer much relevant. States had abandoned the traditional warfare and shifted towards armed conflicts under the cover of police action, self-defense or humanitarian intervention. On the other hand, there were emerging and expanding legal regimes, such as human rights and environment that were required to be operative also in armed conflicts. He said that they expect the Commission to engage in practical analysis of the treaties of various categories.

22. Another Delegate said that on the issue of *Ipso Facto* Termination or Suspension, they opposed the Rapporteur's proposal to replace "ipso facto" with "necessarily", on the ground that "necessarily" was less incisive. The Delegate also agreed that the Draft Articles should not rule out the possibility of automatic suspension or termination in appropriate cases. The Delegate said that although they acknowledged the difference between the concept of termination and suspension, they viewed that the exigencies of particular situations might render difficulties in any attempt to identify or apply the two concepts.

-The Delegate further informed that with regard to the issue of the Relationship with other Branches of International Law, their position was in line with the principle enunciated by the International Court of Justice, in its advisory opinion on the Legality of the Threats of Use of Nuclear Weapons, to the effect that while certain human rights and environmental principles did not cease to apply at the time of armed conflict, their application was determined by the applicable *lex specialis,* namely, the law applicable in armed conflict which was designed to regulate the conduct of hostilities. They were also of the position that to allow *lex specialis* to expressly override or apply during situations of armed conflict was accepted provided that such *lex specialis* included not just international humanitarian law treaties but also any bilateral treaties concluded between the parties to the conflict.

23. One Delegate believed that the "armed conflicts" in the draft should be limited to "international armed conflicts". "Treaties" specified in the draft articles should cover the treaties concluded by states and international organizations. While judging whether a treaty was suspended or terminated because of armed conflicts, one should take into consideration the intention of state signatories at the time of concluding the treaty, the implementation of the treaty, the situation after the outbreak of armed conflicts and the nature, purpose and the object of the treaty. In their view, the legitimacy of the use of force affected treaty relations, and that issue should be further studied

24. Another Delegate commented on three particular aspects of the draft articles presented by the Special Rapporteur, namely, draft articles 2 (b), 3, and 4.

-Referring to draft article 2 (b) which defined the term "armed conflict", the Delegate observed that it might be better to have one and a broader comprehensive definition and must be left to the one who applies the draft article,

the task of determining on a case by case basis. He also noted that a possible way around this special issue might be to adopt a simpler formulation, stating the articles applied to armed conflicts whether or not there was a declaration of war.

-On draft article 3, on the termination or suspension of a treaty during an armed conflict, he said that it appeared that armed conflict usually led to the suspension of treaties between States. The parties to an armed conflict were not obviously in a position to comply with the rules of a treaty concluded with the actual or former enemy. In this regard, he believed that a general principle of continuity in such cases sounded rather unrealistic.

-He pointed out that in draft article 4, the Special Rapporteur had elevated the "intention" of the parties as the main criterion for the determination of suspension or termination of the treaties. He stated that they considered that there was a need to examine the question of intention further, as well as other possible criteria. He suggested that the Commission should particularly consider other criteria which should be determined in accordance with articles 31 and 32 of the Vienna Convention on the Law of Treaties as well as the nature of the armed conflict.

25. On the topic '**Obligation to Extradite or Prosecute (*aut dedere aut judicare*)**', one Delegate said that his government felt that we must take a cautious approach, recognizing the treaty basis in force of the obligation to extradite or prosecute. While it was important to establish international network not to allow safe haven to offenders of serious international crime, we must bear in mind the cardinal principles well established in criminal justice. These principles were relevant, for instance, to constraints on extradition based on sovereign criminal jurisdiction of the requested State and the human right of the accused, to avoid miscarriage of trial and to the independence of prosecution which would require

more guarded formulation, namely to “submit the case to the competent authorities for the purpose of prosecution” as opposed to an outright “obligation to prosecute”.

26. Another Delegate supported the proposal for a thorough and detailed analysis of the link between *Aut Dedere Aut Judicare* and the principle of Universal Jurisdiction. The Delegate supported the study of ILC on certain types of offences in relation to which these obligations arise, namely international crimes.

-The Delegate pointed out that at this juncture, they had reservation on the proposal to introduce the “triple alternative” doctrine as there was no provision in their domestic law providing for such practices. The Delegate however said that in view of the preliminary stage of the study and without prejudice to a final decision on its legal form, they supported the proposal to formulate draft rules concerning the concept, structure and operation of the obligation.

27. Another Delegate underlined that a major obstacle to achieving the objective of the obligation to extradite or prosecute was the lengthy extradition proceedings in some countries. This might result in the expiry of the statute of limitation for the prosecution of the alleged offender which consequently would bar the requesting State to institute its own legal proceedings or to submit the case to the requested State for prosecution. Accordingly, international community should endeavour to set standards for the conduct of extradition proceedings with a view to expediting the process. He further mentioned that in addition, the alleged offenders’ rights to due process of extradition should be ensured given that the extradition hearing did not have the purpose to consider the conviction but rather to surrender the alleged offender to be prosecuted in the Requesting country.

28. Concerning the topic of '**Expulsion of Aliens**', one Delegate said that there should be a balance between rights of States to expel and protection of rights of aliens. He stated that illegal immigrants also should be covered by that draft article.

29. Another Delegate said that that the topic was particularly relevant in the contemporary world where globalization had made transboundary movement of people more intensive. He shared the opinion of the Special Rapporteur that a State's right to expel aliens was a right which was inherent in the sovereignty of that state, but that this right could not be considered absolute. Furthermore, he believed that the Commission should be further encouraged to undertake a detailed consideration of existing customary international law and treaty law, including a comparative study of international case law both at the global and regional levels as well as of national laws and practice.

30. Mr. Chairman, briefly these were the views expressed by the Member States of our Organization at its Forty-Sixth session.

31. The Forty-Sixth Session of AALCO in a resolution adopted on this subject, appreciated the fruitful exchange of views on the items deliberated during the joint AALCO-ILC meeting in conjunction with AALCO Legal Advisers' Meeting held in New York in October 2006. The Member States of AALCO have requested me to continue convening such meetings in future. In continuation of this practice I look forward to your views and suggestions regarding the topics that may be taken up for discussion in the forthcoming AALCO-ILC joint meeting.

32. Mr. Chairman, the Secretariat of the AALCO will continue to prepare notes and comments on the substantive items considered by the Commission so as to assist the representatives of the Member States of the AALCO to the Sixth

Committee in their deliberations on the report of the Commission at its Fifty-Ninth Session. Further the item entitled "Report on Matters Relating to the Work of International Law Commission at its Fifty-Ninth Session" would thereafter be considered at the Forty-Seventh Session of the AALCO.

33. Mr. Chairman, allow me to take this opportunity to extend to you and to your distinguished colleagues, on behalf of the AALCO an invitation to participate at the Forty-Seventh Session of the AALCO. I shall in due course communicate to you the date and exact venue of the Session. Finally, Mr. Chairman, let me express my sincere gratitude to you and to the Commission for allowing me to address this august body.

Thank you