

**STATEMENT OF H.E. AMBASSADOR DR. WAFIK ZAHER KAMIL,
SECRETARY-GENERAL OF THE ASIAN-AFRICAN LEGAL
CONSULTATIVE ORGANIZATION (AALCO) MADE AT THE FIFTY-
FIFTH SESSION OF THE INTERNATIONAL LAW COMMISSION**

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

1. It is indeed a privilege and honour for me to address the fifty-fifth session of this august assembly of distinguished jurists.

2. Mr. Chairman, since I am taking the floor for the first time, I should like to avail myself of this opportunity to extend AALCO's congratulations and best wishes on your election as the Chairman of this body of eminent jurists. Mr. Chairman, we are confident that under your able stewardship the current session will preserve and uphold the traditions and fulfill the functions of the Commission in the progressive development and codification of international law.

3. The AALCO attaches great significance to its traditional and long-standing ties with the ILC. Mr. Chairman, one of the primary objectives of the AALCO, as envisaged in its Statutes is to examine questions that are under consideration by the ILC and to arrange for the views of the Member States to be placed before the Commission. This mandate has over the years helped forge closer bonds between the two organizations. In fact, it has now become customary for the Commission and the AALCO to be represented at the each other's annual sessions.

4. Mr. Chairman, may I take this opportunity to express on behalf of the AALCO our appreciation and thanks to Prof. Choung Il Chee for his presence as the Representative of ILC to the 42nd session of our Organization and appraising us on the developments during the first part of the 55th session of the Commission. I also wish to thank Amb. Chusei Yamada, Prof. Djamched Momtaz and Madame Xue Hanqin who in their capacity as representatives of their respective national delegations made valuable contributions to the deliberations on the work of the ILC. Mr. Chairman, the AALCO on its part appreciates the representation of the ILC at its annual sessions.

5. Mr. Chairman as to the activities of the AALCO since I last addressed the Commission in July 2002, permit me to state that the Forty-second Session of AALCO was held at Seoul, Republic of Korea from 16 to 20 June this year. The session elected H.E. Amb. Young Jin Choi, Chancellor, Institute of Foreign Affairs and National Security of the Republic of Korea as its President and Her Excellency Janet B. Mukwaya, the Hon'ble Minister of Justice and Constitutional Affairs of Uganda as its Vice-President.

6. At a more personal level, the session honoured me by unanimously endorsing my re-appointment as Secretary-General for a second term. On this juncture, I wish to assure the Members there that I would, as in the past, continue to foster and promote the institutional cooperation between the AALCO and the Commission.

7. As regards the substantive issues, the session considered the agenda

item entitled “Report on the Matters Related to the Work of the International Law Commission at its 54th Session”. Mr. Chairman, the items currently on the agenda of the International Law Commission are all of immense interest to the governments of our region and to the AALCO as a body in the service of its Member States.

8 During the deliberations on the ILC’s work at the Seoul session, many delegates offered elaborate comments on the general thrust of the Commission’s work on various topics as well as their country positions on individual draft articles. Mr. Chairman, the session has mandated me to bring to the attention of the ILC the views expressed by AALCO Member States on the work of the Commission. Accordingly, with your permission Mr. Chairman I will now seek to provide an overview of the views expressed by Member States on the work of ILC at its 54th Session.

9. I will begin with the topic “Diplomatic Protection”.

10. At a general level, most of the delegates supported the codification of the topic by the ILC. One delegate said that ILC’s work on the subject could advance the promotion of human rights.

11. As regards the scope of the draft articles, one view supported the Special Rapporteur’s conclusion that the draft articles should be confined to issues relating to “nationality of claims” and “exhaustion of local remedies”. Another delegate felt that the ILC’s work should be limited to precedents and practice. As to the extension of the draft articles to other specific situations, delegates offered the following comments:

- Delegates were against including in the draft articles the issue of diplomatic protection of crew members and passengers on ships, because it was already covered under Articles 94 and 292 of the 1982 UN Convention on the Law of the Sea.
- As regards the protection exercised by international organizations in respect of their officials, one delegate stated that as no link of nationality is involved, the issue does not fall within the domain of diplomatic protection.
- As regards situations when a State occupies, administers or controls a territory other than its own territory, the question of that State exercising diplomatic protection on behalf of the territory’s inhabitants should not be included in the draft articles as such an occupation of territory was illegitimate under international law.
- On the possibility of the exercise of diplomatic protection by an international organization administering a territory, such situations are typically temporary in nature and would better be considered in the context of the topic of the responsibility of international organizations.

12. With reference to the debate on the Calvo clause, it was pointed out that the Calvo clause is simply a contractual device, and no individual can renounce the protection of his or her State, since the right to exercise diplomatic protection belongs to the State. As the Calvo clause has been increasingly losing its practical usefulness in the globalized economy, the delegate saw no need to deal with it in the draft articles.

13. Most of the delegates welcomed the general thrust of draft article 3 and reiterated that diplomatic protection is a discretionary right of a State. A view was expressed that in view of the expanding capabilities of an individual to espouse his claim in any forum directly, the concerns of the individuals involved should not be stretched beyond the point where it becomes obligatory for the State of nationality to espouse the claims involved, ignoring political or other sensitivities of the State of nationality.

14. On the individual draft articles, the observations by the delegates could be summed up thus:

- ❖ One delegate felt that the current draft articles reflect the customary rules of international law, namely, diplomatic protection is the right of a State under international law, nationality link between the individual and the State is the prerequisite of diplomatic protection and the principle of continuous nationality, etc.
- ❖ As regards draft article 7, one delegate welcomed the commentary to this provision which states that the term “refugee” is not limited to refugees as defined in the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, but is intended to cover, in addition, persons who do not strictly conform to this definition, thus leaving the scope of the definition open for further expansion.
- ❖ Diplomatic protection through “peaceful settlement” as stipulated in draft article 1 was welcomed. Diplomatic protection should not be abused for justifying the use of force against a State. Exceptional cases of diplomatic protection a delegate said must be sanctioned by the UN Security Council under Chapter VII of the UN charter.
- ❖ General support was discernible for the rule of continuous nationality in draft article 4.
- ❖ Delegates welcomed the formulation of draft article 12 on exhaustion of local remedies. In the context of draft articles 12 and 13, it was observed that the position that the principle of “Exhaustion of local remedies” is part of customary international law and is central to the triggering of diplomatic protection must be stated as clearly and unambiguously as possible. Secondly, whether an available remedy was effective or not would raise questions about standards of justice employed in the State. As long as these are in conformity with the principles of natural justice, variations involved in standards should not give rise to a questioning of their effectiveness. Third, greater caution is required while dealing with exceptions to the exhaustion of local remedies rule, as any tilt in the balance would undermine the domestic jurisdiction on the State where the alien is located.
- ❖ As regards draft article 14 relating to the futility of local remedies as an exception to the rule of exhaustion of local remedies, the delegates who spoke on this point preferred option number 3 as proposed by the Special Rapporteur. A view was expressed that sub-paragraphs (e) and (f) of this provision relating to “undue delay” and “denial of justice should

be considered along with the question of futility of local remedies.

- ❖ As regards draft article 15 on burden of proof, it was felt that, this was a principle of evidence and is best left to the rules of procedure and need not be elaborated in a separate article.
- ❖ With respect to implied waiver, caution was advised, as it was difficult to devise any objective test for implied waiver.

15. Mr. Chairman, the Commission has sought views of States on the issue of diplomatic protection of shareholders. In this connection, the delegate of the Republic of Korea supported the basic rule enunciated by the ICJ in the *Barcelona Traction* Case that diplomatic protection on behalf of a company should primarily be exercised by the State of nationality of the company.

16. The delegate spoke of his country's reluctance to grant a right of diplomatic protection to the State of nationality of the majority of shareholders in a company. It could result in the discriminatory treatment of small shareholders, and it would be difficult to establish a quantitative standard for such a distinction. The delegate added that it would be difficult to reconcile the idea of the State of nationality of the majority of shareholders in a company having a "secondary" right to exercise diplomatic protection if the State of incorporation refuses or fails to do so, with the discretionary power of the company's state of incorporation.

17. Next I turn to the topic of "Reservations to Treaties".

18. As a general level delegates considered the Guidelines as useful and practical recommendations that States could consider in formulating, modifying and withdrawing their reservations to treaties. A view was expressed that the draft guidelines should be assessed in the light of their compatibility with the Vienna regime on the Law of Treaties. The practical utility of the guidelines, it was felt, would be enhanced if it were accompanied by model clauses.

19. Mr. Chairman, interestingly one of the delegates suggested that the Commission should shorten some of its commentaries since lengthy commentaries on non-controversial matters might give the impression that the law regarding reservation to treaties is less clear or more complex than it really is.

20. As regards late reservations, it was the view of a delegate that in order to ensure stability and predictability in treaty relations, such reservations should be avoided as much as possible. Late reservations are permissible only if none of the contracting Parties object to it.

21. On individual draft guidelines, delegates expressed the following views:

- In the view of one delegate, draft guidelines 2.1.1; 2.1.2; 2.1.5; and 2.1.7 were acceptable.
- Guideline 2.4.1 on the formulation of interpretative declaration does not stipulate any particular form. In the view of one delegation, interpretative declarations – whether simple or conditional – need to be in writing.
- As regards the role of the depositary in the light of draft guideline 2.1.8, many delegates strongly felt that the depositary should play a strictly procedural role in accordance with the relevant provisions of the 1967 and 1986

Vienna Conventions on Law of Treaties.

Draft guideline 2.1.8 stipulating the procedure in case of impermissibility of reservations to treaties, was largely seen as, going beyond the Vienna Convention on the Law of Treaties. It was pointed out that, if the depositary were to intervene on the question of compatibility of the reservation with the object and purpose of the treaty as it is proposed in this guideline, it might prompt the State to react, which would not help to resolve the problem. It is therefore unlikely that a more active role of the depositary would lead to the withdrawal of the reservation.

22. Mr. Chairman, the Commission had sought the views of States on draft guideline 2.1.6 that provides for communication of a reservation by electronic mail and its subsequent conformation in writing. In response to this, the delegate of India maintained that reservations are generally made at the time of ratification or accession and hence, communication of reservation forms part of the communication of the instrument of ratification or accession. Therefore, the question of communication of reservation by electronic mail or by facsimile does not seem to arise at all. The delegate of the Republic of Korea stated that these forms of communication are not normal practice in the Republic of Korea. Yet, the delegate acknowledged that there might be circumstances where these forms of communication could prove useful in the light of rapid communications in modern times.

23. Secondly, in response to the clarification sought by the Commission on draft guideline 2.5x pertaining to “Withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty” two delegates offered their comments. Asserting that withdrawal of reservations is a sovereign prerogative of the State, the delegate of Islamic Republic of Iran characterized recent developments where some monitoring bodies are assigned the role of assessing reservations to a treaty as an “exception” and hence should not be covered by the guidelines under preparation. The response from the delegate of the Republic of Korea was that the phrase “body monitoring the implementation of the treaty” requires clarification, since the competence of monitoring bodies to pronounce on the validity of a reservation depended upon the powers assigned to them by the treaty in question. Otherwise, the power to decide on the permissibility of reservations to treaties rests only with the States or international organizations, which are contracting parties to those treaties.

24. Mr. Chairman, I will now pass over to the topic “Unilateral Acts of States”.

25. Some delegations reiterated the feasibility of the topic for codification and progressive development as well as its utility for States to know what risk they ran in formulating such acts. Others viewed the topic as different from more traditional concepts and as one involving progressive development rather than codification. Another delegate pointed out that unilateral acts could have extra-territorial effects and negatively affect international peace and security. Therefore he called for further examination of the topic.

26. As regards methodology, one delegate suggested that it would be useful to study each specific type of acts, such as promise, recognition, renunciation or protest, before elaborating on the general rules on unilateral acts of States. Another variant of this suggestion was that the Special Rapporteur should first concentrate on those unilateral acts, which, from recorded international practice culminated into obligations.

27. On the classification of unilateral acts, one delegate stressed the need to employ the “legal effects” criterion. Consequently there would be two major categories, namely acts whereby a State undertakes obligations and acts whereby a State reaffirms a right.

28. One delegate contested the proposal of the Special Rapporteur to have a new concept “acta sunt servanda” as a legal basis for the binding nature of the unilateral act on the analogy of “pacta sunt servanda” being the basis of treaty relationship. The delegate found this logic unacceptable, as there was no basis for such a position in international law.

29. Mr. Chairman, now I will address the topic of the “Liability” aspects of the ILC’s agenda item “International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law”.

30. Most of the delegates referred to the close linkages between “prevention” and “liability” and welcomed the decision of the ILC to commence work on the aspect of liability.

31. One delegate underscored the fact that it was not an easy task to codify and progressively develop rules in this area because the existing treaty regimes have been developed primarily on regional and sectoral basis, and it involves profound interests of State Parties concerned. Referring to the decision of the Special Rapporteur to substitute “Allocations of loss” for “liability” in the title of the topic, the delegate characterized this a constructive approach as allocation of loss in the final analysis concerns the relationship between economic development and environmental protection.

32. As regards the scope of ILC’s work, one delegate stressed that it should cover the same as those included in the topic of prevention. Another view suggested that the Commission should work on general rules so as to ensure that States have enough options to handle each case against its specific circumstances. This would reflect the general principle of peaceful settlement of international disputes

33. On the point of allocation of losses, delegates were of the view that it is not the State but the operators who profit out of the operation, should bear the primary responsibility in this regard. On the role of the State under the liability regime, a careful study of international precedents was suggested. Particularly, it was felt that the liability regime established under sectoral conventions could provide some guidance on this matter.

34. Mr. Chairman, as regards the other new topics AALCO Member States generally welcomed the inclusion of these topics to the Commission’s Work Programme. As these topics are still at a preliminary stage of consideration and still evolving, I will not offer any specific comments.

35. With a view to enable the Commission to be informed on the law and State practice of Asian and African States, the 42nd session of AALCO in a resolution adopted on this subject, urged Member States to communicate their response on issues identified to be of special interest to the Commission.

36. Mr. Chairman and Distinguished Members, you may recall that

when I addressed the Commission last year I mentioned that owing to paucity of time, it was becoming difficult to have in-depth consideration of important legal aspects relating to the ILC topics during our annual sessions. In this context I had suggested considering the feasibility of the ILC and AALCO jointly organizing a seminar focusing on one of the topics that is presently at the formative stages within the Commission. The Commission had approved this idea and it was agreed that in-depth consideration of an identified topic could be carried out at the Meeting of the Legal Advisers of the AALCO Member States usually held at New York during the regular session of the UN General Assembly. Notwithstanding the eager and active co-operation from some Members of the Commission, the proposal did not materialize last year due to some unavoidable changes made to the schedule and programme of the AALCO's Legal Advisers Meeting.

37. Mr. Chairman, this idea to have an in-depth discussion with the ILC during the Legal Advisers Meeting was discussed at the Seoul session of AALCO and in a resolution adopted on this agenda item, the Organization expressed explicit support for this proposal. As to the modalities of moving forward on this proposal, I wish to hear your views and suggestions.

38. Mr. Chairman, and Distinguished Members, besides considering the work of the ILC the other items, that were considered by the 42nd session of the AALCO included (i) Jurisdictional Immunities of States and their Property; (ii) International Criminal Court; (iii) Deportation of Palestinians and Other Israeli Practices among them the Massive Immigration and Settlement of Jews in All Occupied Territories in Violation of International Law, particularly the Fourth Geneva Convention of 1949; (iv) United Nations Conference on Environment and Development: Follow up; (v) Establishing Cooperation against Trafficking in Women and Children; (vi) An Effective International Legal Instrument against Corruption; (vii) Human Rights and Islam; and (viii) WTO as a Framework Agreement and Code of Conduct for World Trade. Further, within the framework of the 42nd session, the AALCO in cooperation with the International Committee of the Red Cross organized a one-day Special Meeting on "The Relevance of International Humanitarian Law in Today's Armed Conflicts".

39. Mr. Chairman, pursuant to the efforts of the Organization in recent years to rationalize its work-programme, the Seoul session marks a useful beginning in focusing our deliberations on a set of priority agenda items to be identified for each annual session. This process has already started showing results as can be seen from the detailed and elaborate comments offered by delegates on the topics related to ILC. A comprehensive report on the 42nd session, I assure you Mr. Chairman, would be presented to the ILC at the earliest possible time.

40. Mr. Chairman, as to the future co-operation between the AALCO and the Commission, 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-fifth Session. Allow me to add that an item entitled "The Report on the Work of International Law Commission at its Fifty-fifth Session" would thereafter be considered at the Forty-third Session of the AALCO.

41. Mr. Chairman, allow me to take this opportunity to extend to you and your

distinguished colleagues, on behalf of the AALCO an invitation to participate at the Forty-third Session of the AALCO to be held in Indonesia next year. I shall in due course communicate to you the date and venue of the Session. I look forward to welcoming you all to the next Session of the Organization and to closer future collaboration with the Commission.

42. Finally, Mr. Chairman, I should like to record my gratitude to you and to the Commission for allowing me to address this august body and for the attentive hearing you have given me. Thank you.