

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

**JULY 2004, GENEVA**

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

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

2. Mr. Chairman, since I am taking the floor for the first time, I would 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 is preserving and upholding the traditions and fulfilling the functions of the Commission in the progressive development and codification of international law.

3. The AALCO attaches immense significance to its traditional and long-standing ties with the ILC. Mr. Chairman, one of the primary functions of the AALCO, as envisaged in its Statutes as revised, amended and adopted on 21 June 2004 during the 43<sup>rd</sup> session of AALCO at Bali, remains the examination of questions that are under the consideration of 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 as custom that we all in the AALCO appreciate and willing to see more members of the ILC present in our sessions.

4. Mr. Chairman, may I take this opportunity to express on behalf of the AALCO our appreciation and thanks to Prof. Djamched Momtaz for his presence as the Representative of ILC at the 43<sup>rd</sup> session of our Organization and appraising us on the developments of its work during the first part of the 56<sup>th</sup> session of the Commission. His excellent "compte rendu" has reflected a great professionalism, accuracy as well as the hard and technical work going forward in your august body. We noticed also the excellent work taken up by the special rapporteurs of different items on your agenda. I also wish to thank Amb. Chusei Yamada, and Prof. Choung Il Chee, 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 will always appreciate 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 2003, allow me to inform you that the 43<sup>rd</sup> Session of AALCO was held at Bali, Republic of Indonesia from 21 to 25 June this year. The session elected H.E. Prof. Dr. Yusril Ihza Mahendra, Minister of Justice and Human Rights, Republic of Indonesia, as its President and H.E. Mr. Ambrose Patrick Dery, Deputy Attorney General and Deputy Minister of Justice, Ghana, as its Vice-President. Delegations from Member States consisting of eminent persons made

valuable contributions in the deliberations on various issues.

6. As regards the substantive issues, the session considered the agenda item entitled “Report on Matters Related to the Work of the International Law Commission at its Fifty-fifth Session”. Mr. Chairman, the AALCO as a legal body considers the items that are currently on the agenda of the ILC as of immense significance to its Member States. The importance accorded to these items by our Member States is very much reflected in their participation in the deliberations on the item.

7. During these deliberations many delegates attending the Bali session 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 the Member States on the work of ILC at its 55<sup>th</sup> Session.

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

9. As regards ‘Diplomatic Protection’ there was a general appreciation of the work done by the Commission on the topic. While welcoming the work of the Commission Delegates made the following general observations:

► One Delegate said that the draft articles reflect in essence the

customary international law on diplomatic protection and were satisfactory on the whole. The Delegate wished that the complete commentaries on the draft articles could be finalized as early as possible, which would help to understand the draft articles. The Delegate further hoped that the Commission would finish its second reading on the draft articles in 2006 in accordance with its quinquennium work programme.

► One Delegate observed that the judgment of the International Court of Justice in the Barcelona Traction case of 1970 represented an accurate statement of customary international law on the diplomatic protection of corporations. He said that we could not deny that today's rules and practices governing foreign investment have been built upon the Court's decision in the case.

► While commenting on the diplomatic protection of a ship's crew by the Flag State, one Delegate observed that the crew should not be covered within the topic under consideration. He said that any reference to the judgment of the International Tribunal for the Law of the Sea, in M/V "Saiga" case, should be viewed in the context of the Law of the Sea Convention which was the basis of that judgment. Article 292 of the said Convention ensures the prompt release of the vessels and their crew. As a *lex specialis*, it did not, however, establish, expand or modify the rules embodied in the institution of the Diplomatic Protection.

► Another Delegate observed that the right to exercise diplomatic protection being codified for States does not devolve or imply a duty upon the State to extend the said diplomatic protection to the national, corporation or flagship etc. The right to diplomatic protection was a right

given to States and not to nationals or corporation or flag ship and it was up to the State concerned to decide, based upon its own political reasons which might include foreign policy consideration, as to whether to extend diplomatic protection and also to decide the nature of the diplomatic protection it wished to extend.

10. Delegates also made certain observations while commenting on specific aspects of the topic.

► One Delegate emphasized that there should be nationality link between the corporation and the State exercising diplomatic protection. His delegation supported the wording of paragraph 2 of article 17 of text draft articles on diplomatic protection provisionally adopted by the ILC. However, he preferred to delete the second criterion in brackets. State of nationality of a corporation should be the State in which the corporation is incorporated. He said that he was aware that the International Court of Justice had made reference to criterion of the place of the registered office and criterion of the place of incorporation. In this respect he maintained that the criterion of place of incorporation was growing dominance in other areas of law. Moreover, he shared the view that the criterion of place of the registered office was superfluous because most of the registered corporations were located in the same place. He said that although his Delegation recognized the importance of maintaining balance between the interest of States and those of investors, it was quite cautious to include a reference to the State of nationality of the shareholders.

► One Delegate was of the view that the State of incorporation was

entitled to exercise diplomatic protection with respect to an injury to a corporation. However, he believed that there was no need for a ‘genuine link’ requirement or any such kind of requirement implying economic control in determining the nationality of a corporation. He said that they would like to see the genuine link as one of the factors that a State might consider in deciding whether to take up the claims of a corporation, in the light of the discretionary nature of the State’s right of diplomatic protection.

He further supported the Commission’s decision to include three exceptions to the principle, which says that the State to exercise diplomatic protection was the State of incorporation. As the ICJ has envisaged, the State of nationality of shareholders should be entitled to exercise diplomatic protection if the corporation has ceased to exist, or if the injury to the corporation is caused by the State of incorporation, or if the shareholders’ own rights have been directly injured.

► Further, commenting on Article 17, another Delegate observed that his Delegation concurred with the Commission that the State in which the corporation was incorporated was entitled to exercise diplomatic protection. He said that they found this notion in conformity with the ICJ Judgment in the Barcelona Traction Case. However, to avoid any “State of Convenience” or “Tax haven State”, they were in favor of inclusion of a reference to the existence of an effective or genuine link between the corporation and the State of nationality. The text in bracket in the Paragraph 2 of Article 17 might properly serve this purpose. He said that because of this reason that they were in favor of removal of the brackets. He further said that they also noted with appreciation that the Working

Group had agreed on looking for a new formulation for Article 17.

As regards Article 18 the Delegate said that it did not reflect the existing customary international law. The Delegate believed that Paragraph 2 of this Article introduced an unbalanced exception to the rule set in the Article 17, in favor of the exception. This exception was highly controversial and has the potential to jeopardize the principle of equal treatment of national shareholders and those having the nationality of another State. He said that they also have some sympathy to the suggestion made by some members of the Commission to incorporate Article 19 into Article 18.

11. On the individual draft articles, observations by delegates could be summed up as follows:

► Regarding article 8 (2) of the draft articles, one Delegate was of the view that the stipulation of a refugee being a habitual resident of the claimant state both at the time of the injury and at the date of the official presentation of the claim, makes it difficult for the refugee to seek benefit from the protection. Regarding article 8 (3), the Delegate enquired whether article 8 (1) was similarly applicable if the injury took place in a third State e.g. while the refugee is in transit.

► Concerning Article 21, one Delegate said that they firmly believed that inclusion of this Article would serve the purpose of the Draft Articles and the existing legal regime of investments.

► With regard to Article 22 which deals with diplomatic protection of

legal persons other than a corporation, one Delegate expressed concern over the problems that might arise from the practical implementation of this Article. These legal persons, other than corporations, vary a great deal in their nature and functions. In a quite number of cases they were not recognized by the State in whose territory they perform their activities. Thus, application of a legal regime that was originally established for protection of corporations to different categories of legal persons would raise legal problems. He noted that the Special Rapporteur observed the lack of State practice in this area and proposed the Article as an analogy or as a matter of progressive development. He viewed that Article 22 was a far expression of *lex ferenda* and an abstract prediction rather than a simple analogy or a matter of progressive development.

12. Now I turn to the topic of ‘Reservations to Treaties’:

► A Delegate welcomed the broad-based definition of ‘objections’ as proposed by the Special Rappoerteur in his eighth report as it would alleviate any uncertainty on the divergent practices amongst States. He was of the view that a clear guide on the definition of what was an ‘objection’ was timely. He favored guidelines, which encourage States to give reasons for objections to reservations, as this would encourage transparency and certainty in international relations.

► Another Delegate welcomed the consensus that there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions and assumed that the Commission's work on this topic would be based on this common understanding .He also welcomed the intention of the Special Rapporteur to submit draft guidelines on the idea

of "reservation dialogue" at the fifty-sixth session of the Commission. This would contribute to the integrity of treaties while maintaining basic principle of consent of States.

While focusing on the doctrine of "super-maximum" effects, the Delegate said that there was no need to emphasize that reservations constitute basic elements of consent of States when approving or acceding to treaties. An objection with super maximum effect destroys this element for the sake of integrity of treaty. He said, the Special Rapporteur's proposal for a new wording for draft guideline 2.6.1 could strike a balance between the consent of sovereign States and the integrity of treaties.

13. On the topic of 'Unilateral Acts of States', following observations were made:

► One Delegate supported the recommendations made by the working group of the Commission with regard to the method of work. He welcomed the Commission's intention to focus its work on the unilateral acts *stricto sensu* and on the State practice in respect of unilateral acts.

► Another Delegate supported efforts to identify and elaborate guidelines on when unilateral acts of States create legal obligations in furthering legal security. States must know when the unilateral expression of their will would be taken to be legally binding commitments, as opposed to mere political statements. However, he felt that formulation of legal rules should be deferred until materials on State practice could be analyzed. A further study on conduct of States leading to possible legal effects similar to unilateral acts should also be carried out with the possibility of being

included in the guidelines.

14. Mr. Chairman, let me turn to the topic of ‘International Liability for Injurious Consequences Arising out of Acts not prohibited by International Law’;

► One Delegate was of the view that the conclusions and principles drawn by the Special Rapporteur were very much conducive to further work on the topic. As to those principles, on which agreements have been reached among States as well as inside the Commission, they could serve as the basis for elaboration of the draft articles. As to those controversial issues, the delegate hoped that the Commission might resolve them through further study in the near future.

15. General views expressed by some delegates on the ‘Responsibility of International Organizations’ may be summarized as follows:

► One Delegate said that they were looking forward to seeing the commentaries on four new draft articles that were adopted by the Commission. The Delegate said that their rudimentary view on the topic was that the draft articles should be based as possible as it could, on the in-depth research of relevant practices of international organizations. Study on practices of only a few international organizations could not lead to any convincing general conclusion. At the same time, due attention should be paid to the relationship between responsibility of international organizations and responsibility of States. These two issues should be independent in international law, that is, the attribution of conduct to an international organization should not influence the

attribution of conduct to a State and vice versa.

► Another Delegate appreciated the progress made by the ILC on this topic and suggested that any future work should fully take into account the institutional and legal diversity of various international organizations when adapting the articles on State responsibility to this topic. He was of the view that the scope of this topic should be limited to intergovernmental organizations. In this regard, the term ‘other entities’ used in the draft article 2 required further clarification.

16. Mr. Chairman, keeping in view the preliminary stage of the work on the topics ‘Fragmentation of International Law’ and ‘Shared Natural Resources’, delegates offered following general observations on them.

17. On the topic of ‘Fragmentation of International Law’;

► One Delegate said that he would second the decision of the ILC to change the title of the topic to ‘Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law’. He shared the agreement that the Commission should not deal with institutional proliferation. Instead, the emphasis to focus the study on the subject of fragmentation on the substantive perspectives is something we should properly recommend. He viewed that the Commission was quite correct when it addressed three different patterns of interpretation or conflict in dealing with the substantive aspects, namely, conflict between different understandings or interpretations of general law, conflict between general law and a special law claiming to exist as an exception to it, and conflict between two specialized fields of law. He said that the Commission’s view that the Vienna Convention on

the Law of Treaties would provide an appropriate framework for the study of fragmentation, which was endorsed by the United Nations General Assembly, was believed as an extraordinary guidance to lead the study on the right path as long as it contributes positive conclusion.

18. On the topic of ‘Shared Natural Resources’ following general observations were made by some delegates.

► One Delegate said that they acknowledged the importance of research on it and believed that using groundwater in a scientific and reasonable way was of significance to all States, their nationals and offspring. The Delegate appreciated the attitude of the Special Rapporteur for his preciseness in working and said that the general framework was positive and constructive.

► One Delegate said that natural resources were the original patrimony of humanity and was the source of goods and services as well as of the space in which society developed and evolved. The utilization of natural resources should be considered to meet the need of the present and next generations. He wished to weigh solid support to the work of the ILC to explore and formulate legal definition of ‘shared’ natural resources with a purpose to emphasize that natural resources should be in the benefit not only for the present but also the future generations. The management and the exploitation of such natural resources should be conducted in the most appropriate and sustainable way.

► One Delegate supported the approach of the Commission in collecting all pertinent information before embarking on the formulation of rules in

this area. He also strongly supported the need to protect groundwaters from environmental pollution and other disruptive activities of humankind. He wished to highlight that there was an urgent need for preventive measures to combat contamination of groundwater resources.

► Another Delegate welcomed the approach taken in the first report of the Special Rapporteur, namely, providing the background of the topic as well as a timetable for the future work. On the question of applicability of principles contained in the 1997 Convention on the Law of Non-navigational Uses of International Watercourses to the topic under consideration, he said that they would like to add their voice with those members of the Commission who expressed their doubts. It was their view that the guiding principles for this topic should be the principles governing the permanent sovereignty of States over their natural resources enshrined in the General Assembly resolution 1803 (XVII) of 14 December 1962. He hoped that the distinguished Rapporteur would take this point into consideration in the course of preparing his reports.

19. Mr. Chairman, those were the views expressed by Delegates at the 43<sup>rd</sup> session of AALCO. Mr Chairman, with a view to enabling the Commission to be informed of the law and State practice of Asian and African States, the 43<sup>rd</sup> 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.

20. Mr. Chairman and Distinguished Members, I am happy to inform you that Member States of AALCO have commended my initiative in convening the joint AALCO-ILC meeting in conjunction with AALCO

Legal Advisers' meeting held in New York in October 2003 and the fruitful exchange of views on the items deliberated during the meeting. They have requested me to continue convening such meetings in future also. In continuation of this practice I look forward to your views and suggestions regarding the topics that maybe taken up for discussion in the AALCO-ILC joint meeting this year.

Mr. Chairman, and Distinguished Members,

21. In accordance with its rationalized work programme to focus our deliberations on a set of priority agenda items, besides considering the work of the ILC, the other items that were considered by the 43<sup>rd</sup> session of the AALCO included (i) Law of the Sea (ii) 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; (iii) Extra-Territorial Application of National Legislation: Sanctions Imposed against Third Parties; (iv) Jurisdictional Immunities of States and their Property; (v) International Criminal Court: Recent Developments; (vi) An Effective International Legal Instrument against Corruption; (vii) WTO as a Framework Agreement and Code of Conduct for World Trade; and (viii) Human Rights in Islam.

22. Mr. Chairman, at my initiative, a new item 'Expressions of Folklore and its International Protection' was introduced this time and fruitful discussions took place on it. Further, a one-day Special Meeting was held on the topic 'Establishing Cooperation against Trafficking in persons, Especially Women and Children'.

23. 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 on its Fifty-sixth Session. Allow me to add that an item entitled “The Report on the Work of International Law Commission at its Fifty-sixth Session” would thereafter be considered at the Forty-fourth Session of the AALCO.

24. 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-fourth Session of the AALCO to be held in Kenya 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.

25. Finally, Mr. Chairman, I would 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.