

**ADDRESS BY H.E. PROF. DR. RAHMAT MOHAMAD  
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ORGANIZATION**

SIXTY-THIRD SESSION OF THE INTERNATIONAL LAW COMMISSION  
26 JULY 2011, 10 A.M. (CONFERENCE ROOM XXI)

H.E. Mr. Maurice Kamto, Chairman of the International Law Commission,  
Distinguished Members of the Commission,  
Ladies and Gentlemen,

At the outset, I congratulate you on behalf of the Asian-African Legal Consultative Organization (AALCO), its Member States and on my personal behalf on your election as the Chairman of the International Law Commission. The AALCO continues to attach great importance to its longstanding relationship with the Commission. It would be my earnest endeavour to further strengthen this relationship in the years to come.

Mr. Chairman,

One of the statutory obligations of AALCO is to examine the questions that are under consideration of the International Law Commission, and thereafter, to forward the views of its Member States to the Commission. **My address would be short as the verbatim of the deliberation on the topic “Report on Matters relating to the Work of the International Law Commission at its Sixty-Second Session” held at the 50<sup>th</sup> Annual Session of AALCO would be circulated to all the Members of the Commission.**

Mr. Chairman,

It is my privilege to inform the Commission that the 50<sup>th</sup> Annual Session of AALCO was held in Colombo, Sri Lanka from 27<sup>th</sup> June to 1<sup>st</sup> July 2011. This was truly a historic session, hosted by one of the founding members of the Organization. One of the significant achievements of the Session was the constitution of an Eminent Persons Group (EPG) with the aim to serve as an “Advisory Body” for the Secretary-General to steer the work of the Organization. The aim of this group would be to suggest to the Secretary-General the short, medium and long term measures needed for the substantive

work of the Organization, which include, how to enhance the profile and relevance of AALCO in the international arena; and how to contribute significantly to the substantive aspects of AALCO. A preliminary meeting of the EPG was also convened on the sidelines of the Annual Session and I am happy to inform that Four ILC Members from our Member States, namely, Dr. Rohan Perera (Sri Lanka); Hon. Amos Wako (Kenya); Prof. Shinya Murase (Japan); and Mr. Narinder Singh (India) are Members of the EPG. Dr. Rohan Perera was elected as the Chairman of the EPG. Prof. Djamchid Momtaz, Former Chairman of ILC, Islamic Republic of Iran is also a Member of the EPG. I am confident that this engagement would further strengthen the AALCO-ILC relationship and take it to greater heights.

Mr. Chairman,

The deliberations on the topic International Law Commission was held on 29<sup>th</sup> July 2011. In my introductory statement at the Session, I gave a brief overview of the work of the Commission at its 62<sup>nd</sup> Session and emphasized that inputs provided by the Member States of AALCO would be of immense significance to the ILC in formulating the future trajectory of its work, and that the feedback and information on the state practice of AALCO Member States would enable the Commission to take into consideration the views of diverse legal systems.

**Dr. A. Rohan Perera, Member of the International Law Commission** speaking in his personal capacity, due to paucity of time, focussed only on two key topics, namely, “The Effects of Armed Conflicts on Treaties” and “Immunity of State Officials from Foreign Criminal Jurisdiction” that were specifically dealt with in the first half of the Sixty-Third Session of ILC that took place from 26<sup>th</sup> April to 3<sup>rd</sup> June, 2011. He stated that the comments/viewpoints on these two items on the part of Member States would be of extreme importance to the work of the Commission. As regards the topic “The Effects of Armed Conflicts on Treaties”, he pointed out that the text of draft articles on this issue along with the commentaries thereto, were adopted by the Commission at its first part of its Sixty-Third Session held in 2011. Giving a bird’s eye view of the provisions of the draft articles, he noted that these draft articles as a whole reflected the general proposition

that armed conflicts, *ipso facto*, does not terminate or suspend the operation of treaties, and that this rationale ran through the entire set of draft articles adopted on this issue. As regards the determination of whether a treaty survives an armed conflict or not, he noted that firstly, recourse should be made to the language of the treaty itself as provided for in the draft article 4 and that, in the absence of an express provision, resort would next be had under draft article 5 to the traditional rules of treaty interpretation contained in Article 31 of the Vienna Convention on the Law of Treaties. However, if no conclusive answer was found following the application of these draft articles, the enquiry would then shift to a consideration of matters extraneous to the treaty as provided for in draft article 6, he added. He clarified that draft article 7 contained an indicative list of treaties that included *inter alia*, treaties creating permanent regimes such as land and maritime boundary, and treaties on human rights and international humanitarian law which were, on the basis of their subject matter, deemed to survive even in times of armed conflict.

As regards the topic “Immunity of State Officials from Foreign Criminal Jurisdiction”, Dr. Perera informed that the Second Report of the Special Rapporteur on this subject was considered at the first part of the Sixty-Third Session of ILC. Explaining the difficulties contained in framing the boundaries of this topic, he pointed out that there are two questions that needed to be addressed in a concrete way for progress to take place on this issue. The first in his view was: Is there an exception to immunity in respect of what are called grave crimes under international law? The second was the question of the precise categories of persons apart from the well-known troika (the Heads of States, the Heads of Governments and the Minister of Foreign Affairs), who would be considered to enjoy immunity *ratione personae*. In this regard, he explained that the crux of the Report of the Special Rapporteur on this issue was that immunity of state officials from foreign criminal jurisdiction should be the norm and that, any exception thereto needed to be proved.

In summarizing the main trends of the debate, he noted that there were two streams of thought that informed the entire debate on the topic. According to one view, sovereignty must be limited, and that one could not talk of absolute immunity when grave crimes are

committed. The principle of non-impunity is a core principle, and that one could not speak of absolute immunity where grave crimes are committed even by high-ranking officials. According to another view, the principle of immunity, which is well-established in international law, including the international customary law, does not brook any infringement and that, it was critical in preserving the stability of international relations. The challenge for the Commission, he added, lay in striking a proper balance between the two schools of thought. He also made a plea that the Member States of AALCO should give most serious consideration to this topic when the Report on this issue is before the Sixth Committee during the forthcoming United Nations General Assembly. He stated that it was important for the future work of the ILC to receive the views and policy guidance of Member States of AALCO on the sensitive issues which arise in the consideration of these topics, he added.

**Prof. Shinya Murase, Member of the International Law Commission**, also speaking in his personal capacity, focused his address on two points, namely, future topics that the International Law Commission should take up, and the need to follow-up the work of ILC. He mentioned that ILC had concluded its work on three of its topics and therefore new topics were to be chosen for the next quinquennium. Selection of the topics was based on practical, technical and political feasibility of the topic, moreover the work had to reflect the new developments in international law and the pressing concerns of the international community as a whole. Prof. Murase, had made a proposal to include ‘Protection of Atmosphere’ as a topic and prepare a comprehensive convention to address the whole range of atmospheric issues such as transboundary air pollution, depletion of ozone layer and climate change which could be similar like Part XII of the Law of the Sea Convention on the protection and preservation of maritime environment. He hoped that the Sixth Committee would endorse this proposal. In relation to the relationship between ILC and the Sixth Committee, the need to follow-up developments of draft articles was required. He recalled that the conclusion of draft articles on transboundary aquifers completed in 2008, which could be adopt a resolution in the form of a General Assembly ‘declaration’ on the principles and rules applicable to transboundary aquifer, which could be a basis for future a framework convention. On the UN Convention on

Jurisdictional Immunities of States and their Property, he recalled the contribution of the Special Rapporteur Amb. Sompong Sucharitkul and expressed his belief that his contribution would be duly recognized when the Convention comes into force with the necessary ratifications.

Mr. Chairman,

After these two detailed presentations made by the Members of ILC, the Delegations of the **Islamic Republic of Iran, People's Republic of China, Malaysia, Republic of Indonesia, India, Japan, State of Kuwait** and **Kingdom of Saudi Arabia** expressed their views on different topics on the agenda of the International Law Commission.

On the topic, **Effects of Armed Conflicts on Treaties**, one delegation stated that Article 2 includes express reference to the applicability of the draft articles to non-international armed conflicts. The delegation stated that it continue to deem it inappropriate to include those armed conflicts. The possible effects that this category of conflicts might have on treaties were indeed governed by the provisions of draft articles on "International Responsibility of States" under circumstances precluding wrongfulness. Further, article 73 of the Vienna Convention on the Law of Treaties, which is the basis of ILC's work on the subject, refers exclusively to the effects on treaties of armed conflicts between states. Another delegation stated that the definition of armed conflict provided inadequate restrictive conditions for the term of armed conflicts therein, and that could easily be construed to any use of force and that this in turn could affect the stabilization of treaty relations.

On the topic, **Expulsion of Aliens**, one delegation was of the view that the expulsion must be made with due respect for fundamental human rights of the deportees. Another delagation was of the view that nothing should stand in the way of extradition of an alien to a requesting State when all conditions for expulsion had been met and the expulsion itself did not contravene international or domestic law. One delegation stated that their country had observed the topic as stated in the international human rights law, particularly in lieu of the principles of sovereignty and non-intervention. The delegation

emphasized that in addition to the general protection afforded to all foreigners, certain categories of foreigners, such as refugees and migrant workers, could be afforded additional protection against expulsion and other procedural guarantees.

On the topic, **Protection of Persons in the Event of Disasters**, one delegation observed that it was for the affected State to determine whether receiving external assistance in the event of disaster is appropriate or not. Any suggestion to penalize the affected States would be contrary to international law. Another delegation mentioned that humanitarian assistance should be undertaken solely with the consent of the affected country and with utmost respect for national sovereignty, territorial integrity, national unity and the principle of non-intervention in the domestic affairs of States. Yet another delegation reiterated that the affected State has the principal right, and indeed the obligation, for meeting the needs of victims of disasters within its own borders. The affected State holds the right to decide where, when and how relief operations are to be conducted and possess the power to dictate the terms of the humanitarian response.

On the topic, **Responsibility of International Organizations**, the delegation underlined the importance on the set of draft articles on Responsibility of International Organizations adopted on second reading by the drafting committee during the present session of the Commission and recommended that the AALCO Secretariat could undertake a study on it and present it to the next Annual Session a comprehensive report on the subject.

On the topic, **Law of transboundary aquifers**, one delegation highlighted that the ILC, in an effort to provide a legal framework for the proper management of groundwater resources, had formulated a set of 19 draft articles on the issue based on the texts drafted by Ambassador Chusei Yamada, the Special Rapporteur on the topic. In this regard, the delegation suggested that the draft articles could either be adopted as a universal treaty at a diplomatic conference or as a Declaration of the UN General Assembly. Another delegation while acknowledging the importance of the topic of transboundary aquifers and stated that taking into account the global water crisis, at present, the draft articles would be useful in the form of guidelines and not in a legally binding form. It observed

that States may enter into appropriate bilateral or regional arrangements for the proper management of their transboundary aquifers, as recommended by the ILC, subject to the capacity and resources of States to carry it out.

On the topic, **Reservation to Treaties**, one delegation observed that Member States should study the draft guidelines carefully in the light of their respective practice and express their positions in the debate on the topic in the Sixth Committee of the UN General Assembly.

One delegation took note and supported the proposed topic **International Environmental Law** as the Commission would be able to contribute effectively towards clarifying and redefining the basic principles and rules of international environmental law.

As regards the topic proposed by Prof. Shinya Murase on the **Protection of Atmosphere** two delegations favoured and supported the proposal that the ILC should study the topic “Protection of the Atmosphere” as a possible future topic. One delegation stated that this was made essential by the fact that there existed significant gaps in the applicable principles and rules of international law on this issue. In this regard, the delegation requested the Member States of AALCO to consider this proposal seriously and to agree to authorize this proposal as a new topic.

On the topic **Most-Favoured Nation Clause**, one delegation stated that the consideration of this topic must be addressed within the context of the WTO Agreements and the plethora of regional economic agreements, customs unions, bilateral Free Trade Agreements, Bilateral Investment Treaties and Investment Guarantee Agreements. The delegation observed that it was also trite that MFN clauses were very much intertwined with the bilateral and regional interests of the States involved, and driven by domestic policies and issues of State sovereignty, and politically sensitive and technically and operationally complex. It also observed that other trade-related bodies such as the WTO, UNCTAD and OECD are already undertaking studies on this matter. As such it would be

incumbent on the ILC not to duplicate or overlap with the studies already underway and on which States have more direct participation and contribution.

Mr. Chairman,

Apart from the specific comments on the topics, some **general comments and observations** were also made by the delegations. I would like to highlight some of the important points:

- One delegation supported any efforts to send young officers for attachment or internship programme at ILC. The delegation proposed that the ILC Members from the Asian and African continents open their doors to accept attachment or internship on the recommendation of the respective governments, subjects to applicable ILC rules and procedure. The delegation also called for the Report of the ILC to be made available at least one month before it comes up for consideration by the Sixth Committee as this would facilitate in-depth deliberations.
- Another delegation pointed out that there were three ways for the Commission to obtain the opinions of the Member States. The Commission could seek the opinion before the topic is taken up, and secondly, it could elicit the view points of States by means of circulating questionnaires to them, and finally, it could also seek opinions through comments on the draft articles adopted by the Commission. The delegation urged the Member States of AALCO to respond to these requests, and also to participate in the Sixth Committee's consideration of the ILC report so that their views and positions could also make an impact on the outcomes of the ILC's work.
- While stressing the need for the Asian-African States to make a substantial contribution towards the work of ILC, one delegation suggested that the AALCO Secretariat could formulate questionnaires on each topic that was dealt with by the Commission and, in this regard, made a request that the Member States of AALCO to provide their answers to those questionnaires. The AALCO



Secretariat, could, then, compile those answers and submit them to the Secretariat of ILC. This exercise, in their view, would gradually but certainly affect the formation and substance of customary international law.

- Some delegations were of the view that the Annual Sessions of AALCO should devote more time for deliberating on the agenda item relating to the work of ILC, as it would enable the delegates to have in-depth discussions on the items on the agenda of the ILC. Taking into consideration this suggestion, the Resolution (AALCO/RES/50/S1 of 1 July 2011) adopted at the 50<sup>th</sup> Annual Session on this topic has requested the Secretary-General to consider holding a Special Meeting on this topic at the next Annual Session.

Mr. Chairman,

Allow me to express my sincere gratitude towards the Commission for inviting the Asian-African Legal Consultative Organization for participating at the Sixty-Third annual session of the Commission.

I thank you for the opportunity afforded to me.

Thank you Mr. Chairman.