

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

**19 JULY 2005, 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-seventh 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 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 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, 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 to 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 and 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 my appreciation and thanks to you for your presence as the Representative of ILC at the 44<sup>th</sup> Annual Session of our Organization and appraising us on the developments of its work during the first part of the 57<sup>th</sup> session of the Commission. Your excellent report has reflected professionalism, accuracy as well as the technical work being undertaken 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, who in his capacity as representative of his country made valuable contribution 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 2004, allow me to inform you that the 44<sup>th</sup> Session of AALCO was held at Nairobi, Republic of Kenya from 27 June to 1 July this year. The session elected H.E. Amos Wako, E.G.H. M.P., Attorney General of the Republic of Kenya, as its President and H.E. Tan Sri Abdul Gani Patail, Attorney General of Malaysia, 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-sixth 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 Nairobi 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 56<sup>th</sup> Session.

8. Mr. Chairman, allow me to begin with the topic of “Diplomatic Protection”. While making general observations, Member States of AALCO welcomed the progress achieved on this topic.

► There was a general appreciation to the ILC and the Special Rapporteur, on the adoption of draft articles on Diplomatic Protection. The Delegates observed that the 19 draft articles on Diplomatic Protection, adopted by the

Commission on the first reading during its 56<sup>th</sup> session represented a significant advancement in the development of international law, as they covered the entire gamut of the institution of diplomatic protection, which had undergone vast changes over the years.

► One Delegate observed that the 19 draft articles on Diplomatic Protection basically reflected relevant rules of customary international law. While expressing satisfaction over the progress achieved, the Delegate hoped that the ILC would continue its efforts to improve the draft articles, taking into account comments offered by States, so as to ensure that this topic could be completed on schedule in 2006.

9. Further, following observations were made on individual issues of the topic.

► One Delegate expressed reservation to the extension of Diplomatic Protection to stateless persons and refugees as it departs from the traditional rule that only nationals may benefit from the exercise of diplomatic protection. The Delegate further observed that this reservation also flows from their reluctance to accept any definition of refugee, which expands the universally accepted definition under the 1951 Convention, irrespective of the purpose sought to be achieved by the introduction of a new definition.

► Another Delegate agreed with the general thrust of the articles on diplomatic protection. He, however, underlined that the application of the nationality principle raises a number of difficulties due to problems arising from multiple or dual nationality. He supported the retention of the traditional continuous nationality rule.

► One Delegate said that a State was responsible for injury to an alien caused by its wrongful act or commission. Therefore, diplomatic protection was the procedure employed by the State of nationality of the injured persons to secure protection of that person and to obtain reparation for the internationally wrongful act inflicted. He observed the 19 draft articles have established several legal principles on the Diplomatic Protection.

The Delegate said that the application of diplomatic protection over legal persons as described in articles 9 to 13 of the draft articles set a standard principle by which a corporation was protected by the State of nationality of the corporation and not by the State of nationality of the shareholders in the

corporation. Even though the State of nationality of the corporation has the right to exercise Diplomatic Protection, the State of nationality of the shareholders has the same rights but in a specific conditionality as set forth in article 11. The Delegate was of the view that this draft article provided sufficient balance between the interest of States and the investors.

With regard to the application of Diplomatic Protection to Ships' Crews, as covered under article 19, the Delegate seconded the view of the Commission that both diplomatic protection by the State of nationality and the right of the flag State to seek redress for the crew should be recognized, without priority being accorded to either. The Delegate further said that his Delegation was of the view that the Ship's Crews should have the right to enjoy maximum protection that international law could offer, especially when the threat of the use of unilateral coercive acts at sea, known as Proliferation Security Initiatives and Regional Maritime Security Initiatives was looming over head that could create dangerous situation to the global stability.

► Another Delegate was of the view that the right to diplomatic protection was a right, which accrues to the State as a subject of international law and not to individuals or corporations. The Delegate supported the wording of Article 10 which provided that it was the State which was entitled to exercise diplomatic protection on behalf of its nationals. This article conferred an entitlement upon the State to take certain action on behalf of its nationals. This entitlement was therefore conferred without necessarily imposing any obligation upon the State. The Delegate observed that in terms of this article the right to exercise diplomatic protection was a right which accrued only to the State and it was therefore the State which had a discretion to decide on how and when it would exercise that right on behalf of its nationals.

10. Let me now turn to the topic of "Reservations to Treaties". Following comments were made during the deliberations on certain specific issues of the topic.

► One Delegate believed that the intention of both parties should be taken into account while determining the kind of treaty relationship that exists between the reserving State and the objecting State.

► Another Delegate observed that the Special Rapporteur's ninth report relating to the object and definition of objections constituted a

complementary section to the 8<sup>th</sup> Report on the formulation of objection to reservations and interpretative declarations. He welcomed the adoption of 5 draft guidelines and commentaries thereto namely, the draft guidelines 2.3.5 (Widening of the scope of a Reservation), 2.4.9. (Modification of an Interpretative Declaration), 2.4.10 (Limitation and Widening of the Scope of a Conditional Interpretative Declaration), 2.5.12 (Withdrawal of an Interpretative Declaration), and 2.5.13 (Withdrawal of a Conditional Interpretative Declaration). With regard to the draft guideline 2.6.1, the Delegate supported the wording prepared by the Commission. He however preferred to delete two words in the bracket, i.e., the words “which opposes” and “formulated”.

► Another Delegate focused on two points, i.e. the definition of objection and the question of which State or international organization was entitled to formulate objection to a reservation. On the definition of objection, he observed that they share the view of the Special Rapporteur that objection needs to be defined, before the Commission deliberates on its legal effects. Nevertheless, as already mentioned in the Commission, the definition could be revised, if necessary, when the effects of objections were appropriately formulated. It was the view of the Delegate that the term objection should be defined in the light of established principles of international law, including the principle of sovereignty of States. The delegate said that the principle of sovereignty of States, which was the true basis of the consensual framework of the 1969, 1978 and 1986 Vienna Conventions, ensures that States are only bound to a treaty obligation once they express their consent and no State could bind the other against its will.

He said that they believed that objections with so-called super maximum effect have no place in international law. Assuming such an effect for objections as to create binding relationship between the author of reservation and the objecting State in entirety of the treaty, including the provisions to which the reservation was made, was in fact imposition of the treaty obligations to a State without its prior consent. Such an effect changes the Vienna regime on reservations to treaties and was not in conformity with the general practice of States. As it was pointed out in the Commission's report, the guidelines are intended to be of assistance for the practice of States. It, therefore, should not take any approach, which might be considered as alteration to the relevant provisions of the Vienna Conventions.

On the question of which State or international organization was entitled to formulate objection, the Delegate was of the view that reservation and objection thereto create bilateral legal relations between the reserving State and objecting State, with respect to their treaty relationship. Accordingly, only parties to a treaty are entitled to formulate objection to reservations made to that treaty. This argument was also based on the principle that there should be a balance between rights and obligations of the parties to a treaty. Signatory States do not have the right to make objections because they do not have full obligation to that treaty either. Moreover, reservations and objections thereto may vary in a wide range, from substantive issues to purely procedural aspects of the treaty. Therefore, in the view of the Delegate it did not seem legally appropriate to give a signatory the right to make objection to reservations when its overall obligation towards the parties to the treaty was limited to refraining from acts, which would defeat the object and purpose of the treaty. At the most the signatory State could be entitled to object reservations, which it deemed as contrary to the object and purpose of the treaty.

11. On the topic of “Unilateral Acts of States”, following observations were made:

► With regard to the ILC’s request for comments from States on their practice on this topic, one Delegate proposed that more details and guidance were required from the ILC on the direction they would expect the comments to take, as this was a very wide area.

► One Delegate opined that the concept of a unilateral act has not been analyzed rigorously enough and therefore in the first place, particular aspects of the issue should be thoroughly examined in order to get the picture of State practices and to seek for the applicable law. The Delegate said that they consider it important to define the term “Unilateral Acts”. He further observed that the said term covers a wide range of legal norms and procedures used by States in their conduct to exercise relationship towards each other. He also felt the need to distinguish political acts from legal acts in the absence of objective criteria to define “Unilateral Acts of States”. The Delegate proposed that the Working Group take up an in-depth study of the definition and classification of the “Unilateral Acts of States”.

12. Now I focus on the topic “International Liability for Injurious Consequences Arising Out of Acts not Prohibited by International Law”.

► One Delegate said that the report presented by the Special Rapporteur provided an in-depth analysis of the need for the protection of interest of the innocent victims of trans-boundary harm caused by hazardous activities. He said that the scope of the topic and the triggering mechanism should be the same as that provided for prevention of transboundary harm. In a scheme covering either liability or a regime of allocation of loss, the primary liability should be that of the operator, as he was the person in command and control of the activity and therefore had a duty to redress the harm caused.

The Delegate further said the draft presented by the Rapporteur was not only innovative but also flexible and propounded a scheme without prejudice to the claims that might arise and the applicable law and procedures. The flexibility was further strengthened by the Rapporteur's formulation of 'principles' instead of stipulating 'rules'. This approach was welcomed as some of the draft principles have gained only sectoral acceptance and have not found acceptance in general State practice. The Delegate observed that the major portion of the draft principles was thus seen to be in the nature of progressive development of international law.

In the Delegate's view the proposal advocating compensation for trans-boundary damage caused to environment *per se*, was not supported by sufficient State practice from which general principles could be derived and issues of quantification in monetary terms, *locus standi* etc., for claiming damage were difficult to establish.

The Delegate further observed that the need for the transfer of technology and capacity building in the developing countries has been well recognized in international instruments. Several international multilateral legal instruments also recognized the application of differential standards to developing countries from those accepted by the developed countries, in matters of environmental protection. The Delegate underlined that this balancing factor ensured that environmental consensus was viewed as an essential part of the right to developmental needs of a country. He said that the Report underscored the importance of this view and acknowledged that the choices and approaches for the draft principles and their implementation might also be influenced by different stages of economic development of the countries concerned.

► One Delegate supported the prompt and adequate compensation as set forth in article 4. He said that this article had sufficiently articulated four interrelated elements on the efforts of establishing a prompt and adequate compensation, which were: first, the establishment of a liability regime; second, the liability regime should not require proof of fault; third, any conditions or limitations that may be placed on such liability should not erode the requirement of prompt and adequate compensation; and fourth, the creation of any kinds of securities, insurances and funding industry that provide a financial guarantees for compensation.

With regard to article 6 of the draft principles, the Delegate was of the view that articles 4 and 6 were deeply linked with one another. While article 4 established the obligation of State to give a prompt and adequate compensation, article 6 indicated measures necessary to operationalize and implement the objective set forth in article 4. Thus, he emphasized that the access to national procedures to be made available in the case of trans-boundary damage should be similar to those procedures that a State provided under national law to its own nationals.

13. Views expressed by some delegates on “Responsibility of International Organizations” may be summarized as follows:

► One Delegate pointed out the enormous complexity surrounding the question of responsibility of international organizations. He said that unlike States, which share certain basic qualities, international organizations vary considerably in their structure, functions and competence. This diversity makes it difficult to develop and apply any set of common norms, articles or rules that would cover the multifarious and diverse entities under the term “international organization”. He advised the Commission to be cautious in developing rules for international organizations that mirror the rules set out with respect to States in the draft articles on State responsibility.

While referring to draft article 5, the Delegate said that the commentary to it suggested that the test of ‘effective control’ envisaged in this draft article was largely based on practice relating to peacekeeping forces. He pointed out that it was not clear whether the test of ‘effective control’ would be adequate to deal with all situations where article 5 would be applicable.

► On the three questions put forward by the Special Rapporteur in his third report, one Delegate expressed the following views.



1. The study of this topic should be based, as far as possible, on an in-depth research of relevant practices of various international organizations, but be confined to inter-governmental organizations;
2. In dealing with this topic, the ILC should give more weight to codification rather than progressive development of international law;
3. The “effective control” criterion is an evolving rule that needs to be further fleshed out through practice;
4. The issue of “Necessity” should not be invoked by an international organization to preclude its wrongfulness.

► One Delegate noted that articles were being drafted in an area that has limited legislative guidance. He said that some phrases that run through the articles such as “other acts” and “other entities” should be clarified.

14. On the topic of “Fragmentation of International Law”:

► One Delegate observed that fragmentation of International law is one of the realities of present day international relations.

► Another Delegate hoped that the study would have a positive effect on the application of international law, and could help clarify the relationship among the rules of different sections of international law without weakening the roles and status of basic principles of international law.

15. On the topic of “Shared Natural Resources”:

► While underlining that the topic was a complex one, one Delegate emphasized the need to learn more about transboundary aquifers in general, and be cognizant of the wide variation in specific aquifer conditions and State practice. He expressed his Delegation’s view that context specific agreements and arrangements were the best way to address questions relating to transboundary ground waters or aquifer systems. This would enable States concerned to take appropriate account of the various relevant factors in any specific negotiation. On the question of the final form, he echoed the views of those delegates that have supported a form that gives States appropriate flexibility to tailor agreements or arrangements to suit

individual circumstances. In other words, he supported adoption of guidelines that could be used for negotiating bilateral or regional arrangements. He recalled the situation with regard to the 1997 Convention on the Law of Non-Navigational Uses of Trans-boundary Watercourses, which failed to garner broad support or to have a significant impact on State practice, with the result that the Convention is yet to enter into force.

► Another Delegate expressed following views on the topic.

1. Sovereignty of States over their natural resources should not be overlooked;
2. As the ILC is formulating the “Draft Principles on the Allocation of Loss in Case of Transboundary Harm Arising out of Hazardous Activities”, and has already adopted “Draft Articles on Responsibility of States for Internationally Wrongful Acts”, there seems no need for this topic to cover the issue of liability or responsibility for payment of compensation;
3. The final form of the outcome of this topic could be decided after progress is achieved on substantive matters.

► Another Delegate pointed out the need for the elaboration of an international legal instrument to guide the use, allocation, preservation and management of Transboundary Ground Waters/Aquifers. He said that critical attention should be given to the management and sharing of confined aquifers and the ILC’s approach should be informed by the non-renewable nature of such aquifers. He also observed that it was useful to examine whether the principles of the 1997 Convention on Non-Navigational Uses of International Watercourses were suited to non-renewable underground water resources or whether transboundary aquifers should be governed by a regime akin to other depletable shared natural resources such as oil or natural gas. He said that in view of the delicate nature of the subject, a comprehensive study of State practice might be of useful reference in future work. On the outcome of the work of the ILC, he said that it could take the form of a framework document or guiding principles that would enable States to elaborate more specific national and regional arrangements.

16. As to the future work of the Commission and new topics;

► One Delegate endorsed the two new topics i.e., “Effect of armed conflict on treaties” and “Expulsion of aliens”.

17. Mr. Chairman, those were the views expressed by Delegates at the 44<sup>th</sup> Session of AALCO. Main points of deliberations of the 44<sup>th</sup> Session will be reflected in the Yearbook of the AALCO, Vol. III, 2005. Mr Chairman, with a view to enabling the Commission to be informed of the law and State practice of Asian and African States, the 44<sup>th</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.

Mr. Chairman, and Distinguished Members,

18. 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 44<sup>th</sup> Session of the AALCO included (i) 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; (ii) Jurisdictional Immunities of States and their Property; (iii) International Terrorism; (iv) Establishing Cooperation Against Trafficking in Women and Children ; (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; (viii) Expressions of Folklore and its International Protection; and (ix) Human Rights in Islam. Further, a one-day Special Meeting was held on the topic ‘Environmental Law and Sustainable Development’.

19. Mr. Chairman, as to the future cooperation 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-seventh Session. Allow me to add that an item entitled “The Report on the Work of International Law Commission at its Fifty-seventh Session” would thereafter be considered at the Forty-Fifth Session of the AALCO.

20. Mr. Chairman, next year is going to be an important year for AALCO as it is going to celebrate golden jubilee of its existence. This is also going to coincide with the inauguration of the Permanent Headquarters of AALCO in New Delhi. Keeping in view these important events the 44<sup>th</sup> Session of AALCO decided to hold its 45<sup>th</sup> Session in New Delhi. 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-Fifth Session of the AALCO to be held in New Delhi next year. To commemorate this important event AALCO Secretariat is planning to bring out a collection of 'Essays in International Law'. I take this opportunity to invite you all for your intellectual contributions to this collection of essays. We are also planning to have a Special Day Meeting on the topic of "Statelessness" in conjunction with the 45<sup>th</sup> Session. 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 for closer future collaboration with the Commission.

21. Finally, Mr. Chairman, let me place on 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.