

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

JULY 2002, 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-fourth session of this august assembly of distinguished jurists. At the outset may I offer an explanation. Last year the Commission made an well-intended request that my participation at the ILC session could be arranged for during the first part of its session so as to facilitate detailed discussions between the AALCO and ILC. Despite the best efforts on my part, it has not been possible to make it early this year, as the sudden and tragic demise of the AALCO's Vice-President had necessitated a re-scheduling of our annual session to July this year. My official responsibilities in this regard kept me engaged and I thank the Commission for its understanding on this delay.

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 fulfil 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 Amb. Chusei Yamada for his presence as the Representative of ILC to the 41st session of our organisation and the appraisal you provided on the developments during the first part of the 54th session of the Commission. We were immensely benefited by your informative presentation. I also wish to thank Prof. Djamchid Momtez and Prof. Bruno Simma, who on that occasion, 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 August 2001, permit me to state that the Forty-first Session of AALCO was held at Abuja, Nigeria from 15 to 19 July this year. The session elected H.E. Senator Kanu G. Agabi SAN, Hon'ble Minister of Justice and Attorney-General of the Federal Republic of Nigeria its President and H.E. Prof. Dr. Yusril Ihaza Mahendra, the Hon'ble Minister of Justice and Human Rights, Indonesia as its Vice-President.

6. As many as 15 substantive items were considered in the course of the session. One such important item discussed includes the "Work of the ILC at its 53rd 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.

7. Mr. Chairman, the 41st session of AALCO 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, permit me Mr. Chairman to provide an overview of the views expressed by Member States on the work of ILC at its 53rd Session.

I will begin with the item “State Responsibility”.

8. At a general level, delegates welcomed the completion and adoption of the draft articles by the Commission on the topic. A majority of the delegates acknowledged that the draft articles were balanced and a fair reflection of customary international law. One delegate however was of the view that the draft articles as adopted emphasized ‘codification’ rather than introducing progressive elements of international law. While codification admittedly had the advantage of rendering the draft articles more acceptable to States, the elements of progressive development like the notion of “serious breach of obligations under peremptory norms of international law” and the invocation of responsibility by a State other than the injured State” had the potential to invite further debate among States. Overall, the delegates felt that the draft articles were the best that could be obtained after almost 50 years of hard work.

9. Mr. Chairman, almost all delegates who spoke unanimously endorsed the decision of the General Assembly to take note of the draft articles and include the topic on the agenda of its 59th session. The interim period would offer time for States to reflect on the provisions and also allow for State practice to develop on the lines of the draft articles as presented by the Commission.

10. Mr. Chairman, on specific aspects of the draft articles, the views of the AALCO Member States may be stated in a summary form:-

- a. As regards the notion “serious breach of obligations arising under a peremptory norm of general international law”, some delegates were concerned that it would prove to be controversial as the draft articles do not clarify as who should judge whether an international wrongful act constitutes a “serious breach”. The decision to delete any reference to “international crimes” was welcomed and this deletion, it was felt, would not weaken the draft articles. Another view expressed on probable list of peremptory norms was to the effect that the examples given in the commentary to the draft articles are only indicative. The precise content and conditions under which they could be treated as “peremptory norms”, are open to debate. Accordingly, it was that delegate’s view that this concept requires a careful study on the basis of further development of State practice.
- b. As regards the consequences of a serious breach, that is, the obligation on States to cooperate to bring the breach to an end through lawful means, and not to recognize the resulting situation as lawful and not to render aid or assistance in maintaining the situation, was welcomed. The omission of any reference to “punitive damage” and the simplified structure of provisions of the consequences of serious breaches were noted with appreciation.
- c. With respect to draft article 48 on “Invocation of Responsibility by a State other than an injured State”, one delegate welcomed the limits within which a State other than injured State could invoke responsibility. On the other hand, some other delegates while setting out their understanding of article 48 acknowledged that any State other than an injured State may express its concern in some appropriate form or may demand the responsible State to cease the wrongful act.

However, doubts were expressed as to the appropriateness of elevating such actions to the level of legal responsibility of the State.

- d. Mr. Chairman, in the opinion of many delegates the uncertainty of the concepts of “obligation owed to the international community as a whole” or “obligation for protection of collective interests” contained the potential for abuse. More particularly the formulation under article 48(2)(b) of “the beneficiaries of the obligation breached” conferred on third States a broad excessive right, and therefore likely to lead to disputes between States concerned.
- e. Regarding countermeasures, at a general level, delegates welcomed the checks and balances incorporated in the draft articles to prevent abuse of countermeasures. At the same time, delegates cautioned against expanding the scope of States entitled to take countermeasures and also introducing the notion of “collective countermeasures” in the draft articles. However, as unilateral determination of the legitimacy of countermeasures has operated in favour of powerful States, some delegates were disappointed over the draft articles having left it to the State taking countermeasures to determine whether an act is unlawful. In this context, the need to establish linkages between countermeasures and compulsory settlement of disputes was emphasized.
- f. Countermeasures should be reversible and they should not inflict serious or irreparable damage on the responsible State. For this reason, a delegate felt that the list of prohibitive countermeasures should have been more exhaustive. In the opinion of this delegate two other obligations should have been added to the list. One, the prohibition of any measures of economic or political constraint affecting self-determination, territorial integrity or political independence of the State. Secondly, given the fact that “protection of fundamental human rights” is an obligation in the list of prohibited countermeasures and also that the “right to be free from hunger” is agreed as a fundamental human right, the delegate was of the opinion that countermeasures that banned access to markets by a responsible State for which exports is the principal source of income should be prohibited.

11. Mr. Chairman, These are some of the views expressed on specific aspects of draft articles on States Responsibility. Before I conclude my observations on this topic, may I convey to the Commission on behalf of AALCO Member States the appreciation on the successful completion of the work on this topic. The AALCO wishes to place on record its deep appreciation and admiration for the contribution of all the Special Rapporteurs in shaping the draft articles.

12. I will now turn to the draft articles on Prevention of transboundary harm from hazardous activities. Mr. Chairman, the AALCO offers its compliments to the Commission and the Special Rapporteur Dr. P.S. Rao and his predecessors for the successful completion of the work on this topic. Many delegates commended the draft articles as a significant step forward in the field of international environmental law. The draft articles could provide a solid basis for a framework convention for international cooperation and regulation. The draft articles, it was felt, could serve as a practical guide for the elaboration of international legal instruments dealing with specific aspects of environmental protection. More particularly, the principles concerning public participation, non-discrimination, and settlement of disputes in the draft articles were in the nature of progressive development of international law. As State practice on these matters vary from region to region, it may take time before universal standards could be developed. Finally, given the inter-linkages between prevention and liability, delegates urged the Commission to expedite its consideration of the liability aspects of the topic.

13. Mr. Chairman, following are the views expressed by delegates on the topic “Reservations to Treaties”:

- a. Generally, in the interest of stability and integrity of treaties, delegates were opposed to admission of “Late reservations to treaties”. In exceptional cases, where late reservations are permitted, the ILC’s Guide to Practice should regulate the issue, clarify the conditions for such a practice as well as the procedure to be followed in accepting or refusing a late formulation of reservation;
- b. Opinion was divided on “conditional” interpretative declarations. One view considered ‘conditional’ interpretative declarations as reservations in another form, and hence should not be treated as a separate category different from reservations. Another view stated was that conditional’ interpretative declarations which are different from simple interpretative declarations, to a certain extent, limit or modify the effect of articles concerned on a particular State party, and thus function as reservations to treaties. Therefore, according to this view, it would be appropriate to make a distinction between conditional interpretative declaration and simple interpretative declaration, without setting separate norms for the former and make them subject to the same legal regime as regards reservation.
- c. On ‘the role of the depositary’, delegates felt it should not go beyond the scope of the 1969 Vienna Convention on the Law of the Treaties. It was pointed out that, while in accordance with article 77(1)(iv) and (v) of the Vienna Convention, the depositary could examine the appropriateness of the form of reservation by States to see if it is in conformity with the relevant rules of the Convention and, when necessary, draw the attention of the State concerned to its examination, a depositary is neither an interpreter of the text of the treaty nor a judge on the compliance by a State with the treaty. Hence, a depositary should not be endowed with the right to review the permissibility of reservation and to refuse to communicate such reservations to the States concerned.

14. As regards the topic “diplomatic protection”, support was expressed for the view that the rule of ‘continuous nationality’ should be maintained as the basic standard of diplomatic protection. However, exceptions could be allowed in cases where individuals have changed nationality involuntarily and ended up with no diplomatic protection from any State.

15. On the rule of ‘exhaustion of local remedies’, one delegate pointed out that draft article 10 on the subject contained no reference to the criteria for determining whether local remedies have been exhausted. In particular the delegate was of the view that it would be too great a burden on the part of victims of generalised human rights violation to require that all available local remedies be exhausted. Speaking on the same subject, yet another delegate elaborated his understanding that where an international claim is brought on the basis of a direct injury to a State instead of its national, then it is beyond the scope of diplomatic protection and the rule of exhaustion of local remedies had no relevance. Against this backdrop, the delegate felt that the rule laid down by draft article 11 was not necessary.

16. Comments were offered by delegates on the need to make a distinction between diplomatic protection of companies and diplomatic protection on behalf of its shareholders. It was agreed that, only the State whose nationality a company has acquired through incorporating or registering in the State has the right to provide diplomatic protection to the company. In addition, it was not appropriate for the State whose nationals are shareholders to exercise diplomatic protection vis-à-vis the State in which the company is incorporated. In line with this understanding it was stated that, if an individual shareholder of a company is injured by the wrongful act of the State in which the company is incorporated, the State whose nationality the individual shareholder holds, has a right to provide diplomatic protection. But this was within the scope of diplomatic protection for individuals and not for the company.

17. While discussing the Commission's work on the topic of "Unilateral Acts", the delegates felt, notwithstanding its theoretical usefulness, the Special Rapporteurs classification of unilateral acts based on 'legal effects' criterion may not be viable in practice. A suggestion was made for the draft articles to be divided into three parts: (a) a general section; (b) section on rules relating to act whereby the State undertakes obligation; and (c) those that relate to acts whereby the State reaffirmed its right. Preference was expressed for the ILC, at the present stage, to focus on formulating general rules applicable to all unilateral acts.

18. While the importance of interpretation of unilateral acts was generally acknowledged, delegates felt that it is not the right time to consider this issue. A view was expressed that this aspect could be discussed after the delineation of the scope and definition of unilateral acts is accomplished. However, the *prima facie* stand was that when formulating rules on interpretation, related provisions of the Vienna Convention on Law of Treaties could be used as the reference. When interpreting those provisions, specific circumstances should be taken into account while considering the true intention of the State. At the same time, the special characteristics of the unilateral act itself should be taken into account.

19. Mr. Chairman, in the light of the above deliberations, the 41st session of AALCO in a resolution adopted on this subject, urged AALCO Member States to communicate their response to the questions set forth by the ILC on the topic of Reservations to Treaties and Diplomatic Protection.

20. Mr. Chairman, and Distinguished Members, the other items, apart from the ones that I have already mentioned, that were considered by the 41st session of the AALCO included (i) International Terrorism (ii) Status and Treatment of Refugees; (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) Extra-territorial Application of National Legislation: Sanctions Imposed Against Third Parties; (v) Follow-up of the UN Conference of Plenipotentiaries on the Establishment of An International Criminal Court; (vi) United Nations Conference on Environment and Development: Follow up; (vii) Legislative Activities of United Nations Agencies and Other International Organizations Concerned with International Trade Law; (viii) WTO as a Framework Agreement and Code of Conduct for World Trade; (ix) Establishing Cooperation against Trafficking in Women and Children. Mr. Chairman within the framework of the 41st session, the AALCO in cooperation with the Office of the UN High Commissioner for Human Rights organized a one-day Special Meeting on "Human Rights and Combating Terrorism".

21. Mr. Chairman, it may be recalled that the AALCO had at its 40th session last year included an agenda item on "Legal Protection of Migrant Workers" to its work Programme Pursuant to this, its current sessions the AALCO Secretariat prepared and submitted for considerations by Member States a Draft Model Regional Agreement between States of Origin and States of Destination Employment. Besides, two other new items have been added to AALCO's work programme this year: One is on "An Effective International Legal Instrument Against Corruption" and the second relates to "Human Rights in Islam". A comprehensive report on the 41st session, I assure you Mr. Chairman, would be presented to the Secretariat of the ILC at the earliest possible time.

22. Mr. Chairman, it is a matter of pride for us that AALCO is one of the intergovernmental organizations having cooperative relationship with the ILC. During the term of my office, I would endeavour to further and intensify the working relationship between the AALCO and ILC.

23. The AALCO as an inter-governmental body with 45 States from the two continents of Asia and Africa, is uniquely placed to serve the States of this region in examining and

formulating their responses to newly emerging challenges of international law. The expanding scope and variety of issues on our work-programme is indicative of the willingness of AALCO to keep up with the increased responsibilities of examining a wide range of newly emerging problems of international law. Against this backdrop, I believe you will agree with me, if I say that the relationship between both our organizations should be further intensified. It is our experience that owing to paucity of time, in-depth consideration of important legal aspects becomes impossible on formal occasions. May I therefore reiterate the proposal I made last year and commend for your consideration the feasibility of the ILC and AALCO jointly organising a seminar or workshop. Mr. Chairman, I am conscious of the fact that both our organizations function under tight financial constraints and other limitations. However, the benefits of such an exercise I have stated above would outweigh the limitations. The proposed seminar could focus on one of the topics that is presently at the formative stages within the Commission or discuss the topics proposed under long-term Programme of the Commission. Mr. Chairman, and distinguished Members, I would very much appreciate your feed back.

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

25. 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-second Session of the AALCO to be held in 2003. I shall in due course communicate to you the date and venue of the next Session of the AALCO. I look forward to welcoming you all to the next Session of the Organization and to closer future collaboration with the Commission.

26. 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.
