



**ADDRESS ON THE TOPIC “IDENTIFICATION OF CUSTOMARY INTERNATIONAL LAW” TO BE MADE BY H.E. PROF. DR. RAHMAT MOHAMAD, SECRETARY-GENERAL, AALCO AT THE AALCO LEGAL ADVISORS MEETING AT UN HEADQUARTERS, NEW YORK ON THURSDAY, 29<sup>TH</sup> OCTOBER 2015**

H.E. Mr. Xu Hong, representative of Liu Zhenmin, the President of the Fifty-Fourth Session of AALCO and the Director-General, Ministry of Foreign Affairs of China,

H.E. Mr. Francois Delattre, Ambassador of France,

H.E. Nyamane Mamabolo, Ambassador of South Africa,

H.E. Eden Charles, Ambassador and Chair of the UNGA Sixth Committee,

Dear Mr. Jan Eliasson, Deputy Secretary-General of the United Nations,

It is indeed a pleasure for me to be addressing this distinguished audience on the important topic “Identification of Customary International Law”, a topic that has always been of vital significance to the Member States of AALCO.

My address today will focus on two issues:

*Firstly*, I will highlight the work of AALCO in relation to the topic of Customary International Law (CIL). I am happy to announce to this distinguished audience

that the work of AALCO on CIL stands recognized in the third report of the Special Rapporteur on this topic<sup>1</sup>.

*Secondly*, I will give a brief account of the most important issues arising from the third report of the Special Rapporteur that was submitted in 2015.

### **Work of AALCO in relation to CIL**

At its most basic level, AALCO has provided a platform for its Member States to familiarize themselves with various aspects of the topic CIL. It has also allowed them to exchange their viewpoints on numerous issues (sometimes directly) with the Special Rapporteur of ILC on the topic.

Due to the immense importance that the topic of Customary International Law (CIL) holds for the Member States of AALCO, the Organization had established an *“Informal Expert Group on Customary International Law”* (hereinafter the Informal Expert Group) at the recommendation of AALCO Eminent Persons Group (EPG) in 2014. It was envisaged to act as a technical expert group on the Identification of Customary International Law and formulate responses to the work of the ILC on the subject.

The *first meeting* of this Informal Expert Group<sup>2</sup>, which was held during the Fifty-Third Annual Session held in Tehran in 2014, discussed various issues related to the topic. This also included: the working method, approach and schedule of the Informal Expert Group itself and it was agreed unanimously that

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<sup>1</sup>See, Para 11 of the Third Report of Sir. Michael Wood.

<sup>2</sup> Depending upon the availability of time this part (dealing with meetings of IEG) can be shortened.

the various fundamental facets of the topic of CIL deserved to be discussed at great length in the coming years<sup>3</sup>.

At its *second meeting* held in the Institute of Malaysian and International Studies (IKMAS), National University of Malaysia on 24 March 2015, the Special Rapporteur of the Informal Expert Group Mr. Sienho Yee presented his Report on Identification of Customary International Law and a series of proposed comments on that project. Upon deliberation, and taking into account comments and views made by members, the Group adopted the comments proposed by Mr. Sienho Yee, with some modifications.

The *Third meeting* of the Informal Expert Group took place during the recently held Fifty-Fourth Annual Session of AALCO in Beijing in April 2015. There was active participation by many Member States of AALCO who had shared their concerns/viewpoints/queries in this meeting. The Delegates were of the view that more time should be allocated to the Member States of AALCO to analyze the report and make recommendations thereon. They stressed the significance of a cautious approach in dealing with a highly enigmatic area of Identification of CIL. The delegates were of the view that AALCO should retain this issue on its agenda and follow closely the development within and outside related to this topic. The Chairman of the Meeting expressed serious concern about the lack of capacity on the part of AALCO Member States to promptly reply to ILC questionnaires.

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<sup>3</sup> It elected Dr. Sufian Jusoh, Senior Fellow at the Law Faculty of the National University of Malaysia as its (Interim) Chairman and Professor Sienho Yee of Wuhan University, China as the (Interim) Special Rapporteur.

It also needs to be underlined here that the Special Rapporteur of the AALCO Informal Expert Group (IEG) on CIL Prof. Sienho Yee, had submitted a report on the topic incorporating the concerns of the Member States of AALCO to the ILC on March 20<sup>th</sup> March 2015 for its consideration. The Member States had agreed to transmit his report to ILC without giving any specific approval to it on the whole.

Be that as it may, in accordance with the mandate received at the 54<sup>th</sup> Annual Session of AALCO, a two-day legal experts meeting on “Identification of Customary International Law” was organized in association with the National University of Malaysia (UKM) and the Institute of Malaysia and International Studies (IKMAS) at UKM, Malaysia on 27<sup>th</sup> and 28<sup>th</sup> August 2015. Representatives from ten Member States of AALCO (at various levels) and many other participants took part in this meeting. They had the fortune of listening to Sir Michael Wood himself on this occasion.

In all these meetings, Member States of AALCO have taken an active part in discussing various aspects of this topic and have highlighted the need to continue to discuss this topic in future. Barring these meetings, the topic of CIL has also been deliberated as part of the “Special Meeting on Some Selected Items on the Agenda of the ILC” that AALCO has been holding in conjunction with its Annual Sessions in recent years.

Be that as it may, in the remaining part of my presentation I would like to give a brief overview of the most important issues arising from the third report that

(seeks to complete the set of draft conclusions proposed by the Special Rapporteur) are of critical concern to the Member States of AALCO.

### **Most Important Issues flowing from Third Report on CIL<sup>4</sup>**

#### **1. *Acts of International Organizations and Creation of CIL***

It is true that States remain the primary subjects of international law and, (as explained in the second report,) it is primarily their practice that contributes to the formation, and expression, of rules of customary international law. It is widely accepted that the role of international organizations in the development of international law can not be ignored in this day and age.

The third report specifically addresses the acts of international organizations. There are some circumstances wherein the practice of States emanating from international organizations do contribute to the emergence of CIL. The practice and *opinio juris* of international organizations in the identification of customary international law – as distinct from the acts of States within and through such organizations – is particularly contentious. The contribution of international organizations primarily raises the question as to whether the practice and *opinio juris* of international organizations should contribute generally to any customary rule, or only when it concerns the development of rules that will also bind international organization. And if the answer is yes, then to what extent?.

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<sup>4</sup> At its 2015 session, the ILC considered the third report of Mr. Wood and referred the draft conclusions proposed therein to the Drafting Committee. The Drafting Committee had adopted a full set of 16 draft conclusions. It is believed that in the year 2016, the Commission will indeed adopt the set of draft conclusions, with commentaries, on first reading. A second reading would follow, probably in 2018.

The third report (like the second report) proceeds on the basis of the determination that, where appropriate, the practice of States within international organizations is to be attributed to States themselves. However, its conclusion is that acts of IOs are generally irrelevant to the formation of custom. Instead, the Report's guiding assumption is that the practice of IOs is to be attributed to the States themselves, not to the IOs.

It needs to be acknowledged that:

- First, international organizations differ in terms of their membership and structure, it should not be presumed that the acts or inaction of any of them represented the general practice of States for the purposes of establishing customary international law.
- Second, considerable caution is required in assessing the relevance of the acts, including inaction, of international organizations. This is because there are wide variations in the organizational structure, mandate, composition of decision-making organs and decision-making procedures of such organizations, all factors that have a bearing on such organizations' role, if any, in the formation of customary international law.
- Third, whether actions of international organizations can be attributed to the State community as a whole is a complex question and the answer depends on such divergent factors as, *inter alia*, the nature of the organization (political vs. technical), the inclusiveness of its membership (universal and total vs. regional and limited), the composition of the relevant organ adopting a certain measure (plenary vs. partial) and the decision-making method applied (unanimity and consensus vs. majority).

## 2. *The Role of Treaties and Resolutions*

International law is being increasingly codified in the form of treaties and conventions. Such written texts may reflect already existing rules of customary international law (codification of *lex lata*); they may seek to clarify or develop the law (progressive development); or they may state what would be new law. Bearing in mind diverse views on the issues, adequate caution must be exercised while considering treaties. In order for a written text to be established as a norm of customary international law, it must find support in external instances of practice coupled with acceptance as law. Thus, a treaty provision may reflect or come to reflect a rule of customary international law if it is established that the provision in question:(a) at the time when the treaty was concluded, codifies an existing rule of customary international law; (b) has led to the crystallization of an emerging rule of customary international law; or(c) has generated a new rule of customary international law, by giving rise to a general practice accepted as law.

When dealing with resolutions adopted by States within IGOs and international conferences, the Report gives special attention to UN General Assembly Resolutions. They are particularly relevant as evidence of or impetus for customary international law. Also important in this regard are the circumstances surrounding the adoption of the resolution in question. These include, in particular, the method employed for adopting the resolution; the voting figures (where applicable); and the reasons provided by States for their position. As pointed out in the third report, clearly: “[T]he degree of support is significant. A resolution adopted by *consensus* or by *unanimous vote* will necessarily carry more weight than one supported only by a two-thirds majority of States. Resolutions opposed by even a small number of states may

have little effect if those states are among the ones most immediately affected.” Of course, resolutions adopted in forums such as UNGA wherein there is near universal representation, carries more weight in terms of their persuasive value. However, it is important to emphasize that they cannot, in themselves, constitute customary international law.

### 3. *Specially Affected States*

This concept is most famously associated with the International Court’s 1969 *North Sea Continental Shelf* judgment, where the Court considered it particularly relevant to focus on whether adjacent States that had delimited their continental shelves since 1958, had done so in a manner that suggested that the equidistance rule articulated in the relevant 1958 convention had passed into customary international law. It is important to make it clear that the concept of specially affected state is grounded in international jurisprudence and the writings of leading publicists. But, if this concept is not carefully delineated it might be perceived rightly or wrongly as privileging the role of major powers in the formation of customary international law, rather than simply recognizing that, in certain circumstances, the practice of some States may be more germane to an issue than the practice of others.

However, the third report seems to have overlooked the issue of specially affected states. The AALCO Informal Expert Group had already characterized its elimination as “problematic”. It had suggested that the Commission should ensure inclusiveness and not “superficial equality”. As mentioned in Report of AALCO Informal Experts Group, “the States specially affected by a certain matter will leave a heavier footprint in the formation of rules relating to that matter. Needless to say, those States may have to shoulder greater burden than



others. Naturally their concerns and their conduct deserve special consideration”.

Be that as it may, technological developments raise specific questions concerning the identity of the “specially affected States”. When, for instance, law develops as a consequence of the development of weapons technology, who are the “specially affected” States? The States possessing modern weapons technology, and perhaps also States not possessing such technology who may face the risk of an armed conflict in which the opponent uses such new technology? Indeed, both would appear to have a specific interest in how the law in this field develops. This example indicates that a further sketch of how to determine the notion of “specifically affected” would be very welcome and necessary. In other words, the standard for distinguishing the specially affected States is mostly crucial.

#### **4. Persistent Objector**

Essentially, “persistent objector” rule says that a State that objected to a new rule of customary international law at the beginning of its formation and has persisted in its objection ever since is not bound by the rule for so long as it persists in its objection. The persistent objector rule has already been recognized in essence if not in express terms in the ICJ judgment in the *Fisheries Case*.

The report says that there is sufficient State practice to suggest the existence of the rule. It has also received wide endorsement in academic literature. Barring the opposite arguments, the persistent objector rule is perceived as a safeguard against the transformation of customary international law into “the sole preserve of the mighty”, and is particularly attractive because there is no possibility of dissent from an established rule. For the rule to be

applicable, a State must express its objection clearly, consistently and persistently. Indeed, the first meeting of the Informal Expert Group itself had highlighted this issue.

However, there are many questions, many of which have been treated by Mr. Wood in his third report that still need to be resolved:

- *How real is the difference between persistent and subsequent objection?*
- *What form must objection take before it can be called objection?*
- *Are there any limits or exceptions to the rule of persistent objector itself?*

Furthermore, one issue raised in the Informal Expert Meeting that is also worth considering is the impact of an act to be considered as state practice violating an already established peremptory norm of international law. There is a strong view that some rules of CIL<sup>5</sup> can never be breached, no matter what.

These are some of the important thoughts that I wanted to share with this distinguished gathering on a topic that holds immense importance especially to the developing countries of Asia and Africa. AALCO would highly appreciate any response from the Special Rapporteur of ILC on the issues raised by our Member States. We would also appreciate him if he comes up with more commentaries for the draft conclusions reached that, I feel, would enable our Member States to take more informed positions on them. Going forward, AALCO would continue to keep track of the developments occurring in this area with a view to help Member States identify and influence the course of the work of ILC in the times to come. *I thank you all.*

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<sup>5</sup> The examples could be: prohibition of use of force in the relations of countries, basic human rights, crimes against humanity, etc.