



KEY NOTE ADDRESS DELIVERED BY HIS EXCELLENCY PROF. DR. RAHMAT MOHAMAD AT THE INAUGURAL SESSION OF THE TWO DAY AALCO LEGAL EXPERTS MEETING ON “IDENTIFICATION OF CUSTOMARY INTERNATIONAL LAW” HELD ON 27 AND 28 AUGUST 2015 AT THE NATIONAL UNIVERSITY, MALAYSIA

YBhg Prof. Datuk Dr. Noor Azlan Ghazali, the Vice Chancellor, National University, Malaysia;

Mr. Stephen Mathias, UN Assistant Secretary-General for Legal Affairs;

Dr. Sufian Jusoh, Professor of International Law, National University, Malaysia;

Sir Michael Wood, the Special Rapporteur of the ILC on the subject of Identification of Customary International Law;

Mr. Sienho Yee, Professor of International Law, Wuhan University and Special Rapporteur of the AALCO Informal Expert Group on Customary International Law;

Distinguished Representatives from the Member States of AALCO;

Distinguished Faculty Members and Dear Students of UKM, Malaysia,

It is a great pleasure and privilege for me to welcome you to this two day ‘Legal Experts Meeting on Identification of Customary International Law’ organized by the Secretariat of AALCO in association with the National University, Malaysia. Let me first thank the Vice-Chancellor of the National University of Malaysia, for agreeing to host this meeting here in its campus. May I take this opportunity to extend to all of you warm greetings on behalf of the Secretariat of AALCO, and myself, and my thanks are due to you all for gathering here to contribute to this meeting.

I am happy to see the positive response which we have received from our Member States. Considering the importance of this topic for the large majority of our Member States, we have decided to hold this Meeting in order to elaborate on a variety of issues relating to Customary International law (CIL) and that too in the distinguished presence of none other than H.E. Mr. Michael Wood, the Special Rapporteur of ILC on this topic. We are grateful to you Mr. Wood for making it to this meeting and we are as ever, eagerly looking forward to hear your views on numerous issues of CIL. I also thank Mr. Stephen Mathias for his presence as the representative of the United Nations.

I would also like to take this opportunity to commend Mr. Michael Wood the Special Rapporteur on the topic, for the high quality of his reports. AALCO particularly appreciates that, notwithstanding the complex and theoretical nature of the issues related to the two constituent elements of CIL, the Special Rapporteur has not lost sight of the practical purpose of the work of the ILC on this topic aiming to give guidance on the process of identification of customary international law.

With these welcome remarks, let me move on to the substantial part of my address. I divide my address into three parts.

Firstly, I would try to portray the importance of customary international law in the contemporary era. I will also identify many of the tricky issues of CIL that beg clarity and precision and for which there are no easy answers.

Secondly, I will go on to highlight the historical and mutually-beneficial relationship that AALCO has shared with ILC over the years. I will also dwell on the work of AALCO with regard to the topic CIL which as we all know is one of the topics contained in the agenda item of ILC.

Thirdly, I would go on to highlight some of the areas of common understanding that emanate from the viewpoints/concerns of the Member States of AALCO. I would also pin point the areas of disagreement that needs to be focused and addressed in future.

On the importance of Customary International Law

Custom was traditionally the major source of public international law. This was because in traditional international law there were only a few law-making treaties that established rules for application in the relations between States. The situation is very different now. Today, there are a considerable number of treaties on a variety of subjects in international law from human rights law, to trade law, to environment, to investment and so on. Yet customary international law continues to be significant particularly for the developing countries on account of the following reasons:

Firstly, in some ways, CIL possesses more jurisprudential power than does treaty law. Unlike treaties, which bind only the parties thereto, once a norm is established as customary international law, it is binding on all States, even those new to a type of activity, so long as they did not persistently object during its formation¹.

Secondly, one might assume that treaty law offers the benefit of greater clarity and precision in the articulation of the legal obligations, but this is not always the case. In some areas, customary rules may provide greater precision since they evolve in response to concrete situations and cases, and are often articulated in the written decisions of international courts and tribunals.

¹ A persistently objecting state is not bound by the eventual customary international law rule if the state fulfills two conditions: first, the objections must have been maintained from the early stages of the rule onwards up to its formation, and beyond. Second, the objections must be maintained consistently. The objector should not be able to benefit from its own inconsistencies. In all cases the persistent objector bears the burden of proving its exceptional position.

Thirdly, and perhaps most importantly from the perspective of the developing countries, these States could not play any significant role in the formation of customary international law traditionally, due to the fact that they were under colonial occupation. Now, that the ILC has taken it up, it is very important for them to engage and influence the work of the ILC by giving their inputs and view points to the ILC. I am of the strong view that developing countries constitute an essential voice that can help fill the democratic deficit that characterized the customary international law-making in the pre-UN Charter era.

It is true and also widely supported by the Member States of the UN that custom consists of two elements, namely state practice and *opinio juris* as reflected in Article 38 of the Statute of the ICJ that contains the modern definition of customary international law. However, as there are multiple and varying factors which influence the development of a customary rule in the different fields and areas of international law, the definition of custom as articulated in Article 38 of the ICJ Statute² can barely encompass all the delicate but significant factors which contribute to the formation of a new norm of customary international law.

In relation to CIL, there are a number of issues that need to be clarified and for which there are no easy answers. These include:

- What role can and should custom play in the making of international law?:
- What are the normative foundations of custom (i.e. what makes custom law)?:

² Article 38 of the Statute of the ICJ provides that:

“The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply . . . (b) international custom, as evidence of a general practice accepted as law.”

- What are the evidential requirements for customary international law (e.g. constituent elements, context, and burden of proof)?:
- What is the role of national and international courts respectively in the creation of customary rules?:
- What is the role of non-State actors in the development of customary international law?:
- How do norms of local or special customary international law arise?:
- Are there variations in the 'method' of customary international law in different fields/regimes of international law?:
- What is the relevance of the persistent object theory to the formation of customary international law?:

There is heated debate, and no little confusion, over the nature, limits, and viability of CIL. Surely, this is not merely a tempest in an academic tea-pot! This is the reason why Professor Myers McDougal of Yale Law School famously described the customary international law formation process as one of *continuous claim and response*.

Work of AALCO in relation to CIL

One of the most important objectives of AALCO is to ensure that the voice of Asian and African States is heard loud and clear in the progressive development and codification of international law. An important part of this exercise involves the contribution of the Members of ILC from AALCO Member States, and the contribution of AALCO Member States themselves to the work of the Commission. The Asian and African members of the Commission have undoubtedly made, and continue to make a valuable contribution to the work of the Commission. Their presence is essential if the ILC is to be truly representative.

Indeed, the cooperation between the ILC and AALCO has a long-standing tradition. It was launched within a year of AALCO's establishment at the ninth Session of the ILC in 1957. Since that time the Commission has benefited immensely from different forms of cooperation with AALCO and its Member States. The ILC has welcomed the visits of Secretary-Generals of the Organization at its sessions. Chairs of the ILC have participated in the work of the annual session of AALCO. Eminent lawyers from AALCO countries have become members of the ILC and contributed significantly to its achievements. AALCO's discussions on the topics under consideration of the Commission facilitated its work.

Be that as it may, due to the immense importance that the topic of CIL holds for the Member States of AALCO, AALCO 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 was held during the Fifty-Third Annual Session held in Tehran in 2014, and 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. While discussing the various issues related to the topic including the working method, approach and schedule of the Informal Expert Group itself, it was agreed unanimously that the various fundamental facets of the topic of CIL deserved to be discussed at great length in the coming years.

At its *second meeting* held at 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 of many Member States of AALCO who had shared their concerns /viewpoints/queries in this meeting. The Delegates pointed out the short duration of time Members States had to analyze the report. The meeting was of the view that more time should be given 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.

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. For example, during the Fifty-Second Annual Session of AALCO held in New Delhi in 2013, the topic of CIL was one of the agenda items and the Member States of AALCO were fortunate to hear the views of Mr. Michael Wood on the issue, which were well-received. During these meetings, the Member States of AALCO have reiterated their interest in this topic and their intention to actively participate in its consideration in the future.

With this, let me move on to the last part of my address that focuses on the areas of agreements and disagreements/concerns flowing from this topic from the view points of the Member States of AALCO.

Common Points of Agreement

Firstly, there is great support to the two-element approach to the identification of rules of CIL that is consistent with the jurisprudence of international bodies and which also contributes to the reinforcement of well-established norms (even while precluding fragmentation of international law³)

Secondly, it is accepted generally that the examination of “general practice” should be *representative* and reflective of at least *all major political and socio-economic systems* of world’s various regions⁴.

Thirdly, it is generally agreed that the practice of international organizations (at least in some specified circumstances) is also relevant so far as the formation of CIL is concerned⁵.

³ India and Islamic Republic of Iran in the Fifty-Fourth Annual Session 2015.

⁴ India in the Fifty-Fourth Annual Session 2015

⁵ Islamic Republic of Iran in the Fifty-Fourth Annual Session 2015.

Fourthly, there is general agreement with the view that the outcome of the work of ILC on this subject should serve as a practical tool to practitioners who are not specialists in international law and that it should not be overly prescriptive in order to properly reflect the flexibility of custom.

There are also some areas of the topic of CIL that are of critical concern to the Member States of AALCO.

Grey Areas

With regard to many issues of CIL, there are serious concerns. Just to give two examples: the issues of

- ‘Specially Affected States’ and
- the ‘Concept of Persistent Objector’.

There are arguments for and against the inclusion of these issues into the work of the Special Rapporteur.

A view has been expressed⁶ that the “specially affected states” rule is not reserved for powerful states, but applies to all states who are especially concerned with the subject matter under consideration and whose interests are especially affected by the rule under consideration. We are not very clear as to the parameters required to identify a specially affected state?. Hence, the situation of specially affected states deserves serious consideration⁷.

⁶ Islamic Republic of Iran’s statement at the 54th Session in Beijing 2015.

⁷ It is worth mentioning here that the ICJ had highlighted the special role of the specially affected States in its 1969 judgment in the *North Sea Continental Shelf cases* (ICJ Reports 1969, 3). The Court had said in *paragraph 73* of that judgment that, “With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself,

Similarly, the relevance of the concept of Persistent Objector is debated fiercely⁸.

- Is the international community ready to accept a system in which the majority can develop new rules of CIL and bind the minority to the new rules over their objection?
- Do we have compelling reasons to reject or accept this principle in contemporary international law making?
- Are there limits to the rule of persistent objector?

These are just some of the important but difficult issues that arise under the topic of CIL and need to be discussed threadbare. This brings me to the objective of this intellectual exercise that we are undertaking here for today and tomorrow.

This meeting offers the Member States of AALCO an excellent opportunity to express their views/concerns; to deliberate the merits of the draft conclusions reached; to seek clarity on various issues in relation to the topic from the Special Rapporteur himself. The opportunity is so rare because though you may be able to do so in other forums (like the UN Sixth Committee), it will (mostly) be in a context devoid of debates and discussions. Hence, I invite the Member States of AALCO to use this opportunity to help the Special Rapporteur identify the

provided it included that of States whose interests were specially affected.” Again the Court said in *paragraph 74* of the same judgment that, “Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; —and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.”

⁸ Since a rule of CIL may develop without the express or active support of all states in the international community, the silence or failure of a state to act will not necessarily prevent such a rule from becoming binding upon it (as is clear from the judgment of ICJ delivered in North Sea Continental Shelf Case. However a state can avoid being bound by a rule if it persistently objects to that rule. This was one of the issues in the Anglo Norwegian Fisheries case where the United Kingdom argued the unlawfulness of the Norwegian practice of drawing straight base lines across the mouths of bay to measure the width of territorial sea and where both states accepted the existence of this principle. (1951 ICJ Reports 131).

position of Asian-African States in relation to the various issues of CIL. This in turn will go a long way in making AALCO's participation in the work of ILC more effective and meaningful.

Let me also take this opportunity to mention that this meeting is just one (and the latest) of a process that AALCO has set in motion in relation to the topic of CIL. AALCO would continue to follow its debates, submitting its views and suggestions, organizing meetings of experts and academics on this topic to ensure adequate reflection of the views of its Member States. In this continuous pursuit, AALCO is also planning to work closely with other regional organizations such as the African Union Commission on International law and the like.

While the broader objective of AALCO is to leave some concrete Asian-African imprint on the work of the ILC on this topic by the time it concludes its work in 2018, I sincerely hope that meeting would indeed contribute to a wider understanding of the foundations and function of customary international law.

I wish you all a very fruitful deliberations.

Thank you.