Presentation by Mr. Mohsen BAHARVAND, Deputy Secretary General of Asian-African Legal Consultative Organization (AALCO) on the formation of Customary International Law with a view to the second report of the International Law Commission

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At the beginning I'd like to thank Dr. Suffian Jusoh, Chairman of the AALCO informal expert group on Customary International Law for his invitation to this meeting and the warm welcome we received on our arrival. Secondly I like to thank H.E professor Dr. Rahmat Mohammad the Secretary-General of AALCO for allowing us to attend this meeting as independent experts and for authorizing us to speak on this subject freely in his presence. Of course I should also appreciate Dr. Sienho YEE the Rapporteur of the AALCO informal expert group for his fruitful presentation.

My views are two fold. First I will try to raise some comments on the customary international law in regard with some issues which have been excluded or have not been properly included in ILC report and thereafter I will try to embark upon some of the issues reflected in the ILC second report A/CN.4/672 dated May 2014.

1. **General Comments** (introduction)

Indeed, there is lure in customary international law which every lawyer feels when thinking on its provenance and the way its rules establish in international relations. This attraction stems from its very flexibility and its philosophical and sociological aspects same as other rules of natural law. To find its meaning, the way it is established and probing into its existence is meat and drink of every international law expert. Therefore, when this issue was put on the agenda of the International Law Commission the initiative received an extensive welcome from experts as well as representatives of states in the United Nations.

In general, for a custom to be considered as a rule, in any given society, there are some requirements to be met. To name but a few, a definite action, the consistent usage of the act in different instances and situations, practiced by majority of the society as whole or the majority of the members of a local community, it should be practiced in a sense of law not as a mere habit or notoriety, expediency or the things as such, it should originate from good faith and good intention, not written as law and there should not be any clear statement by a competent authority like courts or governments as opposed to the validity of a custom.

These concepts I suppose are also applicable *mutatis mutandis* to international custom.

1.2 The report in general

Customary international law is a complex issue. This complexity is not only because of the methodology of its deduction but also relates to its innate flexibility and beyond that its volatility given the fact that the international community lacks a superior lawmaking or law enforcing authority. Thus, this is a historical moment for the ILC to brave the challenges ahead in order to underpin more certainty in international relations.

In contrast, the special rapporteur has confined his work to define only the methodology of ascertaining the existence of rules of customary international law. Perhaps the methodology alone cannot meet the expectations of many actors bearing in mind the current international sphere in which many practices are being developed sometimes against the very foundations of the international community. Especially, the special rapporteur has adopted a well-trodden path to substantiate the content of his report, therefore, less new inputs or added value to what has been already established can be seen in this report. Hence, the question may be raised to the effect that to what extent this exercise can be relevant in light of the main function of the International Law Commission namely progressive development of international law and its codification.

1.3 Possible contention

The importance of the International Customary rules is undeniable. For it can remedy the instances of non *liquet* or relatively lawlessness in the absence of treaties. However, it is also the fact that the majority of states hold more tendencies toward the use of treaties for making law. The role that treaties play is by far ahead of international customary rules.

Customary International Law, by definition, is flexible. That is also the desire expressed in the report of the ILC special rapporteur to preserve the flexibility of customary rules. But **unsafeguarded flexibility** in law making may foreshadow uncertainty in the eyes of many subjects of international law. The function of the law is to create a solid ground for the members of a given society to interact in accordance with it.

States are equal in sovereignty but when it comes to the facts they are not equal in having tools and means, in better word the power. In terms of international

customary rules this inequality can amount to inequality in both **capacity to ascertain** and **ability to enforce** the international customary rules. The absence of a compulsory law enforcement and a third impartial party to rule adjunct with an unsafeguarded law making process may result in uncertainty and more contention.

States with more ability to enforce and more capacity to ascertain the international customary rules may seek more flexibility in the formation of Customary International Law on the other hand the others with less ability and capacity may try to define a threshold to the flexibility of Customary Law and delve for a solid ground for the commitments which may be superseded.

On the other hand these inequalities enable states with more ability to create rules for the others which gradually govern their activities and sometimes even in international litigations without their prior consent. This may undermine the principle of sovereign equality. The influence of the United Kingdom on the formation of customary rules in maritime law is one example.

Perhaps international law is not able to remedy all factual inequalities among states but it can, to certain extent, abate their repercussions for the very basic fundamentals of their coexistence. Without a least balanced approach may be hard to reach an outcome of this exercise and to bring it to fruition. Therefore inclusion of some concepts of international law such as good faith and preemptory norms can be a safeguard to this effect.

1.4 Good faith

Any custom in order to make law must be imbued with good faith and legitimacy. Perhaps the most important general principle, underpinning many international legal rules, is that of good faith. This principle is enshrined in the United Nations Charter, which provides in article 2(2) that 'all Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter',

General Assembly in resolution 2625 (XXV), 1970, referred to the obligations upon states to fulfil in good faith their obligations resulting from international law generally, including treaties. It therefore constitutes an indispensable part of the rules of international law generally.

The International Court of Justice declared in the Nuclear Tests case that:
One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of *pucta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral obligation. (Malcolm N. Shaw, International law)

Nevertheless, it should be noted that in most cases the principle of good faith is not easily discernible. When states act it is difficult to ascertain the motives behind their actions. In many cases it is hard to disentangle moral rectitude and that of ulterior purposes *a priori*. In addition, good faith can be more related to implementation of obligations rather than the process of law making. However, since customary international law mainly stems from state practice it could be said that the practice or a proposition should serve to smooth coexistence among states rather than imperiling the friendly relationship among states and vexatious targeting or imposing obligations on other states or group of states . Secondly the state adducing a rule of customary international law or claiming the existence of a rule of international customary law must posit the principle of equality before the law and that the same rule will be applicable to it in the same situation.

Perhaps this principle deserved to be reflected properly in the ILC report if not in the draft conclusions.

1.5 *Ex injuria* practices

As mentioned above, the travail experienced by many states, mainly developing countries, have led them to develop a siege mentality about the international law making process at least in parts if not fully. Especially with regard to the customary rules according to which they may be held bound by legal obligations on sufferance. States are not law firms to monitor and if necessary object any practice being develop around the globe. On the other hand states are not equal in capacity to ascertain and ability to enforce the rules of customary international law. Therefore, it is more useful for many states to legally thwart any abuse of process in the midst of ebbs and flows of international relations.

As a general principle of law unjust acts cannot create law *ex injuria jus non oritur*. In accordance with the other principle no one can benefit from his unlawful act. To deduce the unjust acts in international law as the first step one may refer to the preemptory norms of international law (*jus conges*).

In accordance with Article 53 of the Convention on the Law of Treaties, 1969, a treaty will be void 'if, at the time of its conclusion, it conflicts with a peremptory norm of general international law'. This rule (jus cogens) will also apply in the context of customary rules so that no derogation would be permitted to such norms by way of custom.

Such a peremptory norm is defined by the Convention as one 'accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'. The concept of *jus cogens* is based upon an acceptance of fundamental and superior values within the international system. Various examples of the content of *jus cogens* have been provided, particularly during the discussions on the law of treaty in the International Law Commission, such as an unlawful use of force, genocide, slave trading and piracy.

These norms have been invoked in myriad forums of international law and any act which may result in breach of these norms in any form or another cannot be considered lawful let alone a lawmaking practice.

More emphasis should be placed on unlawful use force. Unlawful use of force not only constitutes breach of *jus cogens* norms it is also the paramount achievement of international community in the post-world war era. There are some instances in the current situation which seem to intend the distortion of this norm.

As examples concepts such as pre-emptive self-defense or responsibility to protect regardless of unsubstantiated legal arguments to justify them or even assent of some states or a group of states to it may result in use of force as opposed to the preemptory norms of international law. By the same token practices as such and not in conformity with the purposes and principles of the charter of United Nations stipulated in article 1and 2 of the charter should be discarded as law making propositions.

unilateral acts which are the source of responsibility rather than a source of international law especially when other states conform to them as a result of coercion such as threatening to sanction or other coercive measures also are considered as unlawful practices.

Hence, I believe that the draft conclusions of the ILC report shall incorporate provisions, as a methodological approach, elucidating what cannot form a rule of customary international law *ab initio*. This practice was adopted by ILC while drafting the Convention on the Law of Treaties, 1969.

Such provisions are useful and necessary to the effect that they insert more certainty among the majority of the members of international community in regard with customary rules.

2. Few reflections on the content of the report

In considering the reports of the International Law Commission regard must be had to both the content and provenance of argumentation contained in the report as well as the draft conclusions driven from them. In this part I intend not to go into the all details of the second report rather I prefer to maintain some of the views until the third report of the ILC is available.

2.1 *Jus cogens* exclusion

Draft conclusion 1(2) of the report states "The present draft conclusions are without prejudice to the methodology concerning other sources of international law and **questions** relating to peremptory norms of international law (jus cogens).

In light of the above, I believe that ILC should not have disregarded all "questions relating to peremptory norms of international law." A question related to the norms may be useful for defining the methodology for determining the existence of rules of Customary International Law. This is not to encourage the special rapporteur to enter into the content of other rules of international law rather it is a matter of necessity and usefulness. On the other hand the draft conclusion 1(1) has mandated the special rapporteur to define the methodology for determining the "content of rules of customary international law" as well. When you are describing an elephant, if the necessity comes, I don't think it is methodologically wrong if you say that it is not a carnivore or doesn't belong to the category of birds. In this line I think the word

"content" can be inserted in the draft conclusion 2(2) after the "questions relating …. Preemptory norms…"

2.2 General practice

General practice of states, I believe, not only relates to the practice conducted by a group of States but also bears a sense of consistency in its usage and duration. A practice should be of constant and uniform usage in a sense of legal obligation to be considered as a rule. In order to keep the uniformity in usage there should be deferent instances and situations on which the law applies regardless of positon or status of its subjects. The general practice in the meaning of article 38(1)(b) doesn't exclusively mean that the practice should be "widespread and representative" as given in draft conclusion 9(1).in addition to that generality may refer to the usage as well which reflects the principle of equality before the law. Without this notion the practice of states may be more politically motivated in special cases rather than law making practice.

The International Court of Justice in many cases when refers to the "general practice" as stipulated in article 38(1) (b) has used the terms " a settled practiced" for instance in *Jurisdictional Immunities of the State of Germany v. Italy* or in *North Sea Continental Shelf case*. Sometimes the phrase "stablished practice" has been used in several occasions. These concepts have been properly defined in the report of special rapporteur. Nevertheless, when it comes to the draft conclusions for instance 2(c), 3 and 4 the phrase "general practice" is used.

Although the draft conclusion 9 of ILC report reflects the concept of consistency, more regard is needed to the effect that whether the phrase "General practice" needs a qualification such as "and consistent" or the word " general" should be replaced by other words such as " stablished " or "settled".

2.3 evidencing the state practice and *opinio juris*

The special rapporteur in his attempt to elaborate the state practice and *opinio Juris* both in the report and in draft conclusions has not defined a clear criteria to distinguish these two concepts. Simply practice relates to physical acts and *opinio juris* is the belief, intellectual or psychological aspect upon which the state decides to act. Perhaps this is the most perplexing part of the report and needs a thorough consideration.

For the ease of reference draft conclusions 7 and 11 should be read together:

Draft Conclusion 7

Forms of practice

1. Practice may take a wide range of forms. It includes both physical and **verbal actions**.

2. Manifestations of practice include, among others, the conduct of States 'on the ground', **diplomatic acts and correspondence**, legislative acts, judgments of national courts, official publications in the field of international law, statements on behalf of States concerning codification efforts, **practice in connection with treaties**, and acts in connection with resolutions of organs of international organizations and conferences.

3. **Inaction** may also serve as practice.

4. The acts (including inaction) of international organizations may also serve as practice.

Draft Conclusion 11

Evidence of acceptance as law

1. Evidence of acceptance of a general practice as law may take a wide range of forms. These may vary according to the nature of the rule and the circumstances in which the rule falls to be applied.

2. The forms of evidence include, but are not limited to, **statements by States** which indicate what are or are not rules of customary international law, **diplomatic correspondence**, the jurisprudence of national courts, the opinions of government legal advisers, official publications in fields of international law, **treaty practice**, and action in connection with resolutions of organs of international organizations and of international conferences.

3. **Inaction** may also serve as evidence of acceptance as law.

4. The fact that an act (including inaction) by a State establishes practice for the purpose of identifying a rule of customary international law does not preclude the same act from being evidence that the practice in question is accepted as law.

If in the terms of the report a "verbal action" by a diplomat in the General Assembly of the United Nations constitutes both state practice and the *opinio juris* of the states and in both cases inaction also is seen as evidence for both, then what would be the deference between these two concepts? How we can recognize the opinio juris of state if it is not expressed?

Clearly there is need to draw a more conceptual line between practice and *opinio juris* which I think the report has failed to do that.

In conclusion I must admit that the report still needs to be more nuanced (developed) and the special rapporteur may be encouraged to try to explore more legal ideas from all schools of thought. The practice of the ILC to publish questionnaires on its subject has proved to be insufficient to have a clear picture of states opinions. Perhaps this can be made through bilateral and regional meetings with precise agenda. Without such a practice I doubt this practice would be able to come to fruition.

Thank you