Presentation Made by Prof. Dr. Rahmat Mohamad on the Third Report of Sir Michael Wood the Special Rapporteur of the International Law Commission on the Subject Customary International Law at the Two Day AALCO Legal Experts Meeting on the "Identification of Customary International Law" to be held on 27th and 28th August 2015.

Dear Sir. Michael Wood, the Special Rapporteur of the ILC on the topic of CIL,
Prof. Dr. SufianJusoh, Professor of International Law, National University, Malaysia,
Distinguished participants from the Member States of AALCO,
Ladies and Gentlemen,

It is indeed a privilege for me to be addressing this distinguished audience at this special meeting on the subject 'Customary International Law' (CIL) that AALCO has organized in association with National University, Malaysia. The topic CIL has not only been a topic of immense importance to the developing countries, it has also been a topic of personal interest to me. The project on CIL (which was taken up by International Law Commission in 2012 with Sir. Michael Wood as its Special Rapporteur) has reached an important point. As such, now is a propitious time for governments, international organizations, non-governmental organizations, scholars, and others to weigh in on the merits of the Draft Conclusions that have been adopted by the ILC until now. I am also happy to

announce to this distinguished audience that the work of AALCO on CIL stands recognized in the third report of Mr. Wood[1].

Customary international law is that source of international law that most aptly encapsulates the changing practice and attitudes of states. The content of customary rules is the product of the dialectical process of international actors over a period of time. It is identified by reference to non-formal criteria, despite the formalism of the evidence used to establish its existence.

The topic (as dealt with by ILC) is not aimed at canvassing the substantive rules of customary international law but, rather, at the rules regarding how such law is formed and identified. According to Mr. Wood, the general objectives of the topic are twofold: to provide greater certainty as to the process of customary international law formation, so as to encourage greater acceptance of such law; and to provide practical guidance to judges and lawyers and other practitioners called upon to apply such law, including within national legal systems.

The First Report[2] on the subject issued in 2013 was preliminary in character, scoping out the contours of the project, indicating a basic road map for its completion, arguing in favor of considerable reliance on the jurisprudence of the International Court of Justice, and providing extensive citations to secondary literature.

The report proposed 11 draft conclusions which were referred to the ILC's Drafting Committee which provisionally adopted 8 conclusions. The eight draft conclusions provisionally adopted by the Drafting Committee in 2014 are divided into three parts: (a) introduction; (b) basic approach; and (c) a general practice. It is proposed that a fourth part, to include the draft conclusions from

[1]See, Para 11 of the Third Report of Sir. Michael Wood.
[2]Depending on the availability of time, this and the next para (highlighting the content of the first and second report) can be avoided.

the second report not yet discussed, will be entitled "Acceptance as law (*opiniojuris*)". Two further parts, to be entitled "Particular forms of practice and evidence" and "Exceptions to the general application of rules of customary international law", are suggested in the present report.

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. *And let me take this opportunity to reaffirm something that I had mentioned in my Key Note Address this morning: AALCO would continue to track closely the developments that occur in this topic with a view to assist its Member States from a long-term perspective.*

The Third Report confirms the general support among the members of the Commission to "two-elements approach". In the debate that followed the Second Report, there continues to be widespread agreement that among the main materials for seeking guidance on the topic were decisions of international courts and tribunals, in particular the International Court of Justice, and that the outcome should be a practical guide for assisting practitioners in the task of identifying customary international law. The content of the Third Report seems to be a definitive step in pursuance of this goal. It *inter alia* further elaborates the "two-element approach", significance of non-state actors including IGOs and writings of "highly qualified publicists". Some of the topics highlighted in the deliberations at AALCO such as "persistent objector" is given due consideration in the Report.

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 flowing 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.

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.

As suggested in the second report of Mr. Wood, in approaching the matter of international organizations and their contributions to customary international law making, it ought to be recognized that "[t]he subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights" (as the ICJ had stated in the Reparation Case); and that international organizations vary greatly one from another, a fact that needs to be borne in mind when assessing the significance of their practice.

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.

Whether and how international organizations may play a role in the formation or expression of customary international law that does not bind them is less clear; one possibility is that such conduct might be "practice" when States have accorded to the international organization specific functions relevant to State rights and obligations (such as the organization serving as a depositary of a treaty); another possibility is that such conduct is not itself "practice" but is conduct that States react to favorably or unfavorably, thereby generating relevant State practice.

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 understood that:

- since 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.
- It is also to be noted that 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 has a bearing on such organizations' role, if any, in the formation of customary international law.

- 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 the existence in customary international law of a rule found in a written text to be established, the rule 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 (for example, while negotiating the resolution or in an explanation of position, an explanation of vote, or another other kind of statement). 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

As noted by Mr. Wood (via paragraph 54 of his Second Report) 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. 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 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? 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. 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. 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 to the rule of persistent objector?*

With this, let me make my final remarks.

Final remarks

The draft conclusions on identification of customary international law (together with the eventual commentaries) are a work in progress. It is my firm belief that the perceptive comments/interventions made during this two day meeting will contribute significantly to the final output. One of the advantages of the Commission taking up a topic is that it provokes debate—within governments, universities, and other learned societies and organizations—which itself contributes to greater understanding and knowledge of the law. This has already been the case in relation to the topic of identification of customary international law, at a time when greater clarity is surely needed. We look forward to further debating on this topic in the future.

I thank you.