



Address by Prof. Kennedy Gastorn, Secretary-General of the Asian-African Legal Consultative Organization (AALCO) in regard to the theme “Identification of Customary International Law: Legal and Policy Implications” on 2 November 2016 at the UN Trusteeship Council Chambers, New York, at 3.00 PM.

Introduction

Your Excellency, Professor Lawrence Awosika, Chair of the Commission on the Limits of the Continental Shelf;

Your Excellency, Mr. Philip Spoerri, Permanent Observer and Head of Delegation of the International Committee of the Red Cross;

Mr. J. Ashley Roach, Visiting Principal Senior Research Fellow, Center for International Law of the University of Singapore;

Excellencies, Distinguished Guests, Ladies and Gentlemen,

At the outset I would like to take this opportunity to thank you for sparing your valuable time to attend this meeting. The year 2016 has been an important one for AALCO for several reasons: *Firstly*, AALCO is celebrating the sixtieth year since its formation as the Asian Legal Consultative Committee (ALCC) in 1956. *Secondly*, it was my honor and privilege to succeed my esteemed predecessor, H.E. *Dato* Prof. Dr. Rahmat Mohamad, as the Secretary-General of this storied Organization. As such, it is also my honor to speak with you today on the sidelines of the United Nations General Assembly. To promote

and disseminate international law in cooperation with the United Nations as one of the principal objectives of AALCO. To this end we are very pleased that through our UN Permanent Observer, Dr. Roy S. Lee, and with your strong support and assistance, various international law activities have been organised on a regular and continuous basis. Your support and assistance are greatly appreciated.

Over the course of its six-decade history, AALCO has strived to serve the interests of its 46 Member States—primarily developing countries in Asia and Africa—at the international level and to promote their interests in the progressive development of international law. To this end, since its inception, AALCO has cultivated a very close relationship with the International Law Commission (ILC). In fact, the work of the ILC has been a mandated part of AALCO’s work programme since 1956 through its inclusion under Article 1(d) of the AALCO Statute.

It has also become customary for Special Rapporteurs of the ILC to address the Annual Session of AALCO and review the progress of work on current topics in the ILC. Conversely, it has become customary for the Secretary-General of AALCO to address the ILC Session and report on the common minimum consensus that emerges from the deliberations on the ILC topics at the AALCO Annual Session. ILC considers this activity significant as through this process it receives the perspective of developing countries.

It is against this backdrop that I am delivering my address today on the theme of the “Legal and Policy Implications” of the ILC’s work on the Identification of Customary International Law”. AALCO has closely followed the work of Special Rapporteur Mr. Michael Wood and the ILC on customary international law ever since the topic was taken up for consideration in 2012. AALCO has

enthusiastically participated in the process of the creation of the Draft Conclusions, not least through the formation, at AALCO's Annual Session in Tehran in 2014, of the AALCO Informal Expert's Group (AALCO IEG). The *raison d'être* of the AALCO IEG was the examination of the reports of Mr. Wood in order to provide comments on these reports to the AALCO Annual Session in Beijing in 2015. This close participation and continual interaction with the ILC and Mr. Michael Wood has been a hallmark of the work of AALCO over the past several years. Therefore, in furtherance of the theme, I will divide the substantive portion of my address into two parts:

First, I will review the work done by the Special Rapporteur, Mr. Michael Wood, over the past four years with particular emphasis placed on the important issues addressed by Mr. Wood and the ILC within their work on the topic of customary international law.

Second, I will relate to you, in brief, both the comments the AALCO Informal Experts Group, which were submitted in 2015, as well as the opinions voiced by AALCO Member States themselves on those comments and other pertinent issues. By doing this, I plan to frame the implications of Mr. Michael Wood and the ILC's work as they are perceived by the Member States of AALCO.

The Work of Special Rapporteur Mr. Michael Wood on the Identification of Customary International Law

Your Excellencies, Ladies and Gentlemen,

The topic of the "Formation and Evidence of Customary International Law" was introduced into the ILC's programme of work at its Sixty-Fourth Session in 2012 and Mr. Michael Wood was appointed as the Special Rapporteur for the

topic. The title of the topic was later changed to the “Identification of Customary International Law” and the decision was taken to have the outcome be in the form of “Draft Conclusions”, along with accompanying commentaries, instead of “Draft Articles”.

In his First Report,¹ in 2013, Mr. Michael Wood outlined the previous work of the Commission on the topic, and defined the scope and outcome of the topic and whether it would include *jus cogens*—for reasons of pragmatism he recommended that the topic of *jus cogens* should not be included, as it would further complicate an already complex topic. He also examined the relationship of customary international law with the other sources listed in Article 38 of the Statute of the International Court of Justice, identified some of the key terms—such as State Practice and *opinio juris*—which would need definition, as well as the range of materials to be consulted.

In his Second Report,² in 2014, Mr. Wood delved further into the scope of the topic and the use of terms, particularly State Practice and *opinio juris*. In his detailed examination of the nature of these terms, Mr. Wood explored the processes by which the presence of these key constituent elements could be determined. Mr. Wood also submitted proposals for 11 Draft Conclusions.

In his Third Report,³ in 2015, Mr. Wood continued his examination of the relationship between the two constituent elements of customary international law. He also enquired into ‘inaction as practice and/or evidence of acceptance of law’, the role of treaties and resolutions adopted by international organizations and at international conferences, judicial decisions and writings,

¹ [A/CN.4/663](#)

² [A/CN.4/672](#)

³ [A/CN.4/682](#)

the issue of the practice of international organizations, and the two particular issues of ‘particular custom’ and ‘persistent objectors’.

Finally, and most recently, Mr. Michael Wood’s Fourth Report,⁴ submitted earlier this year, responded to the main comments and suggestions made by States and others in relation to the 16 draft conclusions provisionally adopted by the Drafting Committee in 2014 and 2015. It also proposed minor modifications to the texts provisionally adopted by the Drafting Committee, and discussed ways and means to make the evidence of customary international law more readily available.

As an extension of this work, the Drafting Committee of the ILC provisionally adopted 16 Draft Conclusions in May 2016 which elucidate upon, *inter alia*: the scope of the project; the constituent elements and assessment of evidence for these elements, including identification of these elements in various forms; the significance of certain materials for the identification of customary international law; persistent objectors; and, particular customary international law.

The Work of the AALCO IEG

Mr. Wood’s reports were very well received by AALCO Member States. The various sessions, seminars and meetings that were held under the auspices of AALCO—some of which featured the participation of Mr. Wood—were instrumental in helping AALCO Member States gain a better insight into the methodology and substantive conclusions of Mr. Wood and the ILC. Chief among these initiatives was the constitution, in 2014, of the AALCO Informal

⁴ [A/CN.4/695](#)

Expert's Group (AALCO), which was envisaged as a technical expert group on identification of customary international law that could formulate responses to the work of the ILC.

Under the leadership of interim Chairman Dr. Sufian Jusoh, Senior Fellow at the Law Faculty of the National University of Malaysia, and interim Special Rapporteur, Professor Sienho Yee of Wuhan University in China, the IEG, at its first meeting in Tehran during AALCO's Fifty-Third Annual Session in 2014, discussed issues relating to the methodology and schedule. The outcome of this meeting lay in the Experts' Group's decision to focus on fundamental issues of particular concern to Member States of AALCO, particularly in regard to their problems and difficulties in day-to-day application of customary international law, and of matters that were of particular concern to these States. The Expert's Group also decided that rather than focusing its efforts on areas where general consensus exists between AALCO States, it would focus on the areas of weaker consensus and agreement in order to strengthen consensus there.

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 Prof. 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 IEG adopted the comments proposed by Prof. Yee, with some modifications. Prof. Yee, also submitted a report on the topic incorporating the concerns of the Member States of AALCO to the ILC on 20 March 2015 for its consideration. The Member States had agreed to transmit Prof. Yee's report to Mr. Wood and the ILC without giving any specific approval to it on the whole.

The third meeting of the Informal Expert Group took place at the Fifty-Fourth Annual Session of AALCO in Beijing in April 2015. At this meeting the Delegates of AALCO Member States stressed the significance of a cautious approach in dealing with a highly enigmatic area of Identification of CIL.

The Views of AALCO Member States

Excellencies, Ladies and Gentlemen,

As Mr. Wood's Fourth Report only came out earlier this year, and since it was not discussed at AALCO's 2016 Annual Session, I feel it is not my place to discuss this report in detail, until such time that the AALCO Member States have themselves aired their views on the contents of the report in the Sixth Committee. However, I will try to focus your attention, in a general manner on the AALCO Member States' views on the work of the rapporteur, as this will provide some insight into the implications of the ILC's work on customary international law.

A major part of the impetus for AALCO's involvement in the ILC's work, and particularly its work on customary international law, is embedded in AALCO's core mission—to help give a voice to the African and Asian States in the progressive development of international law. As we all know, customary international law is historically a Eurocentric concept whose tenets were determined mainly by interactions between Western States. The ILC's work has given a fresh voice to the Asian and African communities on the modalities of how customary international law is and will be developed and identified.

In particular, AALCO Members have voiced their diverse opinions on specifically important and relevant aspects of the ILC's work such as

“persistent objectors”. Several of AALCO’s Member States have noted the possibility, at both the Sixth Committee as well as the AALCO Annual Session, of this concept leading to a fragmentation of international law and that it may thwart the establishment of rules of customary international law. However, other AALCO Member States have voiced their support for the concept and regard it as a necessary safeguard for the consensual nature of international law.

A similar diversity of opinion has also been voiced regarding the question of “inaction”. Several States believe that inaction cannot be seen as relevant practice in the formation of customary international law, and that inaction shall not prejudice the validity and value of an existing rule. States have also expressed the need for caution in treating inaction as evidence due to the practical difficulties of distinguishing clearly the reasons for inaction without the clear expression of intentions.

Conclusion

In the words of the Special Rapporteur, the proposed “Draft Conclusions” are intended to serve as “the authoritative guidelines” for identifying customary law. This set of 16 “draft conclusions” is, in my view, a doctrinal formula which can produce what you would like to produce if you have the right input materials. While this formula is neutral and well formulated as a whole, the real problems may lie in the ramifications and implications they will produce.

The nature of the specific issues flagged by AALCO Member States in the recent past and their divergent opinions on those issues indicates the importance of the ILC’s work. While the ILC’s work on this matter will not

result in Draft Articles, the value of the ILC's work on customary international law cannot be undervalued in relation to its previous seminal works such as the Draft Articles on State Responsibility. One of the Delegates rightly pointed out at the 2016 Annual Session that, although the work of the ILC may be focused less on codification *per se*, there is little doubt that its work will have some authoritative force, whether in the form of "conclusions", "principles" or "guidelines".

Customary international law is notoriously difficult to identify and apply, despite its great importance to the field of international law. The ILC has taken upon itself an onerous task in its enquiries into this topic and AALCO wholeheartedly commends these efforts, both in relation to the examination of the convoluted dimensions of customary international law and the articulation of its findings and conclusions.

It is important to recognize and remember that the work of the ILC and Mr. Michael Wood focuses on the *identification* of customary international law, and not on the *formation* of such law, even though it may be argued that there is some overlap between the two. Many, if not most, principles of customary international law have already been clearly codified in authoritative instruments such as the UN Charter and UN Resolutions, where such principles have been explicitly and sometimes not-so-explicitly mentioned to be customary in nature. The International Court of Justice, our principal judicial organ, has already confirmed in the 1980s that the UN Charter has codified most important principles and rules of the past and most of them have evolved into customary international law. The current work of the ILC on customary international law is secondary in nature—it is meant to aid in identifying such principles where they already exist—rather than creating norms of international law. Perhaps people with more expertise in this area might wish to elaborate

further on what purpose this set of Draft conclusions intends to achieve. Do we need to “identify” customs which are not in the Charter? Would they benefit and strengthen the UN Charter? I invite you to consider.

However, there are several points to be noted here. One is that customary practices themselves may evolve. The work of the ILC should not be seen as repudiating or undermining customary principles where they exist, nor hindering the development of new ones where they arise. Historically, the practices of Asian, African, Latin American and Caribbean countries were not well considered when identifying customary law. The current endeavor of the ILC should be seen as inclusive of the practices of these regions and countries. In my opinion, the ILC should not only consolidate the norms, it must discover the norms and practices of developing countries. It must be identification beyond the known customs.

If the Draft Conclusions are intended as proposed by the Special Rapporteur to serve as the “authoritative guidelines” for the subject, anyone can use it to achieve one’s own purpose, whatever that may be. Since the work of the ILC is authoritative and very influential, whoever uses these “authoritative” guidelines would be able to claim certain authority of the product emerged. In my opinion, the ILC should consider devising a control mechanism for any potential misuse or abuse of them.

The application of the Draft Conclusions would raise certain important practical problems. First, there is the question of the consent of States. Treaties are a firm basis for identifying legally binding principles because of the explicit nature of the consent of States. Consent is not as easily ascertained when identifying principles of customary law. It is therefore one of the primary underlying themes of the ILC’s work, particularly in relation to persistent

objectors, inaction, particular custom, and so on. When utilizing these Draft Conclusions it is important to maintain a balance between the actual intentions of States and the needs of the international community.

The proposed element of “persistent objectors” is an obvious example of practical problems facing the application of the Draft Conclusions. Some have noted the possibility of this requirement leading to a fragmentation of international law and that it may thwart the establishment of rules of customary international law. However, others have voiced their support for the concept and regard it as a necessary safeguard for the consensual nature of international law. The basic question is “to what extent and how common is persistent objector”?

Also, are they really practiced by States and developing countries. Take, for example, the current issue of “refugees in Europe”. How many States have voiced their concern and how many have objected to others’ practice? In fact, the majority have not expressed their views. What would be the consequences if we require “persistent objectors”? If it is not common practice to object publicly to other States’ practice, we are imposing on ourselves a legal obligation to accept others’ practice. So, this requirement of “persistent objector” deserves careful consideration.

Turning now to another point, Professor Dare Tladi is working as the Special Rapporteur for the topic of *jus cogens*. The topic of *jus cogens* was delinked from the topic of customary international law by the ILC because, while the Special Rapporteur acknowledged the overlap between the two topics, *jus cogens* brought with it its own set of specific conceptual intricacies that merited separate study and which would have made the work in customary international law unmanageably complex were it to be included. While I agree

with the ILC assessment of the complexities of the topic of *jus cogens*, I must also point out that peremptory norms are a part and parcel of customary international law, and that the study of customary international law and *jus cogens* must go hand in hand. It may thus be counter-productive to approve Draft conclusions on customary international law without having the opportunity to examine the subject of *jus cogens*.

Different opinions have also been voiced regarding the question of “inaction”. Some believe that inaction cannot be seen as relevant practice in the formation of customary international law and that inaction shall not prejudice the validity and value of an existing rule. Some have also expressed the need for caution in treating inaction as evidence due to the practical difficulties of distinguishing clearly the reasons for inaction without the clear expression of intentions. We need to consider all these in close connection with our actual practice and the possible ramifications and implications that they may lead to.

Finally, I would also like to point out that the ILC has itself discussed customary international law at various points in the past. Article 24 of the Statute of the ILC mandates that the Commission “[...] consider ways and means for making the evidence of customary international law more readily available, such as the collection and publication of documents concerning State practice and of the decisions of national and international courts and on questions of international law [...].” The evidence of State practice and *opinio juris* is asymmetrical, and it is important that all relevant evidence of State Practice and *opinio juris* be examined before arriving at a conclusion about the existence of a norm.

In a 1998 unofficial survey, the ILC itself admitted that it may be impossible to codify the flexible process by which rules of international law are formed in

part because some of the questions—such as what is custom and how is it formed—are fundamental and not secondary. However, as noted by the Commission in its 2011 syllabus, an appreciation of the process of formation and identification of customary law is essential for those who have to apply its rules.

While States will undoubtedly continue to have differing opinions about the eventual results of this process, the ILC's work on the identification of customary international law has gone a long way towards exhaustively outlining, if not authoritatively defining, the long list of relevant factors to be examined when identifying norms of customary international law.

The very nature of law is that it is subject to interpretation and argument. While the ILC's current work may not by itself settle the ongoing arguments pertaining to the identification of customary international law, it has certainly enhanced the engagement with, and understanding of, these arguments by States. It may well prove to be a valuable reference point for practitioners of international law, thereby contributing significantly to the eventual settlement of disagreements concerning customary international law.

I thank you for your attention.