

INTRODUCTION

*Wafik Z. Kamit**

Asian-African Legal Consultative Organization (AALCO) turned fifty years now. Its establishment in the year 1956 marks one of the assertive steps of the peoples who were under the yoke of colonialism for long periods of time and who were seeking to redefine international relations towards more even and democratic participation. The broader political and economic backdrop of international relations constitutes the important driving force in establishing the Organization. Therefore, the establishment of AALCO was an historic event in the long saga of post-colonial assertion of those States whose lived experiences as States and as peoples have certain commonalities. Commonalities in their histories and lived experiences have been the result of the forced interaction of these States and peoples with colonizers. States under colonialism were subjected to exploitative policies, which many a time were justified through the language of law. Post World War II developments led to the establishment of the United Nations in 1945, which immediately became an important platform at the international level. Development of international treaty law making under the UN system, in parallel to the process of decolonization has led to the participation of newly independent States in the international law making process. Relations between States thus, are sought to be defined in accordance with international law rules as enshrined mainly in the form of customary law or the treaty law as it was emerging. However many countries from Africa, Asia and Latin America were of the view that conceptual premises on which international law was being negotiated upon were either alien to them or were detrimental to their economic and political development. In this context it was observed that “classic international law thus consisted of a set of rules with a geographical basis (it was a European law), a religio-ethical inspiration (it was a Christian law), an economic motivation (it was a mercantilist law) and political aims (it was an imperialist law)”¹. Therefore they sought to redefine the conceptual framework and redraw the

* Secretary-General, Asian-African Legal Consultative Organization, New Delhi.

¹ Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier Publishers, New York-London, 1979), at p. 50.

contours of international legal structure whose language plays an instrumental role in defining international relations. As Jawaharlal Nehru, in his speech at the first session of the Asian Legal Consultative Committee (Predecessor to AALCO) aptly said, “it is desirable that the various aspects of international law should be considered objectively and in a scholarly manner by the eminent lawyers and jurists of Asia-Africa.”² The establishment of AALCO has to be seen in the larger backdrop of assertive agenda of the under developed South vis-à-vis the developed north. The fact that AALCO was one of the tangible outcomes of the historic Bandung conference underlines the fact that newly independent States were aware of the significance of international legal structures and also the necessity of subjecting it to thorough appraisal from the perspective, alternative to the dominant view i.e., views from the North.

History of international law in the last fifty years largely has been the history of confrontation. Though the combination of groups that have involved in this confrontation has not been static, even if it is not fluid, the primary concerns that decided and guided the rules of this confrontation are colonialism, underdevelopment, sovereign equality, non-discrimination etc. Thus the confrontation is strongly premised on certain ideological and material bases which may broadly be called developing and the developed countries’ perspectives. The taxonomy of ‘developing and developed countries’ is not intended merely to denote economic deprivation but also encompasses differences involving political, social and cultural spheres. This confrontation took place both on the content of the international legal regimes and also on the form of these legal structures. In other words, the confrontation is not merely confined to the biased nature of international law but also on the form in which these legal norms are articulated i.e. customary law, treaty law and resolutions of international bodies. Customary rules were critiqued as they emerged largely from the practice of European States. Therefore in comparison to customary law, treaty law was found to be more democratic as newly independent States at least had nominal participation. Similarly it was also argued by the developing countries that resolutions of the UN General Assembly do have legally binding character, which was opposed by the developed countries.

Last fifty years have also seen a phenomenal growth of international law attempting to cover as many aspects of international relations as possible.

² Speech delivered on April 18, 1957. See, *Jawaharlal Nehru’s Speeches*, Vol. 3. The Publications Division, Ministry of Information and Broadcasting, Government of India.

During this period international law also broke open itself from the traditional shell of 'instrument to regulate inter-state relations' and today individual constitutes an important subject of international law by way of international human rights law and also because of the recent developments in the field of international criminal law. Many important conventions covering areas like law of treaties, law of the sea, human rights law, environmental law and trade law have come into existence along with a parallel growth of adjudicatory bodies of varied nature. States from South and North have taken part in most of these developments. However, the negotiating process of almost all these instruments has not been smooth and they have all along reflected the uneven economic development and political, social and cultural dissimilarities between various groups of states.

While taking active part in the international treaty law making process, the developing countries from South have also attempted to bring radical transformative measures on to the agenda of the international community. Some of the most conspicuous and controversial issues of this nature were the concept of permanent sovereignty over natural resources (PSNR) and the new international economic order (NIEO). These concepts as they emerged in the backdrop of right to self-determination of peoples were the attempts of the newly independent States from the developing south to assert their economic sovereignty over their natural resources. As international law played an instrumental role in the furtherance of colonial policies, the newly independent countries attempted to convert the mere political slogans into legal language with a view to debunking the content of international law that was predisposed to colonial expansionism.

AALCO as one of the earliest outcomes of developing countries solidarity provided an active platform for many of the discussions on issues of international law which led to the emergence and concretization of alternative views on many issues of international law. For example the concept of Exclusive Economic Zone (EEZ) which today constitutes an important concept of the law of the sea emerged from the deliberations at the AALCO sessions. Similarly Bangkok principles on refugees adopted by AALCO are a valuable reference in the field of refugee studies. Along with these, on many issues AALCO is considered as a forum for eliciting views from African and Asian countries which largely constitute the developing countries' perspectives.

For any organization fifty years is certainly not a small period of time. So also for AALCO, which has been witness to many changes in the realm of international relations and international law during this period. Views from

AALCO or its Member States have influenced considerably in many changes that took place in the field of international law. Therefore a small attempt is being made here to put together various views on some of the issues of international law. The collection of essays in this volume reflects different perspectives of international law, underlying theme being the critical reflection on the evolution and structure of international law from the perspective of States and peoples of the developing countries. However, all the essays are not sought to be tailored to fit into the crude and overt parochial framework. These essays also in fact reflect the breadth of the work programme of AALCO in the last fifty years.

Sompong Sucharitkul's essay is a recollection of his association with AALCO in its initial days as well as the organization's contribution towards international law making in various fields. He nostalgically presents the reminiscences of the passionate persuasion of topics on the AALCO's forum and their subsequent materialization into international legal instruments on various topics. Sucharitkul's essay broadly covers the topics in which AALCO made a substantive contribution in the last fifty years.

History of international law has been subjected to scrupulous evaluation in the critical scholarship particularly in the later part of the twentieth century. Biased and oppressively instrumental role of international law in the larger colonial project of European and developed States has been the subject of several scholarly writings who underline the role of international law in casting historical injustices upon the countries of Africa and Asia. Therefore they argue that the language of "civilized" international law needs to be corrected to make it more representative and democratic. R. P. Anand's essay does a similar exercise here. He presents the historical developments in the origin and application of international law and its biased application towards facilitation and legitimization of colonial project. He highlights the acceptance of international law by the Asian and African states during the post world war period and gradual recognition of its universality by these states.

V. S. Mani in his article felicitates AALCO for the contribution made by it, since its inception, on a "staggering range" of areas of international law. However, his essay is confined to the modern law of the sea, and more particularly to the concept of exclusive economic zone, in conception, birth and evolution of which the AALCO has played a "seminal role". In bringing out AALCO's contribution, the author highlights how the concept of EEZ came as a response to an "unjust traditional law". Thereafter he proceeds to analyze the beginning of the trend through the unilateral declarations made by

various States pertaining to their fishery jurisdiction. He then ventures to dwell upon the First and Second UN Conferences on the Law of the Sea, as well on the various cases pertaining to fisheries decided by the International Court of Justice (ICJ). He narrates how the birth of EEZ took place in the “AALCO’s cradle” and the way this got codified into the United Nations Convention on Law of the Sea, 1982.

P. Sreenivasa Rao’s article attempts to conceptualize the contribution made by AALCO in the last fifty years particularly by way of adopting model legislations, principles and resolutions as constituting the soft law value keeping in view their recommendatory nature. While pointing out the difficulties in concluding treaties and the identification of customary law, this essay thus explores the normative value of the corpus known as soft law. It examines the binding nature of some forms of instruments such as the United Nations General Assembly and Security Council resolutions, which are considered as soft law. It convincingly underlines the conceptual constraints on the one hand and the progressive development and application on the other in recognizing the normative and binding character of instruments known as soft law.

Chusei Yamada in his essay provides a background and commentaries on the codification of the law on transboundary groundwaters, which is being considered under the topic “Shared Natural Resources” by the International Law Commission. The draft Articles on the topic, of which Chusei Yamada is the Special Rapporteur since 2003, is based on four key principles: principle of equitable utilization; principle of reasonable utilization; principle of not causing significant harm to other States; and principle of cooperation among the concerned states. He seeks the AALCO Member States to formulate their positions and offer their contribution on the Draft Articles, which could be adopted as a convention or otherwise.

Rohan Perera in his article highlights some of the emerging legal challenges for the developing countries in the field of international investment. On the first issue, pre-investment coverage, he notes, after analyzing Sri Lanka’s and NAFTA experience on foreign investments, that there is a gradual trend towards providing greater legal protection to foreign investment, not only in the post establishment phase but also in the pre establishment phase. This, he cautions, would be detrimental to the developing countries which could be made liable to pay pre investment expenditures. The second issue his paper focuses is on the legal demarcation between the right of the host State to regulate in the interest of public welfare such as protecting environment, health

etc., and the concept of indirect expropriation of foreign investments. He notes that there exists legal uncertainty and should be cured by providing explicit criteria and by defining the concept of indirect expropriation.

V.G. Hedge in his article analyses, historically and in the current context, the role and impact of the intellectual property rights (IPR) regime on the Asian and African countries. He highlights that the Asian and African countries have never played any meaningful role neither in the development nor in the conceptualization of the current IPR regime, both domestic and international. He notes that during the Uruguay Round of negotiations, the Asian and African countries undertook IPR obligations way beyond what they phantom, due to pressure from the developed countries and without realizing the implications of the obligations under the TRIPS Agreement. This demanded large scale changes in the domestic legal and institutional framework creating huge burden on its domestic policy goals and rerouting the precious national resources allocated for development. At the same time, however, he maintains that the IPR should be regarded as one of the essential tools for development and also for the survival and preservation of the human and biological diversity within the continents of African and Asia. While reflecting on the current discussions in the TRIPS Council and in the ongoing Doha Round of Negotiations, he identifies that for the Asian and African States, *inter alia*, affordable pharmaceutical products, transfer of technology and international protection of traditional knowledge and folklore remain the core issues which need to be focused.

Balakrishnan Rajagopal, in his article attempts to address the necessity of redefining the international law discourse to the benefit of the Third World. He argues that to make international law a tool of the weak and victims, it is necessary to rethink the past categories that have provided the language of emancipation and justice. He elaborates how the prominent categories of 'human rights' and 'development', the main weapons of the third world in the past, have become part of the hegemonic discourses now. Therefore, he argues for reconceptualization of these categories as part of transforming international law into a counter hegemonic tool. Thus for developing a counter hegemonic international law which is radically different, both in content and structure, from the mainstream hegemonic international law, he suggests a few alternative models of assertion. He also underlines the need to develop a critique of the fetishism of institutions towards making a counter-hegemonic international law.

Along with these essays this volume also contains tables providing brief information about the work programme, annual sessions and the international category officials who served AALCO in the past. I hope this volume would be a valuable addition to the ministry libraries, academic institutions and researchers.