The Role of the Asian-African Legal Consultative Organization (AALCO) in the Development of International Law

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Learned Professors and Dear Students,
Ladies and Gentlemen,

I am very glad to be here today meeting you all. At the outset I would like to thank the University of Delhi's Law Centre-II, and Asst. Prof. Anupam Jha, for your invitation to the Asian-African Legal Consultative Organization (AALCO) to deliver a lecture. The codification and progressive development of international law is one of the main concerns of AALCO, and it gives me great pleasure to speak to you about AALCO's work in this aspect within the larger context of the role played by intergovernmental organizations in general.

My lecture today will be broadly divided into two sections; *First*, I will touch upon the role of intergovernmental organizations in the development of international law, both through treaty-making processes as well as through the formation and identification of Customary International Law rules. I will then discuss the particular role of AALCO within this sphere, focusing on both the procedural and substantive aspects of its work in the past and the present.

The Role of IGOs in the Development of International Law

As you are all aware, Article 38(1) of the Statute of the ICJ is most often cited as the authoritative and definitive list of sources of international law, among

them, international conventions; international custom, as evidence of a general practice accepted as law; general principles of the law recognized by civilized nations; and judicial decision and the writings of the most highly qualified jurists as subsidiary means. While Article 38(1) of the ICJ Statute was originally intended for the use of the ICJ only, over time it has come to represent the most important list of sources of international law, with the first two sources, i.e., international treaties and international customs, eventually coming to be regarded as the most important sources. It is therefore important to note that the role of IGOs is intimately connected to these two sources of law.

IGOs and Treaties

There is no doubt that an IGO usually can conclude a treaty with a State or with another IGO. But where does this power come from? According to article 6 of the Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations, 1986, *"the capacity of an international organization to conclude treaties is governed by the rules of that organization."* Here most importantly we need to pay special attention to the phrase "the rules of that organization." It was noted in the commentary of the ILC that, in addition to the constituent instrument, this phrase meant relevant decisions and resolutions and the established practice of the organization.

In fact, besides being a party to a treaty, most intergovernmental organizations more often serve as a forum for treaty making, and this role has fundamentally altered the treaty-making processes in the late twentieth and early twenty-first centuries. Most of the major IGOs such as the United Nations (UN) itself, the International Labour Organization (ILO), and the World Trade Organization (WTO) were established with the intention of

forging a vast global cooperation network through the creation of treaties regulating the activities of persons and interactions between States – a goal that they have largely been successful in achieving. For example, approximately 3500 meetings are undertaken annually within the UN and the majority of these involve some kind of treaty making activity, resulting in the conclusion of over 300 multilateral agreements.[1]

Prior to the proliferation of IGOs, treaty-making, particularly multilateral treaty-making, was a largely *ad hoc* affair predicated entirely on the diplomatic wherewithal of States and their willingness to devote resources and effort to the negotiation and conclusion of these treaties. And there was the prospect of exclusion of certain States from these multilateral treaties due to the power that hosting States had, to invite or exclude other States from participating in the *ad hoc* processes – particularly relevant in eras where recognition of State sovereignty was the privilege of only the so-called "civilized" States.

But intergovernmental organizations have significantly changed this equation by creating fora and environments that offer a great deal of consistency, coherence, continuity and inclusiveness to the international treaty making process. For instance the negotiations that went into the drafting of the Rome Statute of the International Criminal Court under the UN saw participation by 160 States, 33 other intergovernmental organizations, and hundreds of NGOs and journalists, on a scale that would have been impossible in earlier eras.

[1] Dr. Roy Lee, "Multilateral Treaty-Making and Negotiation Techniques: An Appraisal", in *Contemporary Problems of International Law: Essays in Honour Of Georg Schwartzenberger on His Eightieth Birthday* (Bin Chang & Edward Brown eds., 1998), 157.

For these reasons, IGOs have been the primary factors in the proliferation of multilateral treaties in the modern era and in doing so they have heavily contributed to the development of international law. However, the role of IGOs is not limited to the sphere of treaty-making.

IGOs and Customary International Law

Intergovernmental organizations also play an important role in the development of customary international law. As you know, the formation and identification of customary international law is predicated on two important elements – the objective element of "State Practice" denoted by the actions of States, and the subjective element of *opinio juris* denoted by whether the States acted out of a legal sense of right or obligation.

Now the question comes: What role can IGOs play in terms of customary international law? This issue can be pertinently tackled from two aspects, i.e., the practice of IGOs, and the resolutions passed by IGOs.

With regard to the practice of IGOs, the answer used to be quite disputed but much more distinguished and clear now, it can indeed serve as a source of practice in the identification of customary international law. In this respect the consideration of the ILC is very indicative. The Drafting Committee of the ILC in 2015 decided to maintain the substance of the original first two paragraphs of its draft conclusion 4 on identification of customary international law. Paragraph 1 dictates that it is primarily the practice of States that contributes to the formation, or expression of rules of customary international law. But the word primarily was especially used here to emphasize the central role of States and to indicate, at the same time, that the practice of international organizations should not be overlooked. This provision is complemented accordingly by the wording of paragraph 2, which indicates that the practice

of IGOs can have the same effect, but "in certain cases" only. In another word, in certain cases, the practice of IGOs can be regarded as holding similar status as that of States.

In fact the Special Rapporteur Mr. Michael Wood contributed the whole of Chapter VI of his third report to the theme of "the relevance of international organizations". He emphasized that the practice of international organizations may be 1) of evidentiary value, 2) or serve to catalyse State practice, 3) or more importantly, directly serve as relevant practice for purposes of formation and identification of customary international law. As for the last case a most clear-cut example is where States have assigned State competences to international organizations such as the European Union. According to Mr. Wood, "*in essence, such practice may be equated with the practice of States. If one were not to equate the practice of such international organizations with that of States, this would mean not only that the organization's practice would not be taken into account, but also that its Member States would themselves be deprived of or reduced in their ability to contribute to State practice."*

With regard to the resolutions passed by IGOs, the ILC in 2015 in its draft Conclusion 12, paragraph 2 recognized that although resolutions, as such, cannot create customary international law automatically, they may play an important role in the formation and identification of customary international law. According to draft conclusion12, paragraph 2, *"a resolution adopted by an international organization or at an intergovernmental conference may provide evidence for establishing the existence and content of a rule of customary international law or contribute to its development."* According to the chairman of the drafting committee, paragraph 2 highlights firstly that these resolutions may have evidentiary value, and secondly they might also catalyze State

practice and *opinio juris*, thereby contributing to the development of customary international law.

However, caution is needed here. As the ICJ in its Nuclear Weapons advisory opinion explained: *"It is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an opinio juris exists as to its normative character."* The special rapporteur Mr. Michael Wood also stresses the importance of caution within this specific context. For example he emphasized that the resolutions of any particular IGO, especially the UNGA, are not a shortcut to identifying customary norms.

To sum up, we need to properly understand the legal basis of the above capacities and role of the IGOs, which is due to the widely recognized objective legal personality that they possess, and we also need to properly understand the significant governing principle of specialty of the law of IGOs, including the rule of effectiveness.

AALCO and the Development of International Law

Now, after having looked at the broad role that IGOs play in the development of international law, I will now focus on AALCO's work relating to this topic.

The Background and Mandate of AALCO

The end of the Second World War brought with it the rise of nationalism in Asia and Africa, and the decolonization process that led to the creation of several new States in these regions. Having historically been passive objects of international law, these new African and Asian States resented being in the position of having to accede to a system of international law in whose creation they almost played no part, and which, to large extent, did not represent their concerns and viewpoints anyway. However, despite their understandable resentment, these States still fostered the keen desire to

contribute to the continued development of international law, and realized the importance of regional cooperation and concerted action for this purpose.

The seed of the creation of AALCO was therefore planted at the International Legal Conference held in New Delhi in 1954, and it took root at the historic Bandung Conference of Asian-African States in 1955. One year later, the Asian Legal Consultative Committee (ALCC), the forerunner of AALCO, was established on 15 November 1956 by seven participating States. Its name was changed in 1958 to the Asian-African Legal Consultative Committee in order to embrace the participation of African States, and then to the current name in 2001 to reflect its growing role and status. Now AALCO has 47 Member States from Asia and Africa, and enjoys Permanent Observer status with the United Nations, accorded in 1981.

AALCO's *raison d'être* throughout its sixty-year history has been to promote the progressive development and codification of international law, based on the special interests and needs of its member States. The Statutes of AALCO as revised in 2004 denote that the Functions and Purposes of the AALCO are, *inter alia*, as follows:

(i) to consider and deliberate on issues related to international law that may be referred to the Organization by the Member States and to make such recommendations as deemed necessary;

(ii) to exchange views, experiences and information on matters of common concern having legal implications and to make recommendations thereto if deemed necessary;

(iii) to communicate, with the consent of the governments of the Member States, the views of the organization on matters of international law referred to it, to the United Nations, other institutions and international organizations; and,

(iv) to examine subjects that are under consideration by the ILC and to forward the views of the organization to the Commission. [2]

History of AALCO's Contributions to International Law

Vienna Convention on Diplomatic Relations

A very early example of AALCO's contribution to the development of international law is seen in the involvement of the AALCO in the creation of the *Vienna Convention on Diplomatic Relations* in 1961. The topic had been examined by AALCO at its First (1957), Second (1958) and Third Sessions (1959) on reference by the Governments of India and Japan. During the course the AALCO created and circulated a draft Convention on *Diplomatic Immunities and Privileges* among its Member States which not only amended the draft articles that had been prepared by the ILC, but also suggested its own formulations, which were influenced by the experiences of Latin America and tailored to the conditions in the newly independent States in Asia and Africa.

Subsequently, at the UN Conference on Diplomatic Relations in Vienna in 1961, the AALCO's draft Convention was presented for consideration and several of the recommendations therein were accepted and found their way into the 1961 *Vienna Convention* finally. In fact, so thorough was the AALCO's work on the topic of Diplomatic Law, that several of its recommendations were also adopted into the *Vienna Convention on Consular Relations*, 1963, and the *Convention on Special Missions*, 1969.

Vienna Convention on the Law of Treaties

The next important milestone in the development of international law, which AALCO was proudly a part of, was the adoption of the *Vienna Convention on*

[2] Article 1 of the STATUTES OF AALCO (Revised and adopted at the Bali Session, 2004)

the Law of Treaties, 1969 (VCLT). This topic was vitally important for the Asian and African States because most of them, as former colonies, were long suffers of unequal treaties. After an exhaustive period of consultation within the AALCO, which began at its Sixth Session in 1964 but intensified after the Eighth Session in 1966, a Special Rapporteur was appointed and several Sub-Committees were also formed to consider the reports of both the Rapporteur and the AALCO Secretariat, and to deliver their own reports, which were ultimately solidified into comments and recommendations that were submitted to the ILC. Ultimately, these recommendations focused on various topics within the proposed VCLT, and it may also be said that the AALCO's efforts were instrumental in paving the way for compromise solutions reached at the UN Conference of Plenipotentiaries, particularly with respect to Part V of the Commission's draft on Invalidity of Treaties, and ultimately led to the adoption of the VCLT.[3]

United Nations Convention on the Law of the Sea

AALCO's success during the negotiation and drafting of the VCLT also paved the way for what may be its biggest success thus far – the 1982 *United Nations Convention on the Law of the Sea* (UNCLOS). Pursuant to a proposal by the Republic of Indonesia soon after the adoption of the UN Resolution on Convening of a Conference on the Law of the Sea in 1970, the AALCO took up the subject with a view to assisting its Member States and other Asian-African States to prepare themselves for the Conference of Plenipotentiaries. New concepts such as Exclusive Economic Zone, Archipelagic States, and Rights of Land-locked States originated and developed in the course of deliberations in the AALCO and from there finally found their rightful places in the 1982 Convention. In later stages AALCO became almost a negotiating

[3] 24 AALCO Member States are currently parties to the VLCT

forum with other groups of States. The Latin American group gradually began sharing its views and the Western bloc started consulting AALCO too. Thus, the Asian-African States became a powerful bloc at the negotiation in the Third UN Conference on the Law of the Sea.

Following the adoption of the UNCLOS, AALCO's work programme also became oriented towards assisting Member States in becoming parties to the UNCLOS and helping with any related issues. A reflection of the success of this programme, which in turn is a reflection of the success of AALCO's role in the negotiating process, can be seen in the fact that as of 2015, 41 of AALCO's 47 Member States have ratified the UNCLOS.

The Rome Statute of the International Criminal Court

More recently, AALCO has also been active in matters related to the Rome Statute of the International Criminal Court (ICC). The topic "*International Criminal Court – Recent Developments*" was included in AALCO's work programme as one of the agenda items at its Thirty-Fifth Session at Manila in 1996. Since then, the Organization has continuously reported the developments in the ICC at its successive Annual Sessions, and most of the Member States were keenly interested in the deliberations relating to this topic during the Annual Sessions. AALCO's efforts also focused on enhancing awareness of the Rome Statute by organizing several important seminars and meetings.

The Rome Statute is also a good example of AALCO's *modus operandi* with regard to the simultaneous promotion of both ratification of treaties and the interests of Members States. While the concept of the International Criminal Court has a great deal of support among AALCO Member States, there are also crucial concerns relating to the Court's *de facto* focus on African nations,

as well as the role played by the Security Council's P-5 Members in the functioning of and referral of cases to the Court. These concerns are important enough to have prevented widespread ratification of the Rome Statute among AALCO Member States. However, AALCO continues playing its part in representing the interests of its Member States by working towards having these concerns publicized and addressed, thereby helping to create an environment that encourages Member States to become Parties to the Rome Statute in the future.

Bangkok Principles on the Status and Treatment of Refugees

AALCO has also over the course of its history been responsible for drafting important instruments under its own power. A fine example of this can be seen in the *Bangkok Principles on the Status and Treatment of Refugees* in 1966, which were later revised and consolidated at the Fortieth Annual Session of AALCO in 2001. The Bangkok Principles are considered one of the seminal non-Eurocentric formulations of refugee law and have proven to be quite influential in the subsequent development of this area of concern in Asia and Africa. In addition to being one of the earliest examples of a regional approach to refugee problems, some of the salient developments made by the Bangkok Principles are: an expanded definition of the term "refugee", which foreshadowed the definition within the 1967 Protocol to the 1951 UN Refugee Convention, and which also recognized "colour" as a ground for discrimination; and, the creation of "Burden Sharing Principles", which called for solidarity and cooperation in solving the global refugee problems.

The Bangkok Principles also provide an example of the work of AALCO in situations where the prevailing *status quo* of international law is less than ideal from the perspective of Asian-African States. The 1951 UN Refugee Convention has been often criticized for its Euro-centric nature and therefore,

rather than promoting a statute that it had serious ideological differences with, AALCO acted as the point of focus for Asian and African States to create their own instrument relating to refugee law.

Present and Future Work of AALCO

Having discussed AALCO's past experiences in the development of international law, I would now like to turn your attention to some part of the present and future work of AALCO.

Violent Extremism and its Manifestations

Far from resting on the laurels and plaudits that it has accumulated over the course of a storied existence, AALCO continues to strive to seek out and continue expanding the envelope of international law. This includes its current groundbreaking work in the legal aspects of combating Violent Extremism.

The topic of Violent Extremism was deliberated upon at AALCO's Annual Sessions in 2014 and 2015 at Tehran and Beijing respectively. According to the mandate given by Member States, the AALCO Secretariat should convene an Inter-Sessional Meeting of Legal Experts to *"consider AALCO principles for coordination to combat violent extremism and its manifestations which could lead to drafting Asian-African guidelines on violent extremism and its manifestations in order to strengthening cooperation against acts of violent extremism and its manifestations."*

Based on the above mandate, the AALCO Secretariat prepared a Draft document on Principles and Guidelines to Combat Violent Extremism and its Manifestations, which was considered and amended by legal experts from 24 Member States at the Legal Experts' Meeting in January 2016. A second

session of the meeting will be held in May this year to complete the process and present it to the plenary at AALCO's 2016 Annual Session for adoption. If adopted, this instrument promises to be one of the first of its kind - an instrument focusing on the legal aspects of combating violent extremism and promotion of a coordination framework to combat its scourge in the Asian and African regions.

International Law in Cyberspace

AALCO has also undertaken groundbreaking work in tackling cyberspace-related challenges, such as cybercrime, cyber-terrorism, and cyber-warfare, and improving cyberspace governance. The Agenda Item, "International Law in Cyberspace" was proposed as a newest addition to AALCO's work programme at the Fifty-Third Annual Session in Tehran in 2014. At the Fifty-Forth Annual Session in 2015 the member States decided to establish an open ended working group to further consider relevant issues.

The relevance of this topic at the current times is based on the fact that there exists only one multilateral treaty – the Budapest Convention – that deals with the issue of cybercrime, and on the contentious nature of the recently concluded Plenipotentiary Conference 2014, where Asian and African States supported the establishment of a UN-centric model of internet governance with the International Telecommunications Union (ITU) at its center. Additionally, the ubiquitous presence of cyberspace in the daily lives of most of the world's population necessitates the examination of the applicability of norms of international humanitarian law to cyber-warfare. AALCO, while continuing its ongoing examination of these issues and keeping both itself and its Member States abreast of developments in these areas, plans to continue being involved in the dialogue that will hopefully lead to international instruments aimed at regulating governance, warfare, and

crimes in cyberspace. Through these actions, AALCO will also try to ensure that realization of Asian-African interests during the discussions will result in the creation of instruments that will be in the best interests of its Member States to be parties of, thereby encouraging the widespread ratification in the Asian and African regions.

Conclusion

To conclude my lecture, I would like to refresh our memory by citing what the Special Rapporteur of AALCO on the topic of the Law of Treaties, Mr. Sompong Sucharitkul of Thailand who said on 20 Oct. 1967 in his relevant report that:

> *"The big powers have scarcely suffered in the period of relative lawlessness. However, they should not be allowed to continue taking advantage of the application of a bad law once it has become extinct, or to revive it on the alleged ground that it was good for the smaller and weaker nations. This is a crucial point that must be clearly understood and squarely faced by members of the Asian-African Legal Consultative Committee."*

I thank you all for your kind attention.