

AALCO Informal Expert Group's Comments on the ILC Project on "Identification of Customary International Law": A Brief Follow-up

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Abstract

This note presents the text of the AALCO Informal Expert Group's Comments on the ILC Project on Identification of Customary International Law and some information on how AALCO member States reacted to these comments.

1. On 24 March 2015, the Informal Expert Group on Customary International Law (IEG) of the Asian-African Legal Consultative Organization (AALCO) adopted a set of comments on the International Law Commission's project on "Identification of Customary International Law" (AALCOIEG Comments). This set of comments has subsequently attracted attention. The original draft was published in this *Journal*.¹ This brief follow-up provides some further information on these comments.

2. The AALCOIEG was established at the 2014 Annual Session of the AALCO in Tehran. The group was envisaged to act as a technical expert group on identification of customary international law, with a view to formulating responses to the work of the International Law Commission (ILC), including that of Mr. Michael Wood, the Special Rapporteur of the ILC on Identification of Customary International Law. Sufian Jusoh of Malaysia was elected Chairman of the IEG and Sienho Yee of China, Special Rapporteur of the IEG. The meeting of the group was open to all member States of the AALCO and the member States were asked to submit relevant information regarding their positions and practice to the Special Rapporteur.

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¹ Sienho Yee, Report on the ILC Project on "Identification of Customary International Law", 14 Chinese Journal of International Law (2015), 375-398.

3. The Special Rapporteur subsequently submitted to the IEG his Report on the ILC Project on “Identification of Customary International Law”,² with a set of proposed comments.

4. On 24 March 2015, the IEG held a meeting in Kuala Lumpur, Malaysia, again open to all member States. During that meeting, the Special Rapporteur presented his Report. A thorough discussion of the issues and the proposed comments was conducted. Upon deliberation, and after taking into account comments by members of the group, experts, as well as government representatives, the IEG adopted the Special Rapporteur’s proposed comments with some language modifications. These comments were subsequently published on line at the AALCO website³ and, for convenience, are reproduced as follows:

**[AALCO Informal Expert Group on Customary International Law]
Comments on the ILC Project on Identification of Customary
International Law**

[...]

Comment A on the need for greater precision and more concrete criteria

In order to achieve the objective of the ILC project on identification of customary international law to produce a practical, user-friendly set of conclusions, further precision and more concrete criteria are necessary either in the text of the conclusions or in the commentaries. It will be of value also to conduct a survey on the problems and difficulties associated with identifying customary international law in the day-to-day work of the practitioners and then add some language in the conclusions and/or commentaries with a view to helping solve these problems, or provide some illustrations on how to solve these problems.

Comment B on Provisional Draft Conclusion 1 (Scope)

Some matters that have already been or will be dealt with seem to

² Ibid.

³ Report of the Chairman of the AALCO’s Informal Expert Group on Customary International Law, held in Kuala Lumpur, Malaysia on 24 March 2015 (www.aalco.int/54thsession/AALCOIEG%20Chairman’s%20Statement%20and%20Special%20Rapporteur’s%20Report%2020150324.pdf).

go beyond the scope as defined in Provisional Draft Conclusion 1. In order that this draft conclusion accurately defines the scope of these draft conclusions, the word “primarily” should be added before “concern”.

Comment C on Provisional Draft Conclusion 2 [3] (Two constituent elements)

The following command to the decision-makers in identifying a customary international law rule and its content should be added at the end of current Provisional Draft Conclusion 2 [3] or as a new paragraph in this draft conclusion: “In the identification of customary international law, a rigorous and systematic approach shall be applied”.

Comment D on Provisional Draft Conclusion 3 [4] (Assessment of evidence for the two elements)

(1) Ascertaining the proper scope of application of a rule under consideration is critical to the assessment of State practice and *opinio juris* and the evidence thereof. In Provisional Draft Conclusion 3 [4], “the proper scope of application of a rule under consideration” should be added immediately after “regard must be had to”, and corresponding changes be made.

(2) Language should be added at the end of current Provisional Draft Conclusion 3 [4] or in the commentary to it, to the effect that, “The evidence to be relied upon is to be primary materials. Secondary materials, which include, for present purposes, decisions of the international courts and tribunals and the assessments made by august bodies such as the ILC as well as in scholarly writings, may be given weight only if they are well supported by primary materials. Conclusory statements are to be disregarded.”

Comment E on Provisional Draft Conclusion 4 [5], paragraph 2 (Requirement of practice)

There is a need to clarify in Provisional Draft Conclusion 4 [5] or the commentaries the term “certain cases” and the weight to be given to the practice of an international organization, to the effect that the practice of an international organization can count toward the formation or expression of customary international law only if it reflects the practice and positions of its member States and can be counted only with due

regard to the strength of the support of its membership and the representativeness of the practice vs. the generality of States in the international community.

Comment F Provisional Draft Conclusion 5 [6] – Conduct of the State as State practice

Only the exercise of State functions in the field of international relations is relevant to the formation of customary international law. In order to avoid any confusion in the future, “in the handling of international relations” should be added at the end of Provisional Draft Conclusion 5 [6].

Comment G on Provisional Draft Conclusion 6 [7] (Forms of practice)

In order to ensure that only State conduct of the best quality on the international plane be counted for purposes of identifying customary international law, it should be clarified either in the draft conclusions or in the commentaries that: (1) only State conduct in relation to an international question be counted as practice; (2) verbal acts taken in connection with a particular commitment or matter count as practice and as evidence of *opinio juris* and should be given greater weight, while verbal acts expressed in a general and abstract way may count as evidence of *opinio juris* and should be given less weight or none at all; (3) inaction may constitute practice if the situation demands reaction from the concerned State, which is clearly conscious of this situation and has taken a conscious decision not to act.

Comment H on Provisional Draft Conclusion 7 [8] (Assessing a State's practice)

The holistic approach to the assessment of State practice in the process of identifying customary international law should be clarified further in the draft conclusions or in the commentaries. The decision-maker in the identification process is to identify the conduct of the organ of a particular State that speaks finally for a particular State internationally with regard to the particular subject matter under consideration and give effect to that conduct only. Furthermore, the decision-maker is to count only considered and focused conduct, and not incidental, tangential or inadvertent conduct. Furthermore, in grave matters, only conduct with a

requisite formality and solemnity and displaying unmistakableness may be counted.

Comment I on Provisional Draft Conclusion 8 [9] (The practice must be general)

The requirement of representativeness should be clarified in the draft conclusions or the commentaries to the following effect. Representativeness should be fitting representativeness, based on a fitting criterion, rather than superficial or mechanical representativeness. A fitting criterion is informed by the subject matter and the context for the application of the rule under consideration. A corollary of fitting representativeness is the requirement of giving due consideration to the practice of specially affected States. In the light of these considerations and the jurisprudence of the International Court of Justice, due weight should be given to the role and practice of the specially affected States in the identification of customary international law.

Comment J on Proposed Draft Conclusions 10 and 11 (Acceptance as law)

In the draft conclusions or commentaries on assessing evidence of *opinio juris*, it should be emphasized that: in assessing evidence of *opinio juris*, (1) verbal expressions made in connection with a particular commitment or matter should be given greater weight, and those made generally or abstractly, less or none at all; (2) inaction may be taken as evidence of *opinio juris* only if the situation [...] demands reaction from a concerned State, which is clearly conscious of this situation and has taken a conscious decision not to act; (3) only considered and focused conduct or statements, and not incidental, tangential or inadvertent conduct or statements can be considered evidence of *opinio juris*; and (4) in grave matters only conduct or statements with a requisite formality and solemnity and showing unmistakableness may be counted.

Comment K on the Persistent Objector Rule

In the light of the useful role of the persistent objector rule in affording a measure of protection to the sovereignty of the persistently dissenting State(s) and in promoting the formation of new norms of international law as well as the need to strike a proper balance between the interests of the persistently objecting State(s) and those of the international

community, the draft conclusions should contain a provision on the persistent objector rule to the effect 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 and so long as that rule has not attained the status of *jus cogens*.

Comment L on the use of the resolutions of the United Nations General Assembly and similar organizations

The “all due caution” often called for in using the resolutions of the General Assembly or similar organs in the identification of customary international law is well appreciated but how this is done requires further clarification in the draft conclusions or the commentaries. Furthermore, there is a need for a clear rule on how to use such resolutions as evidence in the identification of customary international law so as to put States on notice regarding this point so that they can act accordingly during the voting process at the relevant organizations, in order to ensure better quality in and better respect for the exercise of sovereignty and reduce to a minimum the irony involved in using resolutions of a political nature as constituent material for legally binding rules under customary international law.

5. At the Annual Session of the AALCO in Beijing held in April 2015, an informal consultation session was conducted, chaired by ILC Member Ambassador Dr. Hussein Hassouna, and open to experts and all member States.

6. The issues of specially affected State and persistent objector aroused some interest among the IEG, but, during the informal consultation session, no delegates from the governments raised any issues regarding the wording about these points in the AALCOIEG Comments.

7. Regarding the informal consultation session, the summary report of the 2015 Annual Session stated⁴:

Report of the Chairman of the Informal Consultation on the Work of the Informal Expert Group on Customary International Law

12.10 The report was presented by the Chairman of the Group,

⁴ www.aalco.int/54thsession/Summary%20Report-final-dated%2006%20May%202015.pdf

Ambassador Dr. Hussein Hassouna who stated that the ILC Special Rapporteur on the topic of “Identification of Customary International Law” had already presented three reports on the topic. He went on to highlight the conclusions that had been reached at the meeting of the informal consultation on the Work of AALCO Expert Group on Customary International Law that took place on 15th April 2015. The conclusions included: taking note of the informal expert group recommendations available on AALCO website and appreciating the [...] work of Prof. Yee as AALCO Special Rapporteur; the need to give more time to the Member States of AALCO to analyse the report and make recommendations thereon; that AALCO should retain this issue on its agenda and have more consultation on the topic to have a more in-depth input; that Member States should send their comments on the recommendation made by the AALCO Expert Group in an expeditious manner and that Secretary-General should refer in general to the AALCO Informal Group recommendations and Prof. Yee’s report when addressing the ILC in Geneva later this year.

8. During the general debate at the 2015 Annual Session, some member States referred to the AALCOIEG Comments. Some States expressed support for the IEG’s positions on the issues of specially affected State and persistent objector and this was subsequently reported by the Secretary-General of the AALCO (paragraph 9 below). No States raised any substantive issues with these concepts or other comments of the IEG.

9. In May 2015, H.E. Mr. Rahmat Mohamad, the then Secretary-General of the AALCO, made a statement before the ILC, in which he did refer to the AALCOIEG Comments and the AALCO Special Rapporteur’s Report, and reported, among other things⁵:

A view was expressed⁶ that the issue of specially affected states and the concept of persistent objector should be included in the work of Mr. Michael Woods, Special Rapporteur of ILC. A view was expressed⁷ that the “specially affected states” rule is not reserved for powerful states, but

⁵ Statement by H.E. Prof. Dr. Rahmat Mohamad, Secretary-General, AALCO, at the Sixty-Seventh Session of the International Law Commission (ILC) (Wednesday, 13 May 2015), 6 (on file with the author).

⁶ Iran and Japan in the Fifty-Fourth Annual Session, 2015 (note in the original, *ibid.*).

⁷ Iran in the Fifty-Fourth Annual Session, 2015 (note in the original, *ibid.*).

applies to all states who are especially concerned with the subject matter under consideration and whose interests are especially affected by the rule under consideration. A view was expressed⁸ that [a] more inclusive and [...] cooperative approach is necessary between AALCO and ILC and due regard may be given to the views of many competent jurists from Asia and Africa who have made notable contributions to the field of international law.

10. This view on “specially affected States” as reported by the AALCO Secretary-General thus echoed that expressed by the AALCO Special Rapporteur.⁹ Indeed, the concept of “specially affected States”, like equality of the law that prohibits both the rich and the poor from sleeping under the bridge (as has been said), benefits both the poor and the rich, the weak and the strong States, as long as they are concerned with the particular subject matter and the particular rule under consideration. Under the prevailing circumstances, the health of the international legal system depends on those States who are specially affected.

11. In late August 2015, a dialogue between (1) ILC Special Rapporteur, Sir Michael Wood and Mr. Stephen Mathias, Assistant Secretary-General for Legal Affairs, the United Nations and (2) AALCO experts were held in Kuala Lumpur. The ILC Special Rapporteur made a detailed presentation commenting on the AALCOIEG Comments and the Report of the AALCO Special Rapporteur, who made a detailed response. Speeches were also made by Mr. Mathias and H.E. Mr. Rahmat Mohamad, the then AALCO Secretary-General, and Mr. Sufian Jusoh, Chairman of the AALCOIEG.¹⁰

⁸ Myanmar in the Fifty-Fourth Annual Session, 2015 (note in the original, *ibid.*).

⁹ Yee, n.1, at para.52 (“By now it should be clear that the concept of specially affected States is not reserved for the big and powerful States, but applies to all States who are specially concerned with the subject matter under consideration and whose interests are specially affected by the rule under consideration. A State need not be big and powerful to be specially affected, as one can tell from the emergence of the archipelagic State regime.”).

¹⁰ The critique and response were subsequently published in this Journal: Sir Michael Wood, The present position within the ILC on the topic “Identification of customary international law”: in partial response to Sienho Yee, Report on the ILC Project on “Identification of Customary International Law”, 15 Chinese JIL (2016), 3-15; Sienho Yee, A Reply to Sir Michael Wood’s Response to AALCOIEG’s Work and My Report on the ILC Project on Identification of Customary International Law, 15 Chinese JIL (2016), 33-40. The speeches made by Sufian Jusoh, Stephen Mathias and H.E. Mr. Rahmat Mohamad were published at 15 Chinese JIL (2016), 1-2, 17-31, 41-46, respectively.