ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANISATION (AALCO)
INFORMAL EXPERT GROUP ON CUSTOMARY INTERNATIONAL LAW

24 March 2015

Report

by Mr. Sufian Jusoh
Chairman of the AALCO's Informal Expert Group on Customary International Law

1. The Informal Expert Group on the Customary International Law held its second meeting at the Institute of Malaysian and International Studies (IKMAS), National University of Malaysia on 24 March 2015. The meeting was attended by the His Excellency Professor Dr. Rahmat Mohamad, Secretary-General of AALCO; Mr. Feng Qinghu and Mr. Mohsen Baharvand, Deputy Secretaries-General of AALCO, who were acting as independent experts; Mr. Sienho Yee, the Special Rapporteur of AALCO's Informal Expert Group on Customary International Law; Professor Dr. Rashila Ramli, Director of IKMAS; and participants from Malaysia and Pakistan.
2. During the meeting Mr. Sienho Yee presented his Report on the ILC Project on Identification of Customary International Law and a series of proposed comments on that project. He recommended that the Informal Expert Group consider and present those comments to the Member States of AALCO for their consideration at the Annual Session in Beijing in April 2015 and for transmission to the International Law Commission.
3. In deliberating the report by Mr. Sienho Yee, the Informal Expert Group considered views by participants including by Mr. Mohsen Baharvand and Mr. Feng Qinghu who spoke in their personal capacity. The meeting also considered written comments on Mr. Yee's Report by Mr. Shinya Murase who submitted them on 24 March 2015 in his personal capacity.
4. **Upon deliberation,** and taking into account comments and views made by participants, the Informal Expert Group on Customary International Law adopts the comments proposed by Mr. Sienho Yee, with some modifications. These comments are set in the Annex to this Chairman's Report.
5. The Informal Expert Group further decides that this Chairman's Report, with the annexed comments, and Mr. Sienho Yee's Report, with minor corrections, be immediately submitted to the Secretariat of AALCO for immediate transmission to the Member States of AALCO and publication on the website of AALCO.

Sufian Jusoh

24 March 2015

Annex

Asian-African Legal Consultative Organization

Comments on the ILC Project on Identification of Customary International Law

The Asian-African Legal Consultative Organization presents its compliments to the International Law Commission (ILC) and its members, especially the Special Rapporteur, Mr. Michael Wood, for the valuable work done on identification of customary international law and has the pleasure to present the following comments for consideration and to attach, for reference, the related Report of Mr. Sienho Yee, the Special Rapporteur of the AALCO Informal Expert Group on 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 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 that 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.

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Asian-African Legal Consultative Organization
Informal Expert Group on Customary International Law

Report on the ILC Project on "Identification of Customary International Law"

Sienho Yee,* Special Rapporteur of the
AALCO Informal Expert Group on Customary International Law

1. This Report is written for the Informal Expert Group on Customary International Law of the Asian-African Legal Consultative Organization (AALCO). The Report is divided into five parts: (I) State of the Topic at the International Law Commission (the Commission or ILC); (II) The AALCO Member States' Participation in the Debate; (III) The AALCO Informal Expert Group on Customary International Law and Its Consideration of the Topic to Date; (IV) Possible Comments for the International Law Commission; and (V) Draft Resolution of the AALCO on the ILC Project on Identification of Customary International Law. Finally an Appendix presents a draft resolution, which groups together all the proposed comments, for consideration by the Informal Expert Group and the AALCO.

I. State of the Topic at the International Law Commission

2. At its sixty-fourth session (2012), the International Law Commission decided to include the topic "Formation and evidence of customary international law" in its program of work and appointed Mr. Michael Wood as Special Rapporteur. At its sixty-fifth session (2013), the Commission considered the first report of the Special Rapporteur (A/CN.4/663), as well as a memorandum of the Secretariat on the topic (A/CN.4/659) and decided to change the title of the topic to "Identification of customary international law".

3. The Special Rapporteur concluded (Second Report, para.3.3) that "[t]here was general agreement with the view that the outcome of the work on the topic should be of a practical nature, and should be a set of 'conclusions' with commentaries. Moreover, there was general agreement that in drafting conclusions the Commission should not be overly prescriptive."

4. At its sixty-sixth session (2014), the Commission considered the Second Report of the Special Rapporteur (A/CN.4/672). This Second Report contained 11 proposed

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* Changjiang Xuezhe Professor of International Law and Chief Expert at the Institute of Boundary and Ocean Studies and the Institute of International Law, Wuhan University, China; Editor-in-Chief, Chinese Journal of International Law. Email: sienho@chinesejil.org. The name "Sienho Yee" is also spelled as "Yi Xianhe". The Special Rapporteur is grateful to Mr. Rahmat Mohamad, the Secretary-General of AALCO, and Mr. Sufian Jusoh, Chairman of the Informal Expert Group of AALCO, for guidance and assistance. This Report was submitted on 20 March 2015. Some minor corrections with no prejudice to the substance were made subsequently.

draft conclusions in 4 parts. Part One, "Introduction", includes Draft Conclusions 1, Scope, and 2, Use of Terms. Part Two, "Two constituent elements", includes Draft Conclusions 3, Basic Approach; and 4, Assessment of evidence. Part Three, "A general practice", includes Draft Conclusions 5, Role of practice; 6, Attribution of conduct; 7, Forms of practice; 8, Weighing evidence of practice; and 9, Practice must be general and consistent. Part Four, "Acceptance as Law", includes Draft Conclusions 10, Role of acceptance as law; and 11, Evidence of acceptance as law. The consideration of the Commission is described in the ILC Report 2014 (A/69/10), pp.238-248.[1] The Commission referred these draft conclusions to the Drafting Committee.

5. On 7 August 2014, the Chairman of the Drafting Committee delivered to the Commission a Statement of the Chairman of the Drafting Committee (sometimes referred to as the Interim Report of the Drafting Committee),[2] which contained 8 draft conclusions provisionally adopted by the Drafting Committee at the sixty-sixth session of the Commission. Draft Conclusion 2 as proposed by the Special Rapporteur was deleted and the Committee had no time to discuss the last two draft conclusions relating to "acceptance as law". The 8 draft conclusions provisionally adopted are in three parts and will be referred as hereinafter as "Provisional Draft Conclusions", with the former Draft Conclusion number, if different, in brackets. Part One, "Introduction", includes Provisional Draft Conclusion 1, Scope. Part Two, "Basic Approach", includes Draft Conclusions 2 [3], Two constituent elements; and 3 [4], Assessment of evidence for the two elements. Part Three, "A general practice", includes Draft Conclusions 4 [5], Requirement of practice; 5 [6], Conduct of the State as State practice; 6 [7], Forms of practice; 7 [8], Assessing a State's practice; and 8 [9], Practice must be general. The Statement of the Chairman of the Drafting Committee was made available on line for information only. No commentaries to the Provisional Draft Conclusions are presented yet, although the explanations in the Statement will probably find themselves in the commentaries somehow.

6. Regarding the future program, the ILC Report 2014 (para.184) stated that "the Special Rapporteur indicated that the third report would address, in particular, the various aspects pertaining to international organizations, the relationship between customary international law and treaties, as well as resolutions of international organizations. The third report would also cover the questions of the 'persistent objector', and regional, local and bilateral custom. The need to further consider the question of evidence, and the related matter of the burden of proof, was also stressed by the Special Rapporteur." Obviously, the Drafting Committee and the Commission as a whole will need to consider any new materials as well as the draft conclusions that have been provisionally adopted by the Drafting Committee.

7. The ILC Report 2014 states (para.172): "As to the outcome of the topic, the

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1 A summary of the work of the Commission and the Special Rapporteur is also found in Report on Matters relating to the Work of the International Law Commission at its Sixty-sixth Session, AALCO/53/ TEHRAN / 2014/SD/S1, prepared by the AALCO Secretariat ("AALCO Report on ILC").

2 http://legal.un.org/ilc/sessions/66/DC_ChairmanStatement(IdentificationofCustom).pdf

members of the Commission continued to share the view that the work on the topic should result in the adoption of a practical guide to assist practitioners in the task of identifying customary international law, which would strike a balance between guidance and flexibility. There was still uncertainty, in the mind of the Special Rapporteur, as to the need to cover expressly the aspect of formation of rules of customary international law." Furthermore, the ILC Report continues (para.173), "The Special Rapporteur indicated that this practical guide should take the form of a concise set of robust and comprehensive draft conclusions that should be read together with the commentaries thereto. The commentaries, which would form an indispensable supplement to the draft conclusions, should be relatively short, referring only to the key practice, cases and literature, like the articles on responsibility of States for internationally wrongful acts or on the responsibility of international organizations."

II. The AALCO Member States' Participation in the Debate

8. It is worth noting that among the States that the ILC Special Rapporteur noted in his Second Report as having provided written contributions on the topic, only one is an AALCO Member State.[3] The comments that AALCO Member States made during the 6th Committee debate have been summarized in the Report on ILC Matters prepared by the AALCO Secretariat for the Tehran Annual Session.[4] During the 6th Committee debate in the autumn of 2014, eight AALCO member States made comments.[5]

9. Furthermore, upon information and belief, there is no African Union approach, as such, to the identification of customary international law. Neither is there an ASEAN approach, as such.

III. The AALCO Informal Expert Group on Customary International Law and Its Consideration of the Topic to Date

10. At the recommendation of the Eminent Persons Group of the AALCO, a Working Group on Customary International Law was established.[6] The objective was to formulate responses to the work of the International Law Commission, including that of Mr. Michael Wood, the ILC Special Rapporteur on Identification of Customary International Law.

11. The Working Group held its first meeting on 15 September 2014 during the Fifty-Third Session in Tehran. The meeting was opened by Mr. Rahmat Mohamad, the Secretary-General, of the AALCO and elected Mr. Sufian Jusoh of Malaysia as interim Chairman, and Mr. Sienho Yee (Xianhe Yi) of China as Interim Special Rapporteur.

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3 Mr. Michael Wood, Second Report, 4 & n.12 and text thereto.

4 AALCO Report on the ILC, above n.1, 59-62.

5 See Identification of Customary International Law: 6th Committee Debate, Fall 2014 (a document received from Mr. Michael Wood, consisting of excerpts from the relevant UN documents).

6 Summary Report of the Fifty-Third Annual Session of the Asian-African Legal Consultative Organization, para.5.4.

12. The Working Group first decided that it was to act as an open ended technical working group on identification of customary international law, and affirmed its above-mentioned main objective.

13. The Working Group then discussed various issues including the working method, approach and schedule. One member of the Group identified the concept of persistent objector, hierarchy of norms and *jus cogens* for consideration. Another expressed the view the Group should not confine itself to what Mr. Michael Wood's Second Report dealt with, and commented on the issue of "specially affected States". Various other remarks were made.

14. The Interim Special Rapporteur discussed the possible approach to be taken by the Working Group. One course of action might be to provide a more or less comprehensive, conclusion-by-conclusion response to the draft conclusions already provisionally adopted. Such an approach would duplicate what the Member States would do. Obviously the Member States of the AALCO would respond to the Second Report of the ILC Special Rapporteur, the consideration of the topic by the Commission as well as the draft conclusions provisionally adopted by the Drafting Committee. Furthermore, as the AALCO membership covers a vastly diverse collection of States, it may be difficult to reach a common position regarding many of the draft conclusions. Another course of action might be to focus on the issues on which common positions are likely to emerge from the membership of the AALCO. Within this approach, a narrower version could be to just focus on issues that are of particular concern to the large majority of Member States of the AALCO, particularly the problems that they face during their day-to-day work relating to the topic. Yet another course of action might be to focus only on the difficult issues regarding which a contribution can be made. Of course, such an approach would also be faced with the same difficulties just mentioned above.

15. The Interim Special Rapporteur expressed his preference for taking an approach that would focus on the more important, fundamental and difficult issues of particular concern to the membership of AALCO, fully accepting that our work would not solve all the problems of the world. He was of the view that the Member States of the AALCO by and large were especially protective of State sovereignty and thus this point should be reflected in the work product of the Working Group. He further stressed the importance of ensuring that only the quality exercise of State power be relied upon as reflecting general practice and/or *opinio juris*, and the representativeness of these materials, and the quality of the decision-making in the identification of customary international law. In addressing these matters, he considered it most important to identify and tackle the difficulties and problems found in the day-to-day work in the identification of customary international law.

16. This just-mentioned preferred approach received the general support of those present. The Interim Chairman's Report[7] subsequently described as part of the general sense of the meeting the following:

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7 AALCO Verbatim Record of Discussions, Fifty-Third Annual Session, 15-18 September 2014, Tehran, The Islamic Republic of Iran ("AALCO Verbatim Record 2014"), 263.

> The approach is to focus on some fundamental issues of particular concern to the Member States of AALCO. To implement this approach, the Working Group requests that Member States share information on (1) the problems and difficulties they have encountered in their day-to-day application of Customary International Law and (2) on the more important matters that are of particular concern to them. The Working Group will then decide on which issues to address by taking account of the information received and the views of the members of the Working Group.

17. Subsequently the Secretary-General informed the Plenary that the name of the Group was changed to "Informal Expert Group on Customary International Law", and the Plenary endorsed the appointments of the Chairman and the Special Rapporteur.[8]

18. The Chairman's Report was subsequently circulated and published on line. To date, no communication has been received regarding the information sought.

IV. Possible Comments for the International Law Commission

19. In the light of the current state of the topic at the ILC as highlighted above and in the light of the mandate and the current work of the Informal Expert Group on the topic and the general sense of the first meeting of the Group, this Report will not attempt at a comprehensive treatment of the topic, but will only select and analyze some fundamental issues of particular concern to the Member states of AALCO and propose a set of comments for consideration and adoption by the Informal Expert Group and the AALCO for transmission to the ILC.

20. The general sense of the first meeting of the Group gives us some overarching considerations. These include the promotion of the quality in decision-making in the identification process, the reliance on only the quality exercise of State functions, and the representativeness of the State practice and *opinio juris* at issue. In the light of these considerations, this Report will not rehash areas where general agreement exists, or heap praises for work well done; instead it will focus on areas in need of improvement.

21. As the Provisional Draft Conclusions represent the latest work product at the ILC, they will form the point of departure for or the subject matter of our discussion. Some matters not yet covered by these conclusions will also be dealt with, in anticipation of the work of the ILC Special Rapporteur and the ILC.

22. The areas of concern and the corresponding proposed comments follow.

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

23. The outcome of the topic is intended to be a practical guide to practitioners, yet the draft conclusions were drafted and provisionally adopted in a very general and abstract way so that their utility may be questioned. Furthermore, they may also be open

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8 Ibid., para.8.4.

to criticism that they merely state the obvious or relevant areas, or simply point out the ambiguous areas, without settling anything, and thus not being very useful. For example, phrases such as "regard must be had to the overall context and the particular circumstances of the evidence in question" (Provisional Draft Conclusion 3 [4]), "under certain circumstances" (Provisional Draft Conclusion 6 [7]) and "sufficiently widespread and representative" (Provisional Draft Conclusion 8 [9]) may be helpful in pointing to the general direction but unhelpful in practical terms because they offer no concrete criteria on which an identification exercise may be conducted. It will be of value if these texts can be improved upon either in the draft conclusions or in the commentaries, with a view to adding some further precision to the existing formulations. 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.

24. The following comment is proposed:

> 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)

25. Provisional Draft Conclusion 1 simply states that "[t]he present draft conclusions concern the way in which the existence and content of rules of customary international law are determined". Some matters that have already been or will be dealt with seem to go beyond the scope thus defined. One illustration suffices. The persistent objector rule does not fall within the proper understanding of "the way in which the existence and content of rules of customary international law are determined". It really concerns the scope of application of a customary international law rule or its "opposability". In order that this draft conclusion accurately defines the scope of these draft conclusions, the word "primarily" should be added before "concern".

26. The following comment is proposed:

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

27. The general support for the basic approach as formulated by the ILC is evident and there is no need to add any additional praise. Obstacles exist however regarding how to make the basic approach work perfectly. One problem that has been talked about in the literature is that customary international law as unwritten law is an untidy source of law[9] and the relevant decision-makers may not, perhaps usually not, conduct a full-blown identification exercise. This obtains even with international courts and tribunals, with the International Court of Justice (ICJ) included. President Tomka of the ICJ described its approach as a "pragmatic" one: "the Court has taken a pragmatic approach to determining the existence and content of international custom, considering whether a rule has been convincingly identified before moving on to consider the primary evidence of State practice and *opinio juris*."[10] Even less rigorous instances than the "pragmatic" approach may be found in the Court's cases and other phrases have been used to describe the decision processes such as "truncated", "incomplete", "untidy", so on and so forth. Such a state of affairs in the decision-making in identifying rules of customary international law no doubt will lead to questionable identification. In order to improve upon the quality of the decision-making, a command should be given to the decision-makers to the effect that, "A relevant decision-maker shall apply a rigorous and systematic approach to the identification of customary international law". Hopefully such a command would help to tidy up the "untidy" process by moving the decision-makers to follow a certain course of action and, in so doing, to assess the materials before them in a more thorough manner and to reach a better result. This demand can be added at the end of current Provisional Draft Conclusion 2 [3] or as a new paragraph.

28. The following comment is proposed:

> 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: "A relevant decision-maker shall apply a rigorous and systematic approach to the identification of customary international law".

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

29. The open texture of the formulation in Provisional Draft Conclusion 3 [4] has already been mentioned and comments on improving it have been made above in general terms. In more detailed terms, it seems to be of value to consider several factors as follows.

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9 See, e.g., Hugh Thirlway, The Sources of International Law (2014), 59.

10 President Peter Tomka, Custom and the International Court of Justice, 12 The Law and Practice of International Courts and Tribunals (2013), 215.

30. Firstly, the scope or field of application of a particular potential rule under consideration is of great importance, which can be considered structural. This is so because the decision on this scope or field of application determines the relevant practice and the evidence for it and thus predetermines the outcome of the identification, to a great extent. For example, the ICJ's determination in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* that "it is not called upon in the present proceedings to resolve the question whether there is in customary international law a 'tort exception' to State immunity applicable to *acta jure imperii* in general" and that "[t]he issue before the Court is confined to acts committed on the territory of the forum State by the armed forces of a foreign State, and other organs of State working in co-operation with those armed forces, in the course of conducting an armed conflict"[11] greatly influenced the analysis and the ultimate decision. Here we need not assess whether the proper scope was reached and applied in that case; we need only appreciate the importance of this step in the identification process. Accordingly, ascertaining the proper scope of application of a rule under consideration is critical. As a result, this proper scope should be added as one of the matters that "regard must be had to".

31. Secondly, 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. This approach is necessary in order to ensure the respect for the exercise of State power. This is evident from Article 38, especially paragraph 1(d), of the ICJ Statute. It is worrisome to see that the Special Rapporteur noted "the general agreement within the Commission that decisions of the international courts and tribunals were among the *primary materials* for seeking guidance on the topic" (ILC Report, para.172, emphasis added) and that "[i]t was pointed out that an exhaustive review of State practice and *opinio juris* was exceptional, as more often than not evidence of a rule is first sought in the decisions of the International Court of Justice, the work of the International Law Commission, or in resolutions of the General Assembly and treaties" (ibid., para.158). Placing the decisions of international courts and tribunals and the work of the ILC on such a high pedestal is alarming, because these are really secondary materials under Article 38 of the ICJ Statute. Since paragraph 1(b) of this article defines "international custom" as "international custom, as evidence of a general practice accepted as law", only State materials are primary materials in the true sense of the term in the identification of customary international law. International courts and tribunals are not agents of any State. Neither is the ILC. Therefore, the materials produced by the courts and tribunals and the ILC cannot be primary materials. Article 38(1)(d) treats these materials as "subsidiary means for the determination of rules of law". This is also recognized by Judge Tomka in his statement as quoted above in paragraph 27 of this Report, especially his phrasing, "primary evidence of State practice

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[11] Jurisdictional Immunities of the State (Germany/Italy: Greece intervening), Judgment, ICJ Reports 2012, 127, para. 65; cf. Diss. Op. Gaja, ibid., 317, para. 9.

and *opinio juris*". Indiscriminate reliance on the secondary materials is bound to compound the problems associated with the sometimes truncated, incomplete or untidy processes that produce some of these secondary materials. These materials are only subsidiary materials to which one may turn for help, even in the first instance, but their worth does not come as a result of the status of the author—even the ICJ or ILC—but as a result of the solid support behind them. They should serve as no more than guideposts on the road to the destination, not the destination itself. In the light of the above-quoted strong words in favor of judicial decisions, even a simple reference to the language of Article 38(1)(d) of the ICJ Statute may not be enough. A more explicit reminder that conclusory statements are to be disregarded is necessary in the conclusion or the commentaries.

32. The following comment is proposed:

> (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.
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> (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)

33. Currently Provisional Draft Conclusion 4 [5], paragraph 2 states that "[i]n certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law." The relevance of the practice of international organizations in this area is generally acknowledged. The propriety of Paragraph 2, however, will all depend on how one defines "certain cases" and how much weight one gives to the practice at issue. Neither is clarified in the draft conclusion. The need for such clarification is obvious, particularly in the light of the great variety of international organizations that exist in the world nowadays. In the light of the primacy of State conduct in the area under consideration, 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 the 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 among the States in the international community.

34. The following comment is proposed:

> 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 the 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

35. Provisional Draft Conclusion 5 [6] states that "State practice consists of conduct of the State, whether in the exercise of executive, legislative, judicial or any other functions of the State". The language of this draft conclusion is couched in very broad terms. But it is generally accepted that 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 this draft conclusion, in order to delimit the scope of the conduct that can be considered as State practice for identifying customary international law.

36. The following comment is proposed:

> 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)

37. The current formulation of the forms of practice may be too general and too loose. Consistent with the overall goal of ensuring that only State conduct of the best quality on the international plane be counted for purposes of identifying customary international law, the following aspects warrant emphasis.

38. First of all, as already discussed above, it is important that only State conduct in relation to an international question be counted as practice. For example, a federal court's decision on the relationship between the federal government and a constituent entity should not be treated the same as one on the relationship between a foreign government and the federal government.

39. Secondly, caution should be exercised in according value to verbal acts, although it would be inappropriate to exclude them completely. If too much weight is given to verbal acts, States may resort to them too easily and without sufficient consideration, and this will lead to a cheapening of expressions of views by States, and, as

a result, of practice and "legal conviction" in general. Thus a proper balance must be struck between physical acts and verbal acts. Furthermore, the situational context in which a verbal act is conducted is of great importance, so much so that verbal acts that are taken in connection with a particular commitment or matter should be accorded greater weight, while verbal acts expressed in a general and abstract way, less or none at all.

40. Making a distinction between verbal acts taken in connection with a particular commitment or matter and verbal acts expressed in a general and abstract way can also help to solve the problem of double-counting verbal acts as practice as well as evidence of *opinio juris*. The former can count as practice and as evidence of *opinio juris*, while the latter, probably on the side of *opinio juris* only, or perhaps should not be counted at all.[12]

41. Thirdly, inaction may constitute practice, but if inaction is too easily counted, many instances of State conduct committed without all due consideration may be counted. So it is essential to identify and count only those instances of inaction in a situation that demands reaction from a concerned State, which is clearly conscious of this situation and has taken a conscious decision not to act.

42. The following comment is proposed:

> 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)

43. Provisional Draft Conclusion 7 [8], paragraph 1 states that, "Account is to be taken of all available practice of a particular State, which is to be assessed as a whole." Obviously a holistic assessment of all available practice of a particular State is necessary in the identification process. How that holistic assessment is achieved however remains to be clarified. The few comments in the Statement of the Chairman of the Drafting Committee do not go beyond generalities either. It will be necessary for the Commission to provide further elaboration in either the draft conclusions or the commentaries. While much can be said on this point and it is difficult to say a lot in advance of an assessment,

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12 See Sienho Yee, The News that *Opinio Juris* "Is Not a Necessary Element of Customary [International] Law" Is Greatly Exaggerated, 43 German Yearbook of International Law (2000), 227, reprinted in Sienho Yee, Towards an International Law of Co-progressiveness (2004), 27, 35-36.

it is still important to consider a few points.

44. When "variations" in the practice of a particular State are found, Provisional Draft Conclusion 7 [8], paragraph 2 states, "the weight to be given to that practice may be reduced". In general terms such a position is not objectionable, but in detail whether such a variation exists and how to deal with it when found need to be clarified. Above all, if a "variation" appears in the practice of different levels of organs, such a "variation" is a false one because the practice of the higher level organ is to be counted, not that of the lower level organ. As a result, there should be no reduction of weight to be given to the practice of the State at issue. This point is already mentioned in the Statement of the Chairman of the Drafting Committee (p.15). If a "variation" appears in the practice of different organs at the same highest level of a State, such a "variation" is *usually* also a false one because *usually* the executive branch has the charge of managing international affairs and it is the practice of this branch that counts in the formation of international law. If another branch adopts a conflicting practice, the State incurs responsibility for that conflicting practice if it constitutes a violation of international law. If a variation appears over time in the practice of the same branch in charge of a particular matter, this presents the mark of a variation for the purpose of customary international law formation and identification. Even here that mark of variation may be only a mark, and not variation itself yet; whether a true variation exists remains to be further analyzed. If the variation in fact represents a break with a past practice and if the State has acted consistently since that break, the subsequent consistency should be the basis on which an assessment is made, not the seeming variation. In the light of these considerations, it is important for a decision-maker in the identification process to identify the conduct of the organ (whether executive, legislative or judicial) of a particular State that speaks finally for a particular State internationally and give effect to that conduct only.

45. Secondly, it should be noted that when assessing State conduct, the International Court of Justice applies a rigorous approach, and gives effect only to conduct that reflects a considered decision.[13] Similarly, in the identification of customary international law, 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.[14]

46. The following comment is proposed:

> 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

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13 See Nottebohm Case (Liechtenstein v. Guatemala), ICJ Reports 1955, 17-18; South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Second Phase, ICJ Reports 1966, 6, 38.

14 Cf. Award in the Matter of the Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India, 7 July 2014, paras. 161, 165 (http://www.pca-cpa.org/showpage.asp?pag_id=1376); Maritime Dispute (Peru v. Chile), Judgment, 27 January 2014.

process is to identify the conduct of the organ of a particular State that speaks finally for a particular State internationally 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)

47. Provisional Draft Conclusion 8 [9], paragraph 1 states that, "To establish a rule of customary international law, the relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent". Paragraph 2 states that if the practice is general, no particular duration is required. The Statement of the Chairman of the Drafting Committee states (p.16) that, "Practice also needs to be followed by a sufficiently representative group of States, usually in different regions. The precise representativeness required also depends on the rule in question […]." Representativeness in terms of regional distribution is not difficult to understand, but the last point, representativeness is dependent on the rule in question, is in need of clarification. Perhaps it may be better to consider this as representativeness dependent upon the subject matter in question, as the rule does not come about if no representativeness is found. If representativeness is to be subject matter dependent, how does that play out? Some illustrations from the ILC will be helpful. One can imagine the situation with formation of the rules on the archipelagic State regime. If one assesses representativeness by pitting the number of States asserting the regime against the total number of States in the world, or on the criterion of regional distribution of those claimants, one will not do justice to the situation. A proper assessment will have to take account of the number of actual claimants vis-à-vis the total number of potential claimants, i.e., States with qualifying or seemingly qualifying geographical characteristics. Accordingly, representativeness is not a raw numbers game. Representativeness must be "fitting representativeness", based on a fitting criterion informed by the subject matter and the context for the application of the rule under consideration.

48. The "temporary" elimination of the paragraph on specially affected States (Statement of the Chairman of the Drafting Committee, 16) is problematic. The paragraph should be restored or some language to the same effect should be placed in the commentaries. First of all, a corollary of fitting representativeness is that due weight should be given to the practice of specially affected States. The situational contexts usually distinguish these States from others so that a raw numbers game will count them out. Secondly, the motivation for dropping the issue was ostensibly to treat all States equally. Such equality is only superficial equality.[15] The fact is that many matters might

[15] Rather, "enlightened equality" is required. Cf. Sienho Yee, The International Law of Co-progressiveness: The Descriptive Observation, the Normative Position and Some Core Principles, 13 Chinese Journal of International Law (2014), 485, paras.13, 22, reprinted in id.,

not attract any attention from those States not affected. It is also usually the case that those 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.

49. The need to pay special attention to specially affected States is already reflected in the United Nations Charter, in the context of Security Council decision-making. Article 31 of the Charter states that, "Any Member of the United Nations which is not a member of the Security Council may participate, without vote, in the discussion of any question brought before the Security Council whenever the latter considers that the interests of that Member are specially affected." In the identification of customary international law rules too, the situation of the specially affected States deserves special consideration.

50. Similarly, the ICJ highlighted the special role of the specially affected States in its 1969 judgment in the *North Sea Continental Shelf* cases.[16] The Court said in paragraph 73 of that judgment that, "With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected." Again the Court said in paragraph 74 of the same judgment that, "Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; —and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved."

51. Dropping the recognition of the role of specially affected States in the formation of customary international law will unduly minimize the conduct of the small number of States specially concerned with and/or affected by a particular matter (e.g., the archipelagic State regime) if some kind of quantitative assessment is to be had and, at the same time, may unduly exaggerate the importance of the views of those States not affected by a particular matter and thus encourage them to express their opinions too easily and without sufficient consideration.

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

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Towards an International Law of Co-progressiveness: Membership, Leadership and Responsibility (2014), 1.

16 ICJ Reports 1969, 3.

specially affected, as one can tell from the emergence of the archipelagic State regime.

53. The following comment is proposed:

> 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)

54. Much that has been said above on assessing practice also is relevant to assessing evidence of acceptance of law (*opinio juris*). At the risk of being repetitive, it is important to emphasize that in assessing evidence of *opinio juris*, (1) verbal expressions made in connection with a particular commitment or matter should be given greater weight, while those made generally or abstractly, less or none at all; (2) inaction may be taken as evidence of *opinio juris* only if the situation that 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.

55. The following comment is proposed:

> 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 that 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, 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

56. During the first meeting of the Informal Expert Group, the importance of the persistent objector rule was stressed and a recommendation was made that that the Group should address this issue. This importance of this rule also finds proof in the ILC Special Rapporteur's statement that this issue would be dealt with in his Third Report (ILC Report 2014, para.184).

57. The persistent objector rule was already recognized in essence if not in express terms in the ICJ judgment the *Fisheries Case (United Kingdom v. Norway)* delivered in 1951. In that judgment, the Court said that "the ten-mile rule has not acquired the authority of a general rule of international law. [...] In any event the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast."[17] The general contour of the persistent objector rule is well known and need not detain us too long here. Suffice it to highlight that essentially this 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. So formulated, this rule's relevance to the formation or identification of the rule is perhaps simply that one State's dissent does not prevent the formation or identification of a rule of customary international law.

58. Rather, this rule appears to address the application of the objected-to rule of customary international law, or, more precisely, the non-application of the objected-to rule to the persistent objector. As such, this rule offers the final protection for a State from the tyranny of the majority and a guarantee of its sovereignty with respect to the particular rule at issue. In some cases, however, the persistent objector rule may serve to allow the persistent objector to spearhead a better rule of customary international law on the very same subject matter. Yesterday's persistent objection may well be today's standard embodiment. Yesterday's persistent objector may well be today's standard carrier. This finds proof in the very *Fisheries Case (United Kingdom v. Norway)* case; the persistent objector's practice there is now the law of the day, or something very close to it. Thus, the persistent objector rule plays a very positive role in the formation of customary international law in the long run, in effect serving as a reminder to the majority that sometimes truth may be in the hands of the few and as an incubator for the substantive progress in the development of international law.

59. The ICJ judgment in the *Asylum Case (Colombia/Peru)* also appears to sanction the persistent objector rule. In the context of assessing the existence of a special custom, there the Court could not "find that the Colombian Government has proved the existence of such a custom. But even if it could be supposed that such a custom existed between certain Latin-American States only, it could not be invoked against Peru which, far from having by its attitude adhered to it, has, on the contrary, repudiated it".[18] This statement however can also be understood as the special custom exists among a number

17 ICJ Reports 1951, 116, 131.

18 ICJ Reports 1950, 266, 277-278.

of Latin-American States which did not include Peru.[19] If the formation of a special custom requires the consent of *every* State to which the special custom is said to apply, the persistent objector rule is unnecessary.

60. The dissent of the persistent objector is of course not without any limit. It is important to strike a balance between the interests of a single dissenter or some dissenters in the international community and those of that community as a whole. The balance can be properly struck so that the persistent objector rule applies so long as—this of course proceeds on the assumption that a *jus cogens* norm does not come into being as an instant custom[20]—the objected-to rule has not attained the status of *jus cogens*, which usually is considered as representing the conscience of the international community. As is well known, Article 53 of the Vienna Convention on the Law of Treaties defines a peremptory norm (*jus cogens*) of general international law as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". As soon as the objected-to rule at issue becomes a *jus cogens* norm, the persistent objector loses its privilege. This is necessary in the light of the peremptory character of *jus cogens* norms. An analogy can be found in Article 64 of the Vienna Convention on the Law of Treaties regarding the effect of the emergence of a new peremptory norm of general international law (*jus cogens*) on existing treaties. That article provides that, "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates." Similarly the force of a persistent objection should become void and terminate if that objection comes into conflict with a newly emerged peremptory norm of international law.

61. The following comment is proposed:

> 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*.

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19 Thirlway, Sources, n.9 above, 89.

20 On the possibility of "instant custom", see Bin Cheng, United Nations Resolutions on Outer Space: "Instant" International Customary Law?, 5 Indian Journal of International Law (1965), 23.

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

62. The use of the resolutions of the United Nations General Assembly or similar organs in the identification of customary international law rules is an important and difficult matter. On the one hand, the courts and tribunals including the International Court of Justice have accorded substantial weight to the resolutions of the General Assembly in the identification of customary international law. On the other hand, "all due caution" is called for in doing so. How such caution is to be applied requires clarification in a way that is of practical use to the practitioners.

63. Furthermore, there seems to be 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 in order that they can act accordingly during the voting process at the relevant organizations. As is well known, under the framework of the Charter of the United Nations, the General Assembly is a political setting and its resolutions and/or declarations are not binding legally and thus can be reckoned properly as evidence of "*opinio politico*", rather than "*opinio juris*" in a straightforward way. The substantial or even overwhelming support for such resolutions in large measure, or even precisely in some cases, results from such a political setting and the political nature of these resolutions. It will be somewhat ironic if the non-binding creatures of a species of law—treaty law—are used as the constituent material or evidence of a constituent element for binding rules under a different species of law—customary international law—without anything added. A clear rule on the use of such resolutions as evidence of either practice and/or *opinio juris* will most likely move the States to act in a more conscientious way, with full appreciation of the consequences, and will thus ensure better quality in, and better respect for, the exercise of sovereignty and reduce the irony to a minimum.

64. The following comment is proposed:

> 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.

V. Draft Resolution of the AALCO on the ILC Project on Identification of Customary International Law

65. Consistent with the mandate of the Informal Expert Group and in the light of the work conducted as well as the analysis given above, it is proposed that the Informal Expert Group consider presenting, for adoption by the AALCO plenary and for transmission to the ILC for its consideration, a draft resolution that would group together all the proposed comments as given in this Report.

66. The proposed draft resolution for consideration and adoption by the Informal Expert Group and the AALCO for submission to the International Law Commission is set out in the Appendix to this Report.

Appendix**

Asian-African Legal Consultative Organization

Draft Resolution on the ILC Project on Identification of Customary International Law

The Asian-African Legal Consultative Organization presents its compliments to the International Law Commission (ILC) and its members, especially the Special Rapporteur, Mr. Michael Wood, for the valuable work done on identification of customary international law and has the pleasure to present the following comments for consideration and to attach, for reference, the related Report of Mr. Sienho Yee, the Special Rapporteur of the AALCO Informal Expert Group on Customary International Law:

** Postscript Note: On 24 March 2015, this Report was presented orally to the second meeting of the AALCO Informal Expert Group in Kuala Lumpur, Malaysia. The proposed comments were adopted by the Informal Expert Group, with some minor language modifications as follows: (1) The title is changed to read: "Comments on the ILC Project on Identification of Customary International Law"; (2) At the end of *Comment C*, "A relevant decision-maker shall apply a rigorous and systematic approach to the identification of customary international law" is changed to read "In the identification of customary international law, a rigorous and systematic approach shall be applied"; (3) In *Comment E*, "the member States" is changed to "its member States"; (4) In *Comment H*, "speaks finally for a particular State internationally" is changed to read "speaks finally for a particular State internationally with regard to the particular subject matter under consideration"; and a comma was added after "in grave matters".

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 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: "A relevant decision-maker shall apply a rigorous and systematic approach to the identification of customary international law".

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 the 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 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 that 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.

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