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Editorial Comment

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"

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1. It is a great pleasure to be in Malaysia once again, and an honour to have the opportunity to address this distinguished gathering. The AALCO's interest in the work of the International Law Commission is long-standing, and greatly welcomed.

2. This is a good moment to take stock of progress on the ILC's topic on *Identification of customary international law*. The ILC's 2015 annual report to the General Assembly records that, at its meeting on 6 August 2015, the Commission took note of the 16 draft conclusions provisionally adopted by the Drafting Committee (A/70/10, para.61). These are expected to be considered by the Commission next year, in its sixty-eighth session.

3. The establishment, in Tehran in 2014, of a Working Group (later renamed Informal Expert Group) on Customary International Law, whose main objective is "to formulate responses to the work of the International Law Commission"

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(AALCO Report,[1] para.10) and whose approach is "to focus on some fundamental issues of particular concern to the Member States of the AALCO" (ibid., para.17), was a major and very positive step. It was both interesting and timely for the Commission to have, this past summer, Professor Sienho Yee's report and the Informal Expert Group's 12 Comments (Comments A to L). Under Professor Sufian Jusoh's chairmanship, it was decided to present the Expert Group's Comments, together with the report, to the AALCO's Annual Meeting in Beijing in April 2015. In Beijing, the Comments and report were discussed in a group chaired by my old friend, and ILC colleague, Ambassador Hussein Hassouna.

4. I shall come back to the Comments and to the report in a few moments. In doing so, I shall refer, for shorthand, to the "AALCO Comments" and the accompanying "AALCO Report", though I appreciate that they have not yet been adopted by the AALCO as such.

5. The Comments and the report date from March 2015, and naturally focus mainly (though by no means exclusively) on the first eight draft conclusions provisionally adopted by the ILC Drafting Committee in 2014 following my second report (A/CN.4/672).

6. The AALCO Comments adopted in March 2015 are perceptive and constructive. Even when critical, and they are in places rather strict, stern even, they are welcome. They will be particularly helpful as I now come to draft commentaries to the conclusions.

7. It is interesting to note the basic assumptions underlying the Comments and the report. The Rapporteur 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" (AALCO Report, para.15). I wonder how far this really is the case among AALCO members, and if it is how far it is a position shared by other States as well. My guess is that it is.

8. This starting point – State sovereignty – may seem to some rather out-of-date. It is not. It remains fundamental to the international legal system. State sovereignty seems to underlie and explain much that we find in the Comments and in the report, and explains what may seem at first sight to be a rather strict approach to the identification of customary international law.

9. I was struck, for example, by the strength of the criticism in paragraph 31 of the report. When making the perfectly valid distinction between primary and secondary materials for the purpose of the identification of rules of customary international law, the Rapporteur says that –

1 Sienho Yee, Report on the ILC Project on "Identification of Customary International Law", 14 Chinese JIL (June 2015), 375–398 (hereinafter, "AALCO report") also available on line at the AALCO website (http://www.aalco.int/54thsession/AALCOIEG%20Chairman's%20Statement%20and%20Special%20Rapporteur's%20Report%2020150324.pdf).

> 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.

and he goes on to say that –

> Placing the decisions of international courts and tribunals and the work of the ILC on such a high pedestal is alarming because they are really secondary materials under Article 38 of the ICJ Statute.

I do think this may be based on a misunderstanding. It is important to distinguish two separate matters:

- First, the materials that need to be looked at in order to ascertain the methodology for identifying rules of customary international law.
- Second, the materials (evidence) needed to be examined in order to determine whether a rule of customary international law exists.

10. The ILC topic is of course concerned only with the methodology; it is not the purpose of the topic to apply the methodology to determine any particular rules of customary international law. My reference to the decisions of courts and tribunals being primary materials "for seeking guidance on the topic" was made in the context of determining the methodology, not in the context of identifying particular rules of law. In the first context – methodology – decisions of the International Court of Justice are in my view invaluable – perhaps I should have avoided the word "primary". In the second context, they are of course only a "subsidiary means" within the meaning of Article 38(1)(d) of the Statute – subsidiary but often in practice very important.

11. There is one important systemic point I should make at the outset. The work of the ILC is nothing if it is not collective. The Special Rapporteur is a servant of the Commission, whose proposals are often more in the nature of "kite-flying" than anything else. They are launched, and then blown hither and thither by members of the Commission (and by States), and they emerge the better for the collective consideration.

12. The AALCO Comments, and similar input from regional bodies such as the AU Commission on International Law (AUCIL), are welcome because they reflect serious input from a number of States or regional experts. As I see it they are welcome more because they may be seen as reflecting, to some degree at least, the views of a considerable number of States, rather than because they necessarily reflect a particular regional view on the matter. Regional views may be important, but on a topic like the identification of customary international law they must surely be seen as a contribution to a universal view of the matter.

13. Customary international law continues to play a significant role even in highly codified fields. In uncodified fields, it has proven itself able to adapt to the ways of modern international life. It features regularly in the everyday practice of international law, including by being frequently invoked before international courts and tribunals,

particularly in inter-State disputes, but also for example in investment cases. It is of course enshrined in Article 38(1) of the Statute of the International Court of Justice, a provision that is widely regarded as setting out the sources of international law and that is currently binding on 193 States. Among recent cases that have turned, at least in part, on custom, one may find the *Diallo* case, the *Jurisdictional Immunities of the State* case brought by Germany against Italy, and *Territorial and Maritime Dispute (Nicaragua v. Colombia)*. New cases on the Court's docket, such as the three cases entitled *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*, likewise raise questions of customary international law. Other international courts and tribunals, too—even those that principally apply a particular treaty, such as the International Tribunal for the Law of the Sea—frequently resort to customary rules. Customary international law is increasingly raised in national courts as well. Many domestic constitutional orders recognize customary international law as an applicable source of law, and apply it with increasing frequency. It also regularly features in legal opinions by government legal advisers, diplomatic correspondence, and official statements by States.

14. Why did the International Law Commission take up the topic "Identification of customary international law"? The answer, I think, is that there was felt to be a need for some authoritative guidance on the process of identifying customary international law, for all those who are called upon to apply it – not least given the considerable differences of approach amongst writers. At a time of increasing references to customary international law by numerous legal actors it was thought that the Commission, given its role under the UN Charter, its privileged relationship with States, and its composition and working methods, might be well placed to offer such guidance.

15. In deciding to take up the topic, the Commission was well aware of the difficulties inherent in an attempt to "codify the relatively flexible process by which rules of customary international law are formed".[2] But it was also aware of the need for authoritative guidance on how to identify rules of customary international law in concrete cases, especially at a time when, and here I quote from the syllabus that formed the basis for the Commission's decision to add the item to its work programme, "questions of customary international law increasingly fall to be dealt with by those who may not be international law specialists, such as those working in the domestic courts of many countries, those in government Ministries other than Ministries for Foreign Affairs, and those working for non-governmental organizations" (A/66/10, Annex A, para.3).

16. Members of the Commission agree that the outcome of the project should be of an essentially practical nature. It is not our aim to seek to resolve largely theoretical controversies. In the words of our Chinese member, "[c]ustomary international law itself

2 Report of the Study Group on the Future Work of the International Law Commission, para.104, in M.R. Anderson et al. (eds.), The International Law Commission and the Future of International Law (British Institute of International and Comparative Law, 1998), 42.

is an important issue of international law that is quite controversial … the importance of the topic lies with providing unified and clear guiding principles to international law practitioners, for them to identify and apply customary international law in their practice" (A/CN.4/SR.3185).

17. Here a word about AALCO Comment A (see also AALCO Report, para.23):

> 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.* [Emphasis added. Yes, I agree. But a balance has to be struck between setting out clear guidance and not being unduly prescriptive. During the last session the Drafting Committee went some way towards making the draft conclusions more detailed, but a good deal will have to be left for 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.* [Emphasis added.]

18. We will do our best. That is partly my aim in suggesting that in light of my next (fourth) report the ILC should consider "practical means of enhancing the availability of materials on the basis of which the existence of a general practice and its acceptance as law may be determined" (my third report, A/CN.4/682, para.97).

19. Next, a word about the Commission's methodology when approaching this topic. Where do we look for guidance in determining how to identify customary international law? The first place is Article 38(1)(b) of the Statute of the ICJ itself, which in a sense tells you all you need to know, with its now century-old formula: "international custom, as evidence of a general practice accepted as law". Then there is what States do and say about the methodology, although that is often hard to come by. Fortunately there is much guidance in decisions of the International Court of Justice and – perhaps to a lesser extent – in those of other international courts and tribunals, and regional courts. We have of course looked at national courts as well, studying carefully the decisions of various courts. And then there is much to be learnt from certain writings on the subject.

20. The Commission is still at a relatively early stage of its consideration of the topic. The report of the Chairman of the Drafting Committee from July 2015 contains a set of 16 draft conclusions. The report is on the ILC website (http://legal.un.org/docs/?path=../ilc/documentation/english/statements/2015_dc_chairman_statement_cil.pdf&lang=EF) and the draft conclusions are also available, in document A/CN.4/L.869. The report of the Chairman of the Drafting Committee describes the discussions in the committee, and may be seen as an important part of the *travaux* of the eventual text. The next step is that I now need to prepare draft commentaries on all the draft

conclusions, which I shall do in advance of the next session of the Commission in May 2016. I cannot stress too highly the importance of the Commission's commentaries.

21. I do not have time to take you through each of draft conclusions 1 to 16, even in a cursory way. But I must draw particular attention to draft conclusion 2 (which was adopted in 2014). It is at the heart of the evolving text. As provisionally adopted by the Drafting Committee, it reads:

> To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*).

22. This confirms the two-element approach, which has also been widely endorsed by States in the Sixth Committee of the General Assembly and in abundant international practice. That is already a significant conclusion to be drawn from this exercise. Significant, but not particularly surprising, perhaps. It is important because in recent years there have been calls, mainly from academics, to abandon the two-element approach and, essentially, to abandon custom as we know it: several writers have called for a reduced role for "acceptance as law", arguing that in most cases widespread and consistent State practice alone is sufficient for constructing customary international law. Others have claimed the opposite – reducing the practice requirement to a minimum and concentrating instead on the *opinio juris* element. It is noteworthy that the two-element formula, whose origins are lost in the mists of time, or at least in the mists of nineteenth century German legal thinking, has withstood the test of time.

23. Work on the topic has also shown that several longstanding theoretical controversies related to customary international law have by now been put to rest. It is no longer contested, for example, that verbal acts, and not just physical conduct, may count as "practice." That is reflected in draft conclusion 6 [7], paragraph 1. Nor is it seriously questioned that no particular duration is required for the emergence of a rule of custom (if the practice is general and accepted as law) – draft conclusion 8 [9], paragraph 2. While some theoretical questions may well remain, that is not to be regretted: those engaged in the practice of law may benefit much from such debates, as did members of the ILC.

24. In connection with draft conclusion 2 [3], the AALCO Comment reads (see also AALCO Report, para.27):

> 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".

25. That seems to me to be a rather significant comment. While I am not sure that it would be appropriate to include such a "command" in a draft conclusion, the thought is one that I have sympathy with, and if my colleagues on the ILC agree could be reflected in the commentaries. I do not, however, think it precludes Judge Tomka's "pragmatic" approach (see ibid.). To a large extent the topic aims precisely to make sure that the task of identifying rules of customary international law is not done in a manner that is not rigorous and systematic.

26. I do not have time to go into all the issues that have been discussed within the Commission over the last three years. I shall briefly mention six points.

27. The first question is whether the methodology for determining the existence or non-existence of a rule of customary international law varies across different fields of international law, in other words, whether there might be different approaches to the identification of rules of customary international law in different fields. It is sometimes suggested, chiefly by writers, that in such fields as international human rights law, international humanitarian law and international criminal law, among others, one element may suffice in constituting customary international law, namely *opinio juris*. This is not of course the case as long as we are dealing with what properly may be called "customary international law". There may, however, be a difference in the assessment of evidence of the two elements depending on the overall context, the nature of the rule, and the particular circumstances in which the evidence is to be found. This is reflected in the latter part of draft conclusion 3 [4], paragraph 1. But the underlying approach is the same: both elements are required. Any other approach would risk artificially dividing international law into separate fields, which would run counter to the systemic nature of international law (my Second Report, para.28).

28. This is consistent with the approach of the International Court of Justice, for example in its treatment of the international law of State immunity in the *Germany v. Italy* case (ICJ Reports 2012, 122, para.55), in which it said

> *In the present context*, State practice of particular significance is to be found in the judgments of national courts faced with the question whether a foreign State is immune, the legislation of those States which have enacted statutes dealing with immunity, the claims to immunity advanced by States before foreign courts and the statements made by States, first in the course of the extensive study of the subject by the International Law Commission and then in the context of the adoption of the United Nations Convention. *Opinio juris in this context* is reflected in particular in the assertion by States claiming immunity that international law accords them a right to such immunity from the jurisdiction of other States; in the acknowledgment, by States granting immunity, that international law imposes upon them an obligation to do so; and, conversely, in the assertion by States in other cases of a right to exercise jurisdiction over foreign States. (Emphasis added)

29. A second issue is the relevance of international (intergovernmental) organizations to the formation and determination of rules of customary international law. Here there is a valuable and cautionary AALCO Comment E (See also AALCO Report, para.34):

> 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.

30. This matter proved, to me somewhat surprisingly, quite controversial in the Commission. Of course, international organizations are subjects of international law, but they are not States, and their nature is very different from that of States. As the International Court of Justice has said, "The subjects of law in any legal system are not necessary identical in their nature or in the extent of their rights ..." (*Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, ICJ Reports 1949*, 174, 178). International organizations are also all quite different from each other, ranging from a universal organization with broad political purposes like the United Nations; to regional organizations such as ASEAN and the ADB; to a supranational organization like the European Union, which in many respects acts like a State; to specialized and technical institutions such as the World Bank and IMF. It is necessary to distinguish, for present purposes, between acts of member states and acts of the organization. This is not always easy. Another distinction to make is between practice relating to the internal affairs of the organization, on the one hand, and the practice of the organization in its relations with States, international organizations, etc., on the other. It is the latter practice that is relevant for present purposes, though here, too, the dividing line may not always be clear. The questions then arise, which organs of international organizations are relevant to the customary process? Is it necessary that the organization be acting *intra vires*—that is, within its mandate and powers and functions—for its acts to count? And, to the determination of which rules of international law may the practice and *opinio juris* of organs of international organizations contribute? Only to those rules of international law by which they themselves are (or would be) bound, or does their influence reach farther? Of course, the Commission will not necessarily answer all these questions.

31. While it does not seem possible nowadays to dismiss the practice of at least certain international intergovernmental organizations in certain fields, such as the law of treaties, or privileges and immunities, as relevant to the formation and evidence of customary international law, some of these questions certainly merit further thought and attention.

32. Draft conclusion 4 [5], paragraph 2, says that

> In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law.

I shall have to explain what is meant by "[i]n certain cases" in the commentary, along the lines of what was said in my reports and the discussions that ensued.[3]

33. A third issue is this: the inter-relationship between customary international law and treaties, at a time when custom has been "increasingly characterized by the strict relationship between it and written texts".[4] This issue benefits much from the guidance of the International Court and previous work of the Commission, which demonstrate at least three ways in which a rule in a treaty may reflect a rule of customary international law, in other words may assist in determining the existence and content of the rule. You will find this in draft conclusion 11 [12]: (a) the treaty rule may codify a rule existing at the time of the conclusion of the treaty; (b) the treaty rule may have led to the crystallization of a rule that had started to emerge prior to the conclusion of the treaty; and (c) the treaty rule may give rise to a general practice that is accepted as law, thus generating a new rule of customary international law.

34. While it is helpful to note these three distinct processes, in a given case they may shade into one another. Above all, treaty texts alone cannot serve as conclusive evidence as to the existence or content of rules of customary international law: whatever the role that a treaty may play vis-à-vis customary international law, in order to establish the existence in customary international law of a rule found in a written text, the rule must find support in external instances of practice coupled with acceptance as law. In the words of the *Libya/Malta* judgment, "[i]t is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them" (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p.13, at pp. 29–30, para.27).

35. Another group of issues concerns what Article 38 of the ICJ Statute refers to as "subsidiary means for the determination of rules of international law". As you know, Article 38(1)(*d*) refers in this context to "judicial decisions" and to "teachings of the most highly qualified publicists of the various nations". What does "subsidiary" imply here? It indicates that judicial decisions and teachings are not primary sources of law in the same way as international conventions, international custom, and general principles of law. Rather they are secondary means for assisting in determining

3 See also, M. Wood, "International Organizations and Customary International Law", 48 *Vanderbilt Journal of Transnational Law* (2015) 609–620.

4 T. Treves, "Customary International Law", in *Max Planck Encyclopedia of Public International Law* (2006), para.2.

the law: for interpreting treaties, for identifying the existence of rules of customary international law and their content, and for the determination of general principles of law. Judicial decisions, or the writings of learned authors, may be looked to for guidance as to the law, but are not themselves law. On the other hand the word "subsidiary" may suggest that they are of no great importance, which is clearly not true, especially for judicial decisions.

36. This may be a good point at which to refer to the AALCO Comment D(2) that

> 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."

37. I agree that caution is needed when drawing on what this comment rightly calls "secondary materials". But the exhortation does seem a little bit strict. One cannot necessarily disregard all "conclusory statements".

38. The fourth point I want to mention is the role of judicial decisions in relation to customary international law. This covered in draft conclusion 13 [14]. What do we mean by judicial decisions in this context? Clearly the term covers the judgments of the main international courts and tribunals, in particular the International Court of Justice; and presumably also advisory opinions. But perhaps not separate and dissenting opinions, though these may shed much light. It also covers the judgments of specialized courts, like the International Tribunal for the Law of the Sea in Hamburg, and the International Criminal Court. It also covers inter-State arbitral tribunals, like those that decided the *Alabama Claims*, or the *Island of Palmas* case, or more recently the various arbitral tribunals on maritime delimitation.

39. But what is the position of national courts? It is clear that decisions of national domestic courts may count as State practice and as evidence of the *opinio juris* of States, and thus contribute directly to the formation (and evidence) of customary international law under Article 38(1)(*b*). See draft conclusions 6 [7], para.2, and 10 [11], para.2. But may they also be used as a subsidiary means for the determination of rules of customary international law under Article 38(1)(*d*) in the same way as decisions of international courts and tribunals? There seems to me to be no reason in principle not to include decisions of national courts within article 38(1)(*d*) as it relates to customary international law. Such landmark cases as the *Paquete Habana* and the *McLeod* case have contributed greatly to the law. But domestic cases have to be approached with great care, and in context, since they may reflect national legal systems and approaches, not necessarily the position under international law.

40. Fifth, I come to writings, the "teachings of the most highly qualified publicists" as the ICJ Statute puts it. These are perhaps easier to place than judicial decisions. The role of writers (or "publicists", to use the wording of the ICJ Statute) is clearly subsidiary in the sense I have just explained, and nowadays in reality too (though domestic courts in a number of countries do place a certain emphasis on writers). (The word "publicists" in the ICJ Statute is a curious one in English. I understand that in French it refers to lawyers qualified in public law, as opposed to those who teach or practice private law.)

41. There is understandable concern that writers from all regions and legal traditions should be taken into account. This may at times be problematic, depending on the language in which they write. (The language question is also a problem when ensuring that State practice and *opinio juris* from all regions is counted.)

42. This brings me to my sixth and final point. How should the work of scientific bodies such as the International Law Commission, and indeed of expert groups of the AALCO, be categorised in the context of the identification of rules of customary international law? It is undoubtedly the case that in practice great weight is given to the ILC's work, including by the International Court of Justice, but on what basis is this done? Judicial decisions of both national and other international courts and tribunals referring to the work of the ILC are abundant.

43. In my third report, I described the output of the ILC as a form of 'writings', within article 38(1)(*d*). I did not mention the ILC in the proposed draft conclusions. Nor is it mentioned in the draft conclusions provisionally adopted by the Drafting Committee in 2015. But it was much discussed. A number of Commission members considered that placing the ILC output under "writings" did not reflect the real significance of our work.

44. Perhaps Judge Shi got it about right when, addressing the ILC in 1997, he paid tribute to the significant contributions made by the Commission. He noted that the draft articles and reports prepared by the Commission "were treated by the Court as sources which were at least as authoritative as writings of the most eminent publicist of international law" (A/52/10, 72, para.242).

45. There are certain features that may distinguish the output of the ILC from other writings. First, it is collective, but then so too is some other important work, such as that of the *Institut de droit international* and the International Law Association. Past such bodies include the League of Nations Committee of Experts for the Progressive Codification of International Law, and the Harvard Research in International Law. Then there are the composition, working methods, mandate, and the relationship with States.

46. Any discussion of this matter would need to situate the work of the ILC within this more general category (of bodies engaged in the codification), while at the same time highlighting its prominent position. We could state that the product of bodies engaged in the codification of international law, including the International Law Commission, may serve as evidence for the identification of rules of customary international

law. It would be necessary to stress the care with which the product of such bodies should be approached. For example, in most cases it is more likely to be the final output that carries most weight. It is essential to distinguish between the Commission's work that is intended to be *lex lata* (codification) and that which is intended as *lex ferenda* or progressive development, although that is not always easy in practice. And, above all, it is the response of States to the Commission's work that is of primary importance.

47. There are many AALCO Comments that seem entirely sensible, and may be reflected in the ILC's own commentaries. These include Comment H (on "Assessing a State's practice"), which has some valuable thoughts, including on inconstant practice; Comment J (on "Acceptance as law"); Comment K (on the Persistent Objector Rule), which when read together with the report contains useful insights; and Comment L (on resolutions of the UN General Assembly and similar organizations).

48. There are, however, one or two of the remaining AALCO comments that call for some reaction:

> 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].

49. And, similarly, in relation to draft conclusion 6 [7],

> only State conduct in relation to an international question be counted as practice.

50. I should be interested to hear more about this. The report does not offer much in support; it simply states that "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" (AALCO Report, para.35). While no doubt most of the relevant practice and *opinio juris* will in the nature of things be found in the field of international relations, it does not seem to me that a sharp distinction can be made between "the exercise of State functions in the field of international relations" and other conduct, or that State practice for the purposes of identification of customary international law should be so limited.

51. Comment G (on forms of practice) would seek to ensure "that only State conduct of the best quality on the international plane be counted for purposes of identifying customary international law." I have a good deal of sympathy with the desire to exclude "bad" practice, particularly verbal bad practice – politicians are hard to control! I have just addressed the "international plane" point. The words of caution about verbal acts (AALCO Report, paras.39 and 40) and about inaction (AALCO Report, para.41) are well-taken. Similar points arise in connection with Comment J on acceptance as law (AALCO Report, para.54).

52. Comment I on the need for the practice to be general is of particular interest. In one respect it goes counter to the preference of some members of the ILC against any mention of "specially affected States":

> 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.

53. The rather extensive arguments set out in the AALCO Report for retaining the term "specially affected States" (AALCO Report, paras.47–52) are valuable.

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54. In conclusion, let me say this. I hope that the International Law Commission's work on this topic, which will last for some more years (perhaps until 2018), will continue to attract interest from Governments, international organizations, and academic institutions. That can be very helpful to the Commission in its work.

55. The topic raises important issues, central to the international legal order - those I have just mentioned but many more, such as the role of resolutions of international organizations and conferences. As I have said, such issues would benefit from careful analysis within international organizations, in universities and by other bodies. It is indeed important to make customary international law more tangible, bearing in mind of course that it is precisely its flexible nature that inherently defines it, and that, to a large extent, has afforded it is durability.

56. It has been a pleasure to be invited here today to address this particular subject. I thank you all for your attention, and look forward to our discussions.