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Twofold Nature of International Customary Norms Formulated by International Law Comission and International Law Association

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Abstract: The given article is dedicated to the activities of International law commission of United Nations and Association of International law on questions of formation and evidence of international custom. Author analyzes the cumulative legal nature of international custom, explores its meaning and intercourse between the objective and subjective elements.

Key words: Sources of international law · "Soft law" · Consuetudo · Opinio juris sive necessitatis · International Court of Justice · international custom · Norms of international law

INTRODUCTION

Although international customary norms are recognized by majority of members of world community as one of the main sources of international law, there are still debates ongoing concerning its legal nature. These disputes mainly related to questions of existence of international customary norms and interpretation of its component elements, as well as intercourse between international customary norms and other sources of international law, for example, general principles of international law, international norms of jus cogens, norms of "soft law".

Despite the fact that this controversy is lasting for decades, nevertheless we can witness its substantial change. Perhaps it is related to historical developments, or increasing practice of creation and application of international customary norms. Thus, any discussion concerning international customary norms will remain as one of the relevant topics for members of international law science.

In given article, author aims to analyze the legal nature of international customary norms, the process of its formation in light of scientific analytical works of legal scientists and analytical works of international organization as International law Commission and Association of International Law.

The work of International Law Commission is of our special interest, because it aims to present the orientation for those who must reveal the norms of international custom, including judges of national and international courts.

Association of international law also presented in year 2000, very valuable document, named as *London Statement of Principles Applicable to the Formation of General Customary International Law,* which defined 33 principles with comments. The significance and empirical importance of these works will be demonstrated further.

By examining the legal nature of international customary norms, we can confirm, that it has a cumulative nature and consists of state practice (objective element) and opinio juris (subjective element). However, if in times of Antoni D'Amato the twofold nature of international custom was a confirmed fact, today we witness some semantic and structural change in this question. There is an opinion defining the role of the state practice as an additional, rather than the role played by opinio juris. Thus, as Bin Cheng states, UN Resolutions on Outer Space were accepted by world community immediately, presenting the creation of a new form of custom as "instant" custom which does not require the presence of state practice. In other words, if states agree with existence of some norms, there is no need for further ascertainment of other elements [1].

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According to Niels Petersen, international legal acts as Universal Declaration of Human Rights have direct peremptory effect by virtue of the consent of all states.

However, Petersen notes, that there are some opponents of such an approach in theory of the process of customary norm creation. Hence, it is necessary to take this question seriously and use a comprehensive approach in order to confirm the existence of a new custom. As Robert Jennings insists, "most of what we perversely persist in calling customary international law is not only not customary law: it does not even faintly resemble a customary law" [2], thereby, he notes that for existing of international custom, the *consuetude* (state practice) is strictly necessary.

There is an approach formulated by Kirgis named as a concept of "sliding scale". As he states, on the sliding scale, very frequent, consistent state practice establishes a customary rule without much (or any) affirmative showing of an opinion juris, so long as it is not negated by evidence of non-normative intent. As the frequency and consistency of the practice decline in any series of cases, a stronger showing of an opinion juris is required. At the other end of the scale, a clearly demonstrated opinion juris establishes a customary rule without much (or any) affirmative showing (of state practice) [3].

The judicial practice beginning from famous cases of Lotus and Continental Shelf, recognized existence of twofold requirement. However, many legal scientists must agree with the existence of at least one element, due to the complexity of defining both elements.

In abovementioned *London statement of principles applicable to the formation of general customary international law* three main questions needed to be answered: a) what types of act constitute state practice; b) whose acts count as state practice; c) the density of the practice [4].

Considering the first question, let us mention several principles offered by the authors of the document. Firstly, verbal acts and not only physical acts of states count as state practice. The statement, that verbal acts does not count serious intention and "talk is cheap" has no ground. There is a list of "speech-acts" of state practice as diplomatic statements (including protests), policy statements, press releases, official manuals, instructions to armed forces, comments by governments on draft treaties, legislation, decisions of national courts and executive authorities, pleadings before international tribunals, statements in international organizations and the resolutions. Thus, there is no reason why verbal acts should not count as practice rather than physical acts such as arresting individuals or ships.

Next principle sounds that, acts do not count state practice if they are not public. In this sense, there is no need for an act to be communicated to the entire world, instead at least one state must be informed about the verbal act. Thus, internal memoranda and the confidential opinions of government legal advisors are not considered as verbal form of state practice and not counted as objective element. However there is a reservation stating that in case if the memoranda made public afterwards, it may be evidence of the state subjective attitude to the issue. Besides, not any abstention from act is considered as a state practice. The act must not be ambiguous.

Some principles cover the question concerning the subjects, whose acts are considered to be a state practice:

- Acts of individuals, corporations etc. do not count as state practice, unless carried out on behalf of the state or adopted (ratified) by it;
- The activities of territorial governmental entities do not constitute state practice unless carried out on behalf of the state or adopted (ratified) by it;
- The practice of executive, legislative and judicial organs of the state is to be considered as state practice;
- Although international courts and tribunals derive their authority from states, it is not appropriate to regard their decisions as a form of state practice;
- The practice of intergovernmental organizations in their own right is a form of "state practice".

Concerning the density and the substance of the practice itself, there is a principle stipulating that the general customary international law is created by state practice which is uniform, extensive and representative in character. The uniformity (or consistency) can be demonstrated internally and collectively. "Internal" uniformity means, that all states must act in the same way on virtually all of the occasions [5]. However, requirement of "collective" uniformity states, that if there is too much inconsistency between states in their practice, there is no general customary rule. In *Asylum case*, the International Court of Justice explored some reasons of refusal to constitute state practice as for example, existence of uncertainty, contradictions, fluctuation and discrepancy in the exercise of an act, inconsistency in rapid succession or ratification of conventions, evidence of influence of political expediency in various cases [6]. For a rule of general customary international law to come into existence, it is necessary for the state practice to be extensive, but not necessarily universal.

It is commonly accepted to think that new formed states do not participate in previously formulated and admitted practice of states. However, there are many examples in international law when newly-independent states on the contrary, voluntarily show interest to join existing international customary norms. For instance, states formed after the dissolution of the Soviet Union never indicated that they do not consider themselves bound by customary international law. They have confirmed this fact in their constitution, although they are free to reject it.

The subjective element as opinio juris must be analyzed in prism of principles in order to exclude possible ambiguous interpretation. For example, there is a principle, stating, that the general consent of states on existence of a customary norm is enough and strict requirement of presence of both elements is not necessary. In other words, it confirms the idea presented earlier, that one element may constitute the existence of a customary rule.

In general, questions, related to psychological element (opinio juris) always raises endless contradictions in academic world. As Gugenheim noted, the notion of opinio juris sive necessitatis is not mentioned in classical Roman law and is of ambiguous nature [7]. Some practices, even though regularly observed, are treated by states as being by their nature outside the sphere of legal relations. For example, sending condolences on the death of a head of state cannot be obligatory to all of the states, rather is a sign of good manner or etiquette. As it is states in London principles, there are other cases of mere comity, where the usage is of such a nature that it could perfectly give rise to legal rights and duties, nevertheless does not entail such rights and duties. They call it *opinio non juris.* The frequently given example is exemption from custom duties of goods imported for the personal use of diplomats.

The International Law Commission dedicated several reports to the issue of defining the legal nature of international custom. In 50-s, the Commission offered the list of evidence of existence of international custom and on its 1st and 2nd working sessions discussed the topic "Ways and means of making the evidence of customary international law more readily available". In this report Commission made a number of recommendations, including that the General Assembly call to the attention of States the desirability of publishing digests of their diplomatic correspondence and other materials relating to international law, to make evidence of their practice more accessible [8]. However, later, for some period of time, this question was "paralyzed" on the working agenda of the International law commission. Hence, the unofficial survey in 1998, described the given issue as counterproductive, due to its exceptionally theory-dependent character [9]. Finally in 2010, International law commission included the topic under the heading of "Formation and evidence of customary international law".

In 2011, Sixth Committee of the General Assembly finally approves consideration of this subject and makes a statement to formulate practical guidance with comments for those who must apply this type of rules, such as judges, practicing lawyers and legal advisors. This is relevant also for those in governmental ministries other than Ministries of foreign affairs and those working for non-governmental organizations.

It is extremely difficult, or even impossible systematically describe the custom formation process without blurring its nature, limiting its flexibility and endless evolution [10]. Michael Wood was appointed as a Special Rapporteur, in order to deal with this complicated issue. Meanwhile, UN Secretary prepared its Memoranda concerning the previous work of the Commission. It amounts valuable source of information.

Although Commission considered the question by using comprehensive analysis, for the purpose of this research, we look into the question of legal nature of international custom. Thus, among the important questions elaborated by the Commission, is a question of substantial meaning and manifestation of opinio juris of states as one of the constitutive elements of international custom [11].

In 2013, Michael Wood presents his first report which covers detailed analysis of previous relevant work of the Commission, discusses the scope of the topic and possible outcomes. One of the conclusions he made, is related to the variety of spheres of the application of international custom in international law. It doesn't matter whether the question is within the sphere of international human rights law, international criminal law or international humanitarian law, "[i]nternational law is not a series of fragmented specialist and selfcontained bodies of law, each of which functions in isolation from the others; it is a single, unified system of law" [11, p. 8].

For the first time in history of international customary law, the general questions of methodology of identification of rules of customary international law were elaborated. Thus, he stipulates the necessity to consider the relationship between customary international law and other sources of international law, listed in Article 38.1 of the Statute of International Court [12]. The methodology also covers the terminology of given issue. In opinion of

Mr. Wood, accuracy and consistency in the use of terminology by practitioners and scholars alike could help clarify the treatment of customary international law as a source of law. The Special Rapporteur proposes to use the terms "customary international law" and "rules of customary international law" [11, p. 19].

Michael Wood proposes to consider the category of materials such as those materials demonstrating the attitudes of States and other intergovernmental actors; the case law of the International Court of Justice and other courts and tribunals; the work of other bodies, such as the International Law Association; and the views of publicists, in particular as to the general approach to the formation and evidence of customary international law. We totally agree with importance of the case law of the International Court of Justice for formation and evidence of international custom. Its judgments (including separate and dissenting opinions) shed much light on the general approach to the formation and evidence of customary international law including on specific aspects of these processes [11, p. 22].

In respect of the research of specific aspects of formation and evidence of international customary law, the author of given research offers to analyze the case law of the International Tribunal of the Law of the Sea, international criminal tribunals, the World Trade Organization dispute settlement organs, arbitral tribunals and other specific tribunals.

CONCLUSION

In general, by analyzing this report, we came to the conclusion that this report does not contain any new approaches to this question, mainly constituting existing provisions. Nevertheless, the advantage of the work is in its well structured methodological approach, which allows easily perceive complicated information. However, it is related to those, who are familiar to this issue in detail. For those whose daily work directly connected to the application of international customary rules, this report is descriptive in character and does not contain detailed explanation of important aspects. Thus, the question of methodology of formation and evidence of international customary rules remains open for discussion and further in-depth study.

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