

Customary Law as a Main Source of the International Law

Lecturer Mihail NIEMESCH, PhD.

Titu Maiorescu University Bucharest-Romania;
Associate Scientific Researcher – Romanian Academy,
Institute of Legal Research „Acad. Andrei Radulescu”
avocetniemesch@yahoo.com

Abstract

The emergence of the international law belongs to time immemorial. It was formed and evolved within the international relationships, which it created, consolidated and developed. The international law is tightly connected to the organization of the human society, to the state formation and to the international relationships between various subjects of international law. The international law as well as law in general represents a consequence of the social needs, aiming at the regulation of some specific relationships. Besides the treaty, the custom is a main and traditional source of the international law. Obviously, it cannot be ignored the important contribution of the principles of law in the formation and consolidation of the international law. We should specify that the modern society has begun “to require” the law codification in general, therefore also the codification of the international law, requirement that is based on the accuracy of the written form of law. On this background, the role and the importance of the custom in the system of the sources of law has started to decrease.

Keywords: *international law, customary law, codification, treaty, principles of law*

The emergence of the international law belongs to time immemorial. It was formed and evolved within the international relationships, which it created, consolidated and developed. The international law is tightly connected to the organization of the human society, to the state formation and to the international relationships between various subjects of international law. The international law as well as law in general represents a consequence of the social needs, aiming at the regulation of some specific relationships.

As Giorgio del Vecchio showed “Law is a life relationship of coordination, a guarantee-limit of the social relationships.” [1]

The first norms of international law emerged in the Antiquity. Most of them were customs. Thus, traditionally the international law is customary law, being the result of the agreement between states and not the expression of a higher political will. [2]

Besides the treaty, the custom is a main and traditional source of the international law. Obviously, it cannot be ignored the important contribution of the principles of law in the formation and consolidation of the international law.

As it is known, the custom is an unwritten rule of law, with binding character. Apart from this, the custom is characterized, by the tacit expression of the state agreements regarding the recognition of a certain rule and having a binding character in their relationships. The tacit expression of will is mirrored in the long practice of the states.

The international custom is an essential component in the configuration of the national legal systems and cultures. In this regard, in the literature it was considered that the relationship between the various legal cultures and the norms of the international law represent systems of integration and differentiation of the individual legal cultures as regards the collective perspective of the international law [3].

Art. 38 of the Statute of the International Court of Justice leads to the conclusion that not any practice of the states can represent and create legal rules. Article 38 refers to “the international customary law as an evidence of a general practice accepted as law.”

Defining the international custom, professors Dumitra Popescu and Adrian Nastase characterized it as a quite long general practice, repeated in the relationships between the states, accepted by them as a compulsory rule in their international relationships. [4] The recent doctrine defines custom as that practice applied by certain subjects of law believing that it represents a binding juridical form. [5] Custom is an efficient instrument, especially for the regulation of some fields of the international law, in which the process of codification is in the initial stage, contributing to the development of newer branches (such as spatial law etc.), fulfilling a similar role with that of the general principles [6].

As Charles Rousseau stipulates: “The international customary law results from a position adopted by a state in its relationships with another state, a position determined by a legal certitude and accepted in the same spirit by that state. It is the expression of a line of conduct that the international practice reveals as a consequence of the belief that it corresponds to the fulfillment of an obligation.” [7]

As it is known, the custom is the oldest source of the international law. The international customary law created the maritime law, the diplomatic law, and the war norms.

The literature [8] considers sources of the diplomatic law: the custom, the treaties, the internal laws and jurisprudence. As regards the diplomatic law, a branch of the international law, professor Dumitru Mazilu shares the opinion according to

which *antica comitas gentium*, the international courtesy, even if it is not a real source of law, represents “a precious source of information offering criteria and rules that eventually can favour the diplomatic relationships.”

According to Ion M. Anghel “All the rules regarding the inviolability of the diplomatic agents, of the headquarters of the diplomatic mission and of the residence of the agents and the exception from the state jurisdiction are examples of diplomatic norms of law of customary nature.” [9]

On the other hand the role of the custom in the field of the consular law was shown in the Vienna Convention on 24.04.1963 concerning the consular relationships, which stated in Preamble that “the rules of customary international law continue to govern matters not expressly regulated by the provisions of the present Convention.”

Aurel Bonciog draws attention on the fact that “the local custom or the internal practice of that state, even if it is not an international practice, recognized in unanimity, must be complied with; it is the case of the religious practices in the Muslim states according to which the Christian women cannot enter the mosque.” [10]

We should specify that the modern society has begun “to require” the law codification in general, therefore also the codification of the international law, requirement that is based on the accuracy of the written form of law. On this background, the role and the importance of the custom in the system of the sources of law has started to decrease. It is relevant in this regard the situation regarding the increasing number of treaties concluded and adopted by various states.

The literature considers that in certain situations the commercial customs do not have the character of sources of law. [11]

Out of the uniform commercial customs done under the patronage of the International Chamber of Commerce in Paris, special importance belongs to those known as INCOTERMS (*International Rules for the Interpretations of Trade Terms*), international rules for the interpretation of the commercial customs with large application in the international commercial buy-sell contracts. [12]

The customs, representing the most direct expression of the activity of the participants to the national and international business have a great capacity to adapt to the new contexts emerged in various business fields, their role being to complete the possible legislative and contractual faults. [13]

According to professor Paul Guggenheim, even if there is no objective criterion to establish the moment from which the formation of the customary rule is complete, yet certain circumstances allow distinguishing the custom from the simple habits. To be a custom, that conduct has to be constant and effective; on the other hand, breaking the rule has to be susceptible to be sanctioned. [14]

The international customary law is the expression of the practice that displays the following features:

- The customary practice, resulting from precedents. Unlike the national customary practice that can exceptionally be grounded on a single precedent, the international customary practice is formed in general only by the repetition of some conclusive acts, through an imperceptible process of elaboration that can be seen as a phenomenon of “juridical alluvion”;
- The uniform practice or at least the concordance, the clarity of the positions adopted by various states in a determined problem can lead to the conclusion of the existence of a customary practice with a certain generality [15];
- The evolving practice. [16]

So that the practice of the states has legal force, the repeatability of the conduct has to be characterized by uniformity and continuity. Consequently, the casual or contradictory actions cannot be accepted.

As regards the time factor and the duration of the practice the question is if there is any limitation of the duration of the conduct of the subjects of law. In this regard, Al. Bolintineanu and A. Nastase show that the duration of that practice does not have to be long and the fact that it covers only a short period of time does not prevent the custom to be formed [17].

On the other hand, it is true that certain principles of law or institutions of international law have been formed with a long or very long practice of those states. For instance, principles of international public law, such as the principle of sovereignty, equality and non-interference, norms of maritime or consular law have been established through codification only in the post-war period.

For example, in the modern era, after 1947, when India obtained the independence, the peaceful coexistence became essential element in the foreign policy of this country. In this regard, the contribution of India can be exemplified through the defence and promotion of the concept of Panchsheel. [18]

The five principles of Panchsheel are present in the preamble of the treaty of 1954, concluded between China and India, which aimed at the commercial relationships between these two countries and the intercourse between Tibet Region of China and India. The five principles which regard the peaceful coexistence between the two countries are:

- Mutual respect for each other's territorial integrity and sovereignty.
- Mutual non-aggression.
- Mutual non-interference in each other's internal affairs.
- Equality and cooperation for mutual benefit.
- Peaceful co-existence [19].

These principles were established by the prime ministers of those countries, Chou En-lai and Jawaharlal Nehru. The principles of this international convention were later adopted by more international documents and recognized as rules of the international law. Unfortunately, this treaty and the principles could not prevent Sino-Indian war of 1962.

The international custom played a very important role also in the fields of the international legal protection of the human rights and humanitarian law.

Thus, in the field of international legal protection of the human rights, a series of juridical rules was established by the customary law, such as the slavery abolition, forced labour prohibition etc.

As professor Corneliu Liviu Popescu showed "These legal norms do not have only conventional values but also a customary value. Obtaining a customary value, these legal norms are compulsory and impose as international customary law in the field of human rights and the states that are part of the international treaties containing those legal norms and establishing the human rights." [20]

The humanitarian international law as a branch of the international public law contains norms of conventional and customary law, having as object of regulation the issues of international and non-international armed conflicts.

According to professors I. Closca and I. Suceava "Some customs of humanitarian law such as the warning of the enemy before the attack, the immunity of the members of Parliament, the suspension of the obligations etc. preceded with thousands of years the written norm. Currently, the international humanitarian law, especially that applicable to the naval and air wars is based on customary norms. The importance of the custom in the international humanitarian law was revealed by

ICJ in the decision of 1986 in the case of “Military and Paramilitary Activities in and against Nicaragua”, which acknowledged an equal status with that of the conventional law.” [21]

As regards the time factor, as professor Gh. Moca showed, nowadays, when the rhythm of the international events accelerated and the needs of the legal regulation are often urgent, the time factor has diminished its importance in the process of the formation of a custom. Today not long or quite long periods of time, but quite short of only a few years are sufficient so that a repeated and uniform conduct of the states lead to the emergence of some customary norms.

Institution of the continental shelf, codified in the Convention of Geneva in 1958 was formed by customary means, as a result of some unilateral acts of the states (approximately 25), starting with Truman Declaration in 1945 and some bilateral treaties. [22]

In conclusion, nowadays “the long practice” does not represent any more a basic elements for the emergence and formation of a customary law. It is sufficient a period of time which can be longer or shorter according to the needs of codification.

Yet, to gain the character of legal norm, the practice of the states has to include also the subjective, psychological element. This element consists of the belief that a certain behavior has legal value, a binding force that corresponds to some regulation requirements (*opinio iuris sive necessitatis*).

The will of the states is based on the tacit agreement expressed in a continuous, repeated and uniform practice of the states that appreciate that behavior as compulsory. It is obvious that in the absence of the subjective element, that behavior will have the value of a custom, a simple habit, emptied of the legal force and that finds its recognition at the level of the international courtesy that applies between states on a reciprocity base.

Unlike law, the custom is not a written legal norm and therefore its existence has to be proved. The existence of *opinio iuris* generated often disputes between states and various issues referring to a certain practice can be at the base of a different interpretation from state to state. In this regard, we can exemplify by the Decision of the International Court of Justice of 1950 referring to asylum, which stipulates that a practice inspired from courtesy, good neighborhood and political opportunity cannot generate binding legal force as it does not lead to the “feeling of a legal obligation”. [23]

The actions or the non-actions must be concrete, not fictitious, repeated, not sporadic, and must be issued from the official institutions of the states. If a succession of unilateral actions excluding protests or reserves of the state about a certain conduct can gain the character of tacit recognition, abstention, the silence cannot have always the same meaning.

As concerns a certain practice, it is considered that in the absence of the protests or reserves, simultaneously with the actions of the state, we assist to the tacit recognition of that practice. The abstention, the silence cannot have the meaning of recognition. In this regard, in "Lotus" case, the Permanent Court of International Justice showed that "Only if the abstention is motivated by the conscience of an obligation to abstain it could be the case of an international custom." [24]

As regards the subjective element of the custom the International Court of Justice pointed out that "those acts (of the international practice) have to represent not only a constant practice, but they should represent the proof of the belief that the practice is made compulsory by the existence of a norm. The necessity of such a belief, i.e. of the existence of the subjective element is involved in the notion of *opinio iuris sive necessitatis*. Those states have to manifest the feeling that they comply with something that equals to a legal obligation. The frequency or even the common character of the acts is not sufficient. There are many international acts, for example in the fields of ceremony and protocol which are done almost invariably, but which are motivated only by courtesy or tradition and not by a feeling of a legal obligation." [25]

The practice and also the doctrine admit unanimously the fact that a certain customary norm cannot bind a state that manifested clearly and constantly the disapproval towards a certain practice and refused to apply it. In this regard, Raluca Miga-Besteliu exemplifies this situation by the case of establishing the limit of the territorial sea to 3 miles.

The International Court of Justice held that "establishing the international territorial sea limit to 3 miles does not represent a customary rule generally opposable to Norway, as it always opposed to any attempt to apply such a rule as regards the Norwegian coast." [26]

We have to specify that a state can invoke its constant objection to the formation of a customary norm if the objection is express, and the simple doubts or

abstentions to pronounce cannot be claimed in this regard. Secondly, the objection has to be constant; if a state does not object each time in similar situations it can be assumed that according to the circumstances it abandoned its objection. [27]

The duty of proving the existence of a custom belongs to the state that claims it (*onus probandi incumbit actori*).

The elements of the custom can be established by:

- any acts of some institutions of the state, authorized to receive certain attributions in the field of the international relationships (acts of some ministers, diplomatic notes, declarations of foreign policy, diplomatic correspondence etc.);
- the opinions expressed by the delegates of the states during international conferences or in the deliberations of some international organizations;
- domestic normative acts (laws, executive decisions, acts of the local administration etc.) and decisions of some institutions with jurisdiction on the international relationships;
- the provisions of some international treaties can be invoked as customary norms not between the state parties but in the relationships between the former and the third states.[28]

The custom can be proved by:

- multilateral treaties;
- the practice of the states and the diplomatic practice;
- international court decisions;
- domestic laws and judicial practice.

The doctrine shows that the substance of the international law is customary. As we have mentioned above, an international custom is formed in time by a long and constant practice of the states. However, at the formation of the international law an important role is also played by the treaty. In this regard it is relevant the Vienna Convention of 1969 on the law of treaties which stipulates in art. 38 that: "Nothing in the provisions regarding the treaties and the third states precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such."

The jurisprudence of the International Court of Justice established three conditions for the formation of a custom on the basis of a conventional norm:

- the conventional norm should give a normative character and can represent the base of a general norm of law;

- there should be a very large and representative participation to the convention;
- the practice of the states in the sense of the invoked norm must be frequent and uniform. [29]

The interaction treaty-custom under the normative aspect functions this way:

1. there are treaties that create new rules that can be accepted as custom;
2. there are treaties that codify or reflect the custom in their provisions.

[30]

Through this mechanism the customary norms included in the international treaties will become binding for all the states that signed, but also for those that did not sign the international convention, but adhered later to it, as well as for the states that opposed to the included customary norm.

In this field the treaties of codification of the international public law are very important.

In the literature [31] it was also expressed the opinion according to which the effects produced by some treaties would cease on the grounds of the international customary law. In this regard it was taken into account the non-application of the treaty as a consequence of the formation of a contrary derogatory custom, denunciation of the treaty when one of the contracting parties of a bilateral treaty broke its provisions, the disappearance of a contracting party, the application of *rebus sic stantibus* clause, the clauses of review (analyzed by the author in relation to the international law customary), the effect of a war on the treaties.

Conclusions

Custom is besides the treaty another main and traditional source of the international law. Its main characteristic is the tacit expression of the state agreements regarding the recognition of certain rules as binding norms of behavior in the international relationships.

Although humanity has moved to the stage of written law, the role of the custom cannot be ignored in the category of the sources of law and its contribution to the formation of some essential institutions in fields such as the maritime law or the international organizations.

The process of codification of the customary norms is relevant for specialists, a process that simply burst out shortly after the foundation of UNO in 1945. The

systematization and the specification of the international customary laws transformed the international law in a precise and smooth instrument meant to answer the current needs.

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