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Principle of Persistent Objector in Customary International Law

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Abstract

Rules of international law are of two types: treaty and customary. This article states that a customary rule is binding on any State, even if it did not participate in its creation. Yet, as the article makes clear, there is a possibility of exempting the State from the legal force of the customary rule if it is not agree with the custom. This article is dedicated precisely to the problem of the legal possibility for the State to contest a customary law rule and thereby release itself from the rule, as well as the conditions for the contestation.

The research in the article has a documentary and theoretical basis. Documentary, it is the Statute of the UN International Court of Justice, the jurisprudence of the Court and the reports of the UN International Law Commission. And the theoretical basis of the article, these are the works of the authors on international law.

Keywords: persistent objection, persistent objector, custom, customary international law, opinio juris

Introduction

B**o**th kinds of rules of international law, conventional and customary, have equal legal force. But there is also a fundamental difference between them - conventional rules are written, these are international treaties, and customary rules are unwritten. This is the reason why customary rules have their specific legal nature and specific formation mechanism. The unwritten form of customary rules means that they can only be found and derived from the practice of states. Therefore, for the international custom, it can be summarized that it exists only in practice and as a practice, it can be manifested externally only as a practice, and the only evidence for it is again the practice.

In the doctrine of international law (**Degan**, 1997, p. 143, 144, 147; **Mendelson,** 1998, p. 195; **Skubiszewski,** 1971, S. 840) it is generally recognized that the definition of the customary rule is contained in Article 38 (1) (b) of the Statute of the UN International Court of Justice. This provision regulates the applicable law in the proceedings before the Court, and indicates the customary rules of international law precisely as such applicable law. The definition of the customary international rule in Art. 38 (1) (b) is: "*international custom as evidence of a general practice accepted as law*".

This definition reveals the content of international custom; it consists of two elements with a constitutive character for the custom. The first element is the practice of the States, known as an objective element, and the second element is the acceptance by the States of the practice as mandatory, i.e. as a law, and this is the subjective element (opinio juris) of the customary rule. These two elements are confirmed by the draft conclusions on identifications of customary international law, prepared by the UN International Law Commission (ILC).

Draft conclusion 2 (Yearbook of the UN International Law Commission (Yrbk. ILC), 2018, vol. II, part Two, p. 90), titled "Two constituent elements", declares: *"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)."*

I. **Contesting by the State of the practice of international custom**

When creating a customary international legal rule, no matter how large the majority of States that created this rule, there will always be other States outside of them, not participating in this norm-making process. This raises the question of whether the international custom binds only the States exercising it? The answer to this question is in the legal nature of the subjective element of the customary rule - opinio juris. In the emergence of any customary rule, the presence of this element is presumed, i.e. the recognition by the States of the binding force of the practice of the rule is presumed. The presumption, in turn, relieves the need to prove the opinio juris for each individual State. "*That universal (express or implicit) participation in the formation of a customary rule is not required is evidenced by the fact that no national or international court dealing with the question of whether a customary rule had taken shape on a certain matter has ever examined the views of all States of the world* (**Cassese,** 2005, p. 162).

Thus the presumption of opinio juris means that the customary rule has legal effect for every State, and this also means States that do not apply the rule, even have no relation to it - they did not participate in its creation, did not exercise and do not exercise its practice (**Wolfke,** 1964, p. 162, **Kelly,** 1999 - 2000, p. 499, **Quince,** 2010, p. 108), i.e. the State is automatically bound by the customary rule: "*...customary rules are said to bind automatically also those States which neither participated in their creation nor accepted them*" (**Wolfke,** 1964, p. 162). This makes it easier to ascertain to which States the customary rule is applicable, because it will not be necessary to prove the recognition of it by each State. The result is that in this way the overall legal regulation by customary international law is also facilitated.

And yet there is, albeit a single, possibility for the State to exempt itself from the rule, and that is by objecting to it (**Shaw**, 2010, p. 91, **Mendelson**, 1998, p. 232, **Bernhardt,** 1987, p. 268). The objection can be on two grounds: either that such a customary law rule does not exist at all, or that it may exist, but the relevant contesting State does not recognize it and is therefore not bound by it (**Lim, C. L. & O. Elias,** 2010 - 2011, p. 151, **Mendelson,** 1998, p. 235). The objection, the protest, is a product and expression of the will of the State, leaving no doubt what it is - disagreement with the practice of an emerging customary rule. According to Wolfke (1964, p. 57) "*what, however, is protest, if not the most evident expression of the will of a State to the effect that it does not acquiesce in a given practice and hence that it does not consent to the formation of a new customary rule*". On the contrary, the absence of protest can be taken as a tacit agreement with the practice, and as a result, as a recognition of the practice as a legal rule. Therefore, the protest must be expressed explicitly, independently in writing or orally - leaving no room for doubt or assumption of recognition of the legal rule.

The basis of the objection as a way of exemption from the rule is that, although a custom binds even States that did not participate in its creation, yet States that disagree with the rule must be given the opportunity to exempt themselves from its operation (**Quince,** 2010, p. 48). The explanation for this possibility is in the very essence of the State - its sovereignty (**Stein,** 1985**,** p. 464): the possibility of contesting the rule "... *respects States' sovereignty and protects them from having new law imposed on them against their will by a majority (States)...*" (**Dumberry,** 2010, p. 800). The principle of sovereign equality of States does not allow in international relations the majority of States, just because of this, to dictate the rules of international law - for States, only their number (even if it represents a majority of them) cannot be an argument stronger than state sovereignty (**Mendelson,** 1998, 239 - 240).

The imposition of customary law rules on the States would also contradict the democratic and voluntary nature of international law: the States themselves consciously and voluntarily create its rules (**Lim, C. L. & O. Elias,** 2010 - 2011, p.148). Otherwise, it would come to such an extremeness that a State that has an interest in a given custom can always claim that it also exists for every other State, because it is a universal rule - it applies for the whole world. The State has the right to agree or disagree first with the practice of the rule, and then with the rule itself, and this is a concrete manifestation of state sovereignty.

II. **Conditions for contesting the international custom**

1. **Two conditions for contesting the international custom - general considerations**

In order for the objection to exempt the State from the customary rule, **two conditions must be met**: **the first** is that the objection must be stated during the process of creation of the rule, i.e. before its emergence, and **the second condition** - that the objection be stated systematically, persistently and constantly, in short - every time the disputed State practice is exercised. This situation is also announced in draft conclusion 15, para. 1 of ILC (Yrbk. ILC, 2018, vol. II, part Two, p. 110), titled precisely ”Persistent objector”: “*where a State has objected to a rule of customary international law while that rule was in the process of formation, the rule is not opposable to the State concerned for so long as it maintains its objection.*”

Therefore, the derogatory legal effect of an objection depends on certain conduct of the objecting State. First of all, the State must not participate in any way in the practice of the emerging customary rule, neither with active actions, nor passively and silently - agreeing to this practice, even if it does not exercise it. Second, the State must object to the practice. Third, the objection, on the one hand, must be made before the emergence of the rule itself, which means - in the course of its formation and against the practice that forms it, and on the other hand, the objection must continue even after the emergence of the rule. This is logical because if, after the rule has arisen and when it is attempted to be applied to the objecting State, it does not contest the rule, it is justified to conclude that the State already accepts it. And fourth, if these requirements for State conduct are not met, the customary rule will be binding on that State.

2. As already indicated, there are two conditions for a State to be released from the operation of a customary rule. But it is necessary to clarify what each of these conditions is. **The first condition** is temporal in nature. This condition, firstly, provides that, in order for an objection to an international custom to fulfill its function of exempting the objecting State from it, the objection in itself is not sufficient, but must meet a certain time factor. Secondly, the condition also indicates what this factor is: the objection must be stated before the emergence of the custom, when it is only in the process of formation, which means - within the time frame of the practice from which the custom arises; therefore, it must be disputed while it is only a practice, and there is also another requirement - that the objection should continue even after the emergence of the rule.

This condition is also confirmed by the theory of international law. For example, according to Cassese (2005, p. 162), a State that "*dissociates itself from a nascent rule is not bound by it*", and according to Guzman (2005, 142 - 143), "*the state must make its objections...before the practice solidifies into a rule of customary international law*".

Contesting the custom during its formative period is one of the characteristics of the objection to it. The other characteristic is that it is not the customary rule itself that is actually contested, but its practice. Because when it is objected, the rule is not there yet, there is only a certain practice, which subsequently becomes a customary rule. The conclusion is that so the State can be bound neither by the practice nor by the customary rule arising from it. It is the only possibility to release the disagreeing State from the rule. Conversely, contesting the already existing customary rule will not lead to exemption from it (**Mendelson,** 1998, p. 244; Yrbk. ILC, 2018, vol. II, part Two, p. 111, para. (6) of the commentary of the ILC). The meaning of this way of contesting the rule - when it is still only a practice, is as proof that the state does not accept the rule, as well as proof that this non-acceptance is a convinced, conscious and principled attitude to the rule, and not accidental and only after its occurrence.

Objecting to the practice of the rule exempts from it only the specific objecting State, but does not affect the rule itself - it is formed and arises, exists (**Dinstein,** 2006, p . 286). If we assume the opposite - that the objection to the practice by a single State is able to initially prevent the creation of a new customary rule, the result would be the impossibility of creating new rules at all. As Akehurst (1974 - 1975, 26 - 27) has pointed out, "*in short, dissent by some States does not prevent the creation of new customary rules by other States; it is merely that the dissenting States are not bound by the new rules.*"

The reason that international law does not accept the possibility of exemption from the operation of a customary rule, when it has already arisen is the interest in preserving the security and stability of the international legal order (**Lim, C. L. & O. Elias,** 2010 - 2011, p. 148): the distinguishing of states, especially if they are large in number, from a customary rule leads to its invalidation or modification (**Villiger**, 1985, p. 18), and even to the denial of its very existence (**Dumberry**, 2010, p. 781). As a rule already in force, disputing its applicability to a given State affects this time the rule itself. If a State does not accept it, it means that it does not accept the method of the rule of solving the issue, which is the subject - matter of the rule. And this means that this State will solve the issue in its own and different from the rule manner, which will therefore change the entire legal regulation of the relevant issue, which contradicts the current international law.

3. **The second condition** for the objection to exempt the objecting State from the contested customary law rule is that it be active, unambiguous and consistent (**Dumberry,** 2010, p. 781; **Akehurst**, 1974 - 1975, p. 24; **Guzman**, 2005, p. 143), or continuous (**Stein**, 1985, p. 459). And draft conclusion 15 "Persistent objector", para. 2 (Yrbk . ILC , 2018, vol. II, part Two, p . 111) requires the State's objection to be "*maintained persistently*."

The objection must be raised from the very beginning of the practice (**Shaw**, 2010, p. 91, **Quince,** 2010, p. 61), or at a sufficiently early stage of it (**Thirlway**, 2002, p. 345) or from the earliest possible moment (**Villiger,** 1985, p. 16; **Akehurst,** 1974 - 1975, p. 24). And the State must continue to object to the practice of the prospective rule throughout the time the practice is taking place, which means - throughout the period of formation of the custom. (**Villiger,** 1985, p. 16**; Dumberry,** 2010, p. 801). Hence another requirement: the objecting State must protest against the practice with which it disagrees whenever an attempt is made to impose that practice on it (**Lepard,** 2010**,** p. 238) or at least whenever non-objection would be taken as consent to the practice (or with the custom, after its occurrence) (Yrbk. ILC, 2018, vol. II, part Two, p. 112, para. (9) of the commentary). This will give a consistent character to the contest to the relevant practice.

Therefore, the objection must be stated in such a way that there is no doubt that the State contests, protests the relevant practice. Similarly, the ILC draft conclusion 15, para. 2 on identification of customary international law (Yrbk. ILC, 2018, vol. II, part Two, p. 111, also p. 112, para. (8) of the commentary) requires that the objection must be "clearly expressed" and "made known to other States". The goal is to make the will of the State clear: it does not agree with the practice.

III. The persistent objector principle – summarizing

Conclusions

The principle of persistent objector represents a compromise, and thus a balance between the interest of States and the interest of international law: on the one hand, this principle protects the sovereignty of States, and on the other, it ensures the progressive development of this law. The principle allows a State to release itself from an unwanted rule without interfering with the application of same rule to other States, which accept the rule. When the States have to decide on a question from their practice, and a rule, regulating it, does not yet exist, the decision can only be in the form of practice. And if a State does not agree with the decision, this State can contest it, and this contestation can again only be in the form of practice. Contesting the practice of a forming customary rule, the State does not aim at this practice, but has another, more important, more significant goal - the customary rule itself. The objection to the practice is simply the direct instrument by which the State disputes the rule, so as not to be bound by it, not to allow its application to itself.

The objection against the practice of the custom and that means against it, predetermines the individual scope, i. e. State by State, of the legal effect of the protested rule. The objection outlines a range of States (objectors) to which the rule will be inapplicable. And this circle of States itself will determine another circle of States - those for which the rule is in force; naturally, these are all States outside the first round. But the more important criterion is that these are the States that accepted and recognized the rule - they did not contest it. The importance of delineating these two circles (or groups), of States is obvious - this is how the limits of the applicable scope of the rule, the limits of its legal regulation are determined.

If compare opinio juris (subjective element of the international custom) and the persistent objection, because both are manifestations of the State will, it becomes clear that these are concepts that are completely opposite and contradict each other, each of them is a negation of the other. If opinio juris is a recognition, the objection is a denial of the legal obligation of State practice. The result is that while will of State as opinio juris binds it to the customary rule, this will as an objection exempts it from the custom.

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