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Applicability of customary international law to the new states

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Abstract
Newly emerged states in international relations can be of three categories: states of peoples liberated from colonial dependence, states created by the unification or division of existing states, and states that have begun to carry out new activities for them. The emergence of new states poses a question for current international law, insofar as these states find already existing legal norms - are these states bound by these norms, and above all are these states bound by customary international law norms. It is this problem that is the subject of the study.

Keywords: New states, International law, customary legal norm, international treaty, legal succession

Introduction

The norms of customary international law are the oldest source of international law, and for centuries they have been its main source. But even in our time, the importance of the customary international law norm is preserved - it is the other type of legal norm besides the international treaty. In contrast, the custom is an unwritten norm and this is its main distinguishing feature. Its unwritten form determines its legal nature, reflected in its definition. This definition is contained in the provision of Art. 38 (1) (b) of the Statute of the International Court of Justice of the United Nations: "international custom, as evidence of a general practice accepted as law". The definition reveals that the customary international law norm consists of two constitutive elements for it: the practice of States, defined as an objective or even material element, and the acceptance by States of the practice as obligatory, i.e. as a law, which is defined as a subjective element of the customary norm, usually denoted by the term "opinio juris".

The practice of states in international relations and the regulation of this practice by the norms of international law raises the question of the applicability of the customary norms of this law to such states that arise after the customary norm has already been created, i.e. states new to the norm. The problem here is precisely this - can a customary legal norm bind a state that did not participate in its creation, and did not even know about it until its emergence as a sovereign state.

Materials and Methods

The documentary basis of the study is international treaties and customary international law norms, reports of the International Law Association. The methodological basis of the study is various scientific methods. The specifics of customary international law are clarified. Many examples of new states and their practice regarding established customary norms are given. The article makes a comparative analysis between the different categories of new states. The various reasons for the emergence of new states are studied, which is why the article makes both a historical analysis and an analysis of international relations.

1. The Notion of a New State- Three categories new states

1. The practice of interstate relations distinguishes three categories of states that can be qualified as “new” [1]. The first category is newly liberated states, i.e. former colonies [2]. The second category is states that emerged from other states upon a change in their territory [3], namely the unification of two or more states into one, and the division of one state into two or more states. The third category of states is existing states, but new to a given activity exercised by other states, i.e. states that have not exercised the activity before, and from a certain moment onwards begin to exercise it [4].
2. Authors of international law usually use the term "new state" in general, without specifying which type of such state they have in mind, which is why it can be reasonably assumed that this term should include all three categories of new states [5]. But the most important of them is the first category. These are the states - newly liberated former colonies. With their liberation, colonialism is put to an end, and the colonies themselves become independent sovereign states, thereby becoming subjects of international law, and, accordingly, creators of its norms.

As for the second category of new countries, they arise from already existing sovereign states, and not through national liberation from foreign colonial rule, which is the difference with the first category of newly emerged states - former colonies. The emergence of states in the second category is due to political processes within the predecessor state, so that new states are formed in place of one or more states. The new state may be a union of previous states, or they may be states that arose from the collapse of a previous state, in which the previous state disappears. It is possible for only a part of the territory of the previous state to separate and become an independent state; then the predecessor state does not disappear, it remains, albeit with a reduced territory.

Confirmation of these two categories of new states can be derived from the 1978 Vienna Convention on Succession of States in Respect of Treaties. It regulates separately the succession of states in the case of a state liberated from colonial rule (Arts. 16 - 30), and the succession in all other

cases of the emergence of a state (Arts. 31 - 38): unification and separation of states.

3. The third category of new states, new to a given activity, includes two groups of states. The first are states that are not affected in any way by the relevant activity. It is irrelevant to them and therefore they have no interest in it, they do not even have a physical connection with the activity and therefore do not exercise it. Even if such a state takes a position on this activity, this will not affect the states exercising it in any way, it will not matter to them. But at a certain point, due to some changed circumstances, the state not exercising the activity in question begins to exercise it, thus becoming a new state for this activity. In itself, the state as such, as a subject of international law, is not new, but it is new among the states exercising the activity - up to a certain point it is not among them, and from a certain point it becomes part of them.

There are cases in the literature of such states, e.g. a state without access to the sea because it has no coast, gaining one [6] due to a change in its territory. Then this state will be given the opportunity to declare a territorial sea, contiguous zone, exclusive economic zone, continental shelf, and begin to carry out maritime activities relevant to these spaces.

The second group of states new to the activity are those that are objectively and factually affected by the activity, it produces consequences for them, and respectively they are interested in this activity; nevertheless, for some reason, do not exercise it. It is very important that they do not object to the activity, which means that such a state agrees with it. At a certain point, however, also for some reasons, the state begins to carry out the activity, which, by the way, is another proof that the state agrees with the activity. Starting to carry it out, from that moment the state in question becomes a state new to the activity. And in itself the state is not a new state; it is new only for the activity.

As an example of this type of new state, the literature cites the outer space activity [7]. The number of states that carry it out is small, but the vast majority of states are still affected by this activity, at least due to the fact that a space object in its flight to the outer space and back to earth inevitably passes through the airspace, i.e. the state territory, of non-space states. However, it is possible for such a non-space state to start carrying out some space activity. Then the non-space state will become space, but new for the space activity it carries out, which began long before the relevant state joined it.

4. Upon its emergence, the new state (of all three categories) finds in force customary norms of international law, which regulate the relations that the new state will enter into with other, also established, states, so to say, "old" states. From here the question arises about the attitude of the new state to the established norms, and the other, “old”, states expect the new state to accept and obey the established norms [8].

The peculiarity of established customary norms is that they are finally formed, "completed", i.e. norms that already give rise to legal effect, and therefore are already part of the current customary international law. Conversely, if there was not a “ready” customary norm, but a norm that is still developing, it means that the norm exists only in the form of state practice on a certain issue. Then the new state would find a practice still creating a legal norm, and the state would, respectively, accept or not only state practice. And this is very important, because if it turns out that the new state does not agree with the way in which this practice regulates the relevant issue, its subject matter, it can challenge the practice, which means that the state also challenges the customary norm growing from it, and as a result, it prevents the state from being bound by this norm; this is the legal effect of the principle for the state - persistent objector [9]. Therefore, since what norm the new state finds is a completed customary norm, it must recognize or not no longer a practice, but the legal norm itself. It is obvious that it is a question of the applicability of established customary norms to new states, and the importance of this issue justifies the interest of the theory and practice of international law in it.

2. Automatic binding force of customary law norms already established before appearance of the new state

There are authors on international law who firmly support the thesis that every new state is obliged to adopt those customary law norms that already exist and are in force at the time of the appearance of the state [10], arguing that this is the traditional and dominant position in international law doctrine [11]. "According to the traditional theory, new States are bound automatically by all rules of customary law in existence at the time when they become independent [12]." In international law literature, an analogy is made between the new state and the citizen of the state: just as a citizen is bound by the laws of his state from birth, so the new state is bound by the customary norms of international law from its emergence [13]. Both national laws and international law are obligatory for the respective legal subjects.

Therefore, the new state is bound by the established norm, and automatically - it does not matter whether it agrees with the norm [14] ("although the emerging states did not consent to many existing laws, they still became bound by them" [15]), and it does not matter that it did not participate in its creation: "...new states are bound by existing customs even though they did not participate in their formation" [16]. Consent is irrelevant because the dependence of the new state on the established norm is due not to it, but to its very nature as a state - it is part of the community of states, which gives rise to certain rights and obligations for it, also regulated by customary norms, established before the new state [17].

Proponents of this thesis explain why the new state is automatically bound by the established customary law norm. In order for a state not to be bound by a customary norm, it must begin to challenge the norm before it arises, which means challenging the practice from which that norm arises. The problem, however, is that when the new state appears, it finds not the practice of an emerging norm that can be challenged, but an already formed customary norm that cannot be challenged [18]. That is why, the new state is objectively deprived of the opportunity to challenge the established norm, and hence - to be freed from its legal effect; the new state is obliged to accept and fulfill the established customary norm [19]. Therefore, for the “old” states, both the agreement and disagreement, respectively,

of the new state with the established legal norms are irrelevant for their legal effect towards this state. It is noteworthy that the "old" states express this opinion of irrelevance also to the most important category of new states - the former colonies: new states that have acquired national independence are also bound by the established customary legal norms [20].

3. Challenging the automatic binding force of customary law norms already established before appearance of the New State

But there are also many authors - international lawyers, who take the exact opposite position regarding the relationship between a new state and a customary law norm, established before this state. According to them, the new state is not bound by any customary law norm that already existed at the time of the emergence of this state, including when it is a state new to the activity being exercised [21]. Conversely, the state is free to accept or not to accept the norm in question: "...these States regard themselves bound by customary rules which originated prior to their emergence as States, only if they have recognized these rules" [22]. Thus, the state can challenge, if it does not agree with it, an already existing and effective norm. The goal is to free the new state from the norm.

The supporters of the concept that new states are not bound by the customary norms, but on the contrary, can challenge them, also propose an explanation for their concept. They also proceed from the principle that a state that does not agree with a given customary norm may not allow its application to itself only if it has challenged the norm in the process of its formation, i.e. while the norm is only a practice, and never after the formation of the norm. However, new states, for objective reasons, cannot challenge customary norms before their creation [23]- the states did not exist at that time, and when they arise, they find customary norms already created and in force, i.e. norms that cannot be protested. These states did not participate in the formation of the relevant customary norms, and it is unfair to be forced to implement them. Therefore, these states should be given the right to recognize or not these norms [24], respectively to object to them if they do not agree with them. This right arises for the new state with its very emergence [25], because from that moment the relevant norm of customary international law arises for it.

Despite the thesis existing in international law theory that new states of all three categories are free from the customary norms established at the time of their emergence, and therefore can challenge them, these new states that arise from already existing states (e.g. through their unification or division into parts), as well as these new states that are new to the exercise of a given activity, usually accept the customary norms established, and accordingly apply them in their relations with other states. The International Law Association gives examples of states created by the collapse of already existing states (specifically, these are the Soviet Union, Yugoslavia, Czechoslovakia), which recognize the customary international law norms in force at the time of their emergence as new states [26]. Moreover, some new states of this category even record in their constitutions that customary international law is part of their internal, national law. As an example of such constitutions, the Association cites the constitutions of the Russian Federation (Art. 15, para. 4), Estonia (Art. 3), Belarus (Art. 8), Turkmenistan (Art. 6, para. 2) [27]. The new states from the two mentioned categories are ready to accept the established customary norms, aware that the opposite may create disturbances and uncertainty in relations between states.

The situation is completely different with the category of states that are former colonies that gained national independence with their liberation. Until the liberation, these colonies do not exist as states; they are part of the territory of their metropolis, which is why they do not participate either in international relations or in the process of forming of norms of customary international law. Therefore, for objective reasons, during this norm creating process, the interests of the colonial peoples were neither taken into account nor could be taken into account. When the respective colonial people liberate itself and create its own national independent state, it may agree with the existing customary norms, but it may not agree. On the other hand, however, these norms at the moment of the liberation of the state are already fully formed and in effect. Therefore, it, regardless of its disagreement, will be bound by them.

It is obvious that such an imposed, against the will of the new state, binding is unfair to it, puts it in an unequal position with the other, "old", states: they existed during the practice of the formation of the norm and had the chance to challenge the practice, thereby freeing themselves from the norm (which is the legal effect of the principle of persistent objector state). In addition, the situation with the newly liberated states contradicts both the international law principle of the sovereign equality of states (Article 2, paragraph 1 of the UN Charter), and the very concept of state sovereignty [28]. Therefore, the newly liberated states must be recognized as having the same right to challenge established customary law norms as the "old" states had. The only difference will be that the new states will not challenge the practice of a customary norm, but the norm itself in force.

The significance of the possibility for newly liberated states to challenge existing customary norms is that they should not be treated as bound by these norms. This possibility is also illustrated by the legal regulation of the other case of succession in international law, except for customary norms - succession in international treaties (insofar as treaty norms are the other type of norms in international law). According to Art. 16 of the Vienna Convention on Succession of States in Respect of Treaties, a state - former colony "is not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that at the date of the succession of States the treaty was in force in respect of the territory to which the succession of the States relates", i. e. the territory of the colony, from whose liberation the new independent state emerged. Therefore, for this category of new states - the newly liberated ones, the international treaty norms existing at their emergence have no legal effect on them, which in turn means that such a new state has the right to refuse to apply the existing treaty. There is no reason why the same right should not be recognized for the newly liberated state with respect to the other type of norms in international law - customary. The conclusion is that this state should be able to refuse to apply and enforce the customary norms it finds at the time of its liberation if they do not meet its interests, and therefore it does not agree with them.

Conclusion

Customary international law is one normative regulator (the other is treaty law) of relations between states. Therefore, every new state, upon its appearance, naturally, by virtue of these relations, faces the norms of customary law. Clarifying the legal effect of these norms in relation to new states is undoubtedly of theoretical and practical interest, because, on the one hand, the appearance of such states is an objective and permanent process, and on the other - the legal effect of the customary norms in relation to new states reflects on the legal effect of customary international law as a whole. The applicability of customary international law norms to new states as part of the international community directly reflects on the security and stability of interstate relations in this community.

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