REASSESSMENT OF STATE PRACTICE AS AN ELEMENT OF CUSTOMARY INTERNATIONAL LAW: FOCUSING ON THE PROCESS OF ITS FORMATION

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Abstract *- International custom as one of the norms to be applied in deciding international disputes are referred to in Article 38 (1) (b) of the ICJ Statute as follows; "international custom, as evidence of a general practice accepted as law". It is generally recognized among international scholarship that there are two elements of customary international law. One is "general practice" and the other is "opinio juris". While the former refers to state practice that is generally formed by states, the latter refers to the "recognition" of states regarding the legal character of state practice. Customary international law, especially the concept of state practice, continues to give rise to controversies due to its uncertainty surrounding its formation and manifestation. The International Law Commission decided during its sixty-third session to include in its long-term programme of work the topic "Formation and Evidence of Customary International Law" and dealt with the issue of state practice in its several subsequent reports and the International Law Association has also continuously worked on this topic. Although governmental and non-governmental organizations such as the International Law Commission and international publicists of many countries are carrying out in-depth study on state practice as the most principal element of customary international law, no consensus has been reached yet. The paper attempts to shed light on some uncertainties and illogicalities based on existing theory on the formation of state practice and contribute to establishing hopefully more rational and theoretical understanding on state practice.*

Keywords*: state practice; international custom; International Court of Justice; International Law Commission; International Law Association*

INTRODUCTION

Western international scholars often sustain that international law emerged in Europe, specifically after the Peace of Westphalia in 1648. This, however, is challenged by a number of eastern states and

also by some western scholars[1] since it is based on Europe-centered value and outlook on history and is in contradiction to historic facts.

International law, which is a body of rules governing relations among states, is bound to emerge when an international community, as a group of states, is formed. East or west, International community was already formed in the ancient times when states emerged. Ancient states, including Ancient India, Ancient China, Ancient Egypt and Ancient Joson emerged in the east and afterwards hundreds of city-states like Ancient Greece and Ancient Rome emerged in the west, thereby establishing different types of international legal relations. Of course, the international community in the ancient times was incomparably confined and inferior in its size, range and standardization compared to modern international community. But the international community in the ancient times had principles and norms governing relations among states and the majority of them existed in the form of customary norms of international law.

Although customary international law was already shaped and observed by states in ancient times, no theoretical basis recognizing the meaning or binding force of customary international law existed then. In particular, even though the East was earlier than the West in establishing customary international rules, systemized doctrines governing international law and customary rules were not proposed since the formation of international relations based on coexistence of states was very slow in the east.

Academic approaches to customary international law were first proposed by some western jurists amidst the increasing trend to inherit Roman tradition in the Middle Ages. Francisco Victoria (1480-1546) first used the term "*jus inter gentes*", which is regarded as the origin of the concept of international law in his work entitled "*Kelectiones Theoligicae*"[2], and afterwards Richard Zouche (1590-1660), an English jurist claimed that the sources of *jus inter gentes*, i.e., international law included customs, and legislation and treaties derived from custom[3]. Francisco Suárez (1548-1617) wrote in his work entitled "*De legibus ac Deo Legislatore* (Treatise on Laws and God the Lawgiver)" published in 1612 that the concept of *jus gentium* (the "law of nations") is attached to customs that were agreed upon and adhered by nations worldwide. Hugo Grotius (1583-1645) defined the concept of international law based on *jus naturale* in his works such as *De Jure Praedae* and *De Belli ac Parcis* and, distilled and systemized traditional theory of customary international law.

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[1] Malanczuk, P. *Akehurst's Modern Introduction to InternationalLaw* 9 (London, Routledge, 1997).

[2] Lachs, M. *The Teacher in International Law* 47 (Martinus Nijhoff Publishers, 2nd Ed.1987).

[3] Wang, T.. *Introduction to International Law* 323 (Beijing University Press, 1998); Nussbaum, A. *A Concise History of the Law of Nations* 119-122(Macmillan company, 1947).

Academic views on customary international law proposed in the Middle Ages were inherited and developed by a number of scholars afterwards. In particular, the perspective of F. F. Martens (1845-1909), a famous Russian international publicist on customary international law constituted theoretical basis of a series of international law regimes, including law of war and humanitarian law. View of Martens on customary international law was reflected in his work entitled "Contemporary International Law of Civilized Nations" published in 1882, and it was established as Martens Clause later. The principle of Martens Clause is one according to which the military means or methods that are not allowed in the treaty rules should be determined by rules of customary international law, humanitarian principles and social conscience, which was expressly codified in the Convention with Respect to the Laws and Customs of War on Land adopted twice in 1899 and 1907, and even in the 1977 Additional Protocol I to the Geneva Convention on the Protection of Victims during International Armed Conflicts of 12 August 1949.

Thus academic approaches to customary international law, which had been proposed since Middle Ages, played an important role in drafting and concluding treaties in the areas such as *jus belli*.

However, even in the beginning of the 20th Century, no authoritative theory regarding the constituent elements, process of formation and binding force of customary international law was developed. Although customary international law was enumerated as one of the sources of international law to be applied by the Permanent Court of International Law (PCIJ) in its Statute adopted in 1920, theoretical study on customary international law had little been conducted until WWII. This left a number of questions unanswered, namely what elements customary international law include, what kind of conducts constitute state practice and who makes state practice etc.

Theoretical study and practice of application of customary international law entered a new phase when Article 38(1) of the Statute of the International Court of Justice (ICJ) defined customary international law as including two constituent elements: state practice and *opinio juris*.

After the ICJ Statute was adopted, the jurisprudence of the ICJ contributed to clarifying a number of questions regarding the formation of state practice and customary law by dealing with cases such as the Lotus(1927), the Asylum(1950), the North Sea Continental Shelf(1969), the Barcelona Traction(1970), and the Nicaragua(1986) cases.

Nevertheless, the ICJ was very cautious in illuminating a number of theoretical and practical issues regarding customary international law, including ascertaining the existence and evidence of state practice. This finds expression in the fact that the Court avoided pronunciation about issues such as the customary character of universal criminal jurisdiction, the legal status of the United Nations General Assembly Resolutions and other topics that concern scholars and the international

community[4].

The International Law Commission (ILC) also made strenuous efforts into the topic of state practice and customary international law. Article 24 of the Statute of the ILC provides that,

> The Commission shall consider ways and means for making the evidence of customary international law more readily available, such as the collection and publication of documents concerning State practice and of the decisions of national and international courts on questions of international law, and shall make a report to the General Assembly on this matter.

It was in accordance with this article that the ILC started discussion in its second session for "making the evidence of customary international law more readily available", and since then, has tried to seek and evaluate different kinds of practices that could constitute custom[5].

But in fact, the earlier discussion in the ILC regarding sources of international law was focused on treaties and therefore the issues of customary international law and state practice used to be mainly dealt with in relation to treaties. This is manifested in the statement of the ILC made in its report to the UN General Assembly in 1950 that the conclusion of international treaties by certain states contribute to the establishment of customary international law and that "evidence of the practice of States is to be sought in a variety of materials"[6].

The work of the ILC on state practice and customary international law was performed in a more active and overall manner since the 2010s. According to the decision of the 63rd session of the ILC, in 2012 the topic "Formation and evidence of customary international law" (which was later replaced by the topic "Identification of Customary International Law") was included in the work programme of the ILC and Sir Michael Wood appointed the Special Rapporteur[7].

In 2013, the ILC asked Member States of the United Nations "to provide information, by 31st of January 2014, on their practice relating to the formation of customary international law and the types of evidence suitable for establishing such law in a given situation"[8]. The Rapporteur submitted his first report entitled "Elements in the previous work of the International Law Commission that

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[4] Ferreira, A. d., et al., *Formation and Evidence of Customary International Law* UFRGS Model United Nations Journal 198 (2013).

[5] *ibid*.

[6] ILC, *Yearbook of the International Law Commission* (Vol. II), International Law Commission 368 (1950).

[7] ILC, *Yearbook of the International Law Commission* (Vol. II), International Law Commission 11 (2012).

[8] ILC, *Report of the International Law Commission on its sixty-fifth session*, International Law Commission (2013).

could be particularly relevant to the topic"[9], which was of an introductory nature presenting materials for consultation and suggested the classification and order of all the Commission's work[10]. In May 2014, the second report on the topic was submitted to the ILC[11]. The second report dealt with substantive issues unlike the first one and consisted of four logically structured parts related to the issues for the assessment of the position of customary international law. The third report submitted in 2015 elaborated on this issue stating that "inaction may also serve as evidence of acceptance as law, provided that the circumstances call for some reaction"[12].

On the basis of the three reports, the ILC adopted on the first reading 16 draft conclusions aiming at assisting practitioners in the identification of rules of customary international law in 2016[13], and transmitted the draft conclusions to the governments for comments, with the request to receive them before beginning of 2018. In 2018, the ILC adopted draft conclusions on identification of customary international law with commentaries at its seventieth session, and submitted them to the General Assembly.

Theoretical study on state practice and customary international law has also been dealt with by the International Law Association (ILA), which in 2000 adopted the London Statement of Principles Applicable to the Formation of (General) Customary International Law consisting of thirty-three principles[14].

Nevertheless, international legal scholarship has yet to reach a consensus concerning customary international law and state practice in particular. While some scholars argue universal binding force

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[9] ILC, *Formation and Evidence of Customary International Law: Elements in the Previous Work of the International Law Commission that could be Particularly Relevant to the Topic*. International Law Commission (2013).

[10] Grabowska, G., *Identification of Customary International Law in the Works of the United Nations International Law Commission* 8(2 Sepcial Issue) Wroclaw Review of Law, Administration and Economics 52 (2018).

[11] ILC, *Second Report on Identification of Customary International Law, by Michael Wood, special rapporteur*. ILC sisty-sixth session. Geneva: International Law Commission (2014).

[12] ILC, *Third Report on Identification of Customary International Law by Michael Wood, special rapporteur*. ILC Sixty-seventh session. Geneva: International Law Commission (2015).

[13] ILC, *Identification of Customary International Law: Text of the Draft Conclusions Provisionally adopted by the Drafting Committee*. International Law Commission (2016).

[14] International Law Association. *Final Report of Commission on Formation of Customary (general) International law, Statement of Principles Applicable to the Formation of General Customary International Law*. London Conference (2000).

of customary international law and others contend "persistent objector theory"[15]. Some also argue that state practice is formed not only by states and intergovernmental organizations but also by non-governmental organizations, multinational companies and individuals[16]. In particular, views emphasizing state practice of "non-civilized states" or developing states that deviate from the views of the past focusing only on "civilized" western states in discussing state practice as constituent elements of customary international law are emerging[17].

In this situation, the paper focuses on analyzing the existing views on the formation of state practice as a constituent element of customary international law and on demonstrating the authors' point of view. In Section 2, the subjects taking part in the formation of state practice is classified into primary and limited subjects, the former being states, and the latter intergovernmental organizations. Section 3 raises the questions of the conditions and the point of time of the formation of state practice and attempts to answer those questions based on summarizing the preceding literature. The reports of international organizations and academic papers are cited as sources.

1. Analysis of the Subjects of the Formation of State Practice

Generally, customary international law consists of state practice as an objective element and *opinio juris* as a subjective element. But these two elements of customary international law are not in an equal position. The more the state practice, the less the need for *opinio juris*. The fact that the International Court of Justice simply referred to the constant and uniform practice of states without any reference to the subjective element, *opinio juris* while applying customary international law to numerous cases such as the 1951 Fisheries Case shows the prominent position of state practice.

Thus, a number of legal problems surrounding state practice remain unresolved, although it is regarded as a fundamental element of customary international law both in theory and practice. In particular, regarding the question of who forms state practice, there is no clear-cut standard or "authoritative" doctrine and scholars have divergent views. This is because state practice is unwritten and no recognized method to ascertain them is established. This part of the paper argues that state practice is established by all independent sovereign states, including developing states and

[15] ILC, *London conference:Committee on Formation of Customary(general) International Law* (London, International Law Commission, 2000); Brownlie, I., *Principles of Public International law* (New York, Oxford University Press, 2008).

[16] Mendelson, M. H. *The Formation of Customary International Law 272* Recueil des cours de l'Academie de Droit International de La Haye 203 1998).

[17] Chimni, B. S., *Customary International Law: a Third World Perspective* 112 (1) American Journal of International Law (2018).

intergovernmental organizations established by them.

1.1 A State as a Primary Subject of the Formation of State Practice

State practice literally refers to practice established by states. Nevertheless the problem of who forms state practice matters since the view that extends the scope of the subjects of the formation of state practice to individuals emerges.

Then who can be the main subjects of the formation of state practice.

A state is the primary subject of the formation of state practice. As the primary subject of international legal relations, a state plays the most important role in the formation of state practice and customary international law. In fact, nobody seems to object to this, but answers to the question of which states can be the primary subject of the formation of state practice vary. This finds expression in the use of various terms such as “civilized state”, “non-civilized state”, European or non-European state regarding the subjects of the formation of state practice in several treaties and articles regarding state practice.

It would be reasonable to start discussing the problem as to which states are the primary subjects of the formation of state practice by analyzing the meaning of the word “state” in the phrase “state practice”. In numerous documents dealing with state practice, including draft resolutions the phrases “state practice” or the “practice of States” are used in relation to general practice enlisted in Article 38 (1) (b) of the ICJ Statute. This shows that the relevant organizations including the UN International Law Commission recognizes the term “state” in state practice as not identical to the term “nation” in Article 38 (1) (c).

As already articulated in our article “Reassessment of the ‘General Principles of Law’ Referred to in Article 38(1) (c) of the ICJ Statute” published in the International Studies [18](Son, Jong, & Pak, 2022, p. 152), the word ‘state’ can be understood as referring to a legal entity while the word ‘nation’ when referring to a state is used to denote a state as a community of members of a nation. In other words, although the words “nation” and “state” refers to a state, the former emphasizes national identity or human resources, i.e., people, whereas the latter focuses more on its legal and authoritative nature, i.e., sovereignty.

After all, the use of the word “state” rather than “nation” referring to State practice in numerous international documents indicates that the international community recognizes a state as the primary subject of the formation of state practice as an entity that focuses on its political sovereignty.

[18] Son, H., Jong, S., & Pak, H. Reassessment of the 'General Principles of Law' referred to in Article 38(1)(c) of the ICJ Statute. 59(2) *International Studies* 152 (2022).

On the other hand, the capitalization of the word "state" in the phrase "State practice" in numerous international legal documents also implies that it is an independent sovereign state.

This leads one to conclude that only independent sovereign states can be the primary subjects of the formation of state practice and other non-independent states are excluded in the formation of state practice.

Two categories of non-independent areas under international law existed after WWII. One is non-self-governing territory and the other is trust territory. But since all trust territories became independent by 1994, around 20 non-self-governing territories, including US Virgin Islands and British Bermuda remain. Such non-self-governing territories are excluded from the category of "state" as the main subject of the formation of state practice at least until they achieve independence.

When we say that an independent sovereign state is the primary subject of the formation of state practice, it means that all sovereign states take part in the formation of state practice in an equal position. However, views that confine the subjects of state practice to some particular states, including "civilized states" were predominant in the international arena. The 1907 Convention Respecting to the Laws and Customs of War on Land provides, in the introduction, that state practice is established by "civilized states" by stating that "the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience". And since it was believed that "Europe with its customs and political and cultural relations were at the theoretical centre of the emergence of international law"[19] a number of people excluded reference to the practice of non-Europeans states which were classified as "uncivilized".

The notion of state practice is an invention of international legal doctrine of the 19th century[20] and as the theory of customary international law in the 19th century had been invented in Europe, it was recognized that state practice is also established by "civilized states" of Europe.

In some literature dealing with customary international law confined actors taking part in the formation of state practice to some particular states in an implied way, if not in an express way.

It seems obvious that the drafters of the ICJ Statute also restricted the subjects of state practice establishment to "civilized states". This can be inferred if one analyzes Article 38 (1) (b) of the ICJ Statute in connection with general principles of law recognized by civilized nations referred to in

[19] Chimni, B. S., *Customary International Law: a Third World Perspective* 112 (1) American Journal of International Law 17 (2018).

[20] Ibid., p. 16.

Article 38 (1) (c).

Such views restricting the subjects of state practice to a particular category of states is unacceptable in the present world where sovereign equality is widely recognized as the fundamental principle of international relations.

The principle of sovereign equality was originally codified in Article 2(1) of the UN Charter. However some above-seen provisions of the ICJ Statute, which was enacted at the same time as the Charter, was in contradiction to that principle as it employed the phrase "civilized nations". Several subsequent international instruments elaborated on the principle of sovereign equality. For example, the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations adopted on 24th October 1970 (Friendly Relations Declaration) further elaborated on this principle in conformity with the requirements of modern international relations by stating that "All states enjoy sovereign equality. They have equal rights and duties and are equal members of the International community, notwithstanding differences of an economic, social, political or other nature."

This fundamental principle is unexceptional in relation to the formation of state practice. Thus all sovereign states can take part in the establishment of state practice on an equal basis regardless of the difference of their political systems, territories or national powers. As B. S. Chimni argues in his article "Customary International Law: A Third World Perspective" published in 2018 in the American Journal of International Law, "in a greatly expanded community of states in the postcolonial era even a handful of powerful states cannot create customary international law"[21].

Of course, even in the present era, state practice of developing states and relevant writings of the publicists of those states are not widely available. But that fact that the system of exclusive economic zone was originated from the practice of Latin American states, including Peru, Chile and Ecuador and transformed into a rule of customary international law before it was codified in the 1982 UN Convention on the Law of the Sea illustrates that the influence of developing states in the formation of state practice is by no means negligible.

The fact that China publishes its state practice annually in academic journals also shows increasing role of the developing states in the establishment of state practice.

State practice refers to conducts repeated by states. A state, which is an abstract entity, actually exists in the form of state organs. Therefore, state practice materially refers to the activities of state organs. A state has numerous power organs. State organs can be divided into legislative,

[21] Ibid., p,28.

administrative, and judicial organs in the aspect of the powers performed, and also classified into central and local state organs.

What matters is which organs' conducts contribute to the formation of state practice. This question can be best answered by means of analogy based on the 2001 Draft Articles on Responsibilities of States for Internationally Wrongful Acts, which expressly defines what constitutes an act of a state. Article 4 (1) of the Draft Articles states that "the conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State." According to this provision, notwithstanding their positions, roles or natures, the conducts of all state organs amount to acts of that state, thus contributing to state practice. To illustrate, a legislature of a state is generally the highest power organ of that state, and conducts of a legislative body is an act of that state. A legislature has a part to play in the conclusion of treaties and a country's legislation will normally apply to aliens within its territory (and so affect their national State); and it may also be extraterritorial in its range, thus affecting the interests of other States [22]. Therefore, conducts of a legislative body is naturally an act of that state, thus contributing to the establishment of state practice.

As an executive body exercises diplomatic rights on behalf of that state, conducts of an executive body also amount to acts of that state. As noted in the Final Report of the Committee Statement of Principles Applicable to the Formation of General Customary International Law released in 2000, "the actions of the whole of the executive, and not just the foreign ministry, should count. In modern practice, it is not always the foreign ministry which has the "lead" in international negotiations and transactions: it can be the ministry of finance, transport, and so on. Unless an organ of the executive is acting outside the scope of its authority and its conduct is disavowed by higher authorities, there seems to be no good reason why the ability to create State practice should be confined to the foreign ministry[23]." This entails that the conducts of an executive organ are the keystones of the acts of a state that contribute to the establishment of state practice.

A judicial body, which is a state organ dealing with civil or criminal cases, engage in international relations through judicial activities such as applying international law to its cases or adjudicating

[22] International Law Association. *Final Report of Commission on Formation of Customary (general) International law, Statement of Principles Applicable to the Formation of General Customary International Law*. London Conference (2000).

[23] Ibid.

foreigners. In this sense, conducts of a judicial organ also enables the establishment of state practice Conducts of not only central state organs, including legislative, executive, or judicial organs but also local state organs acting in the name of the state can be regarded as acts of the state unless they exceed their authorized powers.

Conclusion 5 of the International Law Commission's Report on the identification of CIL clarified that conducts of all state organs contribute to the establishment of state practice by stating that "State practice consists of conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions [24].

What is questionable is how to interpret Article 5 of the Draft Conclusions on Responsibilities of States for Internationally Wrongful Acts reading that "The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance." According to this article, the conduct of a person or entity empowered by the state is considered an act of the state thus giving rise to international responsibilities.

If so, can a conduct of a person or entity regarded as an act of the state lead to the formation of state practice, or can a person or entity be regarded as the subject of the formation of state practice?

Of course in the event that a person or entity acts under the authorization of a state or voluntarily performs "official duties" on behalf of a state organ, such acts can be regarded as those of the state and entail state responsibilities. But in the strict sense, state's assuming responsibility for the conducts of a person or entity is one thing, and the contribution of "official conduct" of a person or entity to state practice is another. As mentioned above, state comprises of state organs, conducts of all state organs themselves are acts of the state to exercise legislative, executive or judicial power. Unlike such conducts, acts of a person or entity, although performed within the range of empowerment from the state, are none other than individual acts that are attributable to state acts. A state can take responsibilities for the internationally wrongful acts committed by a person or entity empowered by the state, but conducts of a person or entity per se cannot be acts of the state. Therefore, although performed under the authorization of a state, conducts of a person or entity cannot directly contribute to the formation of state practice, but have certain significance in identifying state practice. This is supported by Conclusion 4 of the Final Report of the International

[24] ILC, *Draft Conclusions on Identification of Customary International Law* 132 (Vol. II (Part Two)) (International Law Commissoin, 2018).

Law Commission that stated that "Conduct of other actors is not practice that contributes to the formation, or expression, of rules of customary international law, but may be relevant when assessing the practice[25]".

1.2 An Intergovernmental Organization as a Limited Subject of the Formation of State Practice

State practice is also established by international organizations. When we say that state practice is established by international organizations, the international organizations mean intergovernmental organizations. This is because an intergovernmental organization is composed of states as its members and its activities reflect the will of the states.

By nature, an intergovernmental organization per se is not identical to a state. Although an intergovernmental organization is established by states, it has an independent international legal character after its establishment. In this regard, it is difficult to say that repeated acts by international organizations are state practices.

Then how can we say that state practice is established by intergovernmental organizations? Although an intergovernmental organization has a separate international legal character, the parties that actually comprise and maintain an international organization in its structural nature are member states. A member state is the main actor determining the will of an intergovernmental organization and, at the same time, plays the role as an executor of an international organization[26]. Within an intergovernmental organization, a member state has the status of a sovereign state that acts independently in conformity with its needs and interests, while having the status of a member of that organization.

Within the framework of an intergovernmental organization, the highest authority such as the General Assembly is an organ in which member states with differing demands and interests decide the will of the international organization concerned, and the interests of the member states usually conflict each other within this organ.

Meanwhile, the influence of member states on the activities of intergovernmental organizations is very strong. The influence of a member state depends, in particular, on the degree to which the member state exercises its authority within the particular international organization. A member

[25] International Law Association. *Final Report of Commission on Formation of Customary (general) International law, Statement of Principles Applicable to the Formation of General Customary International Law*. London Conference (2000).

[26] Wessel, R., & Dekker, I. *Identities of States in International Organizations*. In A. Barros, C. Ryngaert, & J. Wouters, International Organizations and Member State Responsibility: Critical Perspectives 16-23 (Brill Nijhoff, 2017).

state has the power to submit a proposal in accordance with the constituent treaty of the organization and, at the same time, influences the activities of the international organization through free expression of dissent in the voting of the organization. Such activities of a member state within an intergovernmental organization are considered as acts of a sovereign state, and, in particular, the exercise of the right to vote may invoke responsibility of a member state if it is in violation of the obligations under international law[27].

Of course, the status of an intergovernmental organization as an entity possessed of separate international legal personality is not weakened because a state, as its member, holds the main position within the intergovernmental organization and exerts tremendous influence. An intergovernmental organization acts independently according to its constituent instrument and assumes responsibilities for the consequences of its own acts.

Nevertheless, member states still have a key position in the decision-making of the intergovernmental organization, including determining the course of action of the organization. Hence, conducts of intergovernmental organizations make certain contribution to the establishment of state practice.

The formation of state practice by international organizations is also clearly supported by the 2000 Final Report of the Committee Statement of Principles Applicable to the Formation of General Customary International Law of the International Law Association. Article 11 of this report states that "the practice of intergovernmental organizations in their own right is a form of 'State practice'" and in its commentary, it is elaborated that,

Organs of international organizations, and notably the UN General Assembly, also from time to time adopt resolutions containing statements about customary international law. Formally, since the decision is recorded as a resolution of (the organ of the) organization, its adoption is a piece of practice by the organization and some writers treat it in this way. However, in the context of the formation of customary international law, it is probably best regarded as a series of verbal acts by the individual member States participating in that organ[28].

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[27] Naert, F. Binding International Organizations to Member State Treaties or Responsibility of Member States or Their Own Actions in the Framework of International Organizations. In J. Wouters, E. Brems, S. Smis, & P. Schmitt, *Accountability for Human Rights Violations by International Organizations* 163-164 (Intersentia, 2010).

[28] International Law Association. *Final Report of Commission on Formation of Customary (general) International law, Statement of Principles Applicable to the Formation of General Customary International Law*. London Conference (2000).

As the foregoing suggests, the International Law Association also endorsed that state practice can be established through conducts of intergovernmental organizations.

What is noteworthy here is the phrase "the practice of intergovernmental organizations in their own right". The phrase refers to conducts of international organizations performed within the scope of powers granted to it by its constituent treaty or statutes.

In general, the competence of an intergovernmental organization is limited to its charter or statute. Therefore, an intergovernmental organization can perform legal acts with certain rights only within the scope of its purpose and duties, not in all international relations. Such rights of an Intergovernmental organization include the rights granted by its member states such as the right to conclude a treaty, the right to dispatch representatives and the right to claim international reparation. This is what makes practice of intergovernmental organizations limited. In other words, since conducts performed by intergovernmental organizations are limited, state practice of international organizations is also restricted, and, therefore, intergovernmental organizations are restrictive subjects of the formation of state practice. The practice of international organizations in international relations (when accompanied by *opinio juris*) may count as practice that gives rise or attests to rules of customary international law, but only those rules (a) whose subject matter falls within the mandate of the organizations, and/or (b) that are addressed specifically to them (such as those on their international responsibility or relating to treaties to which international organizations may be parties) [29].

The Nongovernmental Organizations (NGOs) cannot be regarded even as a limited subject in the formation of state practice. This is because the NGOs do not have the competence to exercise international legal rights and therefore cannot perform legal conducts.

It is true that a non-governmental body can dispatch its representative to the UN and other intergovernmental organizations, make recommendations concerning the activities of relevant intergovernmental organizations, and realize cooperation in dealing with various legal issues such as the conclusion of an agreement. Such activities of NGOs are recognized by a set of international legal documents including the UN Charter. Article 71 of the UN Charter stipulates as follows;

The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned.

[29] ILC, *Draft Conclusions on Identification of Customary International Law* 132 (Vol. II (Part Two)) (International Law Commissoin, 2018).

Accordingly, the United Nations Economic and Social Council can establish consultative relations with international, regional and domestic civilian organizations. The non-governmental organizations, which are accorded the status of consultation by the United Nations Economic and Social Council, send representatives with particular expertise to the ECOSOC to submit expert information and recommendations. Such information and recommendations play a considerable role in the discussion and adoption of draft treaties, which are made and submitted by states and intergovernmental organizations. In particular, the role played by particular non-governmental organizations such as the International Committee of the Red Cross in shaping state practice in the area of international humanitarian law is by no means weak.

However, the increasing role of NGOs is related to the constantly changing reality of international relations, but it does not mean they have legitimate rights under international law.

This leads to the conclusion that NGOs, legal persons and individuals cannot be the subjects of the formation of state practice, but merely exert certain influence on the formation of state practice. This is clearly endorsed by the Conclusion 4 of the 2018 Draft conclusions on Identification of Customary International Law of the International Law Committee providing "Conduct of other actors is not practice that contributes to the formations, or expression, of rules of customary international law"[30] and its commentary that elaborating that "other parties" included entities other than States and international organizations — for example, non-governmental organizations (NGOs) and private individuals etc.

Above all, the direct subject of the formation of state practice includes state and intergovernmental organizations[31], of which the former is the primary actor for the formation of state practice and the latters are restrictive actors of the formation of state practice.

2. Analysis of the time and conditions of formation of state practice

Customary international law is an amorphous kind of law that neither enters into force on a date certain nor derives from binding texts. It forms more organically, through an interactive and highly informal legal process[32]. The ambiguity of customary international law is mainly due to the fact that the process or point of time of the formation state practice, which is the objective element of

[30] ibid.

[31] International Law Association. *Final Report of Commission on Formation of Customary (general) International law, Statement of Principles Applicable to the Formation of General Customary International Law*. London Conference (2000).

[32] Hakimi, M., *Making Sense of Customary International Law* 118(8) Michigan Law Review 1489 (2020).

customary international law, is unclear.

When and how state practice is formed has also long been shrouded in confusion and skepticism since the concept of state practice has emerged. Historically, numerous international publicists have attempted to solve this puzzle: how it can be at once, so prominent in the practice of international law—routinely invoked and applied in a broad range of settings—and the source of such persistent confusion and derision, but a common understanding has not been established.

However, some authoritative views as to the forms state practice takes do exist. According to Brownlie, custom may be evidenced by numerous material sources, such as, among others, diplomatic correspondence, policy statements, press releases, official legal adviser's opinions, military manuals, state legislation, judicial decisions by national and international courts, resolutions of the UN General Assembly[33].

As to the evidence of state practice, the ILA elaborated in its Final Report as follows;

Verbal acts, meaning making statements rather than performing physical acts, are in fact more common forms of State practice than physical conduct.

Diplomatic statements (including protests), policy statements, press releases, official manuals (e.g. on military law), 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 these bodies adopt - all of which are frequently cited as examples of State practice29 - are all forms of speech-act. Physical acts, such as arresting people or seizing property, are in fact rather less common[34].

The question is, when and how certain state acts establish state practice, whether it is a diplomatic declaration, policy, oral or physical acts. In other words, it is uncertain whether a conduct of a certain state or intergovernmental organization becomes state practice when it is unilaterally announced or made public for the first time or whether it is transformed into state practice at any later point of time.

The formation of a series of state practice, including those related to the continental shelf, shows that state practice started out as a unilateral claim at first, and then developed into a special practice confined to a restricted number of states, and finally into general practice[35]. It is already

[33] Brownlie, I., *Principles of Public International law* 6-7 (New York, Oxford University Press, 2008).

[34] International Law Association. *Final Report of Commission on Formation of Customary (general) International law, Statement of Principles Applicable to the Formation of General Customary International Law*. London Conference (2000).

[35] ibid.

recognized that state practice is a repeated act of states. Therefore, it is self-evident that state practice cannot be formed by a unilateral assertion of a particular state. If so, the question arises as to how long should a state practice be repeatedly followed by states or groups of states for a certain act to be state practice. It makes sense to analyze in light of the criteria of the formation of state practice. This is because a conduct of a certain state can be state practice when it simultaneously satisfies the criteria to be state practice.

In fact, few international legal documents or academic papers that set out criteria for a state act to be state practice are available. But many of the preceding views on international customs and state practice encompass the criteria for the formation of state practice in substance.

The paper proposes the criteria for the formation of state practice in these aspects as: sustainability, consistency, representativeness and openness on the basis of the preceding literature, and in terms of these criteria discusses the process and the point of formation of state practice.

Constancy is one criterion for the formation of state practice that requires a certain act to be continuous without interruption after a certain state conduct is first performed. Normally, some time is required to elapse before there is sufficient practice to satisfy the criterion[36]. Although no precise amount of time is required, it is clear that a certain conduct should be repeatedly carried out without cessation. A certain conduct of a state can be mature into state practice if it continues to be followed by other states, after that conduct is performed for the first time, without cancellation or cessation through another conduct and without objection by other states irrespective of the length of the period of its application. The fact that although some rules of international law such as aerospace law and outer space law have emerged so quickly that they are called "instant" customary international law[37], the relevant acts of states have been continuously carried out for a period of time may be understood as supporting this.

Uniformity is a major criterion for the formation of state practice that requires the same conduct to be repeated without any modification. State practice generally refers to conducts that are repeated by several or numerous states. Therefore, in order to establish state practice, the relevant states must act in the same manner in the situation similar to one where a state performed the conduct in question for the first time. If states behave differently even in situations similar to those of the first state to do the relevant conduct, then such behaviors cannot be state practice as they are not consistent.

The ICJ, in the judgment of the North Sea Continental Shelf cases, stated that the passage of only a

[36] Ibid.

[37] Cheng, B., *Studies in International Space Law* 136 (Oxford, Clarendon Press, 1997).

short period of time was not an obstacle to the formation of a customary rule, as long as, during that time, State practice was extensive and virtually uniform[38]. This shows that the ICJ recognized the uniformity of a conduct as a major criterion for the formation of state practice.

Representativeness is a major criterion of state practice by which the same conduct is required to be repeated by as many states as possible in order for it to be state practice. Certain conduct of a state can form state practice only when it is repeated by several or many states. The more the number of states that act in the same way, the faster the relevant state practice is formed. This does not necessarily mean that the number of states that take part in relevant acts must be majority. The ILA Final Report also observes that "[p]rovided that participation is sufficiently representative, it is not normally necessary for even a majority of States to have engaged in the practice, provided that there is no significant dissent[39]."

Representativeness is the key criterion that determines the constancy of state practice since conducts of states can be transformed into state practice at the point of time when the number states that performs the same conducts among all existing states reaches a certain number.

Of course, there is no definition of quantitative criterion as to how many states should act in the same way to form state practice. It can only be inferred by the degree of relevancy between the relevant conduct and each state. State practice is formed through repeated conducts of relevant states. If a certain number of states associated with the conducts in question repeat the same conduct, such conducts can become state practice. Here, states related to the conduct in question can be classified into generally related, closely related, and most closely related states. Whether state practice is formed through repeated conducts of a few most closely related state, through those of appropriate number of closely related states, or through those of a number of generally related states depends on relevance of a given conduct to each state. In other words, if states that are particularly affected by the conduct, i.e. most closely related states behave in the same manner, such a conduct can form state practice without repeated conduct by a large number of states.

The International Law Association did not absolutize the importance of that "The criterion of representativeness has . . . a dual aspect—negative and positive. The positive aspect is that, if all major interests ("specially affected States") are represented, it is not essential for a majority of

[38] Ferreira, A. d., et al., *Formation and Evidence of Customary International Law* UFRGS Model United Nations Journal 189 (2013).

[39] International Law Association. *Final Report of Commission on Formation of Customary (general) International law, Statement of Principles Applicable to the Formation of General Customary International Law*. London Conference (2000).

States to have participated (still less a great majority, or all of them). The negative aspect is that if important actors do not accept the practice, it cannot mature into a rule of general customary law[40]."

But in most cases, it is recognized regarding the representativeness of state practice that a repeated conduct can be state practice when the majority of states that have the possibilities of doing the same conduct take part in the conduct.

Publicity is a criterion of the formation of state practice by which a certain act can be state practice only when it is made public or communicated to other states. A conduct of a state, whether verbal or physical, cannot be state practice unless it is disclosed to the public. It is because state practice is a form of state act that requires international recognition. Therefore, if an act is conducted in secret or if it is subsequently disclosed, other states would not be aware of such act at the time of its occurrence, and, as a consequence, it would be impossible to expect the repetition of such an act.

The ILA also claimed in its Final Report that acts do not count as practice if they are not public, and therefore, internal memoranda or the confidential opinions of Government legal advisers are not, as such, forms of State practice[41].

In view of these criteria for a conduct to be state practice, it can be said that state practice is formed only a certain act is repeated constantly and publicly in a uniform way until the number of states that do the same act reaches the majority.

In conclusion, state practice can be formed at a certain point in the process of constant, uniform and public participation in an identical conduct by as many states as possible.

CONCLUSION

Although a long time has elapsed since the concept of state practice under international law appeared in the international law theory and the analysis and research thereof have been conducted continuously during this period, the international community has not yet established scientific understanding in a number of issues including the subject or moment of the formation of state practice.

Notwithstanding the fact the generally recognition that state practice refers to repeated acts by states, the view of extending the subject of its formation to individuals or confining it to a particular category of states is widespread. And it is a stark reality that there is no scientific view that can be considered authoritative in relation to the moment or criteria of the formation of state practice.

[40] ibid.

[41] ibid.

The discrepancy in the views on state practice is partly attributed to the differences in the specific social reality of each country, but the fundamental reason is the differences in the demands and interests of each state in relation to state practice and international customs. In this context, it is difficult to establish a theory of state practice which is accepted by all existing states.

But now that the common legal consciousness has already been formed to some extent and the traditional European-centred theory of state practice has been rejected, it is by no means an unsolvable task to explore new theories that meet the requirements of the changed situation. The problem is to focus on the national practices and theories formed by the developing countries that are the mainstream of the international community.

The international community of the present and future requires a theory of customary international law and state practice, which presupposes the recognition of all sovereign states as equal members. This requirement can be met if the international community endeavors to realize international justice in developing the theory of customary international law on the basis of analyzing and reviewing varying theories of international custom explored and developed over a long period of time, and experiences and lessons gained in the course of their application in conformity with the nature of the international community itself.

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