MYKOLAS ROMERIS UNIVERSITY
FACULTY OF LAW
DEPARTMENT OF INTERNATIONAL LAW

GHENT UNIVERSITY
FACULTY OF LAW

VITALIUS TUMONIS
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FORMATION OF CUSTOMARY INTERNATIONAL LAW BY INTERNATIONAL ORGANIZATIONS

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SUPERVISOR:
ASSOCIATE PROF. DR. JUSTINAS ŽILINSKAS

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INTRODUCTION

RELEVANCE OF THE TOPIC

International law has witnessed remarkable development in the XX century. On the one hand, State sovereignty – once a cornerstone of international legal system – has been fading away. The rise of new international actors – predominantly international organizations – transformed structure of international law. Some have spoken of sovereign powers of international organizations;[1] others pointed out decreasing importance of States in international life in general and growing significance of international organizations in particular.[2] Several studies have been published on international organizations as law-makers.[3]

On the other hand, historically the most important source of international law – customary law – has been attacked. Many authors have pointed out inadequacy of customary law to present conditions of international life – its cumbersomeness, vagueness, undemocratic nature, etc.[4] Others have suggested fundamental transformations, for example, to recognize competence of individuals to participate in formation of customary law.[5] Yet others have suggested abolishing customary law altogether and replacing it with other law-making procedures (e.g. principle of consensus).[6]

What seems striking is that legal scholarship paid very little attention to the interaction between these two domains – i.e. the impact of increased importance of non-state actors (except individual) on formation of customary international law. Although there has been discussion on decisions of international organizations as a separate source of international law, in the view of present author, writers on international law failed to analyze sufficiently decisions of

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[1] Sarooshi D. International Organizations and Their Exercise of Sovereign Powers. Oxford University Press, 2005.

[2] *See e.g.* Allot P. The Health of Nations: Society and Law Beyond the State. Cambridge University Press, 2002; Allot P. Eunomia: New Order for a New World, Oxford University Press, 2001 (2nd ed.).

[3] Detter I. Law Making By International Organizations. Stockholm: Norstedt & Soners, 1965; Alvarez J. International Organizations as Law-makers. Oxford University Press, 2005.

[4] Friedmann W. The Changing Structure of International Law. London: Stevens & Sons, 1964. P. 122; Simma B. Consent: Strains in the Treaty Process *in* The Structure and Process of International law (Macdonald R. St. J., Johnston D. M. (eds.). Martinus Nijhoff Publishers, 1986. P. 485 ff.

[5] Ochoa C. The Individual and Customary International Law Formation// Virginia Journal of International Law. 2007, Vol. 48 (1). P. 121 ff.

[6] Guzman A. T. Saving Customary International Law// Michigan Journal of International Law. 2005, Vol. 27. P. 115 ff.

international organizations within the framework of customary international law. Thus, authoritative 9th edition of Oppenheim's International Law states that "at the present [international organizations] can be regarded as merely providing a different forum for giving rise to rules whose *legal force derives from the traditional sources of international law,* there may come a time when the collective actions of international community within the framework provided by international organizations will acquire the character of a separate source of law".

Accordingly, the present work analyzes whether international organizations can contribute to formation of customary international law. The main thesis is that international organizations, together with States, can form customary law in their own name.

One may reasonably ask whether this work is of any relevance to contemporary international law, where, according to many, treaties are becoming exclusive source of international law. In the view of present author, custom is as relevant in contemporary international law as it was a century ago. There are many areas where treaty law is either absent (e.g. State responsibility, jurisdiction of States, law of internal armed conflict), or is far from universal (environmental law, international criminal law, some fields of human rights law,[7] etc.).

Customary law, on the contrary, is a primary source of universal law – as such it normally binding on all members of international community. Furthermore, the treaty itself derives its validity from customary law as the principle *pacta sund servanda* is part of customary law.[8] Moreover, customary law has an advantage over treaty since in many domestic legal systems it is incorporated; meanwhile treaty law may not be part of domestic legal system.[9] Similarly, customary law may be the only law applicable before international court when certain State makes a reservation to compulsory jurisdiction clause whereby multilateral international treaties are excluded from applicable law.[10]

Ultimatelly, the elucidation of the rules on formation of customary international law may contribute to crystallizing the primary rules.[11]

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[7] Meron T. Human Rights and Humanitarian Norms As Customary Law. Oxford: Clarendon Press, 1989.

[8] Oppenheim's International Law (Jennings Sir R., Watts Sir A. eds). London: Longman, 1992 (9th ed.). Vol. 1. P. 31.

[9] Wildbaber L., Breitenmoser S. The Relationship between Customary International Law and Municipal Law in Western European Countries// Zeitschrift für ausländisches öffentliches Recht und Völkerrecht. 1988, Vol 48; Wouters J. Customary international law before national courts: Some reflections from a continental European perspective// Non-State Actors and International Law. 2004, Vol. 4.

[10] Case Concerning Military and Paramilitary Activities in and Against Nicaragua. (Nicaragua v. United States of America). ICJ Reports, 1986. (June 27, 1986). P. 29-38.

[11] Byers M. The Shifting Foundations of International Law: A Decade of Forceful Measures against Iraq// European Journal of International Law. 2002, 13(1).

STRUCTURE

The present thesis is divided into three chapters. The first provides background to law-making in international community. It starts with rudimentary tenets, and then turns to foundations of international legal system. First, it introduces what is often considered to be a starting point for any analysis on law-making in international community – Article 38 of Statute of International Court of Justice. Author concurs with majority of writers that treaties are not formal sources of international law; the importance of this distinction is significant to issue of customary law formation by international organizations since if treaties are formal sources of international law - i.e. they are of law-making nature - then international organizations are competent to form customary international law because they are also competent to conclude treaties. It attempts to discern any rules concerning subjects capable of forming customary international law. Having not found such rules, it proceeds analyze the structure of international legal system, heavily relying on the views of such scholars as Kelsen and Hart. More important, it then aims to prove that there is nothing inherent in States that would grant them monopoly over formation of customary international law; author further criticizes a notion of sovereignty, which even if has some definite meaning in international law, is certainly not concerning with monopoly of States over law-making in international community.

The thesis then turns to foundations of customary international law. It begins by pointing out to basic tenets of customary international law. It briefly enquires into the material element of customary law – density of practice, and subjective element – a notion of *opinio juris*. Finally, it attempts to discern the nature of customary international law.

Finally, the thesis argues that practice of international organizations should be counted for purposes of customary law formation. At first, it attempts to demonstrate that competence of international organizations to contribute to formation of customary law concerning relations of international organizations and States has been established long time ago (the views of international law commission are briefly introduced). Afterwards, the predominant view that practice of international organizations can count as States practice, and not practice of organizations themselves, is analyzed. Finally, author draws on the nature of customary law and on the nature of relationship between member States of international organizations and organizations themselves to prove that international organizations are competent to form international customary law.

OVERVIEW OF LITERATURE

The literature on the issue under discussion is scant. In most of the cases where the importance of international organizations on customary law-making is analyzed, discussion is confined to traditional issues – international organizations as forum for State practice. Thus, excerpt written by Vignes represents somewhat traditional view expressed in the doctrine on the importance of international organizations: "On the point of the participation of international organizations in the formation of customary international law it is worth considering the contribution made by passing resolutions to the formation and consolidation of customary rules. To the extent that those resolutions amount to the expression of a general legal obligation and are accompanied by a sufficient measure of practice, it has often been conceded that they have led – quite apart from judicial nature of the instrument containing them – to the formation of a custom or convention". [12]

The authors of established textbooks also do not pay any attention to the issue.[13] For example, Brownlie in a few pages devoted to law-making by international organizations points only to traditional methods of "law-making" – a forums for state practice, adopting in certain circumstances prescriptive resolutions, providing channels for expert opinions, adopting recommendations and decisions within frame of political organs;[14] finally, he points in a somewhat hastily manner that external practice of international organizations "provides evidence of law".[15]

The issue is not even analyzed in specialist treatment of international institutional law. Thus, for example established textbooks on a subject also confine themselves to traditional points of law-making by international organizations.[16] Otherwise encyclopedic treatment of international institutional law by Schermers and Blokker also fails to pay any attention to formation of customary law by international organizations – only one paragraph is devoted in the

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[12] Vignes D., The Impact of International Organizations On the Development and Application of Public International Law, *in* The structure and process of international law (Macdonald R. St. J., Johnston D. M. (eds.), 1986, Martinus Nijhoff Publishers, P. 829

[13] *See e.g.* Shaw M. International Law. Cambridge: Cambridge University Press, 2003 (5th ed.) P. 1186-1215; Cassese A. International Law. Oxford: Oxford University Press, 2005 (2nd ed.).

[14] Bronwlie I. Principles of Public International Law. Oxford: Oxford University Press, 2003 (6th ed.). P. 663-664.

[15] Ibid. P. 665.

[16] Amerasinghe C. F. Principles of the Institutional Law of International Organizations. Cambridge: Cambridge University Press, 2005 (2nd ed.). P. 186-187; Klabbers J. An Introduction to International Institutional Law. Cambridge: Cambridge University Press, 2002. P. 207-211.

chapter on law-making to customary law (through traditional means and methods) and similar amount of text is devoted in the chapter on position international organizations under international law.[17]

Several important studies on law-making by international organizations have been carried out. Again, little or nothing has been mentioned on formation of customary law by international organizations. Thus, a seminal study by Ingrid Detter published in 1965 only mentioned customary international law in passing.[18] More recently, otherwise remarkable study by Alvarez on international organizations as law-makers, mentions role of international organizations only in traditional sense – as a forum (or venue) for exchange of views of States.[19]

Slightly more attention to the issue has been paid in treatises on customary international law. Thus, Wolfke briefly mentions that practice of international organizations should count in the process of formation of customary law, but he does not provide rationale for this proposition.[20] Mendelson, in his 1995 Hague Academy lectures, somewhat hesitantly admitted that practice of international organizations should count for formation of customary law, but went on to soften this proposition.[21] Similarly, Degan indicates that practice of international organizations should be included in the formation of customary law, but again, he does not elaborate on this proposition.

Strikingly, the boldest statement appears in the 9th edition of authoritative (and conservative) Oppenheim's International Law, where it is admitted that international organizations in their own name may contribute to the formation of customary law.[22]

In general, literature on the issue is scarce and somewhat idiosyncratic. Often, even if possibility of customary law formed by international organizations is admitted, the position is either unelaborated or somewhat muted.

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[17] Schermers H. G., Blokker N. M., International Institutional Law: Unity Within Diversity. Leiden: Martinus Nijhoff Publishers, 2003 (4th ed.).

[18] Detter I. Law Making By International Organizations. Stockholm: Norstedt & Soners, 1965.

[19] Alvarez J. International Organizations as Law-makers. Oxford: Oxford University Press, 2005.

[20] Wolfke K. Custom in Present International Law. Dordrech: Martinus Nijhoff Publishers, 1993 (2nd ed.). P. 152; Wolfke K., Practice of International Organizations and Customary International Law// Polish Yearbook of International Law (1966/67), P. 185.

[21] Mendelson M. H. Formation of Customary International Law// Recueil des Cours. 1998, Vol. 272. P. 201.

[22] Oppenheim's International Law (Jennings Sir R., Watts Sir A. eds). London: Longman, 1992 (9th ed.). Vol. 1. P. 47.

OBJECT, SUBJECT, AND METHODOLOGY

The object of this thesis is international customary law; subject – international organizations' capacity to contribute to formation of this source of international law.

In writing the present thesis, following traditional theoretical methods have been employed:[23] abstraction, analysis, analogy, generalization, deduction, induction, comparative historic, etc. Empirical research has not been conducted as the problem under consideration is susceptible to empirical methods; inquiry into State practice and practice of international organizations is not empirical research but rather falls under appropriate heading of either inductive or deductive approach.

An important point on inductive and deductive approaches should be made. It hardly needs emphasizing that none of these approaches is perfect. As Hart pointed out, "international law not only lacks the secondary rules of change and adjudication which provide for legislature and courts, but also a unifying rule of recognition specifying 'sources' of law and providing general criteria for the identification of its rules".[24] Thus, in the absence of written constitution in international legal system deductive approach is unreliable.

Certainly, we should agree that not only deductive, but also inductive approach is fallible when analyzing customary law.[25] Nevertheless, the inductive approach does yield certain results that we can rely on, but we should bear in mind Schwarzenberger's caution that it "hardly needs mentioning that any inductive 'proof' of a rule of international law always remains provisional: it is liable to be disproved at any moment by better evidence that, in making any particular assessment, was not available or was overlooked".[26]

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[23] Tidikis R. Socialinių Mokslų Tyrimų Metodologija. Vilnius: Lietuvos teisės universiteto Leidybos centras, 2003. P. 369 ff.

[24] Hart H. L. A. The Concept of Law. Oxford: Oxford University Press, 1994 (2nd ed., repr. 1997). P. 214.

[25] Kammerhofer J. Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems// European Journal of International Law. 2004, 15(3).

[26] Schwarzenberger G. The Inductive Approach to International Law. London: Stevens & Sons, 1965. P. 5.

1. FOUNDATIONS OF INTERNATIONAL LAW-MAKING

1.1 INTRODUCTION

Before we turn to niceties of customary international law in general, and formation of it by international organizations in particular, it is necessary to build a foundation for further analysis. This chapter provides an introduction to law-making in international community – so-called sources of international law, their classification into formal and material sources, structure of international legal system and its importance on law-making, States as principal subjects and law-makers, other subjects of international law and their law-making capacity. Essentially, this chapter aims to prove that States don't have an exceptional capacity to form international law, even though they are principal subjects of international community.

1.2 SOURCES OF INTERNATIONAL LAW

The "source of law" is rather elusive term. Holland indicates four senses in which this term is used: (1) the place from which we obtain our knowledge of the law, e.g. the law reports, treatises, etc. (literary source); (2) the ultimate authority that backs up the law, i.e. the state (formal source); the causes that have, seemingly automatically, brought into existence rules that have subsequently acquired legal force, such as custom, religion, and scientific discussion (historical or material sources); or (4) the organs through which the state either grants legal recognition to rules previously unauthoritative, or itself creates new law, such as legislation and adjudication (legal source).[27]

Taking into account the elusiveness of this term, it is understandable why International Law Association in its final report of "Formation of General Customary International Law" pointed out that the "term 'source' properly belongs to hydrography, but it is so well entrenched in legal discourse that it would be somewhat artificial to avoid its use entirely".[28] Kelsen suggests eliminating this term altogether: "The ambiguity of the term 'source' of law seems to render the term rather useless. Instead of misleading figurative expression, one ought to introduce an expression that clearly and directly describes the phenomenon one has in mind".[29]

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[27] Holland E. T. The Elements of Jurisprudence. Oxford: Clarendon Press, 1924 (13th ed.). P. 55.

[28] International Law Association, Final Report of Committee on Formation of Customary (General) International Law – Statement of Principles Applicable to the Formation of General Customary International Law. London Conference, 2000. P. 12.

[29] Kelsen H. Principles of International Law. New York: Rinehart & Company, 1952. P. 304

As regards sources of international law, despite elusiveness of the term "source of law", it is often agreed that Article 38 of a Statute of International Court of Justice provides a starting point:[30]

"1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto." (emphasis added)

As Brierly states, this (Article 38 of the Statute) is the "text of the highest authority, and we may fairly assume that it expresses the duty of any tribunal which is called upon to administer international law".[31] Schwarzenberger even contended that Article 38 is the starting point on the normative level to inductive approach to international law in general: "historical research and the near-universality of Article 38 of the Statute of the World Court tend to transform it into a certainty – of the exclusive character of three law-creating processes in international law: consensual understandings in the widest sense, international customary law, and the general principles of law recognized by civilized nations".[32] Certainly, Article 38 is only mirroring "sources" of international, since as Oppenheim's International Law points out, "Article 38 cannot itself be creative of the legal validity of the sources set out in it, since it belongs to one of those sources itself".[33]

A brief remark here is appropriate on the wording of paragraph (b). Clearly, the wording is not confined to practice of States – "international custom, as evidence of a *general practice* accepted as law". In addition, *travaux prepatoires* indicate that drafters of this provision did not intend to establish detailed rules on application of customary rules (and probably to

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[30] Statute of the International Court of Justice ((26 June 1945).

[31] Brierly J. L., Waldock H. (ed.). The Law of Nations. Oxford: Clarendon Press, 1963 (6th ed.). P. 56.

[32] Schwarzenberger G. The Inductive Approach to International Law. London: Stevens & Sons, 1965. P. 5.

[33] Oppenheim's International Law (Jennings Sir R., Watts Sir A. eds). London: Longman, 1992 (9th ed.). Vol. 1. P. 24.

confine the group of subjects whose practice counts).[34] Therefore, Oppenheim's International Law correctly points out that there is "nothing in Article 38 of the Statute of the International Court of Justice to restrict international custom to practice of states only".[35]

Another question concerns the formal sources of international law and exhaustiveness of Article 38. It is agreed that Article 38 stipulates not only formal sources of international law, but also material (e.g. writings of publicists). Also, there is some issue whether another "source" of international is missing here – resolutions of international organizations as possessing their own legal validity.[36] One aspect of this issue was uncovered by International Court of Justice in advisory opinion on "Legality of the Threat of Use of Nuclear Weapons", where the Court stated that the "General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an opinio juris".[37]

Though this issue has certain interconnecting points with the present thesis, it is nevertheless distinct question and therefore falls outside the scope of the present work.[38]

1.2.1 Formal Sources of International Law

Leaving apart the question of treaty as a formal source of international law (see a next section below), a few points should be made on the notion of formal source. It is important to establish meaning of "formal" source of international law because it may have impact on drawing analogies: for example, if both treaty and customary law are formal sources, and since it is recognized that international organizations may conclude treaties (see below), we could draw analogy between international organizations' competence to conclude treaties and their competence to form customary international law.

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[34] Zimmermann A., Tomuschat C., Oellers-Frahm K. (eds). The Statute of the International Court of Justice: A Commentary. Oxford: Oxford University Press, 2006. P. 749.

[35] Oppenheim's International Law (Jennings Sir R., Watts Sir A. eds). London: Longman, 1992 (9th ed.). Vol. 1. P. 45.

[36] Parry C. The Sources and Evidences of International Law. Manchester: Manchester University Press, 1965. P. 109-115; Shaw M. International Law. Cambridge: Cambridge University Press, 2003 (5th ed.). P. 107.

[37] Advisory Opinion on Legality of the Threat of Use of Nuclear Weapons. ICJ Reports, 1996 (8 July 1996). P. 254-255.

[38] On legal force of General Assembly resolutions see Sloan B. The Binding Force of a Recommendation of the General Assembly of the United Nations// British Yearbook of International Law. 1948, Vol. 25, P. 1 ff; Sloan B. General Assembly Resolutions Revisited (40 Years After)// British Yearbook of International. 1988, Vol. 58. P. 39 ff; Johnson D. The Effect of Resolutions of the General Assembly of the United Nations// British Yearbook of International Law. 1955-1956, Vol. 32.

As International Law Association stated, "formal" sources are those processes which, if they are observed, create rules of law.[39]

According to Verzijl, the term "formal source" is used to indicate the concrete methods by which the basic need of justice and the regulation of conduct in any human society must be embodied in the shape of specific obligatory rules of behaviour. The concrete ways and means, the "formal" sources of the law, differ from community to community . . . they appear as custom, legislation, bye-laws, national case law, papal bulls, treaties, resolutions in international bodies, etc.[40]

On the other hand, as Brownlie points out, the distinction between formal and material sources is difficult to maintain in international law.[41] As he also indicates, formal sources are those legal procedures and methods for the creation of rules of general application which are legally binding on the addresses. The material sources provide evidence of the existence of rules which, when proved, have the status of legally binding rules of general application.[42] He further points out, that in "a sense 'formal sources' do not exist in international law. As a substitute, and perhaps an equivalent, there is the principle that the general consent of states creates rules of general application. The definition of custom in international law is essentially a statement of this principle (and not reference to ancient custom as in municipal law)".[43]

1.2.2 Treaties as Formal Source of International Law

As it was briefly mentioned above, it is necessary to enquire into the nature of treaties as formal source of law because this could lead to the analogy applied to customary law.

It is widely agreed that international organizations generally possess treaty-making capacity (*jus tractatum)*.[44] A conspicuous example of this power is reflected in Preamble of 1986 "Vienna Convention on the Law of Treaties between States and International Organizations or

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[39] International Law Association, Final Report of Committee on Formation of Customary (General) International Law – Statement of Principles Applicable to the Formation of General Customary International Law. London Conference, 2000. P. 12.

[40] Verzijl J. H. W. International Law in Historical Perspective. Leyden: A.W. Sijthoff, 1968. Vol. 1 – General Subjects. P. 2.

[41] Bronwlie I. Principles of Public International Law. Oxford: Oxford University Press, 2003 (6th ed.). P. 3.

[42] Ibid.

[43] Ibid.

[44] Klabbers J. An Introduction to International Institutional Law. Cambridge: Cambridge University Press, 2002. P. 45.

between International Organizations": ". . . international organizations possess the capacity to conclude treaties which is necessary for the exercise of their functions and the fulfillment of their purposes".[45]

Accordingly, it could be contended that international organizations possess competence to form customary international law "which is necessary for the exercise of their functions and the fulfillment of their purposes" in the same way (or by analogy) as they possess treaty-making capacity. The rationale here is simple – if these two sources are equivalent (or similar by their nature), then the same considerations should apply to their law-making: if international organizations can conclude treaties, then they can participate in formation of customary law in their own name.

However tempting it may be to adopt this reasoning, such analogy is unwarranted. The reason is that these two sources are not similar by their nature: treaty is not a formal source, rather, it is a source of particular rights and obligations. Furthermore, in a sense it is inferior to customary law because it derives its validity from customary law. As such, it is inadmissible to draw analogy from subordinate to superior.

Thus, Sir Gerald Fitzmaurice stated that treaties are not sources of law, but only sources of obligation.[46] Similarly, Brownlie states that treaty is not "primarily of source of rules of general application".[47] Oppenheim's International Law states that "treaties are, however, a formal source of international law in only a somewhat special sense. As a material source of law they have very considerable impact, but it may be strictly more correct to regard them formally as a source more of rights and obligations than of law, which is usually taken to require a generality and automaticity of application which treaties do not typically possess".[48] It further points out that ". . . not only is custom the original source of international law, but treaties are a source the validity and modalities of *which themselves derive from custom*. For the fact that treaties can stipulate rules of international conduct at all *is based on the customary rule of international law that treaties are binding upon contracting parties*".[49] (emphasis added).

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[45] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (21 March 1986).

[46] Fitzmaurice G. Some Problems regarding the Formal Sources of International Law *in* Symbolae Verzijl. 1958. P. 157 ff.

[47] Bronwlie I. Principles of Public International Law. Oxford: Oxford University Press, 2003 (6th ed.). P. 5.

[48] Oppenheim's International Law (Jennings Sir R., Watts Sir A. eds). London: Longman, 1992 (9th ed.). Vol. 1. P. 31.

[49] Oppenheim's International Law (Jennings Sir R., Watts Sir A. eds). London: Longman, 1992 (9th ed.). Vol. 1. P. 31.

In a similar vein, Kelsen argues that ". . . in principle, a treaty creates law only for the contracting parties. That a treaty is a law-creating fact, that by a treaty obligations and rights are established, or, in other terms, that a treaty has binding force, is due to a rule of customary international law which is usually expressed in the formula *pacta sunt servanda*. This rule is the reason for the validity of treaties, and hence the "source" of all the law created by treaties, the so-called conventional international law in contradistinction to the customary international law. *The latter represents a higher level in the hierarchical structure of the international legal order than the former*".[50] (emphasis added)

Hart, equally, points out to "customary rules of which the rule giving binding force to treaties is one".[51] (see the following section for the Hart's views).

Clive Parry also pointed out that this logic of law-making should be recognized to international organizations if it were admitted that treaties are formal source of international law: "It must raise also the question whether the achievement by international organizations of at least quasi-membership of the international community invests them with that capacity to participate in the making and changing of the international legal system which States possess and the possession of which by States is the hallmark of that system. If it were the case - but it is submitted that it is still an eminently examinable position - that treaties were a source of international law, then this capacity would have immediately be conceded to international organizations".[52]

1.3 STRUCTURE OF INTERNATIONAL LEGAL SYSTEM

In national legal systems, where written constitutions have force of supreme law of the land, there is no problem of identifying law creating agencies. Constitution normally determines who has law-making competence, how law is created and changed, what is the hierarchy of sources of law, etc. It is not a secret that there is no written constitution in international community. It may be doubted whether there is a constitution of any sort in international community; the views on this issue are split.

Kelsen, conspicuously, argues that international community has its own constitution: "General international law or the community constituted by general international law also has its 'constitution'. The constitution of the international community is the set of rules of international

[50] Kelsen H. Principles of International Law. New York: Rinehart & Company, 1952. P. 314.

[51] Hart H. L. A. The Concept of Law. Oxford: Clarendon Press, 1994 (2nd ed.). P. 233.

[52] Parry C. The Sources and Evidences of International Law. Manchester: Manchester University Press, 1965. P. 25.

law which regulate creation of international law, or, in other terms, which determines the 'sources' of international law".[53]

Hart, on the other hand, is of the opposite view. Before turning to Hart's views on existence of unifying structure in international law, it might be useful to recall that Hart distinguishes between primary rules and secondary rules. Primary rules impose obligations – for example, to refrain from use of force, to refrain from torture, to provide reparations for damage caused, etc. Secondary rules indicate who and how may change primary rules. Hart further distinguishes between three types of secondary rules: (1) recognition, (2) change, and (3) adjudication.[54] The "rules of recognition" determine which rules have quality of law, that is, they are distinguished from moral and other social norms, and from rules that do not have legal force in particular territory.[55] "Rules of adjudication" besides identifying the individuals who are to adjudicate, such rules will also define the procedure to be followed.[56]

But most important to the present thesis are rules of change: the "simplest form of such a rule is that which empowers an individual or body of persons to introduce new primarily rules for the conduct of the life of the group, or of some class within it, and to eliminate old rules".[57] As Hart further expounds on these rules, they may be "very simple or very complex: the powers conferred may be unrestricted or limited in various ways: and the rules may, besides specifying the persons who are to legislate, define in more or less rigid terms the procedure to be followed in legislation".[58] Thus, if we could uncover these secondary "rules of change" which determine who has law-making capacity and what are modalities of law-making, we could determine whether international organizations may participate in law-making process together with States, and if so, what are the particularities of international organizations' law-making capacity.

However, Hart himself denies the existence of secondary rules in international legal system. According to him, international law does not have a unifying structure; it is merely a set of discrete primary rules:

"There is, however, one suggested formal analogy between international and municipal law which deserves some scrutiny here. Kelsen and many modern theorists insist that, like municipal law, international law possesses and indeed must possess a 'basic norm', or what we have termed a rule of recognition, by reference to which validity of the other rules of the system is assessed,

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[53] Kelsen H. Principles of International Law. New York: Rinehart & Company, 1952. P. 303.

[54] Ibid. P. 79-100.

[55] Ibid. P. 94.

[56] Ibid. P. 97.

[57] Ibid. P. 95.

[58] Ibid. P. 96.

and in virtue of which the rules constitute a single system. The opposed view is that this analogy of structure is false: international law simply consists of a *set* of separate primary rules of obligation which are not united in this manner. It is, in the usual terminology of international lawyers, a set of customary rules of which the rule giving binding force to treaties is one. It is notorious that those who have embarked on the task have found very great difficulties in formulating the 'basic norm' of international law".[59]

Hart further adds that "a society may live by rules imposing obligations on its members as 'binding', even though they are regarded simply as set of separate rules, not unified by or deriving their validity from any more basic rule. . . . In most modern societies there are rules of etiquette . . . yet we would not look for, nor we could find, a basic rule of etiquette from which the validity of the separate rules was derivable".[60]

Though Hart's arguments appear compelling, we should point out that it is established that there are some secondary rules in international community (though not the same as Hart had in mind). For example, as regards responsibility of States, International Law Commission attempted to codify secondary rules of responsibility in its "Articles on Responsibility of States for Internationally Wrongful Acts".[61] In its commentary to draft articles, International Law Commission thus described its work: "The emphasis is on the secondary rules of State responsibility: that is to say, the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow there from. The articles do not attempt to define the content of the international obligations, the breach of which gives rise to responsibility. This is the function of the primary rules . . .".[62]

Nevertheless, in our view, even if there is some sort of constitution in international community, it is of little use to us if we can't establish its rules, especially the rules concerning law-making of custom. Thus we are bound to proceed on the assumption that there is no unifying "constitution" in international community which would lay down parameters of formation of customary international law. But before we turn to customary international law itself, it is

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[59] Hart H. L. A. The Concept of Law. Oxford: Clarendon Press, 1994 (2nd ed.). P. 233.

[60] Ibid. P. 234.

[61] Report of the International Law Commission on the work of its fifty-third session. Draft Articles on Responsibility of States for Internationally Wrongful Acts. Yearbook of International Law Commission. 2001, Vol. II.

[62] Commentary to Draft Articles on Responsibility of States for Internationally Wrongful Acts *in* Report of the International Law Commission on the work of its fifty-third session. Yearbook of International Law Commission. 2001, Vol. II. P. 31.

necessary to examine whether there is something inherent in States, as principal subjects of international law, that would preclude law-making competencies of international organizations.

1.4 STATES

International legal system is by its nature State centered. States have had for a long time a monopoly over law-making in international law. International law, by definition, is "the body of rules which are legally binding on states in their intercourse with each other. These rules are primarily those which govern the relation of states, but states are not the only subjects of international law".[63]

A conspicuous example of States exceptional place in international law-making is reflected in Article 53 of Vienna Convention on the Law of Treaties, which stipulates a provision concerning *Jus cogens* norms: " . . . For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the *international community of States as a whole* as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".[64] (emphasis added).

Parry, writing some 40 years before, argued that State based international legal system is likely to retain its impact on sources of international law: "The evidence would suggest indeed, that though the State may be tending to wither away under the influence of internationalist or supernationalist or transnationalist ideology, of technology, and of general tendency to classlessness, there is strong tide of nationalism which may not be pulling in quite the opposite, but is not pulling in the same direction."[65]

Arguably, the same holds true today (at least to a great extent). However, that does not inhibit other subjects of international law to participate law-making process.

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[63] Oppenheim's International Law (Jennings Sir R., Watts Sir A. eds). London: Longman, 1992 (9th ed.). Vol. 1. P. 4

[64] Vienna Convention on the Law of Treaties (22 May 1969).

[65] Parry C. The Sources and Evidences of International Law. Manchester: Manchester University Press, 1965. P. 9.

1.5 SOVEREIGNTY – RISE AND FALL OF NEBULOUS CONCEPT

State sovereignty is one of the historically most important and the same time one of the most nebulous legal notions. Often it is *a priori* assumed that international organizations or other subjects of international law don't have the same law-making competence as States do because they don't posses sovereignty. Or as Sarooshi states, the "concept of sovereignty has always been associated with an entitlement to exercise governmental powers in the internal and external domain, but his has always been subject to sovereign values that have conditioned its exercise".[66] Accordingly, this section analyzes this nebulous notion in order to prove that there is nothing inherent in States that would preclude law-making by other subjects of international law.

To begin with, it is necessary to point out that sovereignty is not a well-defined or single notion. Thus, Verzijl states "that the term 'sovereignty' has long since ceased to represent one single concept. It has, on the contrary, disintegrated into a bundle of very different notions each of which can be expressed by another word or term. It easy therefore to understand and to justify the fact that writers on the law of nations often sigh: if only this word had never been invented and if only it could be torn out root and branch from the traditional juristic terminology!".[67]

Though the term represents more than one concept, on the international plane, it often corresponds to the view that freedom of States may not be limited except by their free will, or that only States are law-makers in international community. Thus, Hart points out that "an uncritical use of the idea of sovereignty has spread similar confusion in the theory both of municipal and international law, and demands in both a similar corrective. Under its influence, we are led to believe that there *must* in every municipal legal system be a sovereign legislator subject to no legal limitations; just as we are led to believe that international law must be of a certain character because states are sovereign and incapable of legal limitation save by themselves".[68]

Historically the word originated from Latin word "*superanitas"*, and later emerged in feudal era as *"superioritas"* denoting the idea of one ruler, commander, court or official being

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[66] Sarooshi D. International Organizations and Their Exercise of Sovereign Powers. Oxford University Press, 2005. P. 9. *See also* Sarooshi D. The Essentially Contested Nature of the Concept of Sovereignty: Implications for the Exercise by International Organizations of Delegated Powers of Government// Michigan Journal of International Law. 2004, Vol. 25. P. 1108 ff.

[67] Verzijl J. H. W. International Law in Historical Perspective. Leyden: A.W. Sijthoff, 1968. Vol. 1 – General Subjects. P. 256.

[68] Hart H. L. A. The Concept of Law. Oxford: Clarendon Press, 1994 (2nd ed.). P. 223.

higher than another.[69] But when emergence of strongly centralized national kingdoms displaced feudal system, the term became synonymous with supreme power, almost without any limits.[70] As Verzijl further traces, because of political evolution in Europe in later centuries and concomitant development of jurisprudence, the notion of sovereignty disintegrated into three completely distinct concepts: those of supreme power within the State, of independence from any other earthly power, and of – an initially denied – exemption from any legal or moral bond whatsoever.[71]

Brownlie points out to three corollaries of the sovereignty and equality of states: (1) a jurisdiction, prima facie exclusive, over a territory and the permanent population living there; (2) a duty of non-intervention in the area of exclusive jurisdiction of other states; and (3) the dependence of obligations arising from customary law and treaties on the consent of the obligor.[72]

Steven Krasner suggests fourfold typology in order to elucidate this concept,:[73]

(1) Domestic sovereignty – organization and effectiveness of political authority, is the single most important question for political analysis, but the organization of authority within a state and the level of control enjoyed by the state are not necessarily related to international legal or Westphalian sovereignty.

(2) Interdependence sovereignty - in contemporary discourse it has become commonplace for observers to note that state sovereignty is being eroded by globalization. Such analysts are concerned fundamentally with question of control, not authority (inability to regulate the flow of goods, persons, diseases, etc.). Interdependence sovereignty, or the lack thereof, is not practically or logically related to international legal or Westphalian sovereignty. A state can be recognized as a juridical equal by other states and still be unable to control movement across its own borders.

(3) International legal sovereignty - this "type" of sovereignty is concerned with establishing the status of a political entity in the international system.

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[69] Verzijl J. H. W. International Law in Historical Perspective. Leyden: A.W. Sijthoff, 1968. Vol. 1 – General Subjects. P. 257.

[70] Ibid. P. 258.

[71] Ibid.

[72] Bronwlie I. Principles of Public International Law. Oxford: Oxford University Press, 2003 (6th ed.). P. 287.

[73] Krasner S. Sovereignty: Organized Hypocrisy. Princeton University Press, 1999. P. 9 ff.

Is a state recognized by other states? Is it accepted as a juridical equal? The classical model of international law is a replication of the liberal theory of the state. The state is treated at the international level as analogous to the individual at the national level. Sovereignty, independence, and consent are comparable with position that the individual has in the liberal theory of the state.

International legal sovereignty does not guarantee that legitimate domestic authorities will be able to monitor and regulate developments within the territory of their state or flows across their borders; that is, it does not guarantee either domestic sovereignty or interdependence sovereignty.

(4) Westphalian sovereignty – an institutional arrangement for organizing political life that is based on two principles: territoriality and the exclusion of external actors from domestic authority structures. Rulers may be constrained, sometimes severely, by the external environment, they are still free to chose the institutions and policies they regard as optimal. Westphalian sovereignty is violated when external actors influence or determine domestic authority structures.

However nebulous this concept of sovereignty has been from its very beginning, even International Court was tempted to engage into speculations concerning this concept. Thus, a seminal *Lotus* case by Permanent Court of International Justice echoes the notion of Westphalian sovereignty:

"International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed".[74] One can feel how sovereignty pervades this dictum.

Even more conspicuous example of the Court's struggle with this notion may be found in another seminal case – *Wimbledon.*[75] In this case, Permanent Court had to refute Germany's argument that it could not under international law restrict its independence significantly by international treaty because that would undermine its sovereignty. In the well-known passage, Permanent Court did not entertain this argument:

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[74] Case of the S.S. "Lotus". Series A.- No. 70 (September 7th, 1927).

[75] Case of the S.S. "Wimbledon". (August 17th, 1923).

"The argument has also been advanced that the general grant of a right of passage to vessels of all nationalities through the Kiel Canal cannot deprive Germany of the exercise of her rights as a neutral power in time of war, and place her under an obligation to allow the passage through the canal of contraband destined for one of the belligerents ; for, in this wide sense, this grant would imply the abandonment by Germany of a personal and imprescriptible right, which forms an essential part of her sovereignty and which she neither could nor intended to renounce by anticipation. This contention has not convinced the Court; it conflicts with general considerations of the highest order. It is also gainsaid by consistent international practice and is at the same time contrary to the wording of Article 380 which clearly contemplates time of war as well as time of peace. The Court declines to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty".[76]

Verzijl's ironical remark best illustrates cogency of this statement:

"One is even tempted to consider that it is merely sophistic word-play when in the pronouncements of the Permanent Court of International Justice one comes across the formulation that the power or faculty of States to fetter their sovereignty by the assumption of obligations is precisely an attribute of that same sovereignty. Formulations such as this evoke the possibility of other similar statements as, for instance, that the *essential of health is the capability of falling ill*, and so on".[77] (emphasis added)

Yet, what is clear from above analysis is that neither of these types of sovereignty has anything to do with limitations on law-making by other subjects of international law. As regards the general cogency of this concept, Anand correctly states that in contemporary international law, however much it might be decried as a political doctrine, sovereignty is not a myth.[78] But it has to be admitted that sovereignty, in its Westphalian sense, has faded away; it is also

[76] Case of the S.S. "Wimbledon". (August 17th, 1923). P. 25.

[77] Verzijl J. H. W. International Law in Historical Perspective. Leyden: A.W. Sijthoff, 1968. Vol. 1 - General Subjects. P. 264.

[78] Anand R. P. Sovereign Equality of States in International Law// Recueil des Cours. 1986, Vol. 197 (2). P. 40.

interesting to note in this respect that UN Charter[79] avoids the term "sovereignty", instead it uses a term of "sovereign equality".[80]

Even better, as Brierly puts it, "for the practical purposes of the international lawyer sovereignty is not a metaphysical concept, nor is it part of the essence of statehood; it is merely a term which designates an aggregate of particular and very extensive claims that states habitually make for themselves in their relations with other states. To the extent that sovereignty has come to imply that there is something inherent in the nature of states that makes it impossible for them to be subjected to law, it is a false doctrine which the facts of international relations do not support.

To conclude, sovereignty – arguably the most elusive concept in international law – does not preclude formation of customary international law by subjects other than states even though it is often assumed that only States, because they are sovereign, may form customary international law. This sovereignty may have many senses, among which are independence, equality, a corresponding duty of non-intervention, a prima facie exclusive jurisdiction over one's own territory and population, or whatever else, but this concept has nothing to do with "constitutional" rules concerning formation customary international law.

1.6 OTHER SUBJECTS OF INTERNATIONAL LAW

It would be a truism to contend that international community consists not only of states. Almost 60 years ago International Court of Justice already recognized that "the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community".[81] In the same case, the Court unequivocally held that United Nations possesses international personality. But of course international personality is not limited to United Nations. As Oppenheim's International Law states, "to the extent that bodies other than states directly posses some rights, powers and duties in international law they can be regarded as subjects of international law, possessing international personality. It is a matter for inquiry in each case whether – and if so, what – rights, powers and duties in international law are conferred upon any particular body".[82]

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[79] Charter of the United Nations (26 June 1945).

[80] See commentary to Article 2(1) *in* Simma B. (ed.) The Charter of the United Nations: A Commentary. Oxford University Press, 2001 (2nd ed.).

[81] Case concerning Reparation for Injuries Suffered in the Service of the United Nations. ICJ Reports, 1949. P. 178.

[82] Oppenheim's International Law (Jennings Sir R., Watts Sir A. eds). London: Longman, 1992 (9th ed.). Vol. 1.P. 16.

The question is rather who are fully-fledged participants, or, what entities constitute international community in a legal sense. Professor Brunno Simma (as he then was) in his Hague Academy lectures argued that international community is a "community that comprises not only States, but in the last instance all human beings".[83] Other scholars don't go that far, but at least recognize that international organizations deserve to be included in the definition of international community. Thus, Danilenko states that although "traditionally the international community is conceived as consisting primarily of sovereign states, intergovernmental organizations have also emerged as a second major class of actors possessing international personality".[84]

Mendelson goes on to recognize that a number of actors on international plane may have important role in contributing to customary international law:

"A contribution to the formation of customary international law, in a *broader* sense, is also made by other types of entity, such non-governmental organizations (e.g. Amnesty International, the Institute of International Law, or the International Law Association); multinational and national corporations; and even individuals. . . . But however important this contribution might be, I would nevertheless maintain that there is a distinction to drawn between the *indirect* contribution made non-governmental bodies to the customary law process, and the *direct* role played by governmental bodies (that is, States and – to a lesser extent – international organizations).[85]

Similarly, Danilenko points out that "although non-governmental organizations play an increasingly active role in the law-making process, especially in such areas as human rights and environment, their formal status is different, however. They are still not considered as forming part of the international community in a legal sense".[86]

International Court of Justice apparently also uses term "international community" as embracing not only states. Thus in its famous dicta in *Barcelona Traction* case, International Court distinguished bilateral obligations from obligations owed to "international community as a whole":

" . . . an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-a-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the

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[83] Simma B. From Bilateralism to Community Interest// Recueil des Cours. 1994, Vol. 250 (Nr. VI). P. 234.

[84] Danilenko G. M. Law-making in International Community. Martinus Nijhoff Publishers, 1993. P. 12.

[85] Mendelson M. H. Formation of Customary International Law// Recueil des Cours. 1998, Vol. 272. P. 203.

[86] Danilenko G. M. Law-making in International Community. Martinus Nijhoff Publishers, 1993. P. 13.

importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes".[87]

International Law Commission, in its Commentary to Articles on Responsibility of States considered that international community is a wider concept than "international community of States":

"As a matter of terminology, it is sufficient to use the phrase "international community as a whole" rather than "international community of States as a whole", which is used in the specific context of article 53 of the Vienna Convention on the Law of Treaties. The insertion of the words "of States" in article 53 of the Vienna Convention was intended to stress the paramountcy [sic] that States have over the making of international law, including especially the establishment of norms of a peremptory character. On the other hand the International Court used the phrase "international community as a whole" in the Barcelona Traction case, and it is frequently used in treaties and other international instruments . . .".[88]

1.7 CONCLUDING REMARKS

In the present chapter it was aimed to prove that international community consists of not only states, but also international organizations (and other entities). At the same time, it was aimed to show that there is nothing inherent in States that would preclude other subjects of international law (in our case – primarily international organizations) from contributing to formation of customary international law. Yet, as we have seen there is no written constitution in international community that would help us establishing rules relating to competence of international law subjects to contribute to formation of customary international law. Neither analogy between treaties and custom would be useful, as treaty is subordinate to custom in the sense that it derives its own validity from custom.

Accordingly, the answer to the question whether international organizations may form customary international law is to be looked in the nature of customary law and powers of international organizations.

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[87] Case Concerning Barcelona Traction, Light and Power Company, Limited, Second Phase (Belgium v. Spain). ICJ Reports, 1970. P. 32.

[88] Report of the International Law Commission on the Work of its Fifty-Third Session. Draft Articles on Responsibility of States for Internationally Wrongful Acts. Yearbook of International Law Commission. 2001, Vol. II. P. 204

2. CUSTOMARY INTERNATIONAL LAW

2.1 INTRODUCTION

Custom, as Brierly states, "in its legal sense means something more than mere habit or usage; it is a usage felt by those who follow it to be an obligatory one. There must be present a feeling that, if the usage is departed from, some form of sanction will probably, or at any rate ought to, fall on the transgressor. Evidence that a custom in this sense exists in the international sphere can be found only by examining the practice states; that is to say, we must look at what states do in their relations with one another and attempt to understand why they do it".[89]

In other words, in order for customary law to be established, there must be general (widespread, consistent, etc.) practice which is considered to obligatory, i.e. there must be some sort of conviction that this practice is followed because it is obligatory. However, this, apparently unsophisticated, clause raises a number of issues: what is the density required for practice (how widespread, how consistent, for how long, etc.), what counts as practice (only physical acts or also verbal acts, e.g. voting in international conferences), what weight should be accorded to verbal acts if they are recognized as the form of states practice, practice by whom counts (is it only by State's organs responsible for foreign relations or all State's organs, and of course, whether non-state actors count), what is the nature of legal conviction or *opinio juris* as it is often called (is *opinio juris* constitutive or declarative, how satisfactorily it performs function of sorting legal from non-legal practice, etc.).

International Court has continuously espoused the view that both elements – objective (practice) and subjective (*opinio juris)* are necessary for customary law to be formed. Thus, in *Continental Shelf* case between Libya and Malta the Court stated that "it is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and opinio juris of States".[90]

2.2 THE CATEGORY OF SUBJECTS COMPETENT TO FORM CUSTOMARY INTERNATIONAL LAW

Though the competence of international organizations to form customary law is the essence of the present thesis and therefore it seems inappropriate to embark on this issue in the present chapter, a brief remark should be made on the traditional view expressed in the doctrine.

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[89] Brierly J. L., Waldock H. (ed.). The Law of Nations. Oxford: Clarendon Press, 1963 (6th ed.). P. 59-60.

[90] Case Concerning Continental Shelf (Libyan Arab Jamahiriya/Malta). ICJ Reports, 1985. P. 29-30.

It is agreed, at least in the writings of substantial majority of writers, that only *State* practice is relevant for the customary law. Thus, authoritative Third Restatement states that "customary international law results from a general and consistent *practice of states* followed by them from a sense of legal obligation".[91] (emphasis added)

Villiger, representing a somewhat traditional view on this point (also traditional in the sense that such contention is unelaborated and unexplained), asserts that "instances of practice have to be attributable to States, for which reason the practice of international organizations or individuals is excluded".[92] However, he also points out that practice of international organizations is significant for the question of customary law of the organizations themselves, provided that such practice can be distinguished from individual practice of State representatives in these bodies.[93]

On the other end of spectrum are those who require to accord competence to form customary law to all participants in international community. For example, in a recent article Christiana Ochoa suggests that this competence should be recognized to individuals (especially in the field of human rights law).[94] Quite similarly, Gunning suggests including NGOs (together with international (intergovernmental) organizations).[95]

In between of these positions, there are those who maintain that States do not have an exclusive competence, however, subjects, competent forming customary international law, should be limited mostly to international organizations.[96] Thus, Mendelson defines a rule of customary international law as "one which emerges from, and is sustained by, the constant and uniform practice of States and *other subjects of international law*, in their international relations, in circumstances which give rise to a legitimate expectation of similar conduct in the future".[97]

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[91] American Law Institute. Restatement of the Law: Foreign Relations Law of the United States. American Law Institute Publishers, 1987 (3rd ed.). § 102 (1) (c) (2).

[92] Villiger M. Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources. The Hague: Kluwer Law International, 1997 (2nd ed.). P. 17.

[93] Ibid.

[94] Ochoa C. The Individual and Customary International Law Formation// Virginia Journal of International Law. 2007, Vol. 48 (1). *See also* Kopelmanas L. Custom as a Means of the Creation of International Law// British Yearbook of International. 1937, Vol. 18.

[95] Gunning I. R. Modernizing Customary International Law: The Challenge of Human Rights// Virginia Journal of International Law. 1991, Vol. 31. P. 211 ff.

[96] *See generally* Bodansky D. Customary (and Not So Customary) International Environmental Law// Indiana Journal of Global Legal Studies. 1995, Vol. 3. P. 105 ff.

[97] Mendelson M. H. Formation of Customary International Law// Recueil des Cours. 1998, Vol. 272. P. 188.

As he admits, this definition is not entirely satisfactorily, but it indicates that subjects of international law other than States can contribute to the formation of customary law.[98] He further proceeds to assert right of international organizations in their own name to contribute to formation of customary law;[99] he even acknowledges that indirectly (but only indirectly, and not in their own name) other entities – like NGOs or multinational corporations – may contribute to formation of customary law.[100]

For the purposes of the present thesis, it is not necessary to embark on the issue of competence of subjects other than States and international organizations to form customary international law; different considerations applicable to different subjects also would allow to draw analogy from competence of international organizations to contribute to formation of customary law to the same competence of other subjects. Suffice it to mention here, that present thesis aims at demonstrating only that customary international law is not exclusive realm of States and that international organizations may on the same footing contribute to customary international law.

2.3 OBJECTIVE ELEMENT

2.3.1 Evidences of Practice and Verbal Acts

It is crucial for the present thesis to ascertain what constitutes practice, since international organizations often cannot engage in physical actions and are thus limited to verbal acts (statements in resolutions, etc.). Similarly, it necessary to ascertain what weight should be given to specific practice (whether that of States or international organizations).

As Third Restatement states, the "practice of states that builds customary law takes many forms and includes what states do in or through international organizations".[101] International Law Commission in its report to the General Assembly on "Ways and Means for Making the Evidence of Customary International Law More Readily Available" indicated following non-exhaustive list of evidences of customary law:[102] texts of international

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[98] Ibid.

[99] Ibid. P. 201.

[100] Mendelson M. H. Formation of Customary International Law// Recueil des Cours. 1998, Vol. 272. P. 203.

[101] American Law Institute. Restatement of the Law: Foreign Relations Law of the United States. American Law Institute Publishers, 1987 (3rd ed.). § 102, Reporter's Note 2.

[102] Report of the International Law Commission on "Ways and Means for Making the Evidence of Customary International Law More Readily Available". Yearbook of International Law Commission. 1950, Vol. II. P. 368

instruments, decisions of international courts, decisions of national courts, national legislation, diplomatic correspondence, opinions of national legal advisers, practice of international organizations (as practice of States! See section of a final chapter of the present work).

Similarly, Brownlie indicates that among numerous evidences of practice the following are included: diplomatic correspondence, policy statements, press releases, the opinions of official legal advisers, official manuals on legal questions, e.g. manuals on military law, executive decisions and practices, orders to naval forces, comments by governments on drafts produced by the International Law Commission, state legislation, international and national judicial decisions, recital in treaties and other international instruments, etc.[103]

As may be seen from above mentioned evidences, verbal acts are included among evidences of State practice. Nevertheless, here we find some fundamental disagreement between authorities.

On the one side we find authorities who assert that only physical acts count as state practice. Thus, in well-known separate opinion in *Fisheries* case, Judge Read asserted that "customary law is the generalization of the practice of States. This cannot be established by citing cases where coastal States have made extensive claims . . . The only convincing evidence of State practice is to be found in seizures, where the coastal States asserts its sovereignty over the water in question by arresting a foreign ship".[104] Among others, similar view is supported by D'Amato.[105]

Danilenko, having taken the position somewhere in the middle, states that "despite the growing recognition of the verbal forms of practice, as a source of law custom continues, as before, to be based primarily on real and concrete practice".[106]

On the other side we find authorities that support verbal acts as evidence of practice. In general, this approach appears to be more widely accepted. Thus Villiger states that States themselves as well as courts regard comments at conferences as constitutive of State practice.[107] He further points out that the "term 'practice' (as per Article 38 of the ICJ Statute) is general enough – thereby corresponding with the flexibility of customary law itself – to cover any act or

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[103] Bronwlie I. Principles of Public International Law. Oxford: Oxford University Press, 2003 (6th ed.). P. 6.

[104] Fisheries Case (United Kingdom v. Norway). ICJ Reports, 1951. (December 18, 1951). P. 191.

[105] D'Amato A. The Concept of Custom in International Law. Ithaca, London: Cornell University Press, 1971. P. 47-98.

[106] Danilenko G. M. Law-making in International Community. Martinus Nijhoff Publishers, 1993. P. 91.

[107] Villiger M. Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources. The Hague: Kluwer Law International, 1997 (2nd ed.). P. 20.

behavior of a State, and it is not made entirely clear in what respect verbal acts originating from a State would be lacking, so that they cannot be attributed to the behavior of that State."[108]

International Law Association's Committee on Formation of Customary International Law in its final report also recognized that verbal acts constitute the objective element of customary law. In the first place, it emphasized in Rule 3 that when defining State practice - the objective element in customary law - it is necessary to take account of the distinction between what conduct counts as State practice, and the weight to be given to it: those who would deny that such verbal acts as statements in an international organization count as practice seem to be motivated by the consideration that "talk is cheap", and that to make a statement is not the same as arresting a ship. However, whilst in some instances this may be so, this goes more to the weight to be attributed to the conduct rather than to any inherent inability of verbal acts to contribute to the formation of customary rules.[109]

Second, in a Rule 4 Report states that verbal acts, and not only physical acts, of States count as State practice.[110] Verbal acts, meaning making statements rather than performing physical acts, are in fact more common forms of State practice than physical conduct. There is no inherent reason why verbal acts should not count as practice, whilst physical acts (such as arresting individuals or ships) should. The practice of international tribunals is replete with examples of verbal acts being treated as examples of practice. Similarly, States regularly treat this sort of act in the same way.[111]

2.3.2 Density

Another important issue is the required density of practice. International Law Association's Committee on Formation of Customary Law thus stated general rule: general customary international law is created by State practice which is *uniform, extensive and representative in character.*[112]

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[108] Ibid. P. 21; *see also* Akehurst M. Custom as a Source of International Law// British Yearbook of International Law. 1974/-1975, Vol 47. P. 3.

[109] International Law Association, Final Report of Committee on Formation of Customary (General) International Law – Statement of Principles Applicable to the Formation of General Customary International Law. London Conference, 2000. P. 13.

[110] Ibid. P. 14.

[111] Ibid.

[112] International Law Association, Final Report of Committee on Formation of Customary (General) International Law – Statement of Principles Applicable to the Formation of General Customary International Law. London Conference, 2000. P. 20.

However nicely general rule is formulated, one must admit that in practice it is often unclear when certain practice attains the necessary density. Mendelson's amusing illustration best reveals the issue: "it makes no more sense to ask a member of a customary law society 'Exactly how many of you have to participate in such-and-such a practice for it to become law' than it would to approach a group of skinheads in the centre of The Hague and ask them, 'How many of you had to start wearing a particular type of trousers for it to become the fashion – and, indeed, *de rigeur* – for members of your group?".[113]

Another problem is that in international community, consisting of little bit less than 200 States, it is often difficult to establish a consistent practice. Friedmann voiced his concern on this issue already some more than 40 years ago, when he stated that "custom is too clumsy and slow moving a criterion to accommodate the evolution of international law in our time, and the difficulties are increased as the number of subjects of the law of nations swells from a small club of Western Powers to 120 or more "sovereign" states".[114] Even if this remark has some merits, it should not exaggerate the problem.

It seems that International Court is sensitive to problems of consistent practice in contemporary international community. Thus, the Court in *Nicaragua* case did not require ideal consistency with respect to rules concerning use of force:

"It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other's internal affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, *in general, be consistent* with such rules, and that instances of State conduct inconsistent with a given rule *should generally have been treated* as breaches of that rule, not as indications of the recognition of a new rule".[115]

2.4 SUBJECTIVE ELEMENT

The subjective element, or *opinio juris*, has several functions, but primarily it helps to distinguish custom from usage. According to Oppenheim's International Law, "a *custom* is a

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[113] Mendelson M. H. Formation of Customary International Law// Recueil des Cours. 1998, Vol. 272. P. 174.

[114] Friedmann W. The Changing Structure of International Law. London: Stevens & Sons, 1964. P. 122.

[115] Military and Paramilitary Activities in and Against Nicaragua. (Nicaragua v. United States of America). ICJ Reports, 1986. P. 98.

clear and continuous habit of doing certain actions which has grown up under the aegis of the conviction that these actions are, according to international law, obligatory or right. On the other hand, a *usage* is a habit of doing certain actions which has grown up without there being the conviction that these actions are, according to international law, obligatory or right".[116]

The International Court on several occasions stressed the importance of subjective element. In *North Sea Continental Shelf* case the Court held that:[117]

"Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that his practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of subjective element, is implicit in the very notion of the *opinio juris sive necessitates*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty".

In *Nicaragua* case, the Court indicated one of the methods for deducing *opinio juris:* "This opinio juris may, though with all due caution, be deduced from, inter alia, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions".[118]

As regards nature of *opinio juris,* there is a fundamental disagreement between two schools of thought: "voluntarists" or "consensualists" consider that *opinio juris* and will or consent is the same, thus, in their view, for a rule to become part of customary law, States should consent to it; "intellectualists" consider *opinio juris* and consent of the States to be two distinct notions, accordingly, in their view it is not necessary for States to consent (in proper sense) to particular practice so that it becomes part of customary law.[119] Or as International Law Association's Committee on Formation of Customary Law puts it, "the subjective element

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[116] Oppenheim's International Law (Jennings Sir R., Watts Sir A. eds). London: Longman, 1992 (9th ed.). Vol. 1. P. 27.

[117] Case Concerning North Sea Continental Shelf (Federal Republic of Germany/ Netherlands). ICJ Reports, 1969. P. 44.

[118] Military and Paramilitary Activities in and Against Nicaragua. (Nicaragua v. United States of America). ICJ Reports, 1986. P. 100.

[119] *See further* Elias O. The Nature of the Subjective Element in Customary International Law// International and Comparative Law Quarterly. 1995, Vol. 44. P. 501 ff.

means, for some, *consent* or *will* that something be a rule of customary law, and for others a *belief* that it is a rule - to put it simply". [120]

It appears that position adopted by International Law Association is most reasonable. As it stated in its final report, "if it can be shown that States generally believe that a pattern of conduct is permitted or (as the case may be) required by law, this is sufficient for it to be law; but it is not necessary to prove the existence of such a belief".[121]

However, as it further pointed out, sometimes lack of *opinio juris* may preclude formation of customary law: "even where there is a settled pattern of behaviour which at first sight satisfies the conditions of customary law, there may be circumstances which disqualify the practice concerned (or some parts of it) from counting towards the formation of a rule of customary law. This is because those concerned assume, assert or take the position that the conduct concerned does not count, has no precedential value".[122] But "it is not necessary that the international community as a whole should have consented to the rule in a conscious sense. *Customary law is not tacit treaty law*".[123] (emphasis added)

As concerns present work, it is not necessary to reach the definite conclusion as to the nature of *opinio juris.* Suffice it mention that whatever approach – voluntarist or intellectualist – holds good, there is nothing in international organizations different from States in this respect.

Moreover, it is certainly true, as Basdevant – member of Washington Committee of Jurists which was responsible for redrafting of the ICJ Statute during San Francisco Conference – pointed out, Article 38 "has given rise to more controversies in doctrine than in practice";[124] similarly, as Thirlway points out, the doctrinal controversy over *opinio juris* "has probably caused more academic controversy than all the actual contested claims made by States on the basis of alleged custom, put together".[125]

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[120] International Law Association, Final Report of Committee on Formation of Customary (General) International Law – Statement of Principles Applicable to the Formation of General Customary International Law. London Conference, 2000. P. 30

[121] International Law Association, Final Report of Committee on Formation of Customary (General) International Law – Statement of Principles Applicable to the Formation of General Customary International Law. London Conference, 2000. P. 30.

[122] Ibid. P. 31.

[123] Ibid.

[124] *Cited in* Zimmermann A., Tomuschat C., Oellers-Frahm K. (eds.). The Statute of the International Court of Justice: A Commentary. Oxford: Oxford University Press, 2006. P. 689.

[125] Thirlway H. International Customary Law and Codification: An Examination of the Continuing Role of Custom in the Present Period of Codification of International Law. Leiden: A.W. Sijthoff, 1972. P. 47.

2.5 NATURE OF CUSTOMARY INTERNATIONAL LAW

If, as we hopefully showed above, there is no written constitution in international community that would provide for rules concerning law-making of customary international law, and at the same time there is nothing inherent in States that would preclude law-making by other subjects of international law, then we must look for the answer whether international organizations may contribute to formation of customary international law in the nature of international custom itself.

Arguably, it would be correct to maintain that customary international law by its very nature shares the same nucleus with customary rules that prevailed in municipal legal systems. And Kelsen puts it this way: "The basis of customary law is the general principle that we ought to behave in the way our fellow men usually behave and during a certain period of time used to behave. If this principle assumes the character of a norm, custom becomes a law-creating fact".[126]

Virally puts it even more eloquently: "The essence of a customary rule lies in the fact that it arises from the conduct of those whom it binds".[127] Thus, if international organizations are the subjects of general international law (see below), then they must be able to contribute in their own name to formation of this law.

Kelsen, by describing difference between customary law and legislation, clearly shows that within framework of customary law, the subjects and law-makers are at least partly identical:

"Legislation is lawmaking by a special organ instituted to this end, according to the principle of division of labor, this organ being different from and more or less independent of the individuals subject to the law created by the organ. *Custom is lawmaking by the individuals themselves who are subject to the law created by their conduct. The individuals creating the law and the individuals subject to the law are at least partly identical.* Custom is a decentralized - legislation a centralized - creation of law".[128] (emphasis added)

To conclude, the competence of international organizations to contribute to formation of custom is inherent in the very nature of customary law.

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[126] Kelsen H. Principles of International Law. New York: Rinehart & Company, 1952. P. 307.

[127] Virally M. The Sources of International Law, in Manual of Public International Law (Sorensen M. ed). St. Martin's Press, 1968. P. 130.

[128] Kelsen H. Principles of International Law. New York: Rinehart & Company, 1952. P. 308.

3. INTERNATIONAL ORGANIZATIONS AND FORMATION OF CUSTOMARY LAW

3.1 INTRODUCTION

As we have already pointed out in the Chapter 1 of this thesis (Section 1.6), international organizations are considered "well-developed" subjects of international law. In fact, as Anand states "the most serious and important inroads into the traditional concept of sovereignty have been made by the creation of international organizations".[129] Bronwlie even entertains the idea of territorial sovereignty by international organizations:

"While the concept of territorial sovereignty normally applies in relation to states, there is the likelihood that international life will comprehend situations in which international organizations not only administer territory in the capacity of legal representatives but also assume legal responsibility for territory in respect for which no state has territorial sovereignty. . . . The nature of the legal relations of an organization to the territory would cause few difficulties of substance, but some difficulties of terminology can be foreseen solely because terms and concepts like 'sovereignty' and 'title' are historically associated with the patrimony of states with definable sovereigns".[130]

Yet, however attractive are these ideas of "supranationalism", Parry correctly cautions that "if any element of international legislation is to be discerned in the operations of international organizations, enthusiasts for such structures would do well to remember that the theory upon which they were built was one of delegation from the State".[131]

In general international organizations have had an enormous impact on international law-making in general.[132] Shermers and Blokker point out that "the creation and functioning of international organizations has partly compensated for the lack of a central, supranational authority".[133]

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[129] Anand R. P. Sovereign Equality of States in International Law// Recueil des Cours. 1986, Vol. 197 (2). P. 33.

[130] Bronwlie I. Principles of Public International Law. Oxford: Oxford University Press, 2003 (6th ed.). P. 107-108.

[131] Parry C. The Sources and Evidences of International Law. Manchester: Manchester University Press, 1965. P. 8-9

[132] *See generally* Alvarez J. International Organizations as Law-makers. Oxford: Oxford University Press, 2005.

[133] Schermers H. G., Blokker N. M. International Institutional Law: Unity within Diversity. Leiden: Martinus Nijhoff Publishers, 2003 (4th ed.). P. 7.

Nonetheless, the main field of this development has been within established framework international law. Thus, Condorelli states that "the process of formation of customary law has been undeniably enriched in large measure both by the development of a closely linked network of international organizations and by the more intensive effort to achieve codification. . . . the main result of this enrichment has been to speed up the process of formation, modification and termination of customary law precisely because the existence of large international fora permits continuous and collective discussion . . .".[134] Yet, he immediately points out that "this enrichment has not really changed the essence of customary law since it tends to be focused on the forms, means, procedures and mechanisms through which the two components of international custom - State practice and opinio juris - reveal themselves and can be identified".[135] Similarly, Alvarez points out (and criticizes) "that these doctrines are applied to IOs are mere parasitical variations on familiar rules applied to states reflects a prevailing assumption that such organizations are merely the agents of states and not in any real sense autonomous entities".[136]

3.2 PERSONALITY AND STATUS IN INTERNATIONAL LAW

As it was pointed out above (Section 2.5 on nature of customary law), in the realm of customary law, persons creating law and persons subject to this law are almost identical. Thus it necessary to briefly points out main characteristics of personality of international organizations.

As Schermers & Blokker state, a "rule of thumb is that, while states are free to act as long as this is in accordance with international law . . . , international organizations are competent to act only as far as powers have been attributed to them by member states. This is related to the basic principle of the law of international organizations: the powers of international organizations limited to those attributed to them by states".[137] A caution is needed – this "rule of thumb" should not be taken dogmatically as international organizations are bound by general international customary law (at the same time, general customary international law may accord international organizations with certain rights that constituent instrument does not accord).

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[134] Condorelli L. Custom *in* International Law: Achievements and Prospects (Bedjaoui M. ed.). Martinus Nijhoff Publishers, 1991. P. 201.

[135] Ibid.

[136] Alvarez J. International Organizations as Law-makers. Oxford: Oxford University Press, 2005. Preface.

[137] Schermers H. G., Blokker N. M. International Institutional Law: Unity within Diversity. Leiden: Martinus Nijhoff Publishers, 2003 (4th ed.). P. 155.

Apparently, Parry takes it from this point when he contends that "in accepted theory the Chater is a treaty. Any new rules of international law which it may have explicitly introduced are therefore attributable to that beginning".[138] However, this point should not be pushed too far. Under particular circumstances, even state may created by international treaty, yet, this does not mean that such will be a subject of international law only within framework of this constitutive treaty. Thus, Schermers & Blokker point out that "unlike ordinary treaties, constitutions not only regulate rights and duties between states, but also- and even primarily – create new subjects of international law".[139]

Similarly, International Court in advisory opinion requested by World Health Organization on *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* held that:
"constituent instruments of international organizations are also treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals. Such treaties can raise specific problems of international law owing, *inter alia*, to their character which is conventional and at the same time institutional".[140]

That international organizations are not solely confined to their constituent instruments was confirmed by International Court already some time before: "International organizations are subjects of international law and, as such, are bound by any *obligations incumbent upon them under general rules of international law*, under their constitutions or under international agreements to which they are parties".[141]

Similarly, International Court when confronted with a question whether voting to particular within international organization, did not hold that the effect of such voting is limited to boundaries of particular treaty (UN Charter in that case):
"The effect of consent to the text of such resolutions cannot be understood as merely that of a "reiteration or elucidation" of the treaty commitment undertaken in the Charter. On the contrary,

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[138] Parry C. The Sources and Evidences of International Law. Manchester: Manchester University Press, 1965. P. 19.

[139] Schermers H. G., Blokker N. M. International Institutional Law: Unity within Diversity. Leiden: Martinus Nijhoff Publishers, 2003 (4th ed.). P. 724.

[140] Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Requested by World Health Organization). ICJ Reports, 1996. P. 74.

[141] Advisory Opinion on the Interpretation of the WHO-Egypt Agreement. ICJ Reports, 1980. P. 89-90.

it may be understood as an acceptance of the *validity of the rule or set of rules declared by the resolution by themselves*".[142] (emphasis added)

To conclude, international organizations' ability to contribute to formation of customary international law is limited to their powers, which, as the rule of thumb, are defined by their constituent treaties.

3.3 PRACTICE OF INTERNATIONAL ORGANIZATIONS AS PRACTICE OF STATES

It is often submitted to treat for purposes of customary international the practice of international organizations as practice of States. A conspicuous example of this is found in the final report by International Law Assocation's Committee on Formation of Customary Law. A rule Nr. 11 states that "practice of intergovernmental organizations in their own right is a form of 'State practice'".[143] A commentary to this rule states that:

"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.45 If so, it would add little or nothing to the weight of such practice *by the member States themselves* to treat the resolution itself (as distinct from voting for it) as a *further* piece of practice, this time on the part of the organization".[144] The commentary does not explain why it is "probably best regarded as a series of verbal acts by the individual member States".

Shermers and Blokker point out to fictional aspect of such approach (although in a slightly different context): "[a] disadvantage of this approach is that it disregards the source of the decision that was not taken simultaneously by a number of states acting in their own capacity and expressing their own individual wills, but by an international organ having a *volonte distincte* [separate will]".[145]

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[142] Military and Paramilitary Activities (Nicaragua v. United States of America). ICJ Reports, 1986. P.100.

[143] International Law Association, Final Report of Committee on Formation of Customary (General) International Law – Statement of Principles Applicable to the Formation of General Customary International Law. London Conference, 2000. P. 19.

[144] Ibid.

[145] Schermers H. G., Blokker N. M. International Institutional Law: Unity within Diversity. Leiden: Martinus Nijhoff Publishers, 2003 (4th ed.). P. 783.

3.4 FORMATION CUSTOMARY LAW CONCERNING RELATIONS BETWEEN INTERNATIONAL ORGANIZATIONS AND STATES

International organizations, as Shaw states, may be instrumental in the creation of customary international.[146] As he further points out, advisory opinion by the International Court in *Reparations for Injuries* case was partly based on the actual behavior of the U.N.[147] Indeed, it is incomprehensible how the Court could reach conclusion that United Nations may present claim for reparations against Non-member State (i.e. with which there no treaty bonds) if not on the basis of customary international law. If on the basis of customary international law, how this rule of customary law could have formed if not on actual practice of United Nations (and, theoretically, other organizations', especially having universal or quasi-universal membership).

This issue seems to be settled. Thus, a Special Rapporteur in International Law Commission Manley O. Hudson pointed out that records of the cumulating practice of international organizations may be regarded as evidence of customary international law with reference to States' relations of the organizations.[148] The same was confirmed by International Law Commission as a whole.[149]

Indeed, it is difficult to imagine how such fields of international law as responsibility of international organizations, their immunities, a rules of treaty law between international organizations or between international organizations and states (1986 Vienna Convention is not even in force, but international organizations conclude international agreements almost weekly), and others could be developed if not by recognizing international organizations' competence to form customary international law. To say that it is only practice of States (in their relations with international organizations) that counts for formation of customary law is to stretch the truth.

3.5 FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW

Finally, we turn to the crux of the present work – whether international organizations may contribute to general customary international law.

As it was already concluded above, it follows from the nature of customary law that international organizations possess competence to contribute to formation of customary

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[146] Shaw M. International Law. Cambridge: Cambridge University Press, 2003 (5th ed.). P. 78.

[147] Ibid. P. 79.

[148] Working paper by the Special Rapporteur, Manley O. Hudson, U.N. Doc. A/CN.4/16. Yearbook of International Law Commission, 1950, Vol. II. P. 30

[149] Report of the International Law Commission on "Ways and Means for Making the Evidence of Customary International Law More Readily Available". Yearbook of International Law Commission. 1950, Vol. II. P. 372.

international not only within field of relations with states but also as regards general international law. Certainly, competence to contribute is predetermined by international organizations' powers (their constituent instruments, as a rule of thumb).

Yet, we should reject false indicators of this competence. Thus, one might be tempted to infer from Article 38 of 1986 Vienna Convention[150] which states that "[n]othing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State or a third organization as a customary rule of international law, recognized as such". Hence, it could be assumed that this provision mirrors competence of international organizations to contribute to formation of general customary international law. But such assumption would be wrong, because the Commentary by International Law Commission indicates that this provision only states that nothing in these articles precludes treaty rules from becoming binding as customary rules, but it does not recognize such possibility – it merely does not preclude.[151]

Rather more support for the thesis that international organizations contribute to formation of general international law we finding in writings of publicists.

Degan points out that the practice of administrative organs in the name of the said organization within its own capacity is included in customary process. However, he maintains that this kind of practice (by administrative organs) of cannot affect rights and duties of states.[152]

Wolfke writes that "the role of the practice of international organizations as evidence of customary rules in the Court's jurisprudence is not limited to relations between the organizations and states. There is also no reason whatsoever for such a limitation. If we assume that the practice of organizations embraces all actions undertaken in virtue of their Statutes, not only by collective organs, but also by particular members or groups of members, it becomes clear that such practice may provide evidence for every kind of customary rule - that is, referring to relations between the organs of organizations, the organs and member-states, the organs and the members of the personnel, between individual organizations and even between individual member-states if they act in virtue of the Statute of the organization".[153]

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[150] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (21 March 1986).

[151] Report of the International Law Commission on the Work of its Thirty-Fourth Session. Yearbook of International Law Commission. 1982, Vol. II. P. 47.

[152] Degan V.D. Sources of International Law. The Hague: Martinus Nijhoff Publishers, 1997. P. 148.

[153] Wolfke K. Custom in Present International Law. Dordrecht: Martinus Nijhoff Publishers, 1993 (2nd ed.). P. 152.

Similarly, Mendelson states "that it is not just the practice of States which contributes to the development of customary rules. The practice of international organizations can do so too. To a varying extent, intergovernmental organizations participate in international relations in their own name, and not that of the members who constitute them. As such, they are subjects of international law who play their own part in the law-making process. For example, the United Nations sends military personnel to perform various functions in different parts of the world, and the European Union conducts external commercial relations in its own name. Their practice contributes to the law of war and of economic relations, respectively".[154]

International Law Association initially also concluded that international organizations may contribute to formation of customary international law:

"Many intergovernmental organizations are (to some extent at least) international legal persons in their own right, and are capable of performing acts which contribute to the formation of international law. For instance, in the *Reservations to the Genocide Convention case*,[155] the ICJ took into account the depositary practice of the UN Secretary-General, as well as that of national chancelleries; and the military activities of that organization can contribute to the formation of customary rules relating to conduct during armed conflicts".[156] Regrettably, it subsequently qualified its position by suggesting treating practice of international organizations as practice of States.[157]

The authoritative Oppenheim's International Law adopts a much better position (and wording):

". . . international organizations are themselves international persons. They *can in their own right give rise to practices which may in time acquire the character of customary law* or contribute to its development, there being nothing in Article 38 of the Statute of the International Court of Justice to restrict international custom to the practice of states only. However, the international personality imposes limits upon the areas of international law which their practices can directly affect".[158] (emphasis added)

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[154] Mendelson M. H. Formation of Customary International Law// Recueil des Cours. 1998, Vol. 272. P. 201.

[155] Reservations to the Genocide Convention. ICJ Reports, 1951. P. 15.

[156] International Law Association, Final Report of Committee on Formation of Customary (General) International Law – Statement of Principles Applicable to the Formation of General Customary International Law. London Conference, 2000. P. 19.

[157] Ibid.

[158] Oppenheim's International Law (Jennings Sir R., Watts Sir A. eds). London: Longman, 1992 (9th ed.). Vol. 1. P. 47.

Yet, however pleasing these statements are, they do not provide the rationale for these propositions. We submit that rationale is twofold.

First, it rests on the nature of customary international law – that law-makers of customary law are these persons whom the same customary law binds (or to use Virally's eloquent statement: the "essence of a customary rule lies in the fact that it arises from the conduct of those whom it binds");[159] as such, international organizations are included in the law-makers of customary international law.

Second, what sets international organizations apart from other subjects international whom custom also binds is the nature of international organizations' powers. International organizations derive their powers from States (whether these are delegations of powers, transfers of powers, or other[160]). As has been already pointed out (see Section 3.2 above), when States create new international person – in our case international organization – they don't restrain its international life within constituent treaty. If States endow international organizations with certain powers (in order to achieve certain goals), they clearly must intend that international organizations would be able to enjoy their powers in all spheres of legal validity, i.e. including customary international law. The conclusion that follows is that international organizations by the very nature of their powers possess competence to form customary international law. This is not to suggest that there is something inherent in the states that would preclude other subjects from contributing to formation of customary law or law-making in general. This is only to suggest that if States have competence to form customary international law (and beyond doubt they do), then, by the very nature of their powers derived from States, international organizations also possess the same competence.

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[159] Virally M. The Sources of International Law, in Manual of Public International Law (Sorensen M. ed). St. Martin's Press, 1968. P. 130.

[160] *See generally* Sarooshi D. International Organizations and Their Exercise of Sovereign Powers. Oxford University Press, 2005.

CONCLUSIONS

1. Article 38 of Statute of International Court of Justice provides a starting point for enquiry into law-making in international community. Yet, it in no way resembles written constitution of international community, and in no way lays down particularities of formation of customary international law.
2. Custom and general principles of law are formal source of international; treaties are not formal source of international law. Yet, classification into formal and other sources of international law is difficult to maintain; it is even doubtful whether the term "source of international law" is appropriate. If this distinction between formal and not formal sources of international is of any value, this value consists of preclusion of drawing analogy between competence of international organizations to conclude treaties and their competence to form customary international law.
3. The structure of international legal system does not provide any guidance on the secondary rules concerning the subjects possessing capacity to form customary international law. International legal system is more appropriately described as a set of customary rules (of which one is that gives validity to treaties). Therefore, one has to proceed by inductive approach to enquire on capacity of international organizations to form customary law.
4. The concept of sovereignty means many things, one of these meanings being independence of State – that possibility of imposing obligations only by free will of the State concerned; this is denied by the mere existence of treaties imposed in the aftermath of war whereby conquering States impose certain treaties on losing States without their free will.
5. Yet, there is nothing inherent in the State that would preclude law-making by other subjects of international law. Even better yet, as Verzijl suggests, "it would indeed, if it were possible, be better to remove the term sovereignty from the juristic vocabulary because it covers a series of homonyms that threaten to make any rational discussion of "sovereignty" as such a Babylonian confusion of tongues, and to leave it as a subject of speculation to legal philosophers, theologians or politicians".[161]
6. Customary international law (or custom, as opposed to mere usage) consists of two elements – objective (practice of States and international organizations) and

[161] Verzijl J. H. W. International Law in Historical Perspective. Leyden: A.W. Sijthoff, 1968. Vol. 1 - General Subjects. P. 265.

subjective. As regards the forms of practice, it is recognized that verbal acts count as evidence of practice. There is nothing inherent in either of two elements that would preclude international organizations from competent law-making.

7. Nature of customary law may be expressed as lawmaking by the persons who are themselves subject to the law created by their conduct. As such, competence of international organizations to form customary international law is absolutely justified.
8. By legal fiction, practice of international organizations is often considered as State practice. This is unhappy situation, because it disregards separate personality of international organizations and at the same time hardly makes ascertainment of customary international law any better.
9. It is well-established that international organizations can contribute to customary international law concerning their relations with States.
10. Apart from the very nature customary law, the nature of international organizations' powers leads to the conclusion that international organizations must possess competence to contribute to general customary international law (not only concerning their relations with States).
11. International organizations possess competence to form international customary law.

SUMMARY

International customary law is traditionally defined as general practice States accepted by them as law. That is, it is composed of two elements – (1) practice of states (so-called objective element), and (2) *opinio juris* (so-called subjective element, which according divergent views means either belief that State is conforming to existing law, or consent to be subject to emerging law).

The present thesis attempts to prove that international organizations may also contribute in their own name to formation of customary international law. It first attempts to establish the existence of secondary rules providing for law-making rules customary law – i.e. by defining subjects capable of forming customary law and establishing modalities. Having not found such rules either as separate set of rules or part of what could be called constitution of international community, it proceeds to prove that States don't have an exceptional competence in law-making in international community; the concept of sovereignty is analyzed, and it is concluded, that whatever sovereignty means, it has nothing to do with exclusive law-making competence of States.

The synopsis of customary international law is the provided. Most importantly, the thesis aims at ascertaining the nature of customary law and then argues that by the very nature of customary international law international organizations possess competence to contribute to formation of customary international law. Yet, this competence is confined by personality of international organizations which possess only those powers that States delegate to them. Nevertheless, the nature of international organizations powers is the second prong of the argument that international organizations possess competence of customary law formation.

SANTRAUKA

Tarptautinė paprotinė teisė paprastai apibūdinama kaip bendra valstybių praktika, kurią valstybės priima kaip teisę. Iš esmės, tarptautinę paprotinę teisę sudaro du elementai: (1) bendra valstybių praktika (objektyvus elementas), ir (2) *opinio juris* (subjektyvus elementas, kuris reiškia arba valstybių įsitikinimą, jog tam tikra praktika yra teisė, arba valstybių valią ar sutikimą kad tam tikra praktika taptų teise).

Šiame magistriniame darbe bandoma paneigti visuotinai priimą įsitikinimą, jog tik valstybės gali formuoti tarptautinę paprotinę teisę. Pirmiausia bandoma nustatyti ar tarptautinėje teisėje egzistuoja antrinės taisyklės nustatančios subjektų, galinčių formuoti paprotinę teisę, ratą ir paprotinės teisės formavimo konkrečias ypatybes. Priėjus prie išvados, jog tarptautinėje teisėje neegzistuoja tokios, magistrinio tezę bandoma pagrįsti remiantis tarptautinės paprotinės teisės prigimti. Tačiau prieš parodoma, jog valstybėse nėra nieko įgimto, kas užkirstų kelią kitiems tarptautinės teisės subjektams formuoti tarptautinę paprotinę teisę; suverenitetas, viena iš migločiausių tarptautinės teisės koncepcijų, neabejotinai neužkerta kelio kitiems subjektams prisidėti prie paprotinės teisės formavimo.

Magistriniame darbe prieinama išvados, jog paprotinės teisės esmė paprastai suprantama kaip tų subjektų praktika, kuriuos paprotinė teisė įpareigoja. Remiantis šiuo pagrindu, autorius įrodinėja, jog tai yra viena iš dviejų priežasčių kodėl tarptautinės organizacijos gali formuoti paprotinę teisę. Antra priežastis yra tarptautinių organizacijų galių, kurias jos įgauna iš valstybių, prigimtis.

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