Challenge of Customary International Law in The Recent Century

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Abstract: This article will analyze the customary international law in recent century. As we know customary law is a long established source of international law. Customary norms themselves are based on state practice and opinio juirs. By the recent growth, in the international system we are faced with conventions. But what about other sources of international law? I mean customary international law. We will focus on uncertainly around in international law and customary international law. This article seeks to delineate this uncertainly and explain its courses. This article wants to say that customary international law is still important and is still used to make progress International law.

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1-Introduction

For better or for worse the two long established sources of customary international law have been profoundly challenged in past few decades. These two elements, the consistent practice of states coupled with the determination (by the practicing state) that such practice is being undertaken out of legal obligation labeled opinio juris[1] are no longer hold in the high regard they were. Indeed, since the 1970, a wide range of newer non-traditional scholarship[2], has emerged arguing against a strict adherence to state practice and opiono juris in determining customary international law and advocating instead a more relaxed interpretive approach.

Within this vein, other scholars have gone further, arguing that widely ratified multilateral conventions or treaties which have established human rights prohibitions against genocide[3] and slavery actually from confirmation of customary international law binding upon all states, not just the signatories. Pushing back against this new movement, more, traditional-mined scholars have castigated its seeming attempt to create shortcut to the generation of international norms. The purpose of international law throughout the centuries has never been to better mankind. But rather has been to ensure a set of universally recognized and agreed upon rules which allow mankind to live in peas and order.[4]

2-State Practice

Let ask what is state practice? And talk about the nature of state practice. The first question, which is contentious, is the nature of state practice. We are not concerned here with deciding which precise events from state practice and which one has to ask oneself before deciding whether, for example, press statements are a form of state practice: what dose practice mean? Behind the apparent dichotomy of "acts" and "statements"[5] lies a more important distinction: that between one argument that sees practice as the exercise of right Clamed and the other that includes the claims themselves and thus blurs the border between the concepts of state practice and opinio juris. Some have devoted much more space to the mentioned questions that I intend to give them. For example how much and for how long the state practice is needed? [6]

In the North Sea Continental Shelf cases before the international court of justice (ICJ):

Although the passage of only a short period of time is not necessarily, or, of itself, a bar to the formation of a new rule of customary international low on the basis of what Was originally a purely conventional rule, an indispensable requirement would be what within the period in question, short through it might be, states whose interest are especially affected, it should have been both extensive and virtually uniform in the sense of the provision invoked … [7]

There is general acceptance among writers on this topic that is to say that in one form or another most jurists would rather think that a practice has become customary law [8] over another practice if it exhibited longer and more consistent usage by More states then a practice which had been in use for a shorter time, and with less repetition and generality than the first.[9]

3-Opinio juris

The concept of opinio juris is arguably the centrepiece of customary international law. At the heart of the debate lies an important conflict: on the one hand, customary law making seems by nature indirect and unintentional – on the other hand, law

making normally re quires some form of international activity, an act of will.

4-Problems of customary international law.

We noted to finding customary law. Finding customary law means know how the (Mentioned) law is formed. then we want to discuss the problems of customary international law. Customary law is not written and has no authoritative text, which has an inherent tiredness and whose meaning need only be extracted. Therefore, the application of customary law involves a recreation of its genesis: one need to show how it has come about and the process has been consistent whit the law making on custom. But some problems that we are faced with customary international law as the problems of international as well. International law does not seem to have a constitution which regulates the nature, foundation and international of sources. It is a pervading problem.

Some believe that there is no constitution of international law specifying when acts become law. we can neither a adequately know the rules of custom- formation nor how those rulers come about.[10]

The second issue to be considered is the duality of induction versus deduction in the approaches to international law.[11] All works of legal literature on customary law must find a method of stabilizing the findings of their research, and must have a set of criteria which determine whether those findings are valid. The criterion of the inductive method is the correspondence of the thesis developed by an author with the facts of international life. Authors who espouse that method will try to induce the law on customary law making from instances where customary. Law has been created in the past. A sort of state practice concerned not with rules of customary law, but with the way in which these rulers come about.

The criterion of the deductive method is an abstract affair. But we should know that all approaches have strengths and weaknesses. Inductions results immediately resemble provable. Facts, an empirical correspondence. Deduction has the benefit of internal logical consistency.

In some approaches, have focused on duality of norms and fact in international law, but we should mentioned that law is precisely rather than fact. It is not necessary that a description of reality unless everybody obeys the law, but a prescription for future behavior. The matter that we wanted to mention is that none. Consensual pattern is represented by the material element (by material element I mean state practice) and on the other hand, will and interest of the countries that believe the legal part of their practice (as we know the belief of countries is opinio juris). About this matter crux discuss those mentioned elements (state practice and opinio juris) as we will see: “We cannot automatically infer anything about state wills or beliefs – the presence or absence of custom – by looking at states external behavior. ”

The normative sense of behavior can be determined only once we first know the “internal aspect” – that is, how the state itself understand its conduct. … Doctrine about customary law is indeterminate because circular. It assumes behavior to be evidence of the opinio juris and latter to be evidence of which behavior is relevant as custom.

Another matter that we should mentioned and in my opinion is a very important Matter which is related to customary international law is that a few authors. See article 38 of international court of justice as an authoritative statement of the sources of international law.[12]

Authoritative statement here means (in my opinion) formal source.[13] of international law. Some describe formal source of international law in Order to describe authoritative statement as the norm which is the source both of validity and origin of new norms dependent upon that firs source.[14] those mentioned authors consequently state that (in the case of custom) article 38(1)(b) of the statute itself is the norm which gives all customary international law norms their validity, makes the international law in an admittedly important treaty defining the applicable law for an admittedly important, but nevertheless particular international tribunal.[15]

But when we focus on history of the mentioned article (I mean article 38), we find that this Article want to show the sources of the international law. So customs (international customs) are a source of international law. As a matter of fact if someone thinks that treaty (I mean international treaty is a higher source of international law and because nowadays we faced with treaties, he or she made a mistake in my opinion. The international court of justice statute defines customary international law in article 38(1)(b) as evidence of a general practice accepted as law. When we focus on the words “general practice accepted as law”, we find that two factors are mentioned in that sentence, first the general practice of states and second what states have accepted as law.[16]

5 - Issues related to customary international law

5-1- Codification of international customary law

Nowadays some international customary law are become treaty, I mean some customary international rulers now are articles of a treaty. For example we can address to some customary international rules related to law of the seas that

nowadays are some articles of the three conventions of the law of the seas. We can also mentioned that some customary rules of maritime law that are a part of maritime law of countries Article i(2) of additional protocol I mentioned that customary international law governs legal matters concerning armed conflict not covered by other agreement.(I mean protocol additional to the Geneva conventions of august 1949, and relating to the protection of victims of international armed conflicts [protocol I], 8 June 1977. Retrieved 30 may 2012)[17]

5-2- The opinion of international customary law about customary international law

The statue of the international court o justice as we mentioned that international custom as evidence of general practice as accepted as law (article 38 (1)(b)) of international court of justice incorporated in to the united nations charter 92. The international court of justice held in Nicaragua v. United States that the elements of an international customary law would be opinio juris which is then proven by exiting state practice. International court of justice have mentioned to customary international law but cautiously.[18] For example Alvarez in the case of North Sea Continental Shell mentioned that: "As a result of rapid changes in international law customs are going to be disappeared, so customary law that is mentioned many times in this case should be considered carefully".[19]

6- Customary international law in recent century

Nowadays countries turned to use contracts and custom last their previous importance. Because of rapid change in recent international law, customary international law and its structure cannot adapt to these rapid changes, but contracts can. But customary international law ignored and is still a source of international law.

7-Conclusion

Customary international law has a long term background in international law, and Article 38 of the statute of ICJ considered customs as a source of international law. But nowadays counties (especially new countries) choose contracts for their relations with other countries. However customs at international level and mutual level are still a source of international law, although contracts have a significant importance at the recent century.

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2 - Throughout this article the term non-traditional scholarship shall be employed to describe the turn toward reinter prating the traditional source of customary international law.

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