On the Issue of So-Called "Instant" Customs in International Law

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Abstract: The "so-called instant" international customs are sometimes singled out as a special type of international customary law. The author analyses the two basic cases in which such customs could possibly arise – the situation in which there is just a single unilateral act, accompanied by *opinio juris*, and the situation in which, reportedly, no practice is needed, due to general *opinio juris.* He observes that, although it looks tempting, the idea that customary rules of law may appear instantly is opposite to the very nature of any custom. On the other hand, any attempt to marginalize the general practice of the state as one of two key elements of international law customs threatens the whole concept of a custom in international law. In fact, the proponents of instant emergence of international legal practices confuse the customary rules of international law and other sources of international law. The author emphasizes that the ideas about 'instant' custom in international law harbor great opportunities of abuse, giving wide, yet also very slippery space to impose the will of some countries. This is especially because the universal international law customs bind all countries.

Keywords: "Instant" Customs; International Law; Sources of International Law

1. Introduction

For very obvious reasons, customary rules of law are the oldest sources of law in general, including international law. However, while in the domestic legal systems customs are mainly suppressed by written law, so that in many countries they are almost completely marginalized, in international law customary rules of law are not only still valid, but are also, together with treaties, the most important source of that law of our times. This has, among other things, been confirmed by Article 38/1/b of the Statute of the International Court of Justice.

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Much has always been written about them, particularly in relation to various specific problems. There are no systematic works that do not pay due attention to international law customs (e.g. Cassese, 2001, pp. 117-149; Shaw, 2008, pp. 72-92; Henderson, 2010, pp. 58-65; Krivokapić, 2017, pp. 133-138), while a number of monographs (e.g. D'Amato, 1971; Wolfke, 1983; Bederman, 2010; Lepard, 2010) and other works are dedicated to them.

It is generally accepted, and confirmed by the decisions of the International Court of Justice that an international law custom has two mandatory elements: 1) general practice, and 2) the awareness of legal obligation (*opinio juris sive necessitatis,* in short *opinio juris*).

These are the constituent elements of the rules of Customary International Law - without them it does not exist. The coexistence of these elements by nature is the result of a particular process, which, depending on the case, can be longer or shorter, but definitely requires a certain passage of time.

However, some views have emerged in theory that an international legal custom can occur instantly (the so-called instant customs).

2. "Instant" Customs

Generally speaking, in theory, "instant" international law customs refer to such customs in their broader and narrower sense.

Some use this term for "instant" international law customs *in the broader sense*, which refers to those customs that occur in a relatively short period of time, but not literally instantaneously. Others under "instant" customary rules of law imply such customs *in the narrow sense*, i.e. those which, according to them, really occur virtually instantaneously.

Since it there is no dispute that the length of time required for the appearance of customs is not of crucial importance, i.e. that it has taken centuries for the appearance of some, while others have appeared in only a few decades or even years, as for "instant" customs in a broader sense, there is actually nothing debatable. Actually, it is only a technical term which draws attention to those customary rules of law that have appeared very quickly, but not instantaneously.

In this way, only the so called "instant" international law customs in the narrow sense deserve attention. In the further text by 'instant' customs we shall imply only those customs.

In this regard, the basic question is: can international law customs actually occur practically immediately?

Some theoreticians believe that such customs are possible, supporting their belief by specific examples. Other theoreticians of legal science deny this possibility. Finally, there is a large number of legal authors who only recognize that some authors speak of "instant" customary rules of law, but they cautiously avoid engaging in the debate and clearly defining their personal view.

The original theory of "instant" international law customs represented the attitude that no long-standing practice is required for the existence of the customs, i.e. that *a single act* accepted by or at least not opposed by other countries *is sufficient*. Some states participate actively in the development of a customary rule of law - by doing, adopting certain acts, while others passively by not opposing the respective practice.

Another approach, which, admittedly, does not refer explicitly to instant customs, is based on the fact that not only general, but actually no practice is required, *but that it is enough to determine that in most countries there is an awareness of the legal obligation* of the rule in question.

According to the above mentioned, in the first case, the request for the existence of a sufficiently long general practice, as a necessary element for the emergence of international law custom, is rejected, but it is required that the existence of at least one act that other states have accepted can be determined. In the second case, the request that there should be some kind of practice is completely abandoned, and only the subjective element is insisted on (the awareness of the legal obligation of the particular rule the existence of which can be established in most countries). In other words, according to this view, the international law custom could occur without any practice, even without any substantive act, as soon as it has been established that in most countries there is an awareness of the legal obligation of certain behavior.

Yet, it is obvious that the essential difference between these views is non-existent. The idea typical of both concepts is that an international law custom can appear almost immediately, instantaneously.

3. The Ways in which "Instant" International Law Customs Could Appear in Theory

Generally speaking, the rules of international customary law, including possible "instant" rules, may appear: 1) spontaneously (from unilateral acts of countries), 2) from international agreements, 3) from the decisions of international organizations and international conferences, and 4) from court decisions.

If we closely examine each of these situations, we can quite easily make sure that, if they are possible at all, "instant" customs can appear only 1) on the basis of *one-time* unilateral acts of states, or 2) based on the decisions of international organizations, that is. international conferences.

Namely, the customs *that appear spontaneously* (classical way, which is becoming less frequent in our time) arise when a state does something (a unilateral act), or the same thing is done at the same time by two or more states, and then that is repeated several times by other states, so that finally the belief matures that the behavior in question in such cases is legally obligatory. What matters here is that *customs which arise spontaneously cannot occur instantly!* General practice and spontaneous appearance, and then the manifestation of *opinio juris* necessarily require a certain passage of time. Whether it is a century, two or more, or just the period of 20 to 30 years is irrelevant. Instant customary rules of law simply cannot arise spontaneously.

Customs *arising from treaties* also cannot occur instantly! It is first necessary for a treaty to come into force, and then include in its membership a large enough number of states. In practice, it necessarily requires the passage of time, which is usually measured by years, even decades! The very coming into force of an agreement logically cannot be immediate, having in mind the long and complicated procedure of treaty conclusion and the fact that the expression of consent to be bound by the treaty requires a certain passage of time. Then, only after the treaty has entered into force, can we talk about the fact that its solutions are (perhaps) accepted in practice also by the states that are not parties to the treaty. Be it either way – both certain wide enough practice and the passage of time are inevitable. In this regard, *instant customs* cannot appear in this way.

When it comes to *court decisions*, it is well known that in international law, a court judgment is valid only between the parties in the dispute (*sententia facit jus inter partes*), and it cannot be the basis of objective law, including customary

international law. It is true that court decisions are evidence that certain international law custom exists - but not due to the court decision, but objectively, with the court judgment only confirming that. However, a court judgment may affect the creation of a custom, but only if it is followed by appropriate practice, followed by the belief of states on legal obligation of such practice. Thus, court judgment does not create international law custom (these are two different legal sources), but can serve as an inspiration and a foundation for the appearance of such a custom - provided that upon making a judgment both elements necessary for the appearance of international law custom are fulfilled (general practice and *opinio juris*).

A good example is the Advisory Opinion of the International Court of Justice concerning the reservations about the Convention on the Prevention and Punishment of the Crime of Genocide (1949), in which, contrary to what had previously existed in theory and practice, the Court concluded that, even when they are not specifically stipulated by multilateral international agreement, the reservations may be permitted under certain circumstances, and that they do not necessary need to be accepted by all contracting parties (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide,* Advisory Opinion of May 28th, 1951, pp. 29-30). This attitude was then adopted by states, and a little later it was incorporated into the Vienna Convention on the Law of Treaties (1969). Therefore, it is a customary rule which has developed in practice on the basis of the above mentioned decision of the Court. However, the decision itself was not a source of the law. Let us remind the reader, it was not even a judgment, but only an advisory opinion. But even if it had been a judgment, it would not have been suitable in itself to create a new law rule.

In any case, a court decision by itself does not create an international law custom, and with that, it does not create the so-called "instant" custom either.

Thus it follows that, if possible at all, an "instant" custom may occur as a result of:

1) *one* unilateral act of a state which has immediately been accepted as legally binding or has not been opposed to by other states. Essentially the same situation is with the common one-time act of two or more states, which has immediately been accepted by other states;[1]

[1] Although there are several of them, the related states in this case act as a single party. The same logic is present here which suggests that the international agreement between two military alliances

2) the decisions of an international organization or an international conference reached by majority vote, or even unanimously.

Indeed, those who advocate the idea of the possibility of the existence of instant customs usually talk about them in relation to two basic situations:

- when we talk about one act, a kind of behavior (procedure) of one or more states, which is immediately followed by the manifestation of *opinio juris* of the majority of states. Therefore, it may be a unilateral act of a state or a single act of several states acting as the same party, which has immediately been confirmed by unambiguous manifestation of the awareness of the legal obligation of such behavior. Such awareness should come at least from those states to which the act in question can be attributed (then the so-called local or particulate customs would appear) but can also come from other states (in which case a regional or even universal custom would be created). As typical, if not the only example of this kind in literature, the example of the launch of the first artificial satellite by the USSR in 1957 is given, when, after the Soviet Union's unilateral act, other states consented to the freedom of conquest and exploration of space by not protesting, although the "Sputnik 1" flew over their territories;

- when there is convincingly enough manifested *opinio juris*, although there is no act of general practice. As the main example certain resolutions of the UN General Assembly are given.

Therefore, in the first case, there is a certain practice, although of only one or a small circle of states, and one-time practice on top of it. Even the proponents of this view accept that we could speak of an "instant" international law custom only if the mentioned practice is followed by the simultaneous reaction of a group or even majority of states. That reaction is most often reflected in the refraining from protesting. In the second case there is no practice, but rather the publicly manifested will of most states is in question. Some theorists, for various reasons, believe that in these cases the so-called "instant" customary law rules arise.

Let us consider both situations mentioned in more detail.

(each of which involves several states) should be treated as a bilateral, and not a multilateral agreement.

4. A Unilateral Act of the Country as a Possible Source of "Instant" Customs

Unilateral acts of countries can otherwise be a source of international law only in exceptional circumstances. Even then they are so as unilateral acts of states, i.e. a special kind of the source of international law, different from international law customs (Krivokapić, 2017, pp. 171-181). It is true that customary rules that arise spontaneously often have a unilateral act of a particular country as a precedent. But a customary rule of law occurs only when general practice has developed over time (i.e. similar behavior of other states), which is, on top of it, confirmed by the awareness of the legal obligation to the respective behavior. However, all this involves the passage of time.

Related with this is also the question: can an international law custom appear on the basis of *a unilateral act* of a state which has immediately been accepted by or at least not opposed to by other states? Because only that could be called an "instant" custom.

First we shall discuss this problem from a general position, and then we shall look at a specific example by which the idea of "instant" international law customs is usually explained and defended – the case of launching the first artificial Earth's satellite.

First of all, by its very nature a customary rule of law cannot appear in a moment. Certain practice, longer or shorter, is its unavoidable part. Not one act, but practice, therefore, *more (several) essentially identical acts* taken one after another in similar situations. Different reasoning is contrary to the very idea of a custom. After all, the very word "custom" is shorter term for "customary behaviour", i.e. the one that takes some time.

No less important problem is the existence in a given case of the awareness of legal obligation. Can such awareness be created and manifested instantly? Or at least in a very short interval? Hardly. And when it comes to the universal level, such a thing is actually impossible - it is clear that it is unrealistic for all states to express such awareness without delay (at the same time).[1]

[1] And otherwise, with regular international law customs, those that appear over a longer period of time, it is often debatable whether such awareness exists. Therefore, this awareness must be proved, for which purpose usually diplomatic correspondence or practice of international courts are used. It is

What has been said about expressing awareness of legal obligation of a certain custom referred to the *active* expression of such awareness. However, since, generally speaking, international law custom can occur by refraining from acting, the question is whether an "instant" custom can arise instantly – if a state would do something, while other states thereby would not protest against it?

We are convinced that the answer to this question must be negative.

In fact, although it is not disputed that international legal custom can occur by refraining from acting, an important condition is the requirement that states refrain from acting exactly because they are convinced that it (refraining) represents their legal obligation. After all, this was confirmed 90 years ago by the Permanent Court of International Justice in the famous *Case of the S.S. „Lotus"* (1927).

In other words, it is required that refraining from acting is motivated by an awareness of the legal obligation of such behavior. More specifically, in the "Lotus" case the Court accepted the claims of France that examples show that the states in similar cases refrained from exercising their criminal jurisdiction, but at the same time it noted that the states did not feel bound to act that way, and that such an international custom could be talked about only on condition that the said refraining of states was based on their awareness that they are obliged to refrain. Accordingly, the Court underlined that one can speak of an international custom also in the case of refraining (i.e., of a custom that was created by refraining from acting), but only if it is motivated by an awareness of the obligation to refrain (*opinio juris sive necessitatis*).

Therefore, in order to claim that a universal "instant custom" has been formed by refraining from acting, it should first be proven that all members of the international legal community have refrained from acting because they have been convinced that such behavior represents their legal obligation. Realistically speaking, something like that is impossible to prove.

It should particularly be emphasized that the absence of immediate protest of other members of the international law community does not necessarily mean tacit agreement. International relationships are very complex and diverse, it is not always clear to the states, especially not immediately, what has just happened with all the important facts, especially with all the consequences of an event in question.

obvious that in reality it would be impossible to prove that such awareness has appeared instantaneously.

Their governments sometimes fail to see the importance of specific acts of other entities, either because they are not sufficiently informed about them, because they are preoccupied with other problems, or because at first they are under the impression that these acts do not affect their vital interests. Therefore, they usually need some time to study the new situation and take a stand, possibly consulting the governments of other states before that. In addition, countries are often one way or another objectively prevented from expressing their view immediately. After all, the events and relationships in the international sphere are so numerous and diverse that it is not realistic to expect every state to protest every time when something seems incorrect or suspicious to it.

To this we should add the fact that the reasoning that would require immediate adverse reactions (protests) of other members of the international community, in order to prevent the appearance of the so-called "instant" customs, hides a serious threat. If, by any chance, it were adopted, it would lead to complete chaos and lawlessness. This is because an interpretation could be imposed, especially by the great powers, that if the states are not currently protesting against certain behavior, it allows a new "instant" custom to appear. Having in mind that universal international law customs are mandatory for all states, it is clear that the possibilities of abuse would be numerous.

Finally, we must return to the first element of an international law custom – the request for general practice to exist. The very idea that certain, the so-called "instant customs" can be formed in such a way when certain unilateral act of a state becomes accepted by other states (they show their *opinion juris*) is a departure from the classical idea on international law customs. But even then elementary logic would dictate that these, other states express their opinion unambiguously, actively. The problems related with it have already been discussed. In this regard, the idea that a new custom is formed when *only one* state takes a certain (only one) act, and *all other states* except that one, are not only passive participants, but by their lack of protest they enable the custom to be created immediately, seems quite absurd![1]

Now is the time to deal with a concrete example.

[1] In other cases as well a custom may exceptionally arise by a unilateral action of a state, like, for example, in the case of the so-called rules on historic bays. However, there is a long-standing practice there of refraining of other states as a proof of their non-opposition.

A part of the doctrine that supports the idea of "instant" international law customs cites the launch of the first artificial Earth's satellite as a typical (if not the only) example of such a custom. They believe that the Customary Law of Freedom of Space (space exploration and conquest) was created when the then Soviet Union launched the first artificial satellite (Sputnik 1, on October 4, 1957) with no state having protested because of its passage over its territory (i.e. through the space which is, according to the classical international law, generally under the sovereignty of the state in question). The protests did not follow either when only a month later another Soviet satellite was launched, or when shortly after that the launch of the first American artificial satellite followed.

Therefore, the fact that something was done that was not in accordance with the then applicable international law, and that other states did not object to it has led some theoreticians to conclude that that marked the emergence of a new international legal custom (Cheng, 1965). Or to make it even simpler: it turns out that one state (the USSR) did something contrary to the then applicable international law, and that other states *immediately* accepted it as a new norm of customary international law. Hence the new 'instant' international law custom. But - is it really so?

Contrary to the position of a number of authors (e.g. Cassese, 2001, pp. 3, 76-78; Swaine, 2002, p. 9) we believe that in the above mentioned case we can talk about the emergence of a new custom (that the universe is the common good) only after the adoption of the General Assembly relevant resolutions that made it indisputable. However, these resolutions were adopted really quickly, but still after a certain period of time - after the launch of not only the first, but also the next few satellites. Only by these resolutions did states express their legal conviction of the freedom of space, which means that it was only then that the appropriate customary rule of law was definitely established.

To clarify this point we should remind the reader when exactly the UN General Assembly resolutions were adopted by which member states expressed their legal conviction (*opinio juris*) on the freedom of exploration and use of space (on the freedom of space flights), i.e. on the fact that space is the common good (*res communis omnius*).

The first of these, the 1348 Resolution was adopted on December 13, 1958, which means more than a year after the launch of the first (Sputnik *1*, October 4, 1957) but also the second (Sputnik 2, November 3, 1957) Soviet satellites and almost a

year after the launch of the first U.S. satellite (Explorer 1, January 31, 1958)! All other resolutions were adopted even later - the second in a row, the 1472 Resolution was adopted on December 12, 1959, and all others (the 1721/1961, 1802/1962, 1962/1963 resolutions, etc.) only in 1961, and the subsequent years.

Thus, even if we assume that the *opinio juris* of UN members is expressed in the first of these resolutions (the 1348/1958 Resolution) the fact is that it happened more than a year after the launch of the first two satellites. In other words, it did not happen instantly, even within a few days or months. Therefore, we cannot talk about an "instant" custom. Essentially, there is the passage of time. It is not so important whether it is a year, 10 years or a century.[1]

With all of the above said, another element draws our attention. Even if we completely ignore the question of the length of time from the launch of the first satellite (a unilateral act) until the adoption of the first of the UN General Assembly resolution (*opinio juris*), there remains a principle problem. The question is whether the mentioned resolutions truly represented evidence of the new universal international law custom (*opinio juris* of all states of the world) when it is known that in 1958 there were only 82 member states in this world organization (due to the Cold War division of the world many then existing states were accepted in the UN membership only several years later).

In this way, even in this case we are not talking about a true 'instant' custom, in any case not of an "instant" custom in its narrow sense. The international law custom of the freedom of space has been created very quickly, but certainly not instantly. The same is true for other customs that have appeared in a very short period of time (For interesting considerations regarding the so-called instant customs, including the critical approach[2].).

[1] On the other hand, it must be admitted that in the present case general *active* practice was missing. Then, and much later, only the two mentioned superpowers were able to launch satellites. All other states participated *passively*, not objecting to that. However, it could be said that these (other) states participated in some sense even actively - from the moment they publicly expressed their support for the conquest of space.

[2] See in (Guzman, 2005. pp. 157-159; Petersen, 2008, pp. 281-283; Scharf, 2014, pp. 305-341).

5. Decisions of International Organizations as a Possible Source of "Instant" Customs

The second approach, which is reduced to the thesis of the existence of "instant" customs, is related to the idea of a number of authors, known as the so-called "non-traditionalists", that in our time only a mental element (*opinio juris*) is sufficient for the development of an international law custom, without the existence of the established general practice, and finally, even without the existence of any prior act (i.e. any practice).

To put it simply, they start from the fact that the international community is already organized enough and conclude that if an agreement is reached in a representative international organization, primarily within the OUN, in which practically all modern states are represented, this results in an "instant" custom. In other words, according to this approach, "instant" international law customs can occur by having the UN General Assembly adopt a particular decision by vast majority. This is because such a decision would mean unambiguous expression of *opinio juris* of member states, meaning the vast majority of the states around the world. Thus, the UN General Assembly resolution would create a new customary rule of law, in a moment, even without previous general practice.

The authors who support this view mostly relate to the issues in the field of human rights law, i.e. humanitarian law. The practical consequence is that if this view were accepted, the decision in question would be (as a universal international customary law) mandatory for all states, even those who voted against it, and also for the non-member states of the UN. The basic idea is that this would do a lot to improve human rights in the world.

However, this approach is not viable.

There is no doubt that the customary rule of law may appear on the basis of certain decisions of the main bodies of the most important international organizations, primarily on the basis of the UN General Assembly resolutions.

However, despite the fact that they often have great moral and political power, especially if they are adopted by a majority of votes, most of these decisions are not suitable by their nature and content to create any kind of legal obligation, including that of customary law. In reality, they are usually recommendations addressed to member states and other entities, but not legally binding acts.

Here it is useful to underline the difference between those decisions of international organizations, which by themselves have legally binding force and other decisions.

If the relevant body of the international organization is empowered by the statute or the agreement on the organization establishment to make binding decisions, the situation is clear - it is a decision (a unilateral act) of the organization of the binding character. As such, the decision is mandatory for the organization members, but not for non-members. On the other hand, the rules contained in that decision may over time develop into customary law, but they are not a part of the customary law by themselves until the required conditions for the appearance of international law custom are met.

Thus, for example, there is more or less no doubt in the doctrine that the decisions of the Universal Declaration of Human Rights (1948) evolved into customary international law. But this happened only in the following decades, when the countries developed the appropriate practice by which they confirmed their allegiance to this document and its decisions. This practice was developed both internally and internationally. More precisely, not only that no country contested the Declaration, but many integrated its decisions into their constitution or referred to the Declaration in their constitution. At the same time, the decisions of the Declaration have been confirmed and further developed at international levels, both at the universal (International Covenant on Human Rights in 1966, as well as a series of other documents) and regional level (European Convention on Human Rights, 1950, American Convention on Human Rights 1969, etc.).

When it comes to the decisions which are not binding by themselves, even if all members of the organization voted for the decision, that still would not mean that the new customary rule of law has been created. This applies to the decisions of the UN General Assembly as the world's most important organization which includes in its membership almost all states of the world. Even assuming that we can accept that the decision reached by vast majority of votes (or unanimously) proves the existence of *opinio juris*, such a decision can only serve as a basis (the first step) for the appearance of a customary rule of law. This is so because the rule will be formed only later, when the required practice develops, i.e. when the existence of the second, material element of international law custom is confirmed.

Otherwise, every decision taken unanimously could be understood as a new customary rule. But then difference between the decision of international organizations and customary rules of law would be completely lost. And these are

quite different things, both by their nature, their role, and the scope of subjects that are bound by them.

On the other hand, if we accepted the approach presented above, the whole new set of problems would arise. For example, what about the General Assembly decisions voted by a huge majority, but not by all member states? Would a custom be formed then as well? Or, what if, for example, all members have voted for it except, say 2-3 permanent members of the Security Council? To what extent could such a decision function in practice, especially in the case of particularly important issues?

Let us assume that the UN General Assembly has reached a decision by a majority of votes (e.g. 95%) that states are obliged to disarm completely within a year. Does this mean that by this single decision a new customary rule of law has been created? Of course not!

A customary rule cannot occur without the proper practice. In the given example, we must ask ourselves what will happen if, after the period of a year (the time in which countries should disarm) no country fulfills the undertaken commitment? Does this mean that every country has violated a customary norm of international law? Or that a new norm has been created, the opposite one according to which countries have the right to be armed? The issue is actually very simple. In the given hypothetical example, the decision has been made (and violated, which is of less interest for us here), but no new international legal custom has actually appeared. We could talk about it only if we found that most states do indeed respect the mentioned rule, thus creating the necessary general practice. But it takes time. Therefore, in any case, an "instant" custom cannot appear in this way.

The following speculation testifies about the absurdity of the idea that a customary rule may appear instantly, upon the decision of the General Assembly. For example, what if, in the above fictitious case, all states of the world except for example the U.S., Russia and China voted for a decision on disarmament? Or even just one of them? For example, the U.S.? Would the states that voted for the decision really be willing to disarm, aware of the fact that one superpower will not do that? In the relationship with that superpower, would they really rely on the fact that it violates some sort of newly established customary law? The answer is imposed by itself.

According to the expressed, even if a certain resolution which was adopted by a large, and sufficiently representative majority on top of it, determines that something represents the law, such a resolution can only be taken as a piece of

evidence that the relevant customary international rule of law rally exists. However, by itself (even if it determines the existence of a rule of law) it does not create customary international law. It especially does not create it immediately! It will be created only if it is proved that with the resolution (which can be taken as evidence of *opinio juris*) there is a corresponding general practice. And that practice requires specific passage of time.

All of the above said is more or less true also for the decisions made at international conferences. Thus, for example, the Final Act of the Conference on Security and Cooperation in Europe (Helsinki, 1975) undoubtedly represents the *opinio juris* of all participating members on what the basic principles of general international law are, but in itself it did not create any new customary rule of law.

After all, also the International Court of Justice pointed out (to tell the truth not on 'instant customs', but rather about the relation between treaties and customary rules of law) that for the existence of international legal custom it is not enough to establish the existence of *opinio juris* of states, but that this awareness of legal obligation must be confirmed by appropriate practice (*Case Concerning Military and Paramilitary Activities in and against Nicaragua,* Judgement 27 June 1986; Charlesworth, 1987).

6. Conclusion

In short, we need to agree with the general view of those who notice that the articulated obligation without practice is nothing more than rhetoric, while the practice of states without *opinio juris* is just a simple custom (Swaine, 2002, p. 7). In this respect, if there are no customs without general practice, it is more difficult to imagine that it can (without general practice) occur instantly!

At first sight, the idea that the customary rules of law can occur instantly looks tempting. That would considerably accelerate the legislative process in the international community. And indeed, if a state does something, and others do not protest or, what is more, if the vast majority of states declare that they consider something mandatory, why wouldn't we think that a new custom has occurred instantly?

Although we have already pointed out the most important issues, it does not hurt to repeat some of them.

First of all, the idea of "instant", "immediate" customs is contrary to the very nature of any, especially legal custom. "Instantly" and "customary" simply cannot go together hand by hand. Certain behavior by its nature has to take some time otherwise it is not a custom.

Furthermore, the customary rule of law exists, and it is confirmed by the numerous decisions of the International Court of Justice, only if at the same time there are present both its constituent elements: 1) general practice, and 2) the awareness of legal obligation. The coexistence of these two elements is a result of a process, therefore it cannot be an instantaneous phenomenon.

Due to the attempts to reduce everything to the *opinio juris*, it is enough to notice that any attempt to marginalize general practice of states as a key element of customs threatens the whole concept of a custom in international law. Ignoring general practice would mean complete denial of customs as such, i.e. their replacement with other sources of international law (treaties, decisions of international organizations), which means with the legislative norms (Baker, 2010, pp. 180-184; Simma, Alston, 1989, pp. 88-100; Weil, 1983, pp. 425-426). And that just is not in accordance with the applicable international law.

In fact, those authors who talk about the instant emergence of a new international law custom only by the adoption of a decision of an international organization body, confuse the two very different sources of international law - international law customs and the decisions (unilateral acts) of international organizations. The first are international law customs, with necessary elements for their appearance and existence, and the second refers to the question whether and when the decisions of international organizations are the sources of international law with binding force by themselves. These are two different things. To the extent in which, in accordance with the processes of even closer connection of various parts of the world, the decisions of international organizations increasingly gain legally binding force, they will be imposed as increasingly important sources of international law by themselves. But they have an individual value even now. There is no need to "put" them under international legal custom, and especially to create the idea that the very act of adopting specific resolution in the UN General Assembly creates an "instant" custom.

In fact, various ideas on instant customs hide unimaginable possibilities of abuse, i.e. wide and at the same time very slippery space for the imposition of the will of individual states.

If we start from the fact that, generally speaking, universal international customs are the only sources of international law that are binding for all states, even those that did not participate in their creation, it will be easier for us to understand the potential danger of the misuse of this institute.

Once formed, the universal custom is mandatory for all. Therefore, if we want to impose a decision (and we are politically, militarily, and economically powerful enough to do that) in the field of law, it is enough to declare something a universal international legal custom. In this respect, the problem arises how to "push" a particular decision as a universal international law custom, in a situation when for the existence of such a custom it necessary to have at the same time both general practice and the awareness of legal obligation. And this is difficult to achieve quickly. In other words, even the most powerful states, i.e. groups of states cannot impose their interests on others in this way, or at least they cannot do it instantly.

However, if we start from the premise that there are "instant" customs too, those that appear through a kind of shortened procedure, instantly, we get the impression that it is relatively easy to reach the desired goal, which is to declare certain decisions mandatory for all countries - regardless of their actual will.

According to the above said, "instant" customs cannot exist for many reasons. However, if we want international law to develop faster and to be mandatory for all countries, the right path is to empower the competent bodies of the most important international organizations to reach legally binding decisions on a much wider range of issues than is the case today. But such a decision can be made only with the consent of all interested states.

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