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PARTICIPATION OF THE NONCLASSICAL SUBJECTS OF INTERNATIONAL LAW IN LAW-MAKING AND LAW-ENFORCEMENT

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PARTICIPATION OF THE NONCLASSICAL SUBJECTS OF INTERNATIONAL LAW IN LAW-MAKING AND LAW-ENFORCEMENT

Alona MANYK

Abstract

According to the current understanding of international law as a "living" law is analyzed inextricable link between the process of law-making and law-enforcement of modern international law. The problem of law-making and law-enforcement of international "living" law is closely linked to the actual problem of the subject's composition of modern international relations. Today on the international scene more and more active participants become international organizations, transnational companies, international justice authorities and a number of other entities which are directly involved in law-making and law-enforcement during the implementation of their own international legal personality instead states as the primary subject of international law.

Moving of the main function in law-making of the international law from the states to other entities is caused by the needs of the subjects in specific international relationships that require from modern international law rapid adoption of laws, quality of response on urgent needs and effectiveness of their enforcement. According to the changes in the subject's composition of law-making, there are also changes in the enforcement process, which are characterized in a "living" international law by a higher percent of efficiency compared with the classic law-enforcement on the basis of positive law.

Modern trends in law-making and law-enforcement are increasingly proving that international law of the global community is the "living" law and naturally-legal vision of international legal regulation, that is dominant in modern international law, should comply or at least not denied by the positive international law.

Keywords:

law-making, law-enforcement, non-classical subjects of international law, “living” law, international law.

Introduction

The current state of development of the international community requires effective and rapid changes in the legal regulation in accordance with the needs. The modern doctrine of international law, which considers international law as “living law”, departs from the classical understanding of the formation of international norms only through the harmonization of the will of states, which once again confirms the concept of “living” law in the theory of international law, because it meant the main role in the formation of norms precisely in harmony with the will of social unions, not the normative prescriptions of states.

One of the theoretical problems of contemporary international law, which has many disputes and unresolved issues, both theoretical and practical, is the uncertainty of the conditions and components of the process of international law-making.

The problem of law-making and law-enforcement of international “living” law is closely linked to the actual problem of the subject structure of modern international relations. Today, in the international arena, more and more active participants become not the states, as the primary subject of international law, but international organizations, multinational companies, bodies of international justice and a number of others who are directly involved in the law-making and law enforcement during the implementation of their international legal personality. The expansion of the circle of subjects of international legal relations objectively becomes the reason for the expansion of the circle of subjects of international law-making and, accordingly, the acquisition of qualitatively new features – “living” law by classical sources of international law and the emergence of new forms of expression of the norms of international legal regulation.

Theoretical Background

The main issues of participation of the nonclassical subjects of international law in law-making and law-enforcement were revealed by O. Butkevych, E. Ehrlich, L. Henkin, O. Kyivets, H. Lauterpacht, I. Lukashuk, O. Merezhko, E. Nys, A. Smbatyan, G. Tunkin and others.

Argument of paper

Today in the field of international legal science and practice the list of sources of international law remains controversial, which is explained by the fact that, unfortunately, there is a lack of a document that clearly identifies sources of international law and enshrined in Art. 38 of the Charter of the United Nations [1] - almost the only normative list of sources - has long been in need of a reboot, including a reassessment, rethinking the hierarchy of sources of international law. The provision of this norm is usually perceived as establishing a list of sources of international law, but this, of course, is not a compulsory list, rather it is a kind of contractual, starting point in considering the issue of sources of international law in the absence of a better one.

Taking into account the dynamics of the development of international law, in international legal practice often poses a question about other sources: resolutions of international organizations and conferences; decisions of international judicial institutions; soft law, unilateral acts and other acts. Speaking about the list of sources of international law, I would like to note that the modern international legal scientific doctrine has long gone beyond the two-sidedness of international law and gives the features of the source of law a variety of external forms of expression. Exiting the limits of the classical international law-making in the framework of the "international treaty - international custom", indicates a new stage in international law-making with the participation of a large number of non-state actors. Therefore, we have to study the process of law-making, and, accordingly, law-enforcement in their inextricable relationship and not by the types of sources, but in accordance with the subject of such processes.

The transition of the main function in the law-making of the norms of international law from the states to other subjects is due to the needs of the subjects themselves of specific international legal relations,

which require from the modern rules of international law the speed of adoption, the quality of responding to urgent needs, and the effectiveness of their enforcement. This vision is almost absolute in the doctrine of international law, in particular, G. Tunkin points out that “the decisions of the International Court of Justice are part of the process of rule-making as part of international practice in the case of the statement of the existence of norms of international law or their interpretation” [2]. The judge of the International Court of Justice, H. Lauterpacht, whose contribution to the development of the doctrine of international judicial lawmaking [3] can not be overestimated, clearly justifies that “in interpreting and applying specific rules of law, the Court does not act as a mechanical machine completely separated from the social and political realities of the international community. In each case, he applies a creative approach, relying on the fullness of international law and the needs of the international community ... since judicial activity is nothing else than lawmaking in concreto ...” [4]. H. Lauterpacht noted that “when applying the necessary abstract norm in relation to a particular dispute, they create a legal norm for a separate dispute submitted to their consideration. The real development of law in society lies that in the process of crystallization of the abstract rule of law ... in international law, judicial law-making is an important element in the resolution of disputes through the development and adaptation of the rights of peoples in the framework of existing law to the new conditions of international life by means of impartial judicial interpretation and argumentation” [5].

Unquestioningly, that exactly the bodies of international justice have the leading role in the allocation of the features of “living” law of classical sources of international law. Decisions of international justice bodies are gradually becoming an indispensable tool for regulating international relations and developing law.

Judicial law-making has always been carried out within the framework of international justice and is possible only in connection with the consideration of specific disputes. The latter is a fundamental difference from the lawmaking of legislative bodies, for which law-making is the main activity. The need for lawmaking arises only after an assessment of the objective need in a legal regulation. The bodies of international justice resort to law-making in situations when, for example, existing legal norms are outdated and there is a need for their

adaptation to changed international conditions, or when, in order to resolve a dispute, it is necessary to fill a gap in the law, or when a legal norm or principle are too abstract and in order to resolve the dispute it is necessary to specify them for application to the relevant factual circumstances under consideration.

Law-making of international justice bodies can be manifested in the change of existing norms and the creation of new legal norms, principles, doctrines, presumptions. It introduces into the existing international law a novelty that corresponds to the realities of international relations and corresponds to the interests of its subjects. Bodies of international justice by their decisions either give impetus to the formation, or even complete the process of formation of custom-legal norms and general principles of law.

The need of judicial law-making is especially great in cases where the bodies of international justice are formed in areas where there was no mechanism for settling disputes before, or such a body is created simultaneously with the agreement of the states of the new treaty-legal regime. Exactly this role was played by arbitrary groups that considered disputes under the GATT. Law-making has become one of the main or, at least, an indispensable characteristic of MTTCI's activities. In fact, the tribunal has provided such a necessary impetus to the development of international criminal law.

In fact, bodies of international justice are the platforms for the progressive development of international public law.

International organizations - one of the most dynamic institutes of human society, characterized by adaptability to the realities of the process of international cooperation, in which they carry out their own functional load [6].

Recognition by international organizations the quality of the subject of international law-making is primarily due to the recognition of international organizations by subjects of international law.

At the present stage of development of international law, international organizations are the main subjects of the creation of "soft" law, which is a significant part of the system of norms of "living" international law. At the same time there is a steady tendency of increasing the number of "soft" norms, which according to their nature, functions, which are they perform, and place in the system, are legal

norms that contain the rights and obligations of the states, formulated in some other way than in the “firm” norms of international law.

By analyzing the decisions of international organizations, it is safe to say that they are a separate source of consolidation of the rights and obligations of subjects of international law, despite the fact that this source is also not included in the so-called list of sources of art. 38 of the Statute of the International Court of Justice.

Quite often, through the using of decisions of international organizations as an international legal regulator, they are trying to regulate new social relations, which, as a rule were not generally known to international law before that. A classic illustration of this statement is the history of the formation of space law. ^[P]_{SEP}Firstly about the necessity of international legal regulation of using of outer space began immediately after the USSR launched an artificial earth satellite in 1957. In 1959, the UN General Assembly adopted Resolution 1472 (XIV) “International Cooperation in the Sphere of the Use of Outer Space”, in 1961 - Resolution 1721 (XVI) “International Cooperation on the Use of Outer Space for Peaceful Purposes”. ^[P]_{SEP}The basis of the whole industry was, nevertheless, the first resolution adopted on this issue, where it was determined that the study and use of outer space is for the benefit of all mankind, and that international law, including the UN Charter, extends to outer space and celestial bodies, and they can not be assigned by any state. ^[P]_{SEP}That's why on these same principles was developed the Treaty on the legal principles of the state's activities for the exploration and use of outer space, including the moon and other celestial bodies (Resolution (XXI). The history of international law does not recognize the case of such a rapid development and the formation of the international legal field. ^[P]_{SEP}And it is the ease of decision-making by an international organization, in comparison with an international treaty, and even more an international custom, that allowed this industry to develop at an extremely fast pace [7]. This example provides the basis for determining the decision of the international organization as a dynamic source of international law.

The process of enforcement in accordance with the concept of “living” law, as seen, develops in two directions. The first is within the framework of the work of the bodies of international justice in the process of evolutionary interpretation of the norms of solid law, which receive a qualitatively new color in accordance with the current realities

and needs of the global community. The second direction is implementation of the norms of "living" law in the process of realization and implementation the "living" norms created by non-classical subjects of international law-making (TNCs, non-governmental organizations). This direction of enforcement is characterized by a higher degree of implementation, but also a higher degree of effectiveness of enforcement. This is explained by the fact that the final application of law at the national level is based on a voluntary basis, which is provided by a non-compulsory mechanism, but by virtue of the consolidation of the rights and obligations of the entities that correspond to their real needs, the realization of which achieves the final expected outcome of the social settlement necessary relations.

As for enforcement, it should be noted that very often this process is accompanied by interpretation of the rules (in particular, the evolutionary interpretation), can not only extend the content of the existing norm, but also lead to the emergence of new norms. Decisions of bodies of international justice provide the relevant contractual norms and principles with greater clarity, adapt their content to the realities of international life.

The main role of the bodies of international justice in applying the norms of "living" international law is carried out in parallel with the activities in the process of law-making, namely the provision of new features to classical sources of international law, and therefore requires a detailed analysis of the functioning of the organs of justice in the application of the norms of "living" international law as separate subject of research.

Conclusions

The regulation and enforcement are very tight in international law from the standpoint of understanding it as "living" law. Today, besides the states, active participation in the rulemaking process in international law are also international organizations whose acts of "soft law" often become a complete source of regulation of international legal relations, which may be attributed to derivative sources of international law. In addition, international courts have a direct influence on the development and formulation of international law, and such influence is not carried out due to the very fact of the existence of such institutions,

but due to their activities, that is, it is about the creation of new rules of international law in the decision-making process, prohibitions, decisions, etc., that is, through their enforcement activities. The practice of international courts can sometimes have even a decisive influence on the understanding, emergence and interpretation of international legal norms, which implies the recognition of such a practice as an effective source of international law.

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