SARA Law **R**esearch **C**enter
International **J**ournal of **L**egal and **S**ocial **O**rder, https://www.ccdsara.ro/ijlso
ISSN 2821 – 4161 (Online), ISSN 2810-4188 (Print), ISSN-L 2810-4188
N°. 1 (2024), pp. 47-57

THE ROLE OF CUSTOMS IN CODIFICATION OF DIPLOMATIC AND CONSULAR LAW

I. BOGHIRNEA

Received 15.11.2024; accepted 21.12.2024
DOI: https://doi.org/10.55516/ijlso.v4i1.213

Iulia BOGHIRNEA
Associate Professor PhD.
The National University of Science and Technology POLITEHNICA Bucharest, Pitești University Centre
E-mail: iuliaboghirnea@gmail.com
ORCID ID: https://orcid.org/0000-0002-1634-1681

Abstract

Diplomatic and consular customs are still a lively subject to research, being primary sources of diplomatic and consular law, important in maintaining peace and diplomatic relations between states. Therefore, using the methods of scientific legal research, we proposed, starting from the analysis of the process by which the old diplomatic customs were formed, the origin of diplomatic and consular customs but also the opinions formulated in the specialized literature, Romanian and foreign, relative to the new dynamics of the formation of new customs in the field of diplomatic and consular law with regard to the time factor, to identify their role in the codification of diplomatic and consular law as well as to point out the importance of recognizing and transposing customs into text in a certain political and diplomatic context between Yugoslavia and the Soviet Union, as a result of which there was this need to be codified in the two Vienna Conventions on Diplomatic Relations (1961) and Consular Relations (1963).

Key words: *codification of customs; consular customs; diplomatic customs; Vienna Convention on Diplomatic Relations of 1961; Vienna Convention on Consular Relations of 1963.*

INTRODUCTION

The maintenance of international peace and security, the sovereign equality of states, as well as the development of reciprocal diplomatic and consular relations between states represent the goals and principles affirmed in diplomatic and consular law, through the adoption of the two Conventions on Diplomatic Relations (1961) and Consular Relations (1963).

As for the concept of "diplomacy", we must note that the first permanent representation formations appeared in the 13th century, when countries and commercial cities appointed agents with reciprocal representation obligations in the harbours and commercial centers of other countries *(Ernest Nys, 1884, p.8)*, but the beginnings of diplomacy appeared with the emergence of the state *(C.-F. Popescu, 2012, p. 242)*.

However, the term "diplomacy" comes from the Greek word *„diplóó",* which meant "double" and was used for the first time in the 18th century, which meant an activity of drafting diplomatic documents in two copies, one was given as a letter of recommendation to the envoys and the second was kept in the archive, the one who owned this doublet was called a diplomat and the activity he carried out was called diplomacy *(Ion M. Anghel, 1996, p. 5)*.

Diplomacy was defined, in doctrine, as the activity of some state authorities of "establishing, maintaining and developing relations with other states, defending its rights and interests abroad, for the achievement of the goals pursued in foreign policy" *(C.-F. Popescu, 2012, p. 242)*.

The foundation of diplomacy is the communication and negotiation of interests and needs between governments of states directly, through their heads, or indirectly, through correspondence or through an ambassador *(F.G. Feltham, 1997, p. 1)*.

The diplomat or head of the diplomatic mission portrays "a symbol" of bilateral relations between two states, the accredited state and the accrediting state *(Nehaluddin Ahmad, 2020, p. 1)*.

Custom is the reproduction of a behaviour, of a long-standing practice, so that it appeared, as a rule of conduct, before the law *(N. Popa, p. 175; I. Boghirnea, A. Tabacu, 2011; pp. 137-142; C. B. G Ene-Dinu, 2023, pp. 105-114)*. This is the pattern of custom in all branches of law. See for details, *(M.-C., Cliza, C.-C., Ulariu, 2023, p. 23; E.-E. Ștefan, 2023, p. 112; Manuela Niță, 2022, pp. 215-224)*. Thus, as in the case of most of the norms of classical international law, they were formed, in time, by custom, simultaneously with the practice of diplomacy itself later being incorporated or codified in international conventions/treaties.

But, the scientific research of the role of custom in public international law, as an essential source, has its starting point from art. 38 of the Statute of the International Court of Justice, which creates a hierarchy of formal sources in the matter *(Michael Wood, Omri Sender, 2024, p.13)*. The International Court of Justice has the obligation, on the basis of these sources, to be able to resolve the disputes that are submitted to its judgment. Thus, the Statute lists in a certain order the formal sources of international law: international conventions/treaties, "international custom, as evidence of a general practice, accepted as law" as well as the general principles of law.

THE ROLE OF CUSTOMS IN CODIFICATION OF DIPLOMATIC AND CONSULAR LAW

International custom is formed through the constant and uniform repetition (*diuturnitas*) of certain determined conduct of states, which is based on the recognition of the fulfillment of certain commitments (*opinio iuris atque necessitatis*), this producing the same legal effects that an international treaty produces, having the same legal force as a written source.

In the specialized literature, "international custom" has been defined as "the tacit expression of the consent of states regarding the recognition of a certain rule as a mandatory norm of conduct in relations between states" *(D. Popescu, 2005, p. 32).*

International custom produces the same legal effects that an international treaty produces, having the same legal force as a written source.

Only within the legal relations between subjects of international law, customary norms are formed, these having two elements that must be met cumulatively, namely: one material and the other psychological *(I. Diaconu, 1977, pp. 92-93).*

Thus, the material or objective element - *usus* - represents a repetition of a constant, generalized practice *(V. P. Haggenmacher, 1986. pp. 25-26)* of states and not "a random action" *(C.-F. Popescu, 2012, p.12),* a series of similar actions of states or similar solutions intervened in analogous situations within the framework of international relations between states, having a continuous evolution over time.

In the doctrine, it is shown that today, the condition of a long-term practice for the formation of custom is no longer an essential condition, especially in terms of multilateral diplomacy, a time interval determined for each individual situation, imposed by the need for legal regulation, being sufficient *(Ion M. Anghel, 1996, p. 6),* insisting on the frequency and uniformity and representativeness of the practice (C.- F. Popescu, 2012, p. 12). However, the opinion according to which customs, in international law, can have a spontaneous character (instant custom), thus excluding any aspect of duration, is criticized and completely excluded *(Ghe. Moca, 1989, p. 34; I. Diaconu, 1977, p. 94).*

The psychological, intentional or subjective element - *opinio juris sive necessitatis* - represents the essential part of custom, being the conviction of states, subjects of international law, that this practice is mandatory, and on the basis of which to regulate their relations based on this generalized practice, "accepted as law". In the Continental Shelf case (Libya vs. Malta) the International Court of Justice ruled that "It is obvious, of course, that the substance of customary international law must be sought, first of all, in the effective practice and in the *opinio juris* of states"[1].

[1] International Court of Justice, Judgment of 03.06.1985, Continental Shelf Case (Libya v. Malta)

Thus, the recognition of customs as binding receives "enforcement", thus transforming them into rules of law *(J. Basdevant, 1936, pp. 516-517, apud. I. Diaconu, 1977, p. 93).* This psychological element differentiates international custom from "courtesy", "usage" or "diplomatic protocol" which are not binding, therefore, do not produce legal effects, these not being customs from the perspective of international law.

What distinguishes custom, therefore, from international usages, regardless of their dimension, is the so-called psychological or subjective or even legal element, *opinio juris,* which characterizes custom. As the International Court of Justice has ruled, in order to be able to speak of a customary rule, "*The States concerned must […] have the feeling that they are complying with it, which is equivalent to a legal obligation. Neither the frequency nor even the habitual nature of the acts are sufficient. There are a number of international acts, in the field of protocol for example, which are almost invariably carried out, but are motivated by simple considerations of courtesy, expediency or tradition, and not by a sense of legal obligation*". The International Court of Justice, in this case, ruled that "the substance of customary international law must be sought, first of all, in the effective practice and in the opinio juris of States"[2].

In public international law and especially in diplomatic and consular law, the concept of "customs" used in the definition proposed by the new Civil Code according to which "customs are understood as the custom and professional usages" (art. 1, paragraph 6 of the Civil Code) - is not applicable to this matter.

The norms of diplomatic law, through the way they were formed, had the same trajectory as other legal norms from other branches of law, until their recognition by the state, a predominantly customary character, being the oldest source of law in the matter and continuing to be considered a primordial, first-rank source *(Ion M. Anghel, 1996, p. 11; Khagani Guliyev, 2014, p. 104).*

I. SOME ASPECTS REGARDING THE NEED TO CODIFY DIPLOMATIC AND CONSULAR CUSTOMS, FINALIZED BY THE CONCLUSION OF THE VIENNA CONVENTIONS OF 1961 AND 1963, RESPECTIVELY

To understand this approach to codifying international customs, we must start with the Charter of the United Nations[3], which was adopted in 1945, which in art. 13 paragraph 1 letter a provides that "*the General Assembly shall initiate studies and make recommendations in order to: promote international cooperation in the political field and to encourage the progressive development of international law and its codification*", one of the objectives of the organization being to encourage this desire, namely to progressively develop the codification of international law.

[2] International Court of Justice, Judgment of 20 February 1969, North Sea Continental Shelf Case, ICJ Reports, § 76 and 77.
[3] Charter of the United Nations of 26 June 1945, Published in the Official Gazette of 26 June 1945.

A first stage took place in 1949, when the UN materialized this objective during the first session of the International Law Commission, which planned the codification of international law. In the Report of the International Law Commission[4] on the work of its first session, 12 April 1949, in the second chapter entitled "Survival of international law and selection of subjects for codification" it is stated that this Commission has the power or competence to select these customs to be codified *(for more details, see Fernando Lusa Bordin, 2014, pp. 535-567)*. Thus, a provisional codification list was drawn up, such as for example: "the regime of territorial waters"; "nationality, including statelessness"; "treatment of aliens"; "right of asylum"; "diplomatic relations and immunities", as well as "consular relations and immunities"[5], which will, after a detailed study by the Commission and the UN General Assembly, complete or delete certain topics for codification from the list.

Therefore, the rules regarding the inviolability of the premises of the diplomatic or consular mission as well as of diplomatic or consular agents are, for example, norms of diplomatic and consular law of a customary nature.

A second stage took place towards the end of 1952, when the UN General Assembly was notified by Yugoslavia with a proposal for a resolution expressing its dissatisfaction with the fact that the Soviet Union had seriously violated diplomatic customs *(Sanderijn Duquet, Jan Wouters, 2017, p.5)*, so that the UN General Assembly raised and gave priority to the codification of the theme/subject of "diplomatic relations and immunities", selected in 1949, at the level of "priority topic"[6].

The third stage was the priority of codifying customs relative to "diplomatic relations and immunities", as well as "consular relations and immunities", as objectives of the five multilateral conventions[7] and those of the UN, through the signing in 1961 and 1963 of two Conventions through which the commitment of states after the Second World War was benefited, renewed on the basis of the principles of international cooperation of states, their equality, peaceful coexistence and the establishment of friendly relations, desires that were

[4] The first session of the International Law Commission was held at Lake Success, New York, from 12 April to 9 June 1949, as provided for in General Assembly Resolution 174 (II) of 21 November 1947.

[5] Extract from the Yearbook of the International Law Commission, vol. I, 1949, pp. 279-281.

[6] Resolution No. 685 (VII), Request to the International Law Commission, 5 December 1952, see https://digitallibrary.un.org/record/211256?v=pdf#files

[7] „ "Multilateral conventions can play an important role in recording and defining norms deriving from international custom," the International Court of Justice ruled, also in the Continental Shelf (Libya vs. Malta) case. This process can be done through the mechanism of codification of customs. For details see https://www.icj-cij.org/case/68 accessed on 11.09.2024. The first multilateral convention, in diplomatic matters, is the Vienna Regulation on diplomatic ranks, signed in 1815.

established in the preamble of the two conventions and which are found in the UN Charter.

The Vienna Convention on Diplomatic Relations of 1961[8] and the Vienna Convention on Consular Relations of 1963[9] represent the conventional regulation by which diplomatic and consular customs were codified, stating that "the rules of customary international law must continue to govern matters in which they have not been expressly regulated in the provisions of the present convention".[10]

The provisions regarding custom contained in the Vienna Convention also exist in the European Convention on Consular Functions concluded in 1967, the purpose of which was to transpose it to the practice of European states *(C. Popescu, 2022, p. p.254)*.

The collection of customs and their publication transforms them from customary, unwritten law into positive law *(N. Popa, 2020, p. 178),* a phenomenon about which Hegel said "When customs come to be gathered and gathered together, then their collection constitutes the Code of Laws [...]" *(Hegel, p. 240).*

II. IDENTIFYING SOME CUSTOMARY RULES BY CODIFYING THEM WITHIN THE TWO VIENNA CONVENTIONS

A first attempt at progressive codification of the diplomatic department was made through the Final Act of the Congress of Vienna in 1815, being the first multilateral agreement on the subject of the classification of diplomatic agents, taking into account the new realities and "demands of international relations between states".

After this year, other such congresses and international conferences[11] followed *(Ion M. Anghel, 1996, p. 18),* but as we have shown, a plan for codifying diplomatic and consular customs was only made in 1949 during the first session of the International Law Commission, when certain topics for codification were selected.

In accordance with the Resolution of the General Assembly of the U.N.U. of December 7, 1959, the Plenipotentiary Conference, convened by the U.N.U. in Vienna between March 2 and April 4, 1961, the Vienna Convention of April 18, 1961 on Diplomatic Relations, which entered into force on April 24, 1964. This U.N. Conference brought together plenipotentiaries from various states, who had

[8] Vienna Convention on Diplomatic Relations of 1961 published in the Official Gazette no. 89/8 July 1968.

[9] Vienna Convention on Consular Relations of 1963 published in the Official Gazette no. 10/28 January 1972.

[10] Preamble to the Vienna Convention on Diplomatic Relations of 1961

[11] These international meetings constitute the traditional form of multilateral diplomacy, consisting of meetings of diplomatic delegations of states, which were convened to debate issues of mutual interest, with the aim of reaching an agreed solution of international cooperation.

the power to decide to draft an international treaty, with the aim of codifying diplomatic law, the oldest customs in this matter.

Also, on April 24, 1963, the Vienna Convention on Consular Relations was adopted by the Conference of Plenipotentiaries convened by the UN in Vienna, between March 4 and April 24, 1963, attended by representatives of 92 states, a convention that entered into force on March 16, 1967[12].

Being a group of related legal norms, it was natural that the signatories of the codification of diplomatic law should deal, after its completion, with the codification of consular law, a phasing that was in the conception of both the International Law Commission and the UN General Assembly *(Ion M. Anghel, 1978, p. 19).*

It was agreed that this codification should not be a simple recognition of existing customs, but also their adaptation to the new realities existing in international diplomatic relations, adding a progressive significance to this approach *(Ion M. Anghel, 1996, p. 19).*

However, the Vienna Conventions did not cover the regulation of the entire general diplomatic and consular law, specifying in its preamble that the norms of customary international law, which are important, numerous and varied *(Ion M. Anghel, 1978, p.22),* will continue to regulate matters not expressly regulated by these conventions but also to help interpret the new norms of diplomatic and consular law.

Therefore, between these conventions, on the one hand, and diplomatic and consular customs, on the other hand, as sources of international law, "a complementarity and close interpenetration are established". That is, if for the signatory states of the two conventions, they are a source of law, for the other non-signatory states the same binding legal norm remains in the form of custom *(I. Diaconu, 1977, p. 105).* The merit of these two Plenipotentiary Conferences is that they adopted the two Conventions on diplomatic relations, respectively consular relations, through which a series of customary rules were confirmed, formed through the practice of states, elevating them to the rank of international regulations with general applicability, thus representing the common will of the states that signed, ratified or adhered to them and becoming, for example, the main, basic element or common law in the matter *(Ion M. Anghel, 1978, pp. 31-33).*

Thus, customary rules on diplomatic immunities were codified, such as: the inviolability of the premises of the diplomatic mission, of diplomatic archives and documents; the accredited (residing) state is prohibited from entering the premises of the diplomatic mission without the consent of the head of the

[12] Being ratified by Romania by Decree no. 481/20 December 1971 for the accession of the Socialist Republic of Romania to the Vienna Convention on Consular Relations, published in the Official Gazette no. 10/28 January 1972.

diplomatic mission; the freedom of the diplomatic mission to communicate with its government using all appropriate means of communication, including through diplomatic couriers or messages in code or cipher (art. 27 para. 1); the inviolability of official correspondence or the diplomatic bag (art. 27 para. 2).

As for the inviolability of the diplomatic agent, provided for by art. 29 of the Convention (1961) over the years it has lost its sacred character, but the violation of its inviolability entails the international responsibility of the accredited state, which has the obligation to take all necessary measures to prevent any attack on the person, freedom or dignity of the head of the diplomatic mission or any member of the diplomatic staff of the mission.

Also, as for the immunities of the staff of the diplomatic mission, these rules also have their origin in customary law, being considered among the oldest in the field *(M. Bassiouni, 1980, p. 609).* Thus, diplomats and their family members benefit from the immunity of the person and personal home, their property, documents and correspondence (art. 29-37 para. 1).

Also through the Vienna Convention, another customary rule that was codified is that relating to the exemption from taxes and duties on the headquarters or residence of the diplomatic mission, as well as on customs duties on objects and products intended for the use of the diplomatic mission, in a quantity that is established by provisions of the receiving state (creditor).

Also, the right of the person representing the accrediting state to fly the flag of his country, which he represents, as well as to place the coat of arms of the accrediting state on the premises of the diplomatic mission and on the autorurism of the head of the mission (art. 20),

The International Court of Justice ruled that this provision should continue to apply even if the states in question are in a military conflict *(Case of the Democratic Republic of the Congo v. Uganda).*

From the economy of the Vienna Conventions *(on the commentaries on diplomatic relations regulated in the Vienna Convention, see Eileen Denza, 2009, pp.1286–1288)* several aspects of the role of custom in the codification of diplomatic and consular law emerge, these being a basis in the regulation of these provisions, namely: the diplomatic mission is understood as a complex and unitary authority of diplomatic relations; if within the framework of customs only the person of the ambassador enjoyed immunities and privileges, the Convention added to them, extending the immunities and privileges to members of the administrative and technical staff, who have the quality of members of the mission; the accredited state is granted a range of special prerogatives; a balance is ensured between the mutual interests of the two states – the accrediting and the accrediting: they become rules of law and certain rules of courtesy (for example: those relating to the request for agreement or customs exemption, etc.).

Consular customs were also transposed into the Vienna Convention of 1963 on the same line of rules.

CONCLUSION

The importance of these two Vienna Conventions on diplomatic and consular relations transformed diplomatic and consular law from a predominantly customary law into a written conventional law, which prompted that the norms were easier to prove, collective or multilateral treaties being today the main formal source of diplomatic and consular law.

BIBLIOGRAFIE

1. Nehaluddin Ahmad, *The Obligation of Diplomats to Respect the Laws and Regulations of the Hosting State: A Critical Overview of the International Practices*, in Laws, vol. 9, issue 3/ 2020, https://doi.org/10.3390/laws9030018
2. Ion M. Anghel, *Dreptul diplomatic și consular,* Lumina Lex Publishing House, Bucharest, 1996;
3. Ion M. Anghel, *Dreptul consular*, Scientific and Encyclopedic Publishing House, Bucharest, 1978;
4. Jules Basdevant, *Règles générales du droit de la paix*, in RCADI, vol. 58/1936 ;
5. Fernando Lusa Bordin, *Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles In International Law*, in The International and Comparative Law Quarterly, Vol. 63, no. 3/ July 2014, DOI: https://doi.org/10.1017/S0020589314000220
6. Iulia Boghirnea, Andreea Tabacu, *The custom- a subsidiary law source*, in proceeding of the International Conference "Knowledge-based society. Contemporary norms, values and benchmarks", organized by *Valahia* University of Targoviste, Universul Juridic Publishing House, Bucharest, 2011;
7. M. C. Bassiouni, *Protection of Diplomats under Islamic Law*, AJIL, vol. 74/1980;
8. M.-C., Cliza, C.-C., Ulariu, *Drept administrativ. Partea generală*, C.H. Beck, București, 2023;
9. Eileen Denza, *Diplomatic Law, Commentary on the Vienna Convention on Diplomatic Relations*, European Journal of International Law, Volume 20, Issue 4, November 2009, https://doi.org/10.1093/ejil/chp082
10. Ion Diaconu, *Normele imperative în dreptul internațional – jus congens*, Academiei Publishing House, Bucharest, 1977;
11. Cornelia Beatrice Gabriela Ene-Dinu, *The presence of custom as a legal source from "country law" to modern civil law*. In International Journal of Legal and Social Order, no. 3(1)/2023. https://doi.org/10.55516/ijlso.v3i1.132;
12. Sanderijn Duquet, Jan Wouters, *From Vienna To New York And Back: The Un's Contribution To International Treaty Making On Diplomatic And Consular Relations*, Leuven Center for Global Governance Studies-Institute for International Law, Working Paper, no.191, Leuven, 2017;

13. Khagani Guliyev, *La coutume locale en droit international: quelques reflexions sur sa formation et sa continuité, in Coutume, Usages et Practique*, (coord.) Gordon Choisel, Gustavo Cerqueira and all, Mare & Martin Publishing House, Le Kremlin-Bicêtre, 2014;
14. R. G. Feltham, *Introduction to the Law and Practice of Diplomacy*, trans. Roxana Aura Duma and Marius Ioan, All Publishing House, Bucharest, 1997;
15. V. P. Haggenmacher, *La doctrine des deux éléments du droit coutumier dans la pratique de la Cour internationale*, in Revue générale de droit international public, no. 1/1986 ;
16. Hegel, *Principles of the Philosophy of Law*, Academiei Publishing House, Bucharest, 1969;
17. Gheorghe Moca, *Drept international public*, I, Bucharest, 1989;
18. Manuela Niță, Formal Sources of International Trade Law. Special View on Custom, International Journal of Legal and Social Order, vol. 1, no.1 (2022), DOI: https://doi.org/10.55516/ijlso.v3i1.126
19. Ernest Nys, *The Origins of Diplomacy and the Law of Embassy to Grotius*, Librairie Européenne C Muquardt,1884, https://gallica.bnf.fr/ark:/12148/bpt6k55070c.texteImage site accessed on 11.09.2024;
20. Nicolae Popa, *Teoria generală a dreptului*, 6th edition, C.H.Beck Publishing House, Bucharest, 2020;
21. Corina-Florența Popescu, *Cutuma în dreptul international public*, Universul juridic Publishing House, Bucharest, 2012;
22. Corina-Florența Popescu, Diplomatic *Customs in The Perspective of Formal Sources of Law*. International Journal of Legal and Social Order, 1(1)/2022. https://doi.org/10.55516/ijlso.v1i1.84
23. Elena-Emilia Ștefan, *Drept administrativ, Partea I*., revised and added edition, Universul Juridic Publishing House, Bucharest, 2023;
24. Michael Wood, Omri Sender, Identification of customary international law, Oxford University Press, 2024;
25. Charter of the United Nations of 26 June 1945, Published in the Official Gazette of 26 June 1945;
26. Statute of the International Court of Justice, published in the Official Gazette of June 26, 1945 Vienna Convention on Diplomatic Relations of 1961 published in the Official Gazette no. 89/8 July 1968;
27. Vienna Convention on Consular Relations of 1963 published in the Official Gazette no. 10/28 January 1972;
28. Resolution No. 685 (VII), Request to the International Law Commission, 5 December 1952, see https://digitallibrary.un.org/record/211256?v=pdf#files
29. International Court of Justice, Judgment of 03.06.1985, Continental Shelf Case (Libya v. Malta);

30. International Court of Justice, Judgment of 20 February 1969, North Sea Continental Shelf Case, ICJ Reports, § 76 and 77.