

OPINIO JURIS, DIALECTIC AND EVOLUTION

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Abstract. By means of the descriptive approach, this article tries to present a meticulous definition from the legal limits of *Opinio Juris*, assess its practical functions and analyze its nature as well. Clearly, about "legal belief" and its necessity in formation of a customary international law rule, there are extensive theoretical debates in scene of doctrines. However, this research firstly addresses the primaries of current theories concerning *opinio juris* and secondly presents some new dimensions in the realm of the judicial practice of International tribunals including ICJ, legal mechanisms indicating *opinio juris* and UN General Assembly acts as well as the other similar texts as the proving evidence of *opinio juris* to specify a legally acceptable framework for Genesis of international law.

Keywords: *Opinio Juris*, Legal belief, Voluntarism, Legal Mechanisms, Customary International Law

1 Introduction

One of the component elements of custom is the immaterial element which reflects the legal belief of the States in following a practice. Now the discovery of this legal belief can be obtained through different ways which are discussed here.

1.1 Concept and Necessity

As the International Court of Justice states in the issues related to the continental shelf of the North Sea, in the formation of the customary rules, merely the existence of a "great" and "much unified" practice is not enough. Also the mentioned practice should be made in a way that it implies the recognition of legal rules or obligations. In this regard The Court explains that "two conditions should be met": first the existence of "an established practice" which contain the mentioned conditions and the other" belief in the fact that such practice is obligatory because of the existence of a legal law". So the objective element of custom- practice- as was mentioned in the previous part, should accompany with a " Subjective Element" which lies in the concept of the "legal belief derived from necessities" .the Latin equivalent which is usually used as an abbreviation:"*Opinio Juris*", "the legal belief of the states" or in others point of view "legal firm vote of the states". Such a concept dissociates the Wheat from the practice or Chaff. Thus the aforementioned practice should be drawn in the form of the following equation.

The general practice of the states + their legal belief = custom = International law; thus the existence of both objective and subjective elements of custom- meaning the general practice and legal belief- is necessary and unavoidable in the process-making of the legal rules. The first element defines what has occurred in the world and the second element prescribes the entering of the existing practice to the legal relations era (right and duty). Also it should be noted that in a way that practice which leads to the formation of the customary rule should be general, the legal belief needed in this process should also have the necessary generality. In other words, the legal belief should also be the product of belief or shared attitude of the states of the world or the international community as a whole. And this is different from the individual legal belief of the states.

Basically the states behavior lie in their relation to each other in different forms. Some of the behaviors may accompany a legal necessity and some others do not. If it is supposed that some behaviors become the custom, the condition is that what is legally necessary (what is necessary in accompany with the legal belief) should be divided from what is not necessary. Also there are some cases in which the behavior or in other words the practice which should be considered in the process- making of

customary rules, is ambiguous. (Idem). Also in these cases the legal belief of states have gained attention as a decisive concept especially from the international Court of Justice in order to explain the issue that why the practices of the mentioned states were not regarded in the process of custom-making. A behavior that does not clearly have the ability to refer to an existing or potential legal treaty or in other words does not fit in the framework of international legal relations, should not be paid attention in making or defining the existence of a general customary rule. One of these cases is the ambiguous refusal.

As mentioned previously, the actions which are based on the refusal have the capability that in a state of the necessary conditions, participate like the positive actions in the process of rule-making. One of these conditions is the necessary clearance for recognition of the action. One of these conditions is crystallization for the recognition of the act. But even if this comes true, theoretically and practically in most of the cases the refusals are ambiguous. And what can make clear these ambiguities are the legal beliefs of the States.

1.2 Nature

Especially the content of the discussion here is based on the question that in the formation process of custom, on which basis and why should the States continue doing that? By States. I mean the States which act in a systematic way and in a specific framework. In this regard, interpreters and the followers of different schools of thought, offer different explanations which can be divided into two groups: 1) The theory of the implied consent of the voluntarist, 2) Legal belief derived from the necessities.

1.2.1 The Consent Theory of the Voluntarist

It has been considered by them from the Grotius time that what explicitly is in consent of the States is treaty and what is done implicitly is customary law. And this is rooted in Positivism. The advocates of the voluntarist theory of custom generally put their establishment on the basis that; since the states have government in the international relations area, they are not required to the obligations without their consent. In their idea, custom is regarded as a kind of implied treaty which the states have to follow if they have created that. Tunkin –one of the advocates of this theory- believes that "the basis of the customary rules, is the consistency of voluntarism of the countries or other subjects of the international law. The countries have the same right in the process of making international law rules and so the majority of them cannot make the rules which is necessary for the small numbers of countries to follow." (Arechaga, 1978) He considers accepting a point of view other than this, contradictory with the principal rules of international law. In law-although not in the world- the states have the same value. It is right that in reality this tendency of the powerful states to determine the actual influence on the process of the formation of international law, legally, the majority of the states cannot create rules for the others and consider them obligatory for them to follow.

Tonkin continues this is of great importance that the situation is different especially in the current international law system whose duty is to adjust the relations between the states belonging to different social system. Only a rule has the capability to convert into general international law rule which has been recognized in all of the legal systems by the States (Walden, 1977). But this theory has a wide range of objections. In this regard Kelsen (1970) believed that "the customary law is necessary to obey for the countries who have not participated in the customary law and the idea that this is just necessary to obey for the countries that have recognized the laws, is on the basis of an international norm." In fact, if this theory will become in to practice in a flexible and permanent way, its practical consequences will be out of mind.

Among the implied consent theorists, professor Strupp maintains interesting view. At first he believes that “agreement” is the only possible source in the international law, Provided that the states are equal to each other, and if there is not a great organization and no top authority to impose a rule on the states, accordingly we can conclude that the international law cannot exist without consent and consistent voluntarists of the states (Strupp, 1934). Strupp considers custom as implied consent that implied satisfaction and this is the interesting point of his view, and a state is necessary to obey the other states who have admitted the claim rule.

1.2.2 Legal Beliefs (opinio Juris) Derived from the Necessities

Literally this expression means a belief or legal belief derived from the necessities; The Latin equivalent of this shows that it has no roots in the Roman law and in the classical writings (idem, p262). It appears that the first person who has used this expression completely, is the 2011 *Genny* contract (D’amato, 1971). And this is in the domestic law framework although in Guggenheim idea, some parts of this idea or other ideas similar to that are found in the written history of Germany in the late eighteenth century (Mendelson, 2000). In the current discussion, generally the expression *Opinio Juris Sive neessitates* is interpreted as “belief in the legal nature and necessary related act (practice), or belief in its necessity”. In other words, a state who makes a practice or procedure, believes that it does a kind of legal obligatory or it accepts a legal right that this obligation and right is also the manifestation of an objective rule and is based on the social life requirements and international life necessities.

Then, Kelsen (1967) believed that the customary law is necessary for the states that have not participated in the creation of customary rule-including new and also the active states- and this idea that the international law is just necessary for the countries that have recognized its law-as was stated by the voluntarists view- on the basis of a norm of international law.

2 The Recognition of a Customary Law with Relying on the Central Role of Legal Belief

As mentioned, the principal approach of the judicial practice in the recognition process of customary international law was based upon considering the practice and then recognize and discover its legal belief. In other words, the judicial practice has searched for the legal beliefs of the states by relying on the states’ practices. But it is necessary to mention that taking such procedures could not be effective in all cases. The developments of the international communities under the influence of the humanistic concepts development and human rights suggest that in the recognition process of related necessary legal rules, another procedure should be taken. In such field, the mentioned process can never be established, because in most of the cases, at first, or there is no practice or what is available is contradictory and inconsistent. As a result and on this basis, International Court of Justice takes another trend in order to recognize the customary rules related to the humanistic considerations especially the humanitarian law i.e. takes another trend into consideration which is usually referred to as practice or modern attitude in the procedure of customary rules recognition.

2.1 Recognition of the Concept and Review of Some Theoretical Concepts

Although the process of the concept and the origin of its formation and recognition of the rule is a pre-determined process and is based upon a twofold system, is never done in a consistent and exact way. The judicial international practice shows that the judicial institutions have followed the mentioned practice when recognizing the rule without considering the pre-defined general system and because of taking into consideration the situation and also the judicial policy which is affected by variables such as shared regulation, justice and benefit and is different from situation to situation. And it is certainly due to the positive and great attribute of custom as a source of fluid with the high

adjustability capability which can continuously adjust itself to the transition of the international community. It appears that the source of such adjustment in judicial practice should be searched through the reaction of The International Court of Justice in recognition of Article 3 common to the four Geneva Conventions in the case of Nicaragua. Way of identifying the shared 3 article in the court’s vote show that this judicial institution has excluded consideration of the states’ practices at first and has considered a central and dominant role for the legal beliefs of the states in the recognition process and this procedure of the court became a pattern for other international judicial institutions who recognized in this way their customary rules in their own competence.

We should also mention that in the new procedure framework, the legal beliefs of the states are derived from Principles of Humanity and Dictates of the public Conscience and not from their practice. In other words, a belief which is not in the framework of the States voluntary and their national benefits but is influenced by most of the principles and natural valuable laws and ideas. In this field, the recognition of the legal belief (in relation to the necessity of a rule) is imagines upon those Principles of Humanity and Dictates of the public Conscience which undoubtedly are acceptable by all members of the international community and then its following is investigated in the state’s practice. In this framework “The Court should convince that the existence of the rule in the legal beliefs of the states, is emphasized in their practice.” The contradiction and conflict in the state’s practice can undermine the laws based upon the practice, however, in the case of the laws dependent upon the humanistic and moral values-here modern customary law- the situation is different and the contradictory practices do not question its validity (Robert, 2003). And this can be a positive attribute for the new procedure in which the natures of the formed and recognized rules have the eternal stability and consistency.

Also sometimes the modern procedure has been compared with the interpretation of Hardt and Koskenniemi. The prescriptive interpretation of Hardt about law and the Utopian interpretation of Koskenniemi about law, on the basis of the first interpretation, laws are not resulted from considering the events and their descriptive because these facts imply what exists (the current practice). But in the light of this interpretation, the legal rules are always prescriptive and are wholly based upon what they should be (the practice which should exist). In the form of the second interpretation also law is based upon the principles which are not related to the states’ benefits or their will; completely moral principles and different from their current reality which is imposed on the world.

2.2 Theoretical Primaries

In order to define the issue and explain it completely, it is needed in the following discussion, first the arguments about the basis of the international law should be submitted that the natural law doctrine is of great importance from the view point of the theoretical bases. Nature, wisdom, justice, morality and divine rights are all the concepts which are evolved from the natural law concepts. From the view point of the advocates of natural law doctrine, it is understood that the basis of the law generally and international law specifically are put in the metaphysics and it is emphasized that there are general principles and rules which govern the individuals and States and States have to obey them.

In other words, principles and rules beyond the will. Tomas Habz philosopher and the British jurist only considers natural law as the basis of international law. But from his point of view, the most important principle of the natural law is the right of self-preservation. In the framework of natural law we face with a collective of primordial, eternal and immutable rights which do not need the elapse of the time and it includes all the humans from every race and sex. Therefore, no statutory and contractual rule can deprive them of a human. From the view point of those who believe in the common humanistic nature, the inspired rules

from the nature of human are so basic that the final aim of a regulation are the rights which are based upon the general awareness and pursuit of human values rules which are the proper finale for the human.

On this basis, the legal regulation which is contained of natural law principles is beyond the desire of the individuals. This point must be mentioned that, the teachings of natural law doctrine especially at the beginning of nineteenth century weakened, however this fact must not be considered as complete disappearance of principle and beliefs of natural law. In this regard, some has used the expression hibernation. Although the natural law lost its position as an inclusive basis of international law for a while, from the late nineteenth century it's observed the reviving of the natural law ideas and thoughts in the basis of international law field. Generally the basic principles of the law are as old as the state. In the framework of this school-unlike natural laws which imagined the legal rules as fixed and eternal and know the state as the positive law of these rules, its advocates know the international law rules as the product of the states will. In this regard, the system which is meant by lawyers is a logically consistent system which creates beyond a deductive pure process, all the rules required for making decisions about the existing and possible issues in the system.

Similarly, unlike the natural law attitude in which belief in metaphysical basis was of great validity and merely by induction, the nature of them can be achieved, the positive law can be achieved by induction and without resorting to the principals of metaphysical concepts. Thus "real law", "ideal law", "law at the same level with reality", "law at the same level of value" are distinct from each other. Such an attitude does not necessarily contradict with the idea which considers "law" as a result of divine will the nature of the objects or human. However, based on the definition, the laws which are not made of will, are not "law" on their own and it means that they should enter into the positive law to become accessible. In other words, Laws have to be made. Often "positive law" and "natural law" are put against each other. Although the positive law doctrine has more consistency with the international system because of the consideration of consent and the states' will as the formation basis of rules, it could not and also it cannot be responsible of the issues and requirements of the current international community.

The development of the human rights and other humanistic considerations especially from the early twentieth century showed the reviving of the principles and natural law ideas in the international law realm. Specifically ratification and formulation of the he Hague Conventions of 1899 and 1907, the adoption of the UN Charter in 1945, that its introduction begins with "we the people of the United States" and the human dignity and fundamental human rights are among the aims and desires of the United Nations. Issuing of the Universal Declaration of Human Rights in 1948, ratification of the Civil and Political Rights in 1996, ratification of the four Geneva Conventions in 1949, ratification of the adjoined Protocols in 1977, the real manifestation of the humanistic values in the form of valuing individual in the international law by predicting individual complaints in international juridical institutions. Special attention of the international court of justice to the humanistic aims and desires, Drafting and ratification of the binding Genocide convention in 1948 and the ratification of several human rights' documents..., and also the dimensions of the permanent and temporary inter states criminal courts in order to act against the serious and systematic violations of the humanistic values. In this framework we can name the establishment of the Nuremberg and Tokyo Criminal tribunals, Criminal Court for the former Yugoslavia and Rwanda and the International Criminal Court in 2002, and it should be noted that not paying attention to the power and the role of the accused official during the prosecution and punishment is another great traits of the above courts), the establishment of several judicial and quasi-judicial institutions especially in the area, all shows the importance of the principles and basis of the natural laws in

the international level. Nowadays, human right is another saying of the natural law.

2.3 The Procedure of the International "Judicial Practice"

From the conceptual and general point of view, it previously mentioned in detail about the modern custom and the process of its recognition in the international judicial practice. Undoubtedly, nowadays, the dominant procedure in the process of the recognition of the customary rules related to the humanistic considerations is affected by the transitions which result from the development of the related concepts. It is transitioned from the initial recognition to the central discovery of "legal belief". If we put apart the theoretical basis of this transition, it should be noted that it is necessary to investigate the procedures of some valid international judicial organizations. It is obvious that just a collection of the judicial ideas in order to introduce the procedure, is enough.

2.3.1 International Court of Justice

As mentioned, the recognition of the article 3 common to the Four Geneva conventions in 1949 by the international court of justice in the case of Nicaragua was a turning point in the new international judicial practice in the process of recognition of the customary international law. In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. (2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavor to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

3 Legal Mechanisms indicating *Opinio Juris*

As internationally legal frameworks, treaties have always played a major role in manifestation of States' legal belief. The content of a treaty as an internationally authentic act, perfectly can reflect States tendencies in connection with global issues. Even according to some scholars, a treaty, specially a law-making one, is the strongest manifestation of States legal belief. Tangibly the recent Statement seems to be exaggerated, because States conclude treaties for diverse purposes and mostly they know that they don't include the international customary law. Accordingly, the consent to be bound by a treaty doesn't inherently reveal the State belief containing the text accordance with custom. However, such statement can be acceptable just about the declarative treaties, because these kind of treaties reflect the remarkably extent of States' general legal belief stating their content have already entered the international customary law realm and its customary content still continues. As the linchpin of *opinio Juris*, generally treaties including bilateral and

multilateral have a significant role in formation of customary rules.

In terms of reflecting all viewpoints of State including legislator and executive arms, treaties enjoy the legal content and potentially transmit the legal belief of party State. In order to prove and estimate the states tendencies concerning the accessed treaty, the text and primary actions relating the treaty codification, must clearly indicate the commitment of party states to the binding legal belief and potentially can be binding for all states including non-party states. ICJ that has always considered the primary actions concerning treaty conclusion as the auxiliary means in recognition of States belief toward customary law, in the case concerning *North Continental Shelf* declared that the accomplished negotiations in Commission indicates that the principle of “median line” as has been stipulated in article six of Commission, had been notably encountered some remarkable hesitations when it was proposed, in a way that they considered it more *Lege ferenda* rather than *Lege lata* or as an emerging rule of customary international law.

Consequently, ICJ though considering the primary actions of 1958 Geneva treaty concluded that there was not any legal belief toward considering the median line method as a general legal rule among those States. Based on the States declared believes, their consent to the treaty text also can indicate the stating reasons of States legal belief (Lepard, 2010). Signature, ratification or accession to a treaty, indicates the consent process of a State to a treaty. In this process, ratification is absolutely more significant than the others. It must be noted that the accession of States to a treaty can include various intentions and only acceptance process of a treaty cannot reveal ipso facto the legal belief of States. In this regard, The States intention must explicitly symbolize the legal belief of them on its legal and binding content, regardless of their accession to treaty or not. As it mentioned, there will be limited problems in declarative treaties, because in these cases either in treaty text (introduction) or articles it is explicitly stipulated or by any other way including the prohibition of reservation right, it is clarified. However, in other kind of treaties, the recognition of “legal belief” will be partially difficult. In these cases also, for example, evaluation of States viewpoints within signature and ratification, the tone of treaty, and States speed in ratification of treaty after signature, even their following approach before the entering into force and some other cases can be appropriate tools in extracting the legal belief toward the accessed treaty.

Furthermore, the number of States accessing to treaty, temporal domain which is needed to entering into force and the frequency usage of “termination” and “withdrawal” clauses in the treaty text, must be taken into account as well. Therefore, treaties totally can contribute particularly in recognition of States legal belief and even objection and non-accession of States to these instruments can indicate the viewpoint and negative propensity of States toward an issue which is covered by treaty.

4 The Role of UN General Assembly and other Similar Texts as the Proving Evidence of *Opinio Juris*

One of the most significant tools extracting States legal belief is the UNGA resolutions. Likewise treaties, resolutions can reflect States viewpoints addressed by GA as well. As an institution enjoying the general jurisdiction, GA can investigate the diverse domain of international issues and subsequently is an important reason indicating States legal belief. In this regard the tenth article of UN charter declares: “*the general assembly may consider the general principles of cooperation in the maintenance of International Peace and security, including the principles governing disarmament and the regulation of armaments, and may make recommendations with regard to such principles to the members of the Security Council or both.*” Moreover, in article 13 it is explicitly emphasized that GA “*shall initiate studies and make recommendations for the purpose of: a. promoting International cooperation in the political field and encouraging the progressive development of international law*

and its codification; b. promoting International cooperation in the economic, social, cultural, educational and health fields and assisting the realization of Human Rights and fundamental freedoms for all without distinction as to race sex language for religion” It must be noted that GA resolutions do not directly participate in custom-making process, rather is considered only as a ground for explanation of States tendencies in a general level.

There is no any reason for States not to be able to declare their legal belief though GA resolutions concerning a specific norm as an internationally legal norm. States votes in relation to resolutions and their statements that have been framed in this form (resolution), easily will reflect their approach. On this basis, such resolutions either can codify customary international law or be effective in genesis of modern customary law. Regarding the declarative resolutions, it must be stated that, since the purpose of these resolutions are manifesting the general principles of international law, consequently have this potential to reveal States legal belief concerning their customary and continuous nature. This fact that GA resolutions can indicate the existing customary law or be considered as the indicator of States legal belief, has been noted under the international judiciary practice. In case concerning Nicaragua, in order to recognize the existence of the customary rule relating non-use of force among the States, ICJ found “legal belief” extractable by resorting to some GA resolutions indicating propensities of States. The consent to the text of such resolutions can be considered as acceptance of regulation validity or the rules creating the legal framework of those resolutions.

In case concerning legality of the threat or use of nuclear weapons ICJ expressed the same statement: “*they can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an opinio juris.*” Referring to some resolutions in Nicaragua case and adherence to “*certain circumstances*” in legality case is not accidental. Such considerations of ICJ indicating all resolutions of GA aren’t evidence for emerging a general legal belief. Under the certain circumstances, resolution can indicate customary international law. In the latest case, ICJ asserted- concerning discussed issue- in spite of high rate of States nay and abstaining votes, many resolutions have been adopted that none of them proving an “*opinio juris*”. In this respect, even a consensual resolution may not reflect States legal belief, when the primary situation symbolizes the affirmative votes have been gained only under some political considerations rather legal will of States. Thus, in general legal belief obtaining process of States, only cannot be relied on superficial form of resolutions. Wordings, adoption process and general framework of resolution must be deeply scrutinized. The general consensus and unanimity do not necessarily prove the aforesaid intention; conversely, the price of achieving consensus or any kind of objection absence may be either absence of a binding legal rule or a kind of ambiguity in which the several legal perceptions are possible.

Consequently, the recent Status can invalidate a rule legally as well. For example in connection with adoption by consensus of some resolutions concerning Outer Space, after a meticulous analysis, Pro Cheng (1986) has concluded that there is no any comprehensive agreement on recognition of these resolution content as “Instant” customary international law. Similar to declarative treaties, some resolutions also enjoy such peculiarity that can be obtained by legal stipulation in several stages including; related ingredients listed in text, primary actions concerning its codification, viewpoints of States within drafting and adoption, resolution tone and some other factors. For example, the famous 2625 GA resolution concerning “*principles of international law*” which is legally general manifestation sample of State belief and indicator of customary international law principles. The framework of this resolution- both in text and title- explicitly contain some international law principles governing on States relations and ICJ has confirmed it in case concerning Nicaragua as well and recognized the resolution content as general explanation of States legal belief. The third

article of defining international aggression resolution and (1)95 resolution- reflecting principles listed in Nuremberg charter-are some other manifestation samples of States general legal belief.

A point seems to be reemphasized; except with organizational and internal issues, UNGA resolutions are only a recommendatory and not binding for state-members. Recommendation means a non-binding advice. In framework of general international practice, advice is explanation of a legal act containing a tendency, however is not binding for its addressees. General Assembly resolutions as a series of recommendation document even though does not contain the authoritative content, according to ICJ at least enjoy a persuasive validity. ICJ in 1966 and in *South West Africa* case explicitly emphasized on the recommendatory nature of GA resolutions. However, their persuasive power can be considerable and at the same time their authoritative dimension does not make them binding. Now some points concerning the situation of resolutions explaining general legal belief of States. As it mentioned, the primary actions relating to resolution codification and the text wordings play an important role in extracting States legal belief. In connection with resolution wordings and used tone, Pro Viralli believes resolutions always contain some signs concerning its creators' will, however, for comprehending such signs, getting familiar with special language of diplomacy is necessary. An example is usage of "shall" and "should" interchangeably. In this respect, ICJ believes the way of UNGA resolution wordings is the significant factor in determining their validity as evidence of States legal belief. In case concerning Nicaragua ICJ declares: "the resolution demonstrates that the States represented in the General Assembly regard the exception to the prohibition of force constituted by the right of individual or collective self-defense as already a matter of customary international law". In Court ruling relating to legality of the threat or use of nuclear weapons, the content of resolution and its ratified circumstances for obtaining the legal belief was considered as well.

In this framework, not only it is necessary the agreed States opinions to be examined, but also the explanation concerning those opinions separately and States statement concerning every paragraph must be scrutinized as well. In case concerning Texaco against Libya, the arbitrator asserted, even though the resolution 3201 relating to creation of new world economic order has been adopted without voting, issued statements by representatives of exporting States symbolize these States had not agreed with change and reforming the rules relating to expropriation compensation which had been previously declared in resolution 1803 concerning permanent sovereignty over natural resources. According to McDougal, for decision making about whether a resolution or UN statement is exact expression of nations expectation from law, various facts need to be clarified, including: how many States do vote in favor or against the resolution or statement? To what extent is the relative power of voters? To what extent the listed policies in resolution is consistent with previous expectation? What has happened after the resolution adoption? What expectations can be created from the other sources? Title of resolution, in some cases may reflect the agreed States will as well. For its very important decisions, GA sometimes determines a specific title like "Declaration", including: Universal Declaration of Human Rights, Declaration on the Granting of Independence to Colonial Countries and Peoples and Declaration on Friendly Relations. However, the title of a resolution is not considered as a miracle.

There may not be a sufficient acceptance concerning specific part of a resolution or declaration- as *lege lata*- on one hand, and there may be a resolution does not enjoy the title of declaration or any similar title on the other. However, as *lege lata* it can be the manifestation of international community unanimity relating to rules listed in resolution. Regardless of declarative resolutions explaining the existing customary international law, about the other resolutions; the more affirmative vote of States within voting, the more effectivity in obtaining the general legal belief of States and consequently formation of customary rule. It must be repeatedly considered that, if a resolution does not contain the

general legal belief of States, at least can express the viewpoints of States concerning an issue that can contribute in genesis process of customary international law. The more number of affirmative votes to resolutions containing a specific rule, the more validity as explaining evidence of States legal belief they will enjoy. According to one noted researcher, repetition of the same norms in the consecutive instruments expressing soft law can lead to the creation of international community legal belief. In his dissenting opinion, Judge Tanaka has expressed the same perception in case concerning South West Africa in 1966. According to Tanaka, even though GA resolutions don't enjoy the binding power, what for customary international law necessary is, include the repetition of similar approaches that usually are observable in these kind of resolutions and declarations. The mentioned considerations concerning GA resolutions role as the reflecting evidence of States legal belief, undoubtedly is applicable about the other similar texts. For example, ICJ in Nicaragua ruling, referring to Helsinki final act ratified in conference on security and co-operation in Europe, recognized it as the States will evidence on prohibition of force use rule. However, since GA is only international public authority guaranteeing all States attendance, as a result enjoys a major role in explanation of States viewpoints and general tendencies concerning various issues. Security Council, Human Rights Council, International Organizations, European Union, Regional and Trans-regional Organization, public conferences and some other institutions, according to their authority, can reflect the States belief and propensities concerning specific issues.

5 Conclusions

Even though obtaining the general, widespread and uniform practice is considered necessary in genesis of customary international law, judicial practice indicates that in relative absence of these conditions, dominant appearance of *opinio juris* can be compensatory. On the other words, the judicial policy of Court has mostly lain on amending the defect of practice through paying more attention to *opinio juris* and obtaining the States firm legal belief. The prohibition on use of force and interference of States in their domestic affairs (Nicaragua case, 1986), is a noted example of applying such policies. Consideration of States silence and non-objection can be stated as the other evidence obtaining the *opinio juris*. International law Association in Statement of principles applicable to the formation of general customary international law in 2000, in spite of its general view recognizing the proving of *opinio juris* unnecessary in process making of customary rules, explicitly expresses that the conduct of States and international courts and tribunals, a substantial manifestation of acceptance (consent or belief) by States that a customary rule exists may compensate for a relative lack of practice. Moreover, some scholars like Cheng believe that *opinio juris* is only principle element of custom-making. Regardless of central role of *opinio juris* in genesis of customary rule, the twofold system governing on formation of customary rule must not be ignored. Even though based on some conditions it may play a major role in crystallization of custom, similar to *opinio juris*, existence of practice is necessary for formation of customary rule as well. Finally, treaties and resolutions provided that not to be derived from political considerations most probably indicate the States legal belief. Treaties are the output of threefold powers (legislation, judiciary, executive) and accordingly symbolize the State's *opinio juris* in various legal affairs. Resolutions of UNGA also are created to reflect the viewpoint of States member concern with several issues. Thus, every full powered mission member is authorized to manifest his State's specific *opinio juris* either by voting in favor of resolution or against it, even by putting the silence policy on the agenda.

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