

## DECODING THE GENESIS OF THE PRACTICE CONCERNING CUSTOMARY INTERNATIONAL LAW

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**Abstract.** International customary rule is composed of the two elements, material that is called practice and immaterial factor which is called *opinio juris*. Through the descriptive method, this article is promised to investigate the limits and various dimensions concerning the practice factor. According to the results, material element at the first step implies states practice and there are no any written and specific rules about what qualifications the practice should have. Issues including the length that the practice should be obtained, repetition of the practice, degree of the practice coherency and integrity, generality of the practice, essence of the practice, practices that are criteria in this framework and finally the other practice makers other than States, are a part of the most significant issues that should be considered in determination.

**Key Words:** Practice, Customary Law, Refusal, Omission, Beneficiary States

### 1 Introduction

(general practice) that is accepted as law, inserted in 38 (1) (B) Article of international court of Justice Statute, basically indicates state practices and this issue is inferred from Court views well. States do not have physical entity. They are a collection of connected governing institutions (organs) that have a complete legal personality. Sovereignty is considered as constitution and the main emblem of government due to international law and is explanatory of its place in international relations. In Max Huber's view in judgement related to Palmas island (1928); (sovereignty indicates the independence in relations between States.) And independence also as has been put by Anzilotti at his personal theory in advisory view of international Permanent Court of justice in 1931 regarding tariff regimes between Austria and Germany, means that the state which according to international law has sovereignty, receives its entity and authority from that same international law. State practices through qualified organs appear that form the main movement of rulemaking at international level. Determination of state qualified organs according to international law has been allotted to its own inside legal system. According to article 4 of International law commission plan draft regarding international responsibility of states 2001, behavior of each governmental organ -according to international law- is considered as the practice of that State regardless of that organ has a legislative, judicial ,executive function or another function and whether what position the mentioned organ has in governmental organization and this organ is an element of central government or an element of local governmental unit (paragraph 1).

The way of separation of power and competency domain among government's different organs also has been allotted to their inner system that of course following considerations should be considered: 1)although the determination of competency domain of formal organs is the responsibility of governments inner system, international law regarding some senior governmental authorities (e.g. the head of the state) considers them among government Ostensible representative who even have competency behind what is defined in inner system framework for them. Concerning making agreement, such a situation has been affirmed by international Court of justice in the case related to maritime and territorial boundary between *Cameroon and Nigeria in 2002*. And Court about this case has based its own verdict on Article 7 (2) of Wien convention on law of treaty 1969. There is no reason to conceive that substantial difference exists in the relation between treaty-making and the process of custom-making (Danilenko, 1995). Nevertheless, we emphasize that the form of exerting such a verdict will include just some of state senior formal authorities.

2) When a government formal ordinary organ acts over its authorities, their behavior will not be contributed in the process of custom-making, albeit by doing a violating act, this issue ascribed to the state and consequently will followed by its international responsibility. In other words, behavior outside authority domain of state formal organs – other than about a few number of senior authorities that already was mentioned – cannot be noticed as making element in rule making process, although it is possible - if being violating- to lead to the responsibility of states at international level(Danilenko, 1998). Concerning this issue, it needs to be stated that the executive power measures must be considered and not only foreign ministry. Leading of international negotiations and occasions in nowadays modern method is not always the responsibility of foreign ministry. This task can be done by economy, transportation ministry and etc. Other than the cases that an executive organ take measures outside its authority domain and its action is rejected by senior authority, apparently there are no appropriate reasons regarding that why state capacity of practice-creating be confined to foreign ministry. ICJ in the case of the *NotteBohmm 1955* states that a governmental rule (whether constitution that is possible, for example, to include claim of competency on maritime areas) can be considered as the manifestation of that state practice. Court in *Lutos verdict* also emphasizes on this issue in the same manner that inner courts are part of government organs and their decisions must considered as a part of state practice. Legislation of territorial rules and reflex ion of them in judicial verdicts during legal procedure can be viewed as notable indicatives of government behavior; particularly, basic and main rules of each country regarding limitation or desigment of government competencies, separation and resignation of authorities and promotion of human rights.

Also, verdicts issued from inner courts particularly can be suitable delineation of executive condition of legal processes, realization of justice immunities and extradition. In many case we see the state practice-making through association of the triple powers with each other. For example, the request of extradition is made. In this case, approving or disapproving national rule, inner court decision and accomplishment or not doing extradition by executive government can be a manifestation of government real practice regarding the mentioned issue (Gilbert, 1998).Also about the governments that have confederation or federal position like US and Switzerland, it primarily must be told that practices of each of their inner territorial units – that also do not have international independent personality- cannot be viewed as state practice, unless their practices are on behalf of central government and or approve and pass by them. Thus, state practice, as it was described, has a determining role in creating rules of customary international law. Indeed, states as main subjects of international system and their behavior and approach as the basic element of rule-making in this domain, has the most important and dominant role in the area of (practice makers).

### 1.1 International Organizations

Even though "general practice" as the material element of custom-making basically indicate state practice, international organizations that are created to organize disorder in international relations in generating systemic order has increasingly developed these days and actually is considered as an inseparable part of international life and plays roles in different areas. This increasingly development has been the outcome of extension of international relations particularly in twentieth century. international organizations that first has just took step in international domains in limited areas and the framework of technical issues, presently has generalized own activities domain to most important international issues including legal, political and security issues. Thus, international organizations due to having subjective legal personality are considered one of the active subjects of international law and

therein can be both producer of right and obligation, and its subject. Although organizations firstly take this own personality form the State will, they with continuance in their activities act as an independent legal personality. Nevertheless, international organizations practice also can be effective in practice-making process and codifying legal rules because the practice of all subjects of international system contributed in generating and creating legal rules. Generally, as international organizations have capacity of treaty-making in international legal area to implement their missions and achieve aims that has been made for their realization – that its borders has been defined in Wien convention on law of treaty among countries and international organizations and or international organization with each other on March 21, 1986- as they also can participate in the formation process of general customary international law through the practice of their organs.

Such association is actually of main impacts and consequences of having independent international legal personality. Of course, we should note that acceptance of legal personality for international organizations should not lead to this conclusion that state members of an organization do not have any independent practice in involved organization framework anymore, and what is efficient in deduction of customary rules is only the practice of the organization itself. International organizations privilege of independent legal personality of constitutive members will not have any conflict with obtaining independent practice of state members of the organization, because one state do not lose own entity and identity due to enrolling in an international organization, rather it assigns some of own competencies and authorities to the related organization to achieve a specific aim. As we will see in the following, international organization resolutions, particularly, *United Nations* General Assembly resolutions are a very appropriate place to assess state practices in discussed issues and a manifestation and reflective of their legal belief. International Court of Justice in advisory verdict related to the reservation on genocide Convention 1951, in explanation of customary law related to reservation, noted the practice of United Nations Secretary General as trustee of many of multilateral treaties alongside the state practice of national authorities. Regardless of the above case as an example of organization behavior, many of other practices of international organizations through their decisions appear in the form of responsible authorities' resolution, statement, and declarations. Therefore, presentation of such documents can be considered as a clear sample of organization practice. Concerning this, even some authors view organization approach as a custom constitutive material element as concrete only in this form and do not accept crystallization of the organization tangible function in the way described above (Higgins, 1987) Oppositely, some others of commentators seek organization practice manifestation just in the framework of tangible behavior of it (and not verbal in the form of resolution and statement) (Mandelson, 2000, p.201). These last group believed that the passage of any resolutions and statements by international organization is more explanatory of governments function which are member of that organization rather than the organization itself, when electing about pros and cons of one resolution that poses some issues regarding international law, states are forming their own practice about the discussed issue or try to display own legal belief related to the matter. Therefore, it is better to know such a function more as a manifestation of state behavior and inclination than assessing organization practice (Ibid, p.202) Hence, international organizations as main subjects of international law system can participate in practice-making process and forming of rules of law, whether in the framework of inner organs and or in relation to other governments at international relations level.

### 1.2 International Judicial Authorities

International court and tribunals are not legislation authorities. The point that is needed to be noted here is that whether international judicial authorities themselves can make practice in the process of international customary law formation? In other words, whether decisions of these authorities can be considered

as “general practice” that constitutes the material element of custom? This issue can be represented from 3 perspectives. One is considering international court and tribunals as constitutions that take their competency and authorities from governments. Thus, their verdicts are viewed as a form of state practice and another that consideration of this authorities as inner organs of an international organization and thus viewing their decisions as the approach of that organization and finally the judicial practice of judicial authorities that can find the presence of customary rules in different areas. In each 3 ways, the issue is that whether international courts and tribunals can be material element of custom-making practice? Regarding this issue, some authors has considered these authorities decisions as a form of state delegation practice. Professor Wolfke believes; this fact that states accept verdicts and ideas of judicial organs means that such decisions per se can be viewed as a form of state practice (Wolfke, 1993). In his viewpoint, such an idea also has been already affirmed by *Guggenheim*. Then Wolfke clearly has point out the international Court of justice practice and accordingly analyses planned references of Court to own prior decisions and also references of other international constitutions including states themselves, international organizations, non-governmental organizations, international law commission and doctrine to such decisions in this framework (Ibid, p.74)

Form his view; it is completely natural that we assess judicial history in the framework of the international practice leading to formation of customary law. It has been explicitly accepted by states. Wolfke even in opposite of persons who believes in kind of made and polished law should be viewed (Ibid, p.75). Also, then some judgments of court are adduced by this lawyer to prove the claim. For example, Court in the case of boundaries limitation of continental shelf between Canada/ Us in 1984 has specified that ( ...Court verdict ...in the cases of North sea continental shelf has been considered as the greatest participation of this authority in application of governing customary law in the discussed area.) part D of paragraph 1 of Article 38 international Court of justice Statute that due to it(... judicial decisions ... as accessory tools to determine rules of law) is considered, also is another reason that has been posed by Wolfke regarding the practice-making role of international judicial authorities verdicts. He believes that this part of Article 38 indirectly guarantees the acceptance of some degree of rulemaking by judicial authorities (Wolfke, 1993).

### 1.3 Non-governmental International Organizations

Primarily does not accept governing doctrine, direct participation of non-governmental international organizations in the making process of international customary law. Although the situation related to treaties is also the same. Non-governmental international organizations are not active subjects of international law and cannot cause right or obligation. They can merely be the subject of right of obligation. Unlike non-governmental international organizations that directly participate in the practice-making process leading to the formation of customary material element, role of non-governmental organizations is only limited to some secret lobbies in backstage and influence on state agents in diplomatic conferences and international assemblies. Therefore, non-governmental organizations can play important roles in all steps related to the formation of customary law, from the beginning of the negotiations and reasons gathering to identifying and final ratification of rule, but they do not have direct participation in the process. Also, - clearly about treaties- non-governmental organizations is possible to enter extensive strains on international society members to put a specific treaty draft in the agenda of future negotiations and or even, in some cases, it's possible to represent a specific draft text of own to be combined with the text that is developed by states (Hobe, 2005). But ultimately, it is these states – and not non-governmental organizations- that participate in the conclusion of treaties. The situation regarding customary international law norms that the above-mentioned organizations, with respect to them, can

indirectly influence on governments function and their approach development (Ibid, p.214).

## 2 Nature of Practice

### 2.1 Verbal and Material Acts

Generally counting practices and behavior that guarantee international practice leading to the formation of customary rule is not a simple task. Primarily, material elements or practice can include both physical and material act of states and verbal act of them. Nevertheless, lawyers' view regarding this issue is not the same because some of the related specialists accept only physical acts as practice, while it seems that dominant view about this issue regarding international judicial practice indicate any kind of behavior as the material element custom-formation. Then, we will continue this discussion in detail. As it mentioned, there is a disagreement concerning the nature of state practice – like other posed issues in the present writing. Some lawyers like Damato and Wolfke view only state material and physical acts as a manifestation of the practice and representing a strict concept regarding this issue, limit the source range of custom's material element. They believe that any claims or general statements per se cannot be explanatory of state practice. In this regard professor Damato asserts; a claim is not an act. Although the claims may articulate a legal norm, they can't constitute the material component of custom. (Damato, 1971, p88) According to him, sending missiles, nuclear procedures, receiving ambassadors, making levies on customs duties, expelling an alien, capturing a pirate vessel, setting up a drilling rig in the continental shelf, visiting and searching a neutral ship and ...are among the most important state's practices. For a state has not done anything when it makes a claim; until it takes enforcement action, the claim has little value as a prediction of what the state will actually do(idem). The situation is the same in the cases that a state decides to support or oppose the development or changing of an act. Damato provides an example in this regard; sending the first Sputnik to the globe and at the same time the development of the customary law related to passing the satellite over other countries' territories. He believes that if a state's decision was to oppose the development of this law, it was necessary for the states to show this either by providing a constraint for passing the aforementioned satellite, or in the case of lack of ability to do this by any way to act against the Soviet Union (idem, p89). Also Damato pays attention to the possibility of difference between the actions and words of states. If our understanding of practice component implies both physical and verbal behavior, we might occasionally face with the issue that there is a difference between what the state says and acts. Basically, this difference will not exist if we consider practices as physical acts. The state can say many things with different voices at the one time but a state can act in only one way at one time (idem, p 51). In addition to Damato, Professor Wei provides nearly the same analysis about the practice component. In his opinion, providing a great commentary of what would be the material component of custom including the placing of different verbal acts such as unilateral intimations, declarations, statements, resolutions, and treaties and... in this framework, only leads to the increase of ambiguities. Specially, in regard of Wolfke's point of view and other similar views; there is no reason for not paying attention to the verbal acts or general declarations of the states. In this regard, hinting to the professor Mullerson's ideas would be logical. Although he will not show clearly the component of the actions that comprise the states practice, he puts the acceptance of the wide concept of the evidences that formulate material component of the custom against the same challenge, as was put by Damato. At first he acknowledges that there is a distinction between what the states claim and what the states act. For example, "the claim" of having the right of innocent passage in waters of a territory and it's "enforcement". But he asserts that in the case of acceptance of the wide definition of practice, what would be the way to distinguish it from the legal believes of the states? (Mullerson, 1998) In this regard also Red considers the distinction between act and legal belief where verbal acts are paid attention as the

reason for creating practices. Nevertheless, Mullerson does not clearly assert that he agrees with the acceptance of verbal acts as the state's practices or not. Finally, he states his analysis this way, that the state's practice can contain both subjective component [verbal acts] and the objective component [physical acts] but the subjective component is not always defined as legal belief (idem). Mullerson believes that subjective attitudes of the states about their act may be implied in their actions (idem).

Diplomatic statements(such as complaints), political statements, press releases, official instructions(such as military law) , armed forces' circular, states' interpretations about the drafts of the treaties , domestic legislation, votes of the national courts and executive authorities, the views of the governments before international courts, international organizations' statements and resolutions are all examples of the verbal acts. Thus, international law association besides Akehurst and Mendelson discusses the quality of participation of verbal acts similar to the physical acts in the process of practice-making which lead to the formation of the material component of custom. Finally it acknowledges despite of the content above, we can consider some of the declarations more usefully as just stating the beliefs than the official acts of the state's practice. Professor Dinstein believes a view which only considers physical acts as the component of custom, is a highly exaggerated view (Dinstein, 2006). This jurist believes this is right that in a wide level a physical act is of a greater importance in comparison to a verbal announcement, warning, or censures (totally verbal acts) however, there is no difference between them in terms of their validity. Actually Dinstein considers a higher value for some actions such as laws authorized by parliaments and the votes issued by the courts than other verbal acts.

In his opinion, undoubtedly, laws authorized by legislative institutions and domestic courts' decisions have a higher value like physical acts –or even more value – in the process of practice-making, however, in other cases the general declarations of the states including statements, announcements and notices, only have a side role (idem) and they cannot make an practice which leads to the formation of the material component of custom without the states' physical acts (idem, p 276). Thus although at first, he considers physical and verbal acts of the states in the same way, finally , he makes some distinctions between them in relation to their role quality in the process of practice-making which lead to the creation of customary rules. Yet this dissociation is not at all comparable to the Twirl Wee point of views who considered totally verbal acts as the evidences for making practices. Dinstein believes in this framework, when the preconditions are available, the general statements of the states can put their actions in a special situation, especially by making clarification of that action or by making explanation of that as an exception to the rule. In other words, there would be a kind of impact on the delimitation of the discussed rule. But this cannot contribute to the process of making the quantitative component of custom on its own (idem, p 277). Besides the judicial practices, international law association in the year 1950 clearly mentions treaties, domestic courts' decisions, national rules, diplomatic correspondences and national legal advisors' beliefs as examples of the possible different forms of the state practice, as well. Also the states' considerations especially big states imply the acceptance of verbal acts as a kind of the state practice. Declarations of the rights of foreign relations of the United States (section 102) states; actions and diplomatic instructions and other governmental acts and official statements whether they have been taken unilaterally or in a form of collaboration with other states ,for example in the framework of international organizations, they can establish different forms of the states' practice. Relying on the verbal acts of the states in order to search for the customary law is the current reality of the international system and is of great importance, especially, for those states which do not have the material facilities for taking actions in a special field.

For example, for the states which do not have the weapons for mass destruction or the states which do not have the facilities for sending satellites to the space or landlocked states, verbal act is the only way of practice for them. As was mentioned above, The International Court of Justice has consistently cited official correspondences, diplomatic declarations and other similar cases and the states have not objected to them.

## 2.2 Verbal Element; Emergence in the Practice or Legal Belief?

As was stated before, the majority attitude toward the defining of the nature of material component of custom contains both physical and verbal acts. Here the problem is that when verbal acts are considered as both the practice evidences and legal belief evidences, what would be the way to authenticate and dissociate them? Verbal acts are being considered as the most important evidence for proving the existence of legal belief. The result which is achieved in this case, according to some lawyers, will be an epistemological way which causes one of the components of the creator of the customary International law rule look redundant. Viewing more meticulously, the solving of problem does not seem to be difficult. Although apparently and at first, considering verbal acts as evidences for both creating practice and evidences for creating legal belief of the states, can lead to the fomenting of some ambiguities, these problems can appear where the states do not have any verbal act about an issue. In the recent case- besides the material component-also the mental component is extracted on the basis of the wide and convincing practice of the states and not through understanding of the preconceived notions. This has been expressly confirmed in the votes of the Court Branch in the year 1984 (Gulf of Maine case). Thus necessarily, insisting on the dissociation between the sources of the evidences of components of custom is not logical. As the verbal acts can show the states practices and also the legal beliefs, physical acts can also contain such situations but in the case of the former we face a different situation. In this regard some of the lawyers, in addition to acknowledging that verbal acts of the states can be cited as a form of practice, they believe that the contents of such actions will also show the mental elements or their legal beliefs. (Mendelson, 2000).

## 2.3 Refusal or Omission

Although the material element or practice implies the states' actions( both physical and verbal), it is possible that under especial situations, refusing to take action( refusal) will be paid attention as a kind of the state's practice in the process of the formation of legal international customary rules. For example, refusal to prosecute an accused or suspect foreigner diplomat for committing the crime in order to create the customary rules related to the diplomatic immunities. The majority of the authors and commentators have more or less accepted the role of refusal in the process of making practices, professor Wolfke believes that "There is no basis for excluding refusal as a kind of process which lead to the formation of the international custom. Everything depends on the situation and occasion." (Wolfke, 1993) Professor Akehurst also stated "The state's practice can contain refusal and silence." (Akehurst, 1994, p11) The point of views of other jurists such as Sorensen, Tunkin, Bernhardt, Danilenko and Kunz, in relation to the role of refusal are the same. In this way professor Mendelson also believes that; refusal can be paid attention as the material component of custom or practice but we should consider the situation and a degree of caution (Mendelson, 2006). Like other jurists such as Wolfke and Akehurst, he poses popular Lutos vote as the basis of his analysis. 168 It appears that the best understanding of the role and place of the refusal in the process of making practices which lead to the formation of customary rules, have been done in the framework of this idea. In this case, The Permanent Court of International Justice did not accept the refusal of the states (except the flag State) from the prosecuting of the accidents on high seas as an evidence for existing a customary legal international rule which ban the states from such actions(idem). But this policy of The Court was for the reason that the refusals

of the states were ambiguous and this can mean that there is no problem in situations that refusals of the states as a government practice contain no ambiguity. In this case, by citing to the lack of prosecution from the non-flag states about the claims related to the collision on the high seas, The French government was a pretender of a kind of duty for such states. The Permanent Court of Justice denies this reasoning of the French government not because of the fact that refusals of the states naturally do not have the characteristic to consider this as a "practice", but because this refusal seemed ambiguous in such situation and it was unlikely that this was as a result of aware commitment.

## 2.4 Characteristics of the Practice

Which characteristics should the practice or material component of custom have? Under which quality are the states' actions recognized as the international practice? Article 38 (1) (b) of the Statute of the International Court of Justice only considers the generality of the practice. Nevertheless, investigating of the jurists ideas about the international juridical practice implies other traits and qualities which the practice that lead to the formation of a customary rule should also contain them. We will discuss this issue in detail in this section.

### 2.4.1 The Generality of Practice and the Limits of This Generality

As was mentioned before especially in citing of the paragraph1 (b) of the article 38 of the Statute of the International Court of Justice, the international practice which lead to the formation of the customary law should be "general". But this generality does not mean the participation of the all of the states in the world in the process of making practices, because this way we should wait for years for creation of a customary law to come true that is so exceptional and far away from expectation. With the generality of the practice, it means that it implies "wideness" and "similarity" which are the basis for the formation of the rule and all of the states are required to comply with them, unless it be in the framework of "Persistent Objector". The general practices of the states contain both the sequential and parallel actions which are as a result of the practices of cognizable organizations in a period. In most of the cases these actions can be accomplished independently, however, the consistency between the states should not be disregarded. Now we should discuss about the issue that how many states should participate in this practice? There is no specific criterion in this regard and naturally like the other issues about the custom, it is difficult to exactly pose a rule about the number of the states which should participate in the practice which leads to the formation of the customary law. This participation not only contains the states actions but also it contains the reactions of other states whose interests are affected. (Akehurst, 1974). The majority of the customary rules which have been done by the international juridical authorities were based on the wide participation of the states. But it is also possible that the general practices of the states be the result of the actions of a few numbers of the countries. And it is also possible that the other states have the "once in each direction" participation. (Dinestein, 2006, p283) But it has been said that if a state or a group of states do not protest against the action of another group in the case that they are objector to that, their silence mean that they have accepted such actions. (Idem) From the standpoint of international Law association committee statement about the principles governing the formation of the international customary law, the States practices should be wide in order to create a general rule of the international customary law, so as was stated in the court's practice, and not necessarily universal, also it is not necessary for the specific governmental requirements to an international customary law, it will be proven that the mentioned state has participated in the practice actively or deliberately has agreed about that (idem).And the international judicial authorities has never denied this state from the commitment for the reason that the state has not participated actively in the practice which lead to the formation of General rule of customary international law claims.(idem).

### 2.4.2 The Time Element

Custom is formed in the floor of time (Dinstein, 2006). How much time is necessary for a customary law to come into emergence? About this we should state that there is no specific criterion. Maybe in this frame work; the time needed for the time passing for creating a customary law; the wording of the International Court of Justice in North Sea Continental Shelf Cases will be the best criterion for analyzer. Although passing a short time does not necessarily or in itself prevent the formation of the customary rule of international law, on the basis of what was basically a convention rule, but the necessary condition in this short period is that the practices of the states especially those states whose interest will have been affected especially, regarding the citation of the regulation, be wide and really consistent. In addition to this, the practice should be made so that it makes possible the recognition of the fact that a legal rule or a legal necessity has been regarded. The needed scale of time continuity in order to creation of an international customary rule depends on various related factors. For example, if an issue was stated which no other rule was accepted about that, establishing the rules concerning the issue will take shorter time than the issue which exist a customary law for it and it should be adjusted for the establishment of the new rule. Nowadays, in parallel of the development of the international relations, the importance of time is reduced. In assessing the behavior of a state, time is of low importance and its situation in each case depends on the other factors related to that activity. In the past and in the Roman law, basically custom was considered as a product of a long practice, also in the common law in order to convert the practice to law, that practice should have a long history so that nobody can remember its root time. (Mendelson, 2006). In the international level, most of the legal rules have a long history. but this does not mean that the formation of the new rules also need such history. At the present, the creations of the customary rules are provided in a short time and faster than the past (idem, p210). For example the rules governing the law of sea were first announced by President Truman in the year 1945. In the year of 1951, in the judgement of the Abu Dhabi Lord Asquith the dispute case of Petroleum Company of Dolapment and Sheikh Abu Dhabi, he ruled that the mentioned doctrine with specific line yet do not appear in the international stature of a rule of law. But over the next years and until the 958 Geneva Conference, more states claimed jurisdiction over the continental shelf. at the time of the conference had been accepted that the coastal states should have especial rules over their continental shelf. And thus 1958 convention recognized such rights for the coastal states.

### 2.4.3 Integrity and Uniformity of Practices

The practice should be Virtually Uniform in order to participate in the process of making the principles of international law. It means that the different samples of the practice, should necessarily be similar and consistent both internally and in general. That the practice should be internally consistent means that the behavior of a participated state in the process of custom-making about a special issue should be consistent in different levels.

By consistency in general, it means that different states should not have different practices about a special issue (idem). In the Nicaragua case, the court did not find an opportunity to consider come points in relation to the present issue. According to The Court when considering customary international law related to the principle of banning on the resort to the force and also the principle of prevention from intervening of the states in each other's internal affairs, this international juridical institution do not expect that the states' practice in obeying the mentioned principles be in a high rate so that they should prevent from intervention in each other's affairs by resorting to force in a consistent way. The Court believes that for the formation of a customary law, it is not necessary that the related practice be consistent with that rule. In order to establish the existence of such a rule, it will be enough that the states' behaviors be generally consistent with that and the examples of the practice

which are inconsistent and incompatible with the rule, should be treated as a violation of that rule and not the signs indicating the recognition of a new rule.

### 2.4.4 The Practice of the Beneficiary States

The wide and consistent practice of the states in order to form a customary law, should be represented. International Court of Justice in the issues related to the continental shelf of The North Sea has emphasized on the "the practices of the states whose benefits are affected in a special way" in the process of practice-making. This suggests that the number of the states in comparison to the situation and the states which are related to the issue is of lower importance because their benefits are in relation to the mentioned rule. For a claim rule to legitimate, a proper reaction from the states and the beneficiary states is needed. Thus for example we can hint to the Britain's contribution in the formation of the law of the sea in the nineteenth century and the role of the United States and the former Soviet Union in the development of the law beyond the atmosphere. Before a claim rule can find its way in the area of the customary international law, it is possible that the participation of some states be more necessary.

### 3 Conclusions

Through qualified organs, State practices appear and form the principle movement of rulemaking at international level. According to international law, the determination of State qualified organs has been allotted to its own internal legal system. In this respect ILC considers every organ behavior as State behavior, regardless of its function, including legislature, judiciary or executive. In the other level, international organizations enjoying subjective legal personality, actively act as practice makers especially that their activities realm has remarkably developed nowadays. These organizations behavior largely shows themselves in the form of declaration and resolution. International judicial authorities also can contribute as practice makers. This contribution may be realized in two forms, first as institutions that received their authority from States and their behavior is seen as States will and second, consideration of these authorities as the internal organs of an international organization and regarding their decisions as organizational practice. Similarly, Non-governmental organizations contribute just in the primary proceedings of practice making as well. ICRC is a NGO that has widely participated in formation of international humanitarian law. Concerning the nature of practice, both physical behavior of State like nuclear test and verbal act like authorities statements are regarded as practice element. However, sometimes verbal acts of States may indicate the legal belief of their doers parallel to consideration as a practice. Similar to Physical and verbal act, omission and silence also may be recognized as practice. Sometimes States manifest their will by omission or silence, like refusal to prosecution and silence on States nuclear test or bombardment. The aforementioned approach of States is regarded as their practice. The generality of practice widely relates to its uniformity and integrity. Even only two States can constitute the necessary quantity to form a regional custom. Because generality is determining not universality. The length of time is not inherently significant for realization of States practice. One practice may be consolidated just over one decade and the other may be recognized over decades. Finally, as the practice makers, the penetration coefficient of beneficiary States acts is noticeably more determining than the others as well.

### References

1. Akehurst, M.: *Custom as a Source of International Law*, 47 British Yearbook of International Law, 1974-75.
2. Danilenko, M.: *The Theory of International Law*, 31 German Yearbook of International Law, 1998.
3. Dinstein Y.: *the Interaction between Customary International Law and Treaties*, 322 Recueil Des Cours:

- Collected Courses of The Hague Academy of International Law, 2006.
4. Gilbert, G.: *Transnational Fugitive Offenders in International Law: Extradition and Other Mechanisms*, 1998.
  5. Higgins, R.: *The Development of International Law through the Political Organs of United Nations*, *British Yearbook of International Law*, 1987.
  6. Hobe, S.: *The Role of Non-State Actors, in Particular of NGOs, in Non-Contractual Law- Making and the Development of Customary International Law*, *Developments of International Law in Treaty Making*, by Wolfram and Rben, eds, 2005.
  7. Mendelson, H.: *The Formation of Customary International Law*, 272 *Recueil des cours: Collected Courses of The Hague Academy of International Law*, 1998. Mullerson, "The Interplay of Objective and Subjective Elements in Customary Law", In: Wellens, K, (ed), *International Law: Theory and Practice: Essays in Honor of Eric Suy*, 2006.
  8. Wolfke, K.: *Custom in Present International Law*, Martinus Nijhoff Publishers, Netherlands, 1993.