

TAKING THE TWO-ELEMENTS THEORY OF INTERNATIONAL CUSTOMARY LAW SERIOUSLY – PROBLEMS WITH DOUBLE COUNTING

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INTRODUCTION

Among the few other preconditions of customary law F. Savigny mentions the “undertaking of the act in the feeling of a legal necessity (*opinio necessitatis*)”¹. As K. Wolfke explained, the two-element theory of customary law (according to which there are two constituent elements, i.e. practice and *opinio iuris*) was introduced to the modern theory of law by the historical school of law². The purpose of this concept was a departure from well-established understanding of the customary law as a *tacit consensus populi*³. According to the generally agreed approach, international customary law is composed of an objective element, i.e. practice and the subjective element – so-called “*opinio iuris*”. This last one is usually understood as a feeling of doing one’s duty or simply doing what is right. Practice without *opinio iuris* is simply a “usage”⁴. Alternatively, it can be a kind of international courtesy or protocol, which are loosely relevant for international law. The ICJ in the judgment in the case of

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¹ FC Savigny, *System of the Modern Roman Law*, vol. I, trans. W Holloway (1867) 140. This condition, referred to as *opinio juris sive necessitatis*, in short *opinio juris* was, according to him “the most important of all”.

² K Wolfke, *Custom in Present International Law* (2nd ed 1993) 46; M Koskienniemi, *From Apology to Utopia – Structure of International Legal Argument* (2007) 415.

³ GT Sadler, *The Relation Custom to Law* (1919) 57, where author cites Hermogenianus.

⁴ R Jennings, A Watts, *Oppenheim’s International Law – Volume 1 – Peace – Introduction and Part I* (1996) 27.

North Sea Continental Shelf⁵ observed:

“The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency or even habitual character of the acts is not in itself enough. There are many international acts, e.g. in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by the considerations of courtesy, convenience or tradition, and not by any sense of legal duty.”

This explains why the premise of *opinio iuris* is “the most important of all”. It is the *differentia specifica* of the customary law. *Opinio iuris* resembles tacit consent at least in one⁶: both are opposite to usage.

I.

Outlined above understanding of the customary law is related to an important question. How should one confirm the existence of *opinio iuris*? Even if we do not stick to the voluntarist concept of law, after all *opinio iuris* is for many lawyers a kind of acceptance, which somehow differs to acceptance of treaties by their parties⁷. Finally, in the case of customary international law, the concept of “general consent” should be taken into account. Therefore the consent of particular States (although this issue is not so obvious in the case of the particular customary law) matters only to some extent, *prima facie* in a different way than in case of treaties⁸. Customary international law is not a matter of “individual subscription”. Sometimes it is also underlined that what matters is consent of a group of States, not necessarily the whole international community. But even if it is possible to specify a set of States whose acceptance is significant, how do we know that these States have expressed their acceptance? This is a purely epistemological matter which, however, seems to be the utmost. The thing is that, in the case of international law, clear and explicit expression of will by States occurs quite rarely. Of course, explicitly and clearly, States express their will to be bound by treaties or unilateral acts (assuming that the unilateral act will not be understood as the omission). But even in case of treaty-like bargain, verbosity is not obvious⁹. Customary law is not so clearly based on an explicit

⁵ *North Sea Continental Shelf (Federal Republic of Germany v Netherlands), (Federal Republic of Germany v Denmark)* [1969] ICJ Rep 44.

⁶ But *tacit consent* implies that customary law as such is a tacit agreement. This has far reaching consequences. Namely it matters in discussion on the ultimate basis of international law. Customary international law understood as a tacit agreement shares with treaties the same ultimate basis – principle *pacta sunt servanda*. See H Lauterpacht ‘The Nature of International Law and General Jurisprudence’ (1932) 37 *Economica* 315.

⁷ A Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (2008) 76.

⁸ GJ Postema, ‘Custom in international law: a normative practice account’ in A Perreau-Saussine, JB Murphy (eds) *The Nature of Customary Law – Legal Historical and Philosophical Perspectives* (2007) 296.

⁹ A Aust, *Modern Treaty Law and Practice* (2007) 142. There is an interesting passage on the silence of States in case of reservations to treaties. Besides its subject these observations can be easily generalized. States mostly do not express their attitude unless their interests are at stake.

acceptance (which is simply presumed), but rather on an implicit acceptance, in other words: on lack of objection. This is the key point of the concept of persistent objector. But this introduces voluntarism *à rebours*, so despite all the effort at the end, the traditional concept of customary law is a quite sophisticated consensual-law making¹⁰. Basis for this may be found in the maxim *qui tacet consentire videtur dum loqui debuit ac potuit*. Inherent weakness of this epistemology is that it is based not on actual, but rather on construed, consent. The idea is that failure to protest is equated with consent (the same as in the case of treaties). But arguments *in concreto* against acquiescence may be repeated here. A.T. Guzman noted that:

“A state might fail to object for any number of reasons having nothing to do with consent. It may prefer to avoid objecting for political reasons; it may not feel that the norm is changing into custom, thus making objection unnecessary; or it may simply not be sufficiently affected by the rule to bother objecting.”

But that only means that not every instant of consent should be treated like consent, properly so-called. Evidence of consent becomes more burdensome: it may be still presumed, however, it is easier to rebut this presumption. Any way, it turns out that distinguishing customary law and treaties is quite difficult¹¹. One cannot deprive the customary law element of consent the internal aspect¹², which is described as *opinio iuris*. To say that customary law consists of only an objective element means that whatever States do is legal, so there is no real distinction between what ought to be and what is. In this perspective, therefore, *opinio iuris* as *differentia specifica* is somehow analogical to basic norm applied by H. Kelsen. It is mostly elusive and vague but it is the key premise of law. While in the case of treaties, consent is expressed in a direct way, in the case of customary law, it is expressed in a “non-written form”¹³.

So if *opinio iuris* is a psychological, inner element of customary law, it

¹⁰ Wolfke (n 2) 162-164. Another argument is based fact that there is no “post-formation objection”, once customary law has emerged it is binding and no withdrawal is available (in opposition to majority of treaties, which because of their “nature” can be withdrawn).

¹¹ Koskienniemi (n 2) 409.

¹² HLA Hart: *Concept of law* (1961) 55-56. The phenomenon of internal aspect of rules is explained in such way:

“Chess players do not merely have similar habits of moving the Queen in the same way which an external observer, who knows nothing about their attitudes to the moves they make, could record. [...] Each not only moves the Queen in a certain way himself but “has views” about the propriety of all moving the queen in that way. These views are manifested in the criticism of others and demands for conformity made upon others when deviation is actual or threatened.”

However, with such internal aspect of rules, criticism is however observable through linguistic usages. Thus, not simply the binding power of the rule matters as such, but proper justification of specific behavior is relevant. In Hart’s theory of law the internal aspect of rules is an inherent element of the notion of law as such. If customary law is claimed to be a law, it will also need its internal aspect.

¹³ Hart (n 12) 56.

can be seen only by the behavior of States, and so just by practice. The internal point of view is a theoretical concept present in Hart's theory of law. The psychological dimension of *opinio iuris* indicates its subjectivity, which is opposed to the objectivity of practice. Thus understanding *opinio iuris* as a sort of so-called "internal point of view" is well founded¹⁴. To a certain degree *opinio iuris* is considered by some as existing and certain, which means that what is awaited in case of *opinio iuris* is its objectivisation¹⁵. *Opinio iuris* is, according to this approach, like the internal point of view, just a matter of fact. But anthropomorphization of the State, by granting it such characteristics like beliefs, only blurs, not clarifies, the notion of *opinio iuris* because it renders cognition of *opinio iuris* as hardly possible¹⁶. However, a sort of anthropomorphization is inevitable when "belief" or "conviction" is awaited. K. Wolfke gives numerous examples when *opinio iuris* was demonstrated through the practice of States¹⁷. Such understanding of customary law means circularity or its reduction solely to the practice¹⁸. Underlining the importance of practice results in reduction of the relevance of *opinio iuris*. Thus *opinio iuris* seems to be superfluous if an epistemology of customary law, not only its ontology, is taken into account¹⁹. In such a case necessary element of customary law is practice; meanwhile "psychological" element is purely constructive one (but there is no appealing reason to not reverse this argumentation). Such an understanding of *opinio iuris* means that what all States do (or abstain to do) is, at the end of day, equal to the conviction of legal relevancy of the practice and its acceptance. So everything all States do is becoming customary law. This concept will not explain what makes law. This is, in fact, the reason why the concept of the *opinio iuris* has emerged. Without this all that is relevant is habit, thus any repeatable behavior. Ultimately

¹⁴ Lefkowitz, 'The Source of International Law: Some Philosophical Reflections' in S Besson, J Tasioulas (eds) *The Philosophy of International Law* (2010) 200.

¹⁵ JL Slama, 'Opinio Juris in Customary International Law', (1990) 15 Oklahoma City University Law Review 648; SJ Shapiro 'What is the Internal Point of View?' (2006) 75 Fordham Law Review 1162 where a reader may find such a passage: "The attitude manifests itself most obviously through conforming behavior. When one takes the internal point of view towards a rule, one acts according to the dictates of the rule". There is a problem of so-called "bad man", but under the condition that "bad man" abides by rule. It is however quite problematic to what extent the figure of "bad man" is applicable to States. "Bad man" undermines the importance of internal point of view.

¹⁶ Slama (n 15) 652.

¹⁷ Wolfke (n 2) 123- 137. Similarly BD Lepard, *Customary International Law – A New Theory with Practical Applications* (2010) 128-138.

¹⁸ Oppenheim (n 4) 29.

¹⁹ See M Wood 'Third report on identification of customary international law', ILC Sixty-seventh session, Geneva, 4 May-5 June and 6 July-7 August 2015, UN Doc A/CN.4/682 6 where H Thirlway is cited. He says that "[t]here may well be overlap between the <<manifestations of practice>> and the <<forms of evidence of acceptance>> of such practice as law; generally, this does not mean that given acts can constitute both, as that would amount to a return of the single-element theory". And he adds that "[t]he two-element theory necessarily implies that there has to be something present that can be described as State practice and something present that indicates, or from which the conclusion can be drawn, that States consider that a rule of customary law exists".

a sort of rule of recognition²⁰ has to be applied. Otherwise the binding power of a specific norm would be decided *ad casum*²¹. In this case all of what is a precondition of practice becomes a precondition of *opinio iuris*, presuming that sort of conviction or acceptances is considered as relevant. But even *opinio iuris* is relevant for emergence of customary law, it is assumed the same time. Thus its relevancy is apparent.

On the other hand there is the completely different approach, according to which the key element of customary law is *opinio iuris*. Thus practice is not relevant as such, or at least just to the degree that the effectiveness of law in general matters²². Paradoxically this approach is known since the traditional approach has emerged²³. It is the effect of the importance of *opinio iuris* in the traditional concept of customary law. The extreme result of this approach is so-called instant custom²⁴. This was mentioned, for instance, in the judgment in case of North Sea Continental Shelf²⁵. The only constitutive element of customary law is *opinio iuris*²⁶. This concept was described by the ICJ this way:

“Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; – and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.”

Practice, so-called usage, is in this case only the evidence, or rather confirmation of *opinio iuris*. But an evidentiary role is not the same as the necessity of practice, which is simply implied. Practice is here understood as an abiding already binding norm²⁷. Mostly *opinio iuris* is expressed by such acts like resolutions of collective organs composed of the States. According to this concept the relevance of practice is very limited, but under the condition that as

²⁰ Hart (n 12) 102-107.

²¹ It is stunning how often international lawyers say that deciding of existence of customary law is a matter of particular circumstances in specific case. Complexity of the evidence of customary law undermines very seriously the thesis that it can be just found on the basis of presupposition that customary law exists.

²² H Kelsen, *The Pure Theory of Law* (1967) 11. There Kelsen talks of “minimum of effectiveness” as the condition of validity of legal norm. But as he underlines that “effectiveness is a condition of validity in the sense that effectiveness has to join the positing of a legal norm if the norm is not lose its validity”.

²³ Slama (n 15) 613; Savigny (n 1) 141.

²⁴ Slama (n 15) 639.

²⁵ *North Sea Continental Shelf (Federal Republic of Germany v Netherlands)*, (*Federal Republic of Germany v Denmark*), [1969] ICJ Rep 43.

²⁶ RM Walden, ‘Customary International Law: a Jurisprudential Analysis’(1978) 13 Israel Law Review 97.

²⁷ Walden (n 26) 97.

such practices, we do not mean resolutions. This condition is a matter of reason. But it seems that in real life, resolutions are actually considered as practice in this case. In the advisory opinion on Legal Status Western Sahara, ICJ observed that:

“[T]he cumulative impact of many resolutions when similar in content voted by overwhelming majorities and frequently repeated over a period of time give rise to a general *opinio iuris* and thus constitute a norm of customary international law”²⁸.

This passage does not invoke the concept of instant custom as such; however, it equates resolutions and practice. If the will of States is expressed in the form of a resolution of the General Assembly of the UN then such a will – *opinio iuris* is a basic element of practice. This (as well presumption of *opinio iuris* on the basis of State practice) is what can be called double counting. Distinction of *opinio iuris* and practice appears to be artificial, especially if the real behavior of States, inconsistent with such “customary law” is considered as a violation of legal norms thus not as a sort of “persistent objector” by deeds.

II.

The concept of instant custom is a method to introduce back-door law making by collective international bodies like e.g. UN General Assembly, alleged “world legislator”. What is especially interesting, this concept does not seem to be the prevailing one but on the other hand it is to some degree a method of explaining the phenomenon of *soft law*. Most of the handbooks and manuals of international law repeat tenets of the traditional concept of customary, at the same time emphasizing importance of *soft law* in contemporary international relations. Consequently, considering final effectiveness, the concept of *instant custom* is not distinguishable from concept of *soft law*. Instant custom is tempting for many because it makes international law more flexible and susceptible to changes of in a political context of the international community. But among its drawbacks there is a blurred notion of law resulting in the uncontrolled creation of legal norms. This uncertainty of law is the effect of “enactment” *ultra vires*. Otherwise no special legitimization would be necessary because indication of legal basis would be enough. But there is no uncontentious legal basis for the

²⁸ However the legal character of such a resolution is confusing. In award concerning the case *Sedco v National Iranian Oil Company*, 84 ILR 495, 526, the US-Iran Tribunal concluded *inter alia*: “United Nations General Assembly are not directly binding upon States and generally are not evidence of customary law. Nevertheless, it is generally accepted that such resolutions in certain specified circumstances may be regarded as evidence of customary international law or can contribute – among other factors – to the creation of such law”. Inability of expressing general norms in a conclusive way means that at the end decision on the legal effect of the mentioned resolutions will be undertaken with the consideration of relevant circumstances. Such decision will be undertaken *ad casum*. This grants significant discretionary power to the decisive authority. The conclusion is not very useful in case of an international court or a *quasi-judicial* body. Wide discretionary power means that parties to the dispute may vary on the exact outcome of reasoning on content of law applicable in that dispute.

law-making power of the resolution of General Assembly of the UN. This is why the concept of instant custom is so “useful”. However the direct result of the concept of *soft law* is that it is no longer possible to explain how to distinguish between *lex lata* and *lex ferenda*. It especially matters if one considers that the key theoretical problem of the customary law is an explanation of the transition from “ought” to “is”²⁹. Considering the practical point of view, it seems that concept of instant custom confuses what law actually is and what we want it to be. There is no way out of this circle.

In context of instant custom to one may invoke other factors in course of explaining the phenomena of *opinio iuris*. They are especially desirability or necessity³⁰. Applying the test of “social necessity” is a method of converting “creation” of legal norms into their “discovering”, but axiological necessity also matters, especially in the field of human right³¹. However there is, of course, a problem as to on what basis a specific collective organ has been granted the competence to discover (authoritatively) content of law. Such reasoning is very contentious because it, to some degree, undermines the consensual basis of international law³².

As it was maintained before, one of tenets of international law is view that customary law is composed of two elements: namely practice and *opinio iuris*. However there is diversity of opinions on the exact relations of these elements. There are two opposing approaches on the emergence of customary law. The first approach implies the primacy of *opinio juris* accompanied by the marginalization of the significance of the practice which, admittedly, does not have to be from time immemorial. Nevertheless, practice is determined in time, even if relevant period of time is short. This approach is the ultimate basis of the concept of instant custom mentioned before. The second approach is that one can deduct *opinio juris* on the basis of practice. The latter approach is the most popular one. If *opinio iuris* cannot be observed otherwise as such, because it is not tangible, one has to focus on its indirect external manifestations. Inevitably such external manifestations are the practice, or more widely: all acts of States. In this context, besides positive acts also an omission matters. However, the exact reason for an omission (inactivity) is at least contentious³³. The exact reason,

²⁹ Koskienniemi (n 2) 422- 423.

³⁰ Slama (n 15) 640.

³¹ Lepard (n 17) 127.

³² R Kwiecień, *Teoria i filozofia prawa międzynarodowego – Problemy wybrane* (2011) 191, where the author underlined the importance of consensualism restraining enacting law not coherent with axiology of international community. Indeed emergence of customary law may be seen as the manifestation of democratic values in the international community. Especially it is difficult to deny that customary law is legitimized.

³³ JL Goldsmith, EA Posner, ‘Understanding the Resemblance Between Modern and Traditional Customary International Law’ (2000) 40 *Virginia Journal of International Law* 645. In this article authors *inter alia* analyze reasons of inactivity being compliant with customary international law in the case *The Paquete Habana*. The issue was why States abstained from seizing the belligerent’s coastal fishing vessels. Proposed explanation is that: “[s]eizing such a vessel is a costly activity in terms of lost opportunities and military expenditures, and it provides the state

effect and motivation of inactivity are mostly mysterious³⁴. Anyway, besides the positive activity of some States being relevant (e.g. especially States interested in emerging legal rule), the inactivity of the (interested) States matters, too. But uncertainty as to the reason for inactivity makes it easier to contest its opposability. The sound argument in favour is the alleged unawareness of the current positive practice of other actors.

In addition, among relevant features of practice, there are its continuation and repetition over a considerable period of time. This last feature of practice ensures that its unawareness is very unlikely, what creates a presumption on the effect of inactivity. Thus the next problem is how to understand *opinio iuris* which is manifested, depicted by the activity and inactivity of States. Underlining the importance of *opinio iuris* is a nexus with a traditional definition of customary law placing this in the realm of “ought”³⁵. What can be ascertained from practice is “tacit recognition”, “absence of protest” or finally “acquiescence”. Observable are positive acts or inactivity coupled with the acquiescence of the other States. The basis of this acquiescence is the presumption mentioned before. Indeed acquiescence may be also result of a positive act. In such a case acquiescence is less contentious. Sound instances of inactivity which the international community faced are abstaining from the threat of use of force against the territorial integrity of any other State or abstaining from instituting criminal proceedings³⁶. The object of specific inactivity matters. From the point of view of other States, there is considerable difference between omission in claiming rights and omission in fulfilling obligations. We must bear in mind that inactivity matters (both as the manifestation of practice and the evidence of practice) only if the current circumstances call for some reaction. This is especially the situation when the rights of an inactive State are breached.

with relatively little gain. A state’s navy often has more valuable opportunities to pursue such as defending the coastline or attacking the enemy’s navy. [...] [i]t might well be that nations did not seize the vessels for the same reason that they did not sink their own ships – they simply had no interest in doing so because the activity was costly and produced few benefits”.

³⁴ For instance in the *Lotus* judgment there is such passage (*The case of the „S.S. Lotus” (France/Turkey)*, [1927] PCIJ Rep Series A No 10, 28): “States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom”. First of all *opinio iuris* is something separate to State practice. But abstention is not unequivocal, especially it will not indicate *per se* its grounds.

³⁵ Wolfke (n 2) 30. More general is observation that international law is as such in the no man’s land between “ought” and “is”. There is no black & white. A sound example is the modification of treaties by subsequent practice. See art. 31 of VLCT, according to which a treaty should be interpreted in context, together with which “any subsequent practice of the treaty established the agreement of the parties regarding its interpretation”. Thus since the conclusion of treaty its modification starts. It may be a sort of special custom, which is limited only to specific treaty and between its parties. But there are no obstacles to modify the treaty by general customary law. Numerous examples can be found in G Nolte, ‘Report 3. Subsequent Agreement and Subsequent Practice of States Outside of Judicial or Quasi-judicial Proceedings’ in G Nolte (ed), *Treaties and Subsequent Practice* (2013) 350-352.

³⁶ Wood (n 19) 910.

What if one encounters widespread contrary State practice? In such a case reasoning on *opinio iuris* is not possible, unless such reasoning is done not on the basis of, but counter to, State practice³⁷. So widespread contrary practice which is a sound argument if we apply this practice based on an epistemology approach. But this is moment when a reversal of the starting point is so tempting. For instance, in such a case a completely different argument may be applied. Namely that stated “indeed believe that rule is desirable”³⁸. Of course this is based on the opposite approach according to which practice plays secondary role. Change of position is surprisingly easy.

III.

There are two important manifestations of practice, on basis of which *opinio iuris* can be presumed: treaties and various (binding *vel non*) resolutions of international organizations. Treaties can be qualified as the manifestation of practice. They have a serious contribution to intensification of practice. However, as was said before, customary law is subject of the realm of “ought” and the realm of “is”. In the last case a treaty is not the prevailing manifestation of practice. Such a role is played by the behaviour of States³⁹. Treaties usually have a serious impact upon the behavior of its parties. But in some circumstances, especially in the realm of “ought”, mere conclusion of a treaty by its parties may be interpreted as the manifestation of practice, especially if the obligation stipulated by such a treaty is the inactivity. This is because inactivity is much easier to maintain and needs less effort. However this distinction between the treaty as such and its efficiency is somehow artificial, at least on the basis of principle *pacta sunt servanda*. Conclusion of treaty renders so firm presumption of its bidding power that there is no virtually necessity to prove whether States abide treaty. Only for the sake of rebutting of such a presumption, the proof of non-compliance must be shown. The key problem and controversy related to the treaty as a manifestation of practice or *opinio iuris* is the fact, that at first glance, the treaty is for non-parties *res inter alios acts*⁴⁰. According to article 38 of Vienna

³⁷ Lepard (n 17) 124.

³⁸ *ibid.*

³⁹ It seems that, according to international law, express consent has the same effect as so-called tacit consent notwithstanding the name of the latter. This approach is well established and is based on the maxim *tacitus et expressus consensus aequiparantur et sunt paria potentiae*. However, from a practical point of view, such equality is apparent. Hardship of tacit consent cognition is the reason why such a form of consent is considered as a “poor cousin”. Such an approach is more linguistic than substantial and therefore easier to apply. See J Waldron, *Law and Disagreement* (2004) 63-64 where the reverse approach, proposed by Bartolus de Saxofferato, is presented. According to this, express consent “may not have the legitimating force of a long established pattern of conduct”. But custom, based on tacit consent, has such force. This is however based on a slightly different concept of law.

⁴⁰ See e.g. Orakhelashvili (n 7) 71.

Convention on the Law of Treaties:

“Nothing in articles 34 to 37⁴¹ precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.”

Emergence of the customary law on the basis of treaty means that the rule expressed in article 34 is not relevant any more in a specific case. Rules of customary law bind, irrespective of individual consent, (which is still firmly presumed). However article 38 of VCLT is not, in any way, the basis of transformation provisions of a specific treaty into customary law, but it only confirms that such a possibility is not excluded. The impact upon the position of third States is that they have to face the coherent practice of States being parties of treaties and acting (or non-acting) in accordance with their legal obligations resulting out of these treaties. These parties are probably States especially interested in existence of specific rules. But such a relationship between treaties and customary law is a sort of *reduction ad unum*. On one hand treaties are manifestations of State practice but on the other hand they are source of law based on express state consent, thus basis for treaties is voluntarism. Treaties and customary law are independent of each other⁴² – the basis of their binding powers allegedly differs, but customary may be dependent upon treaties in cognition.

The evidentiary role of resolutions of international organizations is well established⁴³. It is hard to deny that such resolutions matter. Questionable is the exact mechanism of this presumption. If resolutions do not replace practice rendering this superfluous, the issue is what is the balance between practice and *opinio iuris*? One may argue that such resolutions are direct expression of *opinio iuris*, understood as *de lege ferenda* manifestation. From a dogmatic point of view such a situation seems to be illogical. Conviction on the legal character of a given practice which precedes the practice to which it is related seems to have no sense. However such a chronological order of practice and *opinio iuris* is not well founded if one does not distinguish the emergence and maintenance of customary law. Most international lawyers focus on the emergence, extending this also to maintenance, which blurs the problem. Something different is building a house and taking care of it. Resolutions which are binding do not differ too much from treaties, because they are sort of executive acts to treaties and it makes them quite similar. Thus non-binding are subject of interest here. Such resolutions make specific activity or non-activity legally relevant, which of course is not the same as making such behaviour prescribed as such, which is the most rudimentary dimension of normativity. This legal relevance means that a given behaviour matters from the point of view of those involved in the

⁴¹ Articles 34 to 37 of VCLT concern relation between treaties and third States. This relation is, in general, depicted by the principle *pacta non obligant nisi gentes inter quas inita* expressed in article 34 of VCLT with exception of *pactum in favorem tertii* and *pactum in odium tertii*.

⁴² *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Jurisdiction and Admissibility) [1984] ICJ Rep 424, par 73; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 254-255, para 70-71.

⁴³ M Mendelson, *The International Court of Justice and the sources of international law in Fifty years of the International Court of Justice* (1996) 87.

development and practice of international law. Taking into account that such resolutions are, in the principle, in realm of “ought” it is natural that they are accounted as part of *opinio iuris*. There is also a proposal to simultaneously consider them as part of practice, and this seems to be so-called “double counting” which is so alarming, rendering apparent division for practice and *opinio iuris*. Even if practice, being the object of stipulated “norms” is distinguished from “practice” of voting in favor of non-binding resolutions, it will not prevent the assumption of practice on the basis of such *opinio iuris*. Support of non-binding resolution can be understood as support of behavior stipulated in those resolutions which could be misleading. Voting in favor of a non-binding instrument does not prove, *per se*, voting for binding norm. Representatives of States are aware, after all, that the object of voting is the adoption of, at most, *lex ferenda*, not *lex lata*.

CONCLUDING REMARKS

The phenomenon of double counting, no matter whether State practice or *opinio iuris* is taken as the starting point, is an inherent part of the concept of international customary law. Double counting is the result of the traditional two element concept and deduction on one of the elements on the basis of the other. The point is to take that into consideration during discussion on the formation of customary international law. Once specific issue is settled e.g. by the judiciary organ (like the ICJ⁴⁴), the content and existence of the customary law norm is self-evident. But before it that happens one has to be aware of the circuitry of such argumentation which undermines the concept of international customary law.

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 Kelsen H, *The Pure Theory of Law* (1967).

⁴⁴ There is also interesting discussion whether ICJ judgments can be acknowledged as State practice. See ILA, Committee on Formation of Customary (General) International Law ‘Final Report of the Committee – Statement of Principles Applicable to the Formation of General Customary International Law’ ILA London Conference (2000) 19. However such approach may lead to understanding all international law and its manifestations as state practice what, even if it is correct, dilutes the notion of “practice”.

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