

## THE *SUI GENERIS* OF NUCLEAR FATWA UNDER CUSTOMARY INTERNATIONAL LAW

JABER SEYVANIZAD,

Islamic Azad University (Urmia, Iran)

DOI: 10.21684/2412-2343-2017-4-2-95-134

*Due to the fluctuating nature of the Customary International Law, emerging customs have had good potential to appear in several forms during the past decade. In other words, there are various legal mechanisms indicating the genesis of CIL. One of these forms is the internationally known unilateral act of State which can be potentially recognized as a customary rule. The best example of a unilateral act of State would be Truman Proclamation which was transformed into a customary international rule concerning law of seas. With regards to the same legal framework and acts like Truman Proclamation, this research tries to answer the question that how the sui generis of fatwa in a custom-construction process concerning international law of WMD and through the modernized methodology can contribute. Illustrating the superiority of fatwa over the sui generis treaties on one hand and restricting mechanisms like NPT on the other, it can be indicated that the first steps concerning the genesis of a new customary approach in the field of international law of WMD has been derived from nuclear fatwa.*

*Keywords: nuclear fatwa; customary international law; law of treaties; NPT; WMD.*

**Recommended citation:** Jaber Seyvanizad, *The Sui Generis of Nuclear Fatwa under Customary International Law*, 4(2) BRICS Law Journal 95–134 (2017).

### Table of Contents

#### Introduction

#### 1. Definition of International Custom

#### 2. Material Element

- 2.1. The Practice Makers**
  - 2.1.1. States
  - 2.1.2. International Organizations
  - 2.1.3. International Judicial Authorities
  - 2.1.4. Non-Governmental International Organizations
- 2.2. Verbal and Material Acts**
  - 2.2.1. Verbal Element: Emergence in the Practice or Legal Belief?
- 2.3. Refusal or Omission**
- 2.4. Characteristics of the Practice**
  - 2.4.1. The Generality of Practice and the Limits of This Generality
  - 2.4.2. Duration
  - 2.4.3. Integrity and Uniformity of Practices
    - 2.4.3.1. The Practice of the Beneficiary States
- 3. Opinio Juris**
  - 3.1. The Consent Theory of the Voluntarist**
  - 3.2. Legal Beliefs Derived from the Necessities**
  - 3.3. Theoretical Fundamentals**
  - 3.4. The Procedure of the International “Judicial Practice”**
    - 3.4.1. International Court of Justice
- 4. Comparative Study of Fatwa Sui Generis with NPT and the Advisory Opinion of the International Court of Justice**
  - 4.1. Generalities**
  - 4.2. Compatibility of the Edict’s Legal Regime with NPT Master Keys**
- 5. The Superiority of Fatwa to the System of Treaties**
- 6. The Legality of Threat or Use of Nuclear Weapons**
- Conclusion**

## Introduction

According to the features emanating from the principles of justice and security, the legal regime of the nuclear fatwa<sup>1</sup> is offering a new approach in the field of disarmament and non-proliferation of the weapons of mass destruction. The growing international acceptance of this approach in the realm of customary international law and the fluid nature of the boundaries of the international law development underlie the genesis of a new custom which is originated from legal regime of the

---

<sup>1</sup> Fatwa in the Islamic faith is an authoritative legal opinion or learned interpretation that a qualified jurist can give on issues pertaining to the Islamic law. On the other words, fatwa is the expression of God’s view towards something. This view is extracted from the specified sources by a highly qualified jurist.

nuclear fatwa.<sup>2</sup> This fact requires the necessity of studies in the field of religion and religious beliefs, particularly in religious communities. And more pronounced that, the purpose of international law and monotheistic religions is placed in one direction. This means that if we want to consider a common denominator between them, it will be the maintenance of global peace and security. The only difference here is in a word, and that is "justice," i.e. maintaining international peace and security in terms of justice. Therefore, this fact was noted in the message that Iran's Supreme Leader sent in response to President Obama<sup>3</sup>. In his speech in Berlin, President Obama uttered that international peace and security is recognizable only in terms of justice and asserted that if this matter is recognized, there will be no war in the world. It is evident that the function of religious values has a specific capacity that can be very effective in the genesis of modern international law, as in most of the customary rules which are based on the values of religious beliefs. Thus, it can be said that the values derived from religion and monotheistic thoughts, in addition to influencing the creations of international customs, have a constructive role in sourcing the genesis of international law. The general principles of law or peremptory norms of international law are as follows: the principle of fulfilment of the obligation, good will, non-violence, non-aggression, prohibition of genocide, prohibition of crimes against humanity, prohibition of war crimes, non-racial discrimination, non-polluting the environment, respect for fundamental human right, etc. What is evident is that in formation of the international custom, the position of persons gets stronger, in comparison to States that once were the main subjects of international law. This change of direction in the process of formation and recognition of international law is very important. This can be viewed from two perspectives: first, Ayatollah Khamenei's fatwa, as a person, and in the framework of individual system, led to the development of customary international law and second, as the governmental practice of IRI leads to the development of international law. Even though there are some special international bi or multilateral acts<sup>4</sup> in the prohibition of weapons of

<sup>2</sup> In this respect various efforts, in primary formation of an international custom emanating from the mentioned legal regime can be listed such as; hold of international conference on disarmament in Tehran, bilateral and multilateral meetings with international high level authorities on clarifying IRI's peaceful approach and idea, the global idea of the formation of an international convention on investigation of nuclear threats after the issuance of nuclear fatwa, documentation of nuclear fatwa as an internationally legal act in the United Nations (available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N10/326/00/PDF/N1032600.pdf?OpenElement>); and support of the noted Christian, Jewish religious figures from the issuance of nuclear fatwa and many other relevant cases.

<sup>3</sup> Available at <http://www.dw.de/a-16894996>.

<sup>4</sup> Hague convention on prohibition of poisonous gases (1907), Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (1993), Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, or Biological Weapons Convention (BWC) (1972), Comprehensive Nuclear-Test-Ban Treaty (CTBT) (1996), Geneva Protocol (1925), Brussels Declaration concerning the Laws and Customs of War (1874), Strasbourg Agreement (1675), Treaty

mass destruction (WMD), none could have made a general prohibition which, in the light of a unit system proscribes any access, production, stockpiling, and use of “all sorts of” weapons of mass destruction. The nuclear fatwa, accordingly, has potential to be a precursor of the formation of such a process as it is structured by a custom in several phases. The processes that can be studied are as follows: first, it can only be the crystallization of nuclear fatwa in the frame of a custom. Second, the building a custom from its content and what is reflected by fatwa, and third, the subtraction for the formation of other emerging customs. In other words, what is meant by relationship between the international custom and this fatwa is that; not only this fatwa becomes or has become a customary rule, but not using WMD based on general principles of law and other sources of international law has been accepted as a customary practice under international law and this fatwa accordingly contributes in the formation and consolidation of both material and *opinio juris* elements. At another level, it can be argued whether the *Valliye Faqih*'s<sup>5</sup> issued fatwas which have the same international features, can cause the formation of a regional custom or not – particularly with regard to the Islamic nature of the Middle East Area. Currently, there are many discussions about the moral war under international law. It must be considered whether Iran's Supreme Leader's edict could take a positive step in this respect or not. And also, has it been effective in the formation of moral war customs or not? Generally, there is no treaty powerful enough to make a custom. All treaties and all unilateral acts are effective in this process, more or less. In this section, first we pay attention to the governing rules on the formation of the custom from the perspective of international law. Several approaches related to the formation of the custom are introduced including: traditional, modern, and postmodern, and at the same time, we try to recognize and compare these ingredients with the contents of legal regime of nuclear fatwa and finally, the related limits will be determined.

---

of Versailles (1919), Washington Naval Treaty (1922), Seabed Arms Control Treaty (1971), Outer Space Treaty (1967), Statute of the International Atomic Energy Agency (1956), Convention on the Physical Protection of Nuclear Material (1980), African Nuclear-Weapon-Free Zone Treaty (1996), Antarctic Treaty (1959), Central Asian Nuclear-Weapon-Free-Zone Treaty (2006), Treaty on the Final Settlement with Respect to Germany (1990), Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (Treaty of Tlatelolco) (1967), South Pacific Nuclear Free Zone Treaty (Treaty of Rarotonga) (1985), Southeast Asian Nuclear-Weapon-Free Zone Treaty (1995), India–United States Civil Nuclear Agreement (2005), Fissile Material Cut-off Treaty (not completed), Intermediate-Range Nuclear Forces Treaty (INF Treaty) (1987), Partial Test Ban Treaty (PTBT) (1963), SALT I (Strategic Arms Limitation Talks) (1972), SALT II (1979), Strategic Offensive Reductions Treaty (SORT) (2002), START I (Strategic Arms Reduction Treaty) (1991), START II (1993), START III (not completed), New START (2010), US–UK Mutual Defense Agreement (1958), Nassau Agreement (1962), Polaris Sales Agreement (1963), Quebec Agreement (with Canada) (1943).

<sup>5</sup> *Valliye Faqih* is the head of State and highest ranking political and religious authority in the Islamic Republic of Iran particularly and generally his position among Muslims is like the position of Pope among Christians.

## 1. Definition of International Custom

Custom in the first step, is an action or omission of a joint action among countries and, in some cases, among international organizations, meaning that it is resulted from the repetition of a legal documented action in a notable period. This characteristic is named material element. Custom in the second step displays as obligatory legal approach that this characteristic is named immaterial element.

## 2. Material Element

Regardless of theoretical disputes about Art. 38(1)(b) of the Statute of the International Court of Justice (ICJ), this concept consists of two material (practice) and immaterial (legal belief) elements whose combination will lead to a legal rule (custom) at international society level. These elements will be considered in details later. Generally, material element at the first step implies government's practice. As it was mentioned, there are no written and specific rules about what qualifications the practice should have. Issues including length at which the practice should be considered, repetition of the practice, degree of the practice coherence and integrity, generality of the practice, essence of the practice, and practices that are different criteria in this framework, and finally, makers of the practice other than the governments are parts of the most important issues that should be noticed in determination of material element. Without doubt, lawyers' ideas regarding the international juridical practice are considered as very valuable reservoirs to achieve applicable standards for realizing the custom material element.

### 2.1. The Practice Makers

#### 2.1.1. States

Art. 38(1)(b) of the Statute of the ICJ, basically indicates State practices and this issue is well inferred from Court views. 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 judgment related to the Island of Palmas (1928), sovereignty indicates the independence in relations between States.<sup>6</sup> Independence also has been put at his personal theory by Anzilotti in advisory view of the Permanent Court of International Justice in 1931 regarding tariff regimes between Austria and Germany, meaning that the State which according to international law has sovereignty, and receives its entity and authority from that

---

<sup>6</sup> *Island of Palmas Case (United States v. the Netherlands)*, Scott, Hague Court Reports 2d 83 (1932), (Perm. Ct. Arb. 1928), 2 U.N. Rep. Intl. Arb. Awards 829, at 838.

same international law.<sup>7</sup> State practices through qualified organs appear to form the main movement of rulemaking at an international level. Determination of State-qualified organs according to international law has been allotted to its own internal legal system. According to Art. 4 of the International Law Commission's Draft Articles on Responsibility of States for International Wrongful Acts (2001), behavior of each governmental organ due to international law is considered as the practice of that government regardless that whether the organ has a decorative, legal, executive function or another function and what position the organ has in governmental organizations and also if this organ is an element of central government or an element of local governmental unit (para. 1).<sup>8</sup> The way of separation of power and competency domain among governments' different organs also has been allotted to their inner system. The following considerations should be mentioned:

1. Although the determination of formal organs' competency domain is the responsibility of a government's inner system, international law regarding some senior governmental authorities (e.g. the head of the state) considers these organs among government ostensible representative who even have competency behind what is defined in a domestic system framework for them. With regard to making an agreement, such a situation has been affirmed by the ICJ in the case related to maritime and territorial boundary between Cameroon and Nigeria in 2002. The Court about this case has based its own judgment on Art. 7(2) of the Vienna Convention on the Law of Treaties (1969).<sup>9</sup> There is no reason to conceive that there is a substantial difference in the relation between treaty-making and the process of custom-building.<sup>10</sup> Nevertheless, we emphasize that the form of exerting such a judgment will include some of state's senior formal authorities.

2. When a government's formal ordinary organ acts over its authorities, its behavior will not contribute to the process of building a custom-, albeit by doing a violating act, the issue is ascribed to the State and consequently, will be followed by its international responsibility.<sup>11</sup> In other words, behavior beyond authority domain of state's formal organs – other than a few numbers of senior authorities that were already mentioned – cannot be noticed as making an element in rule-making process, although it is possible – if being violating – to lead to the responsibility of states at

---

<sup>7</sup> *Customs Regime between Germany and Austria, Advisory Opinion*, 1931 P.C.I.J. (ser. A/B) No. 41 (Sept. 5), Individual Opinion of Judge Anzilotti, at 57.

<sup>8</sup> Draft Articles on Responsibility of States for International Wrongful Acts, 53 UN GAOR Supp. (No. 10) at 43, U.N. Doc. A/56/10 (2001), Art. 4(1)(2).

<sup>9</sup> *Land and Maritime Boundary between Cameroon and Nigeria*, Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 275, at 430.

<sup>10</sup> Gennady M. Danilenko, *The Theory of International Customary Law*, 31 German Yearbook of International Law 9 (1988).

<sup>11</sup> Draft Articles on Responsibility of States for International Wrongful Acts, *supra* note 8, Art. 7.

international level. Concerning this issue, it needs to be stated that the executive power measures must be considered in addition to foreign ministry. Leading international negotiations and occasions through today's modern method is not always the responsibility of a foreign ministry. This task can be done by economy, transportation ministry, etc. Other than the cases in which an executive organ takes measures beyond its authority domain and its action is rejected by senior authority, apparently there are no appropriate reasons regarding why state capacity of practice creation must be confined to a foreign ministry.<sup>12</sup> ICJ in the *Nottebohm* case (1955) states that a governmental rule can be considered as the manifestation of that state practice.<sup>13</sup> The Court's judgment in the *Lotus* also emphasizes on this issue in the same manner that inner courts are part of governmental organs and their decisions must be considered as a part of state practice.<sup>14</sup> Legislation of territorial rules and their reflexion in judicial judgments during legal procedure can be viewed as notable indicatives of a government's behavior; particularly, basic and main rules of each country regarding limitation or development of government's competencies, separation and resignation of authorities, and promotion of human rights. Also, judgments issued from inner courts particularly can be suitable delineations of executive condition of legal processes, recognition of justice immunities and extradition. In many cases, we see the state practice-building through association of the triple powers with each other. For example, a 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's real practice regarding the mentioned issue. Also about the governments that have confederation or federal position like the U.S. and Switzerland, it must primarily be told that practices of each inner territorial unit that do not have international independent personality cannot be viewed as state practice, unless their practices are on behalf of central government and (or) approved and passed by the central government.<sup>15</sup> 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, have the most important and dominant role in the area of practice makers. As it was considered, act of State can appear in acts of its entities, and executive power entities are not only under power of president or prime minister rather they can contain measures of

---

<sup>12</sup> ILA, Final Report of the Committee on the Formation of Customary (General) International Law, Statement of Principles Applicable to the Formation of General Customary International Law, Report of the Sixty-Ninth Conference, London, 2000, Art. 9, commentary (b).

<sup>13</sup> *Nottebohm Case (Liechtenstein v. Guatemala)*, [1955] I.C.J. 1, at 22.

<sup>14</sup> *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7), at 23, 26, 28–29.

<sup>15</sup> Statement of Principles Applicable to the Formation of General Customary International Law, *supra* note 12, Art. 8.

a system as a whole. Eventually it is obvious that issuing nuclear fatwa by the Supreme Leader is equal to the act of executive power, because based on the Constitution of the Islamic Republic of Iran, the final decision maker in Iran is the Supreme Leader and determination of general and strategic policies are under his authority.<sup>16</sup> As the first hypothesis, the primary element of custom making – practice – is referred to as the act of *Valliye Faqih* in issuing concerned fatwas and acknowledgement of peaceful activities and emphasis on nuclear fatwa by representatives of international communities.<sup>17</sup> As the second hypothesis, the primary element of custom making is related to the act of Iran in none (usage, proliferation, and stockpiling) of weapons of mass destruction. And as the third hypothesis, practice is related to prohibitive and consistent act of inclined States to assist Iran in connection with the weapons of mass destruction. Furthermore, studying the other factors of practice-building under international law and their role in process of custom-building of nuclear fatwa are necessary to be considered.

### 2.1.2. *International Organizations*

Albeit “general practice” as the material element of custom-building basically indicates State’s practice, international organizations that are created to organize disorder in international relations to generate systemic order have increasingly been developed these days and actually are considered as an inseparable part of international life and play roles in different areas. This increasing development has been the outcome of international relations extension particularly in the 20<sup>th</sup> century. International organizations that first just took step in international domains in limited areas and the framework of technical issues, presently have generalized their own activity domain to the most important international issues including legal, political, and security issues. Thus, due to having subjective legal personality, international organizations are considered one of the active subjects of international law and therein, can be both producers of right and obligation, and its subject. Although organizations firstly take their own personality form State will, they continue their activities act as an independent legal personality.<sup>18</sup> Nevertheless, international organizations’ practice also can be effective in practice-building process and codifying legal rules because the practice of all subjects of international systems contribute to 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 have been set for their realization – that its borders have been defined in the Vienna Convention on the Law of Treaties between States and International Organizations or

<sup>16</sup> Arts. 5, 57, 60, 91, 107, 108, 109, 110 of the Constitution of the Islamic Republic of Iran.

<sup>17</sup> For more information see Jaber Seyvanizad, *Nuclear Fatwa under International Law* 220–250 (Los Angeles, CA: Supreme Century, 2017).

<sup>18</sup> Chittharanjan Felix Amerasinghe, *Principles of the Institutional Law of International Organization* (Cambridge: Cambridge University Press, 1996); Leo Gross, *Essays on International Law and Organization, Volume I/II* (The Hague: Martinus Nijhoff Publishers, 1984).

between International Organizations of March 21, 1986<sup>19</sup> – as they also can participate in the formation process of general customary international law through the practice of their organs.<sup>20</sup> Such association is actually from main impacts and consequences of having independent international legal personality. Of course, we should note that the 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 does not lose its own entity and identity due to enrollment in an international organization, rather it assigns some of its 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 very appropriate places to assess State practices in discussed issues and a manifestation and reflection of their legal belief. ICJ in advisory judgment concerning the reservation right to the Convention on the Prevention and Punishment of the Crime of Genocide (1951) – in explanation of customary law regarding the reservation – noted the practice of the United Nations Secretary-General as a trustee of many multilateral treaties along the State practice of national authorities.<sup>21</sup>

On this basis, act of the United Nation in documentation of nuclear fatwa can indicate UN practice, in addition, the Secretary-General of the United Nations in his bilateral session with Iran's Supreme Leader showed his satisfaction in relation to issuing nuclear fatwa and appreciated Iran's confidence-building measures. Also issuing the resolution in supporting Iran and in condemnation of violence and extremism as double examples of WMD were other instances of UN in custom-building process of nuclear fatwa. In addition to UN, the other international organizations and movements like the Organization of Islamic Cooperation (OIC), the Organization of Islamic Cooperation (OIC), the Non-Aligned Movement (NAM), the International Atomic Energy Agency (IAEA), and the World Health Organization (WHO) admired Iran for issuing nuclear fatwa and directly or indirectly respected its nationally peaceful nuclear approach in several periods of time through several mechanisms, which symbolize the custom-building practice of these organizations. Hence, international organizations as the main subjects of international law system

---

<sup>19</sup> Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 25 ILM 543 (1986)/Doc. A/CONF.129/15.

<sup>20</sup> Statement of Principles Applicable to the Formation of General Customary International Law, *supra* note 12, Art. 11.

<sup>21</sup> *Advisory Opinion Concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, International Court of Justice, May 28, 1951 (May 10. 2017), available at <http://www.refworld.org/cases/ICJ,4023a7644.html>.

can participate in practice-building process and forming rules of law, whether in the framework of inner organs and (or) in relation to other States at international relations level.

### 2.1.3. *International Judicial Authorities*

International court and tribunals are not legislation authorities. The point that must be noted here is that whether international judicial authorities themselves can make practice in the process of forming customary international law or not. In other words, whether decisions of these authorities can be considered as a “general practice” that constitutes the material element of custom. This issue can be represented from three perspectives. One is considering international court and tribunals as constitutions that take their competency and authorities from governments. Thus, their judgments are viewed as a form of State practice. The other perspective considers these authorities as inner organs of an international organization and thus viewing their decisions as the approach of that organization. Finally, the judicial practice of judicial authorities can find the presence of customary rules in different areas. From each perspective, the issue is that whether international courts and tribunals can be material element of custom-building practice. Regarding this issue, some authors have considered these authorities’ decisions as a form of State delegation practice.<sup>22</sup> Professor Wolfke believes this fact that States accept judgments and ideas of judicial organs means that such decisions *per se* can be viewed as a form of State practice.<sup>23</sup> In his viewpoint, such an idea also has been already affirmed by Guggenheim. Then, Wolfke clearly has pointed out the ICJ practice and accordingly analyzes planned references of the Court to its own prior decisions and also refers the other international constitutions including States themselves, international organizations, non-governmental organizations, the International Law Commission, and doctrine to such decisions in this framework.<sup>24</sup> From 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 explicitly been accepted by States.<sup>25</sup> Also, some judgments of the Court are adduced by this lawyer to prove the claim. For example, the Court in the case of boundaries limitation of continental shelf between Canada and the United States in 1984 has specified that “Court judgment... 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.”<sup>26</sup>

---

<sup>22</sup> Statement of Principles Applicable to the Formation of General Customary International Law, *supra* note 12, Art. 10 (commentary).

<sup>23</sup> Karol Wolfke, *Custom in Present International Law* 74 (2<sup>nd</sup> ed., Dordrecht: Martinus Nijhoff, 1993).

<sup>24</sup> *Id.* at 74.

<sup>25</sup> *Id.* at 75.

<sup>26</sup> *Case concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area*, I.C.J. Reports 1984, p. 246, at 292.

Art. 38(1)(d) of the Statute of the ICJ that due to it “judicial decisions . . . as subsidiary means for the determination of rules of law” is considered, also is another reason that has been posed by Wolfke regarding the practice-building role of international judicial authorities’ judgments. He believes that this part of Art. 38 indirectly guarantees the acceptance of some degrees of rulemaking by judicial authorities.<sup>27</sup> Therefore, in the context of custom making of nuclear fatwa, by referring to judiciary judgments of the ICJ,<sup>28</sup> we can refer to general practice of the ICJ in accepting unilateral declarations in position of an international document, based on this fact and several judgments of the ICJ, nuclear fatwa as an unilateral declaration and based on customary practice of the ICJ is recognized as an international evidence. Accordingly, the unilateral measurements of other States in acceptance of nuclear fatwa are supported by international judiciary practice in custom-building process.

#### 2.1.4. *Non-Governmental International Organizations*

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-building 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.<sup>29</sup> 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 can possibly 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 present a specific draft text by themselves to merge with text developed by States. However, it is ultimately these States – and not non-governmental organizations – that participate in the conclusion of treaties. The situation governing on the creation of the norms of customary international law is in this way that the mentioned organizations can indirectly affect States practice and evolve their approaches. For example, the International Red Cross has had a very efficient role in development and promotion of international humanitarian law. In some lawyers’ viewpoint, any surveying of humanitarian law without reference to the International Red Cross will be deficient. The Red Cross consists of the International Committee of the Red Cross (ICRC), 190 National Societies, one coordinator center,

---

<sup>27</sup> Wolfke 1993.

<sup>28</sup> *Nuclear Tests Case (Australia & New Zealand v. France)*, I.C.J. Reports 1974, p. 253, at 269–270, para. 51, and 474–475, para. 53.

<sup>29</sup> See Malgosia Fitzmaurice, *Actors and Factors in the Treaty-Making Process in Contemporary Issues in the Law of Treaties* 49, 57–58 (M. Fitzmaurice & O. Elias (eds.), The Hague: Eleven International Publishing, 2005).

and the Assembly. The ICRC that each of the Geneva Conventions knows as a neutral international institution is responsible for the development and exaltation of substantial humanitarian law. Nobody can ignore the role of this effective international constitution in the codification process and ratification of the Geneva Conventions of 1949, the Additional Protocols of 1977, and other documents related to humanitarian law. Viewing the function of the International Law Association, it can be stated that almost all the tasks of this organization lead to development of Conventions drafts and (or) issuance of resolutions that has been the basis for international rules formal codification. Nonetheless, it must be emphasized again that the International Law Association's activity as a non-governmental constitution has been merely planning for possible realization of generating international law rules and no direct participation is made in this framework. In this regard, the widespread support of NGOs from the issuance of nuclear fatwa is very notable, because it has the potential to be considered as a ground-maker tool in advent of a new legal regime in prohibition of threat, utilization and proliferation of WMD.

## **2.2. 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 their verbal act. Nevertheless, lawyers' views on this issue are not the same because some of the related specialists only accept physical acts as practice, while it seems that the dominant view about this issue regarding international judicial practice indicate any kind of behavior as the material element of custom-formation. Then, this discussion will be continued in detail. As it was mentioned, there is a disagreement concerning the nature of State practice – like other posed issues in the present writing. Some lawyers like D'Amato and Wolfke view only State material and physical acts as a manifestation of the practice and representing a strict concept regarding this issue. They believe that any claims or general statements per se cannot be explanatory of State practice. Accordingly, Professor D'Amato asserts that a claim is not an act. Although the claims may articulate a legal norm, they can't constitute the material component of custom.<sup>30</sup> 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 are among the most important State's practices. For a State that 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.<sup>31</sup> The situation is the same in the cases that a State decides to support or oppose the development or changing

---

<sup>30</sup> Anthony A. D'Amato, *The Concept of Custom in International Law* 88 (Ithaca, NY: Cornell University Press, 1971).

<sup>31</sup> *Id.*

of an act. D'Amato 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. Specially, with regard to 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, pointing out professor Mullerson's ideas would be logical. Although he will not clearly show 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 D'Amato. At first he acknowledges that there is a distinction between what the States claim and how the States act; for example, the "claim" of having the right of innocent passage in waters of a territory and its "enforcement". But he asserts that in the case of accepting the wide definition of practice, what would be the way to distinguish it from the legal beliefs of the States?<sup>32</sup> In this regard, also Red considers the distinction between act and legal belief where verbal acts are paid attention to 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 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.<sup>33</sup> Mullerson believes that subjective attitudes of the States about their act may be implied in their actions.<sup>34</sup> Specifically, about the attitudes of Professor Thirlway, the acts of the States, foundations and international judicial authorities show that simply general statements and declarations without considering any special situation can be paid attention to as evidences for creating the material component of custom, and as previously mentioned, basically, the framework that this lawyer poses for the acceptance of verbal acts of the States is not logical and real. Also Professor Mendelson is among the other lawyers that effectively discusses about the contribution of the verbal acts in the process of the formation of customary international law.

Totally, diplomatic statements including complaints and declarations which show the State policy, State counsel advice, press releases, statute books and official instructions related to juridical issues such as the instructions related to the military law, participation in voting in the international organizations, State remarks about the projects which are under the consideration of the International Law Commission and other similar institutions, national legislation, decision of domestic courts, bills before the international courts and so on are examples of the States' actions which Mandelson believes they contribute to the process of practice-building which lead

---

<sup>32</sup> Rein Mullerson, *The Interplay of Objective and Subjective Elements in Customary Law in International Law: Theory and Practice: Essays in Honour of Eric Suy* 161 (K. Wellens (ed.), The Hague: Martinus Nijhoff Publishers, 1998).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

to the formation of the material component of custom.<sup>35</sup> Under the influence of the Professor Mendelson's viewpoints, the International Law Association's statement about the principles governing the formation of customary law has considered the verbal acts as the State's practice. Art. 4 of the Declaration states: "verbal acts of the States, not only the physical acts, are also considered as the State's practice." According to the Association, in the interpretation of this article, verbal acts mean statements or general declarations which in fact form a commoner shape of the State's practice in comparison to the physical act. 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, Judgements of the national courts and executive authorities, the views of the governments before international courts, international organizations' statements and resolutions and so on are all examples of the verbal acts. Thus, the 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-building which lead to the formation of the material component of custom. Thus, despite of the content above, it acknowledges, some of the declarations can be more usefully considered as just stating the beliefs than the official acts of the State's practice. Professor Dinstein believes that the view which only considers physical acts as the component of custom is a highly exaggerated view.<sup>36</sup> This lawyer believes 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 judgements 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-building; however, in other cases, the general declarations of the States including statements, announcements, and notices only have an auxiliary role<sup>37</sup> and they cannot make a practice which leads to the formation of the material component of custom without the States' physical acts.<sup>38</sup>

Thus, although at first, he considers physical and verbal acts of States in the same way, he finally makes some distinctions between them in relation to their role quality in the process of practice-building which leads to the creation of customary rules. Yet, this dissociation is not at all comparable to the Thirlway's viewpoints who considered verbal acts totally as the evidences for building practices. Dinstein believes in this framework, when the preconditions are available, the general statements of the

---

<sup>35</sup> Mullerson 1998, at 204.

<sup>36</sup> Yoram Dinstein, *War, Aggression and Self-Defence* 215 (3<sup>rd</sup> ed., Cambridge: Cambridge University Press, 2003).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 276.

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.<sup>39</sup> Besides the judicial practices, the International Law Commission in 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.<sup>40</sup> Also the States' considerations, especially great States, imply the acceptance of verbal acts as a kind of the State practice. The Foreign Relations Law of the U.S. (sec. 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.<sup>41</sup> Relying on the verbal acts of States for recognizing the customary rules is the current reality of the international system and is of great importance, especially for those States which fail to have enough material facilities for taking actions in a special field. For example, the land-locked States have no material possibility for the participation in the formation of CIL in the field of law of seas. Only they may participate in formation of CIL by resorting to the verbal acts.<sup>42</sup>

As it was considered, practice can enjoy both material and oral aspects, in both hypothesis, custom-building process towards consolidation of legal regime of a nuclear fatwa is attainable; because first, official representatives of several States mostly in high levels and in different diplomatic and non-diplomatic events supported issuance of nuclear fatwa and its derived disarmament system repeatedly and therefore, manifested the approach of their State to this legal regime. In practice, also with several measures like assistance in completion of Iran's nuclear establishment played a major role. Based on our triple assumptions from mechanisms of custom-building process of fatwa, these practices play a determinative role in this process.

### *2.2.1. Verbal Element: Emergence in the Practice or Legal Belief?*

As was stated, the majority attitude toward the defining 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

---

<sup>39</sup> Dinstein 2003, at 277.

<sup>40</sup> Yearbook of the International Law Commission, 1950, Vol. II, Documents of the Second Session Including the Report of the Commission of the General Assembly, A/CN.4/SER.A/1950/Add.1, at 368–372.

<sup>41</sup> *Restatement (Third) Foreign Relations Law of the United States, Vol. I* (St. Paul, MN: American Law Institute Publishers, 1986), para. 102, commentary (b).

<sup>42</sup> Seyvanizad 2017, at 119.

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 the 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 – beside 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 explicitly confirmed in the judgements of the Court Branch in 1984 (Gulf of Maine case).<sup>43</sup> Thus, necessarily, insisting on the dissociation between the sources of the evidences of custom components 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 former case, we face a different situation. In this regard some 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. In their opinion, our classification of a special verbal act as an example of a mental element or a material element depends on the situation. However, in some situations it is not possible to consider a special verbal act as a material element or legal belief of States, because it might happen that in an issue – like force – in which we face a massive amount of verbal actions. Thus, in such cases, it is necessary to consider the dual elements at the heart of the action and in mixing with each other. It's feasible in this way that only taking actions for issuing a verbal act including a statement release, issuing a diplomatic announcement, participation in voting for issuing a resolution in the framework of the international organizations, participation in negotiations concerning the drafting a treaty or international conventions and taking actions for its ratification are recognized as the material element and the content of the mentioned instruments are recognized as the mental element of States legal belief. Within status above that in some cases distinguishing words as a practice from the words as a legal belief is difficult, in hypothesis of custom-building process of nuclear fatwa by verbal confirmation of international authorities, verbal statements are both practice-maker and indicative of their legal belief.<sup>44</sup>

### **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 considered as a kind of the State's practice in the process of

---

<sup>43</sup> *Case concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area*, *supra* note 26, para. 111.

<sup>44</sup> Seyvanizad 2017, at 98.

the forming legal international customary rules. For example, refusing 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 leads to the formation of the international custom. Everything depends on the situation and occasion."<sup>45</sup> Professor Akehurst also states, that the State's practice can contain refusal and silence. The viewpoints of other lawyers such as Sorensen, Tunkin, Bernhardt, Danilenko, and Kunz in relation to the role of refusal are the same. Also Professor Mendelson believes that refusal can be paid attention to as the material component of custom or practice, but we should consider the situation and a degree of caution. Like other lawyers such as Wolfke and Akehurst, he poses popular Lotus case as the basis of his analysis. 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 bans the States from such actions. But the reason for this policy of the Court was that the refusals of the States were ambiguous; 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 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 International 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. Mendelson believes that in this case, there could be other reasons for refusal which basically have nothing to do with international law. For example, the lack of authority or jurisdiction by virtue of domestic law (most of the criminal rules are constrained in the territory), or lack of interest and believe in the fact that the flag State is in a better situation for prosecution and punishment of the crime. In this framework, there is another similar practice in the ICJ judgement about the legality of the threat or using nuclear weapons in 1996 when the Court denies this reasoning: Since the States that have nuclear weapons have prevented from using them from 1945, so they have accepted the commitment of not using them.<sup>46</sup> Although here the Court denies the possibility of the emergence of a rule on the basis of the States' refusal; this does not mean that the Court disagrees with the acceptance of refusal as a way of the State's practice. The reason is that the political situation (prevention) is responsible for

---

<sup>45</sup> Wolfke 1993, at 61.

<sup>46</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, p. 226, para. 67.

not using the weapons in the mentioned period. In other words, if the situation does not contain any ambiguity, considering refusal as a kind of the State's practice would be possible; if the refusal of the States which have nuclear weapons from using this kind of weapons clearly showed the States' legal judgements, the Court could well extract a customary rule about this issue. In relation to recent expression, which is an important point to be considered, as non-realization of an act can include an omission, non-realization of a verbal act also can include a legal refusal. Therefore, with regard to not hearing any condemnation against nuclear fatwa and its derived legal regime by internationally official authorities, the existence of custom-building process even with refusal mechanism by non-active States can be found out.<sup>47</sup>

#### **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? Art. 38(1)(b) of the Statute of the ICJ only considers the generality of the practice. Nevertheless, investigating of the lawyers' 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 previously mentioned especially in citing Art. 38(1)(b) of the Statute of the ICJ, the international practice which leads to the formation of the customary law should be "general." But this generality does not mean the participation of all States in the world in the process of the practice-building, because in this way we should wait for years to create 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 bases for the formation of the rule and all of the States are required to comply with them, unless it is in the framework of "Persistent Objector."<sup>48</sup> The general practices of the States contain both the sequential and parallel actions which are a result of the practices of cognizable organizations in a period. In most cases, these actions can be accomplished independently; however, the consistency between the States should not be disregarded. Now we should discuss about this issue: 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 contains the reactions

---

<sup>47</sup> Seyvanizad 2017, at 128.

<sup>48</sup> See Yoram Dinstein, *The Interaction Between Customary International Law and Treaties*, 322 Recueil des Cours: Collected Courses of the Hague Academy of International Law 285 (2006).

of other States whose interests are affected.<sup>49</sup> 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 countries. And it is also possible that the other States have the “once in each direction” participation.<sup>50</sup> 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, their silence means that they have accepted such actions.<sup>51</sup> From the standpoint of the International Law Association committee statement about the principles governing the formation of customary international law, the States’ practices should be wide in order to create a general rule of customary international law, so as was stated in the court’s practice, and not necessarily universal,<sup>52</sup> also it is not necessary for the specific governmental requirements to customary international law, it will be proven that the mentioned State has participated in the practice actively or deliberately has agreed with that.<sup>53</sup> And the international judicial authorities have never denied this State from the commitment for the reason that the State has not participated actively in the practice which leads to the formation of general rule of customary international law claims.<sup>54</sup> As it was considered, the alliance of all States in custom-building process of something is not necessary, rather only by positive alliance of some States and even by their silence possibility of custom-building process is possible, so the widespread support of several States from the legal regime of nuclear fatwa has provided enough quantity in order to form a related international customary rule.

#### 2.4.2. Duration

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 framework, the time needed for the time passing for creating a customary law; the wording of the ICJ in the North Sea Continental Shelf Cases will be the best criterion for an 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

---

<sup>49</sup> Michael Akehurst, *Custom as a Source of International Law 1974–75*, 47(1) British Yearbook of International Law 16 (1976).

<sup>50</sup> Dinstein 2006, at 283.

<sup>51</sup> *Id.*

<sup>52</sup> Statement of Principles Applicable to the Formation of General Customary International Law, *supra* note 12, Art. 14(1).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

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.<sup>55</sup> The needed scale of time continuity in order to create an international customary rule depends on various related factors. For example, if an issue is stated about which no other rule was accepted, establishing the rules concerning the issue will take shorter time than the issue for which a customary law exists and it should be adjusted for the establishment of the new rule. Nowadays, in parallel to the development of 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 common law in order to convert the practice to law, that practice should have a long history insofar as nobody can remember its root time. 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 needs such history. At present, the creations of the customary rules are provided in a short time and faster than the past. For example, the rules governing the law of the sea were first announced by President Truman in 1945.<sup>56</sup> In 1951, in the judgment of the Abu Dhabi Lord Asquith the dispute case of Petroleum Development (Trucial Coast) Ltd. and the Sheikh of Abu Dhabi, he ruled that the mentioned doctrine with specific line yet not appear in the international stature of a rule of law.<sup>57</sup> But over the next years and until the 1958 Geneva Conference, more States claimed jurisdiction over the continental shelf. At the time, the Conference accepted that the coastal States should have special rules over their continental shelf. And thus the Convention of 1958 recognized such rights for the coastal States. Therefore, in connection with nuclear fatwa – that in form has structural-legal affinity with Truman declaration – with regard to passage of more than a decade from its issuance, it seems that the process of its custom-building has entered a new phase.

#### 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.<sup>58</sup> It means that the different samples

---

<sup>55</sup> *The North Sea Continental Shelf Cases (Germany v. Denmark and the Netherlands)*, I.C.J. Reports 1969, at 43.

<sup>56</sup> In this year, President of the United States posed the claim of jurisdiction and control over the continental shelf: "The Government of the United States considers the natural resources of the continental shelf waters as then possessions of the United States and under its jurisdiction and control." What mentioned here was a clear statement of the idea of belonging the continental shelf to the coastal State. A unilateral claim which gained support of the other States which had important interests in the area of the continental shelf and finally it converted into a customary rule of international law. The completion of this process lasted for several years.

<sup>57</sup> *Petroleum Development (Trucial Coast) Ltd. v. Sheikh of Abu Dhabi*, (1951) 18 I.L.R. 144, at 155.

<sup>58</sup> *The North Sea Continental Shelf Cases*, *supra* note 55, para. 43.

of the practice should necessarily be similar and consistent both internally and in general.<sup>59</sup> That the practice should be internally consistent means that the behavior of a participated State in the process of custom-building 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.<sup>60</sup> In the Nicaragua case, the Court did not find an opportunity to consider some 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 does not expect that the States' practice in obeying the mentioned principles to be in a high rate so that they should prevent 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.<sup>61</sup> As was considered, no certainty has been prescribed based on the complete implementation of a same practice by international law so that the practice of States in order to consolidate legal regime of nuclear fatwa, mostly in verbal form, includes from direct hint on fatwa to confirmation of Iran's peaceful nuclear policies.

#### 2.4.3.1. The Practice of the Beneficiary States

The wide and consistent practice of the States should be represented in order to form a customary law. The ICJ, 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-building.<sup>62</sup> 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 with the mentioned rule. For a claimed rule to legitimate, a proper reaction from the states and the beneficiary States is needed. Thus for example, we can hint to Britain's contribution in the formation of the law of the sea in the 19<sup>th</sup> century and the role of the United States and the former Soviet Union in the development of the law beyond the atmosphere. Before a claimed rule can find its way in the area of the customary international law, it is possible that the participation of some States is more necessary. What is meant by this, is the realization

<sup>59</sup> Statement of Principles Applicable to the Formation of General Customary International Law, *supra* note 12, Art. 13.

<sup>60</sup> *Id.*

<sup>61</sup> *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. the United States of America)*, 1986 I.C.J. 14, paras. 183–186.

<sup>62</sup> *The North Sea Continental Shelf Cases*, *supra* note 55, para. 74.

of an affirmative practice of the nuclear States in custom-building process of the legal regime of nuclear fatwa, i.e. non (nuclear, chemical & microbial) States basically play no role in utilization or non-utilization of WMD to want to be effective in respect to such custom; however, they can take an effective step by their affirmative acts. In this respect, the remarkable welcome of powerful nuclear States like: China, Russia, USA, India and Pakistan from issuance of nuclear fatwa has accelerated the formation process of a new custom derived from the legal regime of fatwa.

### 3. *Opinio Juris*

As previously mentioned and in the definition, one of the component elements of custom is the immaterial element which reflects the legal belief of the States in following of a practice. Now the discovery of this legal belief can be obtained through different ways which are discussed here.<sup>63</sup> As the ICJ 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 contains the mentioned conditions, and the other "belief in the fact that such practice is obligatory because of the existence of a legal law."<sup>64</sup> Thus, 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 beliefs derived from necessities."<sup>65</sup> The Latin equivalent which is usually used as an abbreviation: "*opinio juris*," is "the legal beliefs of the States" or in others' view point "legal firm judgements of the States." Such a concept dissociates the Wheat from the practice or Chaff.<sup>66</sup> 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; so the existence of both objective and subjective elements of custom – meaning the general practice and legal belief – is necessary and unavoidable in the process of making 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

<sup>63</sup> *Opinio juris* issue is seriously debatable in the customary law. According to some analyzers, the exact defining the psychological element in the process of custom construction, possibly has created more academic debates and discussions in comparison to the whole claims based on the custom rules. Hugh W.A. Thirlway, *International Customary Law and Codification* 47 (Leiden: A.W. Sijthoff, 1972). This expression actually means that the current issue in the world, rather than providing a challenge in the legal relations, paved the way for a wide debate in academic areas. Statement of Principles Applicable to the Formation of General Customary International Law, *supra* note 12, Art. Part III (comment 2).

<sup>64</sup> *The North Sea Continental Shelf Cases*, *supra* note 55, para. 44.

<sup>65</sup> *Opinio juris sive necessitatis*.

<sup>66</sup> Dinstein 2006, at 293.

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.

Accordingly what is certain is that the legal belief of States to the inhumanity of consequences resulting from utilization of WMD, is a universal belief, hence the formation of a custom based on the legal regime of nuclear fatwa – that has prescribed the certain inhibition of WMD – from this view, is completely obvious and undeniable. Basically the States' behavior lies 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 a custom, the condition is that what is legally necessary (what is necessary in accompany with the legal belief) should be separated 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 of making the customary rules, is ambiguous. Also in these cases the legal beliefs of the Sates have gained attention as a decisive concept, especially from the ICJ, in order to explain the issue why the practices of the mentioned States were not regarded in the process of making a custom. 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 existence of a general customary rule – one of these cases in the ambiguous refusals. As was mentioned in the previous sections, the actions which are based on the refusal have the capability that in a state of necessary conditions, participate like the positive actions in the process of making rules. 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 these ambiguities clear are the legal beliefs of the States.

### ***3.1. The Consent Theory of the Voluntarist***

It has been considered from the Grotius time that whatever is explicitly in consent of the States is treaty and whatever 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 countries or other subjects of international law. Countries have the same right in the process of making international law rules and so the majority of them cannot make the rules which are necessary for the small numbers of countries to follow. He

considers accepting a view point 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. Tunkin continues that 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 be converted into general an international law rule which has been recognized in all of the legal systems by the States.<sup>67</sup> But this theory has a wide range of objections. In this regard Kelsen believes that “the customary law is necessary to obey for the countries which have not participated in the customary law and the idea that this is just necessary to obey for the countries which have recognized the laws, is on the basis of an international norm.”<sup>68</sup> In fact, if this theory is put into practice in a flexible and permanent way, its practical consequences will be out of mind. Among the implied consent theorists, Professor Strupp maintains an interesting view. At first he believes that “agreement” is the only possible source in international law, if the States are equal, and if there is not a great organization and no top authority to impose a rule on the States, accordingly we can conclude that international law cannot exist without consent and consistent voluntarists of the States. Strupp considers custom as an implied consent that implied satisfaction and this is the interesting point of his view, and a State is necessary to obey the other States which have admitted the claimed rule. It seems this theory, which is based on manner of presentation of a suggestion to apply a regulation, has somewhat theoretic affinity in road of consolidation of the legal regime derived from nuclear fatwa, because the States that agreed with this regime, which indicates their implied satisfaction, make them committed to non (utilization, proliferation and stockpiling) of WMD.

### **3.2. Legal Beliefs 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 or in classical writings. It appears that the first person who has used this expression completely, is Genny in 1389,<sup>69</sup> and this is in the domestic law framework, although in Guggenheim’s idea, some parts of this idea or other ideas similar to that are found in the written history of Germany in the late 18<sup>th</sup> century. In the current discussion, generally the expression *opinio juris sive necessitatis* is interpreted as “belief in the legal nature and necessary related act (practice), or belief in its necessity.” In other words, a State

---

<sup>67</sup> Raphael M. Walden, *The Subjective Element in the Formation of Customary International Law*, 12(3) *Israel Law Review* (1977).

<sup>68</sup> Hans Kelsen, *Principles of International Law* 44–45 (New York: Rinehart & Company, Inc., 1967).

<sup>69</sup> D’Amato 1971, at 49.

which 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. Accordingly, Kelsen believes that the customary law is necessary for the States which have not participated in the creation of customary rule – including new and also the active States – and this idea that international law is just necessary for the countries which have recognized its law – as was stated by voluntarists – is on the basis of a norm of international law. Based on this school, the hypothesis of formation of custom emanating from legal regime of nuclear fatwa is not unavailable, because based on this school, existence of a necessity related to international life necessities, is a fundamental term in determination of States legal belief in adherence to obeying a practice; with such an explanation, is there any necessity in dreams of international law to be more important than the maintenance of international peace and security? Consequently, recognizing the element of necessity in explaining the nature of custom-building process of legal regime of fatwa is decisive. It is needed to explain that in the international system, some of the rules have a position that the international community do not have doubt in considering them as a part of general international law corpus and so juridical institutes did not conduct a research from the view point of the recognition of the material and immaterial elements of it. For example, the ICJ by using the expressions such as “important principles of international law,” “the fundamental principles of international law,” “a part of modern international law,” “the approved and recognized rules of international law,” and so on, has considered these rules certain and has not accepted a special trend for proving. The Permanent International Court of Justice also had the same situation. That the Court has taken action to the recognition of the rule according to the procedure that it has defined in its judicial practice and we will investigate as a part of international law, does not mean that the court was ignorant of the recognition of the component element of custom, but these rules have been refrained from more research because of the popularity and the certainty of these rules. In other words, “certain practice” and “certain belief” are the existing conditions of a customary rule that the court imagines in relation to some rules from the view point of the mentioned characteristics and then starts to recognize the rule. Also the principles such as the supremacy of international law on domestic law<sup>70</sup> and the obligatory of unilateral action,<sup>71</sup> which undoubtedly are among the accepted principles and certain principles of general international law in the judicial international practice, have been recognized.

On this basis and with regards to the advent of some fundamental rules such as inhibition of genocide, crime against humanity and war crimes, which have been embodied in the legal regime of nuclear fatwa, recognizing the *opinio juris* in practice of agreed States is not necessary.

---

<sup>70</sup> P.C.I.J., Series A, 1928, No. 9 & P.C.I.J., Series A, 1926, No. 7, at 31.

<sup>71</sup> *Nuclear Tests Case*, *supra* note 28, *New Zealand v. France*, para. 45, and *Australia v. France*, para. 42.

### **3.3. Theoretical Fundamentals**

In order to define the issue and explain it completely, the following discussion is needed: first the discussions about the basis of international law which should be submitted that natural law doctrine is of great importance from the view point of theoretical bases. Nature, wisdom, justice, morality and divine rights are all the concepts which are evolved from natural law concepts. From the view point of the advocates of natural law doctrine, it is understood that the basis of the laws – general 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 the States have to obey them. In other words, principles and rules are beyond the will. Thomas Hobbes, a British lawyer and philosopher, only considers natural law as the basis of international law. But from his viewpoint, the most important principle of natural law is the right of self-preservation. In the framework of natural law we are faced with a collective of primordial, eternal and immutable rights which does not need the elapse of the time and includes all the humans from every race and sex. Therefore, no statutory and contractual rule can deprive them of a human. From the viewpoint 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 is the rights which are based upon the general awareness and pursuit of human 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 individuals. This point must be mentioned that the teachings of natural law doctrine, especially at the beginning of the 19<sup>th</sup> century, were weakened; however, this fact must not be considered as the complete disappearance of principle and beliefs of the natural law. In this regard, some have used the expression of the hibernation. Although natural law lost its position as an inclusive basis of international law for a while, as we will explain later, from the late 19<sup>th</sup> century we see reviving its ideas and thoughts in the fundamental field of international law. 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. Likewise, unlike 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 and the nature of objects or humans. 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 basis of the formation of rules, it could not and also it cannot be responsible for the issues and requirements of the current international community. The development of human rights and other humanistic considerations, especially from the early 20<sup>th</sup> century, showed the reviving of the principles and natural law ideas in the international law area. Specifically, the ratification and formulation of the 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” which indicates human dignity and fundamental human rights are among the aims and desires of the United Nations. Issuing the Universal Declaration of Human Rights in 1948, ratification of the International Covenant on Civil and Political Rights in 1966, approval of the four Geneva Conventions in 1949, confirmation of the Additional Protocols in 1977, the real manifestation of the humanistic values in the form of valuing an individual in international law by predicting individual complaints in international juridical institutions, all symbolize paying attention to the principles of natural law in international level. Special attention of the ICJ is to humanistic aims and desires, drafting and ratification of the Convention on the Prevention and Punishment of the Crime of Genocide in 1948 and the ratification of several human right 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 humanistic values. In this framework we can name the establishment of the Nuremberg and Tokyo criminal tribunals, International Criminal Tribunals for the Former Yugoslavia and Rwanda and the International Criminal Court in 2002. 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 trait 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 natural laws in the international level. Nowadays, human right is another saying of the natural law. It must be noted that the existence and the validity of the human right is not because of the States’ will. It appears that the current system is under the influence of some transitions such as development of the humanistic concept and initial humanistic considerations. In some fields we can adjust the role of States’ will and its direct influence in the positive law. In other words, it is the replacement of the bases and judgements of natural law instead of the States’ will in the process of creating international positive law rules. This issue has been discussed in the beginning of this discussion. As highlighted above, the ratification of the Martens clause which can be a criterion for the acceptance of the mentioned transition and the recognition of Art. 3 common to all four Geneva Conventions which are the reflection of this clause was on this basis and in this framework of the ICJ in Nicaragua case.

In addition, the International Criminal Tribunal for the Former Yugoslavia has explicitly announced that, since in the current time the imagination of a customary law creation with relying on the consistent and adjusted States (the material element of

custom) is nearly impossible. Due to the Martens clause, the principles of international humanitarian law can emerge as a citation and resort to humanistic clauses (*opinio juris*).<sup>72</sup> And in this regard, Professor Meron has also acknowledged that the Martens clause has strengthened an attitude on the basis of the process of the formation of customary international law, which is at first as the basis of the State practice. Also Professor's Cassese's attitude toward this clause was the same. What is Martens clause? This clause was first stated in order to solve the problem among the members of the Hague Peace Conference on the position of the resistance movements in the occupied territories. The States thinking that the inhabitants of the occupied territories who have weapons should be regarded as legitimate combatants, could not gain the majority vote for their proposal. And because of this, the regulations related to the position of the combatants in Arts. 1 and 2 of the Hague Regulations did not put the resistant forces' combatants among the list of the combatants. Most of the States considered the Martens clause as a suggestion; on the basis that Arts. 1 and 2 it should not be treated as the last sayings about the combatant's legal situation and the issue whether the combatants of the resistance force have the same situation or not should not be merely determined through the mentioning of omitting them. But we should solve this by this principle "in cases which are not included in this treaty or other international agreements, the military and non-militaries should remain under the support and authority of the international law principles which are a result of certain practices and humanity principles."

### **3.4. The Procedure of the International "Judicial Practice"**

From the conceptual and general view point, it was 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 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 is enough to introduce the procedure.

#### **3.4.1. International Court of Justice**

As previously mentioned, the recognition of Art. 3, common to all four Geneva Conventions in 1949 by the ICJ in the Nicaragua case, was a turning point in the new international judicial practice in the recognition process of 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:

---

<sup>72</sup> *Prosecutor v. Kupreskic et al.* (Trial Judgement), IT-95-16-T, International Criminal Tribunal for the former Yugoslavia (ICTY), January 14, 2000, para. 527.

(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 hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and carrying out 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.

As it was considered, international law derived from voluntarism has never fulfilled its goal in the maintenance of international peace and security, because based on its contractual approach, it has made imbalanced world's legal system and consequently the legal mechanisms have lost their capability in realization of justice. For example, the formation of the Non-Proliferation Treaty created to stop production and proliferation of nuclear weapons based on the principles of voluntarism, finally led to the production of last generation of atomic weapons for nuclear weapon States and also production of first generation of atomic weapons for non-nuclear States. Moreover, numbers of nuclear threats increased and in my opinion, more than anything else it is rooted in the wrong fundamentals governing such treaty – which will be discussed in detail within the next section. In the meantime, the legal regime of nuclear fatwa appears and with a superior status and in position of total defending the human dignity, bans any kind of production, proliferation and stockpiling of nuclear weapons and has this potential to be recognized as an international customary rule, as the harbinger of sustainable peace based on the just processes.

Nuclear fatwa has the same direction with natural law, and in fact is not the creator of any added right to human nature and common conscience of humanity,

rather is a confirm for fundamentals of natural law, accordingly has been welcomed internationally. In a more general view, this discussion whether nuclear fatwa can create a customary rule or not, discloses a historical battle between the advocates of positivism and natural law; whether it is possible to legislate a rule upper than the general nature and human, or legislation of rules merely has reflexive aspect and reflects the constant legal system of world? The bases of many problems are originated from this fact that when we emphasize on the principle of will sovereignty, on the one hand that is the amplifier of international law legislation is remarkable but on the other hand that can make a fertile ground for swerving from realization of natural law, i.e. unlike humanitarian principles and common conscience of humanity; only because of a will, is really worrying. Therefore, the analysis of nuclear fatwa notably clarifies the scope of conflicts in international law and various doctrines, and also enlightens their actual effects. The controversy is that international law is not formable only based on propensities, rather it exists spontaneously relying on humanitarian principles and common conscience of humanity and it needs to be only discovered and recognized, like the rule of gravity that itself was not the creator of gravity but its discoverer. In this phase, the battle between positivists and their opponents is boosted. The first group believes that the axis of values system is will, whereas the second group believes that the values system exists and is independent from the will. For example, if a value is right, no will can take the legitimacy of that right away but the classic system of the formation of international custom has built its basis based on practice emanating from State will, consequently if a will makes a consensus around the falsehood, naturally is formed an untruth custom that among the naturalist is inherently false, because it is in conflict with determined legal system. According to reflexism, nuclear fatwa has such an aspect, i.e. this decree and regulation is the discoverer of common humanitarian principles and noble human values; it does not create or negate a right spontaneously. According to reflexism, "will" cannot affect the truth, years of years the universal will believed that solar system is earth-based and executed whoever disbelieved it, whereas the truth was the other thing and was never affected by the collective will. When there is no will for acceptance or rejection of a truth or value, it is not effective in its legitimacy and existence. For example, imagine a specialist surgeon whose abilities are undeniable but people do not see him for treatment, in fact there is no any collective will on his specialty; now, can this lack void his specialty as a surgeon? The response is absolutely negative; therefore, a will cannot affect the truth. The other fundamental question here is that, has the current international law system that more than anything else has been built based on Voluntarism – and State will plays a major role in its realization – reached his ultimate goals or not? What seems to be correct is that, those sorts of wills are important that are consistent with truth and at least are not in contrast with human and moral system and heritage of common conscience of humanity. Hence, the ideal system of international law is a system that accepts natural law perfectly and positivism and will-based values system conditionally.

#### **4. Comparative Study of Fatwa *Sui Generis* with NPT and the Advisory Opinion of the International Court of Justice**

##### **4.1. Generalities**

WMD's restraining policies and demobilization fundamentals are expressed within the juridical body of the Non-Proliferation Treaty (NPT). The NPT which is mostly the output of plethora mainly concerns the atomic weapon units, that is, it concerns the jeopardy of atomic weapons multiplication, plus scanning to preserve their concession on the acquisition of atomic weapons. After great amount of time and hard discussions, the agreement consisted of a preface and 11 items, was formed and ratified in 1968, and was made operational in 1970. The NPT has been derived from a deal between two insisting aims, non-multiplication of atomic weapons, on one hand, and the utilization of atomic energy for irenic aims, on the other. The covenant is based upon three columns (concepts, criteria): non-multiplication of atomic weapons; the certain right of governments to atomic energy for irenic aims; and eventually, atomic weapons disarmament. We would attribute to these as universal fundamentals on atomic weapons non reproduction and disarmament. In an obvious biased way, the NPT has separated the members into atomic-armed and non-atomic-armed members (states), with distinct rights and liabilities. By particular tools and approaches, non-atomic-armed states are deprived from obtaining the weapons. On the opposite side, however, no particular approaches or designs are imagined for atomic weapons disarmament. Arts. I and II are related to the atomic non-reproduction maxim. Non-atomic-armed states promise to eschew from obtaining atomic weapons, and atomic-armed states promise not to submit the armaments to others. Art. III refers to protections approaches to confirm conformity with non-distance of atomic activities from irenic utilizations to military aims. Every non-atomic-armed state member of the Treaty promises to accept protections, as declared in an agreement to be discussed and finalized with the International Atomic Energy Agency (IAEA) according to the bylaw of the IAEA and the Agency's protection system, for the monopolized aim of confirmation of the completion of its commitments granted under this covenant with regard to eschewing distance of atomic energy from irenic utilizations to atomic armaments or other atomic eruptive tools. Arts. III, IV and V are about "the unbreakable right of all the members to the Treaty to expand research, production and use of atomic energy for peaceful aims without discrimination." Disarmament of atomic armaments maxim is encompassed in Art. VI of the NPT. Every member of the NPT promises to follow talks in good faith on drastic acts regarding to cease of the atomic arms match at an early date and to atomic disarmament, and on an agreement on comprehensive and perfect disarmament under firm and drastic international inspection. The Covenant considers the feasibility of receding from it under specific conditions. Every member shall, in operating its internal governance, have the right to recede from the Treaty if it decides that unforeseen occasions, concerned to the crux of this agreement, have threatened the topmost profits of its country. It must present report of such recede

to all other member states and to the United Nations Security Council three months in advance. This kind of notification shall contain a proclamation of the unforeseen events. It is considered as having threatened its topmost profits. The provision also handles the continuity of the Treaty. Twenty-five years after the entry into force of the Treaty, a conference shall be convened to decide whether the Treaty shall continue in force indefinitely, or shall be extended for an additional fixed period or periods.

#### **4.2. Compatibility of the Edict's Legal Regime with NPT Master Keys**

Although, the edict's juridical commitment is of a one-sided personality, and that of the treaty is a universal one, there are significant juridical likenesses and diversities between the two. It is realized that: Although sometimes compliment, one-sided gumpions have restrictions. Some have not been confirmed, are not included in any limpidity or reporting necessities, are easily revocable, or are not lawfully binding. Seceding abolished armaments while developing substitutions cannot be observed as a performance of an obligation to disarm. Like the NPT, although no particular confirmation workmanship of its own is realized in the fatwa, an obvious reference to Iran having placed "the overall domain of its atomic measures under IAEA provisions and the ad joint protocol in addition to commitment optional limpidity measures" has formally been made in connection with the fatwa. Also, as discussed in the previous part, the counter-WMD obligation made in the edict is not revocable and is lawfully mandatory. Conversely, Art. X of the NPT permits for returning the obligation, that is, a state's removal from the Treaty. Eventually, with respect to expanding substitutions, it is significant to perceive that, while the Treaty prohibits a special kind of weapon, atomic armament, the edict's ban covers all kinds of WMD, even those that could be concocted and perfected in the future. Therefore, by some means in contrast to the recent WMD Commission's offer, the decree's one-sided status has not made it more restricted than the NPT, which is a many-sided cosmopolitan covenant. Generally, both the edict and the NPT have juridical indications on Iran, banning the posterior from the obtaining, generation, storing, and utilization of atomic armament. However, the decree, covering all kinds of WMD, containing atomic, microbial, biological, and unknown weapons, and any possible weapons or tools of warfare which are unfair in their influence, beyond the limitations set forth by the NPT, which merely is about atomic armaments. Based on the fatwa, WMD are religiously taboo and sinful, and from the sovereignty perspective, banned and unlawful. Therefore, the juridical ban declared by the edict is severely originated from the Islamic beliefs and moral principles of the Iranian nation. Thus, Iran's obligation created by the decree is much more than a State's legal commitment in respect of a cosmopolitan consensus. Iran's profound divine and gnomonic obligation by the fatwa adds to the strength and protracted peculiarity of the assumption made by the NPT. Specially, NPT items one and two are about the atomic disarmament maxim. Non-atomic-armed States promise to eschew from obtaining atomic armaments, and atomic-armed States pledge not to send the weapons to others. The decree limits Iran in ways no less limiting than the NPT. For example, NPT

refers to qualifications such as “non-acceptance of transfer,” “explosive devices,” “not to seek or receive any assistance in the manufacture of nuclear weapons.” However, the edict does not employ these terms, it obviously and firmly prohibits atomic armaments, cost-effectively containing the worries set in Art. II. Art. III of the NPT refers to protection approaches to confirm accordance with non-redirection of atomic activities from irenic utilization to military aims. Likewise, although no special confirmation workmanship of its own is encompassed in the fatwa, an apparent reference to IRI having placed “the total domain of its atomic program under IAEA provisions and the additional protocol in addition to pledge optional limpidity acts” has formally been made in connection with the edict. In order to the acquisition of agreement by each non-atomic armed State with the IAEA, the Additional Protocol is an appendage to any available general protection agreement between a government and IAEA. Thus, in addition to the IAEA provisions set in the NPT, the edict is also aware of the Additional Protocol, which postulated, among other cases, a State’s further juridical figures for an extremely more impressive IAEA investigation of any dubious atomic acts. Atopic of meaningful, set in Arts. III, IV and V of the NPT, about “the unbreakable right of all the members to the Treaty to expand research, production, and use of atomic energy for peaceful aims without discrimination.” As related to the demeanor of the protections (safeguards), Art. III(3) of the NPT particularly prescribes that they “shall be implemented in a manner... to avoid hampering the economic or technological development of the Parties or international co-operation in the field of peaceful nuclear activities.” Essentially with the similar regards, the subject is also of momentous to the edict. Although, in this field, the central matter of the State’s internal self-government is much more clearly referred to by the edict. Since the NPT’s formation, there has been an interchange between the right to irenic utilization and the disarmament obligations. The decree, however, there has never been any implications, whatsoever, of provisionality between the WMD-prohibition and the right to irenic atomic program. While the edict has one-sidedly and categorically prohibited WMD, in the NPT no special approaches or methods are considered for atomic disarmament. Worse than that is the NPT wordage on the topic, splicing discussions on atomic disarmament with the “cease of the atomic arms match at an early date,” on one hand, and “a treaty on comprehensive and total disarmament,” on the other hand, rendition the atomic demobilization as an implausible dream. Thus, in this context, also, the edict perches at a superior moral and juridical ground than the NPT. The Treaty ordains the right to members to bow out from it “if it decides that extraordinary events, related to the subject matter of this Treaty, have imperiled the supreme interests of its country.” In obvious divergence to the NPT, based on the edict, irrespective of all States, containing topmost State interests of Iran being in danger, there is no bowing out from the WMD-prohibition. Eventually, about the NPT’s longevity sequent a consensus established in the Treaty Conference in 1995, it was determined that the NPT will continue in force for unspecified period of time. However, regarding the compromise, containing obligation to atomic disarmament, incumbency for the globalization of the Treaty,

and realization of an atomic armament free-zone in the Western Asia, is not being esteemed by atomic-armed members, the undetermined continuity of the NPT is more and more in danger. In contrast, the fatwa's survival, not being subject to multi-sided compromises or conditions, but instead, formed on the basis of profound divine beliefs and moral courses, is eternal.

## 5. The Superiority of Fatwa to the System of Treaties

Can Supreme Leader's fatwa be a performance bond in non-(production, use and stockpiling) of WMD for Iran or not? If this fatwa has a performance bond, is its credibility stronger or weaker than NPT?

Based on the applicable Islamic rules in Iran, when *Valliye Faqih* issues a fatwa that enjoys the primary State order status, obeying it is indispensable for all. Therefore, the performance bond of fatwa is undeniable but whether which one has a stronger performance bond, some points must be posed here.

1. Based on this Quranic principle that states: "O people who have believed (in God) fulfill your obligations." Treaties and all agreements are binding for Muslims. And Islamic States, by signing a treaty, in addition to the legal and moral commitment, are committed also religiously. Hence the commitment evolved from fatwa is inviolable.

2. In spite of the first point, the contracts and treaties are a kind of agreement and a result of the commitment between human and human, but fatwa is the commitment of human in front of God, that is naturally more important for Muslims.

3. The components of a treaty are composed of human will that is formed after negotiations by full-power representatives, and finally is ratified in a specific form. In Iran, for instance, the international treaties must be ratified by the parliament<sup>73</sup> and then will be recognized as an applicable rule. But the components of fatwa is not composed of human will and derived from the God will which has been extracted from the sources such as: Quran, Narrations, Consensus and Reason. Therefore, base of fatwa is divine and base of a treaty is man-made.

4. Treaties are reservable. "Reservation" is a well-known principle in realm of international law of treaties. According to this principle, at the acceptance time of a treaty, States have the right of reservation, i.e. in case of conflict between an article of treaty with domestic law, domestic law will have superiority. But there is no such a thing under the legal regime of fatwa. Nobody has the right of reservation in religious affairs and cannot exclude himself from the inclusion circle of fatwa.

5. International treaties are revocable, and based on expediency, some contents of a treaty may be breached, but fatwa does not have such a nature. When something has been religiously prohibited, that prohibition is not changeable, even because of expediency. For example, production of WMD, because of the expediency of

---

<sup>73</sup> The principle 77 of the Constitution of the Islamic Republic of Iran.

preemption in defending the country borders, is not justifiable under the fatwa regime. It must be emphasized that the aforementioned fatwa, based on the obvious decisive Islamic reasons, i.e. of WMD with the Islamic principle of retaliation set forth in some Quranic verses, is not revocable.

6. International treaties have duration and are terminable. For example, in early Islam in case of "*Hodaibiyeh*"<sup>74</sup> conciliation, we know that the treaty between Prophet and atheists was concluded for ten years (however, this treaty was breached by atheists before ten years). International treaties also can be concluded with specific duration, but fatwa does not obey this practice, and its content is permanently feasible. Therefore, that is a misconception if we believe that it is possible to issue a fatwa in prohibition of WMD just for five or ten years.

7. One of the legal issues that has always been the fundamental component of the legal regulations is the performance bond of a rule and prosecuting judicial authority in case of its breach. Under international treaty system, in case of treaty breach by a State member party, it will be charged to something that has been previously agreed and specified in the body of treaty. But according to nuclear fatwa issued by *Valliye Faqih*, in case of its breach by any person, in addition to being a public crime before the law, as well it is a major sin before God. Consequently, the performance bond of fatwa is stronger than a treaty, because it enjoys both binding religious and legal aspects.

8. Some treaties mostly create rights. For example, the State member of the NPT has the right to have peaceful nuclear technology. The right is basically dispensable, whereas the fatwa, along with the right, creates obligations, and obligation is not dispensable at least by the promiser. Therefore, any conclusion of an agreement or contract obligates IRI to certain commitments. But that is logical and predictable for the States that breached their commitments repeatedly to be worrier of causing it by others and subsequently underestimate the performance bond that has been determined by themselves and as well the United Nation's mechanisms. Nevertheless, after the historical issuance of the nuclear fatwa, IRI rationally presented a serious and inviolable performance bond to the world.

## 6. The Legality of Threat or Use of Nuclear Weapons

Perhaps when the project of asking ICJ in 1992 was posed, no one imagined that the end of this goes contrary to the general belief. Apparently, the benevolent thoughts and peaceful motives made by the presenters of this project – non-governmental<sup>75</sup> organization – was the harbinger of the formation of a movement that, with cooperation of States, was about to lead into a good result in the world.

<sup>74</sup> The temporary (10 years) ceasefire agreement between Muslims and Atheists.

<sup>75</sup> Including the International Peace Bureau in Geneva, International Physicians for the Prevention of Nuclear War, International Association of Lawyers against Nuclear Arms, Greenpeace and so on.

But the court's opinion was not in this regard. If there was a little doubt about the non-strength of theories relating to the legality of use, or the threat of nuclear weapons, from 1996 onwards, not only such doubts have been increased, but also they have been legally consolidated and cited to the ICJ related deduction. Hence, some cynical perceptions from the backstage of NGOs pressure, in order to refer this question to the ICJ, do not seem to be unfounded. Before the issuance of the ICJ Advisory Opinion Concerning Legality of the Threat or Use of Nuclear Weapons in 1996, almost all international lawyers unanimously believed that the use and threat of nuclear weapons is illegal. But after the issuance of this opinion, the aforementioned general consensus was eliminated and this matter was finally considered in favor of the nuclear powers. On December 14, 1994, the United Nations Secretary-General formally sent the decision of the General Assembly on requesting for the advisory opinion of this judicial organ. In the framework of this request, the General Assembly, with the consideration of States commitment in connection with refraining from the threat or the use of force against the territorial integrity or political independence of each other, and also with recalling its resolutions 1653 of November 24, 1961, 33/71 B of December 14, 1981, 34/83 G of December 11, 1979, 35/152 D of December 12, 1980 and 36/92 I of December 9, 1981, in which the use of nuclear arms had been recognized as the breach of the UN Charter and crime against humanity, required ICJ for its opinion whether the threat or use of nuclear weapons in all circumstances before international law is valid or not.<sup>76</sup> Subsequent to this request, the ICJ began several processes of proceedings, and finally on July 8, 1996 issued its advisory opinion. Generally, the ICJ Advisory Opinion Concerning Legality of the Threat or Use of Nuclear Weapons is investigable from the various aspects such as international humanitarian law and analysis of principles like distinction between civilians and combatants, non-imposing unnecessary pain and suffering, international human rights including some provisions of the International Covenant on Civil and Political Rights and the Convention on the Prevention and Punishment of the Crime of Genocide, and also the law of the use of force in light of the UN Charter. Furthermore, the implied emphasis of the ICJ to the priority of States sovereignty in all circumstances, which was the main basis and the most controversial part of this opinion, needs to be meticulously examined. In this regard, the ICJ at first and before entering the above entries, pays attention to the field of the law of use of force. According to the Court, provisions of Charter related to the threat or use of force in the framework of Arts. 2 (part 2), 51, 42 enjoy the capability of general application in any conflicts regardless of the type of used armaments; hence, it warrants neither the permission nor prohibition of any type of weapons including nuclear weapon.<sup>77</sup> Then the Court considers the twofold conditions of "necessity" and "proportionality" in self-defense as the unavoidable principles, regardless of the use of any type of

---

<sup>76</sup> *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 46, paras. 1–9.

<sup>77</sup> *Id.*, para. 39.

tools and war weapons. And in connection with Art. 2, part 4 declares: only having nuclear armaments will not make an illegal threat in use of force contrary to these provisions, unless the resort to force is against the territorial integrity or political independence of States, or in contrast with the purposes of the United Nations.<sup>78</sup> Therefore, the Court cannot find a clear response to the legality of resort to nuclear weapons, however this is not considered illegal only by having such weapons. But out of this framework, is there any specific rule under international law relating to inherent legality or illegality of resorting to nuclear weapons? In this phase, the Court investigates a respond to the above question in the field of general international law. The Court, at first, through hinting to this fact that there is not any specific rule prescribing the threat or use of nuclear weapons or any other type of weapon in all or certain circumstances, specifically in the application of self-defense under international law, emphasizes nevertheless there is not any principle or regulation depending on the legality of the threat or use of nuclear weapons, or any other weapon on a specific authorization under international law.

According to the Court, State practice shows that the illegitimacy of the use of certain weapons as such does not result from an absence of authorization but, on the contrary, is created<sup>79</sup> in terms of prohibition.<sup>80</sup> The Court, before looking for a specific prohibition in connection with resorting on nuclear weapons in States practice, also considered whether such a prohibition can be found under the international contractual law or not. In this regard, the Court states that the certain provisions of the Second Hague Declaration of 1899, the Regulations annexed to the Hague Convention IV of 1907 or the Geneva Protocol of 1925 that has been cited by some States do not prohibit resorting to weapons of mass destruction.<sup>81</sup> According to the Court, the consensus built concerning WMD lies in their illegality through some specific instruments. But the Court does not find any specific prohibition of recourse to nuclear weapons in treaties expressly prohibiting the use of certain weapons of mass destruction and observes in this way that although in the last two decades many negotiations have been conducted regarding nuclear weapons, they have not resulted in a treaty of general prohibition of the same kind for bacteriological and chemical weapons. The Court notes that the treaties dealing exclusively with acquisition, manufacture, possession, deployment and testing nuclear weapons, without specifically addressing their threat

---

<sup>78</sup> *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 46, para. 39.

<sup>79</sup> *Id.*, para. 52.

<sup>80</sup> It seems that the core of all controversial issues resulted from the Court opinion is formed here. A legitimate point that has been inspired by the State-oriented views of ICJ opinion in the *Lotus* case is accepted. The point that had been referred by some States, i.e. "what is not prohibited under international law is permitted." It means, the clear prohibition will legalize some weapons. This type of reasoning by the Court – that based on a change in General Assembly question – from "prescription" to "prohibition" posed, is really dangerous as it may legitimize use of any new weapon in case of non-clear customary or contractual prohibition.

<sup>81</sup> *Id.*

or use, certainly point to an increasing concern in the international community with these weapons. The ICJ finally concludes that these treaties could therefore be seen as the landscape of the future general prohibition on use of such weapons, but the mentioned treaties per se do not constitute the world prohibition on WMD – specifically as the subject of international law. Therefore, it seems that international law has encountered a contradictory situation, on the one hand is maintenance claimant of international peace, and on the other it does not prescribe any certainty on prohibition of the most destructive weapon of the world. Obviously, getting away from the fundamentals of natural law that was once the basis of international law and also assimilated into the legal system originated from voluntarism, will be absolutely along with such contradictions. On the contrary, the legal regime of fatwa, because of the origination from the progressive moral principles, and also the dictation of the common conscience, manifested its certainty on illegality of weapons of mass destruction, and did not let this certainty be affected by any condition.

### **Conclusion**

One of the most significant outputs of nuclear fatwa was the formation of a fertile ground for constructing a new international custom concerning international law of WMD. As mentioned, application of all subcategories of customary international law with elements of nuclear fatwa *sui generis* is legally feasible. Support of nuclear weapon states such as Russia, India, Pakistan, China, North Korea and the USA for nuclear fatwa, largely paved the way of its globalization. All statements, reactions and even behaviors of international officials done in public including body language, have legal meaning and bring the international responsibility for their doers. Therefore, all the States – especially nuclear weapon States – that made a meaningful political connection with Iran during the so-called Iran phobia age are truly remarkable under international law. During the aforementioned period, many States in spite of the baseless all-sided pressure against Iranian nation, instead of closing their tie with Iran, all confirmed its anti-arm approach derived from the nuclear fatwa and reconsolidated their bilateral relationships with Iran. This would not have happened unless they believed in Iran's peaceful approach in its nuclear activities, and what could be more important than the nuclear fatwa indicating this practice? Expressing universal desires to the nuclear fatwa doubled the significance of this act, because this act enjoys some aspects which distinguish it from the other acts with the same functions. For instance, the NPT is a treaty only about nuclear weapons, whereas fatwa includes all possible sorts of WMD, also NPT only focuses on non-proliferation, whereas the fatwa covers and prohibits all functions of nuclear weapon including destruction, policy of prevention and test. Hence, the opportunity of globalizing such a different document enjoying such capacities is being operationalized by several States. The nature of nuclear fatwa can be regarded as the demonstration of Iran's commitment to international acts concerning the proscribing of WMD and

the obligations derived from them. Since the early 20<sup>th</sup> century, Iran has manifested its propensity to almost all approaches which condemn the use of nuclear, microbial and unconventional weapons including the Hague Conventions, the 1899 Hague Declaration (IV, 2) (concerning Asphyxiating Gases), the 1925 Geneva Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, the 1972 Biological and Toxin Weapons Convention, and the 1993 Chemical Weapons Convention. Iran was one of the first States in the Western Asia that commenced its amicable nuclear activities in 1957. It signed the NPT in 1968 and ratified it in 1970. It also underwrote safeguard instrument with IAEA in 1973 and lengthened it for infinite time. At the same time, some countries in the vicinity of Iran like Israel, denied joining the NPT. IRI has joined to the international act for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (1925) in 1929. Having around 50 000 chemical armaments immolations from Iran-Iraq conflicts, Iran is the principle victim of chemical armaments. Almost 20 years after Iran-Iraq armed conflict (1980–1988), the wounded still have to tolerate the sores created by chemical weapons. While Saddam used poisonous biological gases in battle fields and even in residential, IRI being a Member State of the Geneva Protocol of 1925 and loyal to Islamic tenets and humanistic values, eschewed from retaliation in kind. At the time of battle between Iran and Iraq, the supreme leadership, grand Ayatollah Khomeini, numerously stated that it did not retaliate in kind against Saddam's chemically attacks because of the absolute forbiddance on utilizing poison in Islam. Within Paris Conference in 1989, Iran opposed to, and blamed the global village for being isolated in front of Iraq's use of unconventional armaments and convinced international community to finalize the Chemical Weapons Convention (CWC). As the Member States of Disarmament pillar, IRI did its best in negotiation process for the finalization of the agreement and the realization of a structure for the forbiddance of Chemical armaments and underwrote the CWC on January 13, 1993, the first day that it was open for signature, and ratified the Convention on November 3, 1997, as the 82<sup>nd</sup> Member State.

### References

Bernhardt R. *Custom and Treaty in the Law of the Sea*, 205 Recueil des Cours: Collected Courses of the Hague Academy of International Law (1987).

Brownlie I. *Principles of Public International Law* (7<sup>th</sup> ed., Oxford: Oxford University Press, 1998).

Byers M. *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge: Cambridge University Press, 1999).

Cheng B. *Custom: The Future of General State Practice in a Divided World in The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory* (R. McDonald & D.M. Johnston (eds.), Dordrecht: Martinus Nijhoff Publishers, 1986).

Danilenko G.M. *The Theory of International Customary Law*, 31 German Yearbook of International Law (1988).

D'Amato A.A. *The Concept of Custom in International Law* (Ithaca, NY: Cornell University Press, 1971).

*Digest of United States Practice in International Law 2002* (S.J. Cummins & D.P. Stewart (eds.), Washington, DC: International Law Institute, 2003).

Dinstein Y. *The Interaction Between Customary International Law and Treaties*, 322 Recueil des Cours: Collected Courses of the Hague Academy of International Law (2006).

Gross L. *Essays on International Law and Organization, Volume I/II* (The Hague: Martinus Nijhoff Publishers, 1984).

Haggenmacher P. *La doctrine des deux éléments du droit coutumier dans la pratique de la Cour internationale*, 90 Revue générale de droit international public (1986).

Henckaerts J.-M. & Doswald-Beck L. *Customary International Humanitarian Law* (New York: ICRC & Cambridge University Press, 2005).

Mendelson M.H. *The Formation of Customary International Law*, 272 Recueil des Cours: Collected Courses of the Hague Academy of International Law (1998).

Mullerson R. *The Interplay of Objective and Subjective Elements in Customary Law in International Law: Theory and Practice: Essays in Honour of Eric Suy* (K. Wellens (ed.), The Hague: Martinus Nijhoff Publishers, 1998).

Seyvanizad J. *Nuclear Fatwa under International Law* (Los Angeles, CA: Supreme Century, 2017).

Tunkin G. *International Politics and the Creation of Norms of International Law*, 219 Recueil des Cours: Collected Courses of the Hague Academy of International Law (1989).

### Information about the author

**Jaber Seyvanizad (Urmia, Iran)** – Research Assistant and Lecturer of Public International Law, Islamic Azad University, Young Researchers and Elite Club (Ashrafi Esfahani Expy, 3<sup>rd</sup> St., Tehran, Iran; e-mail: sayvania@ymail.com).