ISSUES OF THEORY OF INTERNATIONAL LAW

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TOWARDS CEMENTING INTERNATIONAL LAW THROUGH RENAISSANCE OF THE UNITED NATIONS CHARTER

INTRODUCTION. *This year is the 75-th anniversary of the Great Victory of the Allies – Britain, the Soviet Union and the USA – over Nazi Germany. The most important legal result of this victory has become the Charter of the United Nations – the universal treaty initiated by Great Britain, the Soviet Union and the USA (and later – by China and France) aiming to save succeeding generations from the new world war by establishing United Nations mechanisms to maintain international peace and global security. The UN Charter has since become the foundation of modern international law, respected by States across continents and generations. That seems, however, to begin changing after the collapse of the Warsaw Pact, when its former-members «socialist» European countries (including Bulgaria and Poland) became a part of the Western military bloc – North Atlantic Treaty Organization (NATO). NATO seems to demonstrate now a new attitude to fundamental principles of the UN Charter, first of all, to the principle relating to the use of armed force only according to the UN Charter. NATO States-members launched in 1999 an air campaign against Serbia without authorization by the Security Council; then an ad hoc western coalition, led by the United States, resorted to armed force in 2003 against Iraq and organized in the occupied territory of Iraq the death penalty of the President Saddam Hussein. Even some western European States, France and Germany, first of all opposed such military action of the USA for ignoring the UN Charter. The apparent involvement of the USA in the unconstitutional removal of the Ukrainian President Yanukovich from power in Kiev in 2014 and the subsequent local war between those who recognize such a discharge as le-*

gitimate and those who do not (both referring to the right of self-defense) – these facts make the problem of international peace especially urgent. In this political environment, the risks of World War III seem to be increasing. This paper addresses such challenges to modern international law.

MATERIALS AND METHODS. *The background of this research is represented by the teachings of distinguished scholars and other specialists in international law, as well as international materials including documents of the international conferences relevant to the topic. Some of such materials are alarming, noting that the international legal system is in danger of collapse and it is doubtful whether an international legal order will be possible in the coming decades at all. Others are not so pessimistic. The analytical framework includes also suggested interpretations of the UN Charter and other international treaties regulating interstate relations in the area of global security. The research is based on a number of methods such as comparative law and history of international law, formal logic, including synthesis of relevant facts and analogy.*

RESEARCH RESULTS. *It is acknowledged that there is a need for a more coherent international legal order, with the system of international law being at its heart. Within the context of applicable principles and norms of international law, this article specifically provides the results of analysis of the following issues: 1) centrifugal interpretations of international law as they are reflected in its sources; 2) the need for increasing the role of the UN Charter in the global international legal framework; 3) modern values of the UN Charter as an anti-confusion instrument; 4) the contemporary meaning of the Principles embedded in the UN Charter; 5) comparison of the main principles of international law and general principles of law; 6) jus cogens and the UN Charter.*

DISCUSSION AND CONCLUSIONS. *After discussing the issues noted above, this paper concludes that it is in the interest of the community of states as a whole to clarify the normative structure and hierarchy of modern international law. Greater discipline will need to be demonstrated in the use and classification of principles of international law and general principles of law in the meaning of Article 38 of the ICJ Statute. The content of jus cogens norms most probably will be gradually identified, after difficult discussions across the international community, both at interstate level and among academics. At the heart of such discussions may be the conclusion suggested in this paper on the peremptoriness of the principles of the United Nations Charter – Articles 1 and 2. Such an approach will further promote international law at the advanced quality of regulation of international relations and, for the good of all mankind, assist in the establishment of an international environment much more dependent on the rule of law.*

KEYWORDS: *the Charter of the United Nations, system of international law, main principles of international law, general principles of law, sources of international law, jus cogens, rule of law*

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ВОПРОСЫ ТЕОРИИ МЕЖДУНАРОДНОГО ПРАВА

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К УПРОЧЕНИЮ МЕЖДУНАРОДНОГО ПРАВА ЧЕРЕЗ ВОЗРОЖДЕНИЕ УСТАВА ООН

ВВЕДЕНИЕ. *2020 год – это 75-летний юбилей Великой Победы союзных государств – Советского Союза, Великобритании и США – над нацисткой Германией. Важнейшим юридическим результатом Победы стал Устав Организации Объединенных Наций (ООН) – универсальный международный договор, инициаторами которого выступили СССР, Великобритания и США (позднее также - Китайская Народная Республика и Франция), нацеленный на избавление грядущих поколений от бедствий новой мировой войны путем создания механизмов ООН по поддержанию международного мира и всеобщей безопасности. С тех пор Устав ООН стал фундаментом современного международного права, соблюдаемого государствами на разных континентах и при жизни разных поколений. Появились, однако, признаки изменений этого положения после распада Организации Варшавского договора, когда его бывшие члены – европейские социалистические государства (в т.ч. Болгария и Польша) вошли в западный военный блок – Организацию Североатлантического договора (НАТО). Похоже, что НАТО демонстрирует сейчас новое отношение к фундаментальным принципам Устава ООН, прежде всего, не соблюдая принцип использования вооруженной силы только согласно Уставу ООН. Государства-члены НАТО осуществили воздушные атаки против Сербии в 1999 году, без согласия на то Совета Безопасности. Затем западная коалиция ad hoc, возглавляемая США, использовали в 2003 году вооруженную силу против Ирака и организовали на его оккупированной территории исполнение смертного приговора президенту Ирака С. Хусейну. Даже государства «старой Европы», прежде всего Германия и Франция, не согласились с такой военной акцией США, игнорирующей Устав ООН. Недавняя эскалация противостояния США с Ираном (после убийства американцами руководителей военной миссии Ирана на территории Ирака) является еще одним подтверждением использования вооруженной силы в нарушение Устава ООН. Соучастие США в неконституционном отстранении от власти Президента Украины Януковича в Киеве 1914 года и последующая «местная война» между теми, кто признал этот государственный переворот легитимным, и теми, кто не признал – эти факты свидетельствуют об особой остроте проблемы сохранения международного мира. В такой политической обстановке риск третьей мировой войны выглядит возрастающим. Эти вызовы международному праву рассматриваются в настоящей статье.*

МАТЕРИАЛЫ И МЕТОДЫ. *Настоящее исследование основано на доктринах наиболее известных ученых и иных специалистов в области международного права, а также международных материалов, включая документы международных организаций, относящиеся к теме. Некоторые из таких материалов носят алармистский характер, отмечая опасность коллапса международной правовой системы и сомнения в том,*

что международный правопорядок вообще можно будет восстановить в ближайшие десятилетия.

Другие – не столь пессимистичны. Аналитическая составляющая статьи охватывает также предложенные толкования Устава ООН и иных международных договоров, регулирующих межгосударственные отношения в сфере глобальной безопасности. В исследовании вовлечены разные методы, в т.ч. сравнительно-правовой, историко-правовой, метод формальной логики, включая синтез относящихся к делу фактов, а также метод аналогии в праве.

РЕЗУЛЬТАТЫ ИССЛЕДОВАНИЯ. *Показано, что наличествует потребность в более целостном, связанном воедино международном правопорядке, в котором его ядро составляет система международного права. В контексте применимых принципов и норм международного права в настоящей статье предложены в конкретном плане результаты исследования следующих вопросов: 1) центробежные толкования международного права, отраженные в его источниках; 2) необходимость в росте роли Устава ООН в глобальной правовой системе; 3) ценность Устава ООН как документа, предупреждающего путаницу в правоприменении; 4) современное значение принципов международного права, отраженных в Уставе ООН; 5) сопоставление основных принципов международного права и общих принципов права; 6) нормы jus cogens и Устав ООН.*

ОБСУЖДЕНИЕ И ВЫВОДЫ. *По итогам рассмотрения обозначенных выше вопросов, в работе обоснован вывод о том, что в интересах сообщества государств в целом уточнять нормативную структуру современного международного права и базовую иерархию его принципов. Требуется проявлять большую скрупулезность при толковании и применении принципов международного права и общих принципов права (как они обозначены в ст. 38 Статута Международного Суда ООН). Вероятнее всего, содержание норм jus cogens будет постепенно уточняться, после трудных дискуссий в международном сообществе, как на международном уровне, так и в академической среде. В фокусе таких обсуждений мог бы быть вывод, предложенный в данной статье, относительно когентности принципов, предусмотренных в Уставе ООН, в его статьях 1 и 2. Такой подход, как представляется, мог бы способствовать дальнейшему развитию международного права, более качественному регулированию современных международных отношений; это способствовало бы складыванию международной обстановки, которая в большей мере зиждется на верховенстве международного права.*

КЛЮЧЕВЫЕ СЛОВА: *Устав Организации Объединенных Наций, система международного права, основные принципы международного права, общие принципы права, источники международного права, jus cogens, верховенство права*

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Авторы заявляют об отсутствии конфликта интересов.

1. Introduction. The need to cement international law

75 years ago World War II (1939-1945) ended. The bloody battle between the Allies (Britain, the Soviet Union and the USA) and the Axis Powers (Hitler's Germany, Mussolini's Italy and Japan, subsequently joined by Hungary, Romania and other states occupied by Germany) brought unprecedented horrors. Estimations of civilians and military personnel who died during World War II are different, from 40 million[1] to

[1] 15 million military personal and 35 million civilians, according to the *Oxford Encyclopedia of World History.* See: Oxford Encyclopedia of World History. Oxford: Oxford University Press. 1998. P. 732.

62 million (including 27 million citizens of the Soviet Union)[2]; countless millions more being wounded, crippled, not being able to earn themselves a decent living after the war.

Modern explanations are different as to why the civilized nations through the legal mechanisms available, including the League of Nations, did not stop Hitler's Germany when in 1936 it occupied the Rhineland, in contravention of the Versailles peace settlement; or in the 1938 «anschluss», when Hitler's Germany annexed Austria and invaded Czechoslovak Sudetenland[3].

More important is the later common legal will of Great Britain, the Soviet Union and the USA (and later China and France – as the main victorious powers) as reflected in their meetings in 1943-1945 – to save succeeding generations from the future world war and for these ends to establish a new international global security organization – the United Nations (UN) – and relevant legal mechanisms to maintain international peace. As noted, following the aftermath of the Second World War, «international law entered upon a period of unprecedented confidence and prestige», with «prosecutions of German and Japanese leaders for crimes under international law at Nuremberg and Tokyo»; in this regard, the founding of the United Nations in 1945 was «a critical step in the creation of a new world order» [Evans 2006:48-49]. The UN Charter has since become a universally recognized frame and foundation of modern international law, respected in practice.

Such an international «euphoria» seems to end now. It ended not in 1949 when the Treaty on the North Atlantic Treaty Organization (NATO) was signed by the United States and other western states. The 1949 Treaty provides that its Parties «reaffirm their faith in the purposes and principles of the Charter of the United Nations» (Preamble) and that the «Parties undertake, as set forth in the Charter of the United Nations, to settle any international dispute in which they may be involved by peaceful means» (Article 1). It ended not in 1955 when the Soviet Union and other socialist states of Eastern Europe established the Warsaw Treaty Organization – as a response to including West Germany in NATO. The Warsaw Pact relied again on the Principles of the UN Charter. Even throughout the Cold War between the USSR and «the socialist community» as a whole (based on state property economy) and the USA and its «Western camp» (based on free-market economy) the two adversary groups of states still had to respect international law based on the UN Charter, first and foremost because that was the only way to survive in the nervous environment of mutual deterrence. Indeed, NATO and the Warsaw Pact Organization took account of the «nuclear» second-strike capabilities of each other. It was a mutual respect for international law as a necessity – to survive – for both «capitalist» and «socialist» states.

Strange as it may seem, it was after the collapse of the Soviet bloc – the Warsaw Pact, when the key former «socialist» European countries (Bulgaria, German Democratic Republic, Poland and Russia) transformed themselves from the state-owned economy to free-market economy (similar to the economy of Western states) that such a mutual respect for international law started evaporating. As noted by scholars, such a change was demonstrated by a new attitude of the only superpower – USA – to a fundamental principle of the use of armed force; every military intervention constitutes an act of aggression unless it is justified by the exercise of self-defense (Article 51 of the UN Charter) or is authorized by the UN Security Council (Articles 39-50) [Solidarity… 2010:174]. In spite of this, as sadly observed, «NATO members launched an air campaign without authorization by the Security Council» in Kosovo in 1999. The author further notes that an «ad hoc coalition», again led by the United States, «resorted to armed force in 2003 against the regime of President Saddam Hussein in Iraq». And this «Operation Iraqi Freedom» similarly was not authorized by the Security Council. Some NATO members supported the use of armed force against Iraq without resolution of the Security Council. «In contrast, the States of old Europe, led by France and Germany, opposed it» [Solidarity…2010:202,208].

Basic principles of International Law apart, the risks of World War III are increasing. Technical progress in arms combined with *de facto* military strikes without paying attention to the UN Charter make a global nuclear catastrophe more and more realistic. Recent escalation of U.S.-Iran hostilities after U.S. killing of Iran's generals on the territory of Iraq (without the consent of either the Security Council or of the territorial sovereign – Iraq) is another confirmation of such risks.

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[2] *Rossiiskii entsiklopedicheskii slovar'. V 2-kh tomakh.T.1.* [Russian Encyclopedia. In 2 volumes. V.1]. Moscow: Bol'shaya Rossiiskaya entsiklopediya Publ. 2000. P. 297. (In Russ.).

[3] Oxford Encyclopedia of World History. Oxford: Oxford University Press. 1998. P. 732.

International law is today vast. On the one hand, technological advance is requiring the law applicable to any case to become ever «less national». On the other hand, nation-building has been the work of centuries, so national law has traditionally a well-defined order of authority in many states. It is about national law that Immanuel Kant in the 18th century wrote that the law is «the most sacred from things that God has on Earth» [Kant 1994:383]. It is the English national law that was described as «the great system of jurisprudence, like that of the Universe» [Boorstin 1996:45]. At first glance, international law as compared with English Law, for example, may appear under-developed. Most international relations continue to be conducted at a bilateral level, though often successfully. It is at the multilateral level where pressure towards «legal perfectionism» has been felt most, particularly in recent times. Some will welcome this; contrasted with the earlier view that international law should be confined to an essentially contractual on-going level[4]. Certainly, any international treaty is a compromise between its Parties, and multilateral treaties reflect most often a compromise of compromises. Still, with the world becoming ever more interconnected, universal international legal standards will have to rise to the consequent challenge. Thus, during the current and coming generations, facing unprecedented military and environmental global challenges, a contemporary international law framework will have to be not only conserved (thus preventing chaos in inter-state relations) but also to be perfected ensuring that there is a well-established legal order based on better defined sets of norms.

It is the means by which these ambitions are realized which forms the focus of this paper. It does not rely on any ideology. It pays attention to the legitimate key expectations of both nations great and small. Its desire, to put it simply, is to straighten out the regulation of international relations at the most macro level, so that, in the future, greater attention can be devoted to matters that are very important: peaceful realization of the personal goals of human beings in the contemporary international environment; a universal sense of community of people living on our fragile planet; and – last but most importantly – our shared responsibility for saving succeeding generations from the scourge of World War III and the protection of the natural environment of the Earth, including freshwater resources, forests and clean air.

Different legal scholars underlined the interdependence between international life and international law – from Niccolo Machiavelli (*The Prince,* 1513) to Professor Giraud (*Le droit international et la politique,* 1963) and Soviet members of the International Law Commission Fyodor Kozhevnikov and Grigory Tunkin (20th century). In short, according to the prevailing views, international law is a product of the concurrent legal policy of «civilized nations» while a policy of an individual state is a reflection of its national interests, as understood by its contemporary authorized leaders (presidents, prime-ministers, parliaments, etc.). Such understandings are not necessarily legally and politically optimal, that is such understandings may not reflect the national interests of a particular state in strategic perspective. That is why it is so important that both a «good policy» of state A and a «bad policy» of state B have a common, universal regulator – international law [Kolb 2015:63-98; Vylegzhanin 2015:418-433]. Whereas Grotius placed «good faith» and «equity» as the cornerstone of bringing order to international relations [Grotius 1956:68], Martens believed that the idea of «trust and equity» was the source of law of civilized nations. Martens was convinced that the basic law of history was «the law of the progressive development of international relations» [Martens 1996:20,27]. The philosophy of «peaceful coexistence», so popular in the Cold War spar between «socialist» East and «capitalist» West, nevertheless had a legal dimension. Even within such a philosophy (reflected in out-dated doctrines of «socialist international law» and «capitalist international law») the basic principles of international law, as they are provided in Articles 1 and 2 of the UN Charter, were respected. We emphasize that it is in the contemporary long-lasting interests of all states to respect these basic principles of international law as forming the core of all the system of international law and its main sources.

[4] For the English legal positivist John Austin only a part of international law comprised positive moral rules being laws «properly so called». Namely, those rules «which are set by sovereigns, but not by sovereigns as political superiors» (for example, treaty law) (Lecture 5). As for the «laws which regard the conduct of independent political societies in their various relations to one another... usually styled the law of nations or international law», these were «positive moral rules which are laws improperly so called» (Lecture 5). [Austin 1995: 121,123].

2. Centrifugal interpretations of sources of international law

The sources of international law are *prima facie* familiar: most authors refer to the list provided in Article 38(1) of the Statute of the International Court of Justice (ICJ) and the Statute is an integral part of the UN Charter, according to Article 92. There is an order (to them), if not a hierarchy[5]. Customary law rules (consisted of general practice of states and the relevant *opinio juris* [Vylegzhanin, Kalamkaryan 2012]) confirm what the international community already acknowledges. It should not provide the opportunity for some countries to be creative and attempt to impose by their practice their own will upon others[6]. «The general principles of law recognized by civilized nations» are the pillars in the structure and serve a special function even in relation to the other two main sources – international conventions and international custom. These principles, drawn mainly from concurring principles of national laws of different states, are not static; relied upon when and to the extent necessary[7]. Judicial decisions may provide future guidance for consistency in application of international law, but they do not prescribe *per se*[8]. The «most qualified publicists» in law research can add texture, meaning and examples and even recommendations (through their «teachings»); one of the modern problem of these «subsidiary means for the determination of rules of law» is that they often reflect centrifugal interpretations of international law, in both aspects: what are applicable sources; and how to interpret these particular sources in a concrete case. In order to prevent such centrifugal interpretations judges and arbitrators as well as legal scholars from different countries and different legal systems are supposed to understand «the other reasoning». And that is often impossible: most U.S. scholars, for example, can't read Russian laws and Russian legal teachings. So many English speaking scholars do not even care about what are legal systems of other states – even of such permanent members of the Security Council as Russia and China. As a consequence, English speaking lawyers sometimes do not understand basic issues of fact and law; for example, that the apparent involvement of the USA in the removal of President Yanukovich of Ukraine from power in 2014 was a violation of international law. Some of such teachings, however, may inspire, but it is for states (in practical terms for the authorized representatives of states) to decide when (and again to what extent) to adopt relevant legal ideas.

With such a reality, numerous publications assert that international law seems often ineffective. International judgments, arbitration awards and legal teachings are far from coherent understandings of international law. Why, therefore, does international law seem often ineffective? Many international treaties at the multilateral level fail to enter into force or have a relatively limited number of state parties[9]. It may be that some areas in relations between states are not amenable to universal acceptance: for ex-

[5] Baron Descamps, President of the Advisory Committee of Jurists responsible for drafting the Statute of the Permanent Court of International Justice, summed up the general view of its members when he described the order of presentation of the sources (of international law) as indicating an «order of natural precedence.» For instance, he said: «If two states concluded a treaty in which the solution of the dispute could be found, the Court must not apply international custom and neglect the treaty. If a well known custom exists, there is no occasion to resort to a general principle of law». See: League of Nations. Advisory Committee of Jurists: Procès-Verbaux of the Proceedings of the Committee (June 16th - July 24th 1920) with Annexes. The Hague: Van Langenhuysen. 1920. P. 337.

[6] It should not be forgotten that in Russia and China, to name just two countries, concern has been expressed at the emergence, during the first decade of the 21st century, of the concept of «responsibility to protect». A facility which it has been suggested is reflective of Western ambitions, but which is not supported by a relevant provision of the UN Charter.

[7] General principles of law stand apart from the other two main sources in the Statute. Comprising established norms of municipal law, from across jurisdictions and not infrequently being relied upon by both the common and civil law traditions. They help to support the structure and dress the interior of international law (so to speak) when there are gaps. In this way, norms such as res *judicata*, good faith and estoppel (recognised in many legal systems) have been inserted in international law.

[8] The tension between the two European traditions of law (common and civil) remains never far from the surface; to remind that decisions of international courts and tribunals do not create binding precedent.

[9] For example, the United Nations Convention on Jurisdictional Immunities of States and Their Property (2004) has still to secure the thirtieth instrument of ratification necessary to enter into force; the Vienna Convention on the Law of Treaties is not universal (currently having 116 state parties); the Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean signed in 2018 by the five Arctic coastal states and the five non-Arctic actors, was promptly ratified by Canada, Denmark, the United States, the European Union and Russia, but other important signatories are still hesitating to be or not to be parties to this Agreement.

ample, state succession[10]. Other states may lack the capacity to commit themselves to a wide range of rules[11]. Others seem much more determined, in the international arena, to use international law to secure, uphold and preserve their own position rather than play their part in the harmonization of a legal order in the modern international community. The fact that there is so much confusion about what is or is not a part of customary international law suggests that the source is viewed too lightly in the modern political environment and therefore has developed a lack of focus which has meant it straying from those essential norms for which it would be tautologous to be constantly reiterating in international treaties[12]. In addition to that, «general principles» of law are often confused with the main (fundamental) principles of international law[13]. To be fair, international lawyers (including those working as public servants for their governments) from the common law jurisdictions often fail to remind themselves of the civilian effects of a decision of an international court and tribunal[14]. Many publicists fail to carve the role that the Roman jurists established from the late Republic onwards[15]. Reiterating what their professional colleagues and predecessors have written is good for teaching law students in universities. But their craft might be much more forensic and Socratic in the contemporary legal and political environment[16]. The general principle of law «*audiatur et altera pars*» is not followed for different reasons, as was noted above.

3. The need for increasing role of the UN Charter in the Global International Legal Framework

Since universal customary international law (that is, a general practice of states accepted as law, if we rely upon the simplest definition) can be acknowledged as those rules which, so to speak, «go without saying» in all states of the world, the United Nations Charter comes much more to the forefront.

The UN Charter, which came into force in October 1945, seems for young law researchers anachronistic in places[17] and difficult to

[10] The Vienna Convention on Succession of States in Respect of Treaties (1978) and the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (1983) have secured few state parties. Nevertheless, even such instruments (including these) may provide a very useful template for states when encountering challenges of the type addressed in these treaties.

[11] Respect for rules on self-determination of peoples and for the rules on territorial integrity (Articles 1 and 2 of the UN Charter) remain strong, but states have a different understanding about the contemporary legal content of these rules and about relations between them. So some members of the United Nations family already struggle to participate fully on the international stage. Until recently this was perhaps best reflected by the delay in Palau taking up its seat as a member of the United Nations.

[12] Today customary international law seems most effective so long as it remains uncodified, in spite of attempts within the International Law Commission. Nevertheless, a greater level of oversight is needed to ensure that the meaning and importance of customary law is not lost to an undoubtedly well-meaning and intentioned, but sometimes over-eager, collection of activists (both scholarly, non-governmental and individual).

[13] As noted earlier, general principles of law are a source of international law specifically mentioned in the Statute. In contrast to the main (fundamental) principles of international law, this will be considered below. At this stage we note that the main principles of international law may bear relationship with *jus cogens* norms, be a reflection of customary international law and include many of the core principles set out in multilateral treaties and some perennial to bilateral instruments, but are probably best left as a generally recognised and widely respected set of principles, traversing the wider range of sources of international law, first and foremost international conventions and international custom.

[14] International courts and tribunals do not create binding precedent. As Article 59 of the Statute of the International Court of Justice provides: «The decision of the Court has no binding force except between the parties and in respect of that particular case».

[15] Roman law found a special place for its jurists and the juristic literature. This is reflected in the codification of Justinian, in which one of the four component parts of the *corpus juris civilis,* the Digest, is a collection of thousands of fragments from that literature. The Roman jurists, at least in later jurisprudence, were professional state officials, their works comprising usually commentaries o*n the civil law, the edict of the praetor (the praetorian law, as a whole, known as the ius honorarium, standing alongside the jus civile*) and questions and replies on difficult legal problems (hard cases, if you will).

[16] Too much academic writing in the field of international law being often a tautologous exercise in reviewing what everyone else has said on the given subject, dwelling too little on establishing (in the Socratic method) right questions reflecting modern international life and suggesting right answers to such questions. In Plato»s *Protagoras*, Socrates asks that we make trial of the truth [Plato 1977:213].

[17] For example, the Military Staff Committee, as set out in Chapter VII of the Charter (Articles 45-47), was never established though, in theory, it might be formed. Even one of the United Nations» «principal» organs, the Trusteeship Council, is in need of dissolution (or transformation) having no territories (currently) under its purview: until 1994 when Palau, formerly part of the Trust Territory of the Pacific, became a member of the United Nations.

amend[18]. Still the UN Charter, being a unique international treaty, should come to form the centre point of the updated international legal framework that needs to be respected by all states and further improved. Disdained by many, the importance of the UN Charter and the very existence of the United Nations, established according to the Charter, cannot be overstated: much of its most successful work going unnoticed and largely unreported[19]. The United Nations as an organization, including its principal organs, may need reform, but this discussion is not about whether there should, for example, be an expanded Security Council or not[20]. Rather, it is on the historically established principles of the UN Charter and *in concreto* from this centre (the United Nations) from which international law can be first and foremost developed by the universal consent of states; it is on such basis that in the 21st century universal international law can be more effectively applied and smarter (than before) enforced.

The international legal community has been transformed during the past century. The building-block that was the League of Nations system has today been positively consolidated into a legal and political system of the world order with the United Nations at its core, which, despite its occasional detractors and a challenging international environment, continues to perform with some effectiveness. Specific universal international intergovernmental organizations, which began to emerge in the nineteenth century, have proliferated[21]. Regional international organizations, some having a particular specialist focus, continue to emerge[22]. In past decades, also, the agreement of states to pool their sovereign powers and establish supranational organizations *sui generis* has proved successful: the most obvious of these being the European Union[23]. A problem, though, begins to emerge when each of these types of organization develop their own standards on a given subject. To give but one example, by way of illustration: not only, of course, will the United Nations have its own instruments, standards and expectations on human rights, but the Council of Europe will have its own, as shall the Organization for Security and Co-operation in Europe (OSCE)[24]. It is enough of a challenge to harmonize any new emerging source of any branch of international law with the United Nations Charter as its «pivot»; but, the international legal order becomes less effective when universal international rules are accompanied by a seemingly limitless range of legal «instruments» and «standards» available from outside «branch sources» or «self-contained

[18] To date, the UN Charter has been amended several times. Expansion of the UN Security Council from 11 to 15 members, with the majority required for action being increased from 7 to 9 votes (1965); expansion of UN Economic and Social Council from 18 to 27 members (1965); amendment of Article 109 (in Chapter XVIII, Amendments; 1968); expansion of the UN Economic and Social Council from 27 to 54 members (1973). Article 108 of the United Nations Charter provides: «Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, including all the permanent members of the Security Council».

[19] The UN Economic and Social Council plays a fundamentally important role in international affairs of tremendous benefit to international society in such areas as development, the environment, health and population, much of it of interest for specialists, including within civil society, only attracting the interest of media editors when its findings make sensational headline.

[20] Of the countless recommendations, the most prominent must surely remain the alternative set out in the report «A more secure world: our shared responsibility» (2004). The options are referred to as Model A and Model B. Model A calls for creating six new permanent members, plus three new non-permanent members for a total of 24 seats in the Council. Model B calls for creating eight new seats in a new. See: UN: The Secretary-General's High-level Panel Report «A more secure world: our shared responsibility». 2004. P. 67-68. URL: http://www.un.org/ruleoflaw/files/gaA.59.565/_En.pdf (accessed 12.12.2019).

[21] There are now hundreds of such organisations, from the well-known Food and Agriculture Organization and International Maritime Organization to the less well-known such as the World Tourism Organization.

[22] For example, in the field of security and not being affiliated with the United Nations: the Organization for Security and Cooperation in Europe (OSCE) and the Shanghai Co-operation Organisation (SCO). One of the recent examples is the evolving legal region regime of the Eurasian Economic Union (EAEU) – established by several former soviet republics of the USSR, now independent states.

[23] The EU as a *sui generis* international organization means, in this context, that the EU is neither a creature of only international nor only national law; its member states having pooled their sovereignty to the European Union by treaty across a range of areas either partially or in its entirety: for example, in the fields of fisheries, agriculture and competition law.

[24] Consider, within the field of human rights, torture. The United Nations has the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) and the UN treaty body the Committee against Torture. The Council of Europe has its European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987) establishing a European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The OSCE has a range of commitments on torture prevention, including, but not only, from the Copenhagen Document (1990).

regimes», if we use the term of the UN International Law Commission (ILC). As a consequence, advocates (as well as others who exercise their defense of any position or vantage point) can select that which best suits their cause, which does not contribute to general legal order[25]. As the ILC notes in its documents on fragmentation of international law that is not a positive trend. Such a trend is not sustainable for the world legal order across generations.

In these circumstances, modern confirmations of the highest legal value of the UN Charter are needed not only to prevent negative consequences of fragmentation of international law. They are also needed for remedying contemporary confusion regarding numerous and different and even competing rules of modern international law, the increasing quantity of which is an on-going process.

4. UN Charter as an anti-confusion instrument

International law has been being transformed for centuries. A review of many textbooks on International Law, especially from the end of the 19th/early 20th century is a testament to this[26]. Nevertheless, as already indicated, international law still has some distance to travel until it can stand alongside the municipal law of states with a developed legal system.

In simple words, any system of law may be looked at like a toolbox. Contained within a toolbox are things which have different purposes. Yet, even to this day, there remains uncertainty (in international legal terms) both as to what is contained in this «toolbox» and what role each item – each norm and principle – is designed to achieve. In some national legal systems «*principles of law*» and «*legal norms*» are sharply delineated. The *first* are considered as «guiding ideas» while the *second* are obligatory rules. Such delineation is not applicable to international law. All principles of international law are legal norms, though not all norms of international law are principles of international law. Moreover, among such principles some are principles of a concrete branch of international law (for example, freedom of laying submarine cables and pipelines on the bed of the high seas is a principle of the law of the sea). Such «branch» principles are not the main principles of international law. So there exists in international law a sort of hierarchy among its principles.

As shall be described, the most notorious hierarchical position in the international legal order is held by peremptory norms of general international law (*jus cogens*). The term is used in the *Convention on the Law of Treaties,* 1969 (and the number of its parties is not big), although not in the *UN Charter.* The definition of *jus cogens* is widely cited. These are norms from which no derogation is permitted. There are still discussions as to whether such norms are contained in international conventions only or also in customary law; or in general principles of law; or in all these main sources of international law. And these options stimulate revisiting the old discussion – about what is a norm in international law nowadays.

The legal philosopher and respected international lawyer, Hans Kelsen, wrote much on norms and their place within the legal order. In *A Pure Theory of Law,* he defined a norm in the following way. First, a norm binds a legal person: «By "norm" we mean that something ought to be or ought to happen, especially that a human being ought to behave in a specific way» [Kelsen 2005:4]. In his opinion, norms are imperative and denote what such legal person ought to do, rather than indicate what they actually do. «Norm is the meaning of an act by which certain behavior is commanded, permitted, or authorized. The norm, as the specific meaning of an act directed toward the behavior of someone else, is to be carefully differentiated from the act of will whose meaning the norm is: the norm is an ought, but the act of will is an is» [Kelsen 2005:5].

Crucially, for the international legal order the continued existence of norms of international law is dependent, *inter alia,* upon their validity and of being obeyed by the relevant states and other subjects

[25] The third Protocol supplementing the United Nations Convention against Transnational Organized Crime (UNTOC) (2000) is the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition (2001). Within Africa alone, it is supplemented by the following not always harmonious, in terms of their scope and subject-matter, instruments: (i) Protocol on the Control of Firearms, Ammunition and Other Related Materials in The Southern African Development Community (SADC) (2001); (ii) Nairobi Protocol for the Prevention, Control, and Reduction of Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa (2004); (iii) Economic Community of West African States (ECOWAS) Convention on Small Arms and Light Weapons, Their Ammunition and Other Related Materials (2006); and, (iv) Central African Convention for the Control of Small Arms and Light Weapons, their Ammunition, Parts and Components that can be used for their Manufacture, Repair and Assembly (Kinshasa Convention) (2010).

[26] Consider, for example, Oppenheim's great work on International Law. His Treatise (first edition) is divided into two volumes. Volume I is titled «Peace» (1905). Volume II is titled «War and Neutrality» (1906).

of international law. According to Kelsen, without practice by the addressee the norm cannot be considered to have any legal force, nor, therefore bind: «To say that a norm is «valid», however, means something else than that it is actually applied and obeyed; it means that it ought to be obeyed and applied, although it is true that there may be some connection between validity and effectiveness. A general legal norm is regarded as valid only if the human behavior that is regulated by it actually conforms with it, at least to some degree. A norm that is not obeyed by anybody anywhere, in other words a norm that is not effective at least to some degree, is not regarded as a valid legal norm. A minimum of effectiveness is a condition of validity» [Kelsen 2005:10-11]. Even minimum participation of states in the Vienna Convention on the Law of Treaties testifies that the *jus cogens* clause of this Convention is a valid norm of international law. That does not mean, however, that any provision of this Convention is obligatory for states which are not parties to it.

What is not perfectly clear, reflecting on *jus cogens* (to which all other rules are ultimately subject in international law) is what is meant by a «norm of general international law»? The Study Group on Fragmentation of International Law established by the International Law Commission (ILC) observed that «there is no accepted definition of "general international law"»[27]. It is suggested in legal literature that *general international law* consists of rules which are obligatory to *all states;* in contrast to *local rules* of international law (whether bilateral or regional) which are obligatory to *some states* parties to the relevant bilateral and regional agreements[28]. Following this approach general international law includes both customary international law («international custom») and «general principles of law» sources, which are listed separately in Article 38 of the ICJ Statute. Still, the position regarding multilateral treaties to which many (but not «all») states are parties, as to whether it forms a part of general international law or not, remains uncertain. As was noted – rather in bold terms – by the Special Rapporteur: «55... The language «norm of general international law» was inserted by the Commission to indicate the exclusion of multilateral treaty law, implying a clear distinction between treaty rules and rules of general international law»[29]. Former Member of the ILC Professor Tunkin was of a different opinion, according to which «general international law includes a great quantity of mixed rules, that is, the rules which are treaty rules for some States and customary rules for other States» [Mezhdunarodnoe pravo…1986:59].

We do not advocate here the position of the current Member of the ILC or the opinion of the Member who passed away. We draw attention to the complexity of this issue. We do support, however, the wording of the Special Rapporteur about the relationship between the terms «general international law» and «customary international law» and «treaty law» as it was described in the *North Sea Continental Shelf* case. In that case the ICJ observed that a specific treaty rule can codify (or be declaratory of) an existing general rule of international law, or the adoption of a treaty rule can help crystallize an emerging general rule of international law, or that a treaty rule can, after adoption, come to reflect a general rule on the basis of subsequent practice. As the ICJ put it, as an «indispensable requirement», «state practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved»[30].

Thus, indirectly, either at the time of adoption or subsequently, norms contained in a treaty may be indicative of general international law, but such treaty norms are not per se general international law. The lack of universality even of multilateral treaties, whether in terms of the number of state parties to them, as well as their particular purposes and the attendant rights and obligations which derive from them, makes it hard to consider treaty law as form-

[27] International Law Commission: Report of the International Law Commission on the work of its fifty-eighth session (1 May – 9 June and 3 July-11 August 2006). – *Yearbook of the International Law Commission.* 2006. Vol. II. Part Two. P. 179. URL: https://legal.un.org/ilc/publications/yearbooks/english/ilc_2006_v2_p2.pdf (accessed 12.12.2019).

[28] Vylegzhanin A.N., Kolosov Yu. M. Ponyatie mezhdunarodnogo prava, ego predmet, ob'ekty, sistema [The notion «International Law», its area of application and its system]. – *Mezhdunarodnoe pravo: uchebnik. V 2-kh tomakh. T.1.* Otv. red A.N. Vylegzhanin [International Law: a textbook. In 2 volumes. Vol.1. Ed. by A.N. Vylegzhanin]. Moscow: Yurait Publ. 2016. P.16-20. (In Russ.).

[29] International Law Commission: Second report on jus cogens by Dire Tladi, Special Rapporteur. March 17, 2017. Para 55. URL: https://undocs.org/en/A/CN.4/706 (accessed 12.12.2019).

[30] International Court of Justice: North Sea Continental Shelf. Judgment. – *ICJ Reports.* 1969. P. 43. URL: https://www.icj-cij.org/files/case-related/51/051-19690220-JUD-01-00-EN.pdf (accessed 27.12.2019).

ing *per se* part of general international law. Although this does not prevent any given treaty rule – even reflected by bilateral treaties – from providing evidence for existence of this or that norm of general international law.

Such an assessment may be regarded as somewhat unusual. After all, the first source described in Article 38(1) of the Statute of the ICJ is «international conventions, whether general or particular». It is very important to emphasize that each of the three main sources listed in this article have a different function (from which, at least today, international courts and tribunals can base their decisions). International treaties are indicated first because if treaty norms bind the disputants they alone can be relied upon by the ICJ or any other court or tribunal to establish its ruling (This, of course, being without prejudice to any aspects of the other two main sources which may, separately, be relevant also in the determination of the given dispute). Customary law intervenes (at least to a more direct and substantial extent) usually if treaty law cannot bind the disputing parties, in light of the international legal obligations they have committed themselves to, to a given outcome. This may arise, for example, if a concrete dispute is dominated by an area of international law well-established in a multilateral treaty, but for which one of the disputing states is not a party, provided that the relevant norm (representing a norm of general international law, also) forms a part of applicable customary international law. Any given dispute is likely to be decided in harmony with general principles of law, in the context of Article 38(1) of the Statute of the ICJ. These are «*principles of law*», and not principles of *only international law.* «General principles of law» may assist the court or tribunal in enabling it to find judgment, as the principal basis for the inclusion of general principles, in the first place, was to avoid the Permanent Court of International Justice from being faced with a potential *non liquet,* owing to the absence of relevant rules of international law to decide the case[31]. Today, «general principles of law» (as one of the sources of international law) continue to assist an international court or tribunal substantively, even more if at a level of «reserve» sources.

If treaty rules *per se* do not form part of general international law, therefore they also cannot directly inspire the formation of *jus cogens* norms. It would, though, suggest that general principles of law besides customary international law can directly inspire *jus cogens* norms. It is widely acknowledged that international custom acts as the prime source for *jus cogens* norms. In the Annex to the recent set of Draft Conclusions adopted by the International Law Commission, the norms contained in the document have been qualified previously by the ILC as representing peremptory norms of general international law. They include: the prohibition of genocide; the basic rules of international humanitarian law; the right of self-determination; and, some others.[32] One of the main principles of international law is that «states shall fulfill in good faith the obligations assumed by them» in accordance with the UN Charter (as formulated in the *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations,* 1970, Principle 7). This principle is reflected in Article 2 of the UN Charter. Fulfilling in good faith legal obligations is also a general principle of law, such a principle surely, by now, warranting inclusion in the pantheon of *jus cogens* norms. It has been of longstanding importance. In Roman law, the consensual contracts (including the contract of sale) were valid provided they satisfied certain criteria. One of these was the need for good faith. If one of the parties had acted in bad faith, the contract was void.

So, in this context it is not surprising that the Special Rapporteur of the ILC examining *jus cogens* norms was of the opinion that treaty rules could not directly inspire *jus cogens* norms; however, following consideration by the ILC in plenary and by the Sixth Committee of the UN General Assembly Conclusion 5 provides: «1. Customary international law is the most common basis for peremptory norms of general international law (*jus cogens*). 2. Treaty provisions and general principles of law may also serve as bases

[31] See the remarks of the Norwegian member of the Advisory Committee of Jurists Francis Hagerup and Committee President Baron Édouard Descamps (of Belgium).
League of Nations. Advisory Committee of Jurists: Procès-Verbaux of the Proceedings of the Committee (June 16th - July 24th 1920) with Annexes.
The Hague: Van Langenhuysen. 1920. P. 296, 317, 318, 319.

[32] The others are: the prohibition of aggression; the prohibition of crimes against humanity; the prohibition of racial discrimination and apartheid; the prohibition of slavery; and, the prohibition of torture. See: International Law Commission: Annual Report of the International Law Commission Seventy-first session (29 April–7 June and 8 July–9 August 2019). P. 147. URL: https://legal.un.org/ilc/reports/2019/english/a_74_10_advance.pdf (accessed: 29.12.2020).

for peremptory norms of general international law (*jus cogens*)»[33].

According not only to the *Vienna Convention on the Law of Treaties,* but also to the ILC position, *jus cogens* norms are the only rules in international law which are always non-derogable. It is this very quality that makes them «hierarchically superior» to all other norms in international treaty law. The ILC suggests to go beyond one branch of International Law – that is beyond the Law of Treaties – and to apply the superiority of *jus cogens* to all branches of international law, including, for example, the Law of the Sea, where not treaty rules, but customary rules traditionally play the fundamental role. Indeed, this is reflected in Conclusion 3 of the ILC's Articles on jus cogens, titled: «General nature of peremptory norms of general international law (*jus cogens*)». It provides: «Peremptory norms of general international law (*jus cogens*) reflect and protect fundamental values of the international community, are hierarchically superior to other rules of international law and are universally applicable».[34]

Such a new rigid hierarchy, suggested in the ILC documents, is not reflected in the UN Charter *expressis verbis.* But is it implied? The opinion that only international custom and general principles of law comprise «norms of general international law» and the additional assertion that these two sources (alone) may directly inspire jus cogens norms does not suggest that either one or both are in some way hierarchically superior to the other sources of international law. As noted earlier, the Advisory Committee of Jurists which drafted the original Statute (of the Permanent Court of International Justice) was emphatic that the three main sources of international law (international conventions; international custom; and, general principles of law) were not to be regarded hierarchically. Certainly, Barons Descamps» (the President of the Committee) original proposal, retained by Eli Root and Lord Robert Phillimore, provided for an order: «The following rules are to be applied by the judge in the solution of international disputes; they will be considered by him in the undermentioned order»[35].

Admittedly, reference to *l'ordre successif* may have been removed in order to avoid any possible future misunderstanding as to the existence of any hierarchy of these sources[36]. However, even if this wording had been retained, it would have only served to confirm what has been outlined above: namely, that each of the three main sources (at least) serves its own unique and individual purpose in international law, from which international courts and tribunals may rely as occasion demands, but, crucially, *commencing* with the *applicable treaty law* (if there is *any*).

There is a clearly established hierarchy within treaty law, *one and the only Treaty* standing *above all the others*. Article 103 of the *UN Charter* provides: «In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail».

This begs (in the context of the new ILC documents, considered above) a question. Does the UN Charter stand apart from the whole work of the ILC regarding *jus cogens* norms in international law? Or does the UN Charter reflect in the opinion of the ILC «customary international law» in its entirety and, if so, does it represent its own unique and single category within «international customary law»?

It is probably premature to re-evaluate the list of sources of international law which are reflected in Article 38 of the ICJ Statute, regarding, for example, documents adopted by intergovernmental organizations; are they «subsidiary means for the determination» of rules international law? However, such a re-evaluation may be necessary one day in the future and possibly by other legal means. What is an advisable common opinion of international lawyers is to consider that the norms contained in the UN Charter, including Article 103 cited above, is the fundamental guidance to avoid confusion regarding applicable law in a concrete case and interpretation of this law. Moreover, the UN Charter key provisions are to be revisited by regarding them as not only treaty rules binding States Parties in 1945, but also as comprising customary international law; therefore, there emerges «UN Charter Law» as peremptory norms of general international law; thus providing the formal possibility for customary norms reflected in the UN Charter being upgraded to the status of *jus cogens* norms. This, therefore, begs the question about the current status within international law of the Principles described in Article 2 of the UN Charter.

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[33] Ibid. P. 143.

[34] Ibid. P. 142.

[35] Text presented at the 15th Meeting of the Advisory Committee of Jurists. See: League of Nations. Advisory Committee of Jurists: Procès-Verbaux of the Proceedings of the Committee (June 16th - July 24th 1920) with Annexes. The Hague: Van Langenhuysen. 1920. P.344.

5. The contemporary meaning of the principles embedded in the UN Charter

The series of norms with the highest treaty legal value in international law are those set out in the UN Charter. Articles 1 and 2 of the Chapter («Purposes and Principles») are interlinked.

The United Nations Charter is sometimes called «a constitution for the world», though the term «constitution» means a fundamental source of national law, establishing the supreme rules for people organized in a concrete national state. The UN Charter was not meant as providing supreme legislation for all the population of the world. It was meant to provide basic rules for the conduct of states. Some leaders of the European Union endeavoured to adopt a «constitutional treaty», meaning further limitations of sovereignty of States-members of the EU and there was a relevant reaction and the project was eventually abandoned[37]. Today, much more than then, the world appears neither to be ready nor (probably) willing to confer such a «constitutional» status upon the UN Charter[38]. What it should, though, seek to achieve is the cementing of the status of the UN Charter as the primary instrument of international law. Currently, the membership of the UN is near universal[39]. Drafted at the close of a long and tragic World War II, the UN Charter has stood the test of time well. The UN Charter is a prescient document. A fine, and non-headline, example of this is Chapter VIII (titled: Regional Arrangements) and Article 53(1), in particular, which anticipated the important role that regional arrangements could play in helping to maintain international peace and security[40]. However, the pressure (from some quarters) to walk away may never disappear. The existence of such voices is particularly regrettable when one considers that the United Nations has done its best (sometimes under the most difficult of circumstances, encumbered by its procedures and rules) to fulfill its Purposes: maintain international peace and security, to save our generations from the scourge of new world war, achieve international co-operation and act as a centre for harmonizing the actions of nations («in the attainment of these common ends»)[41]. These are worthy goals for the very survival of mankind.

Is it in the interest of the world community, to be concrete, in the interest of the international community of states as a whole, to alter the Principles of the United Nations? The composition and competences of the Security Council and General Assembly reflect a careful balance between «might» and «right.» Not even a permanent member of the Security Council has on its own the means of adopting a resolution. Nor two or three of such members. Member countries could not be expected to do any less than fulfill

[36] Ibid. P. 338.

[37] The Treaty establishing a Constitution for Europe (2004) would have replaced the existing European Union treaties with a single text. It was ratified by 18 member states. However, the rejection of the Treaty by French and Dutch voters in May and June 2005 led to its abandonment.

[38] This, despite the fact that there can surely be no doubt that the United Nations has primary responsibility for the maintenance of international peace and security on the international stage (as represented, principally, by Chapters I, VI and VII of the UN Charter).

[39] Both the Holy See and the State of Palestine are observers; Western Sahara continues to wait for the conducting of its much anticipated referendum (under Resolution 690, (1991)); Kosovo and Abkhazia perhaps lead a range of territories upon which concerns across certain sections of the international community, and not only within the Security Council, continue to frustrate final achievement of full statehood (at least in terms of acceptability).

[40] For example, in Haiti (and action by the Organization of American States), in Liberia (via the Economic Community of West African States, ECOWAS) and Somalia (the African Union, as well as sub-regionally the Intergovernmental Authority on Development in Eastern Africa, IGAD). Even more successful example of a regional mechanism of peaceful collaboration and maintaining environmental security are the regional arrangements of the Arctic States, including within the Arctic Council [Governing Arctic Seas…2020:6-8].

[41] While the Preamble of the UN Charter provides for the determination «to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind», the Purposes of the United Nations are formulated as follows: «(1) To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace; (2) To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace; (3) To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and (4) To be a centre for harmonizing the actions of nations in the attainment of these common ends».

their obligations, as members, in good faith. The extent to which they do or do not do so must rest (for each) on their own legal conscience and legal policy. International disputes should be settled peacefully; force should be neither employed nor threatened; UN members should be collegial, giving assistance when preventive or collective action is taken (under Chapter VII of the UN Charter), beyond which, to the extent which is judged reasonable, states should be left as sovereign actors (to make their legal policy, both successful and even mistaken). As much should apply to non-members of whom, today, there are mercifully few[42].

The *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations,* adopted by the United Nations General Assembly on the 24 October 1970, has a special significance. According to the 1970 UN Declaration, the seven principles of the United Nations Charter (provided in Articles 1 and 2) «constitute basic principles of international law». That might mean that other principles reflected in other Articles of the UN Charter are also principles of international law, but according to the 1970 Declaration, they are not «basic principles». Moreover, the 1970 UN Declaration reflects the view of the General Assembly of the United Nations as to the necessity of «the progressive development and codification» of the Charter principles. By this Declaration, the UN General Assembly «appeals to all states to be guided by these principles in their international conduct».

The term «basic principles of international law» is not used in the 1969 *Vienna Convention on the Law of the Treaties*. Article 53 of the 1969 Convention provides that a treaty is void if «it conflicts with a peremptory norm of general international law.» A peremptory rule of general international law («*jus cogens*») is defined in this article as «a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.»[43] Under the 1969 Convention if «a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates» (Article 64). Neither the 1969 and the 1986 Treaty Conventions (the *1986 Convention being on the Law of Treaties between States and International Organizations or between International Organizations*) nor the 1970 Declaration noted above make it clear expressis verbis whether «peremptory rules of general international law» and «basic principles of international law» are legally the same or not. Legal teachings have noted the similarity (if not identical nature) between «basic» (or «main») principles of international law and *jus cogens* rules, and also between the latter and obligations *erga omnes;* the ICJ identified «the category of obligations *erga omnes*» in *dicta* in the *Barcelona Traction* case. As was noted, unlike obligations arising in respect to specific injured states, «obligations *erga omnes* are owed to the international community as a whole» [Evans 2006: 162-163]. For reasons explained further we suggest that all main principles of international law as they are provided in Articles 1 and 2 of the UN Charter are peremptory rules of general international law, but not all such peremptory rules are formulated in the UN Charter.

According to the ICJ, «principles» of international law are «certain basic legal notions».[44] They are prescribed by «general customary international law» or by «special international law», and not by national laws. So, there is a clear distinction between the terms «principles of international law» and «general principles of law» (the latter are rooted in national legal systems).

6. Comparison of the main principles of international law and general principles of law

It is remarkable in this context how different is understanding of the terms «general principles of law» and «general (or main) principles of international law» as suggested in the legal teachings. According to Professor Brownlie (the latest book is edited by Professor Crawford): «The rubric "general

[42] Of course, when the United Nations was first established the processes of «salt-water» decolonisation was yet to begin in earnest, thus rendering the organization with an initial membership of only 51. Today, the number has almost quadrupled to 193, the most recent being South Sudan in 2011.

[43] The same definition of *jus cogens* is provided in Article 53 of the Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations, 1986.

[44] International Court of Justice: North Sea Continental Shelf. Judgment. – *ICJ Reports.* 1969. P. 46. URL: https://www.icj-cij.org/files/case-related/51/051-19690220-JUD-01-00-EN.pdf (accessed 27.12.2019).

principles of international law" may alternately refer to rules of customary international law, to general principles of law as in Article 38(1)(c), or to certain logical propositions underlying judicial reasoning on the basis of existing international law. This shows that a rigid categorization of sources is inappropriate» [Crawford 2012:37]. Though we agree with high assessments of Brownlie's contribution to the theory of international law[45] some of his statements are to be revisited today. There are universal and regional and even bilateral rules of customary international law; so we do not think that the term «*general*» (or «*main*») *principles of international law* may refer to *bilateral* or *regional* rules of customary international law. Brownlie's assertion that generally recognised principles of international law (or basic principles) are «certain logical propositions underlying judicial reasoning on the basis of existing international law» has also been challenged. «Logical propositions» rooted in Roman law – such as *lex specialis derogat generali; lex posterior derogate priori; nemo plus juris transferre potest quam ipse habet,* were not considered by Professor Tunkin, for example, as norms of international law *stricto sensu.* Even if they are considered by some other specialists as norms of international law or even if they were applied by international courts and tribunals as rules of international law (and not as general principles of law), they are certainly not basic principles of international law in the context of the UN Charter and 1970 Declaration. According to Professor Tunkin, these Latin tags for judicial reasoning are what is described in the UN Charter as «the general principles of law recognized by civilized nations» [Tunkin 1974:227].

Professor Shaw in his latest edition of *International Law* observes that there are «various opinions as to what the general principles of law concept is intended to refer. Some writers regard it as an affirmation of Natural Law concepts»; other writers «treat it as a sub-heading under treaty and customary law»; some authors regard «the general principles of law as reiterating the fundamental precepts of international law». For Professor Shaw, «the most important general principle, underpinning many international legal rules, is that of good faith. This principle is enshrined in the United Nations Charter» [Shaw 2017:73-77]. We are not ready to share the opinion that principles «enshrined in the United Nations Charter» are reflected in Article 38 of the ICJ Statute as «general principles of law». They are reflected in the first and the second sources – «international conventions» and «international custom».

Professor Kozhevnikov, former Judge of the International Court of Justice, prefers to use, instead of the term «basic principles of international law», the term «generally recognised principles» of contemporary international law, with the same legal meaning. According to him, these principles are «some basic and most important rules of conduct of States», they are «governing sources of international legitimacy» and which «reflect the legal consciousness of all advanced humanity»[46]. We might suggest, however, that some principles of international law, which are not «basic principles» (according to the 1970 Declaration) might be nevertheless «generally recognized principles» – like the principle of the freedom of the high seas, for example.

In light of these different understandings of what is the legal meaning of these terms («basic», or «main», or «generally recognized» principles of international law) it may be suggested that *it is the United Nations Charter's Principles only* which are to be undisputedly regarded today as the «basic» («main») principles of international law. Today these principles are rules of both international customary law and treaty rules (the UN Charter is a treaty and at the same time its rules express the general practice of states accepted as law). The main reason for such an approach is a legal reality (as has been previously indicated); in the hierarchy of international treaties the rights and obligations under the *United Nations Charter only* have primary legal force which is formulated *expressis verbis* and is recognized as law by nearly all states of the world. Besides, the UN Charter's Principles have survived unchanged during the long period of the dramatic changes in international life since 1945.

Modern relations between states are governed firstly by these basic principles of international law. The contemporary processes of economic globalization, transboundary informatization, and new planetary challenges (including increasing military rivalry between states, pandemic diseases and global environmental degradation) do not lead to a necessity to change these basic principles of international

[45] As Professor James Crawford correctly observed in his Preface to *Brownlie's Principles* «several generations of Anglophone international lawyers have absorbed their sense of the structure of their subject from Principles» [Crawford 2012:XVII].

[46] *Mezhdunarodnoe parvo: uchebnik*. Otv. red. F.I. Kozhevnikov [International Law: a textbook. Ed. by F.I. Kozhevnikov]. Moscow: Gosyurizdat Publ. 1957. P.34-35. (In Russ.).

law. They are the key element of the system of general international law based on the UN Charter and the basis of global security. It is because of the effectiveness of the Charter's principles that the peoples of the United Nations are still saving (since 1945) the Earth and several generations of human beings from the global scourge of world war, using the wording of the Preamble of the Charter.

The normative nature of basic principles of international law is confirmed. For example, the *Universal Declaration of Human Rights* of 1948 provides *inter alia:* «These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations». This is important in light of innovation by some scholars of such doctrines as «responsibility to protect». Professor Lukashuk, former member of the International Law Commission, focuses on such a peculiar feature of the basic principles of international law as their stability. He writes that these principles «are not subjected to the influence of particular changes in international relations» [Kurs mezhdunarodnogo prava …1989:8]. The literature would appear to suggest that this is a view universally shared. The processes of economic globalization, ecological interdependence of the globe's population and the emergence of new threats to human beings do not require change to Articles 1 and 2 of the UN Charter. No other alternative set of principles of international law recognized universally have emerged, since 1945, to challenge these.

One of the distinguished specialists in international law, Judge Coroma correctly notes that the «proposition according to which general customary international law is binding on all states which have not objected insistently and clearly against rules in the stage of formation has received wide recognition» [Henckaerts 2005: xii]. It seems even more important now to repeat that the UN Charter principles are universal norms both of customary and treaty international law, which are binding on all states.

It is in the context of the legal notion *jus cogens,* viewed not only within one branch of international law – the law of treaties – but its whole system, that the peremptoriness of basic principles of international law may be generally confirmed in international legal doctrines [Kurs mezhdunarodnogo prava…1989:5-43].

7. Are principles of the UN Charter and jus cogens legally identical?

As noted above, sources of international law are many and their creation is a developing process. So, for such a creation «a rule must come from somewhere» and there is a need for a «fundamental norm on which all international law is based» [Evans 2006:116-117]. The *Vienna Convention on the Law of Treaties,* 1969, provides that parties have in mind the «principles of international law embodied in the Charter of the United Nations» (Preamble). Thus, the 1969 Convention can be in line with the interpretation suggested above, all the UN Charter's Principles are qualified as *jus cogens*. But are all *jus cogens* norms only those rules which are provided by the UN Charter? The following might be added here for consideration: since the 1970 Declaration provides only for seven UN Charter Principles as basic principles of international law, are these seven principles alone of a peremptory character (*jus cogens*)? Naturally, the 1970 Declaration should not be regarded as the final interpretation of the UN Charter principles. The codification and progressive development of international law is on-going. Besides, further improvements of the text of the 1970 Declaration is a reasonable alternative and wise approach to avoid having to revise the Charter itself.

It is asserted that «the theory of *jus cogens* or peremptory norms» is just «a concept without an agreed content» [Evans 2006: 164]. We remark, however, that definitions of the rules on *jus cogens* are provided in two Vienna Conventions on the Law of Treaties of 1969 and 1986 (so it is not just a «theory» or a «concept»; it is a treaty rule). Besides, as previously indicated, the International Law Commission, in its recent work on *jus cogens* norms, has begun to confirm a basket of sources accepted as «bases» for *jus cogens* norms. Dinah Shelton is, of course, correct that multilateral agreements (in spite of such a general rule as «a treaty does not create either obligations or rights for a third state without its consent» – Article 34 of the 1969 Convention) «increasingly contain provisions that affect non-party states» [Evans 2006:165]. Indeed, the UN Charter itself provides: «The Organization shall ensure that states which are not members of the United Nations act in accordance with these principles so far as may be necessary for the maintenance of international peace and security» (Article 2). So, for these purposes, the UN principles were enforced even in relations to states which are not parties to the Charter. Another important legal reality is that only principles and other norms of the UN Charter are enforced by the Security Council, according to the UN Charter. This is not applicable to all *jus cogens* norms, both currently in force and future. Former Member of the ILC, Professor Tunkin notes: «Norms of international law are created and

are modified in the course of international relations. It is natural that the character of international relations exerts a decisive influence upon the development of international law» [Tunkin 2003:45-46]. So more detailed and adapted regulation of contemporary international relations is constantly needed. In such a context new principles and rules of international law may be crystallized. Some of them may develop as *jus cogens*. While the UN Charter's Principles are to be saved as a foundation of such progressive development of international law.

Revision of the UN Charter does not seem helpful, in the contemporary fragile political environment, not only because the danger of accidental «first strike» has increased, but also because of relevant risks of the gradual destruction of the very foundations of the World Legal Order. However, *up-dated interpretations* of the UN Charter's principles of international law should follow, in time, the contemporary development of international relations. Today, such development does not offer grounds for revising the content of basic principles of international law. In future, reasonable «innovations» in interpretations of basic principles of international law (without changing the key provisions of the UN Charter) are feasible if such innovative interpretations receive universal consent from states, reflected both in doctrinal writings and in the practice of the United Nations Security Council.

The American international lawyer, Lori Damrosch, once put the question: is the law by which the international community has been guided since 1945 ripe for fundamental change? She offers, in principle, a negative answer to this question [Law and Force…1991:215]. We agree with this opinion. As Churchill once put it, «democracy is the worst system of government in the world, except for all the others» [Johnson 2015:27]. Modern international law based on the UN Charter seems probably not the best system of governance of international relations but all other systems, including religious and moral, are worse. International law based on the UN Charter has no alternative as a regulator of relations between states in our dangerous and fragile world of today.

8. Conclusions

The contemporary Community of states organized on the basis of international law (with the UN Charter as its core) can't afford what European governments organized in the League of Nations did – let Hitler's Germany in 1939 start World War II. Preventing World War III is not only a legitimate expectation of the peoples of the United Nations; it is also the most important obligation of all states including first and foremost of those which are Members of the Security Council, both permanent and non- permanent. Up till today World War III is being prevented. But it is recognized now not only by journalists but also by military and legal experts that the danger of global World War has dramatically increased nowadays. Recent military escalation of hostilities between the U.S. and Iran (after the U.S. strike on an Iranian military delegation on the territory of Iraq) or stand-offs in the South China Sea are other up-dated confirmations of this.

Preventing World War III is possible only by consolidated international efforts of states, and there is no feasible alternative to international law as the universal regulator of relations between states and other international actors. The UN Charter still remains the only generally recognized fundamental of modern international law. Nobody can predict the exact consequences of ignoring the UN Charter, especially by powerful states, in the current political atmosphere of rising danger of global military conflict. That does not mean that the contemporary international law is static. It is evolving with the new realities of international life and technological and social progress. So, up-dated interpretations of the UN Charter's principles of international law should follow, in time, the current development of international relations. However, any revision of substance of the UN Charter is counter-productive in the modern fragile international life, when the danger of accidental «first strike» has increased. The very fact of the revision of the principles of the UN Charter might be regarded as if they are no longer imperative, with relevant risks of the gradual destruction of the very foundations of the World Legal Order.

The major challenge for the community of states is wisely to put «new flesh to the bone» of the old and tested UN Charter's principles, so that the governance of international relations becomes an on-going «perfecting process», more clever and cautious than it was before. It is in these global and regional confrontations between the conservative values of world security and additional risks of World War III (created today permanently by different factors) that a responsible and smart attitude of the community of states to the UN Charter is urgently needed – to respect this core of the rule of law, and for this end, to respect as a priority at least one of the general principles of law which was known even to our ancestors, and which has come from Roman law: *quieta non movere*.

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