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INTERRELATIONSHIP OF A CUSTOM AND A TREATY IN INTERNATIONAL LAW

Master's thesis

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Tallinn
2020

TABLE OF CONTENTS

INTRODUCTION……..…….…...3

1. POSITION OF A CUSTOM AND A TREATY IN INTERNATIONAL LAW……..10
   1.1. Historical, Collectivist, Voluntarist-Positivist Schools and Non-Traditional Approach to interrelationship of a custom and a treaty in international law.....12
   1.2. The superiority of a custom over a treaty in international law…….…….....17
   1.3. Custom Primacy Theory versus Treaty Primacy Theory ……..……...26
   1.4. Hierarchical interaction of a custom and a treaty…..……..…….....31

2. HETEROGENEOUS APPROACHES TO INTERRELATIONSHIP OF A CUSTOM AND A TREATY IN INTERNATIONAL LAW……...…….…..……37
   2.1. Legal-Formalist Theory of interaction of a custom and a treaty ……...….....37
   2.2. Alternative approaches to the interrelationship of a custom and a treaty……..…..…40
   2.3. Anti-Formalist Traditions in the relation to the interaction of the customary law and the treaty law……..……...…….…....45
   2.4. Legal-Positivist Tradition and interrelationship of a custom and a treaty in international law……..…….....…….……48

3. THE CONCEPT OF *JUS COGENS* WITH RESPECT TO AN INTERACTION OF A CUSTOM AND A TREATY IN INTERNATIONAL LAW…….…...52
   3.1. Challenges of identification of the *jus cogens'* norms concerning interrelation of a custom and a treaty in international law….....52
   3.2. Determination of values of the concept of *jus cogens* ……...……..57
   3.3. Application of *jus cogens* norms in the international legal practice.....60

CONCLUSION……..……..…68

ABBREVIATIONS…….……..…...72

REFERENCES……..…….....73

APPENDICIES……..……..….....84

APPENDIX 1. Table of International Courts' and Tribunals' Cases…….....84

INDTRODUCTION

The history of the interrelation of sources of international law dates back to ancient times. International law has existed since organized communities started dealing with one another consistently.[1] However, what has changed is the definition and meaning of the term "international". For instance, the ancient Egyptians or Greeks would have a much narrower understanding of the term "international" compared to that of nowadays, reflecting the world as they knew it.[2]

The earliest sources of international law such as peace treaties and customs have been in meaningful interrelation since ancient times. Mostly peace treaties were applied by invoking customs to regulate armed conflicts and make the peace between City-States and various nations.[3] The customary law has always derived from the rules of positive morality and treaties either have always been concluded based on the rules of positive morality.[4] Both these sources – treaties and customs have reflected power relations in the international community.

Contrary to this widely accepted approach, some authors had different opinions regarding the interrelationship of a custom and a treaty in international law. Alberico Gentili and Hugo Grotius are classical examples. Even in their analyses of the law of war, they clearly expressed that customary law could not be a source of international law.[5] Grotius and his followers consider customary law as a practice accepted by some people but not as specific constitutive elements.[6] Grotius clearly states: "customary law could never be taken as the law of nations properly said."[7]

In the same way, the binding nature of treaties was frequently regarded as controversial and intensely debated.[8] For instance, Grotius thought that a treaty was only a part of the voluntary law of nations, which meant that treaties, as contracts made between two nations, were binding only for the contracting States.[9] Nevertheless, at the end of 17th century, a German lawyer

[1] C.G. Weeramantry. Universalising International Law. Leiden/Boston. Martinus Nijhoff Publishers 2003. p. 31.
[2] *Ibid.*, p. 45.
[3] E.g. The Treaty of Kadesh negotiated between Ancient Egyptians and the Hittites, adopted in the 1274 BC.
[4] J.B. Murphy. The Philosophy of Positive Law: Foundations of Jurisprudence. New Haven and London. Yale University Press 2005. p.125.
[5] D. Gaurier. An Overview of the Sources of the Sources in the Classical Works of International Law. Sources in the Modern Tradition. - S. Besson and J. D'Aspremont (eds). The Oxford Handbook on The Sources of International Law. – Oxford: Oxford University Press 2017, p. 91.
[6] *Ibid.*
[7] *Ibid.*
[8] J. Austin. The Province of Jurisprudence Determined - Being the First Part of a Series of Lectures on Jurisprudence, or the Philosophy of Positive Law (1832) – W. E. Rumble. (ed.). New York: Cambridge University Press 2009. pp. 80-90.
[9] *Ibid.*, p. 96.

Samuel Rachel followed and improved the aforementioned widely accepted approach and confirmed that the customary law was one of the sources of international law and treaties were presented as another independent source of international law.[10] In the 19th century, there were no more doubts that customary law and treaties were the interrelated and main sources of international law.[11] However, the application of the sources of international law by courts and other judicial bodies was not yet very common.[12] In the 20th century, the 1920 Statute of the PCIJ,[13] and the 1969 VCLT had a significant role in the crystallization of the doctrine of sources in international law.[14]

Currently, contemporary sources of international law are enlisted by Art. 38 (1) of the ICJ Statute, which is a significant point of reference in discourses on sources of international law and the follow-on to the Statute of the Permanent Court of International Justice.[15] Article 38 of the Statute of the PCIJ recognized treaties and customs as primary sources of international law.[16] Moreover, some international legal scholars, as well as judges, suggest certain treaties and customs referring to international humanitarian law and international criminal law to be considered as primary sources of these disciplines.[17]

Customary law is the oldest and dominant source of international law. Article 38.1 of the ICJ Statute also defines it as one of the most dominant sources of international law.[18] Nevertheless, Article 38 of the ICJ Statute does not provide an answer to whether the interrelationship of custom and treaty in international law exists. Therefore, there are some difficulties and challenges regarding the interrelationship of the aforementioned sources. However, practice displays that their interrelationship exists and it does not occur in a vacuum. It is also connected with elements belonging to other sources of international law.[19]

Since Art. 38.1 of ICJ Statute includes neither clear distinction nor hierarchy of formal sources of international law, their application and interrelationship is multidimensional in legal practice.[20] Therefore, the author of this paper believes that by exploring the relation of the

[10] *Ibid.*, p. 100.
[11] D. Gaurier. Sources in the Modern Tradition. An Overview of the Sources of the Sources in the Classical Works of International Law. *op. cit.*, pp. 92-98.
[12] *Ibid.*, p. 96.
[13] Statute of the Permanent Court of International Justice. Geneva 13.12.1920, e.i.f. 16.12. 1920. Art 38.
[14] The VCLT - Vienna Convention on the Law of Treaties. Vienna, 23.06.1969, e.i.f. 27.01.1980, Art 53.
[15] The ICJ Statute. San Francisco, 26.06.1945, e.i.f. 24.10.1945. Art. 38.
[16] C.G. Weeramantry. Universalising International Law. Leiden/Boston. Martinus Nijhoff Publishers 2003. *op. cit.*, p. 45.
[17] B. Simma and P. Alston. The Law of Human Rights 12 Harvard Journal of International Law 1988(82), pp. 89–90.
[18] Statute of the International Court of Justice. San Francisco, 26.06.1945, e.i.f. 24.10.1945. Art.38.1.
[19] T. Erskine. Studies in International Law. Oxford: Clarendon Press 1898, p. 160.
[20] R. Higgins. Process and Problems. Oxford. Oxford University Press 1995, pp. 210-211.

sources of international law with the general doctrine of the sources of international law, the vague issue of the interrelation of sources of international law will be better clarified.

In public international law, the custom remains the powerful but subliminal source of law and it is the source of durability and flexibility for international law.[21] Moreover, one of the oldest sources of international law is customary law, prescribing norms binding on all States.[22] International customary norms have two elements: state practice and *opinio juris*.[23] Every norm of customary international law comprises both these elements.[24] However, customary international law entails special difficulties for itself to be identified in relation with treaty law in legal systems,[25] where law is created and formed by consent of communities, but any formal enactment by governmental entities is ignored.[26]

These elements - state practice and *o*pinio *juris* - require closer examination regarding the interrelation of the aforementioned sources. The reason behind this is the assumption that in order to create customary law, the aforementioned elements may no more require recognition by governmental entities. Instead, the belief of and actions performed by communities are sufficient.[27] Moreover, pursuant to the ICJ's decision in the Nicaragua case, in order to reveal the existence of customary rules, state actions should be consistent with a customary rule, while in case of inconsistency with a given norm, states should condemn such conducts and not recognize it as a new rule.[28]

As regards *opinio juris,* the definition of belief in the obligation is not entirely provided. Firstly, it ignores the fact that many rules are obligatory. For instance, the principle of sovereignty over the continental shelf, for which the real *opinio juris* is a belief not in an obligation but in a right.[29] Secondly, and more fundamentally, as a belief of a state, there is neither consideration of *opinio juris* as the assertion of a legal right nor the acknowledgment of a legal obligation.

The author of the thesis supports the position that the international legal order is moving towards a vertical legal system and the paper will develop the idea that a no-hierarchy concept of sources of international law is normatively problematic. It does not cope with the challenges it faces in the 21st century because, for instance, it evolves the idea that instruments of

[21] D. M. Bodansky. The Concept of Customary International Law. – 3 Michigan Journal of International Law 1995(16), p. 668.
[22] *Ibid.*, p. 670.
[23] North Sea Continental Shelf Cases (Germany v. Netherlands), Judgment, I.C.J. Reps 1969, p. 3.
[24] SS Lotus Case (France v. Turkey), Judgment, the PCIJ reports 1927, para 127.
[25] D. M. Bodansky. The Concept of Customary International Law., *op. cit.*, p. 670.
[26] D. J. Bederman. The Spirit of International Law. Athens: The University of Georgia Press 2002, pp. 32-33.
[27] *Supra* note 23, p. 678.
[28] Nicaragua v. USA, Judgment, I.C.J. Reps 1986, p. 98.
[29] North Sea Continental Shelf Cases, Judgment, I.C.J. *op. cit.*, p. 105.

international law are crafted through essentially the horizontal process instead of the vertical process.[30] These diverse legal approaches to the aforementioned sources make their interrelationship more ambiguous and problematic in the international legal system. Therefore, in order to reveal how the international customary law interrelates with the treaty law, various approaches supporting the superiority of the international customary law over the treaty law will be examined in the present paper.

The problem presented in the current research is an issue of the superiority of custom over treaties in international law. This research problem is relevant because according to Art. 38 of the ICJ Statute, the distinction is only made between formal and material sources of international law; the Statute does not deal with the hierarchical interrelation of custom and treaty in international law.[31] According to the current version of 38 Article of the ICJ Statute, international conventions, customs, and general principles are formal sources, while judicial decisions and teachings of the most highly qualified publicists are recognized as material sources in the sense that they are not the law, but merely evidence of the law.[32]

However, because a clear hierarchical distinction is not inherent in the aforementioned formal sources of international law, especially between custom and treaty, many international law scholars, lawyers, and judges consider them as equal sources, while others develop hierarchical approaches to them.[33] On the one hand, there is an opinion that treaty law must have superiority over customary international law in any case. On the other hand, treaty law and international customary law might be equal or international customary law may be superior over treaty law in certain cases.[34]

The purpose of the present paper is to prove the superiority of the custom over the treaty in international law. Accordingly, the principal objects of the present research are Article 38 of the PCIJ Statute, Art. 38 of the ICJ Statute and Art. 53 of the VCLT. Other objects of the research are jurisprudence of the international courts and tribunals as well.

The present paper develops a hypothesis that the custom is superior over the treaty in international law. To uphold this hypothesis, the paper identifies the following research questions: (i) what determines the significance of customary law within the scope of

[30] *Ibid*., p. 178.
[31] J. Grant. International Law Essentials. Edinburgh: Edinburgh University Press 2014, p. 11.
[32] The ICJ Statute. San Francisco, 26.06.1945, e.i.f. 24.10.1945. Art. 38.
[33] J. O. McGinnis. The Appropriate Hierarchy of Global Multilateralism and Customary International Law - The Example of the WTO', 44 Virginia Journal of International Law 2003(585), p. 231.
[34] A. Cassese. The Hierarchy of Rules in International Law: The Role of *Jus Cogens*. Oxford: Oxford University Press 2005, p. 155.

international law; (ii) do customs have superiority over treaties according to the legal-formalist theory of international law? (iii) what challenges does customary international law face in the course of interrelation with treaty law? (iv) how are the *jus cogens*' norms applied by international courts, when the custom interrelates with the treaty in international law?

To address the aforementioned research questions, the paper-primarily applies the analytical method of research supplemented by the comparative method. The analytical method will be applied to examine the interrelationship of customs and treaties in international law. By employing the comparative method, international courts' and tribunals' case law will be compared to each other regarding whether customary law and treaty law are applied hierarchically in practice. Additionally, this method will be used to compare international customary and treaty laws in terms of superiority.

The research thoroughly analyzes instruments of international law as well as judgments of international courts and tribunals concerning the interaction of custom with a treaty in the international legal decision-making process. The author of the paper supposes that, by such exploration and comparison, arguments will be provided in favor of those specific circumstances in which custom and treaty interrelate.

In the same way, some selected cases of the aforementioned international judicial bodies will be compared to each other by applying the comparative method in light of providing an answer regarding invoking *jus cogens*' norms by international courts in the course of the interrelationship of a custom and a treaty in international law.[35] Furthermore, to a certain extent, the author of this paper relies on peer-reviewed literature, commentaries on international treaties and case law of international courts and tribunals as well as studies and articles of international law scholars and professionals and reports of various NGOs.

The present paper consists of three chapters. The first chapter focuses on exploring positions of custom and treaty in international law and it will reveal and examine how these sources interrelate. Furthermore, it will analyze a non-traditional approach to customary international law and explore Art. 38 of the ICJ Statute in light of the interrelationship of custom and treaty in international law.

[35] *Ibid.*

Moreover, elements of customary international law such as state practice and *opinio juris* will be explored in light of the historical collectivist voluntarist-positivist schools and a non-traditional approach to the customary international law.

Besides, the first chapter will examine the two aforementioned research questions on whether international customary law has superiority over treaty law in international law and challenges of customary law in the course of its interrelation with treaty law. through research of the interrelationship of customary international law and other sources of law, the custom primacy theory will be significantly underpinned. Thus, the author of this paper makes an attempt to support the custom primacy theory.

The second chapter explores the interrelationship of these sources in terms of various theories and traditions of international law such as the legal-formalist theory and the anti-formalist tradition. Moreover, in addition to the aforementioned theory and tradition, alternative approaches to the interrelationship of sources of international law will be explored.

Thus, chapter two is dedicated to the analysis of the second research question concerning the approaches applied in regards to the interrelation of sources in the international legal system where the customary international law has preeminence over the treaty law.

Also, the second chapter dwells on the research query on whether there is a hierarchy among the sources of international law. The attempt is made to determine the place of peremptory norms and Article 103 of the UN Charter within the sources of international law. After exploring preferences and scales of values of customary law and treaty law, the author supposes that it is possible to determine one standard approach to the interrelation of sources.

The third chapter explores challenges in the application of the concept of *jus cogens* in respect to the interrelationship of these sources of international law. Problems related to the identification of the norms of *jus cogens*, determination of their values and their application, when the sources of international law are interrelated, are quite complicated.[36] By examining the foregoing challenging issues the author of the present paper resolves the fourth research query regarding the application of norms of *jus cogens* by international courts and tribunals in those circumstances when the customary international law interrelates with the treaty law.

[36] S. Kadelbach, H. Maarten and W. Harmen. Jus Cogens: Genesis, Function and Identification of *Jus Cogens* Norms. The Hague. Asser Press 2015, p. 157.

For the aforementioned purposes, the application of the norms of *jus cogens* by the Inter-American Court of Human Rights in its decisions, which are also based on international treaties, will be critically studied in respect to the interrelationship of sources in international law.[37]

Analysis of the judgments of the IACHR may provide a clear answer regarding the interrelation of the customary international law with treaty law. Moreover, the judgments of international courts and tribunals in relation to the application of custom and treaty will be examined.

Acknowledgments: I am thankful to the academic and managerial personnel of the Master's programme of International Law and Human Rights for all the assistance and information given. First and foremost, I would like to express my high respect and sincere gratitude to my supervisor, professor, Lauri Mälksoo for attention and guidance during the whole writing process.

I also would like to thank Ph.D. Larisa Belous and Giorgi Zarnadze, Master of Law from Nottingham Trent University (UK), Ph.D. candidate in Law at Ivane Javakhishvili Tbilisi State University, for proofreading of my thesis, valuable suggestions, and advice.

Keywords: international law; sources of law; theory of law; supremacy; custom;

[37] K. Hossain. The Concept of *Jus Cogens* and the Obligation under the U.N. Charter. – 3 Santa Clara Journal of International Law 2005(1), pp. 77-78.

1. POSITION OF A CUSTOM AND A TREATY IN INTERNATIONAL LAW

The interplay between treaty and custom is a topic of great importance in practice and theory of international law. Determination of a place of custom and treaty in international law does not occur in vacuum; there are some dilemmas regarding it. Neither hierarchical separation nor differentiation between custom and treaty in international law is exhaustively provided by Article 38 of the ICJ Statute.[38] The ICJ Statute is the only text in which the member states of the UN have recognized the need for authoritative international instruments in order to generate contemporary international law.

The ICJ judgments and advisory opinions have predominance in determination of custom and treaty in international law. For example, one of the conspicuous judgement is on Canada v. the USA case, in which the ICJ's predominance regarding determination of a place of custom and treaty in international law is highlighted.[39] Notwithstanding this, certain controversial questions have emerged regarding whether there is equality between custom and treaty in international law or whether there is hierarchical differentiation between them.[40]

Theoretically, based on the general doctrine of sources of international law, all formal sources of international law are equal and no single formal source can take precedence over another.[41] However, common sense and practical matters reveal that, firstly, it is recommended to pay attention to any relevant applicable customary rules, then – appropriate conventional norms and in case of failure, general principles of law might be applied.[42]

Nonetheless, based on Art. 38.2 of the ICJ Statute, the ICJ applies principles of equity, fairness and justice as it did in Canada v. the USA case.[43] Though, in the Gulf of Maine case, where a boundary had to be set between Canada and the USA, equity was invoked as a general principle of law under Art. 38 (1) (c).[44] Art. 38.1 of the ICJ Statute establishes a flexible and workable approach of applying sources of international law and granted discretion to the International Court of Justice to the extent where a particular case gives an opportunity to do so.[45]

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[38] Statute of the International Court of Justice. San Francisco, 26 June 1945. Art.38.1.
[39] Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgement, I.C.J. Oral Proceedings Vol.VI 1984, pp 156-157.
[40] S. McCaffrey, D. Shelton, J. Cerone. Public International Law: Cases Problems and Texts. New York. Lexis Nexis 2010, p. 160.
[41] *Ibid.,* p. 166.
[42] J. Grant, Essentials of International Law. Edinburgh. Edinburgh University Press 2014, p.60.
[43] Delimitation of the Maritime Boundary in the Gulf of Maine Area. *op., cit.* pp. 296-305.
[44] *Ibid.,* p. 306
[45] *Supra note* 42, pp. 70-71.

Art. 38.1 of the ICJ Statute identifies custom as an evidence of general practice and characterizes it as the oldest and dominant source of international law, while international treaties play the same role in international law as contracts do in national law.[46] Moreover, Hans Kelsen said that *pacta sunt servanda* was a norm of customary international law and it obligated the states to behave in conformity with the treaties they had concluded.[47]

Furthermore, James Richard Crawford took the same view and argued that international law was a customary law system despite all the treaties - even the principle of *pacta sunt servanda*, which was a customary law obligation.[48] The custom-primacy theory posits that customary law must be seen as normatively superior over treaty law due to its ability to generate universally applicable norms.[49] For instance, the ICJ unambiguously stated that customary norms must be universally applicable to all members of the international community and cannot be subject to any right of unilateral exclusion.[50] Therefore, in the author's opinion international customary law is hierarchically dominant over other sources of international law.

The role of treaty in international law is one of the most controversial issues as well. For instance, Hersch Lauterpacht thought that treaties could be considered as number one in the hierarchy of the sources of international law.[51] Iain Scobbie, Senior lecturer in international law in University of Glasgow, also shared Lauterpacht's opinion and supposed that international conventions and treaties must be the most superior among sources of international law.[52] The potential argument why Iain Scobbie deemed so is that international treaties are applicable to the state concerned and they require a two-stage process of approval such as signing and ratification, which increases their advantage over other sources such as customary law.

The author of this paper disagrees with the aforementioned opinions regarding the advantage of treaty law because a custom might be restated in a treaty format and in this case, if treaty law is at the forefront, then it is a matter of customary law. For example, the UN Charter includes some fundamental customary rules, which are restated in the Charter.[53] Moreover, pursuant to

[46] *Supra* note 40, p. 189.
[47] H. Kelsen. General Theory of law and State. Cambridge. Harvard University Press 1945, p. 121.
[48] J.R. Crawford. Chance, Order, Change: The Course of International Law. The Hague. Brill | Nijhoff 2014, p. 57.
[49] T. Stein. The Persistent Objector and International Law. - 26 American Journal of International Law Law 1985(2), pp 457-482.
[50] North Sea Continental Shelf Cases (Germany v. Netherlands), Summaries of Judgments, Advisory Opinions and Orders, I.C.J. 1969, pp. 2-3.
[51] H. Lauterpacht. The Function of the Law in the International Community New Jersey: The Lawbook Exchange LTD 2000, pp. 34-40.
[52] I. G.M. Scobbie. The Theorist as Judge: Hersch Lauterpacht's Concept of the International Judicial Function. - 2E-Journal of International Law (1997), pp. 264-298.
[53] D. J. Harris. Cases and Materials on International Law, Fifth Edition. London: London Sweet & Maxwell 1998, p. 60.

Art. 103 of the UN Charter when there is a collision of norms regarding obligations of the UN member states, their foremost obligations shall prevail and will be fulfilled under the present Charter.[54] The aforementioned provision can be interpreted in a way that Art. 103 of the UN Charter refers to those obligations of the states, which derive only from treaty law. One of the arguments of that statement is that Article 103 refers only to member States' such international agreements and obligations, which derives from other international treaties law than the UN Charter.

Besides, Article 103 of the UN Charter does not mention customary law in that provision at all when it refers to the hierarchic application of the UN Charter regarding the aforementioned collision of norms. At the same time mentioning of customary rules in Article 103 of the UN Charter is not expressed by any interpretation method of norms. Therefore, it can be argued that customary international law holds the first place in the hierarchy of the sources of international law.

1.1. Historical, Collectivist, Voluntarist-Positivist Schools and Non-Traditional Approach to interrelationship of a custom and a treaty in international law

In order for a customary norm to be formed, its principal elements such as state practice and *opinio juris* must meet certain requirements. The first element – state practice - includes generality, duration and consistency.[55] Though, the dilemma is that general practice of states has never been sufficiently established.[56] The issue of consistency is directly addressed in the Military and Paramilitary Activities Case, where the ICJ held that a state practice should be consistent and when states behave inconsistently under the given rule, this should be treated as breaking the rule, not as indications of the recognition of a new rule.[57] The second element - *opinio juris* is a psychological element considered as a belief of states[58] that converts practice into customs.[59]

[54] The UN Charter, San Francisco, 26.06.1945, e.i.f. 24.10.1945. Art. 103.
[55] V. O. Gluck. Introduction to Rule of Law Practice. Washington, D.C: United States Institute of Peace Press 2010. p. 305.
[56] O. Yasuaki. International Law in a Trans-Civilizational World. Cambridge. Cambridge University Press 2017, pp. 149-171.
[57] The USA v. Nicaragua. Judgment, I.C.J. Reports 1986, p. 100.
[58] North Sea Continental Shelf Cases (Germany v. Netherlands), Judgment, I.C.J. Reps 1969, p. 18.
[59] *Ibid.,* p. 20.

The author of this paper believes that the customary international law was profoundly challenged, when a non-traditional view emerged, which weakens the superiority of custom over treaty in international law. The non-traditional scholars advocate that the two elements - state practice and *opinio juris* - should not be considered as compulsory elements for forming a customary rule.[60] The non-traditional view tried to give rise to a legal theory which would announce these two elements as non-compulsory requirements for forming international customary norms.[61]

The application of the non-traditional approach to forming the norms of customary international law can be encountered in the ICJ's judgment of the North Sea Continental Shelf cases.[62] An international lawyer Michael Akehurst supposed, the aforementioned judgement enhanced thoughts that international treaty law may change its treaty character into customary character because the ICJ relied on the non-traditional view concerning the formation of customary international law in the North Sea Continental Shelf cases. [63]

The non-traditional approach to customary international law undermines the superiority of custom over treaty in international law because this approach decreases importance of one of the elements of customary law such as state practice, which is recognized as a mandatory element for forming a customary norm. In the essence, the non-traditional theory postulates that state practice is merely a regularity of a fact but not a constituting element of a customary norm.

One of the examples of this postulation is that the non-traditional approach came up with the idea that the reinterpretation of customary international law is necessary by removing state practice and *opinio juris* from the practice-based methodological orientation.[64] Moreover, according to the non-traditional theory, resolutions or various international conventions adopted by international bodies may be considered as starting points, which further develop customs in international law.[65] The positive development of the non-traditional theory is that it expands norms of human rights to the international crimes and promotes the idea that convicts can no longer escape the international justice.[66] The proposal by the non-traditionalist scholars has a

[60] M. Akehurst. A Modern Introduction to International Law. – P. Malanczuk (ed.). Akehurst's Modern Introduction to International Law. New York: Routledge 1997, p. 44.
[61] *Ibid*., p. 70.
[62] D. J. Harris. Cases and Materials on International Law, Fifth Edition. London: London Sweet & Maxwell 1998., p. 75.
[63] M. Akehurst. A Modern Introduction to International Law. *op. cit.*, p. 80.
[64] G.J.H. Van Hoof. Rethinking the Sources of International Law. Deventer: Kluwer Law and Taxation Publishers 1983, pp. 107–108.
[65] B. Simma., *op.cit.*, pp. 89–90.
[66] G.J.H. Van Hoof. *op, cit.*, p. 105.

potentially high value because long-held legal customary norms may be under the risk of extinction.[67]

In addition, according to the non-traditional approach, the element of state practice has a limited explanation in the international legal theory.[68] The narrow understanding of state practice means it limits comprehension and describes the state practice as actions performed by the states in the course of their international relations. All these actions and omissions are neutral, which means that they are no indication that the state wishes any behavior to be prescribed as a norm.[69] In the essence, it means that state practice is merely a regularity of a fact, not a norm.[70] Therefore, the author of this paper considers that the non-traditional theory argues the opposite to the superiority of custom over treaty in international law.

The second element of customary law – *opinio juris* is significant for discussion in light of interrelationship of custom and treaty in international law. The concept of *opinio juris* is arguably the most disputed and the least comprehended component of customary international law.[71] There are three approaches to regarding the role of *opinio juris* in the interrelationship of a custom and a treaty in international law.[72] The author of this paper considers that the idea of *opinio juris* is mysterious and it can be said that the *opinio juris* theory is not clearly defined because the states' belief is unclear and it does not explain how a widespread and uniform practice actually becomes legally binding.[73]

According to the historical school, *opinio juris* is the primary and fundamental component of the customary law and the state practice is the product of *opinio juris*.[74] In a nutshell, state practice and *opinio juris* are not independent from one another and they are closely connected as cause and effect.[75] It may be noted that the phrasing of Article 38 of the Statute of the World Court seems to imply this viewpoint because it describes international custom as evidence of a general practice accepted as a law.[76] This could be interpreted in a way that custom is not binding because it constitutes a reflection of the fundamental fact of acceptance of the practice

[67] B. Simma., *op. cit.*, p. 110.
[68] J. Kammerhofer. The Sources of International Law – The Formal Approach. 47 American Journal of International Law 2004(3), p. 528.
[69] K. Wolfe. Custom in Present International Law 2nd ed. Dordrecht. Kluwer Academic Publishers 1993, p.70.
[70] *Ibid.*, pp. 70-71.
[71] C. Bynkershoek. Questions to Public Law. – T. Fank (ed.). Oxford: Clarendon Press 1930, p.76.
[72] *Ibid.*, pp. 76-77.
[73] C. Eagleton. International Government. New York: Ronald Press Company, 1948, p. 554.
[74] T. Erskine. Studies in International Law. Oxford: Clarendon Press 1898, p. 160.
[75] *Ibid.*, p. 161.
[76] Statute of the International Court of Justice. San Francisco, 26 June 1945. Art.38.1.

as law.[77] Since the historical school posits that custom is not binding and it is merely a reflection of a practice accepted as law, custom can interrelate with treaty in a way that treaty might be superior over custom in international legal practice.

Contrary to the historical school, the voluntarist-positivist school holds that *opinio juris* and practice are independent from each other and both must be present before a rule of customary international law can be held to exist.[78] Therefore, customary law is seen as a kind of alliance between state practice and *opinio juris*.[79] It may be said that the voluntarist school of thought might be strongly individualistic in the sense that each state decides whether to accept an obligation as customary law or whether or not to accede to a treaty.[80] The importance of the voluntarist school's emphasis on the strict separation of state practice and *opinio juris* cannot be overestimated.[81]

However, the principal point is that this school of thought insists on the actual presence of *opinio juris* before there can be a rule of customary law.[82] Moreover, the presence of that utterly indispensable component cannot be inferred from the evidence of state practice alone.[83] A final observation is that *opinio juris* has a strong psychological flavor.[84] It is about what is in the mind of a given state concerning a given practice.[85] It might be objected that states do not have minds in the way that humans do.[86] One of the features of Nineteenth-Century positivist writing was a firm belief in the real personality of states – and that could easily be extended to include a collective will or mind.[87]

Although, according to voluntarist positivist school, state practice and opinio juris exist independently and their actual presence is mandatory before customary norm is formed. It might be supposed that voluntarist-positivist school supports the superiority of custom over other sources of international law. Furthermore, according to the voluntarist-positivist school the

[77] G.J.H. Van Hoof. Rethinking the Sources of International Law. Deventer: Kluwer Law and Taxation Publishers 1983, p. 161.
[78] C. Kletzer. Custom and Positivity: An Examination of the Philosophic Ground of the Hegel-Savigny Controversy - A. Perreau-Saussine and J. B. Murchy (eds.). The Nature of Customary Law. Cambridge: Cambridge University Press 2007 pp. 125-148.
[79] *Ibid*., p. 150.
[80] J.L. Kunz. The Nature of Customary International Law. - 47 American Journal of International Law 1953, pp. 662-669.
[81] A.T. Guzman. How International Law Works: A Rational Choice Theory. Oxford: Oxford University Press 2008, p. 131
[82] M. Gilbert. Joint Commitment: How do we Make the Social World. Oxford: Oxford University Press 2014, p.150.
[83] B. Williams. Deciding to Believe - Problems of the Self. Cambridge: Cambridge University Press 1970, pp. 136-151.
[84] *Ibid.*, p. 165.
[85] *Ibid.*, p. 168.
[86] M. Freeman, Genocide, Civilization and Modernity. – 46 British Journal of Sociology 1995 (2), pp. 207–225.
[87] B. Williams. Deciding to Believe - Problems of the Self, *op. cit.*, pp. 136-151.

states independently decide whether to accept various obligations, deriving from customary law, based on widely accepted state practice and *opinio juris,* to accede to a new treaty. Based on this, it can be said that the idea of superiority of customary law among sources of international law is strengthened under the voluntarist-positivist school.

The collectivist school constitutes the third viewpoint regarding *opinio juris*, which significantly contradicts with both previous ones.[88] It rejects the positivist emphasis on the fundamental rights of individual states and the need for individual consent of each state to a rule of law.[89] It adopts a more collectivist or communitarian view of international law in general.[90] It is the emphasis on the interdependence of states, instead of independence, as the fundamental feature of international society.[91] The *opinio juris* element of customary law refers to the acceptance of a practice as law by the international community at large, rather than to the acceptance by each state individually.[92]

One of the advantages of the collectivist school's position is that it is able to posit a commendably objective means for determining the existence of the global general will.[93] The most important point is that the third school tends to regard *opinio juris* as forming in the wake of state practice and its consequence.[94] The third approach tends to hold that *opinio juris* can be presumed to be present on the basis of state practice.[95] Presumably, the position is that, if the practice is sufficiently widespread (and it definitely does not need to be universal) then the existence of *opinio juris* can be inferred.[96]

Based on the North Sea Continental Shelf cases, the ICJ spoke in psychological terms regarding *opinio juris.* Namely, the ICJ held that states must be conscious of having a duty in order for a rule of customary law to be present.[97] Moreover, in this case the ICJ referred to *opinio juris* as a subjective element of customary law.[98] More specifically, the same view is expressed in the case of Nicaragua v. the United States of America and it is described as a belief, which appears

[88] A. Wendt. Social Theory of International Politics. Cambridge: Cambridge University Press 1999, p. 121.
[89] *Ibid*., p. 125.
[90] *Ibid*., p. 130.
[91] *Ibid.,* p. 131.
[92] A. Wendt. Anarchy is What States Make of It: The Social Construction of Power in Politics. - 46 International Organization 1992, pp. 391-425.
[93] R.M. Walden. The Subjective Element in the Formation of Customary International Law. – 12 Israel Law Review 1977, pp. 344-346.
[94] Ibid., p.350.
[95] A.E. Roberts. Customary International Law and Various Approaches - 95 American Journal of International Law 2001(4), pp. 757-791.
[96] *Ibid*., p.380.
[97] North Sea Continental Shelf Cases (Germany v. Denmark and Germany v. Netherlands), Judgement, I.C.J. Reports 1969, para 77.
[98] *Ibid.,*

to have a psychological flavor.[99] Further in this apparently psychological vein, the Court held that States have to know themselves the weight of a legal obligation toward them .[100]

In contrast, the Court does not expressly say whether this subjective element or belief refers to the positions of each state individually or to the subjective stance of the community as a whole. In later cases, the Court has held back from this overtly psychological phraseology.[101] The World Court has not yet provided a final unequivocal opinion as to which view of customary law is correct and, consequently, which view of *opinio juris* must be adopted.

However, the author of this paper supports the approach proposed by the collectivist school because, this approach best meets the indirect request of contemporary international community with regard to creating the customary international rule. Moreover, it should be noted that the Statute of the ICJ describes custom as a source of law deriving from the general practice of States,[102] i.e. the component of general practice can be interpreted in such a way which does not specifically refer to state practice but additionally includes religious, ethnic, cultural or other practices commonly accepted as law, implying that any of the following could be the one to accept the respective practice as customary law.

1.2 The Superiority of a custom over a treaty in international law

The previous section of the paper explored how a custom and a treaty are interrelated in international law under various schools and approaches. The author of this paper made an attempt to demonstrate that various schools perceive the interrelation of a custom and a treaty in international law differently. In this part of the paper the author will follow the mainstream of the voluntarist-positivist school discussed above and try to prove that custom interrelates with treaty in a hierarchical way. The approaches of the above mentioned schools and regarding the ways in which custom and treaty have an effect on each other is a topic of great practical and theoretical importance. Both of these sources of international law have descriptive and regulative values in an international legal system.[103]

[99] Nicaragua v. United States of America. Reports of The ICJ Judgement 1986, para 184.
[100] *Ibid*., para 207.
[101] Gulf of Maine Case (United States v. Canada), Judgement, I.C.J. Reports 1984, para 111.
[102] The ICJ Statute. San Francisco, 26.06.1945, e.i.f. 24.10.1945. Art. 38.
[103] D. B. Hollis. An Interdependent Relationship. Sources in Interpretation Theories. - S. Besson and J. D'Aspremont (eds). The Oxford Handbook on The Sources of International Law. – Oxford: Oxford University Press 2017. p. 423.

These approaches across various features of customary law and treaty law suggest a new way of assessing the importance of the aforementioned sources of international law.[104] It is generally accepted that customary law is a fundamental part of international law. For instance, customs, along with treaties, are one of the main sources of international law, according to Art. 38.1 of the ICJ Statute.[105] Moreover, the role of custom is supreme and significant in determining the character and effect of the Martens Clause adopted in both the 1899[106] and 1907 Hague Conventions.[107]

Besides, the Martens Clause, being the part of the preambles to the 1899 and 1907 Hague Conventions, is a specific instance based on which the different sources of international law such as customary international law and treaty law have common and interrelated concerns about humanity, dignity, necessity and welfare. These elements are specifically addressed by the Martens Clause.[108] Moreover, as a result of interrelationship of a custom and a treaty, such different disciplines of the international law as the humanitarian law and the human rights law begin to intersect.[109] Furthermore, it should be noted that the principle of humanity is at the very heart of the legal system. This principle is not only a moral duty, but also a basic obligation under the international customary law and the treaty law.[110]

Interrelationship of a custom and a treaty in international law may be attested by the fact that customary law frequently mirrors what is contained in treaties. For instance, in the Corfu Channel case of 1949, the ICJ held that it was Albania's obligation to notify others of the presence of mines because this obligation derived not from the Hague Convention of 1907, but from certain general and well-recognized principles such as the principle of humanity, which is the principle of customary law.[111]

Consequently, the author of the paper is of the view that this decision reflects the position of the ICJ that the principle of humanity derives not only from the Martens Clause, but also from the customary law. Before the 1899 Convention was drafted it was generally recognized the treaty law and customary law converge substantially and that customary law was more

[104] *Ibid.,* p. 440.
[105] The ICJ Statute. San Francisco, 26.06.1945, e.i.f. 24.10.1945. Art. 38.1.
[106] The Hague Convention of 1899. The Hague, 29.07.1899, e.i.f. 04.09.1900.
[107] The Hague Convention of 1907. The Hague, 18.10.1907, e.i.f. 26.01.1910.
[108] R.G. Allen, M. Cherniack, and G.J. Andreopoulos, Refining War: Civil Wars and Humanitarian Controls - 18 Human Rights Quarterly 1996 (4), p. 751.
[109] J.E. Kastenberg. The customary international law of war and combatant status: Does the current executive branch policy determination on unlawful combatant status for terrorists run afoul of international law, or is it just poor public relations? - 39 GonzagaLaw Review, 2003, p. 505.
[110] E. Greppi. The Evolution of Individual Criminal Responsibility Under International Law - 835 International Review of the Red Cross 1999, p. 550.
[111] The Corfu Channel Case The judgment of April 9th, 1949: I.C. J. Reports1949 (4), p. 22.

advanced in certain respects.[112] Dinah Shelton states: "It should be noted that both Hague Conventions declared or stated principles and rules that, in essence, represented then existing customary international law."[113] Such interactions suggest that the relationship between customary international law and treaty law is mutually constitutive.[114]

To some extent, treaties are reflective of what customary law is. The principle of states' responsibility to uphold human rights is a lucid example of that reflection because it exists in the customary law and a whole host of treaties as well, which prohibit violations against individuals and groups. The historical sources of customary international law indicate that European States, between 1884 and 1915, already had duties to protect colonized peoples under rules of natural law, as well as under treaties such as the Berlin West Africa Convention, the Anti-Slavery Convention and The Hague Conventions.[115]

In addition, the Martens Clause concerns war crimes and crimes against humanity as well, where custom and treaty interrelate with each other. Antonio Cassese, international lawyer, argued that the Martens Clause admitted that there were laws, principles or rules of customary international law in a specific treaty, which resulted not only from state practice, but also from law of humanity and dictates of public conscience.[116] It can be stated that the Martens Clause was specific acceptance by States in the form of a treaty that these rules existed outside of the treaty law i.e. in the customary law.

Furthermore, under the Martens Clause, humanity is protected from any type of misconduct by not only treaty law, but customary law.[117] Professor Bassiouni also notes that articles of Nuremburg Charter concerning the crimes against humanity come from the preambles to the 1899 and 1907 Hague Conventions - the Martens Clause. Consequently, under the professor Bassiouni's argument, it is possible to legitimately argue that in the context of customary law sources of these crimes existed earlier than the conventions.[118] Based on the discussion above, there is a clear link between custom and treaty in international law.

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[112] T. Baty. International Law in South Africa. London, Stevens & Haynes Press 1900, pp. 79-80.
[113] D. Shelton. The World of Atonement Reparations for Historical Injustices – 1 Miskolc Journal of International Law 2004(2), p. 290.
[114] D. B. Hollis. An Interdependent Relationship. Sources in Interpretation Theories. - S. Besson. *op.cit.,* p. 424.
[115] R. Anderson, Redressing Colonial Genocide Under International Law: The Hereros' Cause of Action Against Germany. – 93 California Law Review 2005(1155), p. 1169
[116] A. Cassese, The Martens Clause: Half a Loaf or Simply Pie in the Sky? 11European Journal of International Law 2000(1) p. 188.
[117] *Ibid.*, p. 190.
[118] M.C. Bassiouni. Crimes Against Humanity – Historical Evolution and Contemporary Application: Cambridge; New York. Cambridge University Press 2011, p. 265.

Customary international law hierarchically interrelates with treaty law in international law concerning genocide as well. The author of this paper thinks that even before adopting the 1948 Genocide Convention, customary law had already prohibited unlawful acts which caused genocidal violence. For instance, prohibition of attacking non-combatants and prohibition of massacre have been rules of customary law since ancient times. Therefore, the author of the paper supposes that international dispute settlement bodies will apply relevant customary rules in any case, whether or not a party to the dispute attempts to ignore the 1948 Genocide Convention.

A contrary proposition, as some authors presume, might be that genocidal violence did not exist until the adoption of the Genocide Convention by the United Nations in 1948. However, Genocide is not a new phenomenon. It had originated much earlier than 1948. Ben Kiernan, professor of international and area studies, published a book – "Blood and Soil" in which he discussed numerous cases of genocidal violence committed in ancient times and colonial era both in North and Latin America as well as in Africa. He also published an article about the Third Punic War (149-146 BC), in which he argued that the Third Punic War might be considered as the first genocidal crime, which was committed by the Republic of Rome.[119]

Customary law does not provide a legal definition of genocide, though prohibition of attacks against non-combatants has been a rule of customary law since ancient times.[120] Therefore, the author of the paper tries to highlight that rules of customary law, which has always prohibited genocidal violence since ancient times, were codified in the 1948 Genocide Convention, the Statute of the two international criminal tribunals (ICTR, ICTY), as well as in the Statute of the International Criminal Court.[121] Thus, under the auspices of those international treaties genocidal violence, prohibition of which derives from customary law, became an international crime.

In addition, genocide, recognized as an unlawful act and genocidal violence coming from ancient times, can be explained under the preamble to the Genocide Convention because the preamble states that "during all periods of history genocide has inflicted great losses on humanity…"[122] Thus, it can be stated that in 1948, the UN General Assembly recognized genocide as a crime, which had been an unlawful act under the customary international law for

[119] B. Kiernan. The First Genocide: Carthage, 146 BC - 51Diogenes 2004(3), pp. 31-33.
[120] Serbia and Montenegro v. Herzegovina and Bosnia (The Crime of Genocide Case), The ICJ Reports of Judgment 2007, p. 135.
[121] U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9, 1998.
[122] The Preamble, Convention on the Prevention and Punishment of the Crime of Genocide. Paris 09.12.1948, entry into force 12.01.1951.

a long time.[123] The ICJ held that genocide is an unlawful act beyond the Convention, and noted that the principles prescribed in the genocide convention are binding on States without any reservations requested by States in the course of its signature and ratification.[124] Therefore, the author of the paper thinks that the interrelationship of these two sources protects individuals and groups of people from genocide as well.

Furthermore, the customary international law and the treaty law prior to the World War II provided numerous situations, which indicated widespread international practice on a range of fronts before the World War II and provided human rights protection. The above discussion regarding genocide, which is an unlawful act under the customary law, reveals that custom arises from continued practice by states and, interrelating with custom, treaties are one of the most typical and significant acts of a state in relation to other states.[125]

In like manner, the judgment in the North Sea Continental Shelf cases is one of the most important decisions of the ICJ's jurisprudence in terms of the interrelationship of international customary and treaty laws.[126] In the North Sea Continental Shelf cases, the ICJ identified three ways in which treaties and custom interrelate.[127]

Firstly, treaties can be declaratory of a pre-existing rule of customary international law.[128] That is the case of many rules contained in treaties such as the Vienna Convention on Diplomatic Relations, The VCLT and the Montego Bay Convention on the law of Sea.[129] Secondly, treaties can crystallize developing customary rules – *Lex Farenda* in *Lex Lata.*[130] That is usually the case related to conventions, which results from the work of the International Law Commission because one of its precise objectives is codification of developing customary rules.[131] The third way is when custom arises from practice of those states, which are not parties to a treaty, after its adoption.[132] This way was presented by Denmark and the Netherlands in the North Sea

[123] W. A. Schabas, National Courts Finally Begin to Prosecute Genocide, the Crime of Crimes. – 1 Journal of International Criminal Justice 2003(1), p. 73.
[124] Reservations to the Convention on the Protection and Punishment of the Crime of Genocide, Summaries of Judgments, Advisory Opinions and Orders, I.C.J. Reports, 1951 p. 19.
[125] A. da R. Ferreira, C. Carvalho *et al.* Formation and Evidence of Customary International Law. UFRGS Model United Nations Journal, 2013(5) p. 193.
[126] A. da R. Ferreira, C. Carvalho *et al. op. cit.* p. 196.
[127] North Sea Continental Shelf Cases (Germany v. Netherlands), Judgment, I.C.J. Reps 1969, p. 40.
[128] A. da R. Ferreira, C. Carvalho *et al. op. cit.* p. 193.
[129] *Ibid.*
[130] C. Kordig. The Justification of Scientific Change. Dordrecht: D. Reidel Publishing Company 1971. pp. 150-170.
[131] A. da R. Ferreira, C. Carvalho *et al. op. cit.* pp. 193-195.
[132] C. Kordig. The Justification of Scientific Change. *op. cit.* pp. 120-130.

Continental Shelf cases and was rejected with respect to the delimitation article, but accepted in relation to other articles of the 1958 Geneva Convention on the Continental Shelf.[133]

In addition, in order for a treaty rule to be considered as a customary rule, it must have a norm-creating character, which means that it cannot allow derogations or be subject to reservations.[134] The main controversy of the case was whether the customary rule, the equidistance principle, which was codified into the 1958 Geneva Convention on the Continental Shelf, was binding on Germany, which was not a party to the abovementioned convention.[135] The Court decided that it was not the case of Article 6 of the abovementioned convention and the use of equidistance method of delimitation was not obligatory between parties.[136] Therefore, Germany was not held responsible under Article 6 of the 1958 Geneva Convention on the continental shelf.

From the ICJ North Sea Continental Shelf cases it can be concluded that the ICJ made the interrelationship of custom and treaty more clear and provided following three circumstances: 1) the treaty interrelates with customary law if the treaty is a codification of a custom; 2) Customary law interrelates with a treaty when the treaty has crystallized emergent rules of customary law; 3) the treaty forms foundation for the passage of its provisions into customary law through the normal process of general practice.[137]

Therefore, in this context, treaties become sources of material or evidence in support of a potential rule of customary law and their role is to provide material to enable the court or the government to find a customary rule.[138] Secondly, according to the Nicaragua case decided by the ICJ, a custom and a treaty can coexist simultaneously.[139] Thirdly, some bilateral treaties are able to produce a customary rule and it is the process that has to be in consistence with the terms of Article 38(1)(b).[140]

Consequently, the author of this paper thinks that doctrines on relationships between treaty and custom are in further development to fill the gaps that deny full efficacy to international law as a system. Moreover, International law is evolving with an everlasting entanglement of its two main sources, while bestowing equal authority upon rules derived from these two sources.[141]

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[133] North Sea Continental Shelf Cases (Germany v. Netherlands, Denmark), Judgment, I.C.J. Reps 1969, pp. 11-12.
[134] *Ibid.*, p. 39.
[135] M. Freeman, Genocide, Civilization and Modernity. – 46 British Journal of Sociology 1995 (2), pp. 207–225
[136] *Ibid.*, p. 54.
[137] B. B. Jia. The Relations between Treaties and Custom – 9 Chinese Journal of International Law 2010, p. 92.
[138] *Ibid.*
[139] Nicaragua v. USA. Judgement, I.C.J. Reports 1986, paras 80-100.
[140] R. Jennings and A. Watts (eds.). Oppenheim's International Law, vol.1, 9th ed. – 65 British Yearbook of International Law 1994(1), pp. 465-467.
[141] B. B. Jia. The Relations between Treaties and Custom – 9 Chinese Journal of International Law 2010, p. 108.

Furthermore, it is believed that customary law as a formal source of international law has an enduring role that cannot be diminished.[142] It has flexibility and responsiveness to the fast-changing globalizing world, no matter how big efforts are made to create treaties as well.[143]

Traditionally, international law is made by and for sovereign states. The cornerstone of international law is the consent of States. This consent is reached by the process of communication that is quite complex, but leads to typical outcomes. A treaty is one such outcome where consent is given explicitly to a rule of international law.[144] Another outcome, where such consent is more implicit, is customary international law.[145] Treaty law and customary law are considered as the most important sources of international law. However, the current System of international law sources, controlled by the States and their governments through the underlying principle of consent, is inadequate to deal with the challenges of the modern world.[146]

Customary law is much more common in international law than in most domestic legal systems. It is sufficient to note that this system works effectively in practice because its stability and predictability are in the interests of most States.[147] However, there are also practical disadvantages. For instance, customary international law can be difficult to prove conclusively.[148] This may require a lot of research, studying practices of as many States as possible and finding relevant statements expressing a legal conviction, where this is available. It would be quite incorrect to assume that treaty law and customary law exist in isolation and certain areas of international law are regulated only by treaties whilst other areas only by customary international law.

On the contrary, these sources interact closely and influence each other. Stated differently, international law is not a static system of rules but rather a dynamic decision-making process. Even a treaty, which is an apparently clear set of written rules, is part of this process.[149] It is usually the product of a long evolution that involves customary international law, prior treaties and often deliberations of and decisions made by international organizations.

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[142] *Ibid.*
[143] Y. St-Fleur. Aerial Belligerency within a Humanitarian Rhetoric: Exploring the Theorizing of the Law of War/Terrorizing of Civilians' Rights Nexus. - 8 Chinese Journal of International Law 2009, pp. 356–358.
[144] P. Malanczuk. Akehurst's Modern Introduction to International Law 7th ed. London and New York: Routledge Taylor & Francis Group 1997 pp. 35-39.
[145] *Ibid.*, pp. 45-46.
[146] *Ibid.*, pp. 32-34.
[147] M. Freeman, Genocide, Civilization and Modernity. – 46 British Journal of Sociology 1995 (2), pp. 207–225.
[148] P. Malanczuk. Akehurst's Modern Introduction to International Law, *op. cit.*, p. 43.
[149] *Ibid.*, p. 38.

After its conclusion, the treaty is implemented and interpreted by international and domestic courts. It becomes part of state practice, sometimes leading to new customary international law, and may ultimately be amended or abrogated by another treaty.[150]

The aforementioned complex interaction of the sources of international law entails very practical consequences. When a specific legal question is being examined or a particular case is being decided, it does not suffice to find the 'right' rule by identifying the applicable treaty or the appropriate rule of customary international law. Rather, it is imperative to take a synoptic look at various sources and analyze their relative relevance and authority.

These rather theoretical observations can be illustrated by providing a broad overview of international investment law. Traditionally, investment law has derived mostly from customary international law. Some of this customary international law still exists today. It consists of certain procedural guarantees for foreign investors, like fair treatment and protection of investors by the home states, vis-á-vis the host states. Two particularly important features have been the protection of property against expropriation, and compliance with contracts concluded between investors and host states. In the course of the 20th Century, this seemingly stable picture of international investment law was disturbed by several events.

The first was the rise of socialist ideologies, notably in the Soviet Union with its repudiation of private business and property rights. The second was the development of new doctrines in Latin America that aimed to shed economic domination by the European powers and later by the United States. Such Latin American ideas culminated in the Calvo Doctrine, named after the 19th Century Argentinian diplomat and jurist Carlos Calvo.[151] This doctrine essentially rejects any special guarantees for foreign investors and purports to treat them just like nationals, for better or for worse.[152] The third and probably the most consequential event was decolonization.

Many new independent developing countries argued, with some conviction, that the property rights and contractual guarantees obtained by foreign investors in their countries originated in situations of inequality, that they constituted the perpetuation of former exploitation, and that investors had made and were still making excessive profits at the expense of the host countries and their populations.[153] The investments that stirred controversy often concerned the

[150] *Ibid.*, p. 47.
[151] R. Jennings and A. Watts. Oppenheim's International Law 9th ed. Oxford: Oxford University Press 1992. pp. 600-650.
[152] *Ibid.*
[153] M.N. Shaw. International Law. 4th Edition. New York: Cambridge University Press 1997. p. 180.

exploitation of raw materials in countries with a large or exclusive dependence on these raw materials for their export earnings.

The ensuing disputes were discussed in scholarly publications, by international organizations and before arbitral tribunals.[154] These disputes involved not only references to customary international law, but also the invocation of various international treaties. The investors relied on their acquired rights and the sanctity of contracts.[155] The host countries relied on unjust enrichment and on the unequal nature of the agreements concerned. In addition, a new doctrine was developed under the label of permanent sovereignty over natural resources.[156] This doctrine found expression in several resolutions of the General Assembly of the United Nations and essentially proclaimed that States had the permanent and inalienable right to control the natural resources in their territory, regardless of any contractual or property rights that foreign investors might have acquired.[157]

It was argued that the doctrine of permanent sovereignty over natural resources was superior to the principle of sanctity of contracts and to property rights.[158] This conflict reached its culmination in the series of resolutions adopted by the UN General Assembly in the 1970s. The most important one was the so-called Charter of Economic Rights and Duties of States, adopted in December 1974.[159] It was approved by an overwhelming majority that was controlled by developing and socialist countries, against the negative votes or abstentions of western industrialized states.[160] Not everything in that resolution was controversial. Principles such as sovereign equality, peaceful settlement of disputes and promotion of international social justice were acceptable to all.[161]

Contrary to this, there was one point on which differences were irreconcilable. It was the provision on expropriation. The right of states to expropriate was not contested in principle. It was a new clause in the resolution which led to much dispute. This clause stated that in case of a dispute over compensation for expropriation, the decision should be made by the courts

[154] D.J. Harris. Cases and Materials on International Law, 5th ed. London: Sweet & Maxwell 1998. pp. 150-160.
[155] *Ibid.,* p. 161.
[156] R. Jennings and A. Watts. Oppenheim's International Law 9th ed. Oxford: Oxford University Press 1992. pp. 550-560.
[157] UN General Assembly Resolution 1803 (XVII) of 1962, Permanent sovereignty over natural resources, A/RES/3171. New York. adopted on 14.12.1962, entry into force 17.12.1973. paras 1-8.
[158] *Ibid.,* para 3.
[159] UN General Assembly. Charter of Economic Rights and Duties of States. A/RES/39/163. New York. adopted on 17. 12.1984. *Preamble*
[160] R. Pritchard. Economic development, foreign investment, and the law: issues of private sector involvement, foreign investment, and the rule of law in a new era. London, Boston: Kluwer Law International, International Bar Association, 1996. pp. 100-120.
[161] *Ibid.* p. 125.

of the expropriating State and on the basis of the law of the expropriating State.[162] In other words, an attempt was made to de-internationalize the issue and make it an internal matter of the State that took the action. This turned out to be rather unacceptable to the capital-exporting States and to the investors themselves. Capital-exporting States and investors insisted that any expropriation had to be compensated and this compensation had to be adequate, meaning that it had to represent the full value of the expropriated property. Moreover, it had to be prompt, i.e. without undue delay, and it had to be effective, that is, in a convertible currency.[163]

Interestingly, the most important legal instrument to restore investors' confidence turned out to be the traditional bilateral treaty. The bilateral investment treaty (BIT) became the favored way for many countries to guarantee legal protection to investors.[164] The BITs regulate access for investors and guarantee fair and equitable treatment.[165] These treaties grant protection in case of expropriation, typically by providing full, prompt and effective compensation. Perhaps most importantly, in case of disputes between investors and host states, the BITs offer procedural guarantees, typically through provisions for international arbitration.

The already familiar picture emerges while reviewing the decisions of arbitral tribunals under this system.[166] Tribunals apply all sources of international law in combination. They rely on multilateral and bilateral treaties, typically BITs. They apply customary international law and various international treaties. Thus, the interaction and interrelationship of various sources of international law can be observed in an investment dispute.

Conclusively, the treaties and customary law are closely interrelated. They often interact by supplementing and replacing each other. Thus, these typical sources of international law ought not to be ever viewed in isolation.

1.3 Custom Primacy Theory versus Treaty Primacy Theory

In one of the previous paragraphs it was shown how custom hierarchically interrelates to treaty in international law under the historical, voluntarist-positivist and collectivist schools. In this part the author of the paper discusses challenges that customary international law may face when it hierarchically interrelates to treaty law because custom primacy and treaty primacy theories treat the interrelationship of a custom and a treaty in international law differently and

[162] UN General Assembly. Charter of Economic Rights and Duties of States. *op. cit.* Art. 2(c).
[163] D.J. Harris. Cases and Materials on International Law. *op. cit.* p. 170.
[164] M.N. Shaw. International Law. 4th Edition. New York: Cambridge University Press 1997. p. 220.
[165] *Ibid.,* pp. 221-222.
[166] R. Pritchard. Economic development, foreign investment, and the law. *op. cit.* pp. 130-149.

this creates challenges in application of both sources. The prevailing view is that customary law is the most prominent, principal and primary source of international law.[167]

There are two principal streams of argument in the treaty primacy theory. The first type of argument stipulates that normatively treaties and customs interrelate equivalently. However, treaty prevails over custom in international law because of the matter of procedural order.[168] The first line is supported by two principal arguments. The first one is that treaties are generally thought to be superior instruments for resolving disputes because of their written character.[169] The second one states that, unlike customary law, treaty law is devoid of ontological and methodological uncertainties and international courts and tribunals give preference to treaty law.[170] For instance, treaty norms are easier to locate, ascertain and apply than customary ones.[171] Moreover, treaties can be applied to codify pre-existing customary norms into treaty law.[172]

In addition, treaties can be applied to regulate bilateral and multilateral relations for governing holistic issues such as humanitarian or climate change problems.[173] Treaties are recognized as *lex specialis inter partes* as well.[174] For instance, regarding creation of the International Prize Court the Hague Convention (XII) explicitly provides that in case a legal query is covered by a treaty between the parties, the Court relies upon the provisions in the said treaty and in the absence of such provisions, the Court shall apply the rules of customary international law or general principles of law.[175]

Consequently, according to the treaty primacy theory, treaty is generally viewed as a superior source of international law over custom due to its perceived legitimacy as a law-making process.

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[167] W. Friedman. The Changing Structure of International Law. New York: Columbia University Press 1974, pp 123-124.
[168] M. Prost. Hierarchy and The Sources of International Law: A Critique. - 39 Houston Journal of International Law 2017(2), p. 293.
[169] S. McCaffre. & Shelton. D and Cerone. J. Public International Law: Cases Problems and Texts. New York*:* Lexis Nexis 2010. pp. 50-70.
[170] M. Prost. Hierarchy and The Sources of International Law: A Critique.*, op. cit.*, p. 294.
[171] *Ibid*.
[172] C. Visscher. Theory and Reality in Public International Law. – P. E. Corbett (ed.). Princeton: Princeton University Press 1968, p. 162.
[173] M. Virally. Manual of Public International Law. – M. Sorensen (ed.). Toronto: Macmillan Press 1969, pp.123-124.
[174] M. Source Preferences and Scales of Values. Prost. Sources and the Hierarchy of International Law. - S. Besson., *op.cit*, p. 647.
[175] Article 7 of The Hague Convention (XII) Relative to the Creation of an International Prize Court. The Hague 18.10.1907, never came into force.

What can be added to the treaty primacy theory is that there is a second trend, which posits that treaty law is not only operationally, but also normatively superior to other law-making processes because treaty law includes the first-class norms of international law, which norms possess unique qualities and attributes.[176] Also, the treaty law possess three essential qualities that makes it unique.

Besides, these are ontological determinacy, practical versatility and process legitimacy. The ontological determinacy refers to the fact that the nature of treaties as a source of international law is unambiguous and uncontroversial.[177] The practical versatility refers to the use of treaties for a variety of purposes and in a variety of contexts from the dramatic war to duty-free shopping.[178] The process legitimacy is based on the principle of freedom of contract.[179] The treaty-making is a conscious and deliberative process, respectful of State consent and contractual autonomy.[180]

Furthermore, in such important areas as climate change or trade-investment, the treaty-making process increasingly involves civil society through the participation of NGOs in intergovernmental conferences.[181] Moreover, in many cases treaty ratification involves a domestic process of legitimization, when treaties must be approved by the Parliament and sometimes even by popular referendum.[182] For the aforementioned reasons, treaty-making is often regarded as relatively more transparent and democratic than the nebulous process of customary law formation.[183]

In contrast with the treaty primacy theory, the custom primacy theory posits that customary international law exists autonomously and is applied separately from international treaty law.[184] The former is superior over the latter, when these two abovementioned sources possess the same content or when a state has reservation in order to prevent using certain norms.[185] Moreover, the customary international law has superiority over the treaty law because it pre-

[176] M. Prost. Source Preferences and Scales of Values. Sources and the Hierarchy of International Law. - S. Besson., *op.cit.,* pp. 648.
[177] G. J. H. van Hoof. *op. cit.,* p. 117.
[178] C. Tams, A. Tzanakopoulos and A. Zimmermann eds. Research Handbook on the Law of Treaties. Cheltenham: Edgar Edward Publishing 2014, p. 110.
[179] M. Prost. Source Preferences and Scales of Values. Sources and the Hierarchy of International Law. - S. Besson., *op.cit.,* p. 649.
[180] S. Malawer. Imposed Treaties and International Law – 7 California Western International Law Journal 1977(1) p. 175.
[181] R. Wolfrum. Legitimacy of International Law from a Legal Perspective – V. Roben (eds). Legitimacy in International Law. Berlin: Springer 2008, pp. 6-8.
[182] R. Wolfrum. Legitimacy of International Law from a Legal Perspective. *op. cit.,* pp. 8-10.
[183] *Ibid.,* pp. 10-24.
[184] A.E. Roberts. Customary International Law and Various Approaches - 95 American Journal of International Law 2001(4), p. 299.
[185] M. Freeman, Genocide, Civilization and Modernity. – 46 British Journal of Sociology 1995 (2), pp. 207–225.

determines the treaty law and regulates its formation.[186] For instance, Hans Kelsen said that this was a norm of general international law, and general international law was created by custom i.e. customary international law, which was the first stage within the international legal order.[187] Moreover, Paul Reuter states: "Treaties are binding by virtue not of a treaty but of customary rules."[188] In that sense, international custom is even more important than the rest of law of treaties.[189]

In addition, it is also posited that because treaties are unable to produce genuine rules of law, they cannot be considered having superiority over customs.[190] They can be interpreted merely as the source of rights and obligations if signed and ratified by states.[191] The other direction of the customary primacy theory posits that customary law may be seen as normatively superior over treaty law due to its ability to generate universally applicable norms.

On the contrary, treaties may only theoretically achieve universal applicability and still it may be undermined by reservations and other flexibility mechanisms.[192] Moreover, the ICJ unambiguously stated that the rights and obligations of the customary international law shall have an equal force for the UN Member States and they cannot be excluded.[193]

Therefore, the author of this paper is of the view that the customary international law possesses superiority over the treaty law and it is fully independent because it creates a systematic autonomy in the sources of international law and its rules exist at the international level independently without an agreement between the majority international actors.

In the same way, there are three versions of the custom primacy theory coming in various guises and with different effects. The first version of the theory posits that custom is superior to the treaty law in that it precedes and pre-determines it.[194] Moreover, the customary law enjoys its privileged and foundational status at the heart of the international legal order and represents itself the source of all sources i.e. the background that determines the condition of validity of

[186] H. Kelsen, *op. cit.,* p. 121.
[187] *Ibid.*
[188] P. Reuter. Introduction to the Law of Treaties. - J. Mico and P. Haggenmacher (eds.). London and New York: Pinter Publishers 1989, p. 29.
[189] M. Prost. Source Preferences and Scales of Values. Sources and the Hierarchy of International Law. - S. Besson., *op.cit.* p. 651.
[190] G. G. Fitzmaurice. Some Problems Regarding the Formal Sources of International Law. The Hague: Nijhoff, 1958, pp. 153-155.
[191] *Ibid.,* pp. 155-176.
[192] T. Stein. The Persistent Objector and International Law. - 26 American Journal of International Law 1985(2), pp 480-482.
[193] North Sea Continental Shelf Cases (Germany v. Netherlands), Judgment, I.C.J. Reps 1969, p. 44.
[194] A.E. Roberts. Customary International Law and Various Approaches - 95 American Journal of International Law 2001(4), p. 650.

all other legal norms and processes.[195] The first version of the custom primacy theory is not much concerned with custom as a law-making process as it is with certain basic, foundational principles such as *pacta sunt servanda* that happen to be of a customary nature.[196]

By contrast, the second and third versions of the custom primacy theory have more to do with custom as a process and its comparative merits. For instance, the second version of the theory posits that custom is the only process capable of producing law in the proper sense of the term, i.e. rules of general validity applicable to the whole legal order.[197] The third version of the custom primacy theory is more concerned with the specific attributes, which custom is said to possess as a law-making process.[198]

In that sense the customary law suggests the promise of majority rule and universal legality. In this context treaty-making becomes problematic in that it gives any State the right to object to the formation of any proposed rule of international law.[199] Therefore, the limits of treaty-making in addressing global public good problems have prompted a return to non-consensual law-making processes though some scholars simply advocated a wider use of custom to achieve universal norms without the specific support from every member of the global community.[200] For instance, Christopher Weeramanty has claimed that custom is vastly superior over the treaty as an instrument for dealing with global public good challenges.[201] In his view, customary international law provides a source, which will need to be increasingly relied upon in the future, where unexpected and urgent problems of unprecedented nature will keep arising for which the treaty law cannot provide the solution.[202]

The superiority of custom is justified on utilitarian and semi-naturalist grounds generating norms despite opposition by a reluctant minority.[203] The author of this paper thinks that the arguments regarding preferences of sources are context-dependent and determined by the project or strategy pursued by the lawyers making them. Furthermore, arguments for the primacy of treaty law are generally driven by the desire for determinacy and consent-based

[195] *Ibid*., p. 651.
[196] Schachter. O. International Law in Theory and Practice. The Hague: Brill | Nijhoff, 1991. p. 77.
[197] *Ibid.* p. 78.
[198] A.E. Roberts. Customary International Law and Various Approaches - 95 American Journal of International Law 2001(4), p. 652.
[199] A. Guzman. Against Consent. – 52 Virginia Journal of International Law 2012, pp. 747-790.
[200] A.E. Roberts. Customary International Law and Various Approaches - 95 American Journal of International Law 2001(4), p. 654.
[201] C. Weeramantry. Universalizing International Law. The Hague: Martinus Nijhoff Publisher 2004, pp. 223-224.
[202] A.E. Roberts. Customary International Law and Various Approaches - 95 American Journal of International Law 2001(4), p. 654.
[203] *Ibid.*

legitimacy. However, arguments about the primacy of the custom are generally driven by the desire for autonomy deriving from consent and universality. States may prefer the design features of treaties, when tackling problems with high distributional costs, for example, climate change.

Nonetheless, the states express a clear preference for custom in dealing with problems that require norms articulated at a high level of generality or in domains, where rules benefit all States in equal proportion, e.g. State immunities.[204] Moreover, within an identical context, for instance, in the context of a specific dispute, the arguments about the hierarchy of sources typically fluctuate between the treaty primacy and custom primacy theories, which mediate the tension between determinacy and generality, consensualism and non-consensualism, sovereignty and community.[205]

1.4 Hierarchical interaction of a custom and a treaty

The previous section of the paper has discussed the challenges that customary international law may face when it interrelates with treaty law and the author of the paper has discussed the advantages of the custom primacy theory in the interrelationship. In this paragraph of the paper the author will make an attempt to prove that a custom hierarchically interacts with treaty law in international legal practice as well.

It is the fact that the sources of international law are entangled in most of the cases set before the ICJ or other international forums.[206] For instance, in the 1986 Nicaragua case, the ICJ observed that the right of self-defense as contained in Article 51 of the UN Charter not only parallels the customary right of self-defense, but restricts the scope of application of the right by adding a reporting mechanism.[207] Mainstream process of thought in international law does not attribute hierarchy to the sources listed in Article 38.1 of the ICJ Statute. Those sources remain the focal point for determining the rights and obligations of States by international

[204] H. G. Cohen. Finding International Law: Rethinking the Doctrines of Sources. – 93 Iowa Law Review 2007, pp. 65-129.
[205] D. Von Daniels. A Post-Foundational Perspective. Sources and the Normativity of International Law. - S. Besson and J. D'Aspremont (eds). The Oxford Handbook on The Sources of International Law. – Oxford: Oxford University Press 2017, pp. 663-664.
[206] B. B. Jia. The Relations between Treaties and Custom – 9 Chinese Journal of International Law 2010, p. 98.
[207] *Ibid*., pp. 98-99.

dispute resolution bodies.[208] For instance, leading textbooks note that this Article does not contain any explicit reference to the formal hierarchy.[209]

In fact, a provision, in accordance with which the ICJ had to apply the sources in the order in which they were listed in Article 38 of the draft version of the ICJ Statute, were rejected in the drafting process.[210] Simultaneously, however, the order in which the sources are mentioned is not entirely relevant because the relationship and applications of sources in the international legal order are based on hierarchical features to some extent. For that reason, in international law two distinctive directions of the doctrine of sources exist in international law. The first of them supports a horizontal system while the second one enhances a vertical system of rights and obligations in international law.

According to the first direction of the theory of sources, international law has been developed as a horizontal system of norms without hierarchy of sources of international law. The first direction enhances the non-hierarchy theory in the international law positing that sources of international law enjoy an equal status and no formal hierarchy exist.[211]

Meanwhile, however, states adjudicators and legal scholars have expressed clear preferences for particular sources and established an informal hierarchy of law-making processes.[212] Furthermore, the international legal order has developed some hierarchical features in the customary law as well as in the treaty-based Charter's obligations and rights.[213]

In addition, Article 103 of the UN Charter determines that the UN Charter obligations shall prevail when there is a collision between the obligations under the UN Charter and obligations of the Member States under any other international agreement.[214] The mentioned clause can be interpreted as a source-based hierarchy because the Charter's obligations stem from the treaty and they refer to treaties not to customs. However, judicial practice reveals that Charter obligations do not always prevail in case of conflict of norms.[215]

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[208] Statute of the International Court of Justice. San Francisco, 26.06.1945, e.i.f. 24.10.1945. Art. 38.1.
[209] J. Crawford. Brownlie's Principles of Public International Law 8th ed. Oxford: Oxford University Press 2012, p. 21.
[210] H. Thirlway. The Sources of International law, in Malcolm Evans ed., International law. Oxford: Oxford University Press 2010, pp. 95-121.
[211] A.E. Roberts. Customary International Law and Various Approaches - 95 American Journal of International Law 2001(4), pp. 640-645.
[212] M. Freeman, Genocide, Civilization and Modernity. – 46 British Journal of Sociology 1995 (2), pp. 207–225.
[213] *Ibid*., p. 637.
[214] The UN Charter, *op. cit.*, Art. 103.
[215] R.G. Allen, M. Cherniack, and G.J. Andreopoulos, Refining War: Civil Wars and Humanitarian Controls - 18 Human Rights Quarterly 1996 (4), p. 636.

The second direction of the doctrine of sources of international law highlights the superiority of the customary international law over the treaty law because of the existence of *jus cogens* norms in the customary international law.[216] The aforementioned second direction considers that *jus cogens* rules are the products of the existing sources of international law and some of them derive from customary international law as well.[217] There is a question about whether it derives from the treaty law or customary international law. The answer is that, according to the second direction, in the treaty law the jus cogens' norms are only codified from the customary international law. [218]

Additionally, under David Kennedy's proposal the customary international law in light of the *jus cogens* norms is hierarchically located at the highest level and it is hierarchically superior over other sources of the international legal order.[219] Under Article 53 of the VCLT, when any international treaty norm is contrary to any customary peremptory norm, such a treaty or part of it is void.[220]

The customary international law includes the principle of automatic and direct applicability recognized in practice of Western countries.[221] All rules of customary international law are universally recognized. Both national and international courts automatically and directly apply these customary international rules.[222] Therefore, customary law is the source that the ICJ still looks at in almost all cases before deciding a dispute.

The fact is that almost all norms of customary international law are directly and automatically binding on States and are superior to similar treaty norms in almost all circumstances.[223] For instance, in the case of Nicaragua v. USA the ICJ held that multilateral treaty reservations could not alter the legal position of the Court with regard to relying on the customary international law because even if treaty clauses and customary rules deal with the same subject matter, the customary rules exists independently and the non-treaty reservations do not apply to them.[224]

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[216] K. Hossain, *op. cit.*, pp.77, 81-83.
[217] Theodor. M. Human Rights and Humanitarian Norms as Customary Law. Oxford: Clarendon Press 1989. p. 79.
[218] *Ibid*., p. 80.
[219] D. Kennedy. The Sources of International Law. – 2 American University International Law Review 1987(1), p. 73.
[220] The VCLT. *op.cit.*, Art. 53.
[221] L. Wildhaber and S. Beritenmoser. The Relationship between Customary International Law and Municipal Law in Western European Countries. Stuttgart: Verlag W. Kohlhammer 1984, pp. 176- 178.
[222] *Ibid*., p. 177.
[223] K. Wolfke. Custom in Present International Law 2nd ed. Dordrecht. Kluwer Academic Publishers 1993, p. 178.
[224] Nicaragua v. USA. Judgement, I.C.J. Reports 1986, paras 172-178.

What is more, the ICJ declared that even if principles of the customary international law were subsequently codified into treaties they continue to exist side by side and whether, for some reason, the treaty ceases to apply between treaty parties, the identical customary clause continues to apply between them.[225] Furthermore, the ICJ claimed that when customary international law and treaty law provisions are not identical, the customary international law continues to exist alongside the treaty law.[226]

Consequently, based on the aforementioned analysis, the author of the paper thinks that the existence of the hierarchy among sources of international law is evident from theoretical and practical perspective. It may also be concluded that norms deriving purely from the treaty law, regarding which any reservations are made by states, come at the third place after *jus cogens* norms and norms of the customary international law because such treaty norms do not have an absolute applicability or binding character upon the subjects of international law.

In addition, the author of the paper considers that the first direction of the doctrine of sources is imperfect because the mentioned direction supports the idea of the horizontal system of sources of international law, which recognizes the formal equivalence of sources.[227]

However, at the same time it creates an informal hierarchy of sources in their practical application.[228] Moreover, it stems from the fact that the subjects of international law and other actors express preferences for particular desirable sources, which are uphold certain values such as determinacy, versatility and universality.[229] In addition, such an informal hierarchy is fluid and transient because it is possible that treaties take precedence over customs as a matter of procedural or operational priority.[230]

However, the custom is still a primary source providing the framework, background and the principal instrument of the interpretation of treaties.[231] Another, even more important fact is that arguments about the primacy of treaty law are based on determinacy and consent-based legitimacy, while arguments about the primacy of customary law stem from autonomy and universality.[232]

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[225] *Ibid*., para 178.
[226] M. Freeman, Genocide, Civilization and Modernity. – 46 British Journal of Sociology 1995 (2), pp. 207–225.
[227] *Supra* note 170, p. 644.
[228] M. Prost. Hierarchy and The Sources of International Law: A Critique. – 6 Houston Journal of International Law 2017, p. 287.
[229] M. Freeman, Genocide, Civilization and Modernity. – 46 British Journal of Sociology 1995 (2), pp. 207–225.
[230] M. Prost. Hierarchy and The Sources of International Law. *op, cit.,* p. 306.
[231] *Ibid*.
[232] *Ibid*., p. 307.

Moreover, the PCIJ and ICJ cases show that almost in all the disputes the PCIJ and ICJ primarily took into consideration whether there existed a customary rule, which regulated the controversial conducts of states. For that reason, the aforementioned international courts firstly asked the state party or parties to submit evidences, which would confirm the existence of the customary rule(s). For instance, the Lotus case judged by PCIJ was the earliest judicial pronouncement on the existence of customary norms and remains relevant till the present day.

In the Lotus case, the PCIJ had to decide whether there was a rule in international law prohibiting the exercise of jurisdiction by Turkey regarding the prosecution of the French lieutenant. After analyzing the evidence brought by France, the court concluded that it was impossible to verify the existence of a customary rule affirming that jurisdiction in collision cases was of the flag State.[233] Therefore, France could not prove the existence of the mentioned customary rule and it was not possible to prove the guilt allegedly committed by Turkey.

Consequently, the Lotus case is a good example that the customary international law has superiority over other sources of international law in international courts' disputes. However, it is crucial for a state to prove the existence of a customary norm.

Moreover, in the Asylum case, brought before the ICJ by Colombia against Peru, the main dispute involved whether Peru was bound by the alleged local custom granting diplomatic asylum, which would force Peru to allow a safe passage for a General to Colombia.[234] Like in the Lotus case, the ICJ asked Colombia to submit evidences which would confirm the existence of this customary rule. However, Colombia could not prove the existence of such a rule and consequently, the ICJ stated that Peru could not hold responsibility.[235]

Therefore, proving the existence of the customary rule was a crucial issue by which the outcome of the Asylum case was determined. This case illustrated the great importance of the customary international law in resolving international disputes between states. Therefore, as with the Lotus case, after the analysis the Asylum case, the author of this paper comes to the conclusion that customary international law is hierarchically superior over the treaty law.

By the same token the Nicaragua case is a good example as well regarding the superiority of the customary international law over the treaty law. The dispute concerns the actions of the USA towards Nicaragua in the context of Sandinista Revolution.[236] Nicaragua claimed that the

[233] A. da R. Ferreira, C. Carvalho *et al.* Formation and Evidence of Customary International Law. UFRGS Model United Nations Journal, 2013(5) p. 195.
[234] Asylum Case (Columbia v. Peru). Judgement. I.C.J. reports 1950, p. 278.
[235] *Ibid.*
[236] United States of America v. Nicaragua. Reports of The ICJ Judgment. I.C.J 1986, p. 34.

USA had breached the rules of international law by using direct armed force against it.[237] Article 2.4 of the UN Charter prohibits the use of armed force.[238]

Therefore, the Court could have decided whether the USA had breached Art. 2(4) of the UN Charter since the UN Charter is a multilateral treaty which also has a binding character toward the USA as a party of it. However, the Court stated that the prohibition of the use of force was also a rule of the customary international law, thus it could discuss the matter not under Art. 2(4) of the UN Charter, but under the customary international law.[239]

Consequently, the Court decided that the USA, by arming, supporting and aiding military and paramilitary activities in and against Nicaragua, has acted against the Republic of Nicaragua in breach of its obligation under customary international law not to intervene in the affairs of another State and not to use armed force against another State.[240]

Moreover, international judicial practice quite clearly reveals the relationship of the sources of international law in cases of contradiction of norms. For instance, the Kadi decisions of the CJEU as well as the Nada and Al-Dulimi decisions of the ECtHR, illustrate that the superiority of the Charter obligations is only acceptable as long as the UNSC acts in accordance with what states perceive to be the correct interpretation of the Charter.[241]

In addition, these judgments indirectly support the idea that the hierarchy of sources of international law exists in not only in theory but in practice as well. It also shows that states retain the decisive role in interpreting the limits of the scope of the Charter obligations including the supremacy clause in Article 103 of the ICJ Statute.[242]

[237] *Ibid.*, p. 16.
[238] The UN Charter, San Francisco, 26.06.1945, e.i.f. 24.10.1945, Art. 2(4).
[239] Military and Paramilitary Activities in und against Nicaragua. *op. cit.* p. 93.
[240] *Ibid.*, pp. 136-137.
[241] E. De. Wet. The Place of Peremptory Norms and Article 103 of the UN Charter within the Sources of International Law. Sources and the Hierarchy of International Law. - S. Besson and J. D'Aspremont (eds). The Oxford Handbook on The Sources of International Law. – Oxford: Oxford University Press 2017. p. 636.
[242] *Ibid.*

2 HETEROGENOUS APPROACHES TO INTERRELATIONSHIP OF A CUSTOM AND A TREATY IN INTERNATIONAL LAW

2.1 Legal-Formalist Theory to an interaction of a custom and a treaty

In the previous chapter of the paper, the place and challenges which custom has and has when it interrelates with a treaty in international law were researched. In this paragraph the author will make an attempt to find out whether a custom possesses superiority over a treaty in international law under the legal-formalist theory. Various approaches and traditions will be studied as well in order to prove that a custom has superiority over a treaty in international law. This chapter will address the second research question whether a custom has superiority over treaty according to the legal-formalist theory of international law.

Customary international law mostly comprises universally applicable norms. Customary rules are binding for all states as such though, not each rule of the CIL. The legal formalist theory describes two circumstances under which customary law resembles treaty law in a way that customary norms are binding upon only a few states or they may not be binding a specific state as treaty norms are binding only treaty parties.[243] These two potential exceptions to the universal applicability of customary international law constitute local or regional customary rules and the theory of persistent objector, which is regarded as a lever against the universal character of the CIL.[244] Below the author of the paper considers these two exceptions in detail.

As for the first possible exception - the theory of persistent objector - the Asylum[245] and the Fisheries cases[246] are explicit international judiciary practice referring to application of persistent objector theory in practice. After analyzing the ICJ discussions on these cases, the author of this paper has come to conclusion that customary law resembles treaty law because of persistent objector rules, which weaken the universal applicability of customary international law. Moreover, there are situations, when the treaty law and the customary law contradict each other. Therefore, any contradiction between treaty and customary obligations can be resolved by means of principles of international law such as *lex specialis derogat legi generali* and *lex posterior derogat legi priori.*[247]

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[243] A. da R. Ferreira, C. Carvalho *et al.* Formation and Evidence of Customary International Law. UFRGS Model United Nations Journal, 2013(5), p.192.
[244] *Ibid.*
[245] Asylum Case (Columbia v. Peru). Judgement. I.C.J. reports 1950, p. 200.
[246] Fisheries case, Judgment of December 18th, I951. I.C. J. Reports 1951, p. 126.
[247] D. Kennedy. The Sources of International Law. – 2 American University International Law Review 1987(1), p. 628.

In contrast, closer scrutiny reveals that the *lex specialis* and *lex posterior* principles are rarely applied by international courts and tribunals because norm contradictions stem from different specialized regimes or sub-regimes of international law.[248] For instance, such contradictions arise particularly between treaty obligations relating to human rights and norms of other sub-regimes, which are treaty-based and anchored in the customary law. Such sub-regime norms include obligations pertaining to extradition and non-refoulement, international peace and security norms, investment and environmental law obligations or obligations pertaining to state's immunity.[249]

Pursuant to the prevailing view, the norms of international law are disorderly deployed in the international legal system; the system of international law is decentralized and fragmented.[250] Therefore, based on this view, international law has developed a system of horizontal rules binding on states or any other subjects of international law only if they agree to be bound by them.[251] Regarding the conflict of norms the VCLT is consistent with the priority of multilateral agreements over customs and when there is conflict between them, the general opinion is that the Vienna Convention applies treaty interpretation methods to codify customary international law.[252]

Contrary to the VCLT approach, the ICJ Statute does not grant an explicit priority to any source.[253] There are two legal approaches regarding the interpretation of Article 38.1 of the ICJ Statute. According to the first one, the aforementioned Article lays down one global list of sources of international law and these sources are equal to other sources listed in Article 38.1 of the ICJ Statute.[254]

Consequently, under the aforementioned first approach, it is possible to consider that a custom and a treaty interrelate as though the contradiction of norms did not exist and neither did the hierarchy among the sources of international law.[255]

[248] *Ibid*. p. 629.
[249] E. D. Wet and J. Vidmar. Conflicts between international paradigms: Hierarchy versus systemic integration. - 2 Global Constitutionalism 2013(2), p. 198.
[250] M. Prost. Hierarchy and The Sources of International Law: A Critique. - 39 Houston Journal of International Law 2017(2), p. 286.
[251] H. Kelsen, Reine Rechtslehre. – M. Knight (trans.) Pure Theory of Law. Clark: The Law book Exchange 2005, p. 129.
[252] I. Sinclair. The Treaty Law. New York: Cambridge University Press, 1984 p. 200.
[253] The ICJ Statute. San Francisco, 13.12.1920, e. i. f. 16.12. 1920 Art.38.1.
[254] A. Z. Borda. A Formal Approach to Article 38.1(d) of the ICJ Statute from the Perspective of the International Criminal Courts and Tribunals. - 24 The European Journal of International Law 2013(2), p. 652.
[255] M. Freeman, Genocide, Civilization and Modernity. – 46 British Journal of Sociology 1995 (2), pp. 207–225.

Contrary to the first approach, the second one stipulates that, Article 38.1 of the ICJ Statute prescribes two distinct lists. The first list – subparagraphs (a) to (c) - lays down exhaustively the formal sources and the second list – subparagraph (d) - lays down some of the means by which such rules of law may be determined.[256] The second formal approach to the Article 38.1(d) is consistently adopted by the international criminal courts and tribunals in their judgments.[257] For instance, in the case of The Prosecutor v. Kupreskic *et al* the ICTY Trial Chamber stated that the Tribunal cannot rely upon the judicial decisions as a source of international law but they may be applied as a subsidiary means.[258]

Similarly, Article 20.3 of the SCSL Statute specifies that the judges of the Appeals Chamber may apply other international courts' or tribunals' relevant decisions as subsidiary materials.[259] However, the SCSL has underscored that the judicial decisions of the ICTY and the ICTR may not be recognized as direct sources.[260] In relation to this point of view, Article 38.1 of the ICJ Statute raises two distinct categories: formal sources of international law and subsidiary means. However, Article 38.1 (d) of the ICJ Statute points out that the judicial decisions or teachings of legal publicists should not be interpreted in a way that would render such sources as less important.[261]

In addition, there are distinctions between judicial decisions of national courts and judicial decisions of international courts. It has been observed that some judicial decisions of national courts present a narrow outlook or rest on a very inadequate use of the international law sources.[262] However, this issue is not the subject of the thesis.

As it is mentioned above, the customary international law may not always have universal applicability in international law because of the existence of some local customs and the persistent objector theory. As for the second possible exception, it refers to local customary international law, which binds only a group of states.[263] For instance, the practice of diplomatic asylum in Latin American States is a local customary rule, which was the subject of discussion in the ICJ Asylum Case, when the ICJ acknowledged the existence of this norm as a local customary rule.[264]

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[256] A. Z. Borda. A Formal Approach to Article 38.1(d) of the ICJ Statute from the Perspective of the International Criminal Courts and Tribunals, *op. cit.*, p. 653.
[257] *Ibid*.
[258] Prosecutor v. Kupreskic *et al*. Judgement of the ICTY 14.01.2000, para 540.
[259] A. da R. Ferreira, C. Carvalho *et al. op. cit,* p. 653.
[260] *Ibid*.
[261] *Ibid*., p. 655.
[262] *Ibid*., p. 660.
[263] A. da R. Ferreira, C. Carvalho *et al. op. cit.* p. 192.
[264] Asylum Case (Columbia v. Peru). Judgement. I.C.J. reports 1950, p. 288.

In addition, in the case of Right of Passage over Indian Territory the ICJ recognized the possibility of existence of the continued practice between Portugal and India, which formed the basis for mutual rights and obligations between them.[265] Regarding the persistent objector theory, it may be claimed that the states can contract out of a customary rule in the process of its formation.[266] At the first glance, it resembles the treaty reservations to some extent. However, the author of this paper thinks that it would be difficult for an individual State to opt out of a customary rule because it would face the pressure of the vast majority of the members of the international community.[267]

2.2. Alternative approaches to the interrelationship of a custom and a treaty

There are some alternative approaches to application of sources in international law-making process apart from the formalist approach, which has drawbacks, because otherwise international community would not apply divergent methods of application of sources in international law. For instance, such approaches can be mentioned as the pragmatic approach to the application of sources in international law, the approach of the natural law doctrine and the positivist approach.

The typical approach of the natural law doctrine considers customs not as a procedure for creating norms but only as the evidence of pre-existing legal rule.[268] The positivist approach states that customary law must be considered as a man-made law, i.e. positive law, which regulates its own creation and is binding on all states.[269] As regards the pragmatic approach, it indicates that the international treaty-making process has not evolved within a horizontal legal system of international law at all.[270] Despite Westphalia's Egalitarian Principles having been prescribed in 1648, influential states still play the largest part in international treaty-making process.[271]

Various international conferences, congresses and summits arranged at various times are effective instances to support the aforementioned position regarding the international treaty-making process.[272] For instance, in 1815 the Congress of Vienna heralded an era of great power

[265] "Case concerning Right of Passage over Indian Territory (Merits)". I.C.J. Reports 1960, p. 40.
[266] A. da R. Ferreira, C. Carvalho *et al. op. cit.* p. 192.
[267] *Ibid.*, p. 193.
[268] A. da R. Ferreira, C. Carvalho *et al. op. cit.* p. 186.
[269] *Ibid.*
[270] J. S. Nye. Soft Power: Who Gets to Run the World? – 80 Foreign Policy 1990, pp. 166-167.
[271] M. Prost, *op. cit.*, p. 313.
[272] *Ibid*., p. 314.

management in Europe in which those great powers made decisions for the rest of Europe and the other states participated formally.[273] The great powers laid down the rules of international law and acted as self-appointed law-makers while less influential states merely accepted those rules and ratified the treaties.[274]

In addition, The Hague Peace Conferences of 1899 and 1907 was based on "one state – one vote" principle although the conferences exhibited an overwhelming inequality of influence among the participants.[275] Furthermore, the agenda and procedure of the conferences were determined by the few dominant military powers and several proposals supported by large majorities were rejected due to the opposition of few influential states.[276] At the Hague Conference the principle of equality was formally preserved and the great powers were able to either force their views or prevent the adoption of proposals unacceptable to them.[277]

Similarly, in 1919 the principle of equality was only formally preserved at the Paris Peace Conference because decisions were made in chambers by the allied states and then less influential countries merely ratified the decisions.[278] Moreover, at the 2009 Copenhagen Climate Summit a small group of great powers citied political expedience and time constraints, brokered a deal in secrecy in the dying hours of the conference and presented it as an accomplished pact to the rest of the delegates, leaving other nations with a very limited choice – sign/take it or refuse the agreement.[279]

The adoption of the Copenhagen Agreement was famously criticized by the Venezuelan delegate, who stated the following: "developed nations will have to be judged by the world for what they are doing at the moment…we are not going to let them get away with it."[280] Thus, as these examples demonstrate, dominance of the great powers is regular and legalized, converting a political power into a rightful authority in the international treaty-making process.

theoretically, an alternative approach exists, which encompasses application of the sources, deriving from the restated doctrine of sources of international law. The abovementioned

[273] M. Koskenniemi and J. Crawford. The Introduction to International Law. Oxford: Oxford University Press 2012, pp. 35-46.
[274] *Supra* note 144.
[275] B. Baker. Hague Peace Conferences (1899 and 1907). Oxford: Oxford University Press 2015, pp. 9-11.
[276] E. D. Dickinson. The Equality of States in International Law. Cambridge: Harvard University Press 1920, pp. 290-91.
[277] M. Prost, *op. cit.*, p. 314.
[278] *Ibid*., p. 315.
[279] A. Gilligan. Copenhagen Summit Ends in Blood, Sweat and Recrimination. The Telegraph, 20.12.2009.
[280] Anonymous, Venezuela: What's Happening in Copenhagen is Unacceptable. The Telesur, 15.12.2009. Accessible: https://www.europe-solidaire.org/spip.php?article15950 (04.01.2020)

approach appeared in the theory of sources because international rules are regularly violated.[281] For instance, the U.S's military intervention in Iraq and NATO interference in Kosovo occurred without the authorization of the Security Council required by the U.N Charter.[282]

The abovementioned alternative approach to the application of sources of international law would prevent violation of international law and make its subjects diligently comply their actions with the norms of international law. Consequently, misconducts and disorders would be decreased. The alternative approach prescribes three main groups of sources. They include all norms of international law regardless of their origin, which are hierarchically arranged in the legal system of international law.[283]

In the first category, there can be all core norms of international law originating from customary international law, treaty law and general principles of law.[284] In the second group, there may be all legitimated rules including various international treaties and ordinary customary rules of international law.[285] In the third group there might be all aspirational norms of international law including those rules described in treaties that have not yet been adopted as substantive norms in the international legal system; they possess a full status of law and might have a considerable political or moral force.[286]

To further clarify, the first group includes the most superior and established norms of international law such as *jus cogens* norms and basic principles and standards of international law. It may also include some of the oldest background principles of international law such as *pacta sunt servanda* and *clausula rebus sic stantibus.* Furthermore, it incorporates two different kinds of customary norms such as process values and internalized norms.

The process values include factors, determinacy, predictability, fair negotiating process that makes a particular agreed-upon rule legitimate, They in turn consist of factors that demonstrate states' intent to be bound including the seriousness of negotiation and the willingness to accept enforcement mechanisms.[287] The process values may also include the principle of consistency

[281] H. G. Cohen. Finding International Law: Rethinking the Doctrine of Sources. – 93 Iowa Law Review 2007(65), p. 67.
[282] The UN Charter *op. cit.,* Art. 42.
[283] D. Kennedy. The Sources of International Law. – 2 American University International Law Review 1987(1), p. 76.
[284] *Ibid*., p. 68.
[285] *Ibid*.
[286] *Ibid*., p.70.
[287] W. Friedman. The Changing Structure of International Law. New York: Columbia University Press 1974, p.111.

of the agreed-upon rules as well as the principle of non-intervention and the clarity of the agreed-upon enforcement mechanisms.[288]

As regards internalized norms, they can be considered as a group of core substantive norms that have been widely and deeply internalized by states and other actors and which might be described as a core international morality such *jus cogens* norms.[289]

The second group consists of legitimated rules of the customary and treaty law, which cover a wide variety of well-known bilateral and multilateral treaties including the General Agreement on Tariffs and Trade, the Vienna Treaty on Consular Relations, the VCLT, the Geneva Conventions, and the UN Charter.[290] In the second group, all customary and treaty norms originate from legitimacy of process and they make the international law more binding.[291] Many treaties are backed by strong process values giving them more binding character and *pacta sunt servanda* comes into force. Thus, the Geneva Conventions and the VCLT serve as examples of treaties imbued with powerful pedigree and determinacy that also reflect norms, deeply internalized by the international community.

In addition, it is important to note that a treaty could be listed in the second group and considered as a legitimated source even if it contains vague norms and uses determinate means to define those terms. Therefore, a treaty which, on the one hand, contains a vague requirement to protect the environment and, on the other hand, sets up a specific mechanism or body to define the scope of that requirement, would constitute a legitimated treaty. Furthermore, the second group would make customary law more official in practice than it is now, based on the traditional doctrine of sources of international law.

Thus, it comprises a group of recognized customary rules that are backed by strong evidence of general practice and *opinio juris.* These rules have repeatedly been recognized and restated as the rules of customary international law. Protection of tribal indigenous communities, inviolability of diplomats and sovereign immunity would be examples of rules falling in this category.[292]

As regards the third group, it includes, for example, judicial decisions of international courts, writings of the most highly qualified publicists, aspirational norms, resolutions adopted by the UN General Assembly, Security Council, international organizations and major international

[288] *Ibid*., p. 112.
[289] *Ibid*., p. 113.
[290] H. G. Cohen, *op. cit.*, p. 70.
[291] M. Freeman, Genocide, Civilization and Modernity. – 46 British Journal of Sociology 1995 (2), pp. 207–225.
[292] P. R. Trimble. A Revisionist View of Customary International Law. – 33 UCLA Law Review 1986, p. 670.

conferences. Furthermore, it may cover the Panel and Appellate Body reports of the WTO dispute settlement. Additionally, the third group might refer to views-comments of the monitoring bodies of human rights treaties.[293]

In like manner, the third group refers to and covers such norms that have not yet been internalized and remain largely aspirational originating from a vague treaty, which were backed by deficient process or such a treaty, which may be lacking in both process values and internalized norms.[294] The alternative approach to the application of the sources of international law deriving from the restated doctrine of sources might have a number of positive impacts in practice. For instance, it would eradicate distinctions between treaties and customs because it would convert treaties from statements of law to evidence of law, where both treaty and custom serve as reflections of evidence of what international society has accepted as law.[295]

By the same token, it would alleviate some of the pressure created by gaps between the doctrinal international law and the actual practice of States.[296] Likewise, by practically adopting such an approach, international courts and tribunals would look for the evidence whether or not the international community has recognized a dispute resolution norm as a customary international norm in which *opinio juris* would become the central concern, whereas the old requirement of consistent state practice would be abandoned.[297] Andrew Guzman considers: "If states as a group believes there is a legal obligation, this is sufficient to generate reputational and direct sanctions. The question of practice is not directly relevant to the issue."[298]

Consequently, this enables finding an instant custom without much evidence of consistent state practice.[299] The international courts also have already started to deploy such techniques. For instance, in the Nicaragua v. the USA case the ICJ emphasized that for a new customary rule to be found, state acts must be accompanied by the *opinio juris sive necessitatis*.[300]

Additionally, other advantages of the abovementioned alternative approach to the application of the sources of international law are that it encourages both those advising states and those acting on a state's behalf to see their actions as part of the process of international law-making.[301] It assists in clarifying international rights for legislation. Moreover, it provides

[293] H. G. Cohen., *op. cit.*, p. 113.
[294] *Ibid*., p. 117.
[295] *Ibid*., p. 118.
[296] M. Freeman, Genocide, Civilization and Modernity. – 46 British Journal of Sociology 1995 (2), pp. 207–225.
[297] A. T. Guzman. Saving Customary International Law. – 27 Michigan Journal of International Law (114) 2006, pp. 149-157.
[298] *Ibid*., p. 160.
[299] H. G. Cohen, *op. cit.*, p. 125.
[300] Nicaragua v. The USA. Judgement, I.C.J. *op. cit.*, para. 207.
[301] *Supra* note 237, p. 128.

improved accuracy, a better picture of the international law governing the international system and it suggests a deeper, more powerful understating of international law.[302] Therefore, the aforementioned alternative approaches prove that there is a hierarchy between customary and treaty law. The customary law has a hierarchically superior place over the treaty law and the Nicaragua v. the USA is an explicit example in order to support the custom primacy theory.

2.3. Anti-Formalist Traditions in the relation to the interaction of the customary law and the treaty law

The discussion regarding the applicability of the sources in the anti-formalist tradition of the 20th century expresses the informal motives for the rejection of the formal approach to the application of sources in the international law prescribed by the formal doctrine of legal sources.[303] The author of the paper thinks that the Anti-Formalist Tradition is by itself a legal theory of sources. In the Anti-Formalist Tradition there are two schools which strengthen the Anti-Formalist approach to the application of sources in international law.

One of them is the New Haven School represented by Myres S. McDougal, on the other hand, there is a German lawyer - Carl Schmitt, whose thoughts and proposals can be considered as the second school which supports the anti-formalist tradition. Schmitt was active as a writer on international law during the most traumatic years of European history such as the periods of First and Second World Wars and the following period of the Cold War in the 20th century. McDougal and his associates lived through during the period that witnessed a cautious revival of Western Legal Traditions and increasing activity of international organizations.

For the both schools the formal approach to the application of sources of international law seemed insufficient and incapable of grasping the contemporary political, economic and social phenomena.[304] For instance, because both these schools had ambitious projects and concepts for international law, they criticized the formal approach to the application of Article 38 of the ICJ Statute and deemed the formal doctrine of legal sources insufficient to regulate the current international liberal legal order.[305] As Martti Koskenniemi puts it, "Anti-formalism is always a call for transformation to overrule existing law either because it does not really exist at all, or

[302] *Ibid*.
[303] M. G-S. Rovira. A Prelude to Institutional Discourses in International Law. Sources in the Anti-Formalist Tradition. - S. Besson and J. D'Aspremont (eds). The Oxford Handbook on The Sources of International Law. – Oxford: Oxford University Press 2017. p. 221.
[304] *Ibid.,* p. 222
[305] M. Freeman, Genocide, Civilization and Modernity. – 46 British Journal of Sociology 1995 (2), pp. 207–225.

if it does, because it should not."[306] The overarching goal the anti-formalist tradition presented was human dignity, meaning the social process in which values are widely shared and the private choice is emphasized as the predominant modality of power.[307] This definition suggests that freedom of choice was one of the key concepts structuring the anti-formalist tradition toward applicability of sources of international law.[308]

In addition, Myres S. McDougal and Carl Schmitt developed the most important features of the Anti-Formalist Tradition in light of applicability of the sources of international law. McDougal and his associates wished their understatement of law as a great creative instrument of social policy to be shaper and deeper. With this purpose they thought of expanding the scope of interest in the process of formation of the decisions from the strict policy function of application of the authoritative decisions to a range of policy procedures such as various community functions in formulating and applying authoritative prescription like intelligence, recommending, prescribing, invoking, applying, appraising and terminating.[309]

In the application of sources of international law, McDougal and his associates searched for rules as shorthand expressions of community expectations. For instance, they considered that the belief that a certain conduct is required by *opinio juris* extends not only to the law, but to any norm of conduct.[310] McDougal disagreed with the formulation and application of Article 38 of the ICJ Statute in the way in which it was prescribed in the ICJ Statute and did not share the formal theory of sources of law. He said that the formulas of Article 38 of the ICJ Statute are misleading because the ICJ Statute presents the ambiguous and capriciously limited array of sources, from which international law is alleged to have derived.[311]

The Anti-Formalist Tradition method proposed by McDougal is the middle of legal realism and secular natural law.[312] McDougal and his associates harmonized the shaping and influencing of the course of international decisions and omissions with their own brand of neoliberal politics.[313] While McDougal explained that informality of functions, occurring in the processes

[306] M. Koskenniemi. What is International Law for? – M. D. Evans (ed). International Law 2nd ed. Oxford: Oxford University Press 2006 p. 68.
[307] M. G-S. Rovira. A Prelude to Institutional Discourses in International Law. Sources in the Anti-Formalist Tradition. - S. Besson. *op.cit.*, p. 208.
[308] M. S. McDougal. H. D. Lasswell and J. C. Miller. The Interpretation of International Agreements and World Public Order. Principles of Content and Procedure 2nd ed. New Haven: New Haven Press 1994, p. 41.
[309] M. G-S. Rovira. A Prelude to Institutional Discourses in International Law. Sources in the Anti-Formalist Tradition. - S. Besson. *op.cit.* p. 209.
[310] *Ibid.*, p. 211.
[311] *Ibid.*, p. 212.
[312] M. Freeman, Genocide, Civilization and Modernity. – 46 British Journal of Sociology 1995 (2), pp. 207–225.
[313] A. D'Amato. A. The Concept of Custom in International Law - 45 Harvard International Law Journal (3) 1971, pp. 134-140.

that culminated in a decision, becomes the law, Carl Schmitt divided his informal decision-making concept into three working concepts of law for any legal science. These three working concepts were norm, decision and concrete order.[314] He shared Thomas Hobbes's thoughts that decisions were the sources of everything, not only as command but also as authority and sovereignty when applying sources in international law.[315] He stated that the concept of legal order contains two completely different elements: the normative element of law and the existential element of the concrete order.[316]

In addition, Schmitt opposed formal positivism by proposing the idea that when applying sources in the international law, the importance of the context created by the political, social and economic meanings of the concrete orders or institutions is must be taken into consideration.[317] However, as both schools stated, the codification process of Article 38 of the PCIJ Statute did not take into consideration the moral, economic, social and political principles.[318]

According to the Anti-formalist Tradition, the formation and application of customary law mark the distinction between the critical morality of international law and the positive morality of state or non-state actors.[319] When applying sources of international law, the Formalist Approach is to be identified generally with the politics of control, but the Anti-formalism applies the empire-centered and charter-centered approaches regarding that.[320] The distinctions among these two approaches depend on the time of conquest, colonization and savage racism.[321]

These two approaches of the Anti-formalism to the application of sources in international law have not yet disappeared because the colonial Euro-American invasion and occupation of peoples, resources and territories have moved into new empires of the various phases of the Cold War, globalization and human rights imperialism.[322] Each of them has developed conceptions of legitimacy and legality.[323]

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[314] A. D'Amato. The Customary International Law - 81 Harvard Journal of International Law (1) 2017. p. 215.
[315] *Ibid.*
[316] A. D'Amato. Treaties as a Source of General Rules of International Law - 3 Harvard International Law Journal (1) 1962, p. 216.
[317] M. G-S. Rovira. A Prelude to Institutional Discourses in International Law. Sources in the Anti-Formalist Tradition. - S. Besson. *op. cit.*, p. 216.
[318] *Ibid.*, p. 222.
[319] U. Baxi. 'That Monster Custom, Who Doth All Sense Doth Eat'. Sources in the Anti-Formalist Tradition. S. Besson and J. D'Aspremont (eds). The Oxford Handbook on The Sources of International Law. – Oxford: Oxford University Press 2017, p. 228.
[320] D. McBarnet and C. Whelan. The Elusive Spirit of the Law: Formalism and the Struggle for Legal Control. Modern Law Review 1991(54), p. 849.
[321] *Ibid.*, p. 873.
[322] U. Baxi. 'That Monster Custom, Who Doth All Sense Doth Eat'. *op. cit.*, p. 236.
[323] *Ibid.*, pp. 236-237.

In the empire-centered approach, the application and interrelation of sources of international law serve the purpose of delimitation of Europe from others and this approach primarily concerns justification of the secular right to empire.[324] Whereas the charter-centered approach acknowledges the nominally shared, but actually contested ideas and political forms such as Christianity, republicanism, liberalism, democracy, sovereignty, rights etc.[325]

2.4. Legal-Positivist Tradition and interrelationship of a custom and a treaty in international law

In the Legal-Positivist Tradition, which is still very influential, international law is seen as the result of the convergence of sovereign wills.[326] For that reason, international law is entirely self-centered and treats its sources as normative commands.[327] In Legal Positivism interrelationship of the sources of international law is based on the following principles and ideas. For instance, they are interrelated to each other through the states and non-state-actors, which apply sources of international law based on freedom and equality principles, where international law has authoritative and binding nature over its subjects via their consent to be bound by it.[328] Moreover, the legal positivism states that interrelationship of sources of international law occurs by consent-based treaty organizations.[329] The Legal Positivism defends the superiority of a normative practice of customary law, though it supports the idea of superiority of multilateral treaties over customs.

In the Legal-Positivist Tradition the interrelationship of sources of international law occurs in a way that the customary international law is treated as judge-made law with judicial pronouncements of customary legal norms.[330] Moreover, when there is an interrelationship of these sources, the customary law is characterized as specific patterns of behavior having a specific normative valence, which members of a group or community employ to hold one

[324] D. McBarnet and C. Whelan. The Elusive Spirit of the Law *op. cit.* p. 880.
[325] G. Grandin. The liberal Traditions in the Americas: Rights, Sovereignty and the Origins of Liberal Multilateralism. American Historical Review 2012(117), pp. 86-91.
[326] P. D'Argent. What Makes Law 'International'? Sources and the Legality and Validity of International Law. Besson and J. D'Aspremont (eds). The Oxford Handbook on The Sources of International Law. – Oxford: Oxford University Press 2017. pp. 553-554.
[327] H. Thirlway. The Sources of International Law. Oxford. Oxford University Press 2014, pp. 93-95.
[328] D. Lefkowitz. Law as Necessarily Posited and the Challenge of Customary Law Creation. Besson and J. D'Aspremont (eds). The Oxford Handbook on The Sources of International Law. – Oxford: Oxford University Press 2017. pp. 325-327.
[329] *Ibid.*, p. 328-330.
[330] J. Patrick Kelly. The Twilight of Customary International Law 40 Virginia Journal of International Law (2) 2000. p. 331.

another responsible.[331] Therefore, the customs interrelate to other sources of international law in a way that they involve the attribution of a specific social meaning to a specific pattern of behavior constituted by the actions of members of the community.

What is more, around 1920, Hans Kelsen adopted the theory of the dynamic structure of law later called the Stufenbau theory.[332] The Stufenbau theory is a metaphorical representation of inter-norm relationships in the legal-Positivist Tradition.[333] The theory is a radical departure from the doctrine of the international legal sources.[334] Regarding the interrelationship among international legal sources, one can summarize four significant statements proposed by the Stufenbau theory.

First, the sources of law are part of the law and all sources of international law are linked by a hierarchical relationship.[335] Second, the sources of international law are not separate from one another and rules hailing from one source can change or otherwise influence rules from another source.[336] Third, if a norm cannot be valid as a norm and it does not exist without its validity being traced back to another norm, then a relationship between these two norms is established.[337] Fourth, one higher norm or source establishes the validity of another lower norm, i.e. its existence as a norm.[338] However, this static validity relationship among sources of international law is better described in a dynamic sense.

The source empowers law creation and empowerment is a necessary, but not sufficient condition of the existence of the lower norm.[339] More clearly, a norm is valid, if and when it was created in a certain fashion determined by another norm, which becomes the immediate source of validity of the first norm.[340] The legal order is not a system of coordinate legal norms existing alongside each other, but a hierarchical ordering of various strata of legal norms.[341] Moreover, the Stufenbau theory argues about existence of the hierarchy of sources in

[331] *Ibid.*, p. 333.
[332] Stufenbau is an obsolete German word meaning step-pyramid.
[333] H. Kelsen. Reine Rechtslehre 2nd ed. Vienna: Franz Deuticke publisher 1960. p. 50
[334] J. Kammerhofer. The Pure Theory's Structural Analysis of the Law. Sources in Legal-Positivist Theories. S. Besson and J. D'Aspremont (eds). The Oxford Handbook on The Sources of International Law. – Oxford: Oxford University Press 2017. pp. 349-353.
[335] *Ibid.*, pp. 345-346.
[336] *Ibid.*, pp. 344-345.
[337] H. Kelsen. Reine Rechtslehre 2nd ed. *Op. cit.* p. 196.
[338] J. Kammerhofer. The Pure Theory's Structural Analysis of the Law. Sources in Legal-Positivist Theories. S. Besson and J. D'Aspremont (eds). The Oxford Handbook on The Sources of International Law. – Oxford: Oxford University Press 2017. p. 346.
[339] H. Kelsen. Allgemeine Theorie der Normen. Vienna: Manz Publishers 1979. p. 82.
[340] H. Kelsen. Reine Rechtslehre 2nd ed. *Op. cit.* p. 228.
[341] K. Hossain. The Concept of *Jus Cogens* and the Obligation under the U.N. Charter. – 3 Santa Clara Journal of International Law 2005(1), p. 347.

international law under such conditions, which are imposed by the empowerment norm.[342] Thus, the sources are ordered and structured, according to the Stufenbau theory, although in international law, by contrast, there are fewer complex structures. Consequently, the author of this paper deems that if there is a relationship or connection among two norms that is inherent in their nature as norms, then an ordering and unification of norms into a normative order is not only possible, but actually seems necessary.

What is more, according to the Stufenbau theory, the sources of international law in the legal-positivism are interrelated to one another through two mainstreams such as externality, and coordination of sources.[343] In the conception of the sources of international law, the externality of sources means that the sources are not norms or rules but they are beyond or outside law, either as entity or epistemic force – a tool for creation of interrelated norms by identical methods, mechanisms or procedures, which are regularly obeyed or are seen as being obligatory.[344] As for the second mainstream, the coordination of sources means that the sources and subordinate sources of international law such as treaty and customary international laws, and certain resolutions of the UN Security Council, coexist together and they are coordinated to one another equally.[345]

In addition, the aforementioned mainstream of the Stufenbau theory posits that except *jus cogens* norms, no hierarchy of sources exists, even though their creation is authorized by the UN Charter, which is one specific treaty.[346] Therefore, the position of the coordinated sources is that one source or one of its resultant norms, does not influence the other source or its norms that they don't derogate from each other.[347]

However, the Stufenbau theory cannot solve all problems existing in international law though it will be able to spell out some of the implications for structural analysis of one specific part of the international legal order – the so called interrelationship of original sources of international law.[348]

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[342] *Ibid.*, p. 348.
[343] J. Patrick Kelly. The Twilight of Customary International Law 40 Virginia Journal of International Law (2) 2000. p. 349.
[344] *Ibid.*, p. 340.
[345] P. E. Corbett. The Consent of States and the Sources of the law of Nations – 6 British Yearbook of International law 1925. pp. 20-30.
[346] K. Hossain. The Concept of *Jus Cogens* and the Obligation under the U.N. Charter. – 3 Santa Clara Journal of International Law 2005(1), p. 351.
[347] *Ibid.*, p. 353.
[348] M. Villiger. A Manual on the Theory and Practice of the Interrelation of Sources 2nd ed. The Hague: Kluwer Law International 1997, pp. 15-20.

Therefore, the mainstream of the Stufenbau theory states that treaty and customary international laws, and general principles of law are interrelated with one another in a way that they are part of the realm of facts and they are not dependent on higher law because of the original nature mentioned in Article 38 of the ICJ Statute.[349] Consequently, the interrelationship of the sources of international law under the Stufenbau theory comes at a price.

However, applying the Stufenbau theory to international law brings great clarity to a traditional debate regarding the interrelationship of the sources in a legal order because of the following arguments:[350]

First of all, a source of law is not an absolute, it is a part of the law and can appear anywhere within a legal order.[351] Secondly, the Stufenbau theory constructs the relationship between sources of international law based on the externality of sources, coordination of norms and the mutual interdependence of sources.[352]

Under the Legal-Positivist Tradition, the Stufenbau theory provides mutual interdependence of domestic law and international law. It gives the idea that domestic law can sometimes be interrelated with the source of international law through the general principles of law because they are results of the convergence of domestic rules and they are legal instruments in the capacity of international law.[353]

[349] J. Kammerhofer. The Pure Theory's Structural Analysis of the Law. Sources in Legal-Positivist Theories. S. Besson and J. D'Aspremont (eds). The Oxford Handbook on The Sources of International Law. – Oxford: Oxford University Press 2017. p. 355.
[350] *Ibid.,* p. 360.
[351] M. Freeman, Genocide, Civilization and Modernity. – 46 British Journal of Sociology 1995 (2), pp. 207–225.
[352] P. E. Corbett. *op. cit.,* pp. 50-60.
[353] P. D'Argent. What Makes Law 'International'? Sources and the Legality and Validity of International Law. Besson and J. D'Aspremont (eds). The Oxford Handbook on The Sources of International Law. – Oxford: Oxford University Press 2017. pp. 555-559.

3 THE CONCEPT OF *JUS COGENS* WITH RESPECT TO AN INTERACTION OF A CUSTOM AND A TREATY IN INTERNATIONAL LAW

3.1 Challenges of identification of the *jus cogens'* norms concerning interrelation of a custom and a treaty in international law

In the previous chapter, the author of the paper attempted to find out whether a custom possesses superiority over a treaty in international law under the legal-formalist theory. Also, various approaches and traditions were analyzed in order to prove that custom had superiority over a treaty in international law. In the third chapter, the author will attempt to explore and find answers to the fourth research question stated in the introduction. The fourth research question concerns the application of the *jus cogens*' norms by international courts when a custom hierarchically interrelates to a treaty in international law. Thus, the present chapter will explore such challenges as identification and application of the concept of *jus cogens* concerning an interaction of a custom and a treaty in international law.

The concept of *jus cogens* is rooted in the writings of Vitoria, Grotius, Christian Wolff and Emmmerich de Vattel, who were the first to refer to certain rules which are superior to the customary or treaty-based rules of international law.[354] Serious discussions are afoot regarding the identification of the norms of *jus cogens*. The most notable approach emphasizes that *jus cogens'* rules are the product of the existing sources of international law and they derive from the interrelated process of the customary international law and general principles of international law.[355] The source of peremptory rules in the writing of Vitoria's era was natural law, while Hugo Grotius and Wolff relied on rationality though the sources of peremptory rules of international law were different for these authors.[356]

Nevertheless, one common point amongst these doctrines is that this source is transcendental.[357] The following significant facts such as the prohibition against slavery and slave trade in the 19th century, as well as the first Geneva Convention of 1864 and the Hague Conventions on *jus in bello* can be indicated as crucial milestones in the identification and development of *just cogens'* concept.[358] However, the consolidation of *jus cogens'* category of norms was going on after the

[354] Y. Berkol. The Problem of *Jus Cogens* from a Theoretical Perspective. – 66 Ankara University Journal 2017(1), p. 83.
[355] K. Hossain. *op. cit.*, pp. 77-80.
[356] *Ibid.*
[357] *Ibid*. pp. 81-83.
[358] *Ibid.*

WWII and it was a product of the Charter of Nuremberg Military Tribunal and the Charter of the United Nations, which have led to a new era for the concept of *jus cogens'* norms.[359]

As a result, a certain concept of *jus cogens'* norm was accepted in the Vienna Convention. Article 53 of the Vienna Convention of the Law of Treaties gives the following definition to *jus cogens:* For the aims of the VCLT a *jus cogens* norm is admitted and recognized by states as a whole from which no derogation is allowed.[360] For the identification of the norms as *jus cogens*, the degree of universality and non-derogability is a mandatory requirement.[361] Non-derogability is one of the factors that can be taken into account as a starting point for the identification of *jus cogens'* norms.[362] Moreover, the ICJ identified *jus cogens'* norms as intransgressible principles of customary international law.[363] Furthermore, the ICJ stated that the rules of the humanitarian law in war have clearly acquired the status of *jus cogens*, from which no derogation is possible.[364]

In addition, regarding the identification of *jus cogens* norms in light of the non-derogability, the ICJ's advisory opinions hinted at *jus cogens*, as intransgressible principles of international customary law.[365] Likewise, in the Oil Platforms case, where the original dispute between the parties related to the legality of the actions of the United States in light of international law on the use of force as self-defense, the USA argued that its military actions should be justified as measures necessary to protect the essential security interests of the USA.[366] The ICJ did not enter into discussion as to the question of whether the prohibition of the use of force militated in favor of a narrower interpretation, but resorted to Article 31(3.c) of the VCLT giving a permission to apply such norms of international law as *jus cogens* norms, for example, the prohibition of the unilateral use of force.[367]

Consequently, the ICJ was guided by the customary international norm and concluded that the actions of the United States of America against Iranian oil platforms could not be justified as measures necessary to protect the essential security interests of the United States of America and the USA's actions could not be justified as self-defense.[368]

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[359] M. Freeman, Genocide, Civilization and Modernity. – 46 British Journal of Sociology 1995 (2), pp. 207–225.
[360] The VCLT, *op. cit.*, Art. 53.
[361] M. Foster and C. Costello. Non-refoulement - Putting the Prohibition to the Test. - M. Heijer and H. van der Wilt (Eds.) Netherlands Yearbook of International Law. The Hague: ASSER Press 2015, p.280.
[362] *Ibid.*
[363] Legality of the Threat or Use of Nuclear Weapons. Advisory Opinion, ICJ. Reports 1996, para 79.
[364] The Occupied Territory of Palestine. Advisory Opinion. No.131. ICJ reports 2004, para. 157.
[365] T. Kleinlein. The Concept of *Jus Cogens. op. cit.*, para. 81.
[366] Iran v. The USA. Judgment, ICJ. Reports 2003, paras: 36-39.
[367] *Ibid.*
[368] *Ibid*., para. 125.

What is more, under non-derogability character, the Inter-American Court of Human Rights makes extensive use of the *jus cogens* arguments.[369] Moreover, the IACtHR applies *jus cogens* norms as an argument to stress the grave character of certain human rights violations and to entail the obligation to prosecute and punish the perpetrators.[370]

Furthermore, the IACtHR extended *jus cogens* obligations to the dimension of the duty to protect human rights, which requires States to take active measures in the field of legislation, litigation and enforcement.[371] In addition, international criminal tribunals stressed the importance of certain offences such as the crime of genocide, sexual slavery, war crimes and crimes against humanity entailing a duty to prosecute or extradite. For instance, in the Prosecutor v. Ruto and Sang case, where charges derived from the crimes against humanity, the ICC took into account the character of the peremptory charged norm and stated that the accused could not invoke privileges derived from his status as an elected official.[372]

On the other hand, there are some challenges regarding the identification of *jus cogens'* norms in the analysis of interrelationship among sources of international law. The first controversial issue is related to the meaning of general international law given in Article 53 of the Vienna Convention.[373] Some international law scholars apply this term to refer to customary international law, while others use it to signify sources of international law. However, the term "General international law" is applied for a specific body of rules applicable to a great number of states and it is composed of norms having a general applicability among the states of the international community.[374] General international law encapsulates universal international law.

The second controversial issue refers to the word combination written in the Art. 53 of the VCLT which can be read as the international community of States as a whole.[375] The definition and understanding of this word combination are ambiguous. Some international law scholars clarify that the acceptance or recognition of all states is not imperative for the emergence of *jus cogens* norms and it is sufficient if the overwhelming majority of the international community makes such acceptance or recognition.[376] Therefore, if this approach is accepted, then the VCLT and customary international law reflects a new method of law creation at the international level. For instance, Christos Rozakis, who is an author of the consensual character of *jus cogens*

[369] M. Foster and C. Costello. Non-refoulement - Putting the Prohibition to the Test. *op. cit.*, p. 157.
[370] *Ibid*.
[371] M. Freeman, Genocide, Civilization and Modernity. – 46 British Journal of Sociology 1995 (2), pp. 207–225.
[372] Prosecutor v. Ruto and Sang (Trial Judgment), ICC-01/09-01/11-777, International Criminal Court (ICC), 18.06.2013, para 90.
[373] The VCLT, *op. cit.*, Art. 53.
[374] Y. Berkol. The Problem of *Jus Cogens* from a Theoretical Perspective, *op. cit.*, pp. 83-95.
[375] The VCLT - Vienna Convention on the Law of Treaties. Vienna, 23.06.1969, e.i.f. 27.01.1980. Art. 53.
[376] Y. Berkol. The Problem of *Jus Cogens* from a Theoretical Perspective, *op. cit.*, p. 98.

norms, argues that international community of States as a whole hints at law creation via will of the majority and this phrase can be considered as a maker of *jus cogens* norms.[377] Furthermore, Rozakis concludes that Article 53 refers to norms of general international law and not to norms of universal law, thereby implying that a rule, which is accepted by consent of the majority of states in the international community may be recognized as a *jus cogens* norm.[378]

Contrary to the aforementioned approach, other international law scholars do not share Rozakis's opinions and argue that Article 53 of the VCLT characterizes *jus cogens* as requiring the consent of all states and not the majority of them in the international community.[379] However, Rozakis' approach regarding the identification of *jus cogens'* norms is a logical way of making *jus cogens* norms applicable to all States.[380]

The third controversial question regarding the concept of *jus cogens* is related to its place in the international legal order. There is no exhaustive answer in legal literature, nor in international instruments, on whether customary international law is the only way of creating *jus cogens* rules or whether there are conventional sources also suitable for the task. There is nothing in the VCLT which prevents the use of conventional sources to express the acceptance and recognition concerning the *jus cogens* norm. Therefore, if no restriction exists regarding how the consent will be given, States should be free to use all mechanisms accessible to them and consequently acceptance and recognition of the norms such as *jus cogens* by States can take place via treaties as well as by way of custom.[381]

In addition, the interrelationship between customary law and universal treaties does not hinder *jus cogens* norms to be considered as an independent source of international law and its place in the international legal order can be viewed from the custom and the treaty perspectives. Dr. Alexander Orakhelashvili supports a position of *jus cogens* norms from perspectives of customary law.[382] For instance, Dr. Alexander Orakhelashvili treated the principle of non-refoulment as a *jus cogens* norm, possessing the status of customary international law and elevated to *jus cogens*' level.[383] He argued that the principle of non-refoulement, which is codified in Article 33 of the 1951 Geneva Convention on the Status of Refugees, is a firmly

[377] C. L. Rozakis. The *Jus Cogens'* Concept in the Treaty Law, Amsterdam, New York, Oxford: North Holland Publishing Company 1976, p. 80.
[378] *Ibid*., pp. 81-82.
[379] *Ibid.*, p. 83.
[380] *Ibid.*, p. 84.
[381] Y. Berkol, *op. cit.*, p. 102.
[382] A. Orakhelashvili. Peremptory Norms in International Law. Oxford: Oxford University Press 2008, p. 54.
[383] *Ibid.*, p. 55.

established peremptory norm related to the rights of an individual derived from the customary international law.[384]

The fourth controversial query regarding the identification of *jus cogens* norms refers to the qualified law-making procedure of *jus cogens* including certain attributes defining the special status of *jus cogens'* norms. The law-making procedure of *jus cogens* norms is considered as a disputable issue because, as a well-known fact, in international law, there is no institutionalized law-making procedure that would have acquired a higher law-making capacity, though an exception may be the law-making activity of the Security Council in the field of international peace and security.[385]

The author of this paper deems that at first, a potential peremptory norm ought to derive from the customary law, treaties or general principles of law, then it can be accepted by the majority of all States expressing their common consent, and this majority of States shall possess state practice and *opinio juris* toward that peremptory norm. After that, it can be elevated to the *jus cogens'* part by common consent of the international community as a whole.[386]

What is more, the author deems that majority of States, but not all states, suffice for a norm to be given a peremptory character. For instance, in 1968 at the UN Conference it was explained that in order for a norm to be accepted and identified as peremptory, a large number of States but not all States' practice and *opinio juris* will be sufficient. It would mean that whether one State or a small group of States did not recognize a peremptory rule, it would not affect acceptance and identification of the *jus cogens'* character norm by the international community as a whole.[387]

Therefore, the author of the paper believes that identification of the *jus cogens* norms in the way that they may be given a special status in the interrelationship of sources of international law obviously would not depend on consistent state practice, but only on an *opinio juris cogentis*.[388]

[384] *Ibid*., p. 57.
[385] T. Kleinlein. The Concept of *Jus Cogens* - 46 American University International Law Review 2015., p. 194.
[386] T. Kleinlein. The Concept of *Jus Cogens. op. cit.*, p. 195.
[387] The Summary records of the plenary meetings of the UN Conference on the Law of Treaties. A/CONF.39/11 1969, para 12, p. 472.
[388] *Ibid*.

3.2 Determination of values of the concept of *jus cogens*

In international law the term "*jus cogens*" refers to norms that have peremptory authority superseding conflicting treaties and custom. *Jus cogens* norms are considered peremptory in the sense that they are mandatory, do not admit derogation, and can be modified only by general international norms of equivalent authority.[389] The author of this paper supposes that the basic values of the concept of *jus cogens* with respect to interaction of a custom and a treaty in international law might be noticed in philosophical premises and methodologies of the views of scholarly protagonists.

One of the fundamental values and effects of the concept of *jus cogens* is that its norms assist the international law in participation in the common good by securing a number of fundamentals referring to humanity and fulfilling some of the demands of practical reasonableness due to their authoritative character.[390] Regarding the authoritative character of *jus* cogens norms, Alfred von Vedross commented that the authority of the norm stems from its relation to the moral task of the State and of the law.[391] For instance, the authority of the *jus cogens* human rights norms secures the conditions necessary for flourishing such a fundamental value as human rights by protecting the ability of individuals to participate to create their common good and helping to fulfill a number of the demands of practical reasonableness.[392]

In contrast with the aforementioned position, not all *jus cogens* norms can have their authority explained by reference to the common good. For example, there are certain peremptory norms, such as the rule of *pacta sunt servanda* - the authority of which cannot be understood in terms of protecting the common good, but rather by reference to its necessity to the continued effective existence of the international legal system.[393]

An issue regarding other values and effects of the *jus cogens'* norms in the interrelationship of the sources of international law is slightly controversial and there are different opinions among scholars of international law. According to one of the most prominent and prevailing views, the superiority character of *jus cogens'* norms is one of its values and the existence of this value is also proved in the ECtHR's *Al-Adsani* case, in which the judges recognized *jus*

[389] North Sea Continental Shelf Cases (Germany v. Netherlands and Denmark), Judgment, I.C.J. Reps 1969, p. 79.
[390] D. Dubois. The Peremptory Norms in International Law- 78 Nordic Journal of International Law 2009, p. 160.
[391] A. Verdross. Forbidden Treaties in International Law - 31 American Journal of International Law 1937, p. 574.
[392] D. Dubois. The Peremptory Norms in International Law. *op. cit.* p. 164.
[393] *Ibid.*

cogens' norms as a superior source of law.[394] The Court added that *jus cogens* norms are such a fundamental and compelling law that they override all other principles of international law including the well-established principles of sovereign immunity.[395] Besides, the Judgement of the ECtHR emphasized that the International Law Commission had found that States are not entitled to plead immunity or apply any other fundamental principle of international law in order to avoid responsibility in such cases where *jus cogens'* character human rights are violated.[396]

In addition, the ECtHR noted that the prohibition of torture, laid down in human rights treaties, enshrines an absolute right which can never be derogated from, not even in time of emergency, and that the prohibition of torture is a *jus cogens* character norm.[397] Therefore, by that prohibition, this *jus cogens*' norm protects such a fundamental value as human dignity in international law. Moreover, the *jus cogens'* norm – the principle of prohibition of torture - is prescribed by Article 5 of the UDHR[398] and Article 7 of the ICCPR.[399] Regarding punishment of torture and other cruel treatment, the UN Convention, by Article 2, requires that states should take beneficial measures to prevent torture in their controlling territory.[400] Also, by Article 4, the UN Convention prescribes that all acts of torture shall be made offences under the State party's criminal law.[401]

By the same token, there have been several judicial statements to the effect that the prohibition of torture attains the status of *jus cogens* and it provides for the protection of human dignity. For instance, in the judgment of Prosecutor v. Anto Furundzija, the International Criminal Tribunal for the Former Yugoslavia (ICTY) referred, *inter alia*, to the foregoing body of treaty rules and held that the principle of prohibition of torture has evolved into a *jus cogens*' list of norms because it protects paramount values of human beings.[402]

In addition, hypothetically, in the case of the so-called ticking bomb scenario, an order or even an obligation to torture a suspect in order to save lives cannot be legal because the prohibition of torture is absolute as is mentioned above in several court cases and it is not allowed under

[394] Al-Adsani v. The United Kingdom, Judgment, App. no. 35763/97, ECtHR 21.11.2001, paras 17-18.
[395] *Ibid*., para 18.
[396] *Ibid*, para 23.
[397] M. Freeman, Genocide, Civilization and Modernity. – 46 British Journal of Sociology 1995 (2), pp. 207–225.
[398] Universal Declaration of Human Rights. Paris 1946-1948, e.i.f. 10.12.1948, Art. 5.
[399] International Covenant on Civil and Political Rights. New York, 16.12. 1966, e.i.f. 23.03.1976. Art. 7.
[400] The United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment. New York, 10.12.1984, e.i.f. 26.06.1987, Art. 2.
[401] *Ibid*, Art. 4.
[402] Prosecutor v. Anto Furundzija, Judgment, IT-95-17/1-T, ICTY 10.12.1998, para. 30.

any circumstances.[403] As regards derogation from treaty obligations including hierarchically superior norms, it is established that when a norm of international law is compulsory, States are not allowed to conclude an international treaty without considering superior norms despite Article 4 of the ICCPR allowing states to make a temporary unilateral derogation from only a part of their treaty obligations.[404]

In contrast, this fact refers to certain factual situations and derogation from the human rights treaty context can be considered as a typical exception, which is not contrary to Article 53 of VCLT because the prohibition of derogation in the second sentence of this Article is generally understood as referring to legal acts and rules, which fully or partially depart from the requirements of the *jus cogens* norms.[405]

The reason why the exception of the allowed derogation from the treaty obligations including hierarchically superior norms in the human rights treaty context exists, is that in human rights law the interests of individuals are detached from the interests of States and are elevated to the international community in order to protect individuals against their states of nationality.[406]

What is more, another fundamental value of the concept of *jus cogens* is that it serves the interests of weaker states. Based on Articles 64[407] and 53 of VCLT the *jus cogens'* norms prevent mighty states from entirely eclipsing the weaker ones by entering into agreements in order to gain exclusive dominance in international law.[408]

In addition, the protection of general human rights at the national or international level can be considered as a value of this concept. For instance, it has been recognized by ICTY in the Furundzija case. In this case, the Trial Chamber held that at the inter-state level, the *jus cogens concept* serves to internationally delegitimize any legislative, administrative or judicial act which authorizes torture.[409] Louis Henkin argued that the peremptory character of the *jus cogens* norm derives from their inherent rational and moral authority, possessing a moral force of unprecedented character.[410]

[403] T. Kleinlein. *op. cit.*, pp. 187-188.
[404] ICCPR, *op.cit.*, Art 4.
[405] T. Kleinlein. *op. cit.*, p. 191.
[406] *Ibid*.
[407] The VCLT *op. cit.*, Art. 64.
[408] *Ibid*. Art. 53.
[409] Prosecutor v. Furundzija. ICTY, *op. cit.*, para 155.
[410] T. Opsahl. The International Bill of Rights: The Covenant on Civil and Political Rights. - L. Henkin (ed). New York: Columbia University Press 1981, p. 523.

In international jurisprudence *jus cogens* is applied to signal that the norm reflects pivotal values for judges. For example, in the judgement of Congo v. Rwanda case the ICJ stated that the prohibition of genocide is endorsed as a norm deriving from the concept of *jus cogens* and Rwanda's reservation to the Genocide Convention was invalid because of incompatibility with the object and purpose of the Genocide Convention.[411] Meanwhile, the Inter-American Court of Human Rights stated that *jus cogens* norms include the principle of non-discrimination and the right to equal protection from torture, the right of access to justice, the prohibition of forced disappearance and the duty to prosecute a violation of *jus cogens* norms.[412]

3.3 Application of *jus cogens* norms in the international legal practice

The author of this paper thinks that international cases illustrate frequent practical application of *jus cogens* norms. These cases exhibit that judges frequently apply *jus cogens* principles because American statutory, constitutional, and customary law does not appear to address the issue or, if applied in their strict sense, they would yield unjust results.[413] This is certainly the case referred to the prohibition of torture. For example, the United States has endeavored to provide a restrictive interpretation of torture for the purpose of allowing the use of particularly harsh interrogation techniques on terrorist suspects and providing broad defense to exempt State officials from criminal liability.[414]

Having examined the international law cases, the author of paper thinks that the decisions of the ICJ and the Inter-American Commission on Human Rights illuminate a conflict of applying *jus cogens'* norms. For instance, in the Nicaragua case the Court applied the customary and general norms against the use of military force;[415] The International Court of Justice decided that the United States had violated both *jus cogens'* norms: the principle of prohibiting the use of force against another state and the norm of non-intervention.[416] It was claimed that the prohibition against the use of force in international relations is *jus cogens*: the reason behind this was to support the existence of an independent norm of customary international law.[417]

[411] Congo v. Rwanda, Judgment, ICJ, Reports, 2002, p. 5.
[412] D. Shelton. The Mystery of *Jus Cogens* and Sherlock Holmes. Netherlands Yearbook of International Law. The Hague: T.M.C. Asser Press 2015.pp. 42-43.
[413] A. Bianchi. The Concept of *Jus Cogens* and Human Rights– 19 The European Journal of International Law 2008(3), p. 505.
[414] *Ibid.*
[415] G. A. Christenson. Peremptory Norms: Fundamental Interests to Global Community. – 28 The European Journal of International Law 1998(3), p. 620.
[416] Nicaragua v. The USA. ICJ, *op. cit.*, para 14.
[417] *Ibid*., para 90.

Moreover, in a separate opinion, president Singh stated that the ICJ's decision not to apply treaty law to the case, but rather to apply customary international law, which outlaws the use of force in international relations, emphasizes that the principle of non-use of force belongs to the realm of *jus cogens*.[418] Besides, judge Sette-Camara stated that the non-use of force as well as non-intervention are not only cardinal principles of customary international law but could be recognized as peremptory rules of customary international law, which impose obligations on all states.[419]

In addition, in the case of March 1987, the Inter-American Commission on Human Rights decided that the United States had violated the right-to-life provision of the American Declaration of the Rights and Duties of Man (ADRDM) in allowing the execution sentences of James Terry Roach and Jay Pinkerton.[420] The Commission specifically found that a norm of *jus cogens* prohibits state execution of children in the OAS system.[421]

The Commission found that in the Member States of the OAS, there was a recognized norm of *jus cogens* prohibiting the state execution of children which was accepted by all states in the inter-American system including the United States of America.[422] It asserted that the provision of the right to life of the American Declaration contains an emerging prohibition against laws, permitting execution of juveniles.[423]

Contrary to this assertion, the United States could not apply the principle of persistent objector of customary international law because the peremptory norm prevents such a defection. However, the only dissenting opinion was that a norm, prohibiting the state execution of children did not have approval internationally and accordingly, without approval of the international community as a whole, it was not a *jus cogens'* norm.[424] Therefore, the author of this paper thinks that the decision, by the IACHR in March 1987, illustrated a supervening effect of *jus cogens* norm on prior treaty and customary international laws for the following reasons:

[418] Nicaragua v. The USA. ICJ, *op. cit.* p. 153.
[419] M. Freeman, Genocide, Civilization and Modernity. – 46 British Journal of Sociology 1995 (2), pp. 207–225.
[420] Case No. 9647 (United States), Inter-American Commission on Human Rights, Resolution No. 3/87, OEA/ser. L/V/II.69, doc. 17, 27.03. 1987, paras 50-56.
[421] *Ibid.*, para. 56.
[422] *Ibid*., paras. 56-57.
[423] L. Wildhaber and S. Beritenmoser. The Relationship between Customary International Law and Municipal Law in Western European Countries. Stuttgart: Verlag W. Kohlhammer 1984, pp. 176-178.
[424] Case No. 9647 (United States), *op. cit.*, paras. 13-14.

Firstly, the Commission applied the supervening peremptory norm to interpret the Declaration on the Rights and Duties of Man and the interpretation sought consistency between the emerging new customary norm against executing juveniles and the *jus cogens* norm of the same content.[425] Moreover, by applying a reinforced customary norm with a peremptory norm, the Commission found the United States in violation of the Declaration's right-to-life provision.

Secondly, the Commission applied the supervening peremptory norm to prevent the United States from claiming the persistent objector exception to the development of an ordinary customary norm against the execution of juveniles.[426] As regards the United States' claim of defection from a *jus cogens* norm, the Commission asserted that the countries of the Americas region, including the United States, had accepted the norm and explained that the case arose not because the United States denied the existence of the international norm prohibiting execution of children, but because no consensus existed regarding the age, at which the States may try juveniles as adults before criminal courts.[427]

In that case the challenging issue was the application of *jus cogens'* norms in their interpretation methods, i.e. the United States of America interpreted *jus cogens* norms erroneously and denied equal treatment of the minimum international standard of *jus cogens* by allowing the fifty States the discretion to sentence juveniles to death for capital crimes.[428]

In that sense, the *jus cogens* concept plays an indispensable doctrinal role in distinguishing a mandatory standard from a discretionary regional standard that is contrary to the US approach according to which the USA prescribed execution of juveniles as a regional standard. After the USA denied the existence the rule of customary international law against executing juveniles by its unilateral objection, the concept of *jus cogens* undoubtedly and logically would have forced revision of that decision.[429]

The application of the *jus cogens* human rights norms, as articulated by the Inter-American Commission on Human Rights, distresses the existing public order system of nation-States by intruding into the relationship between a state and its nationals.[430] Such application faces the challenges such as the challenge of dissonance, the absence of coherence or communication

[425] G. A. Christenson. Peremptory Norms: Fundamental Interests to Global Community. – 28 The European Journal of International Law, *op. cit.*, p. 622.
[426] *Ibid*., p. 623.
[427] Case No. 9647 (United States), *op. cit.*, para 57.
[428] *Ibid*., para 65.
[429] A. da R. Ferreira, C. Carvalho *et al.* Formation and Evidence of Customary International Law. UFRGS Model United Nations Journal, 2013(5), p. 623.
[430] *Ibid*., p. 632.

and the challenge of incommensurability.[431] The incommensurability is the absence of a common basis for comparison in qualities such as value, size, or excellence.[432]

The problem lies in the fact that the *jus cogens* normative system is incommensurable with the traditional states' system.[433] For instance, when the international Court of Justice and the Inter-American Commission on Human Rights applied the *jus cogens* norms and made decisions against the United States, it challenged the entire international community with a complex choice.[434] In effect, the decisions appeal to the international community as a whole to approve of dissonance introduced by a *jus cogens* norm, thereby forcing revision of the structure of the Nation-State law-making system.[435] The solution was to shift the perspectives and loyalties from the Nation-State vision of community and public interest to the common one of survival of international society.[436] This shift would escape the problem of incommensurability by creating a new standard of comparison beyond ordinary international law.[437]

Besides, in that case the peremptory norm applied by the Commission on behalf of individuals in the Inter-American system would impose limitations on a powerful nation to prevent its dominance in resisting revision of a human rights norm.[438] The Commission first raised the claim that the rule prohibiting the execution of juvenile offenders had acquired the authority of *jus cogens*.[439] However, the dissenting opinion was published, which preserved and reasserted the traditional means for determining the pedigree of a *jus cogens* norm, namely that the prohibition of the death penalty with respect to minors under 18 years of age is not a norm of *jus cogens* since it has not been accepted by the international community as a whole.[440] The dissenting opinion also denied that there was violation of a norm of treaty or customary international law against executing juveniles.[441]

Consequently, the author of the paper thinks that the application of *jus cogens'* norms by the Inter-American Commission on Human Rights in a way like they were applied in the case of execution of juvenile[442] fundamentally is in line with public morality and public order system

[431] M. Freeman, Genocide, Civilization and Modernity. – 46 British Journal of Sociology 1995 (2), pp. 207–225.
[432] J. Raz. Value Incommensurability: Some Preliminaries, – 86 Proceedings of the Aristotelian Society 1986(1), p. 120.
[433] *Ibid*., p. 33.
[434] G. A. Christenson. Peremptory Norms: Fundamental Interests to Global Community. – 28 The European Journal of International Law. *op. cit.*, p. 637.
[435] *Ibid*.
[436] *Ibid*.
[437] M. Freeman, Genocide, Civilization and Modernity. – 46 British Journal of Sociology 1995 (2), pp. 207–225.
[438] Case No. 9647 (United States), *op. cit.*, para 70.
[439] *Ibid.*, para. 54.
[440] *Ibid*., paras 12-24,
[441] *Ibid*., para. 34
[442] *Supra* note 438.

though it opposes the US approach that legalizes the juvenile death penalty in some of its States. Doctrinally, the dissent exposes vulnerable points in the Commission's reasoning though there is very little difference in the moral outcome between the United States' position about abuses of human rights in Latin American countries in relation to their own citizens and the Commission's stance for potential abuses by the United States.[443]

In addition, in the case of Leng May Ma v. USA's Immigration and Naturalization Service the United States Supreme Court held that Leng May Ma, a native and citizen of El Salvador, had presented a prima facie case for political asylum based on his assertion that he would face induction into military service in an army, which commits war crimes.[444] The US Supreme Court concluded that the Salvadoran army violated Article 3 of the Geneva Convention by inhumane treatment of civilians, murder, torture and summary executions.[445] Moreover, the United Nations High Commissioner for Refugees held that Leng May Ma had shown he would suffer disproportionately severe punishment on account of his refusal to serve in the army.[446] Therefore, the court unequivocally relied on and applied the *jus cogens* human rights norms, when such a judgment was made.

Similarly, regarding the application of the *jus cogens* norms in the international legal practice, Nicaragua v. The USA is a perfect case for analysis in that sense. Thus, the research question arises whether the United States effectively invoked the concept of *jus cogens* in that case to justify the refusal to comply with Article 94 of the U.N. Charter. Regarding that query there are two approaches to justify the USA's position:

The first approach arguably supports the idea that the norm of the *jus cogens* quality invoked by the USA may be a fundamental argument to a nation-state system, which prohibits any derogation from the sovereignty principle of a state in order to survive the nation-State system and not to undermine good faith compliance with international agreements providing for international adjudication.[447] The argument generally supports the idea that the nation-state's action or inaction should comply with Article 94 of UN Charter in a way that the principle of sovereignty is not violated.

[443] Case No. 9647 (United States), *op. cit.*, para 34.
[444] Judgement of the United States Supreme Court in Leng May Ma v. Immigration and Naturalization Service (357 U.S. 185; 78 S. Ct. 1072; 2 L. Ed. 2d 1246) 16. 06.1958, p. 125.
[445] *Ibid*., p. 188.
[446] United Nations High Commissioner for Refugees. Handbook On Procedures and Criteria for Determining Refugee Status 1979(40), para. 171.
[447] Military and Paramilitary Activities in and against Nicaragua. *op. cit.* p. 639.

The second approach supports the position that the inherent right of self-defense, invoked by the USA in the case of the Military and Paramilitary Activities in and against Nicaragua, is a *jus cogens* norm justifying a broad interpretation of Article 51 of the UN Charter.[448] Therefore, the broad interpretation of this norm may be read as the absence of effective Security Council action in response to breaches of the peace, the autonomy of a state or a region may be placed in jeopardy by external threats not amounting to an armed attack, and, in that case, application of the use of force as a self-defense may be justified.[449]

In addition, for more clarification, the question is about keeping of the public order system to provide peace in a state or in a region as preserving the fundamental interest of the international society. For instance, Professor Rubin suggests, that the principle of self-defense as the norm of *jus cogens* derives from the negotiating history of the Kellogg-Briand pact.[450] He also added that these justifications show how states may construct arguments, based on the application of the concept of *jus cogens*, to keep the public order to avoid abuse of power, which is frequently incommensurable with widespread and intense demands of the international society.[451]

What is more, this case also exhibits that applying *jus cogens* norms as a guardian for fundamental interests of international society communicates the expectation that a public authority might be empowered to invalidate various treaty and customary provisions or norms in order to preserve the minimum consistency and order of the international public system.[452] The consequence of applying *jus cogens* norms in international practice is that the concept of *jus cogens* is invoked as a pure aspiration in order there to be a better system of restraint on the positive international law-making power of sovereign states.[453]

Likewise, the case of the United States v. Toscanino is worth researching in respect of the challenges of the application of *jus cogens* norms in international legal practice. In the United States v. Toscanino the key query was whether the US Supreme Court would be guided by international law or the national law of the USA. Based on the principle of justice, the US Supreme Court applied the *jus cogens* norms and provided relief for an alien, who was tortured by the United States government agents in Uruguay, then was kidnapped by them and brought to the United States for the purpose of obtaining federal court jurisdiction over him.[454]

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[448] *Ibid*., p. 640.
[449] *Ibid*., p. 641.
[450] G. Rubin. Book Review. – 81 American Journal of International Law 1987, p. 255.
[451] G. A. Christenson. Peremptory Norms: Fundamental Interests to Global Community. – 28 The European Journal of International Law. *op. cit.*, pp. 639-640.
[452] *Ibid*., pp. 644-645.
[453] *Ibid*., p. 648.
[454] Judgement of the United States Supreme Court in United States of America V. Francisco Toscanino 398 F. Supp. 916, 10.07.1975, p. 135.

Moreover, the same court also found that international kidnapping violated the plaintiff's rights under the United Nations Charter, the Charter of the Organization of American States and customary international law for which the remedy was the return of the kidnapped victim.[455]

In addition, in Fernandez v. Wilkinson case the US courts applied international law. This case concerned the misconduct of agents or officials of the United States government as well.[456] The court found that indeterminate detention of a person in a maximum security prison, pending unforeseeable deportation, constitutes an arbitrary detention.[457] Since the court could find no remedy under the United States' constitution and by reason of the defendant's status as an excludable alien refugee, the court was guided by international law to find the solution.[458]

As a result, the court failed to find any relevant domestic law and it relied on the principle of *jus cogens* to determine the applicable standard regarding the right to freedom from arbitrary detention.[459] Therefore, the United States district court concluded that the existing customary international law prohibits arbitrary detention, and Mr. Fernandez's detention had violated international law.[460]

Also, the court added that the State of affairs, which resulted in the violation of the alien's fundamental human rights, was the abuse of discretion on the part of the responsible agency officials.[461] In order for the court to determine the *jus cogens* norms, which derive from customary international law, the court considered numerous international sources, including United Nations instruments and declarations, multilateral treaties, various articles by legal scholars, and statements of members of the United States government.[462]

Consequently, after analyzing these cases, the author of this paper thinks that the aforementioned cases illustrate frequent application of the *jus cogens'* norms in the human rights violation cases in the practice of international and national legal systems. One of the reasons of the mentioned frequent application is promulgation of the Universal Declaration of Human Rights and its subordinate international instruments. Moreover, after proclamation of those international instruments, the principles of *jus cogens* have started to develop their predominance in international and national legal systems.

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[455] *Ibid*., pp. 277-278.
[456] Judgement of the United States District Court in the Pedro Rodriguez Fernandez v. George C. Wilkinson. No. 80-3183, 505 F. Supp. 787, 1980, p 750.
[457] *Ibid*., p. 793.
[458] *Ibid*., p. 794.
[459] *Ibid*., pp. 795-796.
[460] *Ibid*., p. 800.
[461] *Ibid*., p.799.
[462] *Ibid*., pp. 795-799.

Apart from the aforementioned conclusion, it may additionally state that the frequent application of the concept of *jus cogens* in human rights cases overcame the court-invoked barriers for remedy or compensation for wrong conducts or grievances and it should be a compelling factor in the progressive enforcement of human rights. Furthermore, the aforementioned cases exhibited that one of the main challenges of application of the *jus cogens'* norms in the international legal system is various interpretations of the *jus cogens'* norms by parties to international or national legal disputes, interpretations of which cause uncertainty or inaccuracy of meaning and application of the specific *jus cogens'* norm.

CONCLUSION

The main conclusion of this study is that there is a hierarchy between custom and treaty in international law. This statement supports the theory that international law instruments are crafted through the essentially horizontal action, instead of vertical process. Based on the conducted research, the author of this paper supports the collectivist school's approach, method of which and the ICJ's practice are consistent with each other regarding the interrelationship of a custom and a treaty in international law.

The aforementioned analysis conducted in the paper has revealed that when customary law hierarchically interrelates with treaty law, the ICJ The court classified the following three circumstances in the North Sea Continental Shelf cases:

Firstly, the treaty may also be binding as a matter of customary law, whether or not the treaty is a codification of customs, or, if the treaty has crystallized emergent rules of customary law. In that sense treaties become sources of material or evidence in support of a potential rule of customary law. Secondly, a custom and a treaty can exist in parallel, and the ICJ declared that a custom and a treaty always exist simultaneously. Thirdly, some bilateral treaties have a feature to produce a customary rule and it is a process that has to be in consistence with the terms of Article 38(1)(b) of the ICJ Statute. Consequently, these three circumstances demonstrate that custom has a hierarchic interrelation with treaty in international law.

The analysis carried out in the paper has revealed that the no-hierarchy concept of sources of international law is normatively problematic and misleading. As a result of the research, the author of the paper has come to conclusion that international law is a system of customary law, thus the author supports the custom primacy theory. It is substantiated that customary law mostly generates universally applicable norms. The customary law is seen as normatively superior over treaty law under the custom primacy theory. The legal-formalist theory posits that hierarchical approaches to customary international norms are developed in international legal practice as well. To some extent, this approach is applied in the international litigations by ICTY, SCSL and ICTY.

The master's thesis has exhibited that the customary law mirrors what is contained within treaties and the latter is reflective of what customary law is. The principle of state responsibility to uphold human rights is a lucid example of the interrelation of custom and treaty which prohibits violations of human rights against individuals and groups.

In the present paper, it has been explored and revealed that the Martens Clause from the preamble to the 1899 Hague Convention II is a prominent provision, which proves that a custom and a treaty have been in interrelation in light of protection of humanity. They are interrelated in regarding genocide. Their purpose lies in protection of human rights and avoiding the commitment of genocide as well. It has been stated that before the 1948 Genocide Convention, customary law had already prohibited unlawful acts concerning genocidal violence. Therefore, whether or not any party to a dispute attempts to ignore the 1948 Genocide Convention, in any case, international dispute settlement bodies will nevertheless apply relevant customary rules.

Consequently, this approach proves that a custom is hierarchically superior to a treaty in international law. The present research has exhibited that the *jus cogens'* norms serve the interests of weaker states by their superiority and authoritative character. International courts carefully, though frequently, apply the *jus cogens'* norms in such disputes, when the customary international law interrelates with, crosses and collides with treaty law.

The study has revealed that the alternative approach to the application of a custom and a treaty in international law derives from the restated doctrine of sources, which prescribes three main groups of sources. They include all norms of international law regardless of their origin, which are hierarchically arranged in legal system of international law and by which the problem of hierarchy among formal sources is solved. It erases distinctions between treaties and customs because it converts treaties from statements of the law to evidence of the law, where both serve as reflections of evidence of what international society has accepted as law. All three groups can be summarized as follows:

The first category includes all core norms of international law originally originating from customary international law and treaty law. The first group includes the most superior and established norms of international law such as *jus cogens* norms and basic principles and standards of international law. It includes some of the oldest background principles of international law such as *pacta sunt servanda* and *clausula rebus sic stantibus.* It incorporates two different kinds of customary norms such as process values and internalized norms.

The process values itself include factors, determinacy, predictability, and fair negotiating process, which make a particular agreed-upon rule legitimate. It includes the principle of consistency of agreed-upon rules as well as the principle of non-intervention and the clarity of agreed-upon enforcement mechanisms as well.

The second category includes all legitimated rules including various international treaties and ordinary customary rules of international law. In the second group all customary and treaty norms come from process-legitimacy and they make the international law more binding. Many international treaties are backed by strong process values, giving them more binding character, such as *pacta sunt servanda* and *clausula rebus sic stantibus.* The second group makes customary law a more official law in practice than it is now, based on the traditional doctrine of sources of international law.

Thus, it comprises a group of recognized customary rules that are backed by strong evidence of general practice and *opinio juris.* The international courts have already started to employ such techniques. In the Nicaragua v. USA case the ICJ emphasized that the state's acts must be accompanied by the *opinio juris sive necessitatis* for a new customary rule to be found.

The third category includes all aspirational norms of international law, which in turn include those rules described in treaties that have not yet been adopted as substantive norms in the international legal system. The aspirational norms of international law have a complete status of law and possess considerable political and moral force. The third group includes judicial decisions of international courts, writings of the most highly qualified publicists, aspirational norms, resolutions adopted by the UN General Assembly, Security Council and international organizations, and major international conferences. The third group refers to and covers such norms that have not yet been internalized and remain largely aspirational, originating from a vague treaty backed by deficient process or such a treaty, which may be lacking in both process values and internalized norms.

The abovementioned alternative approach to the application of the sources of international law encourages both those, advising states and those, acting on a state's behalf to observe their actions as part of the process of international law-making. It provides an improved accuracy, a better picture of international law, governing the international system and suggests a deeper, more powerful understating of international law. Therefore, the aforementioned alternative approach proves that there is a hierarchy between customary law and treaty law. The customary law is hierarchically superior to the treaty law in the application of sources of international law, and Nicaragua v. the USA is an explicit example of this statement.

In the present paper, it was found that the legal positivist theory defends the superiority of customary law and the interrelationship of sources of international law is expressed in a way that customary international law is treated as judge-made law with judicial pronouncements of customary legal norms. In the legal positivism, the Stufenbau theory is considered to be

significant. The Stufenbau theory, regarding the interrelationship of a custom and a treaty in international law, summarizes the following three significant statements:

Firstly, customs and treaties have a hierarchical relationship in international law. Secondly, they are not separate from one another and their rules can change or influence the rules deriving from other sources. Thirdly, one hierarchically higher norm establishes the validity of another hierarchically lower norm, i.e. its existence as a norm.

The Stufenbau theory also argues that there is a hierarchy between a custom and a treaty in international law. According to the Stufenbau theory, a custom and a treaty interrelate in the context of externality and coordinative mainstreams. Both mainstreams are explored and explained above.[463] The mainstream of the Stufenbau theory states that treaty law and customary international law interrelate in the following way: they are part of the realm of facts and are not dependent on hierarchically higher disciplines of international law because of their originality mentioned in Article 38 of the ICJ Statute.

As a result, the Stufenbau theory constructs the relationship of sources of international law such as a treaty and a custom on the basis of externality of sources, coordination of norms and the mutual interdependence of sources.

The concluding question put forward in the present research paper concerned how the *jus cogens*' norms are applied by international courts in those circumstances when a custom interrelates with a treaty in international law. Regarding that, after analyzing a number of cases, the author of this paper states that the *jus cogens'* norms are frequently applied and international practice demonstrates that mostly a custom interrelates with a treaty in human rights violation cases.

In this interrelation *jus cogens* norms have the highest degree of universality and non-derogability as a mandatory requirement. In the context of interrelation of a custom and a treaty in international law the *jus cogens* norms are identified as norms, having a special hierarchical status. A number of the ICJ cases reflect the superiority of the concept of *jus cogens* in the opinions of the ICJ judges. In international jurisprudence the *jus cogens* norms reflect pivotal values in the opinions of judges.

[463] *Supra* chapter 2, p. 47.

ABBREVIATION

Art. – Article

ADRDM - American Declaration of the Rights and Duties of Man

BIT - Bilateral Investment Treaty

ECHR – European Convention on Human Rights

ECtHR – European Court of Human Rights

ICTR – International Criminal Tribunal for Rwanda

IACHR – Inter-American Commission on Human Rights

ICCPR – International Covenant on Civil and Political Rights

ICC – International Criminal Court

ICTY – International Criminal Tribunal for Yugoslavia

ICJ – International Court of Justice

NATO - The North Atlantic Treaty Organization

NGO – Non-Governmental Organization

OAS – Organization of American States

PCIJ – Permanent Court of International Justice

p. – Page

pp. – Pages

para - Paragraph

SCSL – Special Court for Sierra Leone

UN – United Nations

UDHR – Universal Declaration of Human Rights

USA – United States of America

VCLT – Vienna Convention on the Law of Treaties

WTO - World Trade Organization

WWII – The World War II

UNSC – Security Council of the United Nations

CIL – Customary International Law

CJEU – Court of Justice of the European Union

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