The Tunkin Diary and Lectures
Tunkin in naval dress. January 1939. Moscow
The Vinogradoff Institute
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THE
TUNKIN
DIARY AND LECTURES

The Diary and Collected Lectures of G. I. Tunkin at
The Hague Academy of International Law

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Starting our lectures we have, according to the old tradition, to define the subject matter of these lectures. To say “coexistence and international law” is not really to say much.

Co-existence (we mean, of course, co-existence of States) has always been present since States appeared. States not only existed parallelly, they co-existed in the sense that there have always been relations between States. States have never been isolated from each other. The scope and volume of these relations changed. From regional relations in ancient history and also, to a very great extent, during the middle ages, they have become nowadays universal. There has also been an enormous increase in the volume of these relations. The history of co-existence in this sense coincides in fact with the history of international relations.\(^1\)

We shall make a closer approach to contemporary conditions if we envisage co-existence of States having different economic and political systems. Such is certainly the case in our days, but it was also the case in the past, in certain periods of history (e.g. in the period of transition from feudalism to capitalism). To state that at present we have co-existence of States belonging to two different economic systems would be to state only half of the truth. Co-existence of States in our epoch has specific features; it is a co-existence of States belonging to two **diametrically** different economic systems. One system is based on private property in the means of production, the other on common property.

To this division correspond two diametrically different ideologies: one of socialism and communism, i.e. the Marx-Lenin theory of reconstruction of society and building a new society based on common property in the means of production, envisaging elimination of social classes and extinction of the State; the second, propounding principles of existing capitalist society based on private property. Profound differences of ideologies reflect differences between economic systems, not vice-versa.

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1 In this sense the term “co-existence” has been used in the widely known judgment of the Permanent Court of International Justice in the ‘Lotus’ case: “Les règles de droit liant les États procèdent de la volonté de ceux-ci, volonté manifestée dans des conventions ou dans des usages acceptés généralement comme consacrant des principes de droit et établis en vue de régler la coexistence de ces communautés indépendantes ...” Recueil des Arrêts, Sérle A, No. 10, p. 18.
To deal with present day problems of international law it is necessary to take co-existence as it is now. This means that we ought to consider not co-existence of States in general, not even co-existence of States with different economic and political systems, but co-existence of States belonging to two diametrically different economic systems. The specific character of co-existence in our times can hardly be denied and still it is usually overlooked when dealing with the problems of international law.

Nobody can contest that the event of primary historic significance in the 20th century was the Great October Socialist revolution in Russia, the creation of a new economic system diametrically different from the then existing system, the appearance of the first socialist State and, 30 years after, the appearance of a number of new socialist States.

In our epoch the development of society as a whole, the development of international relations and international law, are generally conditioned by the course and by the results of the competition between two existing social systems.

The subject of co-existence and international law falls necessarily into two parts: co-existence and international law, international law and co-existence.

The first group of problems relates to the influence of coexistence on international law. What are the main changes which have taken place during the period of co-existence in the general international law, that is in the law recognized by all States and regulating relations between them? What main developments are taking place in the general international law now? What are the forces at work bringing about those changes?

There is a second group of problems. International law as well as internal law exercises influence upon social relations it is called to regulate. What is the character of this influence and its scope? What is the role of international law in ensuring peaceful co-existence in the conditions of to-day?

Those are problems of primary importance to the theory of international law; they are of no less significance from the point of view—how can international law best serve the cause of international peace?
CHAPTER I  CREATION OF GENERAL INTERNATIONAL LAW NORMS

In examining the influence of co-existence of States belonging to two diametrically different economic systems on international law we have to start with the problem of modes of creating its norms. We ought to study, as it is usually put, “formal sources” of international law, or in other words the processes by which the norms of this specific law come into being. This approach affords the possibility of basing conclusions not on some purely logical categories but on the very facts of international life, bearing in mind that the first condition of every scientific investigation is to take facts as they are. The study of modes of creating norms of international law may pave the way to examining the substance of these norms and also to discovering social forces which determine the main characteristics of international law.

1. INTERNATIONAL TREATY

In international law we see first of all norms created by treaties concluded between States. An international treaty as a means of creating international law norms is a clearly expressed agreement between States concerning recognition of this or that norm as a norm of international law, changing or abrogating existing norms of international law. So a conventional norm of international law is a result of an agreement between States expressed in a specific form—in the form of an international treaty. As to the division of treaties into so-called law-making treaties and other treaties, the importance of this problem seems to have been greatly exaggerated. Anyhow this problem goes beyond the framework of this study. What is necessary to establish here is that norms of international law may be created by treaties.

This norm-creating quality of an international treaty has always been recognized by internationalists, with the exception of those who considered that States do not create norms of international law at all, and that different sources of international law constitute merely an outward expression of pre-existing law.

2. CUSTOM

Everyday observation shows that a considerable part of general international law consists of customary norms. States refer to such norms in their mutual relations and nobody has ever contested that there are customary norms of international law.
But as soon as we approach the problem of the main characteristics of customary rules and especially the problem of the essence of such norms a considerable difference of opinion becomes evident. Professor J. Basdevant in his course of lectures at the Hague Academy of International Law in 1936 said about the problem of customary international law: “Depuis que l'on écrit sur le droit international ce problème a été envisagé sans que l'on soit arrivé à se mettre d'accord.”2 It is no less true now than it was over 20 years ago.

There may hardly be any doubt that the problem of customary international law is one of the most important and also one of the most difficult of all the problems of international law. Upon the solution of this problem depends to a very great extent the whole concept of international law. It is therefore no wonder that this problem has been under constant consideration by international lawyers. Certainly the fact that no unanimity of opinion has been reached and the problem of customary international law is still far from being solved should not discourage further study. Customary norms of international law grow out of international practice. What are the main elements of this practice resulting in the formation of a customary rule of international law?

First of all there is an element of repetition. Historically a customary norm of international law arises out of repeated actions of States. Continuity, that is an element of time, usually plays an important role in a process of formation of a customary norm. But an element of time may scarcely be accepted even as merely creating a presumption in favour of the existence of a customary norm, still less may it be considered as legally required that a customary rule should be “ancient” or of long standing.3

The characteristic of a rule as “ancient” may be a positive as well as a negative factor. Along with the meaning that it has been in use for a considerable time and therefore proved by life, this very characteristic may give rise to some doubts as to whether a rule of such an ancient origin corresponds to the present circumstances. But the most important thing in relation to the time element is that though time plays historically, as a matter of fact, a considerable role in the process of formation of a customary rule of conduct, it is juridically irrelevant.

As has rightly been pointed out by many authors, not every repetition creates a customary norm of international law. A continuous habit of doing certain actions may not result in forming a norm of conduct, and if a norm of conduct has been formed this norm may not necessarily be a legal norm. This may be a norm of international morality or a norm of comitas gentium.

Some writers express the opinion that international practice leading to the formation of a customary rule must have been continued and repeated without interruption of continuity.4 This suggestion is untenable. No rule of international law has ever been created by practice “without interruption” of continuity.5

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2 58 Recueil des Cours (1936, IV), p. 505.
3 In this sense see J. Basdevant, Règles générales du droit de la paix, 58 Recueil des Cours (1936, IV), pp. 513, 518; J. Kunz, The Nature of Customary International Law, 47 American Journal of International Law (1953), p. 666.
4 See, for instance, J. Kunz, loc. cit.
5 See J. Basdevant, Règles générales du droit de la paix, 58 Recueil des Cours (1936, IV), p. 518.
Let us take as an example a principle of non-intervention in the internal affairs of a State which is a universally recognized principle of the modern international law. This principle first appeared in international law in the time of the American and French revolutions in the 18th century. It gradually gained strength, though at times there were considerable set-backs; the 19th century, and especially the first half of it, saw many interventions contradicting to the principle of non-intervention: Napoleonic wars, the Holy Alliance, which made a policy of intervention its official policy, etc. In spite of all these facts the principle of non-intervention had, up to the second half of the 19th century, become a principle of the general international law as it was understood at that time.

But at the same time it would be incorrect to assert that interruption may not influence the formation of a customary rule of conduct. It may really destroy a customary norm which is still in the process of formation. All depends on what kind of interruption we have before us. Though again the most important point is that non-interruption as well as the time element is not decisive in itself.6

The question of whether a customary rule may be established only by positive actions or by abstention from certain actions as well gave rise to some controversy. Prof. J. Basdevant pleading for France in the affair of *Lotus* before the Permanent Court of International Justice in 1927 had expressed an opinion which was often cited afterwards. He said as follows: “L’attitude adoptée par les États de s’abstenir de poursuivre les ressortissants étrangers supposés coupables d’avoir provoqué un abordage en haute mer constitue une règle coutumière internationale.”7

Contrary opinion was expressed by the representative of Turkey and by Judges Nyholm and Altamira who held the view that negative facts were unable to form a customary norm.8

A customary rule of international law grows out of international practice. Practice of States may be that of taking actions in certain circumstances or taking no action. Of course it is usually much easier to ascertain the existence of a customary rule in a case of positive acts, but there is no reason whatsoever to deny the possibility of creating a customary rule by way of a negative practice. The continued habit of not taking actions in certain situations may certainly lead to the formation of a rule of conduct which may be a legal rule. And it goes without saying that all that has been said before concerning the element of repetition and time applies as well to the negative practice.


Many principles and norms of international law contain to a smaller or greater extent an obligation on States to abstain from certain actions in the relations with other States. The principle of respect of sovereignty, for instance, obliges the States to refrain from any act which may constitute an infringement of the sovereignty of another State. According to the principle of nonintervention in the internal affairs of other States every State is under the obligation to refrain from all acts which constitute an interference with the internal affairs of another State. Even such a principle as the principle of the freedom of the high seas, positive in itself, contains an obligation of a negative character, namely to refrain from all acts which may prejudice “the interests of other States in their exercise of the freedom of the high seas”. How might such principles have come into being if there had not been a continuous practice of States of abstaining from certain actions?

All the elements of a customary norm of international law stated before come under the heading of “usage”. But it is generally accepted, and with good reason, that “custom in its legal sense means something more than mere habit or usage.”

It has already been pointed out that a rule of conduct, if any, created by repetition of certain actions or continuous abstentions of States from doing certain actions may not necessarily be a legal rule. Only a recognition on the part of States of such a rule as legally binding, i.e. recognition of such a rule as a rule of international law, has a decisive influence and consummates the process of creating a customary norm of international law. In this sense Article 38 of the Statute of the International Court of Justice expressly speaks of “international custom, as evidence of a general practice accepted as law” (“reconnue comme étant de droit”). A certain ambiguity in this formula gave rise to different interpretations and criticism.

In our opinion Article 38 of the Statute of the Court defines a customary norm of international law first of all as evidence of a general practice. But this general practice is not sufficient to create a customary norm. The general practice, or rather a rule of conduct which is a product of this practice, becomes a customary norm of international law only if it has been accepted or recognized by States as legally binding, as a rule of law.

What does recognition or acceptance by States of a certain rule of conduct as legally binding, as a legal norm, mean? What is the essence of this recognition? Recognition or acceptance by a State of a certain international practice as a rule of law means an expression of a will of a State, it is a consent to consider this customary rule as a rule of international law and therefore as a juridically obligatory rule.

At the same time such a recognition or acceptance implies an offer to other States to accept this rule as a norm of international law. It is a tacit offer, there are no conferences

9 Convention on the high seas of 29 April, 1958, Art. 2.
11 See for instance Ch. Rousseau, Principes généraux du droit international public, Paris, 1944, p. 120.
or negotiations; this offer is implied in actions of State constituting its recognition of a certain rule as a legal norm.\textsuperscript{13}

If such an offer to consider a certain rule as legally obligatory is accepted by some other States, i.e. that these States show by their actions that they recognize this rule as legally binding, in this case a customary norm of international law has made its appearance.

The conclusion that agreement is the essence of custom as a mode of creation of norms of international law is not a self-evident truth. It is a scientific abstraction, reflecting in a general way the realities of life and making it possible to understand more fully the essence of creating a customary norm of international law.

If a customary norm of international law is produced by agreement between States and therefore there is an expression of wills of the States, the sphere of validity of a customary norm is confined to relations of those States which recognized this norm as a norm of law, i.e. which are parties to a tacit agreement.

The sphere of validity of a customary principle or norm of international law may expand by and by, and it is usually in this way that some customary norms have become universally recognized. In many cases a start has been given to a customary norm by a declaration of a single State. Many principles of international law have been proclaimed, for instance, by a revolutionary France in the 18th century, such as respect for the sovereignty of a State, non-intervention in the internal affairs of a State, the principle that military operations should be directed only against military objects and not against civilian population, etc. Or a prohibition of aggressive wars, a principle enunciated by the Soviet State in its Decree on Peace of 8 November, 1917.\textsuperscript{14}

All those principles have gradually won recognition on the part of other States, recognition which found its expression in different ways. These principles are now universally recognized principles of international law.

The principle of prohibition of aggressive war, for instance, came into international law as a conventional principle of the Paris Pact of 1928. In relations between the parties to the treaty this principle replaced the former principle \textit{jus ad bellum}. Gradually the new principle had been recognized by other States, either by adhering to the Paris Pact or in a customary way, so that for some States it was conventional, whereas for others a customary principle of international law. In this way the principle of prohibition of aggressive war has become a universally recognized principle of international law replacing the old principle \textit{jus ad bellum}. It has been further developed by the Charter of the United Nations which speaks already of the prohibition of the threat of force and of the use of force in international relations (Art. 2, para. 4 of the Charter) and with this new content it has been universally recognized by States and is now a principle of general international law.

Starting with the facts of international life we have come to the conclusion that the essence of the customary process of creating norms of international law is agreement

\textsuperscript{13} See in this sense K. Strupp, \textit{Règles générales du droit de la paix}, 47 Recueil des Cours (1934, I), p. 306.

between States. And now coming back to the facts, armed with this general idea, we may say that juridically relevant are all those facts which contribute one way or the other to forming an agreement giving rise to a customary norm of international law.

There are many writers who reject the concept of the *pactum tacitum* but are of the opinion that “recognition” or “acceptance” of, or “consent” to consider a rule as legally binding constitute a decisive element in the process of creation of a customary norm of international law. So M.J. Basdevant states that customary norms “qui naissent spontanément des exigences de la vie internationale reçoivent un caractère positif du fait qu’elles sont reconnues par ceux qui sont en situation de leur assurer une certaine force d’application dans la vie internationale”.¹⁵

Professor Ch. de Visscher in his somewhat vague definition expresses himself in the following terms: “Dans les rapports internationaux, une coutume se forme quand une pratique, par ses applications concordantes, paraît suffisamment implantée pour que l’on puisse y voir l’expression d’un équilibre et d’une stabilisation au moins provisoire des intérêts en présence, par conséquent comme l’élément d’un ordre juridiquement accepté par la généralité des États”.¹⁶ And a few lines below he adds: “Il est donc bien vrai que le fait précède ici chronologiquement la qualification légale; mais celle-ci seule reste décisive, et jamais de la seule uniformité ou de la régularité extérieure de certaines attitudes il n’est permis de conclure à la normativité.”¹⁷

These authors speak at the same time of the *opinio juris* as of an indispensable element of customary norms. In the judgment of Professor J. Basdevant the *opinio juris* means that “telle règle est reconnue comme faisant droit.”¹⁸

Professor Ch. de Visscher considers the *opinio juris* as “réflétant l’attitude du pouvoir à l’égard d’une pratique donné”.¹⁹ Such an understanding of the *opinio juris* practically amounts to recognition.

Usually, however, the term *opinio juris* is given a meaning quite different from that indicated above. And here starts the real trouble with this notion of *opinio juris*. Professor Kunz defines the *opinio juris* as follows: “The practice must have been applied in the conviction that it is legally binding.”²⁰

At the same time Professor Kunz rightly envisages difficulties to which this concept of the *opinio juris* gives rise. He says that on the one hand it is said that usage plus *opinio juris* leads to a customary norm, but on the other hand, in order to lead to such

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¹⁷ Ibid., p. 357.
¹⁹ Ch. de Visscher, *Théories et réalités en droit international public*, Paris, 1955, p.188.

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a norm, the States must already practice the first cases with the opinio juris. And he adds: “Hence the very coming into existence of such norm presupposes that the States acted in legal error.”

Really the opinio juris understood in this sense implies that States should act in the conviction that the corresponding norm of international law already exists and that therefore such a norm had come into being, not out of the practice of States but has existed irrespective of this practice. This reasoning inevitably leads to a conclusion that a norm envisaged by the concept of the opinio juris is not at all a customary norm growing out of the practice of States but a kind of a “natural law” norm.

A leading argument advanced against the concept, according to which the essence of custom as a specific mode of creation of international law norms is an agreement between States, is that allegedly a customary norm of international law binds States irrespective of “recognition” or “acceptance” of this norm on the part of these States. The States, says Professor J. Basdevant, “ne reconnaissent pas a l’Etat nouveau la faculte d’accepter ou non la regle coutumiere; ils le considèrent comme soumis de plein droit au droit coutumier. La doctrine de la Vereinbarung se trouve ici en presence d’un difficile qu’elle a cherche a tourner en faisant appel a une fiction…”

Professor H. Kelsen asserts that “international customary law could be interpreted as created by a consent of the States only if it were possible to prove that the custom which evidences the existence of a norm of international law is constituted by the acts of all the States which are bound by the norm of customary law, or that a norm of customary law is binding upon a State only if this State by its own acts participated in establishing the custom in question”.

And continuing the same line of thought Kelsen says that since customary norms of general international law are binding upon all the States, it would be necessary to prove that all the States have consented to all the customary norms of general international law by their actual conduct, by participation in the establishment of the custom which evidences the law. According to Kelsen such a proof is not required by international law. Customary norms of international law, according to Kelsen, are created not by “the common consent of the members of the international community” but by “a long established practice of a great number of States, including the States which, with respect to their power, the culture, and so on, are of certain importance”.

The foregoing arguments advanced by various authors against the concept of agreement applied to custom are not valid. It does not follow from the concept of agreement that all States should participate in creating every specific customary norm of international law. It is not necessary at all that “practice” should be universal. A customary norm of international law may be created by the practice of a limited number of States and in fact it may become first a customary norm with a limited sphere of application. But to become a norm of international law of universal application it should be recognized by all the States. This extension of the sphere of validity is in some respects analogous to what we may observe in the case of conventional norms of international law. Really, norms of a certain international treaty very often have not been created by all the States parties to this treaty. Those States which have adhered to this treaty did not take part in establishing the norms of this treaty.

Now as to the allegation that a customary norm established by long practice of “a great number of States” is binding upon all other States irrespective of their attitude to this norm, the point is of the gravest importance. Such an assertion can not be accepted either from the theoretical standpoint or on practical considerations.

The above mentioned thesis is, in fact, based on the assumption that the majority of States in international relations may dictate norms of international law binding upon all the States. This idea has been recently developed to its logical limit by Professor R. Quadri. Explaining his concept of “collective or social will” (volontà collettiva o sociale) Professor Quadri maintains that a will, a decision of a group of States, may create in international relations legal norms binding upon all States, i.e. create norms of universal international law. According to Quadri international law is based on the “decision of the overwhelming force in the international community”.25 In his other work published in the Recueil de Cours the author explains what he means by the “overwhelming force”. He says: “Il suffit la volonté, la décision et l’action commune d’un ensemble étant en mesure d’imposer le cas échéant son autorité.”26

This concept is in complete contradiction with the fundamental universally recognized principles of international law, and especially with the principle of equality of States. There is no doubt that the attitude of the majority of States, including States of both social systems, and especially the position of great powers, is of primary importance in the process of creation of universally recognized norms of international law. It is a factual situation. Juridically wills of different States in the process of creating norms of international law are equal. In international relations the majority of States cannot create norms binding upon other States; this is an immediate consequence of the principle of sovereign equality of States.

In practically all cases when it is necessary to find out that a specific customary norm belongs to a body of rules of general international law the normal procedure consists in investigating whether there is the “general practice” accepted as law and whether this acceptance or recognition has been given by all the States.

25 R. Quadri, Diritto internazionale pubblico, Palermo, 1956, p. 89.
Of course a general recognition of a certain rule as a legal norm may be a good reason for assuming that this norm is universally recognized, but it is only a good reason for a presumption, not for a final conclusion.\textsuperscript{27} It goes without saying that it is not always possible, and may even in most cases be impossible, to state with mathematical precision that a specific norm is recognized by all the States as a norm of international law, but we may say that it is a usual case in social problems, and that difficulties which may arise in the process of calculation may not be considered as undermining the rule itself.\textsuperscript{28}

This way, as we understand it, has been followed by the International Law Commission. In dealing with the problem of privileges and immunities of administrative, technical and service staff of a diplomatic mission the Commission has found out that some States (the U.S.A., the United Kingdom, the Soviet Union and others) include, on the basis of reciprocity, members of the administrative and technical staff, and some even members of the service staff, among the beneficiaries of the privileges and immunities, though there are considerable differences in the scope of those privileges and immunities granted to different categories. And the Commission has easily come to the conclusion that there is no rule of international law on the subject, as there is no general practice on the subject.\textsuperscript{29}

On the problems of exemption from customs duties on articles for the personal use of a diplomatic agent, the Commission stated that “as a rule, no customs duties are levied on articles for the personal use of the diplomatic agent or members of his family belonging to his household, including articles intended for his establishment”. Thereby the Commission came to a conclusion that the practice of exemption is general. But then the Commission added, and with good reason too, that “this exemption has been regarded rather as based on international comity”.\textsuperscript{30}

The doctrine according to which customary norms recognized as such by a considerable number of States are binding upon all the States implies a considerable danger in the epoch of coexistence. This point should be specifically emphasized in view of the fact that this doctrine is widely accepted by western writers, and some judgments of the International Court of Justice maybe interpreted in favour of this doctrine.

This doctrine may certainly encourage a definite group of States to try to impose upon new States, for instance upon socialist States or newly born States of Asia and Africa, some norms which may be considered by this group of States as norms of

\textsuperscript{27} See in this sense Strupp, who says that when a norm is applied by any considerable number of States “il y a une presumption normale, \textit{presumptio juris}, donc refutable, en faveur de la validité la norme pour tous les Etats...” (K. Strupp, \textit{Regles générales du droit de la paix}, 47 Recueil des Cours (1934, I), pp. 301-02).

\textsuperscript{28} See e.g. J. Brierly who says: “This test of general recognition is necessarily a vague one; but it is of nature of customary law, whether national or international, not to be susceptible of final formulation.” (\textit{The Law of Nations}, Oxford, 1955, p. 62.)

\textsuperscript{29} See Report of the International Law Commission covering the work of its ninth session, 1957, Commentary to Art. 28.

\textsuperscript{30} Report of the International Law Commission, 1957, Commentary to Art. 27.
general international law but which have never been accepted by the new States and which may prove, partly or wholly, unacceptable to these new States. Of course such a tendency to dictate norms of international law in the present circumstances is doomed to failure, but the situation which may be a result of that tendency may lead to serious international complications.

3. Treaty and Custom in General International Law

International treaty and international custom are two modes of creating norms of international law. The essence of both of these modes is agreement between States on the subject of recognition of a certain rule as a norm of international law. It means that the binding force of conventional and customary norms of international law is the same.

In relation to the place occupied by customary norms and conventional norms in general international law, there is a concept widely accepted in western literature on international law. According to this concept an international treaty is not a source of general international law, i.e. a conventional norm can not be a norm of general international law. Partisans of this doctrine consider that general international law is exclusively customary law. One of the leading representatives of this opinion, Prof. H. Kelsen outlines the said doctrine in the following terms: “General or common international law is customary law valid for all States belonging to the international community. (Customary law is law created by the habitual practice of States.) Particular international law is valid for some States only, and comprises especially norms created by treaties valid only for the contracting parties”.31

There are some other authors who, while being essentially of the above stated opinion, admit exceptionally the existence of conventional norms of general international law. So, for instance, Professor A. Verdross considers that general international law is substantially customary law but, at the same time, he points out that some multilateral treaties are also part of general international law. He specifically refers to the Briand-Kellogg Pact of 1928, the Statute of the League of Nations and to the Charter of the United Nations.32

The concept according to which general international law is exclusively customary law, though quite correct in the time of Vattel,33 is obsolete; it does not reflect the real present day situation as to the sources of international law. The existence of a considerable number of multilateral international treaties to which all or almost all States are parties (i.e. general or universal international treaties) and also extensive efforts in the field of codification of international law have led to a situation when international treaties become a direct means of changing, developing and creating new norms of general international law.

We should also not lose sight of the fact that with the enormous growth in the number of international treaties the amount of conventional norms in the whole network of international law is increasing. This also tends to increase the indirect influence of international treaties on general international law.

An international treaty possesses a quality which makes it especially fit to be a means of creating norms of international law in the epoch of coexistence: it is an express agreement between States. This is of considerable importance for proving the fact of an agreement and also the contents of this agreement. It should also be taken into consideration that in an age of rapid changes in every sphere of life international treaty is a more suitable means of creating norms of international law than custom.34

The concept that international custom constitutes a primary and the most important means of creating norms of international law was certainly correct for the 19th century, but in view of the changes indicated above it no longer reflects the present day situation in international law. In contemporary conditions the principal means of creating norms of international law is a treaty. This is the point of view held by the great majority, if not by all, of the Soviet authors who have treated this subject.35

4. The Problem of General Principles of Law

The problem of general principles of law has been a subject of animated discussion, especially in connexion with Article 38, 3 of the Statute of the Permanent Court of International Justice and now of the Statute of the International Court of Justice.

The great majority of western authors, following Lord Phillimore’s definition, hold the opinion that the general principles of law are principles of national legal systems common to all “civilized nations”.

But as to the relation to these principles to international law there is a great variety of opinions. The representatives of the new doctrine of natural law see in general principles of law justification of their concept. According to M. L. Le Fur, though the general principles of law are not directly principles of natural law which are few in number, “les principes généraux découlent directement du droit naturel ou objectif Tous deux en effet puissent leur fondement dernier dans cette notion de justice et de moralité qui est

34 This has rightly been pointed out by Ch. Visscher, see his Coutume et traité en droit international public, Revue Générale de Droit International Public, 1955. He says that, in the present day international relations there is no such, as he calls it, “degree of passivity” (degré de passivité) which has played a substantial role in the formation of customary norms of international law. In these conditions international custom may play only a subordinate role in comparison with treaty (“... le coutume ne saurait tenir qu’un rôle subordonné”), p. 359. It seems, though, that the author considers it a negative development (see his Théories et réalités en droit international public, Paris, 1955, p. 196).

universelle et qu’on peut dire naturelle chez l’homme”. These principles should find their positive expression in the municipal law of “civilized States”.36

According to Professor Verdross general principles of law as they are understood in Article 38, 3 of the Statute of the Court are principles of natural law which have found their positive expression in the existing national legal systems. General principles of law are based on the common legal consciousness of the peoples. They should be distinguished from general principles of international law as general principles of law do not find their expression in treaties or in international custom. They constitute therefore a separate source of international law. General principles of law, according to Verdross, constitute a foundation of the whole international law, being at the same time an integral part of it.37

There are other authors who consider that general principles of law if understood as being principles of national legal systems have nothing to do with international law. In the opinion of M. D. Anzilotti the general principles of law indicated in paragraph (c), Article 38 of the Statute of the Court, are first of all general principles of international law and, in the second place, principles universally recognized in the legislation of different countries. If the former, though having originated in national legal systems, have been recognized as principles of international law, the latter, remaining principles of national legal systems, do not belong to international law and may be used only as building materials for framing a norm of international law.38

Quite a number of other authors hold the opinion that the general principles of law in the sense of Article 38, 3 of the Statute of the Court are only those principles of national legal systems which have entered international law by way of custom or treaty. Professor P. Guggenheim says that general principles of law “reposent soit sur le droit conventionnel, soit sur le droit coutumier”:39 Dr B. Cheng, while insisting that “the essence of general principles of law is the fact of their being common to all legal systems”40 admits that “international custom or customary international law, understood in a broad sense, may include all that is unwritten in international law, i.e. both custom and general principles of law”.41 The authors holding the opinion that principles of national legal systems as such form part of international law refer usually to the decisions of international courts and tribunals. We are going to deal with the role of those decisions in the creation of norms of international law later on. At present it will suffice

38 D. Anzilotti, Corso di diritto internazionale, Roma, 1928, p. 106-07; G. Morelli considers that application of a particular general principle of law in international law may mean that this principle has entered international law through custom or treaty and that Art. 38, 3 does not make “general principles of law” norms of international law. And he adds: “non resta che considerare quei principi come semplici criteri ai quali, nella constatata assenza di norme consuetudinarie 0 convenzionali applicabili al caso, dovevano conformarsi le singole decisioni della corte…” (Nozioni di diritto internazionale, Padova, 1951, p. 29).
41 Ibid., p. 23.
to say that there is no general practice on the subject, in the sense, it should be understood, in the time of co-existence, and there is no recognition of such a situation as legally binding by the States belonging to both economic systems of today.

Principles of municipal law of various States exercise a profound influence on international law, but this does not mean that these principles may be, as such, also principles of international law. The juridical and class nature of the principles of national legal systems differs from that of principles of general international law. Principles of municipal law express the will of the ruling class of one State. They may be changed by the State, so that a principle considered to be “common” to all legal systems today may lose this tomorrow. Principles of national legal systems may be binding only in the framework of municipal law, as one State cannot create norms binding upon other States in international relations.

The fallacy of the doctrine indicated becomes especially striking in the light of the co-existence of States belonging to two diametrically different economic systems. General principles of law which may be found in the legal systems of States belonging to those two systems, though sometimes containing technically similar rules, are of different juridical and class nature, i.e. are different as legal norms. There are therefore no general principles “common to all States”. There may be common legal notions reflecting general features of legal phenomena, but not common legal norms. But in spite of this, general principles of different national legal systems are of importance to international law. They exercise a general influence on the development of international law and they influence it also in a direct way, being a material for creating norms of international law through custom or treaty. This transformation of principles of national legal systems leads to a creation of corresponding principles of international law, which may be technically similar to those of the municipal law of various States, but as legal norms these are different.

From the point of view of a scientific classification of modes of creating norms of international law Article 38, 3 of the Statute of the Court cannot be accepted as denoting a separate mode of creating norms of international law. It may be interpreted as indicating the historical origin of a certain category of principles recognized as norms of international law. Therefore “general principles of law” can only be principles of international law. This point of view on the subject of “general principles of law” is generally accepted in the Soviet literature on international law, though there is some difference in interpretation of this general idea by several authors.42

5. THE ROLE OF “AUXILIARY SOURCES” OF INTERNATIONAL LAW

The norm-creating process in international law is a very complicated one. International treaty and international custom are two modes which consummate the process

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of creating norms of international law and therefore bring into being norms of law. However, in addition to these two modes there are other forms which play a certain role in the norm-creating process taken as a whole.

These forms constitute definite stages in the process of creating, developing, altering and annulling norms of international law, i.e. are stages in the process of moulding agreement between States on these questions. Moreover, some of them help to establish the fact of the existence of norms of international law and play a not minor role in their interpretation. Considering the role of these forms they may be called “auxiliary sources” of international law. These auxiliary sources include resolutions of international bodies, decisions of international courts and arbitral tribunals, national legislation and decisions of municipal courts, opinions and resolution of different non-governmental organizations and “teachings of the most highly qualified publicists of the various nations” (Art. 38 of the Statute of the Court).

Decisions of international bodies, especially decisions of the General Assembly and of the Security Council of the United Nations, adopted in conformity with the provisions of the Charter, play an important role in the process of forming new principles and norms of international law, corroborating, consolidating and interpreting existing principles and norms of international law. They do not, however, create norms of international law. The United Nations is not a world government and is not empowered to dictate rules of international law. According to the Charter, decisions of the General Assembly on different questions regarding relations of States may not go beyond recommendations, and therefore are not legally binding upon States, though decisions of this body adopted by the votes of States belonging to both existing systems, including great powers, possess a great moral authority.

As to the Security Council, it may adopt decisions binding upon States. Article 25 of the Charter stipulates that all Members of the United Nations should abide by the decisions of the Security Council, adopted in accordance with the provisions of the Charter, and carry them out. However, a decision of the Security Council is an act relating to a specific case only and, therefore, does not create a norm of international law. It is an act of application, but not one of creation, of law.

What has just been said about the United Nations is still more justified with regard to any other general international organization.

Decisions of international courts and arbitral tribunals play an important role “as subsidiary means for the determination of “rules of law” (Art. 38 of the Statute of the Court). The decisions of the International Court of Justice, for instance, are usually referred to as corroborating or denying the existence of a certain rule of international law. So the Court in its judgment of 9 April, 1949 in the Corfu Channel case corroborated the existence of the principle of the sovereignty of the coastal State over its territorial waters. On the contrary, in its judgment of 18 December, 1951 in the Anglo-Norwegian Fisheries case the Court expressed the opinion that the so-called 10 mile rule, according to which gulfs and bays enclosed by the land of one and the same State may be

43 See Reports of Judgments, Advisory Opinions and Orders, 1949, pp. 18, 23, 36.
considered as internal waters of this State only in the case when their entrance from the sea is not more than 10 miles, is not a rule of general international law.  

But the opinion of Judge H. Lauterpacht can hardly be accepted. This is what he says, referring to decisions of the international courts: “They state what the law is. Their decisions are evidence of the existing rule of law. That does not mean that they do not in fact constitute a source of international law. For the distinction between the evidence and the source of many a rule of law is more speculative and less rigid than is commonly supposed … In so far as they show what are the rules of international law they are largely identical with it.”  

This statement gives rise to objections. To say that international courts “state what the law is” and that “their decisions are evidence of the existing rule of law” is not quite accurate. This concept, rooted as it is in the municipal systems of common law countries is not applicable to international law. To ascribe to international courts a role as the mouthpiece of international law is going too far. According to the Statute of the International Court of Justice decisions constitute only one of the “subsidiary means for the determination of the rules of law” (Art. 38 of the Statute). And Article 59 of the Statute of the Court expressly provides that “the decision of the Court has no binding force except between the parties and in respect of that particular case”. To assert that, though the decisions of the Court are not binding either upon States or upon the Court, yet “no written provision can prevent them from showing authoritatively what international law is, and no written rule can prevent the Court from regarding them as such”, is not in conformity with the above-mentioned provisions of the Statute of the Court. If the Court regarded its own decisions as “showing authoritatively what international law is”, that would mean that it considered them as binding upon itself and upon States. But it is just the contrary of what Articles 38 and 59 of the Statute of the Court provide.

Having no desire whatsoever to underrate the authority of the decisions of the International Court of Justice, especially those decisions which have been adopted unanimously, we ought to state that no other authority may be ascribed to the decisions of the Court except that provided for in the Statute of the Court itself. The International Court of Justice is an international body and like every international body it owes its existence to an international agreement. This agreement is the Statute of the Court. No international body may acquire greater authority than that provided for in the international agreement which has agreement between States, which in some cases may be also a tacit agreement.

National legislation and decisions of municipal courts may also be means of ascertaining what the rules of international law are. This role of the above-mentioned means of ascertainment derives from the fact that norms of international law are created by

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44 See Reports of Judgments, Advisory Opinions and Orders, 1959, p. 131.
47 Former judge Prof. S. Krylov says: “The Court has no right to create a norm not known to International Law in force” (S. Krylov, *The International Court of Justice*, Moscow, 1958, p. 65 (in Russian)).
agreement between States and national legislation, as well as decisions of municipal courts, may be considered in some instances as expressing acceptance or recognition by a certain State of this or that rule as a rule of international law. The municipal courts are organs of the State and as has rightly been pointed out by Judge H. Lauterpacht “their decisions within any particular State, when endowed with sufficient uniformity and authority, may be regarded as expressing the opinio juris of that State”.48

But one point ought to be specified. Judicial decisions, even though regarding the matters of international relations, may still be only expressing opinio juris in the framework of internal law. To be relevant to international law they should express, as suggested by M. K. Strupp,49 opinio juris gentium, i.e. should imply recognition of a certain rule as a norm of international law. This equally applies to national legislation and to various official declarations of States.

Writings of international jurists may also be one of the means of ascertaining the rules of international law. The Statute of the International Court of Justice enumerates, alongside judicial decisions, also “teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law” (Art. 38 of the Statute). Considering specific difficulties proceeding from the multitude of instruments and sometimes also from a considerable ambiguity, especially of customary norms of international law, the doctrine of international law is of considerable help. But at the same time it is true that with the growth of practice of States, evidenced by widely accessible records and reports, and of decisions of international organizations and tribunals reliance on the authority of writers as means of ascertaining norms of international law tends to diminish.50

Opinions and resolutions of social, scientific and other organizations, both international and national, may play a considerable role in the process of development and application of international law. They constitute a kind of subsidiary means for ascertaining the existence of various norms of international law and their interpretation. They may also be very valuable from the point of view of the progressive development of international law as very often they contain suggestions in this respect.

While paying due regard to the importance of the above mentioned auxiliary sources, it should, however, be emphasized that norms of general international law come into being solely as a result of the completion of the international norm-making process, which takes place either in the form of a treaty or in the form of an international custom.

49 See K. Strupp, Règles générales du droit de la paix, 47 Recueil des Cours (1934, I), pp. 307-08.