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Dear readers,

Let us present the second volume of the Kutafin University Law Review (KULawR) to you. You are holding in your hands an innovative product created behind the walls of the Kutafin Moscow State Law University for both Russian and foreign legal community. Previously, apart from some exceptions, Russian legal knowledge was not accessible for English-speaking auditoria.

The first volume of the KULawR was published in September 2014. We tried to present and spread it among wide range of lawyers over the World. We would like to assure you that we are doing our best in order to create a new international fora for international legal collaboration and exchanging experiences and opinions in the framework of our journal.

The current volume covers different topics in the fields of constitutional, international, contractual, international private branches of law as well as a theory and history of law. It united authors from all over the world representing different legal cultures with their unique understanding of law. It looks like a real international consortium of legal mindset, estimations, opinions and knowledge.

We would really like to welcome you to pages of the Kutafin University Law Review. You can also become a part of our Journal team. The KULawR equally accepts submissions from both well-known scholars and talented newcomers. It's a great opportunity to make a step together in order to share our common ideas and contribute to a legal scholarship.

The best ideas are always welcomed!

All additional information you can find on the web page of the journal at www.kulawr.ru.

Kindest regards,
Editors-in-Chief
Irina Alebastrova, PhD, Associate Professor
Paul Kalinichenko, Doctor of science (Law), Professor

ARTICLE

INTERNATIONAL LAW RAISON D'ETRE AND THE GROUNDS FOR THE INTERPRETIVE APPROACH

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Abstract

In constitutional States, principles are of different kinds. Some are of procedural nature or point to the functioning of law ('how'), some others encapsulate the raison d'etre, purpose and value ('what' and 'why') of the legal order, as a whole. With regard to the International legal system the second kind of principles remains much disputed upon, although a clarification of such an issue would be of relevance in the development of IL, especially in the adjudicative sphere.

One of the obstacles to overcome is certainly the account and narrative that legal positivism has offered of IL. This article shall explain, on the one hand, some weaknesses of traditional positivism, with particular concern for the transformation and interweaving of legalities in the supranational sphere. On the other hand, it shall appraise especially the contribution by the late Ronald Dworkin to IL, and how his interpretive theory of law can be projected onto the international environment. Eventually, recent cases before international Courts shall be considered, that expose the way judicial reasoning actually profits from asking questions of principles.

Keywords

International law, principles, legal regimes, legal adjudication, interpretivism, justice.

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1. Re-setting the Scene in the Supranational Domain

1.1. In the last decade the approach to law has been deeply affected by the constitutional way of thinking. It influences both the interpretive endeavours of courts and legal theory advancements. The appearance of the European constitutions, after World War II, shifted the legal universe from the Rechsstaat, Stato di diritto,[1] to the 'constitutional' legal State. This change channeled the posited law through substantive and procedural principles that have become the criteria of recognition, validity and constitutional legitimacy of ordinary legislation. *Mutatis mutandis* - new frames have been provided for the International Law (IL) under the Universal Declaration of Human Rights, the *United Nations Charter* and the European Convention of Human Rights. A large number of regional and quasi-universal agreements, conventions and treaties reoriented legal intercourses, duties and guarantees on the basis of a newly forged substantive programme of principles. And as a matter of fact, despite their disputed nature, principles play a crucial role in the International Law and the Administration of Justice. Principles do not only fill the legal gaps, but also serve as fundamental means for the interpretation of rules and the enhancement of legal reasoning.[2]

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1 JR Silkenat, JE Hickey, PD Barenboim, The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat), Springer, Dordrecht 2014.

2 F Raimondo, General Principles of Law in the Decisions of International Criminal Courts and Tribunals (Brill, Leiden 2008).

However, while a role of principles in States' ambit increases, International Law seems to overlook that special kind of principles which characterizes the identity and builds up the foundation of a legal order. This is due both to the dominant authority of legal positivism in western legal theory, and to the poor elaboration that the latter has made of the international legal order specifically.

1.2. Legal philosophers of the last century, apart from Hans Kelsen, have barely deepened their understanding of International Law for both cultural and analytical reasons. Herbert Hart understated the legality of IL, as minor and incomplete, *vis à vis* the State, the perfect, central case, for the concept of law.[3] Such thesis can only in part be explained by the features and the structure of the International Law of late 50s.

Last decade registers two different reactions in legal theory scholarship. The first one concentrates on Hartian theory of law, and tries to amend it from the inside. It acknowledges that chapter X of the Concept of Law[4] (Hart) is 'embarrassing',[5] and that the thesis assuming the absence of secondary rules in IL is erroneous.

This means that Hartian theory can and should be applied in the international order, either for IL advancement in the subsequent years or because of the characteristics that were overlooked by Hart.[6] This holds true as well for the Hartian 'fundamental norm', *id est* the rule of recognition, that is now found inside the IL system, through criteria set by Art. 38 of the Statute of the ICJ[7] as well as those enshrined in the Vienna Convention for the Law of Treaties.[8] Hartian theory is also adopted in order to describe the newly transformed scenarios where global legal authorities and extra-

3 HLA Hart, The Concept of Law (with a Postscript edited by PA Bulloch and J Raz) (2nd ed, OUP 1997).

4 ibid.

5 J Waldron, 'International Law: 'A Relatively Small and Unimportant' Part of Jurisprudence?' (2013) NYU Law, Public law and Legal Theory WP 209.

6 S Besson, 'Theorizing the Sources of International Law' (2010) The Philosophy of International Law 163.

7 Waldron (n 1) 219.

8 Waldron (n 1) 219.