

THE FEATURES OF THE IMPACT OF THE CIVIL AND COMMON LAW TRADITIONS VIS-À-VIS THE SOURCES OF INTERNATIONAL LAW

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ABSTRACT

International law as a separate legal system has its own sources. This paper is about the impact upon those sources made by two major legal traditions of the modern world: Civil law and Common law traditions. The first part of the paper is about the sources of international law in general, and an attempt is made here to indicate the significance of comparative analysis. The second part presents the great impact that has made Civil law tradition since the time of Rome and the "founders" of international law, taking into account each source that is considered a source of international law extracted from Roman or Civil law. The third part considers through the spectrum of Common law what the value of judicial precedent in the practice of the International Court of Justice (hereinafter: ICJ) is and if the Court creates law. At the end of the paper, some conclusions are attempted.

PART 1.

THE SOURCES OF INTERANATIONAL LAW

The Significance of Comparative Approach

The essence of law, as well as international law, is very complicated. "In one view, the essence of law is that it is imposed upon society by a sovereign will. In the other, the essence of law is that it develops within society of its own vitality"¹. The international law as a separate legal system has its own features. But generally, international law, like national law, is a product of the development or just of a will of international society, the main actors of which are states (as general actors) and international organizations. Both of them can take part in the creation of norms of international law. And the process of the creation of international legal norms has been under the influence of the major legal systems, especially Civil and Common law systems. And "it is not surprising that the theories and practice developed in municipal system of law have exerted their influence upon the minds of those who were called upon to deal with it in the international sphere"².

The investigation of the influence of separate legal systems on the sources of and the whole international law with the comparative approach "assists in the creation

¹ Sir Carleton Kemp Allen, "Law in Making", Oxford (1964), p. 1.

² **W. E. Holder** and **G. A. Brennan**, The International Legal System, Cases and Materials, Butterworths (1972), p. 91.

of a healthy context for the development of international relations"³, as "[m]odern world conditions require that international law be completely re-thought: over and above mere peaceful co-existence between nations new forms of co-operation must develop on the technical matters and upon regional and even world-wide scales"⁴.

Moreover, the comparative approach and comparative law are very important for international law and its development, which is a continuous process and needs to be understood in its multidimensional development. Nowadays the international unification of the law touching international relations that is in other words "unification of sources" is a very significant function of the United Nations and "the harmonization implied by international unification of law cannot be carried out without the help of comparative law"⁵.

General and Subsidiary Sources of International Law

Any legal system requires a body of law⁶. And "international lawyers appear to have persisted longer in search of 'sources'"⁷. Now it is easier to find them as Article 38 of the Statutes of the ICJ defines that "[t]he Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

The Article does not use the word "source" that is why many scholars, taking into account that in the international legal system "states are both the law-makers and the subjects of that law" and "the modalities of creating international law vary from those employed in the national systems" refer to them as "'law creating processes' rather than 'sources of international law'"⁸.

The present paper uses both categories, as the investigation of the impact of two legal traditions vis-à-vis the sources of international law is also an investigation of impact on their creation.

Instead, international law derives from the host of treaties and conventions made by the state and it can be witnessed in the judicial decisions of various courts and tribunals, which often refer to the general principles of law, recognized by civilized nations or the writings of eminent authorities on international law.

It is noteworthy that the Statute defines direct sources of international law and subsidiary means that can be used in order to determine some rules of law. And on the basis of the used terms sources of international law can be classified in general and

³ **Rene' David** and **John E. C. Brierley**, *Major Legal Systems in the World Today*, New York (1978), p. 8.

⁴ **Friedman (W.)**, *The Changing Structure of International Law* (1964), see in Rene' David and John E. C. Brierley, *supra* note 3, p. 8.

⁵ **Rene' David** and **John E. C. Brierley**, *supra* note 3, p. 10.

⁶ **Gerard J. Mangone**, *The Elements of International Law*, Homewood, Illinois (1967), p. 4.

⁷ **Clive Parry**, *The Sources and Evidences of International Law*, Manchester University Press (1965), p. 1.

⁸ **W. E. Holder** and **G. A. Brennan**, *supra* note 2, p. 51.

‘subsidiary’⁹. In other words, the Statute defines "the exclusive character of three law-creating processes in international law: consensual understandings in the widest sense, international customary law, and the general principles of law recognized by civilized nations"¹⁰.

On the other hand, Article 38 defines some means that can be used in order to find out or for determination of the existing rule. But Article 38 pays no attention to the fact where the rule can be retrieved from, or where those abstract rules of international law are that need to be determined.

Moreover Article 38 in its words gives no opportunity for the creation of law by judicial decisions as it mentions Article 59 of the Statute of ICJ, which defines that "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case."

But it is not the case of practice of the ICJ. That is why the judicial precedent of the ICJ is usually discussed on two ways:

1. judicial precedent in the Statute of the ICJ and
2. in the practice of the ICJ.

As far as the teachings of the most highly qualified publicists of the various nations are concerned, the Statute also views them as a subsidiary means for the determination of rules, and in practice, they are also "responsible" for the development of international law.

PART 2.

THE IMPACT OF CIVIL LAW TRADITION

In Civil or Romance-Germanic law tradition, "the accepted theory of sources of law recognizes only statutes, regulations, and custom as source of law"¹¹. It is not difficult to see that the Statute of the ICJ defines the same sources as the general sources of international law. Although "the general principles of law" are not mentioned above, many scholars consider them as one of the features of Civil law tradition¹². And Rene’ David believes that the interpretation of the provision – "general principles of law recognized by civilized nations" that is defined in Article 38/1 (c) of the ICJ Statute, "can only be based in comparative law"¹³.

It is almost a common point of view that "[t]he Law of Nations is but private law ‘write large’. It is an application to political communities of those legal ideas which were originally applied to relations between individuals"¹⁴.

"Roman law can be thought to fulfill its role as a source of inspiration for international law in three ways. First, it might have served as a direct historical source dur-

⁹ The term "Subsidiary source of international law" is used in Oppenheim’s International Law, 9th edition, Longman (1992), I, p.41, para. 13.

¹⁰ **W. E. Holder** and **G. A. Brennan**, supra note 2, p. 52.

¹¹ **J. H. Merryman** and **R. Pe’rez-Perdomo**, *The Civil Law Tradition, An Introduction to the Legal Systems of Europe and Latin America*, Third Edition, Stanford (2007), p. 24.

¹² For example: **Randal Lesaffer**, *Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription*, *European Journal of International Law* (Feb. 2005); 16 No 1, p. 25-58.

¹³ **Rene’ David** and **John E. C. Brierley**, supra note 3, p. 9.

¹⁴ **T. E. Holland**, *Studies in International Law and Diplomacy* (1898), p. 152, in Randal Lesaffer, supra note 16, p. 25.

ing the formative period of the modern law of nations. Second, it might have served as an indirect historical source because of its enduring impact on the great municipal law systems afterwards. Thirdly, it might still be considered *ratio scripta*, the expression of a timeless and universal law"¹⁵.

Historical Approach

In order to see the influence of Civil Law on the sources of international law, it is very important to look through approaches of "the founders" of international law. And almost all of them had a point of view that the origins of international law had come from Roman or private law.

According to the view of the former judge of the ICJ H. Lauterpacht "[t]he modern repudiation of private law as a source of international law seems to have received some support from Grotius and his forerunners and successors"¹⁶.

Albericus Gentilis (1552-1608), Regius professor of Civil Law at Oxford said that "[a]ll Sovereign Princes are obliged to be governed by the Civil Law in the disputes between them."

Hugo Grotius (1583-1645), 'the founder of international law', "did not accept private law (or Roman law) as having *per se* obligatory force in international law, but he certainly was taking over, under a different name, its rules and principles whenever he deemed it to be evidence of the law of nature applicable to a given case"¹⁷. Moreover, as Grotius mentions "with respect to the whole mankind States took the place of private people"¹⁸.

We agree with H. Lauterpacht's view that Roman law had played a paramount role during the formative period (16th -17th centuries) of international law as the great authors of international law, like A. Gentilis, H. Grotius, Richard Zouche and even the 'positivist' Cornelius van Bynkershoek (1673-1743) had made ample use of 'private law analogies' derived from Roman law in articulating the emerging law of nations." Moreover "[i]n the Middle Ages, Roman Law was, to a large extent, conterminous with law"¹⁹.

For Lauterpacht as well, Roman law was the common core under the municipal law system of the Civil law tradition, which can be considered as an indirect historical impact.

In the light of the abovementioned, we can say that Roman law served as a historical source for current international law.

Civil Law and International Law Sources

Treaties

One of the features of Civil Law tradition is that it is a private law, or in other words, "private law derives from Civil Law." And the whole private law is based on

¹⁵ Randal Lesaffer, *supra* note 12, p. 25.

¹⁶ Hersch Lauterpacht, *Private Law Sources and Analogies of International Law*, First published 1927, (1970), p. 8.

¹⁷ *Ibid.*, *supra* note 16, p. 14-15.

¹⁸ H. Grotius, *Mare liberum* 5 (1609): see on Grotius in this respect, R. Tuck, *The Rights of War and Peace, Political Thought and the International Order from Grotius to Kant* (1999), p. 79-89; see Randal Lesaffer, *supra* note 16, p. 28.

¹⁹ Hersch Lauterpacht, *International Law* (1973), ii, p. 185 in Randal Lesaffer, *supra* note 12, p. 34.

contract that is "a promise between two or more parties that the law recognizes as binding by providing a remedy in the event of breach"²⁰. One of the main differences between Common law and Civil law contracts is that in Common law tradition the general pillar of the contract is "'mutual assent' between the parties"²¹, while in Civil law tradition it is 'a promise'.

The Charter of the United Nations recognizes the sovereign equality of the states as one of the *jus cogens* or peremptory principles of international law (*Article 2/1*). And this principle is the basis of international law on treaties (*The Preamble of Vienna Convention on the Law of Treaties, (1969)*). Without this principle, there can be no agreement between states.

"The law of treaties was tributary to contract law"²². And "[t]hat all contracts are based on agreement and that they should bind the parties were Roman ideas"²³. As a matter of substantive law, therefore, "it was the French Civil Code's achievement to recognize that the parties' agreement creates a contract, regardless of its form or subject matter"²⁴.

Taking into account the abovementioned, we agree with Judge H. Lauterpacht that "[t]he legal nature of private law contracts and international law treaties is essentially the same. The autonomous will of the parties is, both in contract and in treaty, the constitutive condition of a legal relation which, from the moment of its creation, becomes independent of the discretionary will of one of the parties" and "[i]t is the law of the State which gives objective force to a contract in private law, and it is the rule *pacta sunt servanda*, one of the fundamentals of international law, which imparts objective force to international treaties"²⁵.

Thus, some conclusion can be made that an international treaty that is in the first level of hierarchy of the sources of international law is an expression of a contract from Civil Law (Private Law) tradition, and that the principle *pacta sunt servanda* that provides: "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith" (*Article 26 of Vienna Convention on the Law of Treaties*.) is nothing else than one of the major features of Civil Law tradition, as "good faith" is applicable to Civil Law only.

Custom

In the hierarchy of the sources of international law, according to Article 38 of the ICJ Statute, the custom is the second one.

There are some controversies among some scholars concerning the significance of the custom in international law. Some of them think that the role of the custom is not so important to feel comfortable at this pace of the development of international

²⁰ **Burnham William**, Introduction to the Law and Legal System of the United States, Fourth Edition, Thompson West (2006), p. 289.

²¹ *Ibid*, p. 289.

²² **Randal Lesaffer**, *supra* note 14, p. 27.

²³ **R. Zimmermann**, The Law of Obligation, Roman Foundation of the Civilian Tradition, Oxford (1996), p. 563-5 in John Bell, Principles of French Law, Oxford University Press (1998), p. 307.

²⁴ **John Bell**, Principles of French Law, Oxford University Press (1998), p. 307.

²⁵ **Hersch Lauterpacht**, *supra* note 16, p. 156.

law, because of its slow movement and development²⁶. The positivist school of law has also attempted to dismiss the role of custom. According to that view, "custom now occupies only a minimal place in codified law which in the future is to be identified with the will of the legislators"²⁷ or with the will of states in the case of international law. This view is also expressed in the official documents of some states²⁸.

The others think that it is a dynamic action for the creation of international law and even more important than treaties, as it has universal application²⁹. And even some scholars think that it is very difficult to "make a sharp division between customary law and the principles of law"³⁰.

However, the application of customary international law by the ICJ is a fact now and nobody thinks that there has been any influence on the contemporary international law by the customary law.

The wording of Article 38 shows that for the creation of a customary rule only the state practice is not enough and that practice must be "accepted as law." The state practice is only the material element; the subjective belief of states in the fact "that behavior is a law"³¹ is also required. In other words "[n]ot only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need of such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*."³² Thus, customary international law consists of state practice (*usus*) and *opinio juris*. And it must be indicated that *opinio juris* is not required to be expressed; it can also be deduced from the state practice, but the practice must be "crystallized"³³ enough.

As the impact of two main legal traditions on the international custom as a source of international law is concerned, it must be born in mind that "Common law is not a customary law." And "[t]he 'general immemorial custom of the realm' upon which the Common law is theoretically based was never anything more than a simple fiction employed in order to remove any suspicion of arbitrariness with respect to what the early judges were actually doing". It can also be added that "[l]aw in England, before the elaboration of the Common law, was essentially customary, and the Common law borrowed many rules from the varied local customs formerly in force, but the process of building the Common law itself was the fashioning of a judge-made law, based on reason, which replaced the customary law of the Anglo-Saxon period"³⁴.

²⁶ For example: **W. Friedman**, *The Changing Structure of International Law*, New York (1964), p. 121-123.

²⁷ **Rene' David** and **John E. C. Brierley**, *supra* note 3, p. 118.

²⁸ For example: The American Law Institute, *Restatement of the Law Third, The foreign Relations Law of the United States*, / St. Paul, Minn. (1987), p. 32.

²⁹ For example: **D'Amato**, *The Concept of Custom in International Law*, Cornell (1971), p. 12

³⁰ Fisheries Jurisdiction Case (United Kingdom v. Iceland), Separate Opinion of Judge de Castro, I.C.J. Reports 1974, p. 100. Available at <http://www.icj-cij.org/docket/files/55/5991.pdf>

³¹ **Malcolm N. Shaw**, *International Law*, Fifth Edition, Cambridge (2003), p. 70.

³² North Sea Continental Shelf Cases, Federal Republic of Germany/ Denmark; Federal Republic of Germany/ Netherlands, (Judgment of 20 February 1969), I.C.J. para. 77. Available at <http://www.icj-cij.org/docket/files/52/5561.pdf>

³³ *Ibid*, p. 57.

³⁴ **Rene' David** and **John E. C. Brierley**, *supra* note 3, p. 358.

But one may ask whether the judge who is trying to apply some rules tries to declare and apply what is already law that exists as a customary rule, or introduces a new rule into the law. In this case some demarcation lines must be made between custom and rules of Common law: "[c]ustom is not usually matter of record, and has to be proved from practice – frequently ancient practice, not easily demonstrable; whereas rules of Common Law, however general and ‘immemorial’, are always to be found in some kind of formulation, whether in decisions, dicta, or commentaries”³⁵.

As it concerns Roman law, “[i]t was accepted as a fact of general recognition ... that the original law of Rome had been customary”, that was codified later, “first with the semi-legendary *Leges Regiae*, and next with the Twelve Tables”³⁶. And even before the thirteenth century “[t]he existing elements, from which the system was to be constituted, were essentially of a customary character”³⁷. But scientific community does not accept the explicit theory of custom in Roman law. And even now “while an explicit theory of custom is absent from the surviving sources of Roman Law, its recognition in great variety of circumstances leaves no doubt of its practical importance”³⁸.

The faith that customary international law has been under the influence of Roman or Civil Law comes also from the fact that in Roman law the essential characteristic of custom was “uniformity or unanimity of practice”³⁹ and that such terms as *usus* or *opinio necessitatis* were essential part for making obligatory custom in Roman law. All these terms can be seen in the judgments of the ICJ and they are used for finding out the existence of customary rules in international relations of states. It does not mean that customary international law is some kind of mirror of the customary law that has been in Roman or Civil Law, but it can be a proof for that it is Civil Law tradition that has made a great influence on recognition customary rules as source of international law by the ICJ and on the further development of customary international law, that has been codified since the 20th century but still serves the international community as a great area of obligatory rules.

General Principles of Law

Article 38/1(c) provides the third source of international law that is “the general principles of law recognized by civilized nations.” These principles do not consist “in specific rules formulated for practical purposes, but in general propositions underlying the various rules of law which express the essential qualities of judicial truth itself, in short of Law”⁴⁰. If we look through the *travaux préparatoires* of the Statute, we can see that Lord Phillimore, who proposed the formula, explained that “by general principles of law he meant ‘maxims of law’” and that these principles must be “accepted by all nations *in foro domestico*”⁴¹. As far as the recognition “by civilized nations” is concerned, the qualification was intended “to safeguard against subjective and possi-

³⁵ Sir Carleton Kemp Allen, *supra* note 1, p. 153.

³⁶ *Ibid.*, p. 81.

³⁷ Rene’ David and John E. C. Brierley, *supra* note 3, p. 33.

³⁸ Sir Carleton Kemp Allen, *supra* note 1, p. 82.

³⁹ *Ibid.*, p. 83.

⁴⁰ W. E. Holder and G. A. Brennan, *supra* note 2, p. 92.

⁴¹ *Ibid.*, p. 92-93.

ble arbitrariness on the part of the judge" and to exclude from consideration systems of law of primitive communities that were not civilized⁴². Article 38/1 (c) "denies the fundamental tenet of positivism that custom and treaty are the only sources upon which the judge is entitled to draw"⁴³.

The general principles of law or super-eminent principles (*Generalklauseln, principes g'ene'raux*) are also regarded as sources of law in Civil law tradition. These principles can be found sometimes "in the enacted law and also, if need be, outside it" and "they bring to light the fact that in the Romance-Germanic family there is a subordination of law to the commands of justice, such as it is conceived at a given moment in a given period, and that this legal family is a *jurists' law*, not merely a system of legislative norms"⁴⁴.

Judge H. Lauterpacht saw these principles as "nothing but the basic principles and features that the main law systems of the world shared" and "as private law, of all branches of the law, had the longest tradition and were by far the best developed, general principles of law under Article 38 referred first and foremost to the common heritage of (Western) heritage national private law systems"⁴⁵. In his view "[i]n consequences, the Statute had legitimated the practice of private law analogies and had given it an essential role in the development of international law"⁴⁶.

H. Lauterpacht indicated also the view of Common law lawyers saying that some 19th and 20th century lawyers, especially from common law countries, directly referred to Roman law as '*ratio scripta*' (*The reason of the thing*). To those authors, Roman law by definition seemed to embody the general principle of law.

For him, private law rules could only be invoked as proof of 'general principles of law' inasmuch as they were truly 'general'. This necessitated that those rules had to be 'universally adopted', which outweighed consideration of 'legal justice'. Under 'universal' he understood that these rules had at least to be found in "the main systems of private jurisprudence"⁴⁷.

Taking into account the abovementioned, it can be stated that "general principles of law" are one of the main features of Civil Law tradition and that it has greatly influenced understanding and applying such principles in contemporary international law. To prove this, a lot of 'maxims of law' functioning in international law and having their roots in Roman law can be adduced, such as *pacta sunt servanda*, *nulum crime sine lege*, *lege specialis derogat legi generalis*, *jus excludenti alios*, *onus probandi incumbit actori*, right of occupation *terra nullius*⁴⁸, etc..

However, one should not forget that "[t]he general principles as a whole are determined and defined by comparative law, i.e. by the process of comparing municipal

⁴² Ibid, p. 93.

⁴³ **H. Lauterpacht**, 'General Rules of the Law of Peace', in E. Lauterpacht (ed.), *International Law, Being the Collected Papers of Hersch Lauterpacht* (1970), I, 179, at 242.

⁴⁴ **Rene' David** and **John E. C. Brierley**, supra note 3, p. 137.

⁴⁵ **Randal Lesaffer**, supra note 12, p. 29.

⁴⁶ **Hersch Lauterpacht**, supra note 16, p. viii.

⁴⁷ Ibid., p. 177.

⁴⁸ The Permanent Court of International Justice recognized the last principle as 'an original means of peaceably acquiring sovereignty'. - *Legal Status of Eastern Greenland* (1931), P.C.I.J., at 44 and 63. Available at http://www.icj-cij.org/pcij/serie_AB/AB_48/01_Groenland_ordonnance_19320802.pdf

systems of law." It means that besides the huge influence from Civil Law tradition, the general principles of international law are influenced also by Common law tradition, because "a principle of law is general if it is being applied by the most representative systems of municipal law"⁴⁹. This notion has been reaffirmed by the ICJ in *Corfu Channel* case⁵⁰.

The teachings of publicists

The one of the subsidiary means for determining rules of international law, per Article 38/1 (d) of the Statute of the ICJ, is "the teachings of the most highly qualified publicists of the various nations". The teachings that can appear in various forms like books, articles, etc., are considered "secondary sources" in terms of the sources of international law.

Looking through the history, writers on international law held a "pre-eminent position" and it was very difficult to speak about and to implement international law and not to rely heavily on the writings of Suarez, Gentilis (16th century), Grotius, Zouche, Pufendorf (17th century), also in 20th century, in particularly in the first part, international law was a subject of influence of scholars (Oppenheim, Lautherpacht, etc.) and even "[u]pon a long view, there seems to be no legal order wherein the publicists – a peculiar term – played a greater part than international law"⁵¹.

The ICJ in its cases mostly does not include statements of publicists, but opinions of judges are full of these statements⁵². Individual judges pay "greater or less regard to the writings of publicists as authoritative statements of the law, although as a matter of policy the Court will not disclose in its judgment the secondary means of determining the relevant rules which have most influenced its deliberations"⁵³. The PCIJ also referred to doctrine. In the judgment of 1925, it referred to the "much disputed question in the teachings of legal authorities and in the jurisprudence of the principal writers"⁵⁴. That is what we can also see in some judgments of the courts in modern Italy, even in the circumstances when the legislature has prohibited citing books and articles in their opinions⁵⁵.

Under the comparative analyze it can be seen that in Common law tradition "law owes less to professors ... and more to judges"⁵⁶, on the other hand "[w]orks of legal

⁴⁹ **W. E. Holder** and **G. A. Brennan**, supra note 2, p. 94.

⁵⁰ **Shabtai Rosenne**, *The International Court of Justice, An Essay in Political and Legal Theory*, Leyden (1957), p. 423.

⁵¹ **Clive Parry**, *The Sources and Evidences of International Law*, Manchester University Press, 1965, p. 103.

⁵² *Fisheries Jurisdiction Case (United Kingdom v. Iceland)*, Separate Opinion of Judge de Castro, p. 100, Separate Opinion of Judge Dillard, pp. 56-57, 61, 69-70, I.C.J. Reports 1974; *Nuclear Test Case (Australia v. France)*, Dissenting Opinion of Judge de Castro, pp. 377-378, Dissenting Opinion of Judge Sir Garfield Barwick, p. 405, 396, 428-429, Separate Opinion of Judge Gros, p. 297, Joint Dissenting Opinion of Judges Onyeama, Dillard, Jimenez de Arechega, and Sir Humphrey Waldock, p. 314, I.C.J. Reports 1974, etc.. Available at <http://www.icj-cij.org/docket>, See also *Edvard Hambro / Arthur W. Rovine, The Case Law of The International Court, 1973-1974*, Vol. VIII, A. W. Sijthoff – Leyden, 1976, p. 65.

⁵³ **W. E. Holder** and **G. A. Brennan**, supra note 2, p. 110.

⁵⁴ *Certain German Interests in Polish Upper Silesia*, P.C.I.J., Series A, N. 6 (1925), p. 20. at http://www.icj-cij.org/pcij/serie_A/A_06/16_Interets_allemands_en_Haute_Silesie_polonaise_Compentence_Arret.pdf

⁵⁵ **J. H. Merryman** and **R. Perez-Perdomo**, supra note 15, p. 59.

⁵⁶ **Rene' David** and **John E. C. Brierley**, supra note 4, p. 365.

scholarship were for a long time the fundamental source of law in Romance-Germanic family", which was not as such for the lawyers from Common law tradition, and "[o]nly recently has the primacy of doctrinal writing given way to that of enacted law, with the establishment of democratic ideas and the advent of codification"⁵⁷.

Looking through the Roman law history, we can find also that in some period great Roman lawyers' opinions were even regarded as a source of Roman law. And it is true that sometimes Romance-Germanic legal family is considered to be "jurists' law"⁵⁸. It is also significant that the main 'representatives' of Civil law tradition: *Corpus Juris Civilis* and the Civil Code of Napoleon were drafted by scholars.

Thus, it is noteworthy that "legal scholars are the dominant actors in civil law"⁵⁹ and it is the Civil Law under whose influence teaching of most qualified publicists has been recognized by the international community as a subsidiary means for the determination of law rules or as a secondary source.

PART 3. THE IMPACT OF COMMON LAW TRADITION

The main sources of international law have their roots in Civil Law tradition, but it did not prevent some lawyers from conclusions that "the law of nations in its full extent, was a part of the law of England"⁶⁰ or that "international law is a part of United States law"⁶¹.

It is very hard to agree with them. No one denies that Common law has its part of influence upon international law, but it cannot be the main source from which the law of nations takes its start, what is more comfortable to say about Roman law.

Nevertheless, the main evidence of the influence upon the sources of international law by Common law is the judicial precedent.

The Significance of the Judicial Precedent in the ICJ and International Law

Article 38/1 (d) provides judicial decisions as a subsidiary means for the determination of rules of law and mentions also Article 59 of the Statute, which stipulates that "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case." A similar article can be found also in the French *Code Civil* (Article 5: "Judges are forbidden to decide cases submitted to them by way of general and regulatory provisions."). But the wording of Article 59 is complicated and "has reference not to the major question" but "to an altogether minor point relating to intervention – a point connected with Article 63"⁶² which lays down: "2. Every

⁵⁷ Ibid, p. 134.

⁵⁸ Rene' David and John E. C. Brierley, supra note 4, p. 137.

⁵⁹ J. H. Merryman and R. Pe'rez-Perdomo, supra note 11, p. 60.

⁶⁰ Lord Mansfield, *Triquet v. Bath*, 3, Burr. 1478 in Jans I. Westengand, American influence upon International law, *Journal of Comparative Legislation and International Law*, New Series, Vol. 18, N. 1 (1918), Cambridge University Press, p. 3.

⁶¹ The U.S. Supreme Court, Mr. Justice Gray in *Paquete Habana*, 175, U.S., 677, 700 in Jans I. Westengand, supra note 60, p. 3.

⁶² Sir Hersch Lauterpacht, Sir Hersch Lauterpacht, *The Development of international Law by The International Court of Justice*, London (1958), p. 8.

state so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it," otherwise Article 38/1 (d) would be meaningless.

Thus, Article 59 does not forbid using judicial precedent but "states directly what Article 63 expresses indirectly"⁶³. Although this point of view is not universal and it is accepted also that Article 59 "excludes the system of proceedings"⁶⁴. And if it is so than only in the Statute and in theory, but not in practice.

In practice, referring to the previous decisions is one of the features of the ICJ. There are many cases where the International Court (the PCIJ and its successor the ICJ) referred to its previous decisions. For example: "Nothing has been advanced in the course of the present proceedings calculated to alter the Court's opinion on this point"⁶⁵, "following the precedent affording by its Advisory Opinion N. 3 ..."⁶⁶, "the Court would normally apply the principle it reaffirmed in its 1950 Advisory Opinion concerning the *Competence of the General Assembly for the Admission of a State to the U.N.* ..."⁶⁷, "as the Court said in its Judgment on the preliminary objections in the case concerning the *Temple of Preah Vihear* ..."⁶⁸, "the principles underlying earlier decisions throw light on the question ..."⁶⁹, etc.

Moreover, it is difficult to find a case where no reaffirmation to previous decisions is made. But it does not mean that international law (and the Court) "adopted the common law doctrine of judicial precedent"⁷⁰. The Court is not bound to act in accordance with its previous decisions. And if in Common law tradition the case-law "follows the rule of *stare decisis*", no such demand is required for the ICJ. But some judges had another point of view. For example, Judge Read in the *Peace Treaties* case adopted a highly technical principle of the Common law: "Article 38 of the Statute is mandatory and not discretionary ... The expression 'judicial decisions' certainly includes ... the principles applied by the Court as the basis of its decisions"⁷¹.

⁶³ Ibid, p. 8.

⁶⁴ Application for Review of Judgment N. 158 of the United Nations Administrative Tribunal, Dissenting Opinion of Vice-President Ammoun, I.C. J. Reports 1973, p. 249. Available at <http://www.icj-cij.org/docket/files/57/6041.pdf>

⁶⁵ German Interests in Polish Upper Silesia (Merits), P.C.I.J., Series A, N. 7 (1926), p.31. Available at www.icj-cij.org/pcij/serie_A/A_07/19_Interets_allemands_en_Haute_Silesie_polo_naise_Fond_Opinion_Rostworowski.pdf

⁶⁶ Greco-Turkish Agreement of December, 1926, P.C.I.J., Series B, N. 16 (1928), p.15. Available at http://www.icj-cij.org/pcij/serie_B/B_16/01_Interpretation_de_l_Accord_greco-turc_Avis_consultatif.pdf

⁶⁷ Fisheries Jurisdiction Case (United Kingdom v. Iceland), Jurisdiction of the Court, Judgment, I.C.J. Reports 1973, pp. 9-10. Available at http://www.icj-cij.org/pcij/serie_B/B_16/01_Interpretation_de_l_Accord_greco-turc_Avis_consultatif.pdf

⁶⁸ Nuclear Tests Case (Australia v. France), Judgment, I.C.J. Reports 1974, pp. 267-267. Available at <http://www.icj-cij.org/docket/files/58/6093.pdf>

⁶⁹ Interpretation of the Convention of 1919 concerning Employment of women during the Night, Advisory Opinion, P.C.I.J., Series A/B, N. 50, 1932, p. 375. Available at http://www.icj-cij.org/pcij/serie_AB/AB_50/01_Travail_de_nuit_Avis_consultatif.pdf

⁷⁰ Sir **Hersch Lauterpacht**, supra note 62, p. 13.

⁷¹ Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, I.C.J., Advisory Opinion, 1950, Available at <http://www.icj-cij.org/docket/files/8/1865.pdf>

On the other hand, the ICJ "while not fettered by the rigidity of the formal doctrine of precedent, has largely adopted its substance"⁷². The appearances of judicial precedential system can be also noticed in Civil law tradition. In the contemporary judicial systems of Civil law, countries courts try not to act in contrary to their previous decisions and that is because of the influence that Common law tradition has had upon Civil law and upon international law.

The adoption of the doctrine of precedent has its reasons. The reason is the same as it was for the creation of formal doctrine of precedent in the countries of Common law. It is the absence of a generally recognized system of law, such as in Civil law. There are, of course, many international agreements that create international legal system, but that system is very stable and needs to be developed. For that the international tribunals and especially the ICJ are the only institutes that can develop it out of the political influence of states and sometimes even try to create a law.

Does the ICJ create law?

The creation of law by judges is a feature of Common law. The Common law, "created by the royal courts of Westminster, is a 'judge made' law" and "[t]he role of judicial decisions has not only been to apply but also to *define* the legal rules"⁷³.

According to the competence the Court has received from the international community, it has no right to create law. The International Court (the PCIJ and then the ICJ) has been set up with certain purposes, defined in its Statute but in years it has grown up "to fulfill tasks not wholly identical with those which were in the minds of their authors at the time of their creation"⁷⁴. The new direction of the Court's function has been the development of international law. And "judicial decisions have become a most important factor in the development of international law, and the authority and persuasive power of judicial decisions may sometimes give them greater significance than they enjoy formally"⁷⁵.

Some scholars think that in the process of the development of international law the Court sometimes creates law. And that law has been defined as "judicial legislation", which is "not a legal term of art, but legal philosophy"⁷⁶.

The Court itself has always denied in its cases that it could create law: "[i]t is clear that the Court cannot legislate ... it states the existing law and does not legislate"⁷⁷. Judge Weiss in *Lotus* case also was against the creation of law by the Court: "[i]nternational law is not created by an accumulation of opinions and systems; neither is its source a sum total of judgments, even if they agree with each other. ... the only source of international law is the *consensus omnium*"⁷⁸. Judge Read declared in

⁷² Sir **Hersch Lauterpacht**, supra note 80, p. 14.

⁷³ **Rene' David** and **John E. C. Brierley**, supra note 3, p. 348.

⁷⁴ Sir **Hersch Lauterpacht**, supra note 80, p. 5. In sociology this phenomenon is described as "a heterogeneity of aims."

⁷⁵ Oppenheim's International Law, 9th edition, Longman (1992), I, p.41, para. 13.

⁷⁶ Sir **Hersch Lauterpacht**, supra note 62, p. 155.

⁷⁷ Legality of the Threat and Use of Nuclear Weapons, ICJ Reports, 1996, pp. 226, 237, para. 18. Available at <http://www.icj-cij.org/docket/files/95/7495.pdf>

⁷⁸ The Case of The S.S. "Lotus", France v. Turkey, Dissenting Opinion of Judge Weiss, P.C.I.J., September 1927, Series A, N. 10, pp. 43-44. Available at http://www.icj-cij.org/pcij/serie_A/A_10/32_Lotus_Opinion_Weiss.pdf

Peace Treaties case that the Court "is not a law-making organ"⁷⁹. The same view was held by Judge Ammoun in *Namibia* case and by Judge Krylov in *Reparation* case⁸⁰.

But taking into account that there is no doubt that the Court can contribute to the development of law, "presumably that development ultimately results in the creation of new law"⁸¹. And it is true that "in many cases it is quite impossible to say where the development of law ends and where its creation begins"⁸². Another interesting view is that Judge Tanaka held in *South West Africa* case: "[w]e cannot deny the possibility of some degree of creative element in the judicial activities" and the Court is permitted "to declare what can be logically inferred from the *raison d'être* of a legal system, legal institution or norm" but is not permitted "to establish law independently of a legal system, institution or norm"⁸³.

Although the Court has been careful "never to assert a power to make a law"⁸⁴, it in several cases has made revolutionary pronouncements that may be considered as a new law. In *Jurisdiction of Danzig Courts* it said that individuals sometimes can be a subject of international law and bring claims based on international treaties⁸⁵. In *International Status of South-West Africa* the Court recognized not only the rights of States and peoples, but also the rights of inhabitation in the matter of petition⁸⁶. And the most important case of this sphere was the *Reparation* case, which is "one of the most significant examples of judicial legislation"⁸⁷. In that case the Court held that "the UN has the capacity to bring an international claim against the responsible *de jure* or *de facto* government (even of non member States) with a view of obtaining the reparation"⁸⁸.

There are a lot of examples of judicial legislation (*The Genocide Convention case*, *The Anglo-Norwegian Fisheries case* etc.), where the Court defined some rights and obligations that had never been before in international treaties, in custom or even

⁷⁹ Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, I.C.J., Advisory Opinion, Dissenting Opinion of Judge Read, 1950, p. 244, Available at <http://www.icj-cij.org/docket/files/8/1879.pdf>

⁸⁰ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), Advisory Opinion, Separate Opinion of Vice-President Ammoun, I.C.J., 1971, p.72. Available at <http://www.icj-cij.org/docket/files/53/5601.pdf>, Reparation for Injuries Suffered in the Service of the United Nations, Dissenting Opinion of Judge Krylov, I.C.J., 1949, p. 219. Available at <http://www.icj-cij.org/docket/files/4/1847.pdf>

⁸¹ **Mohamed Shahabuddeen**, Precedent in The World Court, Cambridge University Press (1996), p. 68.

⁸² Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, Individual Opinion by Judge Alvarez, I.C.J., 1949, p. 190. Available at <http://www.icj-cij.org/docket/files/4/1839.pdf>

⁸³ South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Second Phase, Dissenting Opinion of Judge Tanaka, I.C.J., 1966, p. 277. Available at <http://www.icj-cij.org/docket/files/47/4969.pdf>

⁸⁴ **Mohamed Shahabuddeen**, supra note 82, p. 86.

⁸⁵ Jurisdiction of the Courts of Danzig, Advisory Opinion, P.C.I.J., Series B, N. 15, 1928, p.17, Available at http://www.icj-cij.org/pcij/serie_B/B_15/01_Compotence_des_tribunaux_de_Danzig_Avis_consultatif.pdf

⁸⁶ International Status of South-West Africa, Advisory Opinion, I.C.J., 1950, p.133, Available at <http://www.icj-cij.org/docket/files/10/1891.pdf>

⁸⁷ Sir **Hersch Lauterpacht**, supra note 62, p. 176.

⁸⁸ Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J., 1949, p. 187. Available at <http://www.icj-cij.org/docket/files/4/1835.pdf>

in general principles of law. The Court defined them as the result of the development of law. But in reality, those actions cannot be considered something else but creating law through its development.

Thus, it must be concluded that the ICJ has been influenced by the features of the Common Law tradition very much at least in the field of applying judicial precedent and creation of law.

CONCLUSION

In the light of the above mentioned, some conclusions can be made. As we have already seen both legal traditions have had a significant influence and impact upon the sources of international law and on the international law as a whole.

We can say that in international law Civil law tradition predominates and its impact is more fundamental, as it: (a) has been the historical source for international law, (b) has served as basic sources for general rules of natural law that has formed the law of nations, (c) has still been considered to be '*ratio scripta*', or the expression of universal law. That is why, the main and general sources of international law are the traditional sources of the Civil law tradition (statutes, treaties, custom, general principles of law, legal writings).

As far as the Common law tradition is concerned, it must be indicated that since the establishment of the Permanent Court of International Justice, the features of Common law, judicial precedent and judge-made law, have become a very important part of the whole international law. And nowadays no international lawyer can realize the notion of international law without going through the cases of the Court. The Court has done a significant work in the development of international law with its continuing judicial precedents and sometimes judicial legislation. There is no doubt that the precedential law and the development (sometimes creation) of law has become one of the inherent and integral parts of international judicial procedure.

Thus, there is a great impact vis-à-vis the sources of current international law from both legal traditions, and as Judge Lautherpacht said; international law is nothing else but "the generalization of the legal experience of mankind"⁸⁹.

Another significant feature of international law is that in the 20th and the 21st centuries, it has become the main and powerful measure, by which legal traditions affect and influence each other.

ՏԱՐՈՆ ՍԻՄՈՆՅԱՆ - Մայրցամաքային (քաղաքացիական) և ընդհանուր իրավական ընտանիքների ազդեցության առանձնահատկությունները միջազգային իրավունքի աղբյուրների վրա - Միջազգային իրավունքը՝ որպես ինքնուրույն իրավական համակարգ, ունի իր առանձին աղբյուրները, որոնք սահմանված են ՄԱԿ-ի Արդարադատության միջազգային դատարանի կանոնադրության 38 հոդվածի առաջին մասում. դրանք են՝ միջազգային պայման-

⁸⁹ **H. Lautherpacht**, International Law: the General Part, in E. Lautherpacht (ed.), International Law, Being the Collected Papers of Hersch Lautherpacht (1970), I., p.74-75.

նագրերը, միջազգային սովորույթը, իրավունքի ընդհանուր սկզբունքները, դատական որոշումները և դոկտրինաները:

Ժամանակակից միջազգային իրավաբանական գրականության մեջ դեռևս վերջնական պատասխան չի ստացել այն հարցը, թե երկու հիմնական իրավական ընտանիքներից՝ ռոմանագերմանական (մայրցամաքային կամ քաղաքացիական) և անգլո-սաքսոնական (ընդհանուր), որ իրավական ընտանիքն ի՞նչ չափով է ազդել միջազգային իրավունքի աղբյուրների ձևավորման և զարգացման վրա:

Այդ գործընթացն ավելի հիմնավոր, համակարգված և բազմակողմանի գնահատելու համար հեղինակը դիմել է համեմատական իրավագիտությանը, որը, ընդգծելով հիմնական իրավական ընտանիքների աղբյուրների տարբերությունը և հստակորեն տարանջատելով դրանք, հնարավորություն է տալիս բացահայտելու առանձին իրավական ընտանիքի գերիշխող դերը:

Չեղինակն ուշադրության է արժանացրել այն փաստը, որ նշված աղբյուրների սահմանման ժամանակ հիմնականում որպես հիմք ընդունվել է Մայրցամաքային իրավական ընտանիքը, ինչն արտացոլվել է ՄԱԿ-ի միջազգային դատարանի կանոնադրության 38 հոդվածում: Սակայն, հեղինակը նշում է նաև, որ իրավական ընտանիքների աղբյուրների գործնական կիրառության ընթացքում չափազանց դժվար է հստակ սահմանել, թե դրանք որ իրավական ընտանիքին են պատկանում՝ ընդհանուր, թե քաղաքացիական:

Ժամանակակից միջազգային իրավունքում ավելի են մեծանում այն աղբյուրների դերն ու նշանակությունը, որոնք ընդունված է համարել իրավական նորմերը որոշակիացնելու երկրորդական միջոցներ: Որպես օրինակ հեղինակը նշում է դատական նախադեպը, որը, սահմանված լինելով ՄԱԿ-ի Արդարադատության միջազգային դատարանի կանոնադրությունում՝ որպես «իրավական նորմերի որոշակիացման երկրորդական միջոց», դատարանի պրակտիկայում կիրառվելով, ձեռք է բերել ընդհանուր իրավական ընտանիքի երկրներում ընդունված դատական նախադեպի որակներ: Դեռ ավելին՝ հեղինակը գտնում է, որ երբեմն դժվար է չհամաձայնել այն մտքի հետ, թե Արդարադատության միջազգային դատարանը նույնիսկ ստեղծում է միջազգային իրավունքի նորմեր, ինչը ընդհանուր իրավունքի երկրների դատարանների մեծաշնորհն է:

ТАРОН СИМОНЯН – Особенности влияния континентальной (гражданской) и общей правовых семей на источники международного права. – Международное право, как самостоятельная правовая система, имеет источники, которые установлены в первой части статьи 38-й Устава Международного суда ООН. К ним относятся международные конвенции, международный обычай, общие принципы права, судебные решения и доктрины. В современной литературе нет окончательного ответа на вопрос, какая из двух основных правовых семей – романо-германская (гражданская) и англо-саксонская (общая) – и в какой степени воздействовала на формирование и развитие источников международного права.

Этот процесс требует глубокой, системной и всесторонней оценки. В статью затрагиваются проблемы сравнительной юриспруденции, которая, выделяя и чётко различая источники основных правовых семей, даёт возможность выявить домини-

рующую роль отдельных из них. Примечательно, что, когда принимались эти источники, в основу была положена главным образом континентальная правовая семья, что проявилось в статье 38-й Устава Международного суда ООН. Однако по ходу практической имплементации этих источников трудно чётко указать, к какой из правовых семей, общей или гражданской, относится тот или иной из них.

В современном международном праве повышается роль тех источников, которые принято считать вспомогательными средствами для конкретизации правовых норм. В качестве примера автор приводит судебный прецедент. Названный в Уставе Международного суда ООН «вспомогательным средством конкретизации правовых норм», на практике он приобрёл свойства судебного прецедента, принятого в странах общей правовой семьи. Более того, Международный суд создаёт нормы международного права, что является безусловной прерогативой судов стран общего права.