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The Relation between International Law and Domestic Law in the Jurisprudence of the International Court of Justice

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I

The problem of the relation between international and domestic law arose in the 19th century due to the changes in the function and character of international law. Two main theoretical conceptions were advanced purporting to show the true inwardness of the ocurring changes — monism and dualism. The relation between international and domestic law was also a subject of the practical considerations of the international judiciary. International courts on numerous occassions have had to deal with the acts of municipal law which were related to pending cases.

The monists and dualists offer different approaches to the role played by domestic law in international judicial proceedings. Under the monist concept of the hierarchical unity of the legal order, international courts, when confronted with an act of domestic law, inquire into its compatibility with international law. The dualist theory of the dichotomy of the two legal orders, on the other hand, considers the conduct of States as the subject of international litigation. In the latter theory, an act of domestic law is only one element in a factual setting of a dispute.

The present article deals with the question whether, and if so to what extent, the two concepts — monism and dualism — find their support in the jurisprudence of the International Court of Justice. Considerations are limited to those cases in which the problem of the relation between international and domestic law is of the primary character. Thus, this article does not deal with other aspects of the problem like the local remedies rule (Interhandel Case), application of the concepts of domestic law in international relations (Barcelona Traction Light and Power Co., Ltd. (second phase), or exclusive domestic jurisdiction (Certain Norwegian Loans Case).

K. Marek analyzed the approach of the Permanent Court of International Justice to the relation between international and domestic law. She reached the conclusion that Permanent Court inquired into the conformity of the acts of municipal law with international law and that the Court

admitted the possibility that they might be in conflict. Hence, practice of the Permanent Court confirmed the correctness of the monist theory. K. Marek went so far as to state that should international courts adhere strictly to the dualist principles, they would be unable to function.[1] The analysis of the jurisprudence of the ICJ in this article aimes at the determination whether it warrants the same conclusions as those of K. Marek.

Under what circumstances is the International Court of Justice, whose function is to decide on the disputes "in accordance with international law",[2] called upon to inquire into domestic law? Article 36 (2) of the Statue of the ICJ gives at least partial answer to this question. Enumerating the legal disputes Article 36 (2) mentions disputes concerning "the existence of any fact which, if established, would constitute a breach of an international obligation" (subsection c). The interpretation of this provision leads to the conclusion that the Court may inquire into the domestic law of States while establishing facts allegedly violating international obligations. Such will most often be the case in the disputes concerning the alleged violation of international law by the legislative action of a State.

The related question concerns the manner in which an international obligation can be violated. Is the violation constituted by the national legislation *per se* or is it constituted by the State's conduct consisting of the enactment of the legislation? Those two possibilities reflect the monist and dualist points of view. As said by K. Marek, "*admettre qu'une règle de droit interne peut être conforme — ou non conforme — au droit international, c'est admettre l'unité des deux ordres*".[3] To the dualists on the other hand, the subject of international dispute is always the conduct of a State and not its domestic law.[4] Thus, when analyzing the jurisprudence of the International Court of Justice in this context, we must ascertain, first of all, whether the Court inquired into the conformance of national legislation or the conduct of States with international law.

II

The problem of the relation between international and domestic law appeared for the first time in the jurisprudence of the International Court

[1] K. MAREK, *Les rapports entre le droit international et le droit interne à la lumière de la jurisprudence de la Cour Permanante de Justice Internationale*, "Revue Générale de Droit International Public", 1962, No. 2, p. 277.

[2] Article 38(1) of the Statute of the ICJ.

[3] K. MAREK, *op. cit.*, p. 268.

[4] Such view was expressed *inter alia* by K. GRZYBOWSKI in his book *Trybunały międzynarodowe a prawo wewnętrzne* [*International Tribunals and Domestic Law*], Lwów 1937, p. 1.

of Justice in the Fisheries Case in 1951. The Court described its duty in that case in the following manner.

"The Court must ascertain precisely what this alleged system of delimitation consists of [...] and whether it was applied by the 1935 Decree in a manner which conformed to international law".[5]

The term "applied" as used by the Court seems to indicate that its intention was to inquire into the conduct of Norway and not into the conformity of the Decree with international law. However, as pointed out by K. Marek, the Permanent Court of International Justice in many instances interpreted national law of the States while declaring at the same time intention to inquire into the "application" or "attitude" of a State.[6] Therefore, an analysis of the reasoning of the Court is necessary.

The Court began by examining the Norwegian practice concerning the delimitation of its sea boundaries and reached the conclusion that it had been based, for a very long time, on the straight base-lines. The Court then proceeded to the question of the compatibility of the 1935 Decree with this practice. In the operative part of the judgment the Court pronounced

"that the method employed for the delimitation of the fisheries zone by the Royal Norwegian Decree of July 12th, 1935, is not contrary to international law; and [...] that the base-lines fixed by the said Decree in application of this method are not contrary to international law".[7]

Thus, in the Fisheries Case the International Court of Justice inquired into the conformity of the conduct of Norway and its consequences with international law. It did not pronounce, however, on the conformity of the Decree with international law. The Court considered in this context the method applied by Norway and its consequences — fixed base-lines.

The Case Concerning Rights of Nationals of the United States of America in Morocco was the next dispute in which the International Court of Justice inquired into dometic law. In its submission the government of France asked the Court to declare

"that the Decree of December 30th, 1948, concerning the regulation of imports [...], is not in conformity with the economic system which is applicable to Morocco, according to the conventions binding France and the United States".[8]

The position taken by the government of the United States was characterized by the Court in the following manner:

"The Decree of December 30th, 1948, involved consequently a discrimination in favour

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[5] Judgment of December 18, 1951. ICJ Reports 1951, p. 134.
[6] K. MAREK, *op. cit.*, pp. 273—274.
[7] ICJ Reports 1951, p. 143.
[8] Judgment of August 27, 1952. ICJ Reports 1952, p. 182.

of France, and the Government of the United States contends that this discrimination contravenes its treaty rights".[9]

The previous quotations show two different approaches to the same dispute. France wanted the Court to declare that, the municipal act was not contrary to international law — a reflection of the monist position. The Court, however, looked upon the problem differently. The 1948 Decree was of course mentioned in the Court's characterization of the submission of the government of the United States. Nevertheless, the alleged violation of the rights of American nationals was caused, according to the Court, not by the Decree itself but by the privileged position of France brought about by the Decree.

The same problem appears later in the judgment:

"It follows from the above mentioned considerations that the provisions of the Decree of December 30th, 1948, contravene the rights which the United States has acquired under the Act of Algeciras, because they discriminate between imports from France and other parts of the French Union, on the one hand, and imports from the United States on the other. France was exempted from the control of imports [...], while the United States was subjected to such control. This differential treatment was not compatible with the Act of Algeciras, by virtue of which the United States can claim to be treated as favourably as France, as far as economic matters in Morocco are concerned" [10]

The opening part of this paragraph seems to support the conclusion that the Court inquired into the conformity of the Decree with the Act of Algeciras. Further on, however, the Court said that it was the differential treatment that constituted the violation of international law. Thus, the violation was caused not by the Decree itself but by the consequences brought about by it. The Court also indicated the particular forms in which the international obligation was breached, i.e. — exemption from the control of imports. It is clear that the International Court of Justice reached its conclusion in this case through a legal analysis of the actions taken by virtue of the Decree from the standpoint of their compatibility with the Act of Algeciras. The Court did not compare the provisions of the Decree with that of the treaty.

In the Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants, the Netherlands asked the Court to declare

"that the measure taken and maintained by the Swedish authorities in respect to Marie Elisabeth Boll [...] is not in conformity with the obligations binding upon Sweden *vis à vis* the Netherlands by virtue of the 1902 Convention governing the guardianship of infants." [11]

The Netherlands sought a declaration that the conduct of the Swedish authorities was not compatible with the international obligations of Sweden.

[9] *Ibid.*, p. 183.
[10] *Ibid.*, p. 185.
[11] Judgment of November 28, 1958, ICJ Reports 1958, p. 61.

Instead, the Court focused upon the legal grounds on which the measures challenged by the Netherlands were taken, i.e. on the Swedish Law of June 6, 1924. Comparing the provisions of the 1902 Convention with the provisions of the Swedish Law, the Court found that "the purpose of the latter places it outside the field of application of the Convention".[12] In conclusions the Court rejected the Dutch claim. The Court reasoned that since the Swedish Law has different purpose and regulates subject matter different from the Convention, it cannot constitute a breach of the Swedish treaty obligations.

The arguments put forward by the International Court of Justice in the Case Concerning the Application of the 1902 Convention resemble the reasoning of a constitutional tribunal inquiring into the compatibility of the act of municipal law with a constitution. Such an approach taken by an international court seems to support the proposition that both international conventions and municipal laws form parts of the same legal order.

The judgment in the Case Concerning the Application of the 1902 Convention should be treated as a departure from the dualist plea that international courts should inquire into the conduct of States and its consequences. Had the ICJ followed the dualist principles, it would have treated Swedish Law only as one element of several, on an equal footing with the administrative and judicial decisions issued by virtue of this Law. The Court reached the conclusion that the Swedish Law did not fall within the scope of application of the 1902 Convention. Thus, the Court should have proceeded to examine the compatibility of the judicial and administrative decisions with the Convention.

Domestic law played an important role in the two Fisheries Jurisdiction Cases.[13] The disputes arose out of Iceland's decision to limit the fishing rights of foreign vessels within the 50-mile zone around this island. The restrictions were introduced unilateraly by virtue of the Icelandic Regulations of July 14, 1972. After hearing the case the Tribunal reached the following conclusion:

"The provisions of the Icelandic Regulations of 14 July, 1972 and the manner of their implementation disregard the fishing rights of the Applicant. Iceland's unilateral action thus constitutes an infringement of the principle enshirined in Article 2 of the 1958 Geneva Convention on the High Seas [...]. It also disregards the rights of the Applicant as they result from the Exchange of Notes of 1961".[14]

This judgment can be interpreted in two ways. On the one hand, the Court said that the municipal acts in question, were not compatible with

[12] *Ibid.*, p. 69.

[13] Cases United Kingdom *v.* Iceland and Federal Republic of Germany *v.* Iceland.

[14] Judgments of July 25, 1974. ICJ Reports 1974, pp. 29 and 198. Both judgments are almost identical and therefore only one of them (UK *v.* Iceland) was quoted. Pages in footnotes refer, nevertheless, to both of them.

the international obligations of Iceland. On the other hand, the Court stated that "the manner of their implementation" was not campatible with the obligations. The term "implementation" may indicate that the Court attached particular importance to the conduct of Iceland as a whole, and not only to the provisions of the Regulations. Following the reasoning of the Court we may conclude that it focused its attention on the compatibility of the establishment of the 50-mile exclusive fisheries zone with international law. The conclusion that such an action violates international law was reached by the Courth by analyzing whether restricting the fishing rights of other States beyond the territorial sea was compatible with the principles enshrined in the Geneva Convention.

This proposition also finds support in the judgments aconcerning the jurisdiction of the ICJ in these two cases. Describing the subject of the disputes, the Court said:

"The present case concerns a dispute between the Government of the United Kingdom [Federal Republic of Germany in the second case — *W. D.*] and the Government of Iceland occassioned by the claim of the latter to extend its exclusive fisheries jurisdiction to a zone of 50 nautical miles around Iceland".[15]

It is noteworthy that the Court made no mention here of the Icelandie Regulations by virtue of which Iceland extended its exclusive fisheries jurisdiction.

An analysis of the judgments of the International Court of Justice dealing with domestic law leads to the conclusion that in almost all of the case (with one exception) the Court inquired into the compatibility with international law of the conduct of States rather than of their domestic laws. Thus, the judgment in the Case Concerning the Application of the 1902 Convention Governing the Guardianship of Infants is the only trace of the monist theory in the jurisprudence of the Court. It is to be remembered, however, that the judgment in this case was often criticized. Some of the judges pointed out in their individual and separate opinions appended to that judgment that the majority's theory of the different scope and purpose is not compatible with the principle *pacta sunt servanda*.[16] This principle constitutes the basic premise of the monist theory. Judge H. Lauterpacht elaborated on this point:

" If a State enacts and applies legislation which, in effect, renders the treaty wholly or partly inoperative, can such legislation be deemed not to constitute a violation of the treaty for the reason that the legislation in question covers a subject-matter different

[15] Judgments of February 2, 1973. ICJ Reports 1973, pp. 7 and 54. Cf. comment in footnote 14.

[16] Such view was expressed by the following judges: KOŻEVNIKOV (ICJ Reports 1958, p. 72), H. LAUTERPACHT (*ibid.*, p. 80), B. WINIARSKI (*ibid.*, pp. 137—138), and R. CÓRDOVA (*ibid.*, p. 141).

from that covered by the treaty, that is concerned with different institution, and that it pursues a different purpose?"[17]

Rejection of the proposition that the jurisdiction of the IJC reflects the monist theory of the unity of the international and domestic law does not mean that it does support the dualist theory. There are a number of cases that negate some basic dualist premises. The Case Concerning the Application of the 1902 Convention, for example, makes clear that one no longer can maintain that international and domestic law deal with different subject matters. The question of the quardianship of infants, until 1902 belonging exclusively to the sphere of domestic law, became the subject of international regulation.

The Nottebohm Case repudiated the proposition that there are no contacts between international and domestic law. The Court recognized in this case that the question of nationality belonged to the domestic jurisdiction of a State.[18] Thus, on the ground of the dualist theory, the Court should have reached the conclusion that it had no jurisdiction over the case. The Court held instead that the acts of States performed in the exercise of their domestic jurisdiction had "international effects" and could be the subject of considerations of international courts.[19]

A similar opinion was expressed by the Court in the above mentioned Fisheries Case:

"Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law".[20]

From this point of view, the Court is called upon to inquire into the consequences brought about by the acts of domestic law on the international plane. The International Court of Justice never pronounced on the invalidity of the act of municipal law. It limited itself to holdings declaring that such acts were "not opposable" to the other subjects of international law.[21] Similarily, in the Nottebohm Case the Court's concern was limited to "whether the nationality conferred on Nottebohm can be relied upon as against Guatemala".[22]

In the Nottebohm Case the Court stated clearly that it had reached its conclusion without considering the validity of Nottebohm's naturalization according to the law of Lichtenstein.[23] Thus, the Court repudiated the theory

[17] ICJ Reports 1958, p. 80.

[18] Judgment of April 6, 1955. ICJ Reports 1955, p. 20.

[19] *Ibid.*, p. 21.

[20] ICJ Reports 1951, p. 132. This opinion was repeated by the Courth in the Fisheries Jurisdiction Cases — ICJ Reports 1974, pp. 23 and 191.

[21] Fisheries Jurisdiction Cases, ICJ Reports 1974, pp. 34 and 205.

[22] ICJ Reports 1955, p. 17.

[23] Ibid., p. 20.

of the unity of international and municipal law. Had it followed this theory, the Court should have considered Nottebohm's naturalization according to the law of Lichtenstein. If the naturalization was granted in accordance with the law of Lichtenstein, it should have been declared to be opposable to Guatemala. Provided the Nottebohm's naturalization did not breach any international obligation, the domestic law constituted the only criterion of the validity of this act.

The Nottebohm Case supports the proposition that domestic law plays different roles in international and national legal systems. Such a proposition is not compatible with the monist theory.

The above considerations indicate that the jurisdiction of the International Court of Justice with regard to the relation between international and domestic law cannot be explained by either the monist or by the dualist theories. It is true, however, that *tertium non datur*?[24]

III

In his lecture at the Hague Academy of International Law, Sir Gerald Fitzmaurice advanced the following view:

"The entire monist-dualist controversy is unreal, artificial, and strictly beside the point, because it assumes something that has to exist for there to be any controversy at all — namely a **common field** in which the two legal orders under discussion both simultaneously have their spheres of activity".[25] By the term "common field" Fitzmaurice understands "the same set of relations", but in his opinion the sets of relations are different for international and domestic law.[26] International law governs exclusively the relations between States, subjects of international law. When domestic law touches upon the rights or interests of third States, international law is the only legal system applicable as it is the only legal system governing the relations between the parties to a dispute.[27] It is the only sense in which one can argue for the supremacy of international law.

Fitzmaurice's view has several weak points. In particular, it does not take into account that today, in many instances, the natural and legal

[24] So K. MAREK, *op. cit.*, p. 265.

[25] G. FITZMAURICE, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, "Recueil des Cours de l'Académie de Droit International" 1957 — II, vol. 92, p. 71.

[26] Ibid., p. 73.

[27] As stated by G. Fitzmaurice: "Any conflict between them in the international field, that is to say on the inter-governmental plane, would fall to be resolved by international law, because in that international law is not only supreme, but in effect the only system there is". *Ibid.*, p. 72.

persons are along with the States subjects of international law. Should this development continue, it will not be possible to maintain that international and domestic law regualte two different sets of relations. One can agree with K. Skubiszewski that "in some points the views of Fitzmaurice are mutation of dualism, and as a whole they do not form a separate theory that could replace monism and dualism".[28] Nevertheless, when applied to the analysis of the jurisprudence of the ICJ, Fitzmaurice's views find their support. The jurisdiction of the Court is limited to the disputes between States and it may decide such disputes only in accordance with international law.[29] These restrictions eliminate the arguments advanced above against Fitzmaurice's views.

In most cases the ICJ dealth with the question of the implementation of the international obligation as opposed to question of the conformity between domestic and international law. What role does domestic law play in such case? The Court has never provided a direct answer to this question. Its predecessor, the Permanent Court of International Justice, offered the following opinion in the Case of the Certain German Interests in Polish Upper Silesia:

> "From the standpoint of international law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions and administrative measures".[30]

The opinion of the Permanent Court was widely criticized.[31] W. C. Jenks commented upon it:

> "The proposition that international courts and tribunals take cognizance of municipal laws only as facts accordingly falls well short of being established law. It is, at most, a debatable proposition the validity and wisdom of which are subject to, and call for, further discussion and review".[32]

The opinion of the Permanent Court in the Case of Certain German Interests reflects the dualist view; it perceives the conduct of a state in enacting municipal act as the subject of international dispute. However, the grammatical interpretation of the Article 39 (2) of the Statute of the PCIJ (as well as of the ICJ) makes clear that the conduct of a State allegedly breaching international obligation constitutes only a fact for the Court.

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[28] K. SKUBISZEWSKI, *Prawo międzynarodowe w porządku prawnym państwa* [*International Law in the Municipal Legal Order*], in: *Prawo międzynarodowe a prawo wewnętrzne w świetle doświadczeń państw socjalistycznych* [*International and Domestic Law in the Light of the Experiences of the Socialist States*], A. Wasilkowski (ed.), Wrocław, Ossolineum, 1980, p. 25.

[29] Arts 34(1) and 38(1) of the Statute of the ICJ.

[30] Judgment of May 25, 1926. PCIJ 1926 Series A. No. 7, p. 19.

[31] See e.g. K. MAREK, *op. cit.*, pp. 266—267.

[32] W. C. JENKS, *The Prospects of International Adjudication*, London, Stevens & Sons Ltd., 1964, p. 552.

In certain categories of disputes domestic law enables the Court to establish whether international law has been violated. Thus, in the proceedings before the Court domestic law plays the role of evidence. Its significance varies depending upon the kind of fact to be proved by it. In the Anglo-Iranian Oil Company Case the International Court of Justice used the Iranian Law of June 14, 1931 to establish that the Iranian government intended to exclude from the jurisdiction of the Court disputes relating to application of all treaties accepted by it before the ratification of the declaration establishing the compulsory jurisdiction of the ICJ.[33]

The Court stated:

"The law [i.e. the Iranian Law of June 14, 1931 — *W.D.*] is not, and could not be, relied on as affording a basis for the jurisdiction of Court. It was filed for the sole purpose of throwing light on a disputed question of fact, namely, the intention of the government of Iran at the time when it signed the Declaration".[34]

In the Asylum Case the ICJ used the Peruvian Code of Military Justice of 1939 in order to establish that under Peruvian law the military rebellion was not considered a common crime.[35]

Acts of municipal law play a key role as evidence in disputes concerning the conduct of a State enacting laws which result in a breach of international obligations. Would the Court have heard any of the cases dealt with above in their earlier stages, i.e., right after the enactment of the acts in question but before any specific actions infringing upon the interests of the other States were undertaken?

In the South West Africa Cases (second phase) the International Court of Justice held that

"[...] in their individual capacity, States can appear before the Court only as litigants in a dispute with another State, even if their object in so doing is only to obtain a declaratory judgment".[36]

Such an action may be brought only by a State having a legal right or interest in the claim, conferred by international convention or rule of law.[37] Legal right or interest was given a wide interpretation by the Court:

"[A] legal right or interest need not relate to anything material or "tangible" and can be infringed even though no prejudice of a material kind has been suffered [...]; States may be entitled to uphold some general principle even though the particular contravention

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[33] Judgment of July 22, 1952. ICJ Reports 1952, p. 106.

[34] *Ibid.*, p. 107.

[35] Judgment of November 20, 1950. ICJ Reports, p. 282.

[36] South West Africa Cases (second phase). Judgment of July 18, 1966. ICJ Reports 1966, p. 34.

[37] *Ibid.*, Judge Ph.C. Jessup critized this view in his separate opinion, *ibid.*, p. 423 ff. On the same subject see W. C. JENKS, *op. cit.*, pp. 491—492.

of it allegedly has not affected their own material interest; — that again, States may have a legal interest in vindicating a principle of international law, even though they have in the given case, suffered no material prejudice, or ask only for token damages".[38]

The opinion expressed by the Court in the South West Africa Cases warrants conclusion that the claim seeking a declaration that the act of the municipal law of a State breaches international law, is admissible. Based on the previous practice of the Court, it is impossible, however, to forsee whether in such a case the Court would inquire into the conformity of municipal act with international law or whether it would focus on the violation of international law by the conduct of a State.

IV

It is difficult to draw any conclusion from a practice which is not uniform. The Case Concerning the Application of the 1902 Convention differes in its treatment of domestic law from all other cases decided by the International Court of Justice. Accordingly, it is impossible to reach a valid conclusion as to the Court's attitude towards the relation between international and domestic law.

The terms employed by the Court in the Case Concerning Rights of Nationals of the United States of America in Morocco as well as in the both Fisheries Cases tend to suggest that the ICJ did not pay particular attention to the theoretical aspects of the problem of the relation between international and domestic law. The phrases "municipal law violates convention" and "the consequences of the municipal law violate convention" were used interchangeably by the Court. Thus, one can conclude that in its considerations the ICJ did not consciously follow any of the theoretical doctrines aimed at the explanation of the relation between international and domestic law. Nontheless the search for arguments in favour or against the monist and dualist doctrines in the jurisprudene of the Court is fully justified.

The examination of the Court's practice in this respect leads to the conclusion that it did follow neither monist nor dualist theory. Its true nature is best explained by the mixed theory separating the fields of operation of international and domestic law. According to this view, the Court deals with the relations between States in which international law enjoys absolute supremacy. Comparing the analysis of the jurisprudence of the ICJ with the conclusions reached by K. Marek we can say that after World War II the jurisdiction of the Court moved in a different direction.

The jurisprudence of the International Court of Justice indicates also that international judiciary can exist even if it is not based on the principles

[38] ICJ Reports 1966, p. 32.

of the monist doctrine. I find it hard to agree with the Marek's opinion that international courts cannot function properly until they adhere to the monist principles. On the other hand, it seems justified to say that the dualist theory limits the role of international judicial bodies. As it was pointed out by W. C. Jenks, such a result is absolutely inconsistent with the contemporary trends in international law. [39] In the case of the ICJ, however, these limitations were not self-imposed by the judges. They were imposed by the States which created the Court and narrowed its jurisdiction to the disputes between States and provided that such disputes will be decided in accordance with international law.

[39] W. C. JENKS, *op. cit.*, pp. 552—553.