The Rise and Development of International Law under the Theoretical Framework of the Three-Layers of Law Theory

"For historical and juridical, between the two branches of law, it was impossible for international lawyers not to define occasionally their views on the admissibility of some particular concept of private law"

-Judge H. Lauterpacht-

Prasit Pivavatnapanich*

Law is linked closely to society in accordance with the Roman adage "ubi societus ibi jus." Law, as a living phenomena, reflects social needs and it functions as a necessary instrument of dispute settlement in any society, both at domestic and international levels. As far as legal theory is concerned, law has several meanings. According to the Three-Layers of Law, there are three types of law: laymen's law, lawyer's law and legislator's law. In individual States, there are these laws. Likewise, three types of law can be found in the international community as well. Broadly speaking, law began spontaneously but it has been developed deliberately by leading jurists. The last stage of law is technical law concerning the policy of State. Indubitably, private law first appeared in the history of law prior to international law by many centuries, so the influence of private law, as an archetype of jurist's law, cannot be denied especially in the formative period of international law. And with the advent of the rapid growth of scientific technologies, international law has become much more involved with technical reason or policy as opposed to its role in the formative era of traditional law in the eighteenth-nineteenth century. To sum up, international law can be characterized as three forms of law: customary international law, jurist's international law and technical international law.

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Introduction

The theory of evolution of law, the so-called *Three-Layers of Law Theory*, presents the most appropriate method to explain how law emerged and developed. The Three-Layers of Laws Theory is usually described as the exponent of the source of private law, developed two decades ago by the prominent civil jurist, Dr.Predee Kasemsup, acclaimed as the founder of this school of thought. Nonetheless, the present author strives to apply this theory to international law. The chief purpose of this article is to assess the relationship between the Three-Layers of Law Theory and the origin as well as the progress of international law in some branches.

This article principally comprises two parts. The first part widely depicts the general concept of the Three Tiers of Law and the latter part is mainly devoted to explaining the relationship between the Three-Layers of Law and international law. In addition, part two is chiefly concerned with how private law influences international law. The following paragraphs are the detailed outline:

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1. The General Concept of the Three-Layers of Law Theory

1.1 What is the Three-Layers of Law Theory?

The Three-Layers of Law Theory is a theory of the evolution of law developed by Professor Preedee Kasemsup. The salient feature of the Three-Layers of Law is that the law does not solely come from the command of state but also from reason. According to this theory, there are three types of reason, namely simple natural reason, juristic reason and technical reason. For a better grasp of the evolution of law, the periods of the formation of laws can be divided into three eras.

1.1.1 Laymen's Epoch

In ancient societies called *laymen's epoch*, human beings employed simple natural reason as a method of controlling behavior among members in each community. Simple natural reason signifies a reason stemming from innate human beings, to wit, it does not come from academic or systematic study. The inductive and analogous methods of reasoning are an attribute of human beings. The ability to compare how other people feel is a basis of moral argument. In addition, natural reason, common sense or the usual capability to discriminate between good and evil conduct, hinges

on morality or a sense of fairness. In primitive societies, where there is no formal procedure of justice like a court or bureaucracy, simple natural reason plays a significant role in settlement of disputes since the legal profession and the concept of legislation have not yet occurred. In this primitive period, law was the product of exercising moral rules in parallel with the customary law, called *the good old law* by Professor Robert Lingat,[1] a French legal historian, and it was also named laymen's law.

Laymen's law, so called customary law, is defined as a series of legal rules derived from the habitual conduct in the community and is based on morality. The following paragraphs will explain the nature of customary law.

Nature of customary law

The distinguishing feature of customary law is the written law arising from human conduct. The formation of customary law is very complex, unintentional and unplanned. An example of the rise of customary law illustrated by H.F Jolowice, an important Professor of Roman law, was a classical one. He put it clearly this way *"Two people have to pass one another on a path; they are both leading pack-horses with their right hands; it is safer that they should be between the horses when they meet, and so each keeps to the right. The custom of keeping to the right is formed."*[2]

Customary law is virtually contingent upon simple natural reason adapted or changed during each social milieu. Owing to the various characterizations of human traits, the content of law, especially law of family and inheritance, of one country is different from another. Law is nothing but a reflection of the spirit of people, called *Volkgeist,* diversified

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[1] Lingat, Robert (1973) *The classical law of India,* U.S.A, University of California Press, pp. 14-17.

[2] Jolowicz, Herbert Felix (1963) *Lectures on jurisprudence,* Great Britain, The Athlone Press, p.196.

in its own community. In the earliest epoch, the law hinged on morality; thereby the law cannot be separated from it. Undoubtedly, the earliest form of law in any society either domestically or internationally is customary law. The foremost constituents of customary law are practice known as material element and legal consciousness, *opinio juris*, described as the psychological element.

In the realm of legal theory, one of the perennial questions is the genesis of customary law. Indeed, no one knows precisely how and when customary law begins. The formation of customary law is very complicated, possibly, customary law originates from imitation.[3] Naturally, human beings act with accustomed behavior.

Material element: state practice

In general, practice simply means the conduct or behavior of human beings; however, no single conduct, *i.e. usus*, can produce or establish the practice. The distinguished attributes of practice are long, certain and constant. Normally, the duration of practice is of a considerable length. Namely, since time immemorial, practice is a necessity for the creation of customary law in as much as the period of time must be long enough to observe that the conduct is good evidence of genuine practice. In other words, the salient nature of customary law is certain and consistent.[4] Moreover, the state practice takes shape very slowly.

Psychological element: opinio juris sive necessitatis

It is widely accepted that practice without *opinio juris*, a legal conviction of mandatory action or omission, debars the formation of legal customary rules. *Opinio juris* is deemed to play a crucial role in distinguishing a mere usage, comity or courtesy from a rule of law governing any human behavior in society. Whatever rules or convictions are

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[3] Allen, Carleton Kemp (1968) *Law in the making*, Great Britain, Clarendon Press, pp.101-111.

[4] According to the Roman maxim, *consuetudo debet esse certa, nam incerta pro nullis habentur*, it means that a custom should be certain, for uncertain thing are held as nothing.

accompanied by the *opinio juris*, they are markedly recognized as a law, not a political or social rule.

1.1.2 Lawyer's Epoch

Roughly speaking, after the laymen's epoch ended, ancient societies began forming heterogeneous communities. On account of the emergence of complicated problems, customary law was adjusted to the more complex circumstances, especially in civil society involving in commercial disputes. Law is an animate feature, not dead wood; thereby it improves continually over time until reaching a satisfactory solution. On these grounds, men cannot merely exercise simple natural reason for ruling but must employ more logical and valid reasons called *juristic reason* or *lawyer's law.*

Undoubtedly, law is closely related to fact, meaning a juristic reason relying on an indisputable fact. The learned lawyers consider as the base on which their decision is made. Most learned judges begin to corroborate the solutions by scrutinizing the individual facts. Having investigated the facts painstakingly they can distinguish as to the merit of the case. Following repeated decisions made on various cases, they can verify and articulate the rules of law or the principles of law accurately. Law exponentially involves practical solutions and judicious thinking including the assemblage of facts. Legal reasoning depends upon facts. Nevertheless, facts *per se* are neither law nor legal science. Metaphorically, only by degree was the rule of law built with facts, like a hamlet constructed with wood, however, an array of facts cannot be called legal science any more than a pile of wood can be named a hamlet.

Bearing in mind, although law and legal science are closely related, they are not identical. Every society either vandalized or civilized has its own laws but only advanced societies can separate legal norms from moral rules.

The using of juristic reason and artificial reason is the char-

acteristic of any lawyer, and is essentially the outcome of the continued intellectual activity invented and developed by numerous brilliant jurists who were either judges or professors. Actually, jurist's law was continually innovated and elaborated by deciding individual case over many years. The using of juridical reason is not spontaneous and does not occur inadvertently but requires long, consistent and enduring learning as well as practice until attaining a legal mind. Having been studied and also developed from the Roman Empire till the Renaissance, law transmuted itself into a more systematic and logical reason than in any other period of world history. After the innovation and the gradual growth of using legal reasoning, law branched out slowly from ethics, forming its own rules simultaneously. It is generally accepted that legal science differs from morality or ethics. Whereas moral rules can be understood by common sense, legal rules can be unintelligible without scrupulous and assiduous learning from jurists. Typically, the jurist's law is conceived as a transcendental law for ordinary person's understanding because of complicated rules and ideas.

Like other academic disciplines such as philosophy, economics, physics, arithmetic and so forth, legal science possesses its own methods and contents that are highly systematic as well as logical thinking, including plenty of jargon in conveying an idea. To decide legal issues accurately, a law student who is a novice at juristic thinking has to learn many basic concepts and technical terms about the system of legal norms first. Since lawyers systematically and continually develop their knowledge of legal science, they effectively solve the more complicated juridical points with legal mind. Consequently, it is not possible to study legal science without the assistance of learned pedagogues and recorded judicial documentaries as well. Using several kinds of legal reasoning, particularly the analogy, the detailed rule of law was gradually elaborated and developed by interpreting and construing of the law. Besides inductive and deductive arguments, analogies play prominent roles in deciding

various individual cases by comparing the similarities and differences between the precedents and the cases in question.

The notion of the impossibility of specific performance is a *par excellent* of the juristic reason. In the eyes of laymen, a debtor has always a duty to execute the obligation for a creditor but, in certain circumstances, a debtor can be exempted from his obligation in the case of any loss by *force majeure* or the fault of the creditor. Developed by the learned judges in common law and leading professors in civil law, the concept of impossibility was incomprehensible for laymen who had not systematically studied and properly trained as lawyers.

Another example of jurist's law is the principle of ownership, tracing its history back to the Roman law. According to law of property one of the modes of ownership is a component part such as alluvial soils and building on the land of a third person. In principle, anyone who constructs a house or a building on the land of others either *bona-fide* or *mala-fide* the true owner of that building is the owner of that land not the constructor because the house or other structures built on the land is a component. According to the principle of the property law, the owner of the land is the owner of the house or the building.

1.1.3 Modern Period

Lastly, during the rise of the Modern State in western European countries,[5] technical reason served as an apparatus for building the Nation State from 1700 until 1900. In this era, law can be separated from morality because the relationship among members of the community is

[5] The topic of the birth of the Modern State is very interesting because it closely relates to the rise of traditional international law in European countries in the nineteenth-century. There is an abundance of famous books discussing this issue. I would strongly recommend the following readable and remarkable books. See Naidis (1972) *The western tradition: a survey of western civilization*, U.S.A, The Dryden Press Inc., pp.261-283; J.M.Roberts (1995) *History of the World*, England, the Penguin, pp.485-505.

so complicated that the using of both natural and juristic reason cannot solve a legion of problems which have arisen in modern society such as accidents, crime, environment, politics, business transactions, etc. Due to the tremendous increase of social needs in various areas, additionally, the government could not simply use customary law and code to work out the appropriate solutions to practical problems. For example, the expansion of the metropolitan areas into rural districts put demands on the technical laws in terms of the construction laws, the traffic laws, the industrial laws, etc. These laws are mainly concerned with the management of regular public services.

In modern society, technical law, a form of legislation, becomes a surrogate law.

By and large, the form of technical law is an Act enacted by the Parliament[6] which is the principle organ of State for making the law in democratic States.

In conclusion, there are three stages of development of skilled juristic reasoning. From the earliest period of the formation of law, law was called customary law based upon morality. Unlike the customary law or *Volksrecht*, the layman's law, the lawyer's law is an incessant consequence of learning law discipline and using law experience over hundreds of years. Although it arose inadvertently, law was elaborated deliberately by jurists over a long time.

1.2 The Contribution of the Three-Layers of Law Theory to Legal Science

Ever since the Thai Law School was dominated by the influence of Legal Positivism, a kind of doctrine of law proposed by John Austin, a British jurist, the law lecturers approached the definition of law as hinging on the command of sovereign. Not until 1975 did the Faculty of Law,

[6] In contrast, the form of jurist's law is codes or judgment.

Thammasat University, revised a curriculum proposing several new disciplines such as *The Thai Legal History, Legal Profession and Philosophy of Law.* Since 1975, Dr. Predee Kasemsup, who devoted his whole life to academic activities, propounded that all laws did not merely derive from the will or power of the suzerain or supreme ruler but also came from other sources of law. He suggests to many jurists that, in the realm of legal theory, there are three types of laws: layman's law, lawyer's law and legislator's law respectively. From then on, the approach to explaining the meaning of law changed.

With regard to the Three-Layers of Law, there are several benefits of the aforesaid classification of laws. The following paragraphs are principally devoted to explaining the contribution of this theory to many facets of law.

1.2.1 The Interpretation of Law

In the domain of interpretation of law, if the law is based upon custom or culture, the jurist should interpret the law in accordance with the customary or historical background. In principle, the interpretation of technical law, a statute, must always consider the objectives and purposes of law. These can be found in many parts of such statutes such as a preamble, the position of provision, an annexation, etc. It should be noted that *ratio regis*, the spirit of law, can stand alone from *travaux préparatoires* when the Parliament passes a law. Law looks like a living thing flourishing or dying depending on the role of the learned judge instead of the intention of draftsmen. Also, the manifestly obvious advantage of the distinction between code and statute is the method of interpretation. Normally, with regard to the civil law tradition, analogy is only employed in code law and it is not used in specially written law like the Act. According to the common law tradition, similarly, analogy is solely reserved for case law called precedent doctrine. A learned judge does not employ analogy in written law called Statute.

1.2.2 The Application of Criminal Law

In the area of the application of criminal law, criminal law is rooted deeply in morality, *mala in se;* laymen cannot claim justification for his/her own fault. In contrast, the ignorance of criminal law called *mala prohibita,* a criminal offence hinged on state policy or unrelated to moral ground, is not an exoneration for the guilty.

1.2.3 The Evolution of Law

As regards academic advantages, the Three-Layers of Laws can function as the optimum method of delineation of the evolution of law or the commencement of new legal rules. According to this theory, law and society are corresponding, namely, the more complicated the society, the more laws are required. In prehistoric society, the power structure of community was quite lenient with ruling and human relationships among members not severely restrictive. Because of easy living and informal relations, the modern law including the legal science was not necessary to govern the behavior of people. Due to a lack of an administrative system and modern law, ancient society used the customary law, a criterion for making decisions on human conduct accepted for a long time, to judge what was wrong or right.

In contrast, in the modern State, the problems are so complicated that the ruler cannot exert customary law in order to resolve a cornucopia of problems that are very complex, intricate and dynamic. To deal with various problems both effectively and promptly, the government wields power by means of legislation, a technical law, in order to ameliorate and pre-empt any difficult situations in society. That a technical law or law-making is enacted by Parliament, an organization of State, is ineluctable because the ruler cannot wait for the formation of customary law to grapple with a multitude of problems. Since, additionally, many problems occurring in modern States are not closely connected to morality, such as, the control of car accidents, the prevention of contaminated water, the management

of toxic waste, the regulation of monetary system, etc, so government or other organs of State have to enact a law immediately by means of technical reasons, a kind of specific purpose reason, instead of natural or juristic reason.

1.2.4 The Relation between Law and Society

Last but not least, the Three-Layers of Law Theory clarifies the relation between law and society lucidly. It is commonly believed that law is nothing but the command of the ruler accompanying legal sanctions like capital punishment or imprisonment. Moreover, no one gainsays the fact that law can only exist in the context of modern Secular State or an advanced community. The aforementioned belief is completely wrong. At least, there are two reasons for rebutting this popular belief.

Firstly, law, command and sanction are not exactly the same. There are many provisions in private law comprising legal obligations without sanction, for instance, the maturity of a minor, the principle of *bona-fide* and *force majure,* the rules of domicile, the principle of the division between movable and immovable things and so forth. Also, there are numerous commands, particularly in an individual administrative command produced by administrative agents, which are lacking the characteristics of law[7] even though it imposes rights and duties on specific people and events. The administrative order of granting or revoking Thai nationality or the administrative commands of tearing down a building are merely a particular command, not laws.

Secondly, anthropological evidence divulges that primitive societies, whilst not absolutely developed into states or nations such as tribes, clans or nomads, possessed both legal norms and mechanisms for dispute settlement. Law inevitably mirrored sociological phenomenon

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[7] As far as legal theory is concerned, the distinguishing feature of the natures of law are general concepts or principles and abstract not specific command that can only be applied to a particular person or event.

coming into existence prior to the rise of the Sovereign State for thousands of years. The Roman maxim *ubi societus ibi jus* corroborates the ultimate truth about the significance of a system of legal rules. Law and order is ubiquitous and it is a primary precondition for every society either barbarian or civilized.

2. The Three-Layers of Law Theory and International Law

In this part of the article, the author tries to explain the general principles of international law with regard to the theoretical framework of the Three-Layers of Law. To understand the relation between the Three-Layers of Law Theory and the development of the principle of international law, I would especially like to expound my own ideas. First of all, the present author views customary international law as a layman's law (2.1). Secondly, the principles of international law developed and articulated by legal scholars are deemed the jurist's law (2.2). Thirdly, the rise of the modern international legal rules are regarded as the technical law (2.3).

It should be noted that the Three-Layers of Law used in private law is not exactly the same as international law, particularly in the detailed rules. Broadly speaking, however, the history of origin and development of international law is similar to internal law: beginning with customary law, developed by jurist's law and innovated by the legislative process.

2.1 International Law Formation in Ancient Times: Customary law as a Source of International Law: An Overview

Akin to the domestic legal system, the earliest form of international law is customary law,[8] not law-making such as treaty, resolution or

[8] See Hoof, Godefridus J.H. van (1983) *Rethinking the sources of international law,* The Netherlands, Kluwer Law and Taxation Publishers, p.85.

unilateral act of state. There are several archetypes of customary international law, for instance, the principle of personal inviolability, the self-defense rules at war, the principle of effective occupation of territory, etc. Broadly speaking, customary law was a salient feature of international law in the past when there was a lack of an international legislation, government, including courts. Nonetheless, law is a prerequisite for co-existence among states in the international community, so customary law plays a prominent role in regulating the conduct of states. Once a fundamental law for hundreds of years, customary law remains a pillar of international law up to now. Today even though treaties are deemed to be the most essential sources of international law, customary law is still important to create the rule of law particularly in the field of space law and the law of the sea.

Nonetheless, after the publishing of the leading publicists' work, such as Grotius Victoria Vattel, etc, international law became more juristic and systematic than in the time of incipient formation of international law in the sixteenth century. One of the most important factors that critically changed international law's content and method was the influence of Roman civil law. Roman law, as a best prototype of jurist's law, considerably permeated through classic international law by the forerunners of international lawyers. Historically, there are various fields of the earliest law of nations affected by Roman law. For instance, the principle of acquisition of State territory that is *terra nullius,* a land without ownership or sovereignty of any state, recognized by a rule of effective control over territory.

2.2 The Development of International Law in Jurist's Period: the Role of the International Court of Justice and Legal Scholars

Compared to modern international law, private law, both the civil law system and common law system, is a highly developed or mature

law. From the angle of legal theory, it means that private law or Roman Civil Law has more juristic characteristics than international law, closely associating with the national interest of each state including political pressures from powerful countries. One of the most significant reasons that makes private law more sophisticated than international law is the length of time of development. According to the continental law system, private law was fully developed by Roman jurists over two milleniums ago and it was continually refined and systematized as well as conceptualized by groups of eminent legal scholars such as *Glossators*[9] and Commentator including the Historical Law School called *the Pandectists*[10] *of the nineteenth century.* For this reason, the rules of private law are very useful and necessary to cope with the hundreds of problems in international affairs among sovereign states.

Likewise, common law is the product of using the juristic reason, an analogical and inductive method, elaborated by learned judges for thousands of years. Historically speaking, common law in England begins from the individual case in the form of writ granted by the Chancellor.

The distinguishing characteristic of common law is judging the case in hand, based upon the legal reasoning of the previous case formulated and developed by the former judges for a long time. To judge the case in question rightly, the ability to distinguish between *ratio decidendi,* a merit of the case, from *obiter dictum* is the first and important task of any judge.[11] As a result of judging case by case using induction and analogy

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[9] See Lawson, Frederick Henry (1953) *A common law looks at the civil law,* U.S.A, University of Michigan Law School, p.22, 23, 79; Merryman, John Henry (1969) The civil law tradition, U.S.A, Standford University Press, pp.10-14, 63; Nicholas, Barry (1962) *An introduction to Roman law,* Great Britain, Clarendon Press, p.46.

[10] See Lawson, Frederick Henry, *supra note,* p.41, 43, 76; Merryman, John Henry, *supra note,* p.66.

[11] For any readers who are interested in the principle of *ratio decidendi,* the author suggests the following authoritative textbooks. Jolowicz, Herbert Felix (1963) *Lecture on jurisprudence,* Great Britain, The Athlone Press, pp.252-261.

for many hundreds of years, common law became gradually elaborated and established in British society. In its golden era from Lord Coke to Lord Mansfield, the law of England transformed customary law, layman's law, into common law, jurist's law. Up to the present time, common law is a sophisticated system of law paralleled with civil law.

Succinctly, in the formative stage of international law, the Reception of Roman Civil Law or private law resorted by analogy is an ineluctable phenomena in the history of international law. The most important reason that allows international lawyers to draw an analogy between two different systems of law is the nature of thing or the claim of logical reason, not expressly recognized by international positive law. However, some positivist publicists contended that analogy can only be used when it is manifestly authorized by a given system of law.[12] In my view, although directly unrecognized by written law, analogy can be properly exercised in solving legal problems. Moreover, it is not necessary to expressly acknowledge an analogy in written law like the civil code or Article 38 of the Statute of the International Court of Justice because using analogical reasoning is one of the legal methods of law, not the substance of law.

Like domestic laws, international law commences spontaneously but it was developed as well as elaborated deliberately by international leading jurists either International Court of Justice [hereafter I.C.J] or international academic and practical lawyers such as Professors of international law, legal advisor of foreign affairs and International Law Commission [hereafter I.L.C]. The first step and the most important tasks of the learned judges, both national court and international court, are interpretation and application of positive law rather than creation of law. Interpretation by lawyers by means of induction and deduction including analogy led to legal rules evolving into more complicated and substantial

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[12] Cited by Lauterpacht, Hersch (1970) *Private law sources and analogies of international law*, United States, Longmans Green and Co., Ltd, p.19.

forms. Law is a living thing and the judges play a vital role in enriching the law.

Unlike the learned judges, legal scholars and Professors of international law have dedicated their whole life to academic work, especially doing research and proposing legal theories by writing authoritative treatises. Although article 38 does not recognize the teaching of leading publicists as a legal source, the doctrines elaborated and developed by legal scholars influence international lawyers to adapt and to adopt these doctrines which help mould the drafting of multinational and bilateral treaties including paving the way for the formation of new legal rules. The rest of this article is mainly devoted to some of the contributions of I.C.J by means of judgments and advisory opinions, including dissenting opinion and the doctrine of legal scholars enriching the growth of international law.

2.2.1 The Law of Treaty

Aside from the source of law, the law of treaty is widely considered as the fundamental and essential discipline of international law. The law of treaty is closely similar to the law of contract. If the law of obligation, or the law of contract, is conceived as the skeleton of private law, the law of treaty is deemed the infrastructure of international law, especially from the Westphalia Treaty to the cyber age.

There are many legal aspects relating between the law of contract and the law of treaty. For a better understanding of this subject, it is necessary to describe the following particular topics.

The legal basis of treaty: intention

The legal basis of treaty is the consent, or intention, of state.[13]

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[13] Bearing in mind always, when I say that the legal foundation of treaty is consent, it does not mean that international law is contingent exclusively on the consent of state. International law does not circumscribe merely the treaty but includes *customary law and general principle law.*

Consent of state creates the legal binding force or international legal obligation between or among the parties under international law. Likewise, the legal ground of contract is the intention of the parties. It is generally believed that the principle of freedom of contract is sacrosanct and should remain so. And this principle must be applied to the law of treaty as well, as far as legal theory is profoundly concerned.

The defection of the intention: error duress and fraud

In the law of treaty and contract the real intention is indispensable to the validity of treaty and contract. It is generally believed that the legal basis of the validity of the contract is the expression of the party's intention. However, the invalidity of contract, void or voidable, can be affected by the specific grounds: error duress and fraud.

In general, like a contract, a treaty may be invoked as a cause of invalidity of treaty (void or voidable) if error duress or fraud affects the intention of party.

The concept of peremptory norm: jus cogens[14]

Every system of law both civil law and common law including private law as well as international law recognize the proscribed rules called *jus cogens*. *Jus cogens* plays a paramount role in the law of contract as a limitation of the purpose of contract and the ability to conclude the contract. Originating in the Roman era,[15] *jus cogens* called peremptory norm, is manifestly embodied in the Vienna Convention on the Law of Treaty 1969 on article 53 and 64. On the following pages I will concentrate entirely on the existence of peremptory norm in international law.

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[14] See Christopher Ford (1994) Adjudicating jus cogens, *Wisconsin International Law Journal*, Fall; Hoof, Godefridus J.H. van (1983) *Rethinking the sources of international law*, The Netherlands, Kluwer and Taxation Publishers, pp.154-156.

[15] However, the term *jus cogens* is not employed in the *Corpus Juris Civilis*. Actually, the first jurists to use this term are the *Pandectists*, a group of German scholars who were engrossed in studying the Roman Civil Law from the original source called *Digest* or *Pandect* in Greek. See Alexidze (1981) *Legal nature of jus cogens in contemporary international law*, R.CA.D.I III, p.233.

The concept of *jus cogens* in the law of treaty has been hotly disputed among international lawyers up to the present day, especially the point of the rise and content of *jus cogens*.[16] The source and emergence of peremptory norm are apocryphal. Some say that the origins of *jus cogens* in international law are not clear.[17] In spite of vague meaning, *jus cogens* is already recognized by international law. Broadly speaking, as far as the philosophy of law is profoundly concerned, there are two schools of thought that pay much more heed to this problem. The former is positivism and the latter is naturalism.

According to the positivist, international law is the system of international rules based exclusively on the consent of state, either explicit or implied consent. At the same time, the positivist lawyer repudiates the existence of *jus cogens* or denies the idea of peremptory based on natural law. For the positivist, there is no room for the tree of natural law, as a tree of knowledge, to take root.

In contrast to the positivism law school, the natural law school, in theory and in practice, allows the influence of religion or morality to lay down a series of necessary principles for living in peace among nations. According to the naturalists, there are some norms that cannot be violated or changed by the consent of state. In other words, the peremptory norms are independent from the power of state. *Jus cogens,* as a supreme norm, is the legal norm applied equally to all states either capitalist states or communist states, either rich states or poor states.

Typically, the positivists usually contend that the term of *jus cogens* is very ambiguous. They contend that the Achilles heel of *jus cogens* is its obscure meaning. When some writers mention *jus cogens,* the positivists often think that this word is prosaic. Actually, it is probably impossible to

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[16] See Alexidze, *supra* note, p.259.

[17] Henkin, Louis (1995) *International law: politics and values,* the Netherlands, Martinus Nijhoff Publishers, p.38.

define and to explain *jus cogens* to everyone's satisfaction because the structure of legal institutions, such as I.C.J, I.L.C, and General Assembly, is based on the excellence of diversity. The salient feature of World Community is the difference of political regimes, economic systems, religious beliefs, cultural conduct and legal systems. Therefore, it is very difficult to reach an agreement of the proper meaning of *jus cogens* that can be applied to all States regardless of the diversity.

Despite the controversy of the true meaning and scope of peremptory norms, the notion of a peremptory norm became a highly interesting topic among legal theorists and international practitioners after World War II. The satanic action of Adolf Hitler, the Evil One, in killing millions of innocent victims in what was known as the Holocaust, proves that the existence of *jus cogens* is absolutely irrefutable. Moreover, during the Second World War in Asia Pacific, sex slaves, called comfort women and the Rape of Nanking,[18] committed by the Japanese Imperial Army reminded the international community that the demands for *jus cogens* were significantly necessary to guarantee international security and peace.

On these grounds, the I.L.C' s commentary shows several examples of a peremptory norm, that is to say, an unlawful use of force, any other criminal acts under international law trade in slaves, piracy and genocide.[19] As far as these examples are concerned, the concept of *jus cogens* is firmly rooted in morality, goodness, and justice, including the sense of peaceful living. Briefly but accurately, *jus cogens* is nothing more than the

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[18] Whoever is interested in the sexual slavery perpetrated by the legion of Japanese soldiers in the Second World War, please read the following articles: Yvonne Park Hsu (winter,1993) "Comfort Women" from Korea: Japan's World War II Sex Slaves and Legitimacy of Their Claims for Reparations, *Pacific Rim Law Policy Journal;* Boling (1995) Mass rape prostitution, and the Japanese imperial eschews international legal responsibility, *Columbia Journal Transnational Law;* Taihei Oda (1999) The "Comfort Women" Case: Judgement of April 27, 1998 Shimonoseki Brach, Yamaguchi Prefectural Court, Japan, *Pacific Rim and Policy Journal.*

[19] See Sinclair, Ian Mc Taggart (1973) The Vienna Convention on the law of treaties, Great Britain, Manchester University Press, pp.121-122.

Renaissance of natural law. Next, I will discuss the role of the judge in developing and considering an idea of a peremptory norm.

In the area of international tribunals, the dissenting opinions of Judge Schcking, a German lawyer, in the Oscar Chinn case and Wimbledon case have been recognized. He addresses:

> *...I can hardly believe that the League of Nations would have already embarked on the codification of international law if it were not possible even today to create a jus cogens the effect of which would be that, once States have agreed on certain rules, and have also given an undertaking that these rules may not be altered by some of their members, any act adopted in contravention of that undertaking would be automatically void.*[20]

And he mentions *jus cogens* again in the Wimbledon case. He points out that "... it is impossible to undertake by treaty a contractual obligation to perform acts which would violate rights of third parties."[21]

In a nutshell, no matter how we discuss the true meaning of *jus cogens*, it relies heavily on natural reason, a moral precept, and juristic reason. Irrefutably, a peremptory norm is not a technical reason or artificial reason invented and abrogated arbitrarily by one or some States. A peremptory norm is immune from the consent of State. Once again, the existence of *jus cogens* is not dependent solely upon the consent of States, becoming the mandatory principle binding all States. At the same time, a peremptory norm functions as the cornerstone of the law of treaty. If the World Community is deprived of it, international chaos may be the end result.

2.2.2 The Interpretation of Treaty

The principle of treaty interpretation acknowledged by the Vienna

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[20] Cited by Sinclair, Ian Mc Taggart, *supra* note, p.119.

[21] *Ibid*, p.120.

Convention reflects the theory of interpretation of law elaborated by the civil law jurists and the learned judge of the common law. In fact, there are, *summa divisio*, two main schools that explain the method of interpretation of law: civil law school and common law school.

Regarding the former school, the teleological or objective approach has considerably played a vital role in interpreting the civil code. At the same time, the literal interpretation is not accepted by civil law tradition because code law should be employed to its full potential by a learned judge. According to this theory, the judge or any lawyers must consider law in parallel with letter and spirit. Letter or word cannot be isolated from context or purpose. It is widely believed that an interpretation is required if the letter or word is equivocal or dubious. On this point, Sir Jennings, a former Judge and President of the Court, points out that *"A problem of interpretation arises when the meaning of a treaty is doubtful or controverted. Where the meaning is clear, the treaty should be applied to its clear meaning."*[22] This accepted belief is still debatable. Before applying the law, the learned lawyer should construe the law with regard to the spirit of law or social context, even though words have a clear meaning because the party should pay more meticulous intention to the letter and spirit in the light of circumstance, together with the objectives of a treaty rather than the pure literal meaning.

For the latter school, common law, restrictive interpretation, known by some scholars as literal rule, is viewed as the principle of statute interpretation. Historically, the learned judge uses the literal rule when he interprets a statute because he always thinks that the main source of English law is common law, not written law, passed by Parliament. Consequently, he endeavors to construe restrictively because he fears that a statute will encroach on common law. Also, analogy is prohibited by

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[22] See Bedjaoui (ed) (1991) *International law: achievement and prospects,* the Netherlands, Martinus Nijhoff Publishers, p.144.

statute.

The previous paragraphs outline the basic concept of the interpretation of both civil law and common law. Next, the present author will discuss treaty interpretation in detail.

From the juristic point of view, the principles of treaty interpretation are derived from private law. On this point, Lord McNair, the leading voice on the law of treaty, put it clearly *"...successive generations of writers and, more recently, of arbitrators and judges, have elaborated rules for the interpretation of treaties, borrowing mainly from the private law of contract."* However, specifically speaking, the methods of treaty interpretation are closely linked with the interpretation of civil code and statute in the civil law system and the common law system respectively.

That the Vienna Convention recognized the interpretation in *bona fide* in accordance with the ordinary meaning and in the light of the treaty's object as well as purpose[23] is the reflection of the influence of private law. The doctrine of teleological approach firstly used in the sphere of private law is the well-established principle of interpretation in the continental law system. Like the interpretation of civil code, the primary task of treaty interpretation is making an effort to find out what is the authentic intention of the signatory states. To discover the true purpose of a treaty, the parties cannot confine themselves to translating or to reading word by word each sentence in a treaty. Sir Lauterpacht, one of the *Special Rapporteurs* on the topic of the law of treaty, warns lawyers of the danger of strict adherence to the literal meaning. He states *"The eliciting of the intentions of the parties is not normally a task which can be performed exclusively by means of logical or grammatical interpretation."*[24] The spirit and objective of a treaty lie behind the provision, so the learned

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[23] Article 31 (1).

[24] Cited by O'Connell, Daniel Patrick (1970) *International Law,* vol.1, London, Stevens & Sons Ltd., p.251.

lawyer should seek them out by reading the whole provision along with the other related provisions as well. However, this does not mean that a judge or an arbitrator deviates from the terms. Absolutely, the interpretation must start with a term or a sentence but should not quickly end as soon as the lawyer has finished considering a word. Interpretation is a legal process of intellectual activity, not guesswork, which requires long practice. And also interpretation and translation are quite different in that translation is based on a different language, translating from one language to another. But interpretation relates closely to construe the proper meaning of word or legal term in connection with the spirit of law.

The limitation on analogy

As we have seen, public international law is not precisely tantamount to private law. Applying the principle of the law of contract by using the legal method of analogy enables many theorists to create the rudimentary theoretical framework of the general principle of international law. In addition, the development of the system of international law was based upon the principle of private law until the international law was well-established as a stand-alone system of law along with municipal law. During the development of international law over many years, the rules of international law became gradually independent from the influence of private law.

In the field of the law of treaty, there are several rules that have the special characteristics of international law. For example, international law accepts many ways to express the consent of a State to be bound by a treaty whereas the law of contract recognizes in a specific way to be legally bound by a contract, to wit, in written or verbal form. Under the Vienna Convention on the Law of Treaties 1969,[25] signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession are an illustration of the consent to be bound by a treaty.

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[25] Article 11.

Another example of the uniqueness of the law of treaty, particularly in multipartite treaties, is a reservation, a unilateral act of state modifying or excluding the provisions of the treaty. According to the law of contract, the party cannot unilaterally modify or exclude the legal binding force of some articles contained in a contract without the consent of another party. According to the Vienna Convention,[26] in contrast, international law allows states to make a reservation any time, when signing, ratifying, accepting, approving, unless the treaty permits states to do so.

2.2.3 The Attribution of Statehood

The central idea of law in any legal system, and also in both domestic and international law, is essentially concerned with the triangular juristic concepts: the concept of person, the concept of property and the concept of juristic act. As far as legal theory is profoundly concerned, the attribution of statehood is closely related to the legal notion of person.[27] According to the law of person, as a rule, the beginning of legal personality of natural person starts with completed birth and ends with natural death. Likewise, the beginning of statehood begins when the following conditions are complete, as a *sine qua non:* a permanent population, a defined territory, a government and capacity to enter relations with other states.[28] At the earliest period of the rise of the modern states in European countries during the sixteenth and the seventeenth centuries, the predecessors of international law possibly borrowed the concept of legal personality of juristic person from Roman Private Law by analogy.

In order to organize the international order, international jurists must conceive a modern state as a subject or person under international law because the concept of statehood entails the ability to bear rights

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[26] Article 19.

[27] There are some similar views on this point. See Henkin, Louis, *supra* note, p.11.

[28] The Montevideo Convention on the Rights and Duties of States.

and duties including responsibilities, separating from its members such as the right to independence, the right to self-defense, the power to grant nationality to state's own citizen.

2.2.4 The Principle of Acquisition of Territory

International law recognizes the wide variety of modes of territory, such as occupation, accretion, cession, discovery, etc.[29] because territory is one of the fundamental and necessary qualifications of state, *sine qua non*. Professor O'Connell says clearly *"Without territory a legal person cannot be a state; with territory it can perform acts and be subject to duties which it could perform and to which it would be subject if it lacked territory."*[30] Consequently, groups of people without a definite territory, such as Palestinians, political liberal movements, nomads, can not be called a state, likewise, an unborn child, *en ventre sa mere*, cannot be called a person. This topic links with the history of colonization. We cannot discuss this topic irrespective of the historical background.

No one can deny the fact that traditional international law is the product of Western Civilization[31] during the "Age of Discovery" or "Colonialism." Then the acquisitions of ownerless territory were delineated.

Occupation,[32] together with Christian claims of civilization

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[29] See Brownlie (1998) *Principles of public international law,* Great Britain, Oxford University Press, pp.129-167; Detter (1994) *The international legal order,* U.S.A, Dartmount, pp.331-344.

[30] O'Connell, Daniel Patrick, *supra* note, p.403.

[31] Public international law, or law among nations, in the formative period in the nineteenth century was an outcome of Roman Civil Law which blended faith with the Christian religion. Most of the principles of international law were exclusively derived from western thought invented and developed by western writers. Anyone who is interested in the influence of Christian religion on the origin of classic international law should read the following books: Gerrit Gong (1984) *The standard of 'Civilization' in international society,* England, Clarendon Press, pp.54-93; Mark Janis (1991) *The influence of religion on the development of international law,* U.S.A, Martinus Nijhoff Publishers, pp.85-106.

[32] It should be noted that discovery differs from occupation in that discovery, *per se*, cannot create the legitimacy or original title to *terra nullius*.

superiority, was commonly used to lay claim over parts of Africa, America, Australia and Asia. It means that occupation described as "original title" was viewed as a juristic concept and blended the idea with religious faith. From the juristic reason, the concept of occupation over the abandoned land was primarily derived from Roman law.[33]

Occupatio is the first taker of ownerless property, becoming its owner.[34] According to Roman law of property, occupation, *occupatio,* of abandoned thing, such as enemy property, wild animal, pristine land, leads to ownership.[35] Several years ago, several States claimed ownership over the Spratley Islands as a *terra nullius* by employing the principle of *occupatio*. It showed the influence of Roman law toward international law.

2.2.5 The Principle of Self- Help

In the judgment in Corfu Channel case 1949 [Merits] between the United Kingdom and Albania, world court had an opportunity to explain and clarify the meaning of self-help or self-protection. One of the crucial points of this case is the minesweeping operation, called "Operation Retail," executed by the British Navy. The United Kingdom government contended that the minesweeping in Albanian territorial water was one of extreme urgency and the United Kingdom's Agent, Sir Eric Beckett, described "Operation Retail" as self-protection or self-help. On this legal point, the United Kingdom's argument was unacceptable under international law. At the same time, the operation acted by the British Navy breached the established principle of sovereignty of State.

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[33] W.E. Butler, *Russian legal theory*. (Darmouth), pp.527.

[34] Borkowski (1994) *Textbook on Roman law*. Great Britain, Blackstone Press Limited, p.173.

[35] See Schulz, Fritz (1992) *Classical Roman law*. Germany, Scietia Varlag Aalen, p.361.

2.2.6 State Responsibility and State Liability[36]

Following the judgment of the Corfu Channel case, Judge Krylov delivered the remarkable dissenting opinion about the problem of fault, *culpa*, in international responsibility of State. Although disagreeing with the judgment, he affirms that the principle of state responsibility is based upon the notion of negligence called *culpa.* At the same time, he also denied the theory of risk is the states responsibility.[37] His dissenting opinion ascertained what was the essential element of international responsibility. In general, the concept of state responsibility is rooted in the principle of fault called wrongful conduct either wilful or negligent. In the case of treatment of aliens as well as the principle of territorial sovereignty including other issues, the notion of fault is an established rule from classic international law till modern international law. Indubitably, the principle of state responsibility based on *dolus* or *culpa* is the principal regime of international responsibility among nations.

Following the I.L.C draft's articles as well as commentaries on state responsibility under the auspices of the United Nations, the indispensable condition of international wrongful conduct of state, *sine qua non,* consists of two elements: the concept of the attribution of state and the notion of the breach of international obligation. By submitting a series of highly academic reports, many Special Rapporteurs had an opportunity to discuss the legal problems, to clarify the obscure meanings of technical terms, to shape ideas and so on. Consequently, International Law Commission contributes to the development of state responsibility by delivering valuable legal suggestions and comments the reports on state

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[36] For those who would like further insight into the distinction between state responsibility and state liability, please read my following publications, Pivavatnapanich, Prasit (1999), Some reflections on state responsibility: a comparative study, *Thammasat Review,* vol. 4, no.1; *Legal issues relating the liability arising from nuclear plant under Thai law* (research in Thai), 1998; *The problems of the elements of state responsibility in international law* (a thesis of master of law submitted to Thammasat University in Thai).

[37] See The Corfu Channel case 1949 [Merits], p.72.

responsibility submitted by Special Rapporteurs.

2.2.7 International Legal Personality of International Organization[38]

From being a juristic concept, also concerned with international law, subjects of international law are legal persons on which international law bestows legal rights and duties. Consequently, subjects of international law, some scholars called international persons, have the capacity to exercise their own rights and execute their own duties in the light of international law, both unwritten law and written law. In accordance with traditional international law, the modern state or sovereign state is exclusively a subject of international law. Nowadays, modern international law recognizes other legal entities as an international person, such as international organizations, national liberation movements and individuals. Nonetheless, the following paragraphs will concentrate exclusively on the legal status of international organizations at the international levels.

Prior to the Second World War, the problem of recognition of international organization as a subject under international law was not widely debatable among international jurists until United Nations requested International Court of Justice to consider that United Nations can obtain the reparations from Israel due to the death of Count Bernadotte, a Mediator. One of the crucial points of the Reparation case (1949) is that the United Nations, as a public international organization, could bring the international claims against Israel, as a sovereign state, pursuant to international law. In dealing with this issue with regard to the proper function of international organization, the court did not hesitate to decide that *"the Organization*

[38]The juristic concept of juridical personality of international organization plays a central role in operating it's activities both in domestic and international plane. There are a pleathora of literatures regarding international personality of intergovernmental organizations. See N.D. White (1996) *The law of international organizations, Great Britain*, Manchester University Press, pp.27-56; Crosswell (1952) *Protection of international personnel abroad*, New York, Oceana Publications, pp.14-28.

was intended to exercise and enjoy.... Functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane." Also, the court concluded clearly that *"the Organization is an international person."*

Following the advisory opinion of this case, what is the rule of law decided by the court? Why can the United Nations claim at the behest of itself against state? In other words, how can the court judge the problem of the legal personality of United Nations? This question is easy to ask but difficult to answer because the Charter, as a source and limitation of function, does not manifestly recognize United Nations as an international legal person under international law. In order to justify the Organization's-ability to bring the lawsuit to the international level, the advisory opinion of the court must be vindicated by using legal reasoning. The core of legal reasoning of the Reparation case is the notion of legal personality developed in the realm of private law: law of person and law of partnership. In both of these laws, the juristic person, or the artificial person, is endowed with legal personality that recognizes the juristic person's rights and duties including liability separating from its member.[39] According to the law of person, any juristic person such as a corporation, a foundation, an association and so forth can possess the property, hold the liability, be entitled to claim against a third person, etc. Also, if Organization is virtually devoid of international legal personality, so far as legal theory is deeply concerned, it cannot properly execute its function as well as purpose in accordance with its Statute or Constitution. To attain the objective of any Organization effectively, the inherent legal personality of Organization is indispensable.

It is noteworthy to say one should be wary of assuming that an

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[39] The concept of legal personality can be dated back to Roman law of person. See Borkowski, *supra* note, p.76.

international organization is equivalent to sovereign State. In the eye of the principle of international law, both Modern State and international organization are subjects of international law, however, the rights and duties, including some characteristics, are not the same. For example, the power to grant the nationality, *ius soli* or *ius sanguinis*, is reserved exclusively for the State.

2.2.8 The Principle of Good Faith

The emergence of the concept of good faith, as a legal concept, closely relating to the principle of *pacta sunt servanda* dates back to Roman Law. Although this concept was considerably influenced by Christianity,[40] the author does not touch upon how Christian religion has had an impact on the notion of *bona-fide*.

The principle of good faith was elaborated and refined by jurists. At the outset, it has played a critical role in private law. Good faith has infiltrated many branches of law such as law of contract, law of tort, law of property and so forth. In addition to private law, it has played an important part in administrative law and international law as well. To understand the importance of good faith in international law, understanding of the meaning of good faith is vital.

The true meaning of good faith is still controversial. Most lawyers usually understand that the concept of good faith is similar to the principle of *pacta sunt servanda* but, actually, the two notions are not quite the same. Good faith is not equivalent to *pacta sunt servanda* because good faith is more applicable than *pacta sunt servanda*. Typically, the legal principle of *pacta sunt servanda* is usually applied in the law of treaty, making and executing the international agreements between signatory States. But the concept of good faith can be used in other fields

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[40] See O'Connor J.F. (1991) *Good faith in international law*, Great Britain, Darthmouth Publishing Company Ltd., pp.23-30.

of international law such as the interpretation of treaty, the exercise of sovereignty in a state's own territory, the compliance of United Nation's-resolution, etc. The concept of *pacta sunt servanda* presupposes the notion of concluding an international agreement whereas the concept of good faith presupposes the international relation of sovereign States in the World Community.

2.3 The Rise of Some Modern International Legal Rules: Technical Law

Looking back to the traditional international law, some modern international legal rules are based on technical reason involved in national interest and international security. Today international law is not confined solely to the classic disciplines such as diplomatic law, state responsibility, state immunity, state succession, law of war and so forth. It is widely believed that the international community with its specific problems requires many international legal rules in order to govern the conduct of hundreds of states peacefully. The international technical law plays an important part in regulating many areas of international law because of the rapid growth of scientific technology, for instance, the discovery of the natural resources under the sea, the invention of the satellite and space stations, the development of telecommunications, the danger of environmental problems, the expansion of using the Internet, etc.

The rest of the following paragraphs are mainly focused on the influence of some technical reasons over international rules.

2.3.1 Space Law

Legal experts have made prominent contributions to the field of space law in various legal issues. With the highly rapid growth of space technology and lack of comprehensive legal rules, international law scholars point out several legal problems arising from using the outer space. For example, Wilfred Jenks, one of the significant pioneers of space law, was concerned deeply about the problem of legal status of outer

space and he recommended that it should be considered as *res extra commercium.*[41] And still another problem proposed by academic lawyer, J.C. Cooper, is the demarcation between airspace and outer space. This problem is very difficult to solve because there are several theories dealing with the solution. Some scholars suggest that outer space starts about 600 miles from the earth whereas other scholars recommend that outer space begins at no further than 20 miles above the earth's surface.[42]

After the launching of Sputnik 1 (1957), the international community became conscious that the *corpus iuris civilis* of space law had come into force. Space activities, either the exploration or exploitation, imagined as a new phenomena at a time of no legal experts or legal texts, demanded the establishment of the principle of the Peaceful Uses of Outer Space as soon as possible, so the formative process of the source of space law relied upon customary law, *lex non scripta,* for regulating the space activities of states with security. Because the numerous detailed rules of space activities in the treaty process were moot points, the best solution to practical problems depended extensively on the general principle of law in terms of resolution[43] or declaration and customary law. The customary law of space law laid down the broad principles of law rather than detailed or specific legal rules.

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[41] See Bhatt (1973) *Legal controls of outer space: law, freedom and responsibility,* New Delhi, S. Chand & Co., Ltd., pp.23-24.

[42] See detailed issue in Thirawat, Jaturon (1997) *Space law: the principle and practical problems,* Thailand, Thammasat University Press, pp.11-16.

[43] To be able to lay down a broad series of general principles of law in order to regulate the peaceful use of outer space, the General Assembly agrees to propose four resolutions. The first resolution is *Resolution 37/92 of December 10, 1982* concerning using artificial satellites. Second, *resolution 1721 (xvi) of December 20, 1961* is concerned with exploiting outer space in connection with the principles of international law. Thirdly, *resolution 1884 (xviii) of October 17, 1963* prohibits all states from installing nuclear weapons, including other lethal weapons. Lastly, the principle of International Direct Television Broadcasting called DBS is embodied in *resolution 37/92 of December 10, 1982.* See Stacey Lowder (1999) A state's international legal role: from the Earth to the Moon, *Tulsa Journal of Comparative & International Law,* pp.265-266.

Nevertheless, unlike customary law in private law, the time element was not required to shape the legal norms, that is to say, time immemorial is not indispensable to creating the customary international law. With the advent of the exploitation of space employing a both peaceful and military use, the international community urgently required law to lessen the *lacunae*. For this reason, the beginning of custom of space law was virtually instantaneous. Owing to the unimportance of timing, there were many fundamental principles of space law that were suddenly accepted, for example, the principle of *The Freedom of Outer Space, Peaceful Use of Space, The Common Interest, Non-Appropriation, Jurisdiction over Astronauts and Celestial Bodies,* etc. Succinctly speaking, in the earlier period of the formation of rules of law, space law, as a branch of international law, appears as customary law.

At the second stage, many leading space lawyers made efforts to invent and develop a group of legal rules that would be necessary for exploring and using outer space including other celestial bodies. Owing to the lack of any comprehensive substance of space law, the suitable way to resolve many legal vacuums was the use of analogies from other fields: Law of the Sea and Air Law.

The example of the jurist's space law is the concept of legal status and control of the Moon and other celestial bodies. Undoubtedly, the exploration and peaceful use of space have opened new horizons in the growth of international space law. One of the most challenging problems is the legal status of the Moon. Can State or other international entities like international organizations occupy or appropriate the Moon? This question can be answered depending upon which legal theory is used: *res nullius* or *res communis.*

Another example of jurist's law is the law of state responsibility. Space activity is *per se* an ultra-hazardous activity. Despite a lawful activity, the international community requires the international legal regime of state responsibility as soon as possible in order to guarantee

the security and safety of mankind.

In the third stage, the exploration and exploitation, as well as scientific research, became so sophisticated that customary law or the resolutions of the United Nations could not solve hundreds of technical problems such as Remote Sensing, Direct Broadcasting Satellite (D.B.S), the Definition and Delimitation of Outer Space and so on. These problems require the technical and detailed rules of law which do not only involve juristic reasons but also are closely associated with other factors like national interests, scientific experiments, lucrative investment, the security of state, etc. For this reason, the important source of modern space law is the law of treaties that laid down definitely the number of detailed rules, both scientific and juristic. Moreover, the law-making treaty is the appropriate method not solely to cope with the actual problems but also to prevent any difficulties that could conceivably arise in the future. The international community can participate in law-treaty directly or indirectly so every state has an opportunity to demand the law as it should be. In contrast, customary law is incapable of predicting many difficulties that do not exist at the present time. Customary law merely reflects the law as it is, *lex lata*, or actual practice of states, not laws as they should be, *lex ferenda.*

Another example of the international technical law in space law is the registration of space objects. Under the Convention on Registration of Objects Launched into Outer Space, 1975, if any space objects are salvaged by a state, such the state has a duty to return such space objects to the state where such space objects are registered.

It should be noted that the more technical reason, the less juristic reason because many principal legal problems, for instance, the problem of how to use space, jurisdiction, responsibility, etc, were solved by the pioneers of space law scholars such as John C. Cooper, Cocca, Matte, Foster and so forth.

Concluding Remarks

The author has attempted to explain how international law commences and develops with regard to the theoretical framework of the Three-Layers of Law Theory. As far as the theory of the Three-Layers of Law Theory is concerned, international law is not completely immune from private law: jurist's law. Furthermore, broadly speaking, the origin and development of private law and international law have followed similar lines: from customary law to jurist's law and to technical law, respectively. The history of international law is the Reception of Roman Civil Law by degree through judgments, arbitral awards, including leading treatises. The main reason why private law influences international law is the merits of private law. Private law *per se* is much more juristic and systematic than international law. However, this does not mean that international law is equivalent to private law. There are many international rules, as a *sui juris*, immune from private law, such as the concept of immunity of state and diplomatic agent, the notion of neutral state, the idea of the *causa bellum* and so on.

The reception of Roman Civil Law, as a prototype of lawyer's law, into international law was a watershed in the development and progress of international law. This reception reflected the insufficiency of international rules, during the formative age, to cope with the many problems occurring among States. In addition, the reception did not result from political motivation but from juristic necessity.

Actually, the Three-Layers of Law Theory deals mainly with the source of law, an important question of any branch of laws. Finally, I would like to end my article with van Hoof's words[44] *"As law is primarily a device for regulating and ordering relations in society, any system of law should be able to answer the question of what the law is or where it can be found. The question of the source of law is therefore fundamental in any system*

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[44] Hoof, Godefridus J.H. van (1983) *Rethinking the sources of international law*, p.3.

of law." And the Three-Layers of Law Theory attempts to answer this perennial question.

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