

**Sándor Szemesi<sup>1</sup>:**

## **The Adequacy of Gyula Toghze's Teachings in 21-century International Law**

### **Introduction**

92 years ago, the Hungarian Parliament enacted the Act XXXVI of 1912 on “the establishment of the Hungarian Royal Universities of Debreczen and Pozsony”. Actual training was commenced in 1914 under fairly austere circumstances, in the building of the Reformed College<sup>2</sup>. As corresponding to the practice of that period, the University was managed by the Rector Magnificus, who was elected on an annual basis by the faculties as in accordance with a predetermined order; he was personally responsible for the training and research work at the University, as well as the development of the institution. From among the university teachers of the Faculty of Law, nine professors of jurisprudence owned the title up to the suspension of the Faculty's activities in 1949; Gyula Toghze was the only professor of public international law, who could ascend the position.

Gyula Toghze was born on April 13 1867, in Szatmárnémeti. He attended secondary school in his home town, as well as in Budapest, Eperjes, Prague and Debrecen. He took his school-leaving examination in 1885, at the Reformed College of Debrecen. He studied law at the universities of Budapest, Vienna, Paris, London, Leipzig and Berlin, and then as a post-graduate student of law he spent half a year at the University of Munich as supported by state fellowship. His scientific–magistral career started on February 01 1895, when he was appointed to a professorship at the Reformed Church's Academy of Law in Kecskemét. Initially, he lectured on theory of law, as well as on criminal law and moral philosophy. On January 01 1910, his course of life took him to the Academy of Law in Debrecen, where he became a public ordinary professor, and headed the Department of International Law and Theory of Law. By the middle of the 1910s, Toghze's scientific publications were dominated by writings on international law, though he did not draw away completely from his interest in theory of law.

When the Hungarian Royal University of Debrecen was being organized, it stood to reason that he was called upon to govern the Department of Theory of Law and International Law; he accepted the commission, and on August 28 1914 he was appointed to be the public ordinary professor of the said department. In the academic year of 1918–19, he was the dean of the faculty, while in 1922–23 he occupied the post of Rector Magnificus in the institution having been renamed as the Hungarian Royal Tisza István University by that time. He was commissioned to be the dean in the academic year of 1930–31 for the second time. He retired in 1937 at the age of 70, and then moved to Budapest, where he died on November 12 1939.

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<sup>1</sup> Assistant lecturer at University of Debrecen Faculty of Law, Department of Public International Law

<sup>2</sup> About the history of the University see Zoltán Varga: A debreceni Tudományegyetem története I. 1914-1944. (The history of the University of Debrecen I. 1914-1944.) [Debrecen, 1967.]

Gyula Toghze's first printed work on international law was entitled as "A háború és a nemzetközi jog" (War and International Law), published in Debrecen, in 1916<sup>3</sup>. At the beginning of the 1920s, several of his studies, publications were dedicated to the Peace Treaty of Trianon<sup>4</sup>, and then having attended the summer course of the Académie de Droit International in the Hague he incorporated his teachings on international law in a handbook in 1925<sup>5</sup>. It was in 1930 when he published the most extensive product of instructional literature on international law in Hungary so far, an almost 740-paged handbook called "Nemzetközi jog" (International Law)<sup>6</sup>; the present study intends to subject this piece to thorough analysis in the light of today's knowledge on the topic. In the subsequent years, additional publications followed: "Nemzetközi bírászkodás" (International Jurisdiction) in 1931<sup>7</sup>, and "A munka nemzeti és nemzetközi védelme s ez utóbbinak organizációja" (National and International Protection of Labour, and the Latter One's Organization<sup>8</sup>) in 1932<sup>9</sup>.

### **Subjects of international law in Gyula Toghze's approach**

In Gyula Toghze's view, international law is "the regulation of relationships with respect to interstate rights and state sovereignty, as well as their policy in matters of public interest"<sup>10</sup>. When examining this basic definition, it is clear that the scope of international legal regulation covers the states fundamentally, and their international relationships constitute the subject-matter of international law. Yet, Toghze also mentions so-called secondary subjects of limited legal capacities: primarily, the League of Nations, the member states of various state unions, dominions and colonies, certain "International Committees", insurgents and finally individuals<sup>11</sup>.

According to Toghze, the League of Nations was a specific form of confederation, and "thus its being a subject of international law cannot be challenged."<sup>12</sup> Apart from the League of Nations, he was inclined to accept any other international organizations as subjects of international law on the basis of the following argumentation. As in the operation of states there are forums of legislation, execution and jurisdiction, as well as bodies involved in the related activities, in the communities among nations there occur such organization that are, however, have to be treated as the delegates of the individual states. Accordingly, legislative (or rather regulative) functions are ministered by congresses

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<sup>3</sup> Gyula Toghze: *A háború és a nemzetközi jog* (War and International Law) [Debrecen, 1916.]

<sup>4</sup> *Alkalmi beszéd a trianoni békével kapcsolatban* (Occasional speech with regard to the Peace Treaty of Trianon) [Yearbook and almanac of Hungarian Royal University of Debrecen, 1921-22., pp. 9-27.], *Világbéketerörekvések* (World peace aims) [Debrecen, 1923.]

<sup>5</sup> *Nemzetközi jog* (International Law) [Debrecen, 1925.]

<sup>6</sup> *Nemzetközi jog* (International Law) [Debrecen, 1930.]

<sup>7</sup> *Nemzetközi bírászkodás* (International Jurisdiction) [Kecskemét, 1931.]

<sup>8</sup> *A munka nemzeti és nemzetközi védelme s ez utóbbinak organizációja* (National and International Protection of Labour, and the Latter One's Organization) [Debrecen, 1932.]

<sup>9</sup> About the life and writings of Toghze see e.g. Béla Szentpéteri Kun: *Dr. Toghze Gyula a debreceni m. kir. Tisza István tudományegyetem 1922. évi rektor magnifikusa* (Dr. Gyula Toghze, the Rector Magnificus of Hungarian Royal Tisza István University of Debrecen in 1922.) [Pictured Almanac of Debrecen, 1922.]; Ágnes Kenyeres (ed.): *Magyar Életrajzi Lexikon* (Hungarian Biographical Dictionary) [Budapest, 1969.] p. 830.; Béla P. Szabó – Sándor Madai (ed.): *A Debreceni Tudományegyetem jogász rektorai 1915-1947.* (Jurisprudent rectors of University of Debrecen 1915-1947.) [Debrecen, 2002.] pp. 75-100. In this latter one the essay about Gyula Toghze was written by József Szabadfalvi (University Professor at University of Miskolc Department of Legal Theory and Legal Sociology)

<sup>10</sup> Toghze [1930.] p. 2.

<sup>11</sup> Toghze [1930.] p. 157.

<sup>12</sup> Toghze [1930.] p. 157.

and conferences, administrative responsibilities lie at international committees and international societies (unions) of administration, while jurisdiction is attended by international courts of justice. Gyula Toghze did not use the technical term “international organizations” that has become so widespread since his times, but he distinguished rather implicitly between governmental and non-governmental organizations (though these modern terms seem to be fairly mistaken, yet accepted), and he regarded only governmental organizations to be the subjects of international law – at least, this approach of his is suggested by the fact that the bodies mentioned as legal subjects in his works had the *differentia specifica* that they had been established as the delegates of the individual states.

The significance of the League of Nations is indicated by Toghze's efforts to describe the circumstances of its foundation, objectives, composition, the issues of admission and exclusion, its organs, their functions and scopes of activities, as well as the amendments to the charter of foundation in details, over 37 pages<sup>13</sup>. This sort of analytical approach essentially corresponds to the methodology used nowadays; for instance, Professor Károly Nagy presents the United Nations (that can be regarded as the successor of the League of Nations in several respects) in his handbook published in 1998 as follows: circumstances of formation, objectives, provisions of membership, description of the organs of the United Nations<sup>14</sup>.

Congresses and conferences are interpreted as “the assembly of representatives delegated to discuss the common causes of states, or important issues that involve the interests of these states”<sup>15</sup>. Congresses were occasionally attended by monarchs themselves, or such high-ranking state dignities were delegated who were vested with extensive authorization, while conferences were held with the participation of bodies, diplomatic or economic representatives, experts accredited to the hosting government of the conference, and thus obviously provided with much more narrow competence as compared to the former delegates. Nevertheless, in legal terms “both types of gatherings yielded decisions of similar significance”<sup>16</sup>. As considering today's view on international law, congresses and conferences are still held, but cannot be regarded as subjects of international law on any account, because they absolutely not separate entities gaining any form of independence from the states, but only forums for the states to hold intercourse with each other.

The term “international administrative bodies” used by Toghze practically corresponds to today's notion of “international organizations”, because Toghze brought international river committees, international health committees (among them, the International Public Health Agency having similar functions as the existent World Health Organisation), international committees controlling international financials (with a responsibility for protecting the interests of foreign creditors) and international administrative societies (e.g. International Telecommunication Union and Universal Postal Union) to this category. Yet, it is important to note that at that time state sovereignty was not restricted by the eventuality of any state being voted out in these international organizations, therefore “decision-making – apart from pre-nominated, minor issues – requires consensus.”<sup>17</sup>

Gyula Toghze divided international courts of justice into two groups, and made a distinction between mixed courts and international courts proper. Mixed courts consisted

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<sup>13</sup> Toghze [1930.] pp. 321-357.

<sup>14</sup> Károly Nagy: Nemzetközi jog (International Law) [Budapest, 1998.] pp. 443-479.

<sup>15</sup> Toghze [1930.] p. 359.

<sup>16</sup> Toghze [1930.] p. 360.

<sup>17</sup> Toghze [1930.] p. 365.

of the natives of different states, were established by the mutual agreements of the states, though “they do not judge .... the cases of international legal subjects (i.e. states), but citizens.”<sup>18</sup> In today’s terms these courts would not be considered as international courts, simply because private persons may not counter each other during the vindication of any international legal right according to the current approach to international law. “International courts of justice proper” include the Permanent Court of Arbitration created by the Hague Convention of 1907, the Permanent International Court of Justice brought to life by the Covenant of the League of Nations, the Central-American International Court of Arbitration and the International Prize Court (this latter one has never been put into operation, as the Hague Convention of 1907 ordering the establishment of this court have not been ratified by the states involved).

Private persons as being subjects of international law were discussed by Gyula Toghze only in half a page; there he outlined previous teachings on private persons as legal subjects, and concluded that private persons held rights (including the right for vindicating their legal demands) exclusively from a practical point of view with the factual legal subjects being the states even these cases. The states vested their citizens with the position of international legal subjects in order to facilitate proceedings at the competent courts, still these private persons cannot be regarded as independent international legal subjects<sup>19</sup>. Nevertheless, it is interesting to note that Toghze did not rule out the possibility that in the course of time international law “would manifest itself as the right of a universal community coming before states that has the capacity to dominate not only the states, but other intrastate formations, moreover individuals, and against this community all the above, participating entities would act as particular legal subjects.”<sup>20</sup> Actually, it is one of the probable ideological backgrounds, reasons why private persons have been able to become international legal subjects as concerning human rights by today.

### **Sources of international law**

Nowadays, finding the sources of international law is a fairly easy challenge, as several of them are included in Article 38 of the Statute of the International Court of Justice seated in the Hague (it is to be remembered, however, that there exist law sources that are not presented in the said Statute). Obviously this “aid” was not available to Gyula Toghze when compiling his handbook, though he was able to specify the required law sources similarly to the those of the latter-day Statute. According to Toghze, the sources of international law embraced customs, treaties, decisions by international courts of justice, writings by publicists, legislative acts by the individual states and decisions of their own courts of justice. From among them, customs, treaties and court decisions are direct law sources, that is “law originates from them directly”, while writings by publicists, state legislative acts and decisions by the national courts can be considered as indirect law sources, because “they create law indirectly.”<sup>21</sup>

In Toghze’s opinion the criterion for any customary law to emerge is that it should be observed by more than one state on a permanent basis – essentially this view corresponds to our today’s notion on the material condition for the evolution of customary law. Yet, Toghze also realized that the fulfilment of this conditions was not sufficient, as customary

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<sup>18</sup> Toghze [1930.] p. 379.

<sup>19</sup> Toghze [1930.] p. 158.

<sup>20</sup> Toghze [1930.] p. 158.

<sup>21</sup> Toghze [1930.] p. 27.

law presumed upon the requirement that states should regard showing proper attitude as compulsory, binding – in today's terms this is the so-called *opinio iuris sive necessitatis* as the psychological precondition for the development of customary law. Toghze was also correct to mention that if this psychological component – though he did not call it this modern way – was missed, then we could not talk about customary law, but only comity of nations (*comitas gentium*), wherein the feeling of liability was totally absent.

Written sources of international law (though they can be regarded only secondary sources following customary law) comprises “interstate treaties”. In Toghze's work, an international treaty was “such manifestation of agreed wills by two or more states that applies to sovereignty, ensures certain rights, but at the same time states obligations, as well as specifies, amends or terminates regulatory principles.”<sup>22</sup> The definition entails that at that time written understanding was not considered as a requirement (it was then stipulated by the Vienna Convention on the Law of Treaties of 1969), monarchs had the ability to conclude any treaty orally, though “recently international treaties have been committed to paper by the parties involved.”<sup>23</sup>

Toghze was convinced that international treaties concerned only states, yet the attitude, conduct required by these treaties was dependent on the actions by the government bodies and the subjects of the state with the precondition that “the treaties concluded by the state shall be codified, and thus be binding to the subjects.”<sup>24</sup> This is obviously the description of the dualistic relationship of international law and internal law. Toghze distinctly discussed the case that if the head of the state concluded the treaty, but the parliament did not adopt the same (the act of ratification in today's term), “externally it would be binding to the state, yet under public law the treaty would be unrealisable. This would then give way to conflict.”<sup>25</sup> It means that under the customs of the period the binding force of international treaties could invariably made recognized by ratification, that is the signature of such treaty never implied the recognition of its binding force.

Back in the 1930s, as concerning the validity of international treaties a compulsory element was their being registered at the Secretariat of the League of Nations with the aim of confining secret diplomacy that was highly popular even in the early part of the 20<sup>th</sup> century. Nowadays, the “only” sanction of non-registration at the Secretariat of the United Nations is that non-registered treaties may not be referred to in any proceedings at the organs of the United Nations (including the International Court of Justice in the Hague).

According to Toghze, the primary source of international law was customary law, inasmuch as treaties derived their binding force from it. “In spite of this fact, a treaty may act against any custom, and having become binding, it may terminate that specific custom.”<sup>26</sup> By today, it has been evident that customary law and international treaty are equal sources of international law, and it can be regarded as highly exceptional cases when an international treaties is able to completely deteriorate a given rule of customary law (for instance, when the treaty has been joined by all states) – since states not involved in the treaty (apart from the Charter of the United Nations) are not bound by that particular treaty.

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<sup>22</sup> Toghze [1930.] p. 392.

<sup>23</sup> Toghze [1930.] p. 401.

<sup>24</sup> Toghze [1930.] p. 30.

<sup>25</sup> Toghze [1930.] p. 399.

<sup>26</sup> Toghze [1930.] p. 31.

Gyula Toghze argued that decisions by international courts had to be treated as direct sources of law, because such decisions were not related to specific cases, but were to be interpreted as of doctrinal significance. On the other hand, Toghze himself pointed out that there existed a contrasting approach stating that the responsibility of courts lay only in the strict dispensation of justice, and they were not entitled to create new law<sup>27</sup>.

The writings or teachings of publicists were qualified as indirect sources of law, as they basically intended to interpret, systematize customary law. According to Toghze, all the rules mutually agreed by the illustrious publicists eventually became binding by dint of customs. In Toghze's view, the same category applied to any attempt to codify international law, as their influence would surface only in the practical field, especially court decisions. The process of codifying international law did gather pace only after the Second World War, by the establishment of the International Law Commission of the United Nations.

Similarly, legislative acts by the individual states (that related rules for the international community can be frequently derived from), as well as decisions by the national courts (that may affect also the citizens of other states, and thereby attain to international significance) were regarded as indirect sources of law, though nowadays they are just exceptionally considered as actual sources of law (for instance, in the case of the so-called parallel laws, when two states do not conclude any formal treaty, but they formulate identical legislative acts internally).

On the other hand, today's approach hold the so-called autonomous unilateral legal acts to be sources of international law, including notification, recognition, waiver, protestation and promise<sup>28</sup>; they were all mentioned also by Toghze emphasizing that these acts could not be regarded as sources of international law. Nevertheless, Toghze discussed neither *ius cogens* (a piece of terminology evolved later), nor general principles of law in his works, albeit he himself mentioned in his handbook for example the principle of *pacta sunt servanda*.

## Conclusion

Reading Gyula Toghze's handbook, it is obvious that international law in 1930 was considerably similar to the present-day regulations, though various differences of basic importance could also be found (for example, in the interpretation of human rights). One specific merit of the first professor of international law in Debrecen, Gyula Toghze's work was that it did not only strive for giving an introduction on the history of development of a given legal institution, as well as on the related international legal literature from diverse aspects, but was also apt to justify Toghze's differing view where the author did not agree with respected international experts of law. As a closing note, I would like to quote the introductory words from Gyula Toghze's handbook: "... it would be an achievement, if with this present work I could somewhat contribute to the broadening of knowledge on international law, as well as to raising interest in international law in Hungary."<sup>29</sup> I am definitely convinced that his book fulfils both of the two demands.

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<sup>27</sup> Toghze [1930.] p. 31.

<sup>28</sup> Nagy [1998.] pp. 52-54.

<sup>29</sup> Toghze [1930.] p. I.