

YUGOSLAV WAR OCCURRENCES AND THE INTERNATIONAL AND "MUNICIPAL" LAW PROBLEM RELATIONS

UDC 327:355.01](73+4:497.1)

Milan Petrović

Faculty of Law of the University of Niš

Abstract. *This paper, first of all, resolves the old moot question – whether international law is really a law as a positive law or not. It provides an affirmative answer, starting from the positivistic definition of the law, such one which the concepts law and positive law considers the same. According to it, the law is an order which a state as a holder of a public power of compulsion, "imperium", creates, protects or recognizes. So, since international law is an order created, protected or recognized by states as holders of "imperium", it is obviously a positive law. That which makes illusion that there is within or above the positive law one more law, "natural law", is the fact that there are within the positive law certain absolute moral principles; but, they are not valid as such, thanks to their inherent properties, but through the acts of making positive, that is to say adoption by the competent state organs. Further, the paper's standpoint is that of the monist doctrine, according to which international and "municipal" laws make one unique order, in the sense that international law is a branch of the "municipal" law. By means of a detailed analysis, the article proves inapplicableness of the dualist doctrines to the actual facts of the universal international law. Only, the former monist doctrine's viewpoint is either that the "municipal" law has greater legal force than that international (the teachings of the supremacy of the "municipal" law) or that international law has greater legal force than that "municipal" (the teachings of the supremacy of international law). This, however, proves that neither of the hereinbefore mentioned two teachings is correct, but that the "municipal" and international laws are of equal force. The "municipal" law is a territorial law of a state, while international law is an extraterritorial law. A state, particularly its constituent power (pouvoir constituant) may – that being the essence of the monist doctrine – put out of force each norm both territorial and extraterritorial laws, but, thus, it can violate both the territorial and the extraterritorial laws of some other state – at the same time the activities of the state being both lawful and unlawful. Subordinated to the idea of territoriality and extraterritoriality are other basic legal concepts: the municipal sovereignty is reflected in the presence of the constituent power upon a territory; the international sovereignty exists when one more condition is fulfilled*

– that the subject territory is not at the same time the territory of some other state. The article, therefore, represents an outline of a whole theory of law as well.

Key words: *state and law concepts, subordination and coordination in international and "municipal" laws, exterritoriality of international law*

The endeavors of this paper are purely theoretical. It is intended to clear up one of the most difficult questions of the theory of state at all, and the theory of international law in particular, the question of relations between the international and "municipal"(interstate) laws. But, to provide that answer, it should first clear up certain facts of the history of diplomacy, which make up the factual basis of theoretical judgments in question; the latest Yugoslav war occurrences (1991-1999) are just those which offer such relevant grounds of theirs; after them, with the essential assumption in view that the theory of law is a dead letter if not grounded in that what is happening in the space and time, neither the theory, being built upon the essentially different actual facts, can be the same any more.

Tito's Yugoslavia (1945-1992), although nominally a communist state which has proclaimed "dictatorship of proletariat", was a favourite of the anti-communist West. Its main pillar, the United States of America, kept on warning the Union of Soviet Socialist Republics, the communist empire, not to interfere with her. Johnson, the President of the United States, told to Brezhnev, the soviet leader, in 1968, that Yugoslavia is under the protection of Washington; that she can carry out a very risky politics, that is, to pursue economy surviving on credits, to have enormous foreign debt, inflation, unemployment, and that this politics obviously encourage separatism, which, however, is still unable to come into being.¹

That for the international relations quite unusual "altruism" was aimed to make the communists within the Warsaw Pact, beyond the "Iron Gate" as well those in the "Third World" to believe that there is also a socialism better than that grounded in the planned economy, the market socialism, so to say "capitalist" socialism. In fact, Tito's regime was an estate state, which, as such, was closest to the Mussolini's experiment from 1943-45, to his "Repubblica Sociale Italiana", "Repubblica di Salo".² But, when by the end of 1990s the last soviet dictator Gorbachev opened to the Warsaw Pact states perspective of transition "from socialism to capitalism", the Titoist experiment was no more requisite to the West; "altruism" has turned into egoism; Yugoslavia has become a prey instead of a protégé.

That this transformation from the protégé into the prey should be made possible, nationalisms in the federal republics, "socialist republics", were put into motion, the which nationalisms Tito himself began to foster starting from VIII Congress of the League of Communists of Yugoslavia, held in 1964. The first to be put into motion was the Albanian nationalism in Kosovo, subsequently that of Slovenian, and then all of them like an avalanche. Therefore, it is not at all unexpected that the nationalist parties at the first multi-party elections in the Yugoslav Republics after the establishment of the Titoist dictator-

¹ See M. Collon, *Poker menteur, Les grandes puissances, la Yougoslavie et les prochaines guerres*, Bruxelles 1998, 232 sq.

² K. Deschner/M. Petrović, *Krieg der Religionen, Der ewige Kreuzzug auf dem Balkan*, 2. Aufl., München 1999, 299 sqq., 307.

ship, held in 1990, completely defeated their competitors. Only, there was an essential difference between the Serbian and other nationalisms. Those nationalisms longed for dissolution of Yugoslavia by means of secession of certain Republics; the Serbian nationalism wanted, on the contrary, to keep Yugoslavia, but with certain changes in the constitutional status quo or even without them; variants "Great Serbia" or "Union of Serbian States" were kept in reserve, most probably only for the purpose of frightening the rivals; the positive law was, therefore, on their side because under the Constitution of the Socialist Federative Republic of Yugoslavia of 1974 a one-sided secession was explicitly excluded; according to its Article 5, paragraph 3, "Border of the Socialist Federative Republic of Yugoslavia cannot be changed without the consent of all Republics and Autonomous Provinces". But, the United States of America and her NATO allies did not want at all to lose the prey and, distorting the obvious truths and outrightly violating international law, turned to the side of separatists. All the secessionist republics were recognized independent in the course of 1991-1992, one of which, Bosnia and Herzegovina, even did not possess the characteristics of a state according to international law.

Those illegal acts have served the United Nations Security Council, on which the United States of America became the only deciding factor, as a legal basis for sanctions against the Federal Republic of Yugoslavia as a federation of Serbia and Montenegro imposed under Resolution No. 757 on 30 May, 1992. Also, the reasons for that were fictions, which were brought about by replacing causes and effects, that the military forces of Serbs in Bosnia and Herzegovina, which fought against the government of that "state" were a part of the Yugoslav People's Army, for the actions of which the Federal Republic of Yugoslavia should be responsible, so that the situation in Bosnia and Herzegovina and in other parts of the former Socialist Federative Republic of Yugoslavia constituted danger to the international peace and security, for which, again, Serbia and Montenegro should be responsible. Finally, that the Serbs from Bosnia and Herzegovina should be forced to accept unfavourable peace solutions for them, which will be legally sustained at the peace conferences in Dayton and Paris held in 1995, their state, Republika Srpska was previously subordinated to terrorist air bombing by the United States of America and her NATO allies.

In looting Kosovo and Metohia, the United States of America and her NATO allies did not employ the same legal fiction – recognition of independence and then declaration of "foreign", Serbo-Yugoslav military and police forces for "aggressors" – most probably not because Kosovo and Metohia was not a state, but an autonomous province, component part of Serbia (according to the Constitutions of the Socialist Federative Republic of Yugoslavia and the Socialist Republic of Serbia of 1974 having the characteristics of a "state fragment"), but because it would result in creating "Great Albania", for which an agreement not only in the UN Security Council, but on the NATO itself could not be reached. That is why a decision was made for Kosovo and Metohia to officially remain a component part of Serbia and the Federal Republic of Yugoslavia, but to be subordinated to a military occupation and civil administration under the United States of America and her allies, as those already established in Bosnia and Herzegovina. In order to force the Belgrade regime to accept that, Serbia was, without any mandate by the UN Security Council, exposed to terrorist air raids from 24 March to 9 June, 1999. It was only when the Belgrade regime was ready to surrender regarding Kosovo and Metohia that the UN Security Council was engaged, which, to the shame of that institution, under its Resolu-

tion No. 1244 dated 10 June, 1999, made the consequences of an aggression against a sovereign state "legal".

Thus, in essence, to the states re-recognized unlimited **right to wage war** (*jus belli*), which the international community, led mainly by the principal aggressors on Serbia and the former and present Yugoslavia, beginning from the Pact of the League of Nations of 28 June, 1919, through the Briand-Kellog Pact of 27 August, 1928,³ to the United Nations Charter of 26 June, 1945, has made every efforts to revoke it by narrowing it to the right of a state to the indispensable defence and the collective measures of the UN Security Council aimed to prevent the actual or prospective endanger of the territorial integrity of any state by the outside aggression. For, to recognize the right of war only to the greatest imperialistic power in the history of mankind, the United States of America, and at the same time to deprive other powers of that right, it would mean to abolish the principle of equality among states, which appears to be the corner stone of the modern universal international law.

Since prevention of aggressive wars is the very essence of the United Nations, its failure to do that shall mean its definitive end: It shall be moved to the museum of many unsuccessful creations of international law. Let us remind ourselves that the very predecessor of the United Nations, the League of Nations, actually ceased to exist when, employing its sanctions, it failed to check the aggression the fascist Italy commenced against another member of the League of Nations, Abyssinia (Ethiopia), on 3 October, 1935, although it was officially dismissed only by the conclusion of Assembly of member states of 8-18 April, 1946. There is, however, a distinction between the League of Nations and the United Nations that must not be overlooked: the League of Nations at least called the things real names and tried to check the aggressor; the United Nations, on the contrary, gets into lies, rewards the aggressor and punishes the victim of the aggression.

The question of relations between international and "municipal" (internal state) laws, which is here, so to say, being posed by itself, means, however, an answer to an old, but still actual question, whether the norms of international law may at all be rated as legal norms or not. The learned who teach international law, almost all of them, provide a positive answer to it, even when they lack worthy facts, which is, from the human point of view, understandable, because on the contrary they would exclude themselves and their profession from the law science. But, answer to that question does not fall within the competence of the science of international law, but of a science that deals with the **notion of law** as such, and thus with the notion of international law, and that is the theory of law or, possibly, because of tight connections between the law and state, the theory of state. There are, in connection with this, renowned theoreticians of law and state who present serious facts against the legal character of the norms of international law. Sure that we are not here in position to deal with all theoretical views which deny lawfulness to the standards of international law, but only to those we consider grounded in the facts which are hardest to deny. Those are the views of F. Somló, Hungarian, who wrote in the times of World War I, and the two contemporaries, Frenchman Burdeau and our compatriot and

³ On that Pact see: L.Le Fur, *Précis de droit international public*, 2-e éd. (Serbian translation: L.Le Fir, *Međunarodno javno pravo*, Beograd 1934), 352 sqq.,

teacher R. Lukić.

First of all we need to say what we consider legal norms (formal sources of law). Those are norms, which are for the purpose of creating, amending or abolishing subjective rights, and duties prescribed, protected or recognised by a **state**. The state is, therefore, the fundamental material source of rights, although not the only one; there are various forms of nongovernmental legal norms, but all of them must, eventually, be connected with the **will of state**; the norms that a state does not approve, but they are, nevertheless, in effect, belonging to some other kind of norms, conventional or moral, but in no way to those legal. Legal norms are not only those published in the governmental official register and which are mainly dealt with by the law science. A state does not create the customary law norms, but it uses them, that is, protects them and according to that they are legal norms. Not only that the state creates the autonomous law norms; moreover, it neither has to protect them; it is well enough, if they should be legal norms, that the state does not oppose their application and not to consider their performance illegal. Belonging to the latter kind of autonomous law norms, "pure autonomous law", is, first of all, the church law, the right of boycott belonging to trade unions and merchants, the right of competition of the members of the civil society. But, are not the "pure autonomous law" norms in fact conventional norms? That is, are not we forming a mistaken notion of those law sociologists who construct the notion of a law that is outside, even above the law of the state, "social" or the "law of life"?⁴ No, we do not think so. A law is an order of subjective rights.⁵ The standards of "pure autonomous law" constitute a basis of subjective rights and all other legal norms; the conventional norms do not have that feature. For example, if someone brings charges to be paid for damages caused by a boycott or competition, the court will investigate whether the actions by means of which the damages were caused are prohibited under any legal act. If it finds that they are not, it will reject the demand for compensation, which here equals the recognition that a person making damages has legal licence to do so to the third persons.

In spite of all that, a social norm as a condition of the state law validity necessarily exists in each state; we call it "**social legal norm**". The contents of that norm are a recognition of a power as a state power by the stronger part of the people, and its function is foundation of the state and law legitimacy. It is obvious, however, that existence of the social legal norm does not in any case mean existence of some suprastate law, since that norm only determines which law is to be considered a state law and does not represent any material border of that law.

Enforcement is not an essential element of the legal norms. Countless law writers claim just the opposite. For them, a norm is legal just because its performance is provided by a physical enforcement of the state, that is, because its violation results in a sanction, which also consists of employment of physical enforcement by the state. Favourableness of that "sanctionist" theory results from the fact that it is clear, logic and easy to use; by means of it, "legal" norms are very simply distinguished from those "non-legal". The said

⁴ See: G. Gurvitch, *L'Idée du Droit Social*, Paris 1931, 53sq.; E. Ehrlich, *Grundlegung der Soziologie des Rechts*, Neudruck, München/Leipzig 1929, 99.

⁵ J. Kohler, *Lehrbuch der Rechtsphilosophie*, 3. Aufl., Berlin-Grünwald 1923, 81 sq.; T. Živanović, *Sistem sintetičke pravne filozofije*, Beograd 1959, 99.

theory is, however, a great violence over the reality, which is neither simple nor logic. Truly, there is a state behind a great number of legal norms, as a guarantor of their effectiveness, with its physical enforcement. There is also a great deal of legal norms short of such warrant, either because it is impossible or because it is needless; those authorising norms and norms by means of which other norms are abolished. Similar duality can also be found with the state. Its crucial feature is possession of physical force great enough to provide obedience to its will. But, also like a necessary state of welfare, it renders services indispensable for survival of its citizens: "The state fortune giver", says Ripert, "replaces Christ the consoler of the distressed."⁶

Our understanding of legal norms is **positivistic**: The legal norms are only those norms, which are, as we have already seen, indirectly or directly wanted by the state, and there is no any pre-existent or suprapositive "natural law". If some other legal discipline were here in question, but not the science of international law, this disassociation from the "natural law" would be needless; they have secreted that nonscientific concept from themselves, in spite of all opposing of the law philosophy, way back in the 19th century. But its ghost is still wandering through the dark rooms of certain works in the field of international law, creating thus in the eyes of the representatives of the scientific method in law a depressing picture of troddenness by the time.

Nevertheless, there is no a system of legal norms of a state where certain **apriori, ideal** principles cannot be encountered; their obvious facts of life, their positive effectiveness were a motive for a story on the "natural law". Something other, however, is in question, **ethical norms effective also in law**, the ideal and apriori nature of which has excellently been proved recently by a German philosopher N. Hartmann.⁷ It was already Hegel who in his "Science of Logic" pointed out that "what should be" (das Sollen) is the category of existence as such.⁸ Only, that of essence here is as follows: There is no one unique ethical system in the form of whatever eternal moral law. There are more of them. For instance, Christian, Hinduistic, Buddistic, Islamic morals, the rationalist humanism morals, each of which allows countless concretizations. Resulting from this is that moral norms, to be a **part of positive law**, must be incorporated into it by the will of the state.⁹

Let us now bite into the question, as we have earlier announced, of lawfulness of international law.

Somló, a renowned law positivist and follower of J. Austin (1790-1859), the English law theoretician, founder of the "analytic jurisprudence", allows that there is only one material source of law, "legal power" (Rechtsmacht) for a totality of people. It is such power to the commandments of which the people of a certain "circle" "usually", "regularly" are obedient, that is, more frequently than to the commandments of any other power. It means that people can be subordinated to a greater number of powers, which

⁶ Sure under the condition that will impose increasing obedience on us. G. Ripert, *Les forces créatrices du droit*, Paris 1955, 188 sq.

⁷ N. Hartmann, *Ethik*, 4. Aufl., Berlin 1962, 119 sqq.

⁸ G.W. Hegel, *Wissenschaft der Logik*, I, herausg. von G. Lasson, Leipzig 1951, 119 sqq.

⁹ On that see excellent works of two outstanding authors of the science of law: G. Ripert, *La règle morale dans les obligations civiles*, 3-e éd., Paris 1935; J. Esser, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts*, Tübingen 1956.

prescribe the norms of their conduct, but it is only in one certain "society" that only one of them is the "legal power". It reaches that quality through quantity, and it is here that lies the fundamental weakness of his teaching; namely, it directs "numerous norms" to its subjugated and by means of positive regulation powerfully embraces a "wide range of living relations", because of which its norms make one multitude, the "law order".¹⁰ As it can be seen, Somló replaces the notion of state by the notion "legal power"; he reserves the expression "state" for the "society established under the obedience to the norms of a legal power".¹¹ Because of that neither "sovereignty" belongs to such understood "state", but to the legal power, as a "totality of properties which extol a power to the level of legal power".¹² In other words, a legal power is the legal power because and only because of being sovereign, the sovereignty is identical to the lawfulness of the legal power.

Starting from these analyses, Somló constructs the notion of international law. It consists of the norms to which the legal power is subordinated, because it is one law of coordination that is inconceivable to him; there would exist only the "law of subordination", since without subordination to the norms of a higher authority there is neither "municipal" nor international law. One mistake more, which will soon be refuted. In keeping with this assumption, there is one power in the international law community as well, the components of which are great powers, and the essential property of which is of being able to impose obedience to the member powers of that community "international legal power".¹³ In favour of the priority of the international law norms over the norms imposed by certain legal powers, Somló also refers to the formal fact, which will be more correctly understood later on, that a certain legal power cannot arbitrarily repeal a norm of international law in the creation of which it took part, but only in agreement with other legal powers.¹⁴

In addition to all that, the norms of international law are not legal norms, since the international legal power is not a legal power. The norms it prescribes are proportionally rare compared with the norms lying behind which is an individual legal power. The international legal power is unstable; a war between great powers, which compose it, destroys that power, destroying thus international law. Finally, the international law norms are often violated; it is great powers that insufficiently respect them.¹⁵ It is from there that Somló draws a conclusion that the international law norms are only one kind of conventional norms which should be designated as "international or supranational norms".¹⁶

However, Somló has not properly determined legal norms. It is from there that his whole construction of international law loses grounds. Quantitative criterion of "more often" obedience is extremely shaky; Somló himself, considering the theory of governmental connecting, all of which for him are of "international legal nature", since "there can be no state above state", he says "that each time it will not be possible to establish with conceptual sharpness whether a connecting of states still allows a governmental character of

¹⁰ F. Somló, *Juristische Grundlehre*, Leipzig 1917, 93 sqq.

¹¹ *Ibid.*, 251.

¹² *Ibid.*, 280.

¹³ *Ibid.*, 153 sqq.

¹⁴ *Ibid.*, 155.

¹⁵ *Ibid.*, 159 sqq., 162 sq., 163 sqq.

¹⁶ *Ibid.*, 170.

parts, so that consequently it still does not produce such character of the whole, or conversely, whether it has already destroyed the governmental character of former states and now have subordinated them to a comprehensive governmental creation. Since solution of this question also depends upon that how far are extending the forces of the norm which has been established by connecting, a **transitional field** will, surely, very easily result, for which the answer to our question must be uncertain".¹⁷ Therefore, there may exist states, which are not states, that is, nonstates that are states at the same time.

The notion of a state does not depend at all upon the number of norms it imposes. It, and consequently the law, appears when a human force, as a rule in the form of a smaller or more complex organization, commences on a **territory** to effectively provide **public order and peace**, to take care of state and public security. Freedom and property, marriage and family, religious services, may then be mere factual situations protected under the conventional norms. The state seems to have been created in that way, as a military and police power, which has provided public order and peace in one tribe, city or nation, while the other branches of law have gradually been created by means of customary and autonomous laws. Public order and peace on a territory, "police clause" in the modern sense, is, consequently, a fundamental category, original grounds of the state and law. International law must have appeared much later, with a formed consciousness on possible **extritoriality of public order and peace**; extritorial public order and peace are a basic category of international law. The history bears witness to the first found international agreement which dates back to around 3100 BC, between two Mesopotamian city-states and that making of those agreements was usual practice only in the second millennium BC; Egypt and Mesopotamia being the leaders in international law.¹⁸ Here, the reader's focus of attention is switched to the extritoriality effectiveness idea of certain legal norms and historical and legal and logical precedence of "municipal" (interstate) law over that international the idea understands. For, that idea could occur only as a consequence of the state idea groundedness, that is, of the interstate public order and peace. If abstracted from it, the state remains; if abstracted from the state, it vanishes too.

Further, the assertion that the whole law is possible only as a "subordination law" is null and void when encounters the facts of the legal reality. Namely, it is not only international law the law of coordination, that is, put it more precisely, **modern universal international law**, but constitutional law of today's "constitutional state" is also to a great extent such a law. Such character of that constitutional law is reflected in the absence of subordination of "immediate state organs" of each other; parliament, people and, possibly, the head of state stand in a constitutional state in the coordination relation, while in a federal state in that relation, as the factors of its constitutional power, are the member states of the component state.¹⁹ Again, that relation was more expressed in a one-time West European estate state, which, because standing there opposite each other were the monarch and estates as equally authentic legal subjects, was called a "dualistic" state.²⁰ Only that dualism of legal structures, to be dealt with later on, was not in question there, but

¹⁷ *Ibid.*, 291 (stressed by M.P.). See also 290 and 295.

¹⁸ A. Nussabum, *Geschichte des Völkerrechts in gedrängter Darstellung*, München/Berlin 1960, 1 sqq.

¹⁹ See G. Jellinek, *Allgemeine Staatslehre*, 3 Aufl. von W. Jellinek, Berlin 1915, 544 sqq., 556 sq.

²⁰ *Ibid.*, 381 sqq.

dualism of holders of one unique legal order. "International legal power", therefore, does not constitute a part of the notion of international law.

It is just at this point that G. Burdeau, an outstanding French theoretician of state and political scientist, commences criticism of the lawfulness of international law.²¹ "Legal order", he points out, "may appear only in one society". However, the fundamental conditions of existence of each society are social objective and power. However, that what is missing is an international power: "Insufficiency of the idea of international law can be explained, of course, by the nonexistence of a supra-state power. Without that power, international law cannot be conceived. It can be born only if above certain legal orders a global legal order, which coordinates and restricts them over their corresponding domain if effectiveness, is established. Establishment of such an order may, however, be only the act of one power which does not owe anything to that or that national legal order, but results directly from an idea of international law."²²

We do not contradict this opinion. Nevertheless, at the same time, we do not think that it refutes **every** possibility of international law. That what it denies is only one supranational international law to which "municipal" laws of certain states are subordinated, we also agree with that, that one such **universal** international law do not exist today. However, if we take a stance that it is, as we have said above, a **law of coordination**, which is not above certain state legal orders, the Burdeau's criticisms can be understood as a strike of saber against water. Again, we think that appearance of a worldwide supra-state power, which would, from its own fullness, determine the competence to particular states, is impossible under the present living conditions of the mankind. But, should it appear anyway, its existence would be for a great number of states

experienced as a disaster, so that it would be a source of civil wars and revolutions, but not that of "worldwide peace".

Starting from the elements of the state and law we have already arrived at in this paper, it would be a bit easier for us to revoke the critics of the lawfulness of international law presented in his standard text book by R. Lukić.²³ For our renowned theoretician of law and sociologist, there is only such international law that has been approved by one state; but, it has thus ceased to be international law and became a part of "municipal" law of the state in question. All other forms of international law are not legal norms with reference to that state. For, according to him, the main characteristic of the law is that its norms are protected under sanctions of the governmental instrument of power. That is valid for the international law norms as well, since in mutual relations the states employ enforcement measures, particularly war, when they estimate that international law has been violated. Though, that enforcement can hardly be qualified as a sanction similar to that in the "municipal" law, because enforcement is employed here by someone who is above the subjects of law, while there the enforcement is employed between the subjects, governing between whom is a sovereign equality.

Let us make a halt here. We also think that international law for a state most frequently may be valid only if it has approved it. But, it does not still mean that

²¹ G. Burdeau, *Traité de Science politique, I: Le Pouvoir politique*, 2-e éd., Paris 1966, 379 sqq.

²² *Ibid.*, 387.

²³ R.D. Lukić, *Uvod u pravo*, Beograd 1973, 399 sqq., 426 sq.

international law has lost its characteristic feature. Say, institutions of diplomatic and war law are so essentially different than those of other branches of "municipal" law that disappearance of international law cannot be spoken of at all either when the state has approved it. We also agree that reprisals and war, particularly "righteous war" (*bellum justum*), are sanctions of international law;²⁴ the sanctions adequate to international law as the law of coordination. However, we have seen that sanctions in the form of physical force are not an essential element of the legal norm; no matter how, but what is achieved by them. Like the norms behind which there is the will of the state, and by means of which creation, change and termination of the subjective rights and duties are longed for, so the international law norms are also norms just the same as the norms of the "municipal" law, nothing more nothing less.

But Lukić initiates one more argument, sociological or pseudosociological, against the lawfulness of norms of international law. Like an orthodox Marxist writer, he points out that legal norms are those norms, which appear as a will of the governing class, which it imposes, to the subordinated class, which undoubtedly applies for "municipal" law, but not for international law. Only, that definition of the law, coined in view of the relations between the bourgeoisie and the proletariat in the West Europe of the 19th century is too narrow and partial.²⁵ Sure, it may be said that legal norms are always imposed by the strong over the weak, the stronger being often the great majority of population.²⁶ But, it is not only the characteristic property of "municipal" law. Similar performance is also being repeated, as particularly demonstrated by Somló, in international law;²⁷ and, be it added, most frequently in much more brutal way than in the "municipal" law. Nevertheless, all those inequalities appear in the **process of creating law**, not constituting its **notion**. That is why, strictly speaking, the science of law does not deal with them, but history, the science of politics and sociology.

If international and "municipal" laws have been demonstrated so far to be of the same essence, so that international law is also, in view of this, an irrefutable law, their mutual relations should be further precisely determined. There are, bearing on this, two kinds of doctrines: widely spread "dualistic" and rarely advocated "monist". According to the dualistic doctrines, "municipal" and international laws are not only different parts, fields or branches of a definite legal order and system, as it has been postulated here and which has been strictly advocated by Lukić, but they are two quite different, one from the other independent legal orders and systems. Conversely, from the "monist" doctrines viewpoints they are unique. But here arises one great paradox. Dualistic teachings tend to prove that the norms of the "municipal" and international laws are mainly equal legal forces, which is correct, but they do that by means of a wrong argumentation. The monist teachings, on the contrary, tend to prove that either international law is stronger than the "municipal" or that the "municipal" law is stronger than the international, but none of the

²⁴ See also H. Kelsen, *Reine Rechtslehre*, 2. Aufl., Wien 1960, 321 sqq.

²⁵ H. Kelsen, *The Communist Theory of Law*, New York 1955, appears, according to us, as exemplary critics of the orthodox Marxist theories of state and law.

²⁶ See L. Duguit, *Traité de droit constitutionnel*, I, 3-e éd., Paris 1927, 535 sqq., 670 sqq.; *idem*, o.c. II, 3-e éd., Paris 1928, o.c., 22 sqq.

²⁷ Somló, o.c., 154 sqq.

two alternatives is correct, although these teachings rely on the true ground. Modest is the contribution of this paper as well as removal of that paradox.

The "dualistic" doctrine was founded by the German professor of the Constitutional and International Law, Triepel (1868-1946).²⁸ According to him, international and "municipal" laws are "two circles which at the best come into contact but never intersect".²⁹ Their opposites are twofold: once in the sense of normed living relations, the other time in view of the source. "Municipal" law determines relations inside the state, that is, among the individuals and legal persons and the norming state itself.³⁰ The subject of international law are legal relations among the coordinated states.³¹ Also, the sources from which international and "municipal" laws come from are different. In contrast to the sources of the law of the state, the source of international law is in the common will of states qualified for creation of objective law which Triepel calls "agreement" (Vereinbarung) and which is a legal basis for making international contracts the character of which is "legal transaction" (Rechtsgeschäft).³²

Since international and "municipal" laws are thus separated, a question is raised whether these two legal orders can act to each other. Indeed, Triepel says, which in view of his whole construction is surprising, that as for the source it is international law that is above that "municipal", but it does not mean that international law within the state legal order can produce effects,³³ nor that "municipal" law can, moreover, receive it.³⁴ That reception must follow through a separate "transformation", the which expression is introduced later on; Triepel used to speak about "transformation", "legal change", "acceptance", "adoption", "embodiment".³⁵

Resulting from this is that the subjects of the state are not the subject of international law. The law opposite to international law is null and void. The citizens can be addressed only by the governmental norms, to which they owe their obedience.³⁶ The state is, at the same time, responsible to shape its legal order so that it should be suitable for fulfilment of its international legal obligations for, conversely, it commits international legal delict.³⁷

This sharp dualism has been mitigated to some extent by Anzilotti, the Italian author. His view is that a binding force of the international law norms and those of municipal law originates from different basic norms, so it is why that these two legal orders are independent to each other, although precedence goes to international law. Due to the separateness of these two legal orders, there can be no norm of international law that would result from the internal state regulation of rights, nor, on the other side, any legal norm which is binding within the state can draw its binding force from the international legal basic norm. Consequently, international legal norms could not affect the

²⁸ H. Triepel, *Völkerrecht und Landesrecht*, Leipzig 1899.

²⁹ *Ibid.*, 111.

³⁰ *Ibid.*, 12 sqq.

³¹ *Ibid.*, 18 sqq.

³² *Ibid.*, 43, 45, 48 note 1, 61., 70 sqq.

³³ *Ibid.*, 257 sqq., 259

³⁴ *Ibid.*, 169 sqq.

³⁵ *Ibid.*, 120, 170.

³⁶ *Ibid.*, 259 sqq.

³⁷ *Ibid.*, 299 sqq., 313 sqq.

effectiveness of the internal state norms and vice versa. There are no true conflicts between international and "municipal" laws. The international law can refer to the law of the state and the latter to international law, too.³⁸ This reference can either be receiving-material, resulting in acceptance of international law into that "municipal", when formal effectiveness, addressees and contents of norms more or less are changed. But, if reference should not be receiving, formal, then the international law rules employed by the internal state organs remain the rules of international law. Also, without the transforming reception, the governmental organs can apply international law, but only casually.³⁹ Anzilotti allows that much, principally separating two groups of legal norms, influence of international law on shaping the legal norms within a state.

A contemporary author, Freiherr von der Heydte, thinks that the moderate dualism is identical to the moderate monism, that view being governing.⁴⁰ Moderate dualism is also advocated by the Anglo-Saxon writers.⁴¹ Yugoslav theoreticians of international law were also of the same viewpoint.⁴² The Soviet doctrine of international law was dualistic from the outset.⁴³ Only, its viewpoint at first gave precedence to "municipal" law, to evaluate then towards the full equality, towards the absence of any legal subordination of one law to the other.⁴⁴

The international and "municipal" laws dualism doctrine is mature for scientific appraisal. In this connection we will now extract the discussions on the dispute on the precedence between the "municipal" and international laws from it, since a more general question is in the matter, common to both dualistic and to its opposite monist doctrine.

With the subject and the formal sources of international and "municipal" laws in mind, the difference between them is thus relative that, starting from them, they cannot be admitted to be able to constitute two quite different, hardly touching each other legal systems. All legal norms regulate the conduct of people. International law mainly regulates the conduct of the representatives of the governmental organs, but to a certain extent that of "common" individuals. But, certain branches of "municipal" law, constitutional law, procedural law as well as certain fields of criminal law mainly regulate the conduct of the representatives of the governmental organs and in that sense there is no difference between them and international law. "Agreement", as understood by Triepel, is a frequent source of "municipal" law as well. In fact, a fundamental one: A law is

³⁸ D. Anzilotti, *Lehrbuch des Völkerrecht*, I, Berlin/Leipzig 1929, 37. sq.

³⁹ *Ibid.*, 43 sqq. See also: Anzilotti, *Corso di diritto internazionale*, I, in: *Opere di Dionisio Anzilotti*, Padova 1955, 52 sqq.

⁴⁰ F.A. Freiherr von der Heydte, *Völkerrecht*, I, Köln 1958, 35.

⁴¹ See: D.P.O'Connell, *International Law*, I, London/New York 1965, 46; G. Schwarzenberger, *A Manual of International Law*, 5th ed., London 1967, 45 sqq.

⁴² Instead of all, see: J. Andrassy, *Međunarodno pravo*, 4th ed., Zagreb 1961, 3 sqq. Confer also: E. Dorch, *Der gegenwärtige Stand der Jugoslawischen Völkerrechtslehre*, Herrenalb 1960, 29.

⁴³ See: E.A. Korowin, *Das Völkerrecht der Uebergangszeit. Grundlagen der völkerrechtlichen Beziehungen der Union der Sowjetrepubliken*, Berlin-Grünwald 1929, 34, 42 sqq. See also: Kelsen, *The Communist Theory of Law*, 148 sqq.

⁴⁴ That evolution is clearly reflected in the works of G.I. Tunkin, one of the leading Soviet writers, who in an earlier work (*А. Фердрос, Международное право, Москва 1959, Предисловие, 15 sq.*) advocates the view on the precedence of the "municipal" law, while in another of later date (*Международное право. Ответв. ред. Г.И. Тункин, Москва 1982, 70*) the view of its equality with that international.

"agreement" of the majority in the parliament, customary law is "agreement" of the majority of member of a legal community. As for the constitutional monarchy, the constitution and the laws appear as a form of "agreement" between the monarch and the parliament, in the federal state the houses of the federal assembly usually resolve the federal laws and the federal constitution, again by reaching "agreement".⁴⁵ Incidentally, normative "agreement" of two or more states, the last basis of the international law effectiveness according to Triepel, cannot be seen why it would be of greater legal power than the international contract – legal transaction between those same subjects.⁴⁶

In fact, dualism of international and "municipal" laws would be possible only under the condition that they have different **material sources** governing between which are **subordination relations**. But since there is no one **permanent and stable, institutionalized** international legal force, international power, in the field of the modern universal international law, international organizations headed by the United Nations do not essentially differ from the organizations to which the public authorisations in the Yugoslav law⁴⁷ have been transferred by the state, that is, by the public institutions of French, Swiss or German laws (*établissement public, öffentliche Körperschaft*),⁴⁸ then there can be no any dualism of international and "municipal" laws in the sense of dualistic doctrines.

Therefore, there exists a similar dualism, and it exists only then when there is such inequality. It occurs in "municipal", but exceptionally in international law as well, and that in **particular** law. Its forms are as follow: federal state, decentralization by means of "state fragments", supra-state, protectorate and union of states. Advancement of the elements of those theories will be at the same time refutation of the understanding on the impossibility of subordination of one legal power to another.

In a federal state, both the organs of the central and organs of the federal states establish legal orders, the legal orders being of the component states subordinated to the federal legal order. Here, we cannot deal with a multitude of theories on the federal state, but we will advance only our view, because it seems the only one which can bring peace between the idea of statehood of the parts and the idea of statehood of the whole.

An essential feature of a typical modern state is the **constituent power** (*pouvoir constituant, verfassunggebende Gewalt*) **of the nation**, "national sovereignty", the national sovereignty must not unconditionally be identical to the "people's sovereignty", but may also belong to other factors which embody the national will, for instance, to the ruler or a political movement. In a truly, and not simply nominal federal state, one or more nations performs (perform) its (their) constituent power both through the organs of

⁴⁵ Duguit, o.c., I, 375, claims that there is a difference between the "collective act" as a "multitude of one-sided acts", where examples we have quoted fall in, and the "agreement" (union); such difference can be made by positive law, subordinating "consent" to the contractual law regime. But, there is no such difference at the level of fundamental legal notions.

⁴⁶ Particularly pointing to that weakness of Triepel's teaching are E. Kaufmann, *Das Wesen des Völkerrechts und die Clausula rebus sic stantibus*, Neudruck, Aalen 1964, 160 sqq., Jellinek, o.c. 377 note 1 and Somló, o.c., 173 note 3.

⁴⁷ See: S. Popović/B. Marković/M. Petrović, *Upravno pravo. Opšti deo*, 3, ed., Beograd 1998, 59 sqq.

⁴⁸ Cf.: M. Hauriou, *Précis de Droit administratif et de Droit public*, 12-e éd. par A. Hauriou, Paris 1933, 280 sqq.; A. Grisel, *Droit administratif suisse*, Paris/Neuchâtel 1970, 115 sqq.; E. Forsthoff, *Lehrbuch des Verwaltungsrecht*, I: Allgemeiner teil, 10. Aufl., München 1973, 485 sqq.

central and those of the member states. But, that all those legal powers could also be understood as a **one** state, it must be assumed that none of them, neither the component nor the central, **is fully** a state, but that it is only their **wholeness**.⁴⁹

Similar dualism of legal orders also exists in the unitary state which is decentralized in a manner featured by one or more "state fragments" or "provinces" (G. Jellinek),⁵⁰ that is, put in a more moderate way, "**forms of territorial autonomy**". That writer deserves merit of being the first to apply the notions of modern legal theory of state upon them, remaining unsurpassed teacher in many aspects. Particularly important is his discovery that the power of the "state fragments" organs is a **state power**, that those organs are "members of a rudimentary governmental organization of the subject province".⁵¹ Consequently, they create law in the full sense of the word, which coexists with the legal order of the state the component parts of which they are. But, in determining the notion of "state fragment", monarchies existing before the First World War such as Austria, Hungary, Russian and British Empire, served as examples for him. Therefore, the "state fragments", according to him, differ from the state in that their highest organs – monarchs – are "identical to the monarchs of the states ruling over them", because of which they "miss state power which rests only on one's own will".⁵² Only, even certain type of monarchies, say vassal state and a member of the real union, cannot be said to rest only "upon their own will". And when we come to the republic point of view, then neither according to the very Jellinek the supreme state power rests upon "certain mere psychological process", but upon "certain order conforming to the constitution!"⁵³

The most precise gauge of differentiating the state from the "state fragment" is offered by the constituent power of the nation; the state must have it, while the "state fragment" cannot. Let us take dominions of the British Empire, among which were excelling Canada and Australia, until the First World War, as an example of "state fragments" with a particularly high degree of statehood. Those dominions had their own parliaments provided with legislative power and governments suited to them, their own courts, their own army and navy. Canada and Australia were even organized as federal states, federations, which only underlines the state character of their total organization. But their constitutions were enacted in the form of British laws, their territory was British, their inhabitants were subjects to the English king (queen); in international relations they were represented by the British government. Moreover, Canada was allowed to conclude trade conventions with Germany, but she did it on behalf of the English king and under the control of the English Parliament.⁵⁴

⁴⁹ Understanding of a federal state seemingly similar to that of ours, but essentially different from it, is advanced by C. Bornhak, *Allgemeine Staatslehre*, Berlin 1896, 246 sq. According to him, neither the federal nor the member state are not sovereign in themselves and thus they are not states, but only linked they make a state and thus the holder of sovereignty. But from his presentation, which does not know the category of the constituent power as an essential feature of the state, it cannot be concluded why the relation of the state and the below analysed "state fragment", even the relation of the state and municipality cannot be constructed in the identical way.

⁵⁰ Jellinek, o.c. 647 sqq., 653 sqq., 657 sqq.

⁵¹ *Ibid.*, 654.

⁵² *Ibid.*, 656, 658.

⁵³ *Ibid.*, 711.

⁵⁴ M. Boghitchévitch, *Halbsouveränität. Administrative und politische Autonomie seit dem Pariser Verträge* (1856), Berlin 1903, 165 sq., note 60.

During the First World War there occurred qualitative improvement of the legal status of dominions. Under the Imperial War Conference Resolution of 16 April, 1917, they were recognized as "autonomous nations" having the right of "exemplary vote" in the British foreign affairs. That raised them, in our view, to the level of sub-states ("semisovereign states") in the British Empire as a supra-state ("the state of states"). Thus the Dominion of Canada, Free State of Australia, Union of South Africa and the Dominion of New Zealand separately signed the Versailles Peace Treaty on 28 June, 1919, and became the members of the League of Nations, and even independently of the British Empire made a resolution on ratifying peace treaties. Already at the Imperial Conferences held in 1926 and 1930, six dominions became sovereign states, "united by a common allegiance to the Crown and freely associated, as the members of the British Commonwealth of Nations". Since then, and particularly having in mind the Westminster Statute of 1931 as well, under which the succession to the throne may be changed only by the agreement of parliaments of dominions and British Parliament, the link between Great Britain and dominions is only one kind of personal union.

The aforementioned theory of "state fragments" that can help the position of autonomous provinces of the Republic of Serbia under the constitutions of the Socialist Federative Republic of Yugoslavia and the Socialist Republic of Serbia of 1974 to be correctly understood on the legal basis, is a question which, in spite of the fact that it does not fall in the positive law any more, is of great significance for legal theory and legal history as well. Under those constitutions, both provinces, Vojvodina and Kosovo, had their own state organizations: legislative, administrative and judicial organs, independently established under their constitutions. Although, in the field of legislature they were considerably subordinated to the Republic of Serbia, but in the sphere of judiciary and administration they were practically independent; stipulated under the Constitution of the Republic, excluding provisions relative to the state of war, was **unambiguously** only one case when an organ of the Republic might exercise the power of enforcement in the territory of the province: when it would be necessary for the purpose of performing a decision of the Constitutional Court of Serbia (Article 419, paragraph 2). In spite of all that the autonomous provinces were "state fragments", but not the states. For, it was under both of the aforementioned constitutions that only the Republic was determined as a **national state**, so that, in consequence, based on the "sovereignty of people", the constituent power of the nation was recognized only to it (Articles 1 and 3 of the Constitution of the Socialist Federative Republic of Yugoslavia, Basic principle I of the Constitution of the Socialist Republic of Serbia). Conversely, under both Constitutions the province was determined as an "autonomous community" "in which the working people and citizens, peoples and national minorities exercise their sovereign rights" (Article 4 of the Constitution of the Socialist Federative Republic of Yugoslavia), Article 291 of the Constitution of the Socialist Republic of Serbia). Further, the territory of the Republic was a unique one as well as the citizenship of the Republic (Article 3, paragraph 1 and Article 4, paragraph 1 of the Constitution of Serbia). If added to this is that the Constitution of the Republic has resulted from the "sovereignty of people" and that of the province from the "sovereign rights" as one of its part it follows that the Constitutions of the provinces were a **part** of the Constitution of the Republic in the wider sense granted upon which to the organs of the Republic, particularly to the republican organisation of the League of Communists, were the right to the **sovereign interpretation**

of the Constitution – a circumstance that was of a decisive significance in the political occurrences over the 1988-1990 period.

The supra-state ("the state of states") consisting of one or more sub-states ("semisovereign states") must be a rare thing in the modern law since it means subordination of one nation (the nation of the sub-state) to the other (the nation of the supra-state). But earlier, when the idea of the monarchist sovereignty was above the idea of the sovereignty of people, as well as in the course of certain legally abnormal situations, it was frequently encountered as a form of a state. Serbia itself, on her way to the full independence as a state, has also passed through the phase of sub-state (vassal state) of the Turkish Empire as a supra-state (1858-1878). A note should be made here, however, that the institution is very old, and that it could be encountered even in ancient times.

The sub-state is, like a member state within the federal state and the "state fragment" in the unitary state, an **integral part** of the supra-state, so that, therefore, its relation with the supra-state is regulated under its "municipal" law. Indeed, that relation may be regulated under the international agreements of the supra-state with third powers, which, as for Serbia, was the case, but without any impact to its legal nature. G. Jellinek, who has, again, made the greatest contribution to the development and theory of the supra-state, called its relation with the sub-state "unorganized".⁵⁵ By that, like the authors to follow, he thought of the absence of joint organs of the two state forms, to the onesided right of commandment of the supra-state to which the onesided duty of obedience of the sub-state suited best. In spite of all that, the sub-state is also a state in the very meaning of the term. It can possess almost full **internal independence**; the supra-state affects the population of the sub-state indirectly, through its highest organs. Because of that that population can also have the citizenship of the sub-state, although its citizens on the territory of the supra-state are never foreigners. Internal getting independent of the sub-state can go that far that the supra-state can retain only the right of military intervention in case of unrest within it and the right of annual tribute the purpose of which is compensation for the independence granted.⁵⁶

Differentiating from the state fragments with the highest possible autonomy possessed by, as we have already seen, the British dominions prior to the First World War, is the sub-state in that it is based upon the **constituent power** of either its **monarch** (if it is an absolute monarchy) or its **nation** (if it is a republic), or the **community** of the monarch and people's representatives (in the constitutional monarchy).

Such understanding is also made possible by the proper determination of the legal position of Serbia from the Sultan's edict of 3/15 August, 1830, to the full independence gained in 1878. According to the widespread view, Serbia has gained a status of dependent, vassal state with the independent internal administration under that legal act of the Sultan.⁵⁷ According to another view advocated by Bogitchévitch, Serbia will become a vassal state considerably later, under the conclusions of the Paris Congress in 1856,

⁵⁵ Jellinek, o.c., 749. See also G. Jellinek, *Die Lehre von den Staatenverbindungen*, Berlin 1882, 140 sqq., where he speaks about "inorganic nature of the state of states".

⁵⁶ See: J.L. Kunz, *Die Staatenverbindungen*, Stuttgart 1929, 530.

⁵⁷ D. Janković, *Istorija država i prava jugoslovenskih naroda*, Beograd 1970, 231.

under the decision of great powers with the assent of Turkey.⁵⁸

The first view is not correct because it neglects the difference between the state and the "state fragment". The said Sultan's code was not an expression of the will of either Serbian people or the Serbian prince, but it was a merely Turkish regulation. Also, the constitution of the Principality of Serbia, promulgated on 1/13 February, 1839, was the Sultan's firman, under which Serbia was characteristically called a Turkish "province". A similarity with the legal position of the British dominions prior to the First World War can be concluded.

On the other hand, the second view makes a mistake because, having formed a frequently mistaken notion of the theoretician of international law, assumes that a state **without delay** may be created under an international agreement. According to the classical legal theory of state, the principal founders of which were Laband and Jellinek, such an agreement, on the contrary, may only be a prerequisite of the creation of a state, important for assessing its **legitimacy**, while that very creation is a **real process**, which may but need not be featured by the performance of an international agreement.⁵⁹

According to our view, a modern state comes into being when in a territory, within a nation living on that territory, a constituent power commences to be effective. It is not of decisive significance how that power commenced to be effective. If, say, two states agree, that is, conclude an international agreement to establish a higher constituent power above them, and if such an agreement comes into force, i.e., if such a power comes into being, there is no any reason to say that a new state has not been established under the international agreement. The old natural law theory on the creation of a state, which explained it as an agreement of all with everybody (*contractus societatis*) and all with the ruler (*pactum subjectionis*), would be here undoubtedly right. Note that it has, in fact, discovered the problem of social legal norm and constituent power, because of which it must be considered as a basis of the modern theory of state. However, the classical legal theory of state is right in view of such international agreements, like that of 1856, because its parties were not, neither could be the constituent power in Serbia; only the Serbian people and the Serbian prince could be considered as such power.

Starting from this understanding, we link the creation of the Serbian vassal statehood in the 19th century with the commencement of the second reign of prince Miloš, which resulted from the outright violation of the regulations of the 1839 Constitution, as an emanation of his absolutism, that is to say, **constituent power**. The constituent power, which, subsequently, became apparent in the laws of the constitutional character of the prince Miloš under the 1869 Constitution.

But, in spite of that internal independence, the sub-state, that also being a crucial element of its essence, need not possess any independence in the international relations. Indeed, the supra-state can allow it to conclude certain non-political agreements (particularly those under which the border traffic is regulated) with third parties, if they agree, and to maintain consular relations with them, so that because of that it may have a limited in-

⁵⁸ Boghitchévitch, o.c., 31 sqq.

⁵⁹ On this in details, along with ample references, see: Jellinek, *Die Lehre von den Staatenverbindung*, 253, sqq., idem, *Allgemeine Staatslehre*, 270 sqq., 774 sqq.; P. Laband, *Sad Staatsrecht des Deutchen Reiches*, I, 5. Aufl., Tübingen 1911, 28 sqq.

ternational legal subjectivity. But the supra-state can in no way permit the sub-state to conclude purely political international agreements, such as alliances, agreements on neutrality, ceding of territories and the like. The international agreements concluded by the supra-state shall be without delay exercised upon it as well and it is the supra-state, which shall be responsible for its violations of international law.⁶⁰ All these are the consequences of the fact that the supra-state and the sub-state are a territorial unity. Therefore, the permission of the supra-state that the sub-state would participate in international relations may be considered a kind of international law **decentralization**. Conversely, the permission of the supra-state that the sub-state should be constituted the same as when the unitary state decides to transform itself into a federal state is a kind of **constitutional law partial dereliction**.

Among the legal orders of the supra-state and sub-state governing is, therefore, dualism of "municipal" law grounded in the subordination of the legal order of the sub-state to the legal order of the supra-state, that subordination predominantly being expressed with the position of the sub-state in view of international law in mind. The legal relation of the supra-state and sub-state as **one** state may be understood similarly to the relation of the member states and the central state in the federal state. As regards its theory and its people in the narrower sense, the supra-state may be quite independent, even a unitary state. But as for the territory and the people of the sub-state, neither the supra-state nor the sub-state are, taken independently, fully states, the state is but their **entirety, totality**.

There are great resemblances between the relations of the supra-state and the sub-state and the protectorate; they are that large that certain authors have been of opinion that there are no essential differences between them. But there is one difference of the kind. The relation of the supra-state and the sub-state is that of "municipal" law; the protectorate, the relation of the protecting state (protector) and the protected state is the relation of international particular law. But it is a relation of subordination as well; the protected state is according to international law subordinated to the protecting state.

In recent times, the protectorate has been more frequently used than vassality and it was mainly during the decolonisation period after the Second World War that it vanished. That form was particularly used by France and Great Britain for the purpose of imposing colonial administration to the states not belonging to the European culture and the peoples of which were, therefore, called "semicivilised". Yet, although in considerably rare cases, a protectorate used to come into being under the considerably different conditions. Only, the subordination of the protected state to international law should not be thought of as being lesser than the subordination of the sub-state to "municipal" law, that is, that the protected state was more independent in the relation with the protecting state than the sub-state in the relation with the supra-state. Just on the contrary, it was usually vice versa, and many protectorates have practically constituted liquidation of the statehood of the protected.

Say, such an example has been offered by the agreements on protectorate concluded by France and the Tunisian bey on 12 May, 1881, and 8 June, 1883. Under the first agreement, France has taken over for the protectorate characteristic obligation to provide

⁶⁰ Kunz, o.c., 532.

permanent support to Tunisia against any internal and outside danger (Article 2) and guarantees performance of the agreements which at present exist between Tunisia and European powers (Article 4). In turn, France shall be granted the right of military occupation (Article 2) and shall be represented with the bey by a minister-resident (Article 6). Tunisia undertakes "not to conclude any act of international character she has not acquainted the French government with and upon which has not previously come to an agreement with". Diplomatic and consular agents of France abroad will take care of the protection of "Tunisian interests and the citizens of the Regency" (Article 6). Article 1 of the second agreement obliges Tunisia, for the purpose of facilitating performance of the French protectorate, to "get down to administrative, judicial and financial reforms which French government would deem useful". Thus, the complete internal administration of Tunisia has been subordinated to France.⁶¹

On the contrary, a similar agreement concluded between France and Monaco on 17 July, 1918, contains proportionally low level of subordination of that miniature state towards the great neighbour. Under Article 1 of the subject agreement France promises to Monaco to defend her independence and guarantees independence of her territory "as if that territory would constitute a part of France"; Monaco undertakes to "exercise its sovereign rights to the perfect compliance with the political, military, maritime and economic interests of France". She further undertakes (Article 3) not to transfer the Principate either on the whole or partially to some other power other than France. Pursuant to Article 2, Monaco must not conclude any international agreement without prior consent ("entente préalable") of France; France, also, grants consent on regency and succession to the throne. Finally, Article 3 provides for that "in case of vacancy of the throne, particularly in absence of direct or adoptive successor, the territory of Monaco will establish an autonomous state under the name State of Monaco under the protectorate of France."

A great difference between these two protectorates is immediately obvious. Namely, the latter does not involve any military occupation or any interference in the internal affairs of the protected state.

The older doctrine's view was that the protectorate may disappear exclusively on the grounds of an international agreement and that that internationally contractual basis is the only criterion of its differentiation from the internal dependence of one state from the other, like that existing between the supra-state and the sub-state. Thus Boghitchévitch says: "A protectorate comes into being under the contractual relation between two equal sovereign personalities, which possess a right of selflimitation and association. Therefore, its regulation exclusively belongs to international law".⁶² This view is an expression of a solid assumption that international law as a complex of norms that regulate relations among states as "sovereignty equal" subjects, permits subordination of one state to another only if resulting based upon the consent of the subordinated state. Generally, that is correct, but not unconditionally and at all times.

The first internationally contractual basis abandoned on the occasion of establishing a protectorate occurred on 18 December, 1914, when Great Britain, under an act of the government put Egypt, formerly a vassal state within the Turkish Empire, but under the

⁶¹ See: F. Despagnet, *Essai sur les Protectorats*, Paris 1896, 196 sqq.

⁶² Boghitchévitch, o.c., 194. Also Kunz, o.c., 313 sq.

British occupation since 1882, announcing at the same time cessation of the Turkish suzeraineté, under her "protectorate". Under the peace treaty of 24 July, 1923, Turkey "renounced all the rights and title upon Egypt", retroactively from 1914.

The older doctrine, starting from the assumption of "sovereign equality" of subjects of international law, refused to understand the then legal position of Egypt as the true protectorate,⁶³ considering it, in any case, "abnormal".⁶⁴ A recent doctrine, however, is not that strict. One of its most eminent representatives, Verdross, an Austrian, allows, starting from the British protectorate over Egypt, that a protectorate may also be grounded under the one-sided act, because according to international law effective, although illegally produced, limitation of capacity to contract of a state acts erga omnes.⁶⁵ But, in this case neither illegal limitation of the capacity of Egypt to contract was in question at all nor any limitation of the capacity to contract, but, on the contrary, its expanding, or better, its establishment, because Egypt as a vassal state, had not had any capacity to contract in the international affairs prior to establishing the protectorate. Dahm's view, on the contrary, is correct, according to which the 1914 protectorate over Egypt has come into being by England's leaving Egypt, as her part, out of her sovereignty, but retaining her role of protective power.⁶⁶ We have already seen that a sub-state comes into being within the supra-state by a **partial constitutional law dereliction**. Under its one-sided, internal state act, one state makes the other independent, makes it a subject of international law, but at the same time retains supremacy of international law in the form of a protectorate. Dereliction as a means of getting independent is nothing unusual: Great Britain has gradually transformed her dominions into sovereign states by means of a sequence of derelictions.

For the question we are dealing with, exceptionally instructive is the getting independent of the of Federal Republic of Germany after the Second World War.

On 9 May, 1945, unconditional surrender of the German Reich came into effect, while on 5 June of the same year the "Control Council" was set up by the four powers victors through which they formally took over the supreme power in Germany. Deprived of her own state power, Germany has disappeared as a state and turned into a "state fragment" without any autonomy. Conversely, in the West Germany law literature, an attitude was supported that in spite of the total destruction of the state organization of the Third Reich, the state of Germany has continued to exist anyway, because the relation between her and the occupying powers was "fiduciary relation" (Treuhandverhältnis)!⁶⁷ That would be the same as if we would claim that the Serbian medieval state had not ceased to exist in 1459, but that it continued to live in a "fiduciary relation" with the Turkish Sultan! Only that that legal nonsense had a political meaning: the purpose of it was to later on justify the claiming of the right of the West Germany to the continuity of the German Reich. That led to further confusions. Carlo Schmid (not Carl Schmitt), the leading theoretician of the West Germany statehood restoration after the Second World War, has asserted that in a restricted territory the German Reich has never collapsed, and that now has appeared

⁶³ See: Kunz, o.c. 770 sq.

⁶⁴ A. Zimmern, *The Third British Empire*, 2nd ed., London 1927, 10.

⁶⁵ A. Verdross, *Völkerrecht*, 4. Aufl. unter Mitarbeit von K. Zemanek, Wien 1959, 282.

⁶⁶ G. Dahm, *Völkerrecht*, II, Stuttgart 1961, 130.

⁶⁷ See: Dahm, o.c., I, Stuttgart 1958, 169 sq., II, 135.

again in the temporary form of "state fragment"!⁶⁸ The assertion, namely, that the German Reich has appeared again means just this, that it, as a state, had previously ceased to exist.

The three western allies, the United States of America, Great Britain and France commenced already in 1946 to gradually organize the German power, first at the local and then at the provincial level. Thus the "state fragment" began to acquire increasingly wider autonomy. A turning point now is their permission to allow the provinces within the western occupation zones to create a state of West Germany, the federal units of which they would be, and those provinces performing the constituent power, passed on 23 May, 1949, a Basic Law for the Federal Republic of Germany. But the new state has no any international subjectivity. Consequently, it is a sub-state over which the three western states have a coimperium. That state was qualitatively changed under the Paris Agreements of 1954. According to the Agreement on Relations of the Federal Republic of Germany and the Three Powers of 23 July, 1954 (the so-called General Agreement) the Federal Republic of Germany should have "full power of a sovereign state in its internal and international affairs" (Article 1, paragraph 2). In spite of all that the three powers have retained, in the form of one-sided reservation, certain far-reaching limitations of the West-German sovereignty, the essence of which is establishment of some kind of their protectorate over the Federal Republic of Germany, reflected, first of all, in the right of keeping forces in her territory, and then in the existence of different rights resulting thereof in favour of the stationed forces. It was only under the Article 7 of the Agreement on the Final Regulation Relating to Germany of 12 September, 1990, concluded bearing on the unification of two German states, that the rights of former four allies relative to Berlin and Germany as an entirety were definitively ended.

But if one-sided, internal acts of a state, even if illegal, as we have seen earlier in the assertion of Verdross, can establish relations of international law, is not it then the strongest argument against the consequent dualism of international and "municipal" laws?

Only, if there need not exist qualitative differences between the semisovereignty and the protectorate neither in view of the contents nor in the view of coming into being, then, why is the semisovereignty a category of "municipal" and the protectorate of international law? Just because of that and only because of that that international law is, as we have already pointed out, **exterritorial law**. In view of that, the territory of the protected state is **never** a territory of the state-community, while the territory of the sub-state is **always** the territory of the supra-state as well; at the same time, the citizens of the protected state **are never** the citizens of the state-community, while the citizens of the of the sub-state need not, but also **may be** the citizens of the supra-state. That is why the protected state possesses **external sovereignty**, while the sub-state does not. It is a lack of territorial and personal belonging to some other state, that is, a complete exclusivity of elements concerning the state, together with the constituent power, that makes an assumption of external sovereignty as a **complete and authentic international (exterritorial) subjectivity**.

Association of states in "municipal" and in international laws demonstrate significant parallelisms. There is such a parallelism between the supra-state with the sub-state, on the one hand, and the protectorate on the other hand. There is such another parallelism be-

⁶⁸ Cit. in: E. Nolte, Deutschland und der Kalte Krieg, 2. Aufl., Stuttgart 1985, 204.

tween a federal state as a category of "municipal" and the confederation (union of states) as a category of international law, in the sense that the member states as parts of the federal state do not have, principally, international law subjectivity, while the member states of the confederation are in any respect subjects of international law. However, as we shall see, the relations of those states with the confederation are regulated under the "internal" law of the confederation, to which the laws of member states are subordinated. It is, at the same time, the last case of dualism and subordination of two legal orders and two legal powers.

A modern type of the confederation is not a frequent phenomenon. Its first form is the United Provinces of the Netherlands founded under the Utrecht Union of 1579 and will exist by the end of the 18th century. Falling into this type, as its forms belonging to the past, are North-American Confederation from 1778 to 1787, the confederacy of rebellious southern states of USA (The Confederate States) from 1861 to 1865, The Rhine Union from 1806 to 1813, The Swiss Confederation from 1815 to 1848 as well as the German Union which lasted from 1815 to 1866 as its historically the most important form. There is only one today, although in many aspects specific union of states, the European Union.⁶⁹ In spite of the rarity of that phenomenon, the legal theory of confederation is of exceptional advantage, since by far a more frequent federal state can only be fully understood by means of it – after all, three classical federations; the United States of America, Switzerland and Germany have come from the confederation – so that it is, also, indispensable to draw a line between the confederation and other international **political** organisations, such as, first of all, Organisation of the United Nations and NATO.

The oldest, but the most widespread teaching considers the confederation as an international contractual "society" (*societas*), the member states of which possess unlimited and absolute sovereignty. The confederation would, therefore, be differentiated from the federal state in that the federal state is really a state, although a complex state composed of states, while the confederation has no characteristics of a state, but it is, on the contrary, a mere contractual relation although a permanent legal relation of eminently political character, the basic purpose of which is maintenance of peace within the contracting states and joint defence from aggression without. This teaching was primarily supported by the classical German legal theory of state as well as the American doctrine.⁷⁰

But that teaching was greatly out of step with the reality, so that its representatives had to search for fictions in order to keep their constructions in harmony with it. For, like the federal state, the confederation also had international subjectivity, *jus belli*, active and passive right of legation, the organization which primarily reflected in the existence of a federal assembly, the members of which were by the instructions bound delegates of member states, but in a minimum of administrative organs, that could indirectly act upon the citizens.⁷¹ The member states were responsible to perform the decisions of the organs

⁶⁹ A. Bleckmann and S.U. Pieper think (in A. Bleckmann, *Europarecht. Das Recht der Europäischen Union und der Europäischen Gemeinschaften*, 6. Aufl., Köln/Berlin/Bonn/München 1997, 83 sqq.) that the European Union is, under the Agreement on EU of 1992, something more than a confederation and less than a federal state. However, there can be no third category between the confederation and the federal state.

⁷⁰ See: G.J. Ebers, *Die Lehre vom Staatenbunde*, Breslau 1910, 84 sqq., 156 sqq., 166 sqq.

⁷¹ See: Jellinek: *Die Lehre von den Staatenverbindungen*, 185 note 21a and there cited references.

and did not dare to violate the federal law; on the contrary, the federal assembly could authorise some other member state or more of them to carry out the **federal execution** over the renitent member state, that is, using physical force to compel it to obedience.

With this in mind, there were outstanding writers who denied the essential difference between the federal state and the confederation.⁷²

In order to avoid this consequence, the governing teaching has constructed a contractual "law" to nullify federal acts and secession from the union, the which "law" is not available to the member states in the federal state, but allegedly available to the member states of the confederation, proclaiming that "law" an essential criterion of differentiation between the federal state as a real state and the confederation, as a mere international agreement.⁷³

Existence of the alleged right to nullify the federal legal acts is an expression of opinion that the relations between the confederation and the member states are internationally legal relations and that the state may perform obligations from those relations of its own volition. This is not correct already from this fact, because, as we will see later on, those relations are not internationally legal relations. But, even if they were, the state has no right to behave in the way it likes to in those relations, because it would mean nothing less than negation of international law.

The member state as a rule has no right to secession from the federal state it is a component part of. Only, it may have that right, but that it does not change the essence of the federal state anyway. Thus, under all the constitutions of the Union of Soviet Socialist Republics, which was a very centralised federation, each federal republic was recognized the right to freely leave the federation (Article 4 of the Constitution of 1924; Article 17 of the Constitution of 1936; Article 72 of the Constitution of 1977). When the relation between the member state and the confederation is in question, it is not at all different. There is a right to secession only if permitted under the basic legal act of the union. Conversely, there is no that right. Moreover, secession is frequently forbidden under those acts. Thus Article 1 of the Utrecht Union, "eternal unions" of the Swiss Confederation, preamble to the North-American Articles of Confederation: "Confederation and Perpetual Union between the States"; Article 1 of the German Federal Acts speaks of "permanent union", the Vienna Concluding Acts of 15 May, 1820, (by means of which the German Union has been upgraded and consolidated), Article V, even say: "The Union has been founded as a permanent association".

The right to secession has been constructed following the example of the right of breaking off permanent agreements, starting from the assumption that the confederation unconditionally comes into being under the contractual procedure. Here, we cannot get into the hard question of terminating internationally legal agreements. However, with the view that international law is a law, then a state cannot be recognized a right that by merely referring to its sovereignty it may free itself from its international contractual obligations. All the better that the Vienna Convention on the Contractual Law of 23 May, 1869, also allows such possibility under the extremely aggravated conditions. On the

⁷² Cf, for example: S. Brie, *Theorie der Staatenverbindungen*, Stuttgart 1886, 84 sqq.; A. Haenel, *Deutsches Staatsrecht*, I, Leipzig 1892, 11 sq.

⁷³ See: Jellinek, *Allgemeine Staatslehre*, 766 sqq., 781; Kunz, o.c., 448 sq. with ample references.

other hand, the confederation need not necessarily be established under the agreement; a unitary or federal state may be one-sidedly, under its internal source of law, transformed into a union of states⁷⁴ transferring all its state power to its certain parts, performing, put it in another words, **complete international dereliction**. In one such case there would be no any assumption for construction of law to secession of member states.

Therefore, when Kunz says that the right for nullification and secession of member states is a "natural law" assertion⁷⁵, one should agree with him.

The confederation is neither the contractual relation nor a kind of federal state. It is, according to us, and it is our fully original view, something qualitatively different both from an agreement and a state – but namely **international or supranational state fragment** as a particular form of **legal power**. We have seen that the internal state state fragment in its fullest form is a maximum degree of decentralization of a state, which is differentiated from the state only in that the constituent power of the nation is not effective in it. The union of states is, however, a maximum degree of the supra-state decentralization, the transformation of which results in the creation of a federal state, from which the confederation is differentiated in possessing no constituent power. But, its organs are state organs, its enforcement power is imperium, its legal order is a state legal order subordinated to which are legal orders of the member states.

Only that that subordination must not be such as to destroy the character of the member states as legal subjects of international law. The rule: *Lex superior derogat legi inferiori* in a federal states means that a valid federal law puts outside effect, abolishes, nullifies, in any case removes from the legal order the law of the member state opposing it; it is in this case the meaning of derogation.⁷⁶ That and such rule cannot be in effect in the relation between the federal and the particular law of state in the confederation. The state fragment law such as the confederation is cannot nullify the law of a state, which is the legal subject of international law. On the contrary, the statehood of that state would be essentially reduced, if not completely destroyed, while the confederation would turn into a state. Therefore, in case of conflict of norms of two legal orders, the federal and the particular law of state, all the conflicting norms would continue to be in effect, but in the concrete case the federal norm, as a superior, would be applied. It would, in spite of all that, only **suspend the norms** of the particular state orders opposing it. But, in order to avoid that different organs should apply regulations of the opposing contents, normative acts of former confederations have not usually directly obligated the citizens of the member states.

The relation between two orders, when the norms of the confederation are directly applied, is well demonstrated by the decision of the European Union Court in the legal matter of *Costa/ENEL* of 15 July, 1964.⁷⁷ It reads:

⁷⁴ This is also maintained by H. Kelsen, *Allgemeine Staatslehre*, Berlin 1925, 195.

⁷⁵ Kunz, o.c., 455.

⁷⁶ See: A. Hansel, in: *Handbuch des Deutschen Staatsrechts*, herausg. von G. Anschütz/R. Thoma, II, Tübingen 1932, 314 sqq., 321.

⁷⁷ *Sammlung der Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften*, 1964, 1251 (1269 sqq.). In subsequent judgements, that court has confirmed view it has taken in that matter. See their list in: Bleckmann, *Europarecht*, 377. See also: Vesna Knežević-Predić in: *Uskladjivanje prava SR Jugoslavije sa pravom Evropske unije*, edited by M. Petrović, Niš, 1999, 144 sqq.

"In contrast to the usual international agreements, the Agreement on the European Economic Community has created its own legal order, which, on the occasion of its coming into force, has been entered in the legal orders of member states and which the courts shall have to apply. For, establishing a community for indefinite time, with its own organs, with legal competence, with international capacity of taking over operations and which is particularly provided with truly sovereign rights resulting from limiting the competences of member states or transferring the sovereign rights of member states to the Community, the member states have limited, although on a narrow area, their sovereignty creating thus a legal body binding upon their members and themselves. /.../

The obligations the member states have assumed under the Agreement on Establishing the Community, would be no more unconditional, but only possible, if they could be called into question under the subsequent legislative acts of member states. Where the Agreement wants to recognize the right of the one-sided conduct to the states, it does it under the clear provisions ... As for the requests of states for exceptional approvals, provided for, on the other hand, are procedures of approvals..., which would be subjectless if the states could get rid of their obligations by a mere enactment of laws.

The **priority of communitarian law** (underlined by M.P.) has also been approved under Article 189; consequently, the regulation is 'binding' and in 'is directly valid in each member state'. That regulation, not limited by anything, would be of no significance if the member states could deprive it of the effect by legislative acts which would be given preference over the communitarian norms.

Following from all these is that under the Agreement created law, which, consequently, results from an autonomous source of law, cannot be surpassed, because of that independence of its, by the internal state legal regulations of whatever nature they could be, if not desired to dispute the character of its communitarian law and to call into question the very legal grounds of the Community".

A qualitatively different sequence of legal phenomena, namely that of international organizations with transferred public authorizations, comes into being with the Organization of the United Nations. It has international subjectivity and *jus belli*,⁷⁸ and it is just that possession of the rights that imparts to it a **political character**, possessed by state and confederation. The United Nations is, on the one hand, differentiated from the so-called "administrative unions" in that they also appear as associations of states with the status of juridical personality, but have nonpolitical character. On the other hand, it is differentiated from such international political organisations such as the North Atlantic Treaty Organisation (NATO) in that those organizations have no legal subjectivity and because of which their organs represent only **joint organs** of contractual states; NATO in essence is nothing else but an agreement on alliance added to which is a complex military-administrative apparatus without any legal independence.

It is more hard, however, to make a distinction between the Organization of the United Nations and the confederation because certain renowned law scientists qualify the Organization of the United Nations as a "principally universal union of states".⁷⁹ But, the

⁷⁸ See: Dahm, o.c., II, 156 sqq.

⁷⁹ Verdross, o.c., 451. Thus also H. Nawiasky, *Allgemeine Staatslehre*, II/2, Einsiedeln/Zürich/Köln 1955, 198; idem, o.c., III, Einsiedeln/Zürich/Köln 1956, 143.

relations of the United Nations and its members are regulated under the international particular law, but not being, as in the case of protectorates, the relations of legal inequality, subordination, but relations of full legal equality, coordination. That is how the enforcement exercised by the United Nations is exclusively internationally legal enforcement. Therefore, the United Nations is not a legal power. In fact, it is an internationally legal subject only against the third states; against the member states, it is a contractual relation, society. If the Organization of the United Nations is qualified as a "non-genuine", or better "social" union of states, we will be closest to reality.

Since we have found out the proper meaning and scope of the dualism of legal orders, we have thus put an end to the critics of the doctrine of dualism of "municipal" and international laws. Left to be considered are, more correct as the logic is, **monist views** and within their frameworks to resolve the problem of **precedence** of "municipal" and international laws. Let us start from the monist doctrines, which recognize the precedence of international law.

The most representative advocate of such monism is Verdross.⁸⁰ According to his view, which he himself names "moderate" or "articulated" monism, international and internal state laws are two different, to a great extent independent parts of a unique legal system, within which international law is above the internal state law. That independence goes that far that conflicts and contradictions of the two laws are quite possible; thus, a state law that offends international law "temporarily" and "provisionally" (!) obligates within the state territory.⁸¹ From the moderate dualism, which recognizes the precedence of international law, this view is differentiated in that that the effectiveness of both laws is grounded in an international act, "constitution of nonorganized community of states". That constitution consists of a "system of originaire norms" which included norms on creating positive international law with the bona fides principle governing all international relations as well as norms on the international subjectivity, since those norms make assumptions for further building of international law.⁸² Verdross also names those norms "fundamental legal principles".⁸³ They came into being by a "nonformal consensus" and for the first time were expressed in writing in the Westphalia Peace Treaty of 1648.⁸⁴

Recognizing the dualistic deviations we have analysed, we also agree with the monist thesis on the belonging of international and internal state laws to one legal order and on the state as its material source. Existence of the "constitution of nonorganized community of states" upon which the alleged international law is based still does not make us to think of it as proved. It is impossible to qualify the "nonformal consensus" as an act of the international constituent power, which would have greater legal power than other sources of international law. Verdross himself and his co-author Simma report that some of its norms have sunk into oblivion for a while by means of desuetude(?).⁸⁵ Again, it cannot be seen

⁸⁰ Verdross, o.c., 18 sqq.; A. Verdsross/B. Simma, *Universelles Völkerrecht. Theorie und Praxis*, Berlin 1976, 71.

⁸¹ Verdross, o.c., 62, 64.

⁸² Verdross/Simma, o.c., 71.

⁸³ Verdross, o.c., 24 sq.

⁸⁴ Verdross/Simma, 71 sq.

⁸⁵ *Ibid.*, 73.

why these norms should also be binding to the internal state authorities.

Obviously aware of these difficulties, Verdross, in order to defend his teaching, completely abandons the scientific grounds. In his international constitution he sees a collection of principles indispensable from the **natural law and legal policy** standpoint.⁸⁶ In the theory of law as a strict, that is to say, positivist science, neither natural law nor providing political lessons have, on the contrary, nothing to do with it.

Generally, monist theories, which advocate the precedence of international law, must inevitably in proving that precedence slip into natural law. Say, Duguit points out that international law is based upon "international solidarity" and upon "sense of justice", but not upon some commanding force.⁸⁷ Dahm, according to whom the national law is subordinated to international law like "higher law",⁸⁸ finds the top of all the laws, first of all, in the rule "pacta sunt servanda", which is one commandment of the "practical reason".⁸⁹

The positive laws, where the western laws are no exception, do not acknowledge the absolute precedence of international law. The old dictum of the Anglo-Saxon law, originating from Blackstone (1769), that "international law is the part of the law of land", does not mean, in Great Britain, the precedence of international law before the statute; the court shall be obliged, in the conflict case, to apply the statute. In the United States of America, subsequent federal legislation may nullify previously concluded international agreement, and the state organs may employ the rules of international law in the way they understand them.⁹⁰ The basic law in the Federal Republic of Germany provides for, in its Article 25, that the "general rules of international law... are component parts of the federal law" and that they have "precedence before the laws". But that general rules, the establishment and scope of which are within the competence of German organs, must withdraw before the constitutional provisions.⁹¹ According to Article 55 of the Constitution of the French Republic, "Contracts or agreements which have been ratified in a regular manner, that is, acknowledged, have, from the moment of made public, higher force than that of the law, under the condition that the contract, that is, agreement shall be applied by the other side". Only, since the courts are forbidden to investigate the constitutionality of the law, the courts, as a rule, apply subsequent law, in spite of its being opposite to the international agreement. In addition, in keeping with the doctrine of "actes de Gouvernement", the court is not allowed to investigate the administrative act by means of which any international agreement is performed.⁹²

The monist doctrines, which establish the precedence of "internal" law, are, therefore, closer to reality than the views advanced so far. It is interesting that the European theoreticians of international law who advocate them are very rare today.⁹³ Advocating the monism doctrine viewpoint of "municipal" and international laws with the precedence of

⁸⁶ Verdross, o.c., 19, 24 sq.

⁸⁷ Duguit, o.c., I, 190 sqq.

⁸⁸ Dahm, o.c., 53 sq.

⁸⁹ Ibid., 12.

⁹⁰ See: Schwarzenberger, o.c., 47.

⁹¹ See: W. Rudolf, *Völkerrecht und Deutsches Recht*, Tübingen 1967, 240 sq.

⁹² Cf.: N. Quock Dinh, *Droit international public*, Paris 1975, 255.

⁹³ The last work of the kind seems to be the paper: P.A. Papaligouras, *Théorie de la société internationale*, I, Zürich 1941.

"municipal" law were, however, our great theoretician and philosopher of law T. Živanović and Italian Giorgio del Vecchio⁹⁴, probably the greatest European law philosopher of the 20th century. In spite of all that, the principal disadvantage of those doctrines is that they leave international law to the tender mercies of certain states.

Our understanding on international law like "exterritorial law" of a state is monist; it relies, as we have said earlier, upon the historical and legal and logic precedence of the "internal law". Only, this does not mean precedence if **effectiveness, in legal force**.

The understanding of the exterritoriality of international law is not our creation. Its founder is Hegel, with his definition of international law as an "external state law".⁹⁵ However, his erroneous making absolute the state sovereignty led him to deny "external state law" as a law, to degrade it to something which only "should be" (das Sollen), led him to the notion of international morals, but not to international law. But from the correctly understood state sovereignty, namely from its essential **dualism**, follow quite different consequences; as a holder of **internal** sovereignty the state is a material source of "internal" law, while as a holder of external sovereignty it is the material source of international law.

In itself, the exterritoriality is not only a feature of international law in **modern** and **narrower** sense. By the power of its external sovereignty, the state also prescribes the exterritorial norms under which certain, first of all political criminal acts are prohibited, so that is why those norms make some kind of international law as well. Say, the French Law on Criminal Procedure provides for a series of cases when the French penalty laws are applied to the criminal acts committed outside the French territory.⁹⁶ Having in mind just the cases when the state on its own volition threatens foreigners with a penalty who would commit a high treason abroad against her or recognizes foreign law in the field of international private law, H. Nawiasky, the renowned German-Swiss theoretician of state and law draws a conclusions that territory is not at all an element of the state!⁹⁷ Such a conclusion is not valid because it does not assume the difference between the internal and external sovereignty, "municipal" (territorial) and international (exterritorial) laws.

Viewed from here and only from here, the question of the validity of international law can be solved. Essentially, it is connected with the **unremovable possibility of conflict** between the territorial and exterritorial laws. By means of its legal acts and material doings of territorial and exterritorial character, a state can violate both territorial or exterritorial laws of another state, for example, to nullify an agreement it has concluded with that state, and those acts and doings may, from its legal order point of view, be absolutely legally good. From the point of view of the state the rights of which have been violated, not only that those rights may be valid still, but also the violations committed may be the hardest offences. And since international law is the **law of coordination** (with the exceptions we have pointed to), both states are at the same time right and wrong. Consequently, requesting international law to be logically a noncontradictory entirety means to commit

⁹⁴ Cf.: Živanović, o.c., 107 sqq.; del Vecchio, *Lezioni di Filosofia del diritto*, XIII ed., Milano 1965, 330 sq.

⁹⁵ G.W.F. Hegel, *Grundlinien der Philosophie des Rechts oder Naturrecht und Staatswissenschaft im Grundrisse*. Nach der Ausg. von E. Gans herausg. von H. Klenner, Berlin 1981, 373 sqq.

⁹⁶ P. Bouzat/J. Pinatel, *Traité de Droit pénal et de Criminologie*, II, Paris 1970, 1635 sqq.

⁹⁷ Nawiasky, o.c., III, 7.

violence against reality. Suited to that reality is only our theory, which is basically monist, but in outcome dualistic.

JUGOSLOVENSKA RATNA ZBIVANJA I PROBLEM ODNOSA MEDJUNARODNOGA I "UNUTRAŠNJEGA" PRAVA

Milan Petrović

Ovaj rad rešava staro sporno pitanje – da li je međunarodno pravo uistinu pravo kao pozitivno pravo ili nije. On daje potvrđan odgovor, polazeći od jedne pozitivističke definicije prava, takve koja pojmove pravo i pozitivno pravo smatra istovetnim. Prema njoj, pravo je poredak koji država kao nosilac javne vlasti prinudjivanja, "imperijuma", stvara, štiti ili priznaje. Te pošto je i međunarodno pravo jedan poredak koji stvaraju, štite ili priznaju države kao nosioci "imperijuma", i ono je samim tim pozitivno pravo. Ono pak što stvara privid da unutar ili izvan pozitivnoga prava postoji još jedno pravo, "prirodno pravo", jeste činjenica da unutar pozitivnoga prava postoje određeni apsolutni moralni principi; no, oni ne važe kao takvi, zahvaljujući svojim inherentnim svojstvima, već kroz akte pozitiviranja, što će reći usvajanja od strane nadležnih državnih organa. Rad, nadalje, stoji na stanovištu monističke doktrine, prema kojoj međunarodno i "unutrašnje" pravo čine jedan jedinstven poredak, u smislu da je međunarodno pravo jedna od grana "unutrašnjega" prava. Članak detaljnom analizom dokazuje neprimenljivost dualističkih doktrina na aktuelne činjenice univerzalnog međunarodnog prava. Samo, stanovište ranijih monističkih doktrina je ili da "unutrašnje" pravo ima veću snagu od međunarodnog prava (učenja nadmoći "unutrašnjeg" prava) ili da međunarodno pravo ima veću pravnu snagu od "unutrašnjeg" prava (učenja nadmoći međunarodnog prava). Ovo, međutim, dokazuje da nijedno od ovde pomenuta dva učenja nije korektno, već da su "unutrašnje" i međunarodno pravo jednake snage. "Unutrašnje" pravo je teritorijalno pravo države, dok je međunarodno pravo njegovo eksteritorijalno pravo. Država, a posebno njena ustavotvorna vlast (pouvoir constituant) može – a to je suština monističke doktrine – da obesnaži svaku normu i teritorijalnog i eksteritorijalnog prava, ali, ovo može da povredi i teritorijalno i eksteritorijalno pravo neke druge države – pri čemu su aktivnosti države i zakonite i nezakonite.

Potčinjeni ideji teritorijalnosti i eksteritorijalnosti su i drugi osnovni pravni pojmovi: unutrašnja suverenost se ogleda u prisustvu ustavotvorne vlasti na nekoj teritoriji; međunarodna suverenost postoji kada je još jedan uslov ispunjen – da predmetna teritorija nije u isto vreme i teritorija neke druge države. Članak, stoga, predstavlja i kratak pregled cele teorije prava.

Ključne reči: *pojam države i pojam prava, subordinacija i koordinacija u međunarodnom i "unutrašnjem" pravu, eksteritorijalnost međunarodnog prava*