INTERNATIONAL LAW — PRIVATE INTERNATIONAL LAW

(Law philosophy and theorem of norms)

by

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assistent

Foreword

As a rule, facts are more credible than theories and that is why we prefer them. However, only such things can assume the nature of facts which are possible to grasp, describe or formulate. This, in turn, calls for notions and categories to be supplied by theory.

No one raises doubts as to the existence of private international law; optimists go as far as recognizing the existence of even international law. The problem arises when it comes to describing the relations between the two of them. The attempt which follows is made along two paths. On the one hand, the extent to which international law as a whole and private international law as a whole are preconditions for one another or factors determining one another is considered in Part I while Part II of this study considers the actual norms and legal institutions from a close range in an effort to find out whether or not it can be proved that they have come to be included in international law or private international law from the other system of law or, if in a given case, they should be considered independent areas that cannot be classified into one or the other of the categories. In our case the latter possibility is essential. The objective is not to classify the disputed norms and institutions into the category of international law or private international law; quite the contrary, what is considered to be an achievement is the description of the *grey zone* lying between the black and white zones. These phenomena which are of a double nature are far from being anomalies or distortions; in actual fact, they are norms on an equal footing with the provisions of international law or private international law the description of which (in a manner completely free from the biased approach only too characteristic of international lawyers and private international lawyers) may well result in the birth of categories that are useful even for practice.

I. The relations between international law and private international law (Ontology)

1. Questions and answers: why may the private internationale law exist?

When studying the relations between international law as a whole and private international law as a whole, the first question to be considered is this: why does a state permit that its organs applying the law can take decisions on the basis of provisions borrowed from foreign legislators and why does it make it possible to enforce decisions taken abroad.

The relations between the state and the natural and legal persons subordinated to its authority, the regulation of these relations and the connections between legal entities are of vital importance from the point view of the state and their survival and reproduction. If the state permits outside intervention, it must surely have good reason for doing so. The reasons for this sort of submissiveness as well as the limits to this submissiveness have long been sought by scholars of private international law.

Way back in the 17th century Voet was of the opinion that respect and courtesy by one state for another make the states permit foreign law to be applied on territories belonging to their sovereignty. By saying so he formulated the essence of the doctrine of comity. In his "System des heutigen römisches Recht" Savigny deducted private international law from the international legal community thus creating a basis resting on natural law and international law for the existence of private international law.* (STEVENSON, p 565). This is sufficient to indicate the two possible directions of the explanation. *The first one gives priority to the state making the application of foreign law and the extent of its gaining ground dependent on the will of the state while the second one suggests that there is a command which is basically of the nature of international law and which forces the states from outside and no state can withdraw itself from it.* Obviously, in both cases and, in particular, in the second one, the point at issue is the extent to which foreign law can penetrate, that is to say the depth to which it can penetrate into the law of a given state.

Those who choose the first path and are the advocates of the determining role of the state generally take advantage of the arsenal of notions used for proving and defending absolute sovereignty. According to the backbone of their arguments the state is competent to draw the lines within which its laws are valid. (SCHNITZER, pp 22 and 25 and NIEDERER, p 64, and, in particular, the Working Group: Völkerrecht p 74.) This was the predominant view when the Code of Hungarian Private International Law, (Decree with the Force of Law No. 13, 1979) was formulated as reflected by the commentary given by the Ministry of Justice: "following the traditional principle of private international law the path is generally opened

* To promote legibility simple footnotes like this are given in the text. The work quoted, for example STEVENSON's is given in the References.

up for the application of foreign legal provisions referring to legal conditions containing foreign elements and so it expresses in several respects *the equality of national laws (or systems of law)*, that is to say the principle of modern comity which is something like a neo-comity". (See MÁDL, On the first ... p 258.)

According to the advocates of the second path the command of international law forces the states to apply the provisions of private international law. This is the position maintained, among others, by Ferenc Mádl and Lajos Vékás: "According to the predominant concept of today the obligation of the states to mutually recognize each other's legal system stems from public international law; this is a willingness that within certain limits and provided certain preconditions exist foreign law is applied to the bearing of the case of the private international law. In this sense the existence of private international law is rooted in the public international law". (MÁDL–VÉKÁS p 47.) It is interesting to note that the formulation given by Raape and Sturm is almost identical. (RAAPE–STURM p 44.) However, a person educated in debates of orthodox international law will immediately recognize that what is lying behind these two types of approaches is basically the traditional debate in international law described as "dualism or monoism, and if the latter is the case, which is the primary one?". The limitation involved in the word "basically" is necessary because those who recognize the determining role of international law or at least its nature of setting limits do not necessarily maintain that international law and domestic law belong to the same system. (I shall come back to the question of whether or not private international law is purely internal law at a later stage.) For it is possible that on the basis of a modest dualist position which recognizes that there is a sort of communication between the two legal systems or branches the idea of international law being the primary factor can also arise. The essence of this view is that although international law does not belong to the same system as private international law, but it does contain provisions which involve obligations for the states at least inasmuch as specifying their range of authority. In other words, it is the task of international law to define state competence and to "divide up competences". (NIEDERER, 74.) Naturally, the advocates of these views are quite modest. Ferid (FERID p 32.) maintains that the states are bound by international customary law not to refrain completely from applying foreign law, not to deviate arbitrarily from their own law of conflict of laws or respect the acquired rights but he adds that these norms cannot be regarded as provisions applied in the Federal Republic of Germany either. Raape and Sturm do not go any further than stating (RAAPE–STURM p 44.) that it would run counter to international law if the private international law of a country were composed of one provision only stating that domestic law must be applied in every case that has international implications. It would also be considered as a violation of international law if a state took the liberty of excluding the law as a whole of another state belonging to the community of states from the laws applicable on the basis of collision norms. I am of the opinion that

the two authors are right thus choosing the easy method of cutting short the historical elaboration of the debate on dualism and monoism and pointing out that a good rewiew taking a monistic view with the primacy of international law is given in a study written by László Bodnár (See BODNÁR).

2. *Production forces, production conditions and sovereignty*

Instead of entering into further details of the history of scholarship let us examine the ideas of sovereignty associated with the theory of dualism and monoism; in other words let us study the basis on which the existence of the states and their acceptance in the international legal community is realised. In case it is sufficient for the establishment and survival of a state to organize its own society and ensure its reproduction along with its own reproduction, we can say that state sovereignty is intact and this follows from the state itself. According to this concept international law does not mean more than the occasional and incidental encounter of the wills of the state which can either be of a dualist nature or it can be embodied in a monoistic concept declaring the priority of domestic law. However, if we set out from the idea that every state exists in an environment made up of the other states and this external world means, at the same time, the condition for its survival, it is easy to arrive at the conclusion that international law can contribute to creating sovereignty and to keeping it alive, that is, it is an essential condition for the existence of the states and one of its guarantees for their survival. In this case sovereignty must be regarded as "limited" and embedded in the correlation system made up by the other states and, to a certain extent, it must also be considered as a phenomenon ensured by international law. This is the manner in which we can arrive at a relatively dualistic or at a monoistic idea recognizing the primacy of international law. According to this system of thoughts international law is of a greater significance, it is of a "higher order" than internal law because in the form of agreements between states it creates a guarantee of such quality for the survival of a party to this agreement for which a state would not be capable of on its own. This hierarchic advantage, however, does not mean supranationality since not the decision-maker but the decision taken is over the individual states.

The question arises: why is this so important? Because with an interpretation of the category of sovereignty taking into account even its politological implications we can arrive at the most acceptable explanation of the existence of private international law.

The process involved is a simple one. Namely it is a process which is quite well-known but in legal thinking little if any thought has been given to it except for some phrases. It can be described as the broadening of the range of production relations and their rearrangement. *The states have become dependent on one another to such an extent that there is practically no sense in applying the term "social conditions" to an individual state.* The dimensions in which the markets exist, the capital and goods move or

manpower migrates are broader than a state, sometimes as great as those of a region or the whole world. And this point must be given due consideration when it comes to analysing law as a "category of the superstructure". In the first stage this means a more realistic approach to sovereignty which, as you will see later, is also embodied in the recognition of relative immunity that replaces absolute immunity. In this connection it can be stated that of the states that are formally independent from a legal aspect and constitute part and parcel of a system of mutual, economic and political interdependence "only that state is a *sovereign* one which can have as much influence or even more impact on the decisions taken by the states with which it is in contact than they have on its own decisions." (VALKI, L.: Organizational ... p 426.) Thus in a politological sense we mean a balanced system of dependence and not an absolute freedom of action when we are seeking the content of sovereignty.

The reply to be given to the basic question can be reached in the second stage, that is, why does a state permit that the law of another state is applied on its own territory? The answer is that this is required by the state of affairs since the fact that social and production conditions go beyond the national limits has become an indispensable condition for the survival and reproduction of the societies.

The production conditions do not need a passport to cross the boundaries. However, the persons and things in which these conditions are embodied need one. To speak in simpler terms, it follows from its ontological nature that the law must reflect the expansion and rearrangement of the economic conditions that constitute its basis. Thus the states that make the collision norms and the unified law regulating, "enabling" the above process do no more than take notice of the command of facts and in this manner" so much the better for them." Therefore, *the existence of private international law is the consequence of economic necessity embodied in the system of mutual dependence.* International law is a secondary factor, a deducted reason, but it is necessary to make references to it inasmuch as it supplies the formal means of the linkage between states. (The international agreements describing the provisions of a content of private international law will be further discussed in Chapter II.) It goes without saying that international law could not remain unaffected while changes of such dimensions took place in world economy. A basic principle stating the obligation of the states for cooperation was established the essence of which is not composed of the less concrete norms formulated by it but rather of the fact that by making a general call it points out a manner in which the states should behave and the way in which their international law which reflects their behaviour should be moulded. (NAGY, B.: pp 275 – 280.) The formulations of this principle which are not legally binding such as the Declaration of the UN General Assembly. No. 2625 of 1970 on the principles of international law regulating friendly relations between states or the Declaration of Principles in the Helsinki Final Act about the principles valid for the 35 countries parties to the Document make it clear that cooperation should be affected in general fields including economic

cooperation irrespective of the economic, social and political system of the cooperating states. This fundamental principle of international law makes cooperation between states obligatory, even if only in general terms, and reflects the recognition brought about by economic changes that the states cannot pull out of the joint regulation of the reproduction of the world. It follows then that to this end they must make provisions of private international law promoting economic cooperation providing foresight and calculability. To this extent international law also acts as a reason for the existence and expansion of private international law, but I have to emphasize that the final, ontological explanation to the problem lies in the production conditions and not in international law.

3. *A hypothesis about the possible central points of relations between international law and private international law*

A more thorough examination of the production conditions, that is, economic conditions and relations between persons and objects associated with them gives rise to further ideas. I think if we consider the point seriously that law is of reflective character what is suggested, among others, by Vilmos Peschka (PESCHKA, V.: pp 37—49.), it is well worth looking behind the screen of the law to find out more about the interpretation of the changes of the law. The forms of reality are like by a membrane or film held together by the threads of the law while its creases are determined by the forms themselves. This can serve as a basis for the following hypothesis which is still to be proved.

The relations between international law and private international law or the content of the grey zone that fuses the characteristics of the two of them are dependent on the social and economic system of the countries whose relations are intended to be studied. The expansion of the production conditions is not of the same intensity in each direction. It is quite obvious that their frequency and depth are dependent on whether these conditions are created between countries with the same or different social systems. The extent of mutual dependence is different within socialist and capitalist countries or between the two groups. Moreover, even the developing nations have their own specific interests that are manifested in private international law or international law the form which it assumes.

As a first step let us examine the relations between the members of the two opposing world systems. Their political foundation is peaceful coexistence and their practical guideline is cooperation providing for mutual and balanced benefits and advantages. This is the field in which the socialist countries are only too keen to guard sovereignty which means the defence of the institutions constituting the foundations of their social system. It is the consequence of this state of affairs that rules of conflicts of law or uniform law included in international legal agreements are most likely to be established in the traditional areas of private international law such as the civil law relations of the individuals, in the field of family law or in the area of commercial law which corresponds to the extent to

which the given socialist country has made the world market into an element of its own economic system. There are very few norms, however, promoting the movement of capital or manpower or those providing for the state to figure as a civil law entity.

If a comparison of the system of legal provisions is made for the countries belonging to the same bloc or group specific central points can be identified.

Concerning the relations between the socialist countries the objective is to translate the principle of socialist internationalism into practice in respect of the political plane and international law. This means in practice that within this group of nations there are several agreements of private international law nature, concerning citizenship, legal assistance, and so on, and, on the other hand, they are not so much anxious about sovereignty being violated, a fact reflected in the intensity of interstate relations. If the social foundations are identical, it is not difficult to formulate provisions involving the fundamental production conditions. It follows from the special economic role of the socialist state that it can produce phenomena in fairly large numbers belonging to the grey zone in which zone the major characteristic of the state is not that it is the bearer of the sovereignity but that it is the most important and actual economic factor. In such a position it has the power to coordinate the plans and production or divide up the related tasks and to establish contacts not only on the market. With this it makes communication on ministry and trust level more frequent which brings about specific legal formulas. This finds expression in the Comecon's technique of regulation as well as in the management of the foreign trade of the individual countries.

Concerning the relations between the capitalist countries, in addition to the quite elaborate traditional provisions of the private international law, provisions making the free flow and migration of capital, manpower and services possible are made at an ever increasing pace along with provisions eliminating the trade barriers. It is not the common economic position taken by the states that is characteristic, but rather their uniform endeavour for creating indentical conditions for the factors of the economy inclusive of the natural and legal persons.

Law-making which is of an integrational character and is carried on within the Common Market is of particular importance constituting a challenge for international lawyers and private international lawyers to revise their theories.

In the absence of sufficient information I am not in a position to make a statement about the developing countries. However, it is beyond any doubt that their economic and trade ties with the highly industrialized states are more important from their point of view. Concerning the legal implications guiding these ties my hypothesis is the following: in the relations between the developing nations and the socialist countries agreements translating the political principle of international solidarity into practice are of decisive importance. It is characteristic of these agreements that the socialist countries offer complex services that follow from the

leading economic role they are playing. In other words, the agreements they conclude are not of a general normative nature, for example, one that regulates the investment of capital, but very frequently they agree on the building of a complete project. It is done in two stages as a rule, that is to say on the plane of international law and private international law that breaks the former down.

The relations between the capitalist countries and developing nations are characterized by the fact that the latter group is all out to eliminate even the traces of colonization, that they wage a struggle against neo-colonialism and, at the same time they are very largely dependent on foreign capital and technology. This applies, in particular to those developing countries that have chosen the path of capitalist development. Thus in their relations detailed regulations are established for investment, the movement of currency and for the flow of technological information. Agreements clarifying the possibilities of expropriation and nationalization are also important, or the relevant customary law which, according to western international lawyers does exist (SØRENSEN, editor, Manual pp 626—629.).

In connection with the developing countries the role of those international organizations which are subjects of international law is well worth mentioning. The status of the provisions regulating the financial, economic or technological assistance given by these organizations is by no means easy to describe from a theoretical point of view.

To summarize what has been discussed above the relations between international law and private international law as well as the volume of the grey zone between them is presumably dependent on the social system adopted by the two countries under examination. The objective of this chapter, however, is merely to describe the most general correlations for which an additional thing is necessary, namely the content of the value of the two legal systems.

4. *Value selection or value indifference*

It is a commonplace in Marxist literature on law that internal law possesses a value content and that social conditions are arranged by internal law in the interest of some social force and, accordingly, in compliance with the order of values preferred by that force. The fact that this problem must not be interpreted in a simplified manner is indicated by the meticulously accurate formulation made by Vilmos Peschka: "Tracing the value content of legal norms back to class interests, in particular, to the specific interests of the ruling class, in other words, to define the value content of legal norms as though it was class content is far from being sufficient to end the pluralistic, relativist and contradictory nature which is characteristic of the value content of legal norms. The relationships between the contradictory interests of heterogeneous classes, between the actual, daily and historical interests of the ruling class and the interests of the state organ expressing them make it absolutely clear that the value con-

tent of the legal norms that develop on this level and in this kind of synthesis is very far from being homogeneous. Therefore, legal norms reveal a pluralistic and relative character even in case it can be stated as a tendency that *the value content of the legal norms are determined fundamentally and in a historical perspective by the interests of the ruling class*". (PESCHKA, V., pp 166 – 167. A quote I picked.)

A venture designed to seek the value content of international law leads to a diametrically opposed result. It is the fundamental characteristic of agreements between the two world systems, or speaking in more general terms, of agreements aiming at universality that the force determining the internal law of one of the social systems cannot become predominant for the other. None of those making international law can gain the upper hand because the essence of the related provisions is mutual agrement based upon compromises and coordination of the will of sovereign and legally independent states. That is why the opposition between the two world systems cannot be resolved or eliminated by international law in a positive fashion; its potentials are limited to saving the separated status of the states and to defending the prevailing order of the community of states. A logical conclusion was drawn from this train of thoughts for the first time in Hungarian literature on the subject by László Valki who said, "The norms that constitute the backbone of the present system of international norms are indifferent, neutral and irrelevant from the point of view of the final value". (VALKI, L.: On the Value Content of international Law ... p. 9.) It is not an integral part of the subject being considered right now though it is part and parcel of the truth that putting aside neutrality international law has opened up a path for changing the status quo when it recognizes the people's right of self-determination. And limitation of the means that can be resorted to in the case of a conflict between states such as the prohibition of the use of force, and so on is, in effect, a value by itself, as is pointed out by the author quoted above.

From our point of view supplying an answer to the following question can be a step forward. If domestic law is basically of a value content and if at the same time the universal rules of international law that is to say the rules applicable between the two world systems are above all neutral meaning that they cannot be associated with the interests or with the value system of any class or social force the question arises: what can be said about the rules of private international law and the grey zone?

Basically, private international law is also neutral meaning that its stock of provisions is not subordinated to the value system of any of the societies. This aspect is underlined, among others, by Ferenc Mádl when he concludes that "in addition to the relatively smaller role played by the relations of production the decisive factor is the practically direct force of the means of production, the influence exerted by mutual interests associated with the uniform stability of international exchange conditions, and so on. In these relations and in legal institutions regulating modern exchange and technological conditions the decisive role played by the forces of production and the standards of their development which are approxi-

mately identical is of primary importance apart from the general role played by production relations with which the commands received from the forces of production are transferred in different, for example, in socialist or non-socialist directions. As a consequence the legal form adopted (although it is designed to serve different objectives depending on the social-system), is, in the function of *sui generis* legal regulation, after all identical or similar." (MÁDL, F.: Comparative ... p 203.) The economic conditions bringing about private international law, the association between states that follows from the condition of the forces of production can boil down to the same point as in the case of international law, that is, the conflict and substantial rules of private international law are *not* value selecting.

It is not permissible to render this neutrality to be too absolute. If the conflict rules of a given country lead to the application of the law of another state and this foreign law is basically conflicting with the domestic legal system of the state concerned and with the value system it expresses, then the general "defensive" institution of private international law will come into play: this is the clause of "ordre public". By referring to this the forum concerned can refuse to apply the law of another country. Article 7 of the Code of Hungarian private international law states the following: "The application of foreign law should be discarded in case it runs counter to Hungarian public policy." Public policy means the fundamental legal institutions which are defined by imperative rules. In actual fact this coincides with the internal cornerstones of sovereignty, the political system, the principal rules governing property relations and the pillars of citizenship law. Thus the norms of private international are not completely insensitive to values. Even if they would incidentally lead to a settlement denying the values of the domestic legal system, they might as well be treated parenthetically with the aid of the clause of public order. This method, however, is merely an "exceptional one and is of a defensive character; it is designed to protect the prevailing legal order and cannot lead to discriminatory objectives" – this is stated by the commentary given by the Minister of Justice and is attached to the Code and it is also supported by para 2 Article 7: "2. The application of foreign law cannot be discarded merely because the social and economic system of the country concerned is different from that of Hungary." In other words, private international law does not adopt any discrimination and as such it makes it possible to adopt the provisions of any foreign legal systems because their overwhelming majority belong to the value indifferent zone. A distinction is only made in connection with the possible penetration of a value system which is extremely conflicting by adopting the clause of public order.*

* The exceptional character of the application of public order is generally recognized; e. g. FERID pp 60 – 61. The author embarks on the job of listing item by item the institutions to be protected by public order in the law of West Germany (pp 63 – 64.).

II. International law, private international law and the related border areas – from a legal dogmatic approach

1. *The method*

The term "legal dogmatic" figuring in the title of Part II should be treated as one without any negative or pejorative implications. In the following the assembly of phenomena composed of these two or three elements and which are difficult to describe will be approached in the conventional manner. What concerns the differences they lie, compared to what can be read in literature about this subject, in the fact that the objective is not necessarily to give a traditional answer to the highly traditional questions (definition, subject, legal sources, object, application) or point out one by saying that "this is the only correct answer"; it is much rather the objective to prove that the questions put in the well-tested categories cannot be answered by replies of the same category. In a number of cases the problem cannot be solved by classfying the items into the two categories of international law and private international law as distinct from one another for there will be grey elements left over and to be disposed of. And they need to be placed into the limelight rather than to be put aside as inconvenient because what they reveal is not the shortcoming of the skills of the researcher but the recognition that a highly contradictory system with plenty of overlapping is being examined and the real result in this case can be its true reproduction. And in case the researcher can classify each phenomenon into the category of international law or private international law he has most certainly used force when treating facts.

2. *The Grey Zone*

It is characteristic of the phenomena belonging to the grey zone, that is to say, of the objects of subsequent analysis that one of their composite elements does not come from the same legal system as the rest. The factors of international law, private international law or other branches of law come to be mixed. The reason for this may be the fact that one of the subjects of the legal relations of a nature of international law is not an international legal subject or that the object of legal relations between two international legal subjects are of the nature of private law, or that the legal relations of private international law nature are settled by international legal provisions and at last that relations belonging to one sphere are realized by the mechanism of enforcement of law of another sphere.

A) *Legal Subject*

In the field of legal subjects the greatest difficulty is posed by the diversity of the state. It has been of common knowledge for long that the status taken by a state can be one of iure imperii, that is, by wearing all the armours of their sovereignty when they enjoy full immunity or one of

iure gestionis, that is, in the capacity of private law which is, in fact, the status of a "merchant" when the state is just one of the many private entities. However, the custom of enjoying the advantages associated with sovereignty in these relations is still going strong in relations between states, that is, the attitude not to subject themselves either to foreign law or a foreign court. A classic example to this effect is supplied by the foreign trade missions of the Soviet Union which enjoy immunity linked with sovereignty even in simple business deals except when they relinquish this right in a bilateral agreement or in a contract (BUGOSLAVSKY p 118.). The dualism of iure imperii and iure guestionis roles is already reflected from a legal aspect in the western countries. In 1972, the European Convention on State Immunity was signed the essence of which is that all the states are entitled to functional immunity meaning that in purely iure gestionis cases they are not exempt either from the force of foreign law or from the competence of a foreign court. In the legislature and judicial science of the socialist countries the idea has also arisen that with functional immunity direct relations between states could be made more balanced and more effective. Funcional immunity is recognized by the Hungarian private international law code on the basis of reciprocity. (MÁDL: On the first ... p. 278., and concerning the theoretical debate on the problem see MÁDL–SÓLYOM ... pp 217–233.)

It is no easy matter to find out the capacity in which the state is involved in given relations. Fortunately there are three approaches that can offer assistance to decide the problem. Firstly, the relations cannot be purely of an international law character in case there is a legally incapable subject at the other end from the viewpoint of international law. Secondly, in case the parties at the oppsing ends are possible subjects of international law, but the content of legal relations is not related to sovereignty and the problem is fundamentally of the character of private law. Thirdly, the question may be if a given organ or organization acts as the organ of the state or in the capacity of an independent legal subject of the civil law.

The examples for the first case are supplied by agreements concluded by the states with legal persons in the majority of cases with multinational companies. In such cases neither of the parties involved can impose its will on the other. The state will not become a simple subject of civil law, the legal subject will not become sovereign. This is the case, for example, when the state obtains a loan on the international money market, a move of which the International Court stated that it is not an international legal affair (HAMBRO p 25.), or in case a concession agrement is concluded. The fact that the latter belongs to the grey zone is indicated by Article 21 of the agreement signed by the Persian Government and the Anglo–Iranian Oil Company in 1933: "The contracting parties declare that they base the performance of the present Agreement on principles of mutual goodwill and good faith as well as on reasonable interpretation of this Agreement.

The Company formally undertakes to have regard at all times and in

all place to the rights, privileges and interests of the Government and shall abstain from any action or omission which might be prejudical to them.

This Concession shall not be annulled by the Government and the terms therein contained shall not be altered either by general or special legislation in the future, or by administrative measures or any other acts whatever of the executive authorities. (The Article is quoted after McNair: McNAIR pp 6 – 7.)

It is obvious from the passage quoted that the parties involved are in a "special" situation. The state represented by the Persian Government will remain to be sovereign but it cannot perform either legislative or executive functions in the given case. It is true that the Anglo – Iranian Oil Company does not become sovereign, but it is capable of limiting the area of activity of the sovereign to the extent similar to an agreement concluded with a subject of international law. The extent to which this case belongs to the grey zone is confirmed by the fact that the contracting parties specified an arbitral tribunal to act in case a dispute arises, that is to say the Anglo – Iranian Oil Company did not subject itself to the legal authorities of the Persian state either and this tribunal had to take a decision on the basis of the rules specified in the Article quoted and not on the basis of a national law. It can therefore be stated that in the high number of agreements modelled along the lines of the one signed by the Persian Government and the Anglo – Iranian Oil Company both the state and the legal person are in a non-typical situation from the point of view of both international law and private international law. This fact delegates the whole deal to the grey zone lying between the two of them.

The situation where the status of the state is determined by the special characteristics of the legal relation in which it is a party will be examined in the course of reviewing the theory and praxis of economic law.

In the third group of cases in which the iure imperii nature of the position taken by the state is questionable is when it cannot be identified quite clearly who is authorized or bound by a statement made by a given organ. An analyst finds himself in a situation only to easy to cope with when the document (agreement) in question has been signed on behalf of a certain state or its government and possibly it has also been approved or ratified following a complicated or simple procedure which is designed to be proof of its status in international law. But what happens if, for example, the leaders of the Board of Planning of two socialist countries conclude an agreement on the coordination of their plans or on exchanging statistical data, or when the leading officials of patent offices agree on going together to a third market (country), let alone, for instance, the cooperation protocols signed, say, by Academies of Sciences, a document which involves, among other things, the movement of persons and money. Socialist legal science is still seeking the answers to the problem (MÁDL – – SÓLYOM pp 225 – 227.), and it is very unlikely that the position outlined by Jenő Bobrovszky in connection with the patent offices can be transferred to another area on the basis of analogy. (I challenge it even in its own implications.) He writes that within the Council for Mutual Econo-

mic Assistance, besides the agreements concluded by the member states "a number of bilateral agreements have been signed by offices which, in essence, are also regarded as international legal agreements between states which are subjects of international law on behalf of which the offices have reached agreement on a given question" (BOBROVSZKY p 121). It remains to be questionable, however, whether or not a document signed by a patent office acting on its own behalf is directly binding for the state it belongs to. It must be stated that it is by no means an easy job to decide which state organ's action can be regarded as one directly linked with the state. The answer given by Ferenc Mádl and Lajos Vékás is that "actions taken by the legislative or administrative power of the state, in general the actions of the central administration entrusted with sui generis public law functions are regarded as actions by the state itself." (MÁDL – VÉKÁS p 215.) The problem is, however, that the term sui generis public law function is still to be clarified all the more so because within the premises of Hungarian law judicial science refuses to accept the division into public law and private law, a classification broadly adopted in western legal science, and even if this would be forgotten by us as good-willed readers by saying that we quite understand what the authors have in mind it is still to be tackled what the phrase "in general the actions of the central administration" implies. For it is the cloak of ambiguity of the expression "in general" in which the core of the problem lies. It is ambiguous because the phrase might as well be completed saying: "but sometimes even the actions of non-central state administration" or saying: "but sometimes even not the actions of the central administration". A solution to the problem is offered if we accept that on the levels of both central and non-central administration such agreements are concluded which cannot be regarded as belonging either to the sphere of international law or private international law, because they belong to the grey zone lying between the two of them. This assumption is confirmed by the lines written by Ivan Szász in his article on the legal mechanism of the Council for Mutual Economic Assistance: "The development of currency and monetary relations can have a significant impact on the development of the system of institutions regulating the relations of contract-law *or something similar* between the enterprises of the member-states and also between their *state organs*". (SZÁSZ, p 216. Passage picked by the author.) In the relations between state organs which are similar to contract-law relations the state acts neither iure imperii nor iure gestionis but in the capacity of a legal entity belonging to the grey zone.

There are few problematic phenomena to be encountered if we take into account the situation of individuals and legal persons and temporarily put aside the conclusions stemming from the norms of international customary law and international legal agreements including rules of the nature of private international law. The science of international law has assumed a uniform position on the question that apart from this neither the individual nor the legal person is the subject of international law, although there are certain agreements which make it possible for them to enter and emerge

in the international arena. To this category belong the provisions making it possible for individuals to be compensated for directly under the peace treaties that followed the First World War and the provisions involving the western powers and the Federal Republic of Germany after the Second World War which made it possible to directly statisfy material demands arising in the wake of the occupation of Germany by the Allies through a court of arbitration. (DAHM, p 415.) The reason for mentioning them here in connection with the grey zone lies in the fact that they are of property law nature. Documents relating to human rights enabling individuals to be involved directly in international law such as the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the petition right known in connection with the trusteeship system of the United Nations are not associated with the subject of this study.

B) *The Objects*

We find ourselves faced with almost unsurmountable difficulties in respect of the jungle between pure international law and private international law if we embark on examining the objects of regulation. The 20th century has given birth to such a complicated and articulated system of economic relations which proves practically impossible to be incorporated by any of the legal systems or legal branches. Hambro had good reason to write way back in 1962 "It would seem perfectly possible that international financial and economic law is in the making and that such law would be eminently well fitted to govern relations between governments and such private companies. It would indeed be a natural and perhaps even necessary development of international law which would thus add a province to its domain." (HAMBRO, pp 39–40.) Following a very witty and concise description of the "revolt of facts" Ferenc Mádl said in 1978 that not only conventional private international law failed to cope with this revolution, but "the conventional long standing branches of law such as civil law, trade law, international law, and administrative law have also been made to assume a similar inertia type of role at several places when an approach to the new phenomena was attempted to be made by them only from the direction of the old categories ... The second stage of the revolt (while bearing it in mind that the stages are important primarily not from the aspect of sequence but much rather because of their content) is made up of those endeavours that seek a new order to replace anarchy: new theories are elaborated, new concepts and new disciplines are outlined in an effort to achieve a scientific interpretation and systematization of new facts and phenomena." (MÁDL: Comparative ... p 176.)

You may well ask: what is the point at issue? Briefly speaking, we can say that the task of international law has been to the present day to regulate relations between states which are directly associated with their sovereignty. The duty of private international law has been lying a level lower since it has been designed to regulate the relations between citizens

and legal persons, through national and international conflict rules and at a later stage through uniform law. Intervention on the part of the state in the internal economy, or the foreign trade monopoly practised in the socialist countries and the formation of economic integrations have led to the multiplication of "diagonal" type of relations connecting the planes of international law and private international law. To settle the problem with these relations both planes as well as administrative law, financial law and constitutional law have produced their own provisions. The reaction on the part of legal science is nothing but a start made out of the actual content of regulated relations and the forms of reality instead of setting out from the law-making subject and the legal sources when determining the areas of law (the systems and branches of law). Of course the conclusion drawn from this starting basis is not of one type. As stated by Mádl, in the work by Loussouarn and Bredin entitled "The Law of International Trade" "constitutional law, the administrative law, trade law, civil law, public international law, procedural law (and as a reverse of the old state of affairs) private international law in the case of the individual institutions are all in one bunch." (MÁDL: Comparative ... p 195.) In his "European Community Law" Ipsen discusses the "norms of a nature of constitutional law, administrative law, tax law, commercial law, labour law, public international law private international law, procedural law, penal law together with one another and makes the assumption that *together as they are they constitute an independent area of law which is closed in itself, or at least even if they are cancelled they continue to retain this or that of their character* but even if they are lifted out of this 'conglomerate system' they cannot be forced back into their old category". (op. cit. p 199.)

Following no little struggle international economic law came to be declared as existing by a couple of people engaged in socialist judicial science. While Blagoievich spoke only of the need for "a struggle to be waged with an outlook of comprehensive international economic law against retrograde and reactionary forces hiding themselves behind the barricades of classic public international law and other traditional branches of law" (op. cit. p 213), Boguslawski identifies a *branch of law that is in the making.* At the same time Seiffert maintains that this process has already *come to an end.* Boguslawski and Seiffert force international economic law into the framework of the socialist economic integration. In Seiffert's view "Subjects of this branch of law are the states, other subjects of public international law, before all Comecon, international organizations for an economic branch, state organs and international and national economic enterprises" while the objects are "1. prognostics of economic policy, production plans, coordination of technological development; 2. specialization, cooperation and standardization; 3. coordination of foreign trade plans; 4. coordination of investments and the foundation of joint companies; 5. terms and conditions of trade and the exchange of goods and the related system of conditions including pricing and the relations between companies assuming the form of goods and money; 6. payment system; 7. deliveries; 8. interstate directing bodies and their activities; 9. the sta-

tutes of different international organs; 10. trade and shipping agreements (MÁDL: Comparative ... p 217.).

There is no need for lengthy comments on the problem. It is quite clear that what we find here is the combination of the areas and norms of civil law, administrative an, financial law, private international law and international law. It is not the duty of this study to draw the conclusions since its objective is confined merely to *describing* the grey zone and it does not want to adopt the method of rigid classification into categories. That is why it wishes to mention that the new university textbook for private international law will bear the title "Hungarian private international law supplemented with the principal elements of the law governing international economic relations". And what is covered by the term: law governing international economic relations, and why, can be read in a study written by Ferenc Mádl under a similar title (MÁDL: Comparative ... pp 248–281).

The next in line in the points at which international law and private international law rub shoulders, or more exactly, where they overlap each other is the position of foreign citizens and legal persons. This obviously follows from the fact that the natural and legal persons are under the control of international law in connection with the norms concerning jurisdiction and of private international law, as the foreign element in the legal relation. Thus either one or the other of the disciplines would claim these areas for itself. In France, Spain and in the other romanist countries as well as in the Soviet Union the law of aliens and citizenship law are classified into the category made up of the objects of private international law. (RAAPE–STURM: p 25 and BOGUSLAWSKY pp 73–87.). Other authors like the Germans and Anglo-Saxons exclude them from the category of private international law and delegate them to the category of international law (STEVENSON p 562), or consider them as distinct areas of law (RAAPE–STURM p 26); the latter is the case with Ferenc Mádl and Lajos Vékás (MÁDL–VÉKÁS p 48). Within the frame of this question the problems of citizenship cannot cause any difficulty but the combination of international law and private international law is quite obvious in connection with the principle of the minimum standard and in the case of diplomatic protection, and. The practice of expropriation and nationalization is fairly rich in rules of a double nature too.

In actual fact the principle of minimum standard is a supplementary provision of equal treatment to be given to foreigners (it is denied by the socialist countries HARASZTI–HERCZEGH–NAGY: p 179). This is maintained by western authors (for example, VERDROSS–SIMMA pp 586–589) who say that the states are compelled by international law to guarantee certain rights of private international law even in case the citizens of a country are not entitled to it (for example, defence of "acquired rights").

In contrast to consular protection diplomatic protection is generally regarded as an activity belonging to the sphere of international law. However, in his book Private International Law Lunc says that "the diplo-

matic intervention by a state in case the personal rights of its citizen or its organization are violated in another country means the insufficiency of the "normal" (judidicial or arbitrational) order of the particular legal system in the given case. An intervention of this kind means that in addition to the norms of civil law and private international law the rules of international law regulating the given relations between governments have also been violated." (LUNC: p 15.) The argument he gives is quite convincing to prove that this kind of protection is of the nature of the grey zone.

Both expropriation and nationalization are fundamentally domestic affairs, that is to say they have nothing to do with international law. (BOGUSLAVSKY: p 130.) However, the sharp debate between east and west on this issue (see, for example, VEDROSS–SIMMA: pp 589–593, or SØRENSEN Manual pp 485–489) shows that this is largely ignored by practice. No wonder because a host of legal documents delegates the question into international law, or more exactly, into the grey zone. It is sufficient to mention in connection with this the provisions specifying global compensation in the Czechoslovak–Austrian agreements pertaining to the rights of property (19 February, 1974; BGBL 451/1975) or the Convention of Establishment concluded by the United States and France in 1959 (UNTS 401 vol. 75, 80.) which contains in Article 4 guarantees for appropriate compensation in the case of expropriation, or the Charter of Economic Rights and Duties of States. The latter was adopted in 1974 by the United Nations General Assembly and although in legal terms it is not a binding document it is still a valuable testimony to the present state of affairs. Article 2. "Every state has the right ... *c)* to nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing state and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means." Without giving any interpretation of the above quote it is believed to be easy to recognize the extent to which the elements of international law are mingled with those of private international law.

C) *The Sources of Law*

It is an almost trivial fact that international law and private international law are mingled with one another in the field of the sources of law. It is beyond any doubt that the agreements codifying conflict rules or uniform law act as material for both international law and private international law. However, with respect to the interpretation of this fact the opinions are very different. One extreme view tends to incorporate the

whole private international law of this kind into international law (for example Laduchensky and Krülov; see HRABSKOV pp 119–120 and Nussbaum; see STEVENSON p 564); the other view maintains by referring to the transformation by which the states render rules of this kind part and parcel of domestic law that they should be classified into the sphere of domestic law and deny their international nature altogether. (KEGEL: pp 4–5, NIEDERER pp 68–72; BOGUSLAVSKY p 22.) Quite naturally there is also a transitional category lying between the two extremes; for instance, Hrabskov denies that a clear-cut answer would be possible (HRABSKOV: p 122.). Makarov does not go any further than reiterating the dualism of the origins arising from international law and the content associated with private international law (MAKAROV p 131.). I think that this is the position that corresponds most favourably to realities. Since these agreements which are the documents of international law "live or die" according to the international rules of the law of treaties as codified, by the Vienna Convention on the Law of Treaties of 1969. Their interpretation, their being in force but above all their becoming obligatory for the citizens and legal persons take place in a manner identical with the "pure" international legal agreements.

While it is a must for the state to make it possible to translate them into practice they do not constitute any other obligation directly for the state which is a sovereign body. These agreements containing private international law rules live in the non-sovereign sphere; they are not referred to in foreign ministries or international organizations; they are used as points of reference in documents establishing contract obligations, at courts and before the authorities of local administration. Their dual nature cannot, therefore, be challenged at all and must be recognized as the dialectics of form and content.

The transformation theories that can imagine the enforcement of international law in the domain of domestic law merely as a result of a state action proper which is what legislation is have an additional weakness. They fail to supply explanation as to what the impact inside the country of a provision of international customary law can be attributed to, a provision that cannot be transformed into a domestic provision because of its nature since such a measure would be equal to unilateral codification. (It must be noted at this point that neither the Hungarian legal theory nor the official judicial policy could supply any answer to this difficult question; from a legal point of view it is still a puzzle in Hungary today who can be obliged by the provisions of international customary law and for what and mainly on what grounds.) Although it is beyond any doubt that a number of questions belonging to the sphere of private international law such as, for example, the principle of equal treatment in the field of the law of aliens, are still regulated only by customary law. Obviously, there can be no doubt that the norms of this kind belong to the grey zone.

When reviewing the sources of law mention must also be made of whether or not private international law can contribute at all to the enrichment of international law and whether there are norms which the latter

borrowed or absorbed from the former and subsequently incorporated into itself. The answer to this problem is negative with a single restriction. Para 1/c of Article 38 of the Statute of the International Court of Justice considers the general principles of law recognized by the civilized nations as a possible basis of the decisions of the International Court, that is, they are regarded as sources of law. Here another problem must be faced since these principles, provided they exist at all, are not recognized by everyone as sources of law. One of them is, Geza Herczegh (HERCZEG, G.: pp 97 – 98.) who blocks the path of further train of thought in this direction. But if there are such principles, a point that is not denied even by Herczegh himself, and they act as sources of law for international law as suggested by Verdross and others (ibid. p 97) the question may well arise that one or the other may stem straight from private international law in the form of identical or similar basic principle of the private international law of several countries. I shall come back to these debated rules when discussing international arbitration.

D) *Application*

The differences detectible in the enforcement of law are most characteristic of the differences between international law and private international law. The specificity of international law and the cardinal argument opposing it lie in the fact that the enforcement of international law promises doubtful results and does not hold out hopes for a settlement without the minimum of cooperation preserved between the oppsing parties. In private international law, however, the injured party has good reason for hoping that the violatin of his rights can be redressed with the assistance of the decisions to be taken by institutions lying above the parties involved in the legal case such as a court, arbitration tribunal or other authorities, or in the final resort by using compulsion. The difference involved is so marked that in case a person not sensitive to the refined chapters of legal dogmatics is to be given a reference basis helping him in the ways to decide if a legal involvement belongs to the sphere of international law or private international law, it would be quite sufficient to tell him to consider relations with international law implication in which the conclusion of responsibility and bringing about legal consequences are up to the parties themselves and take place through them, while it should be considered a case implying private international law if there is an organ or forum which does not settle the dispute between the oppsing parties only to the limit of cooperation between them but, perhaps, explicity against one of the parties.

This explanation is naturally far from being satisfactory for an expert since international law also knows of the application of central sanctions, first of all in the range of authority delegated to the UN Security Council or in the form of collective self-defence as a manifestation of the legal consequences of agression and it also adopts procedures similar to those used by the courts. These, however, do not have anything to do with the subject of

this study. When mapping the grey zone consideration must be given to the arbitration tribunals which are ad hoc or standing international institutions that have been established on the basis of international law. Here the opposing parties involved are either two states or a state and another body which is not a state in connection with a judgement to be passed on cases of a civil law character and not directly stemming from sovereignty.

Their two major variations are quite well-known: two states come to be opposed to one another because it assumes the case of one of its civil or legal persons in its own sphere and in the course of adopting diplomatic protection it lays claim to another state, or a natural or legal person comes to be opposed directly to the state on the basis of an agreement signed by them beforehand or on the grounds of international law. It is common to both of them, and in connection with this let me recall the case of the Anglo–Iranian Oil Company versus the Persian Government, that an international forum established by an agreement belonging to the grey zone or involving international law has to take a decision on legal relations of a civil law content.

In such a case the question lies in whether the law applied by the respective international forum belongs to the sphere of international law or private international law. This is what Makarov has to say about the problem: "If the international forum does not operate as an appeal court and there are no conflict rules stipulated in the agreement between the states (parties) which could be regarded as lex fori of the international forum then the international forum itself is left with the duty of discovering or establishing them and so, regarding their sources, they are norms of international law." (MAKAROV: p 132.) Lipstein, however, describes these norms as "international" norms of private international law, a concept that I approve. ("Rules of International Conflict of Laws" LIPSTEIN: p 174.). Both theory (McNAIR p 10.) and the arbitration tribunals that handle the cases tend to identify these norms as the general principles of law in line with para 1/c of Article 38 of the Statute of the International Court. Thus, for example, in the case of Saudi Arabia versus Arabian American Oil Company the court ruled that "the Arbitration Tribunal holds, therefore, that it has to ascertain the law to be applied to the merits according to the indication given by the parties, to determine this law by taking all circumstances of the case into consideration. In the present instance the agreement of the Parties does not relate to any single system of law. In so far as the Tribunal is empowered to determine the law to be applied, it will do so, by resorting to the general doctrine of Private International Law." (The quote is on the basis of Hambro–HAMBRO pp 43–44.) In the case of the sheik of Abu Dhabi and Petroleum Development Ltd. the umpire Lord Bishopstone ruled that neither the law of Abu Dhabi (since no such law existed) nor British law which was exluded by the agreement could be applied and so the verdict will be based on "the application of principles rooted in the good sense and common practice of generality of civilized nations – a sort of 'modern

law of nature" which, in my opinion, is also a description of the norms associated with the grey zone.

References must also be made to another characteristic practice adopted by arbitration tribunals. It was characteristic of the mixed tribunals established after the First World War to act between the Allied Powers and the losing nations on the basis of the peace treaties (they were authorized to specify their own procedural rules) that they were authorized to bring a verdict in cases in which the citizens and legal persons of the victorious states could lay claims against the losing states and their citizens as well as legal persons. It is not only the nature of the parties that verifies the delegation of the above procedure into the grey zone but also the fact that the verdict was passed partly on the basis of the provisions of the peace treaties and partly on the basis of the general principles of private international law. It is also characteristic that the role played by the states was quite specific. The losing states did not have to bear the consequences of their affairs of a iure gestionis nature, but they bore the impacts of the actions committed in their sovereign status as warring parties. In other words they were made responsible in their capacity of a sovereign state in matters of purely civil law. (For example, the Hungarian State was made to pay a compensation of 15.000 francs for having deprived a French citizen of his motor car on September 19th, 1914. (Decisions ... pp 75–76.)

Finally, let us examine whether or not there is any concrete correlation between the enforcement of private international law through domestic courts and the international law. The answer to this question is a positive one and it is based on the fact that the recognition of a state or government which belongs to the very sphere of international law can exert considerable influence on both the enforcement of the immunity of the state that has been recognized and on the possibility of disposing of property existing within the borders of the states that have performed the recognition. From our point of view it is much more important that quite frequently the court of the state that has performed recognition of another state applies the law of the state that has been recognized as reference law only after the process of recognition has been completed. In the same manner the measures that have been taken on the basis of supreme power will also be acknowledged following recognition. An excellent example to this effect is the case of Luther versus Sagor in which the British appeal court altered the ruling of a lower level court on the basis of the de facto recognition by Britain of the Government of the Soviet Union while legal proceedings on a lower court level and on appeal court level were in progress. And it must also be noted in this connection that the legal consequences of the nationalization implemented by the Soviet Union were also recognized as part and parcel of the general recognition. (DAHM: p 127.)

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VÖLKERRECHT – INTERNATIONALES PRIVATRECHT

(Rechtsphilosophie und Normenlehre)

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(Zusammenfassung)

Die Voraussetzung der Abhandlung ist die allgemeine Beschreibung des Verhältnisses zwischen Völkerrecht und Internationalem Privatrecht, mit besonderem Nachdruck an die Elemente die weder ins Völkerrecht noch ins Internationales Privatrecht eindeutig eingeordnet werden können. Die Gesamtheit der Normen und Institutionen solcher Character wird als „Graue Zone" benannt.

Im ersten Teil der Studie werden folgenden Rechtsphilosophischen Fragen erörtert:

1. Warum wird das Internationales Privatrecht angewendet?
2. Was für ein Zusammenhang ist zu bemerken zwischen der Neuordnung der Produktionsverhältnisse und der Ausweitung und Veränderung des IPR-s.
3. Im welchen Masse beeinflusst das Gesellscheftssystem der teilnehmenden Staaten den Schwerpunkt der internationalprivatrechtlichen Verbindungen.
4. Gedanken über den Wertinhalt des Völkerrecht, des IPR-s und der Grauen Zone.

Im zweiten Teil sind doktrinäre Fragen der Normenlehre in möglichts nichtdoktrineller Art beantwortet, undzwar die Lage der Subjekten, der Objekten und der Rechtsquellen in der Grauen Zone, wie auch der Erzwingungsmechanismus.

МЕЖДУНАРОДНОЕ ПРАВО – МЕЖДУНАРОДНОЕ ЧАСТНОЕ ПРАВО

(Философия права – доктрина норм)

д-р Болдижар Надь

ассистент

I. Соотношение международного права и международного частного права вообще

1. Вопросы и ответы: почему действует международное частное право.
2. Производительные силы, производственные отношения, суверенитет.
3. Гипотеза о центре тяжести в соотношении международного права и международного частного права.
4. Выбор ценности или неутральность.

II. Нормативный подход к международному праву, к международному частному праву и к общим областям

1. О методе
2. О «Серой зоне»

А) Правосубекты
Б) Правообьекты
В) Источники права
Г) Осушествление