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The Relationships and Connections Between International and National Law[1]

The Scope of the Problem

While considering the connections and relationships between international and national law, it is easy to engage in the discussion of the fundamental questions of our field, because putting the two orders side by side induces one to study their similarities and differences. This, in turn, leads to the examination of such general questions as the nature of international law, its sources, and the role and significance of state sovereignty. In this approach, the relation between international and national law is, in the opinion of some authors, a central theoretical issue of our field. This can be clearly seen in the major conceptions of this relation, namely, dualism and both versions of monism.

The connections between international and national law are diverse and in fact a number of international law problems can be viewed from the angle of national law. Approaching them from this angle, however, would produce a monograph, which would scrutinise various international law institutions and the way they function from within the State. Examples of this may be such issues as entering into treaties in agreement with national law requirements, exhausting the national due course of in-

1 Translated from: K. Skubiszewski, *Wzajemny stosunek i związki pomiędzy prawem międzynarodowym i prawem krajowym*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1986, no. 1, pp. 1–16 by Tomasz Żebrowski and proofread by Stephen Dersley and Ryszard Reisner. The translation and proofreading were financed by the Ministry of Science and Higher Education under 848/2/P-DUN/2018.

stances in the context of diplomatic protection extended by the State to its own citizens, and assuming international responsibility.

When studying the various relationships between international law and the law of a specific State, one must work on the assumption that both kinds of law are positive. This assumption excludes from the subject matter of the present article consideration of the view that takes international law to be a law of nature, or various opinions denying the legal nature to our field. For both the naturalistic and negatory approaches—despite their complete opposition—cause us to lose sight of various questions that call for a resolution each time the relationship between international and national law is studied from the position of legal positivism.

We should focus on the binding force, application and observance of international norms in a national legal order, including conflicts between national and international norms. To ensure a full picture, the opposite question must not be left out, namely the role of national law norms in the international law order. However, the mutual impact of legal orders poses problems chiefly for a national legal order and therefore it is there that the impact is particularly current. For most of the time, national courts (and not international ones) and national administration (and not the international one) face the question of whether the matter they are about to rule on has been regulated in the other legal order (i.e. the international one) and specifically how to resolve a possible conflict between a national norm and an international one. It is true that the law of nations faces similar problems in this area. International organs have had to give their opinion more than once regarding if and to what extent national law is adequate for a specific international-law relation, but these are in fact very rare situations. In other words, there is no — and cannot be any — symmetry in this respect between national and international law. The positioning of the latter in the former is an almost daily problem in the law of every State. The opposite situation—the application and observance of a national norm in the international law order—is a problem

of much smaller proportions. Hence, it is necessary to focus on how international law permeates the legal order of a State and what helps and what hinders its full implementation there.

National law is to be taken to mean the law enacted by the State; in those legal systems where customary law still plays a role, it is to include customary norms recognised by the State and applied by State courts. Other legal orders are not covered by this study. In particular, it does not discuss possible connections and relationships between the law of nations and the law developed by other communities than state ones, especially by religious ones: Jewish, Canon, Islamic and other kinds of law. The increasing penetration of the interests of a human individual by international law makes the correlation between it and the law of a religious group extend beyond purely academic interests. This may be especially true of Canon Law since the Holy See and Vatican State are subjects of international law.

The Impact of One Law on the Other

As shown above, our problem first of all concerns the enforcement of international norms in a national legal order; a parallel problem—the application of national norms in the international legal order—is much less significant. This is not to say that there is no correlation between one law and the other on another plane, even with a certain predominance of national law. This other plane is the flow of the same matter and content between international and national law. A dissertation published in 1840 reads that „one lends to and supplies the other with building materials."[2] A quite surprising thing to say, as at that time the scope of matters regulated by international law was still rather narrow. Yet, the author of the quoted words had already noticed a number of issues regulated by both one and the other law. In his opinion, this mutual exchange is observed

2 H.C. von Gagern, *Critik des Völkerrechts. Mit praktischer Anwendung auf unsre Zeit*, Leipzig 1840, p. 6.

especially in federations and confederations, but it is also found in relation to such problems as conquests, overseas colonies, currency, credit, banking, postal service, railways, passports and outlaws.[3]

When generally discussing specific issues, many authors notice the mutual impact of one law on the other in terms of content and, thus, their interrelationship, with the latter being variously understood.[4] Sometimes national law is seen as having a great impact. Some Soviet authors see the impact of national law on international law in the very fact that the latter is made by States. They also emphasise the role of "progressive systems of law" in the development of international law.[5]

Naturally, the conceptions and ideas that have arisen in various States, or even ready-made solutions adopted in national law, make their way into treaties in large numbers when a treaty becomes an instrument of national law unification or serves to develop, reform and improve national law. When included in treaties, the norms of labour, commercial and transport law, or laws for the protection of the fundamental interests of an individual (human rights), follow models developed in this or that national legal system. However, a treaty is never a mere repetition of the norms in force in a State. It is supposed to contribute to the improvement of the law in a given field, or even writing it anew. In fact, an example is hard to come by of a unifying treaty that would be limited to merely reflecting the law already in force in a State. Such a treaty would rather always take on a law-making role by influencing the way law is shaped in that State. This means that national law is internationalised—its norms are of treaty provenance, being a result of work conducted in the international arena, serving the purpose of developing

3 Ibidem, pp. 11–12, 17.

4 E.g. D.B. Lewin, *Osnoionoje problemy mieżdunarodnogo prawa*, Moskwa 1958, Ch. IV, § 2, stresses the mutual impact of both kinds of law. E.R. Huber, *Deutsche Verfassungsgeschichteseit 1789*, vol. 5: *Weltkrieg, Revolution und Reichserneuerung*, Stuttgart 1978, discussing the Weimar Republic constitution, writes about the interrelationship between the constitution (political system) of the State and the "international order" in which the State remains included.

5 G.I. Tunkin, *Osnovy sovriemiennogo miezhdunarodnogo prava*, Moskwa 1956, Ch. I, § 3.

national law—by bi- or multilateral negotiations, at international conferences or in international organisations.

A State sometimes legislates on matters that are international par excellence, e.g. diplomatic and consular law, the conclusion of treaties, etc. Such legislation will not have much significance for international regulation if a given branch of law is stabilised, especially if it has been internationally codified. Formerly, when multipartite treaty law was far less developed, such national legislation influenced the practice of other States and gradually brought improvements to customary law, for instance, in the field of diplomatic privileges and immunities or maritime law. In the last-mentioned field, also today, the pressure of national solutions on international norms is easily seen. The reason for this is not the absence of international regulation, but rather the strong desire of many States to revise all of international maritime law and the questioning of many of its norms, not excluding its fundamental principles (3rd UN Conference on Maritime Law).

The Enforcement of International Norms in a State: Problem Origins, Difficulties and Obstacles

From the historical perspective, the convention of applying and observing international law in a State is a matter of a relatively recent origin. While many other issues belonging to our field were discussed in detail in the literature of the 16th, 17th and 18th centuries (even earlier examples can be cited), the relation of the law of nations to national law was not exhaustively considered before the beginning of the 20th century.[6]

6 H. Triepel, *Völkerrecht und Landesrecht*, Leipzig 1899. On pp. 3–7, he expresses his views on the fragmentary treatment of the question by the literature published hitherto. In the same year as Triepels book, a dissertation by Wilhelm Kaufmann was published entitled *Die Rechtskraft des internationalen Rechts und das Verhältnis der* Staatsgesetzgebungen *und der Staatsorgane zu demselben*, Stuttgart 1899. Contrary to Triepel's, Kaufmann was not rigorous about differentiating both legal orders.

Historically, international law developed as a legal system that was primarily meant to separate the power of sovereign States and divide the jurisdiction of their contiguous organs.[7] It also regulated agreements, legations and conflicts between States (these are the oldest areas covered by international law). However, other spheres of State activity were regulated much later; on a larger scale this was done only recently. Importantly, the separation of power and jurisdiction, as well as the regulation of agreements and wars between sovereigns, did not for the most part require respective norms to be given expression in the legal order of a State. The application and observance of international law was the business of monarchs and States in exclusively or almost exclusively external relations, and as such did not require any domestic legislative activity. When, however, such a need did exceptionally arise, regulations were enacted to help the situation, such as national laws of old on the treatment accorded to foreign envoys and legations.

The situation began to change in the 19th century when States entered into an ever-greater number of treaties (including multilateral ones), regulating various matters that until then had been left exclusively to national law. It was increasingly often necessary to harmonise national legislation with international rules and make the latter enforceable at home. Admittedly, English case-law and the authoritative juristic literature had already addressed the question of the relationship between international and national law in the 18th century, which attests to the fact that the issue had become pertinent there. On a larger scale, the problem was only tackled later on.

National organs, in particular courts, as a rule did not obstruct the application of customary international law or at least certain of its rules or

7 Nonetheless, already in this context, the problem of the relationship between the two kinds of law appears as it always does when the territorial, personal or temporal scope of the binding force or application of national law is determined. Cf. H. Kelsen, *Les rapports de système entre le droit interne et le droit international public*, "Recueil des Cours" (RC), 1926-IV, vol. 14, pp. 227, 250–252, — "Théorie du droit international public", RC 1953-III, vol. 84, p. 1.

principles whenever the case under consideration called for it. A treaty, however, came up against much greater obstacles. They resulted from the emergence of parliamentary democracy, with legislation being taken over by elected bodies and governments becoming accountable to parliaments. A treaty could not be applied within a country immediately after it came into force, for otherwise the head of state and the government (as entities concluding a treaty) would circumvent parliament by enacting laws by way of treaties. Therefore, the constitutional law of many States (not necessarily of the same political system) demanded that in particular those treaties that were to produce effects in internal affairs of a State (because, for instance, they concerned the rights and duties of its citizens or encumbered the State with a financial burden, etc.) had to obtain the consent of parliament before they were ratified. The next step was the rise of the procedure whereby a treaty norm came into force within a State only after an appropriate legislative measure had been taken.

There were (and are) other reasons why it is difficult for international law to penetrate a national legal order. First, state adjudicating bodies are sometimes seen to be inert or somewhat reluctant to go beyond their own law, unless the law expressly says that another law should be applied. Second, in most States, courts are expected to apply statutes, which is sometimes narrowly and literally understood, making courts ready to leave the care for the enforcement and fulfilment of international law provisions to the government. Third, a national authority is not always sufficiently familiar with the international norms that need to be applied to a given case. Contemporary States suffer from the inflation of native legal norms and many adjudicating bodies have difficulties with assimilating the excessive amount of legislation and navigating their way through the maze of national regulations. Is it thus surprising that courts are unwilling to look for grounds for their judgments in international law? The unwillingness is justified for yet another reason: establishing the meaning of a customary international norm sometimes calls for knowledge that many judges and officials do not have. In turn, treaties

are so numerous today that it is not always easy to figure out what each of them regulates. Finally, the official publication of treaties is usually delayed, sometimes for a very long time. By delaying the publication, governments simply prevent the enforcement of a treaty within their respective countries, with even the best will of courts notwithstanding.

At first glance, it would seem that the application and observance of international law in a State should not pose any difficulties. The is the subject of this law, it has international responsibilities; why then would this law not have binding force in the State and be enforced there on an equal footing with national law? This is a complicated matter. The reasons why international law in its entirety is not universally, automatically and by its own virtue made part of every individual state legal order are diverse and have accumulated with time. It cannot be denied that in many States, including those where transformation is in force, the courts apply certain principles of customary international law without express statutory authority.[8] Some countries have incorporated customary law in its entirety, with the national grounds for such a significant measure being sometimes more formal than real. In other States, however, the position of customary norms is less clear and almost everywhere problems arise with the application of treaties and the resolutions of international organisations. To various degrees, the resolution of such problems calls for the initiation of the national legislative process.

8 Cf. The judgment of an Italian court in Ministry of Defence v. Ergialli, "International Law Reports" 1958–11, vol. 26, p. 732. The judgment relied on the law as it stood prior to the adoption of the Constitution, Article 10. It follows from what J.B. Scott wrote, *The Legal Nature of International Law*, "American Journal of International Law" 1907, vol. 1, pp. 846, 863, he believed that the very fact that customary norms belonged to the law of nations made them an „integral part" of the national law of every State, while the national courts „consciously or unconsciously apply and enforce international law rules."

The Enforcement of International Norms in a State: The Diversity of Methods

A State is under an international obligation to enforce binding inte national-law norms in its domestic law, if the introduction of a given national-law measure is necessary for compliance with such norms. The fulfilment of the State's obligations under international law often requires that public organs in the State apply international norms or—in more general terms—bring about the state of affairs prescribed by these norms. In addition, it is necessary that national law entities comply with these norms. The Hague Permanent Court of International Justice had an opportunity to remind us of „a self-evident principle according to which a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of obligations undertaken."[9] Furthermore, the Court emphasised that a State cannot invoke its law and local difficulties to excuse a breach of international obligations.[10]

Nonetheless, the choice of the means adopted to ensure the enforcement of international law in a State is left, at the moment, to the discretion of each State, as international law does not indicate this or that means, despite the fact that the choice of a method may affect the intended result.

Of course, the situation where every State enjoys discretion in the choice of method may change, but exceptions are still very rare and do not alter the overall picture. A treaty may provide (i.e. States may agree in a treaty) that its norms will have a specific place in the national legal order of the contracting parties. In the event that such a provi-

9 The case of Exchange of Greek and Turkish Populations (1925), "Cour Permanente de Justice Internationale" (CPJI), B, no. 10, p. 20.

10 In the case of the Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory (1932), the Hague Court said that „according to generally accepted principles […] a State cannot adduce as against another State its own Constitution with a view to evadingobligations incumbent upon it under international law or treaties in force", ibidem, A/B, no. 44, p. 24. See also the case of competence of Gdańsk courts (1928), ibidem, B, no. 15, p. 17 and the case of Free Zones of Upper Savoy (1929), ibidem, A, no. 24, p. 29. Earlier this stance was adopted by arbitration court decisions, e.g. in the case of the *Alabama* (1872).

sion is made, each contracting party will incur an international obligation (i.e. obligation as against the other contracting parties) to ensure that the treaty occupies the place in the domestic law that is specified in the treaty. The scholarly literature form Western Europe has recently mentioned two examples. These are the European Convention on Human Rights and the treaties establishing the European Communities. As regards the Convention, in some quarters it is held that some of its provisions create an obligation for the parties to incorporate its text verbatim into national law, or at least Section I of the Convention.[11] When considering the place of the EEC Treaty in the law of Member States, the Court of the Communities spoke of the integration of the legal order created by the Treaty with the legal system of Member States. This integration entails an obligation on the part of national courts to apply and observe the common legal order, with national law being barred from abrogating the law derived from the ECC Treaty.[12]

Many of the obligations incumbent upon a State by virtue of international law can be fulfilled only in its own legal order. A number of international-law norms simply require national law to achieve the result intended by them.[13] Many norms, especially in present-day treaties, regulate relations that arise also—or even primarily—within national borders. If such treaties were not to find expression in national legal orders, their conclusion would prove pointless and unnecessary. In most cases, a private person exercises the rights granted to them by international law only through national law. Strictly speaking, an international norm not so much grants a right to an individual as provides that once national law is activated, the individual will acquire the right. Only when a private person has certain procedural rights in the international

11 H. Golsgong, *Die europäische Konvention zum Schutze der Menschenrechte und Grundfreiheiten*, "Jahrbuch des öffentlichen Rechts" 1961, vol. 10, p. 123, especially pp. 128–129.

12 Case no. 6/64, Flaminio Costa v. E.N.E.L., *Recueil de la Jurisprudence de la Cour*, 1964, vol. 10, pp. 1158–1160.

13 H. Triepel, *Völkerrecht…*, footnote 5, p. 271: "Das Völkerrecht bedarf des staatlichen Rechts, um seine Aufgabe zu erfüllen. Ohne dies ist es in vieler Hinsicht ohnmächtig. Der Landesgesetzgeber erweckt es aus der Ohnmacht."

forum, e.g. they may file petitions or take advantage of their capacity to be a party to proceedings, etc., or when they are able to file claims arising from international law on their own in an extra-national forum, is the incorporation of relevant international-law norms into national law of little significance. In such cases, these are matters of international law, rather than national law. These are, however, still very rare cases. As a rule, a private person benefits from international law through national law. This situation does not always satisfy the person involved, but nonetheless this is the legal reality.

Gradually, at various times and in various States, national law has developed certain channels (some better, some worse) for importing from international sources everything that needs to be fulfilled in the legal order of the State. The methods existing today for achieving this purpose have been devised by the law of this or that State and not by international practice. The choice of method is driven by various factors. Sometimes it is a desire to underscore the role of international law in the life of a given State, and at other times the legal tradition of a country, or the constitutional balance of power among the governing authorities. Additionally, the choice may simply be made on the spur of the moment and a pragmatic approach will have the upper hand. Interestingly enough, the political system is not a decisive factor in the choice of method. A comparative study of the law of various countries shows that the same method is adopted in different political systems and vice versa—different methods are sometimes employed by countries which have similar political and legal systems.

Thus, two major methods can be considered: the reception of an international-law norm or the incorporation of such a norm into the national legal order without reception. It happens, however, that the methods adopted in various countries lack the simplicity of these two major categories. Some methods do fit precisely into one or other of them. As regards others, it cannot always be said whether we are dealing with the binding force or application of international law without reception or

vice versa—reception has already taken place and the nature of a norm has been transformed. Such doubts tend to arise in some cases of incorporating large sets of international-law norms, e.g. customary law in its entirety, into a national legal order.

The incorporation of an international-law norm into the national legal order does not always lead to its enforcement within the State. If an international-law norm is in conflict with a national law norm, it is necessary to resolve the conflict in favour of the former. However, this is not what happens everywhere, in spite of the fact that usually a court will try to avoid conflict by adopting an interpretation reconciling both norms. Another difficulty may stem from an international-law norm itself; a norm may not be suitable (due to its wording) or not be designed (due to such an intention of States) for application in a State until executive provisions are enacted. If the State failed to enact them, it would breach its international obligations and possibly the national law. Such situations arise most often with treaties. If a treaty has a programme character, i.e. it makes it incumbent on the State to undertake appropriate legislative steps, upon its incorporation into the national law, competent state bodies have a national law obligation (not only an international one) to enact the norms enforcing the treaty.[14]

While not adopting the dualistic view that there is an absolute difference between relations and matters regulated by international law and national law, one can hardly deny that international law usually regulates matters that do not figure at all in the national sphere. In other words, these are matters that do not form part of the relations existing between the State and a citizen, between various State organs, or between private persons. Nevertheless, it does happen, and quite often too, that a norm regulating solely interstate relations, or the operations of international organisations, becomes part of a national legal order.

14 W. Wengler, *Völkerrecht*, vol. 1, Berlin 1964, pp. 464–465; P. Reuter, *Principes de droit international public*, RC, 1961–11, vol. 103, pp. 425, 472, distinguishes between *obligations de comportement* and *obligations de résultat*.

For example, the Charter of the Hague Court has been transformed into the law of various countries although very few of its provisions can be observed and applied within a State (e.g. Article 19, granting the justices diplomatic privileges and immunities). A correct distinction is made between treaties that are not intended to be effective in domestic legal orders, because they regulate solely relations between States or the operations of international organisations, and treaties the purpose of which is to „achieve specific results in the internal legal order of the contracting parties."[15] The distinction may be extended to cover norms deriving from other sources of international law.

Political treaties, international organisation charters and other agreements concerning strictly international policy are incorporated into national legal orders, despite this being unnecessary. Most of their norms will not be applied within a State, because they are not meant to affect internal relations. Such an incorporation mostly results from the parliamentary supervision of the government. As a matter of fact, however, this supervision could be exercised without any consequences for national law.

Unity or Separation of the Two Kinds of Law?

The phenomenon discussed above can also be viewed from the perspective suggested in the title of this section. The incorporation of international-law norms into a national legal order, including those which do not regulate internal relations within a State, makes them form a certain whole with national law. Can this already be called a unity? When a national-law norm is formulated as a result of transformation—one identical with an international-law norm in terms of content—the similarity of both orders in terms of content is beyond question.

15 J.A. Winter, *Direct Applicability and Direct Effect: Two Distinct and Different Concepts in Community Lazo*, "Common Market Law Review" 1972, pp. 425, 426.

However, parallel international and national norms also attest (or possibly even primarily attest) to something else. Since only the activation of the state apparatus makes an international norm bring about the intended results in the national sphere, one can hardly speak of the unity of national law and international law in this respect, or of their belonging to an all-encompassing legal system. In particular, the relationship between international law and national law cannot be described using the federation model in which the law of each federation member is in force alongside federal law, and the federal constitution regulates the relations between both kinds of law, including the relations between the federation and its members. With regard to particular national legal systems, international law does not play the role that a federal constitution does with respect to federation members and their law, nor are there any bodies in the international community that could regulate the relationship between the international and national legal orders.[16]

At first glance, the decisions of the Hague Court seem to support arguments that deny the unity of both kinds of law—international and national. Has not the Hague Court reduced state statutes to the rank of „mere facts, manifestations of will and activity of States?"[17] Such a radical approach has not prevented the Hague Court from examining the conformity of the law of a given State with international law, establishing the content of that law (as a preliminary question) independently of the question of its conformity with the law of nations, or even applying national norms to resolve an international dispute.[18] In the event of conflict between national and international norms, the Court did not hesitate to give precedence to the latter. Hence, the Hague Court by no

16 Cf. P. Guggenheim, *Traité de Droit international public. Avec mention de la pratique internationale et suisse*, ti I, (2nd ed.), Genève 1967, pp. 54–55.

17 The case of certain German interests in Polish Upper Silesia (précis), CPJI, A, no. 7, p. 19. The Court explained that it approached the matter „from the perspective of international law" and its own, calling itself an "organ" thereof.

18 K. Marek, *Les rapports entre le droit international et le droit interne à la lumière de la jurisprudence de la Cour permanente de justice internationale*, "Revue Générale de Droit International Public" 1962, vol. 66, p. 260, in particular pp. 268 ff.

means separated both legal orders on the model of the dualist doctrine, but to a large extent approached them as forming a certain whole.[19]

It is practice that best shows how strong the connections between one kind of law and the other are. They are so strong that separating them is not possible, despite the variety of methods for incorporating international law into a state legal order, despite the need to activate national law for this purpose, and despite the frequent differences between the norms of both legal orders and the fact that in certain situations national law is given precedence over international law in some States. Many national-law norms are of international origin; even ones of a constitutional rank. Since the State is, and will remain, the main entity applying international law[20], national law must conform to international law—whereas the executive apparatus of the State should serve international norms as well. The fact that States are subject to international law and their observance of the principle of *pacta sunt servanda* must necessarily reflect upon the problem under consideration. In the event of conflict, logic and the rule of law dictate the primacy of an international norm. Moreover, stable peaceful cooperation between States would hardly be imaginable if national legal orders were not in accord with the international order.[21]

This accord argues in favour of the unity of both kinds of law, or that is at least conducive to it. In the opinion of some jurists, both systems are underpinned by the same „general principles of law; in law, the most fundamental principles are common to all its branches […]. Hence, there is no unbridgeable gap between international law and national law."[22] There are authors who draw attention to another aspect of the problem by indicating that the "generally accepted principles of inter-

19 Ibidem, p. 298.

20 P. De Vissecher, *Les tendances internationales des constitutions modernes*, RC, 1952–1, vol. 80, pp. 511, 527.

21 Cf. H. Mosler, *L'application du droit international par les tribunaux*, RC, 1957–1, vol. 91, p. 619, who on page 634 writes even about the unity of legal orders because of the requirements of the peaceful co-existence of States.

22 D.P. O'Connell, *International Law*, vol. 1 (2nd ed.), London 1970, p. 3.

national law" are also national-law norms.[23] Both approaches, however, bring about a similar result: a rapprochement between both kinds of law in view of their accord and unity. This result would be achieved in a considerable measure if, in particular States, such general concepts as public order or public policy, which are crucial for the operation of every national system of law, were also to entail an obligation to respect international law.

Terminological Issues

When compared to international law, or sometimes even set in opposition to it, national law is not a clear-cut concept. When using this term, we are guilty of some simplification, because there is no such thing as national law in general. It must be considered in relation to a specific State, often to a specific period of its history, especially as defined by its constitutions. A temporal limitation becomes necessary when at a certain moment of its history a given State adopts a new and different way of regulating the relationship between its law and international law. For example, in 1946, a new French constitution accorded absolute precedence to international treaties over statutes; the Netherlands made significant modifications to the position of international-law norms in its legal system by revising its constitution in 1953 and 1956. More examples could be given, with most of them taking place in the years following the Second World War. Thus, strictly speaking, what should be studied is the relationships and connections between the law of nations and a specific national law.

Nonetheless, a certain generalisation is possible. A comparative analysis shows that most issues related to the problem at hand are common to all or almost all state legal systems: these issues appear in na-

23 E.A. Korovin, *Nekotoriye osnovniye voprosy sovremenney teoriy mezhdunarodnogo prava*, "Sovetskoye Gosudarstvo i Pravo" 1954, no. 6, p. 35. Korovin's view was criticised by Tunkin (ibidem, footnote 4).

tional legal orders regardless of the political system and are not a special feature of this or that socio-economic system. There are naturally unique issues which arise only in some States, as for instance the principle adopted in the decisions of English courts in the 18th century and upheld ever since— namely that the law of nations is part of national law, i.e. the law of England. This principle has been adopted by only few legal systems. Nevertheless, the fundamental issues are the same in various States; therefore, they can be discussed through reference to abstract "national law."

The Polish professional literature often uses the term "internal law" instead of "national law." The terminology in this case is to a certain extent conventional, so nothing prevents us from speaking and writing about „internal law" in the sense of the law of a given State. For the sake of full terminological symmetry, however, internal law should be contrasted not so much with international law as "external" law. The concept of "external state law" is a specific conception of the law of nations which boils down to it being denied the status of a separate legal order with respect to particular national legal systems. For this reason, the use of this concept is not recommended. "Internal law", juxtaposed or contrasted with international law, assumes the unity of all law. Since this law is "internal", it may be understood as only a part of a larger legal order, having its other external part. Meanwhile, the unity of all law in force around the world—the foundation of Kelsenian monistic construction—has yet to be proven and cannot be presupposed in advance by terminology. In our field, the term "internal law" is also employed in another sense: the proper law of an international organisation. Thus, for various reasons, it is better to use the term "national law."

While the use of the term "national law" as a general term does not present any difficulty, a number of doubts are raised by the detailed terminology associated with the problem under discussion. Legislators rarely explain the meaning of the expressions they use, but their meaning is vital for positioning international law in the legal order of a given

State. The language of drafters is sometimes imprecise or downright misleading. The same term is used to designate different phenomena and vice versa—different terms are sometimes supposed to mean the same thing, but due to their diversity, they may suggest that there are various methods for incorporating international law into the national order. For instance, it is not uncommon for "transformation" to be given a very broad sense, meaning the general introduction of an international norm into the legal order of a State, rather than the one specific manner of reception that transformation is.

Another example of a term that is not always clear-cut is the "direct" binding force of international law and its force or effectiveness *ex proprio vigore*. It must be remembered that the directness or proper force are in most cases relative, because they depend as a rule on (albeit to various degrees) the tolerance of the national legal system, if not on an express national norm, with exceptions being rare. The latter include the law of war[24], in particular the law protecting war victims. It binds addressees at home regardless of whether and how it has been introduced into the internal legal order of a given State. Let's repeat, however, this or that exception does not alter the overall picture of the problem: international law does not equip itself with direct force within a State and in the relations arising there.

A contrary opinion was expressed by arbitrator Asser in the decision on the Warsaw power station case (1936):

> A regularly concluded treaty is a source of objective law in the contracting States, having binding force in each of these States and in the international forum, and even when the rules of the treaty would contravene State statutes, preceding or subsequent to the date of its conclusion.[25]

24 Cf. H. Mosler, *L'application*, footnote 20, p. 631.

25 France vs. Poland, the arbitration award of 23 March 1936, concerning the amount of compensation, *Reports of International Arbitral Awards*, vol. 3, pp. 1688, 1696.

However, the opinion of Asser may be considered to be at best a postulate; it does not reflect an international norm and the obligation of States following from it, nor does it represent the actual state of law in a number of States. Thus, the so-called direct binding force of international-law norms in a national legal order is characterised by the fact that they are not transformed into national norms or otherwise received into this order but nonetheless are binding within the State. Directness must be understood here as the absence of reception (in particular transformation) and not as the automatic binding force of the law of nations, all by itself, in intrastate relations, because as has already been mentioned, the direct binding force always has some support in national law. The law of nations itself does not suggest such a solution; it leaves the matter to States to decide.

The term "direct binding force" or more precisely "direct effectiveness" has yet another meaning. The point here is not the incorporation of an international-law norm into a national legal order (this has already been done), but whether, owing to its purpose or wording, a norm is enforceable within a State, i.e. organs may apply and addressees obey it without enacting additional executive provisions in that State (the problem of self-executing treaties).

These two meanings of "directness" with respect to the position of an international-law norm within the legal order of a State need to be carefully kept separate and distinguished.

Doubts may also arise in connection with the concept of the effectiveness of an international-law norm in national law. Since a norm is effective, it could be believed that it will always be enforced even when it finds itself in conflict with a national norm. Meanwhile, some authors writing on effectiveness pass over the problem of conflict and limit the meaning of effectiveness to the possibility of applying an international-law norm within a State. If this is what is meant, such authors should give up using the term "effectiveness" and, depending on what is actually meant, write about the binding force, application or observance of an international-law norm within a State. This would be especially

recommended as legal theory has sufficiently defined and distinguished between these three concepts.[26]

The term "enforcement" of an international-law norm within a State means the emergence of a state of affairs postulated by a given international norm.[27] Various measures will bring about such a result. Hence, the term is sometimes synonymous with the application or observance of a norm, while on other occasions it covers more or even all the measures which, in a given case will lead to implementing in a State what an international norm has prescribed.[28]

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26 Cf. Z. Ziembiński, *Teoria prawa*, Warszawa–Poznań 1973, pp. 27–28, 117–120.

27 Ibidem, pp. 119–120.

28 The above article is a fragment of a larger work to be published in the future. It will conclude the research into the System of International Law conducted at the Institute of State and Law, Polish Academy of Sciences. Some views expressed in this article have already been published earlier, see especially the paper *Prawo międzynarodowe w porządku prawnym państwa* delivered at a conference in Warsaw in October 1977, Ossolineum 1980, p. 13.

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SUMMARY

The Relationships and Connections Between International and National Law

The paper is an English translation of *Wzajemny stosunek i związki pomiędzy prawem międzynarodowym i prawem krajowym* by Krzysztof Skubiszewski, published originally in Polish in "Ruch Prawniczy, Ekonomiczny i Socjologiczny" in 1986. The text is published as a part of a jubilee edition of the "Adam Mickiewicz University Law Review. 100th Anniversary of the Department of Public International Law" devoted to the achievements of the representatives of the Poznań studies on international law.

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