RIVISTA DI DIRITTO INTERNAZIONALE
Anno LXXXVI Fasc. 4 - 2003

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# DUALISM REVISITED. INTERNATIONAL LAW AND INTERINDIVIDUAL LAW

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Milano • Giuffrè Editore

# DUALISM REVISITED. INTERNATIONAL LAW AND INTERINDIVIDUAL LAW

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> «... the author [Florio] starts from the fallacious basis of the "strictest dualist doctrine" accepted even in the often absurd form given to it recently by Arangio-Ruiz. The author is mistaken when he believes and continuously states that the dualist doctrine is the dominant one; quite to the contrary, it is today generally abandoned and has one of its few remaining oases only in the Italian school» (Joseph KUNZ, book review, *American Journal of Int. Law*, 1957, p. 849). See also Joseph Kunz's reviews of Arangio-Ruiz's 1950 and 1951 works [note 4 *infra*], *ibid.*, 1953, p. 512 f., and *Österreichische Zeitschrift für öffentliches Recht*, 1955, p. 105 f(*).
>
> «... ce n'est pas la réalité que le juriste doit subordonner au concept mais celui-ci à celle-là» (ROMANO, *L'ordre juridique*, Paris, 1975, p. 39).

## Introduction - *Persistent Relevance of the Topic*

1. According to a widespread view, the «monism/dualism» debate (1) is only a remnant of the pre-second (if not first) World

(*) Joseph Kunz was a good reader of Italian, an admirer of the Italian School of international law and an inflexible castigator of Italian dualist writers, most particularly of the author of the present article, which is sincerely dedicated to his memory. A number of savoury samples of the heartfelt but gentle and somewhat pathetic reprimands imparted by Kunz in his generous vain struggle against the «Italian disease?» (the last quoted question coming from Gaja) can be found in SANTULLI, *Le statut international* etc. [note 1, *infra*], pp. 266-267, footnote 556.

(1) Up to 1927, see Anzilotti's bibliography in *Cours de droit international* (Gi-

War scholarship (2). The *coup de grâce* to the debate would have come especially from post-second World War developments: the intensifi-

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del's translation), Paris, 1929, pp. 49-50. I would stress, or add, TRIEPEL, *Diritto internazionale e diritto interno* (It. transl. by Buzzati), Torino, 1913, and *Droit international et droit interne* (French transl. by Brunet), Paris, 1920; OPPENHEIM, *International Law*, London, 1905; TRIEPEL, *Les rapports entre le droit interne et le droit international*, in *Recueil des cours*, 1923, p. 77 ff.; KELSEN, *Les rapports de système entre le droit interne et le droit international public*, *ibid.*, 1926-IV, p. 231 ff.; WRIGHT, *International Law in its Relation to Constitutional Law*, in *American Journal of Int. Law*, 1923, p. 234 ff.; KUNZ, *La primauté du droit des gens*, in *Revue de droit int. et de législation comparée*, 1925, pp. 556-598; ID., review of ARANGIO-RUIZ, *Gli enti soggetti* etc. [note 4, *infra*], in *American Journal of Int. Law*, 1953, p. 512 ff.; ID., review of *Rapporti contrattuali* etc. and *Gli enti soggetti* etc. [note 4, *infra*], in *Österreichische Zeitschrift für öffentliches Recht*, 1955, p. 105 f.; SCHIFFER, *Die Lehre vom Primat des Völkerrechts in der neueren Literatur*, Leipzig, 1937; ID., *The Legal Community of Mankind*, New York, 1954; VERDROSS, *Règles générales du droit de la paix*, in *Recueil des cours*, 1929-V, p. 275 ff.; KELSEN, *Théorie générale du droit international public, Problèmes choisis*, *ibid.*, 1932-IV, p. 119 ff.; SCELLE, *Règles générales du droit de la paix*, *ibid.*, 1933-IV, p. 331 ff.; KELSEN, *General Theory of Law and State*, Cambridge (Ma.), 1946; PERASSI, *Introduzione alle scienze giuridiche*, Milano, 1953; HOFFMANN, *Organisations internationales et pouvoirs politiques des Etats*, Paris, 1954; KELSEN, *Théorie du droit international public*, in *Recueil des cours*, 1953-III, p. 1 ff.; MORELLI, *Nozioni di diritto internazionale*[7], Padova, 1967; ID., *Stati e individui nelle organizzazioni internazionali*, in *Rivista*, 1957, pp. 3-25; BERNARDINI, *Produzione di norme giuridiche mediante rinvio*, Milano, 1966; SPERDUTI, *Le principe de souveraineté et le problème des rapports entre le droit international et le droit interne*, in *Recueil des Cours*, 1976-V, p. 333 ff.; MANN, *The Consequences of an International Wrong in International and National Law*, in *British Year Book of Int. Law*, 1976-1977, p. 1 ff.; ID., *Foreign Affairs in English Courts*, Oxford, 1986; WILDHABER, *Sovereignty and International Law*, in *The Structure and Process of International Law. Essays in Legal Philosophy, Doctrine and Theory in the Honour of Judge Weng* (MacDonald and Johnson eds.), Dordrecht, 1986, p. 425 ff.; *International Law and Municipal Law, Proceedings of a German-Soviet Colloque on International Law at the Internationales Recht Institut an der Universität Kiel* (Tunkin and Wolfrum eds.), Kiel, 1987; BERNARDINI (A.), *Norme internazionali e diritto interno, formazione e adattamento*, Pescara, 1989; ID., *La sovranità popolare violata nei processi normativi internazionali ed europei*[2], Napoli, 2001; PALMISANO, *Colpa dell'organo e colpa dello Stato nella responsabilità internazionale, Spunti critici di teoria e prassi*, in *Comunicazioni e studi*, vols. XIX-XX, 1992, pp. 623-755; GAJA, *Positivism and Dualism in Dionisio Anzilotti*, in *European Journal of Int. Law*, 1992, p. 123 ff.; SHAHABUDDEEN, *Municipal Law Reasoning in International Law*, in *Fifty Years of the ICJ. Essays in Honour of Sir Robert Jennings* (Lowe and Fitzmaurice eds.), Cambridge, 1996, pp. 90-103; *L'intégration du droit international et communautaire dans l'ordre juridique national. Étude de la pratique en Europe* (Eisemann ed.), The Hague, 1996; STEINBERGER, *Sovereignty*, in *Encyclopedia of Public International Law*, vol. IV, Amsterdam, 2000, pp. 500-521; MANZINI, *The Priority of Pre-existing Treaties of EC Member States within the Framework of International Law*, in *European Journal of Int. Law*, 2001, p. 781 ff.; VAGTS, *The US and Its Treaties: Observance and Breach?*, in *American Journal of Int. Law*, 2001, p. 313 ff.; LEBEN, *Hans Kelsen, Écrits français de droit international*, Paris, 2001; SANTULLI, *Le statut international de l'ordre juridique étatique. Etude du traitement du droit interne par le droit international*, Paris, 2001; PICCHIO FORLATI, *Il diritto dell'UE fra dimensione internazionale e transnazionalità*, in *Jus*, 1999, pp. 461-473; FLORIDIA, *Diritto in-*

cation of international relations, the expansion of the *ratione personarum, loci* and *materiae* scope of international law, the proliferation of international and « supranational » institutions, and the consequent increase in the number of international norms placing upon States obligations extending to all the fields of human endeavour, including areas once considered of null or scarce international concern. Factors such as these would have marked, at one and the same time, a more or less decisive prevalence of monism and the obsolescence of the debate. In particular, the fact that monism would have been gaining ground over dualism would be demonstrated, according to a considerable part of the doctrine, by constitutional developments in a number of States — also in connection, in some instances, with the participation in « supra-national » institutions — that render international law « directly applicable » by national administrative and judicial organs (3). The idea of the prevalence of monism is clearly put forward in the passage by Joseph Kunz quoted below the table of contents.

I disagree on both counts (4).

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*terno e diritto internazionale: profili storico-comparatistici*, in *Riv. di dir. pubblico comunitario ed europeo*, 2003, p. 1340 ff.

(2) An example is the statement that « The predominant view of modern Spanish commentators is that despite the traditional importance given to monism and dualism, the doctrinal polemic between those theories is overcome today »: AURRECOECHEA, *Some Problems Concerning the Constitutional Basis for Spain's Accession to the European Community*, in *Int. and Comparative Law Quarterly*, 1987, p. 14 ff., at p. 24, citing writings by Espada, Serrano Alberca, Herrero de Minón, Sánchez and Rodriguez Zapata.

(3) An example, again, in AURRECOECHEA [*supra* note 2], p. 23 ff., esp. pp. 23 and 24.

(4) My views go back to the following works to some of which I must regretfully refer in the following pages: *Rapporti contrattuali fra Stati e organizzazione internazionale, per una teoria dualista delle organizzazioni internazionali*, in *Archivio giur. Filippo Serafini*, vol. CXXXIX, 1950, pp. 7-158; *Gli enti soggetti dell'ordinamento internazionale*, Milano, 1951; *La persona giuridica come soggetto strumentale*, Milano, 1952; *Sulla dinamica della base sociale nel diritto internazionale*, in *Annali della Facoltà giuridica dell'Università degli studi di Camerino*, 1954, pp. 1-76; *The Problem of Organization in Integrated and Non Integrated Societies*, this *Rivista*, 1961, pp. 585-603; *The Normative Role of the General Assembly of the UN and the Declaration of Principles of Friendly Relations*, with an Appendix *On the Concept of International Law and the Theory of International Organization*, in *Recueil des cours*, 1972, III, p. 629 ff.; *L'Etat dans le sens du droit des gens et la notion du droit international*, in *Österreichische Zeitschrift für öffentliches Recht*, 1975, pp. 3-63 and 265-406; *The Friendly Relations Declaration and the System of the Sources of International Law*, with the same Appendix, The Hague, 1979, p. 199 ff.; *Le domaine réservé, l'organisation internationale et le rapport entre droit international et droit interne, Cours général de droit international public*, in *Recueil des cours*, 1990-VI, p. 9 ff.; *The Plea of Domestic Jurisdiction before the ICJ: Substance or Procedure?*, in *Fifty Years of the International Court of Justice. Essays in Honour of Sir Robert Jennings* (Lowe and Fitzmaurice eds.), Cambridge, 1996, pp. 440-464; *The Federal Analogy*, in *Euro-*

2. To begin with the alleged obsolescence of the topic, it should be obvious to any observer that international and municipal law interact — as (at least) *distinguishable* legal systems — whenever a relationship between international persons is also affected by national legal rules; or, *viceversa*, whenever a relationship between physical or legal persons of national law is also affected by rules of international law. Much as one may assume, at first sight, that the various rules involved operate all together, piling up haphazardly one on top of the other, the problem will arise sooner or later as to which rules — national or international — prevail, under what conditions and with what consequences (5). Similar considerations apply

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*pean Journal of Int. Law*, 1997, pp. 1-28; *Fine prematura del ruolo preminente di studiosi italiani nel progetto di codificazione della responsabilità degli Stati*, in this *Rivista*, 1998, pp. 110-129.

*Adde*: review of Guggenheim's *Traité de droit international*, vol. I, in *Rivista*, 1953, pp. 294-297; and review, together with Daví, of Verdross-Simma's *Völkerrecht* in *Österreichische Zeitschrift für Aussenpolitik*, 1979, pp. 187-192, and Verdross' *réplique*: *Eine neue Völkerrechtstheorie*, in the same periodical, 1979, pp. 263-269.

Reviews of the above-listed works are indicated in note 61/a of the cited *Appendix*.

A work under a title partly identical to the title of the present writing (*Diritto internazionale e diritto interindividuale*) was mentioned, as a contribution to *Studi in onore di Tomaso Perassi*, in the above-cited *Dinamica*, pp. 7, 31, and 34. Although I took up the subject casually (albeit frequently) in the above-mentioned writings, I never wrote the cited work. In addition to fulfilling the promise I then made to myself, the present article is intended to deal with the topic more organically and particularly to revisit that fundamental cause of the separation of international and domestic law which is the factuality of the State in the sense of international law. Although that concept is in my view essentially as valid to-day as I saw it in the above-mentioned *Gli enti*, I believe it requires a review in the light of the developments of international law in the areas of self-determination, democratic régime and, more generally, of what a number of scholars view as international «State-making» and «government-making» norms (paras. 15-22, *infra*).

(5) The assertion that international law and municipal law are part of one and the same legal system finds its origin, presumably, in the consideration that whenever an interaction occurs in practice between international and domestic norms, it manifests itself, at the international or the national level, always in terms of a simultaneous impact of international and domestic norms — or, more specifically, in terms of simultaneous impact, upon the parties in the given situation or relationship, of international and national legal rights or obligations. The *prima facie* impression is thus one of coexistence of the two sets of norms (or the two sets of legal rights or obligations) within one and the same normative context. That the coexistence of the two sets of norms implies not that they belong to one and the same system inevitably appears, nevertheless, as soon as one is confronted: (i) with any issues of existence or validity of any of the domestic or international rules under consideration; (ii) with a case of conflict between the domestic and international norms involved. The issue then arises as to which norm or set of norms is valid or existing and eventually which norm or set of norms should prevail for the (judicial or administrative) settlement of the matter at the international or domestic level, according to the case. Such an issue, in its turn, splits into two interrelated questions: (i) the question whether the exi-

to the far less studied interaction between the internal law of international or «supranational» bodies, on the one hand, and international law or any national legal system or systems, on the other hand (paras. 34 f., *infra*). That rather elusive problem becomes particularly complex in the — not infrequent — situations where an international organ carries out, in the territory of one or more States, what I call «vicarious State activity» (*ibid.*).

It follows that the problem of the relationship of international law to municipal law is at present more urgent and acute due to the above-mentioned developments — including notably the proliferation of international organizations and isolated organs — than it was in the past. It simply arises more frequently and in a far greater variety of contexts and modes. It is so not just before national courts and international tribunals but also before national or international administrative and political organs.

It should not be overlooked either that the monism/dualism debate is very much alive under different scholarly livery. As any one can see, the current writings on international law appear to be unevenly divided — setting aside theories I have difficulty to grasp — between two tendencies represented, on the one hand, by what I would call the interindividual or «constitutional» theories of international law, and, on the other hand, the theories of international law as an inter-State system. Of course, a number of variations are discernible within the framework of each group of theories, almost all characterized by a high degree of ambiguity. On the whole, though,

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stence or validity of any relevant norm(s) should be considered as a matter of international or domestic law: whether in other words, one should look, before applying any of the ... concurring norms, at the rules on the sources (Hart's secondary rules) of international or domestic law — surely not at both sets of rules as if they belonged to one and the same system; (ii) the question whether the national or the international norms prevail, namely whether the primacy, on the international or the domestic plane according to the case, belongs to domestic or international law.

If, as assumed, the situation or relationship is one for the regulation of which international and domestic law interact, namely, are both directly or indirectly relevant, the legal answer or solution — by an international or a national operator, according to the case — will be the result of a concurrence of international and national norms. It would be superficial, however, to infer, from such a concrete «piling-up» of international and national norms (or international and national rights/obligations) in regulating the matter, that the concurrent rules must belong to one and the same system. In addition to belonging to different legal systems and stemming from different sources, the concurrent international and domestic norms also perform different functions in the regulation of the matter; and they are frequently subject, as the dualist doctrine shows better than monist writers, to different procedural treatment: one to be treated, for example, as a *quaestio iuris* and the other as a *quaestio facti* (para. 9 with notes 39-40, *infra*).

these two conceptions set forth, in a somewhat broader, less narrowly normative or technical — albeit also less rigorous — perspective, the allegedly obsolete contrast between monism and dualism.

One must add that a proper definition of the relationship between international law and national law is essential, as will be shown, for the proper appreciation of the very nature of international law and organization. The revival of the debate, rightly undertaken first by the Eisemann project and now by Professor Nollkaemper at the Amsterdam University Institute, is also welcome, in my view, in order to help do justice to the scholarly merits — at times ignored or contested — of the authors who first took up the difficult matter and treated it with unsurpassed scientific ingenuity (6).

3. With regard to the merits, the doctrinal positions are difficult to define and classify mainly because it is generally not clear whether those who deal with the matter refer to the relationship between international law and national law — not to mention other coexisting legal systems — from a *juridical* or a *factual* viewpoint. *Grosso modo*, while a fair number of scholars seems to adhere, expressly or implicitly, to a more or less radical monist approach (not infrequently tainted by a natural law approach to law in general), others seem to take an obscure middle course between monism and dualism. According to some of the latter, the prevalence

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(6) As rightly stressed by two particularly pugnatious critics of dualism like Paul Guggenheim and Krystyna Marek: « Sous ce premier aspect, le problème naît du besoin qu'a l'homme de rationaliser et de systématiser les phénomènes, de les ramener à une forme logique et cohérente sans laquelle ceux-ci se laissent difficilement concevoir dans toute leur étendue » (GUGGENHEIM, *Beiträge zur Lehre von Staatensukzession*, p. 3, translated from German and quoted by MAREK, *Les rapports entre le droit international et le droit interne à la lumière de la jurisprudence de la Cour Permanente de Justice Internationale*, in *Revue générale de droit int. public*, 1962, p. 265).

One shares that view: with the addition, though, that it is not just a matter of rationalization. As shown in the preceding note, it is firstly a practical problem for the judge or any other law operator.

It is impossible, on the other hand, to agree with what follows immediately in the same passage:

> « Dans ce sens, la conception moniste avec primauté du droit international répond seule à ce besoin, correspond à une nécessité intellectuelle [*sic*!] et, en supprimant au maximum les contradictions et les difficultés [*sic*!], fournit des solutions logiques [*sic*!], cohérentes et acceptables [*sic*!]. Ce droit objectif supranational [*sic*!] rend possible, sans aucun doute [*sic*!] la coexistence des ordres juridiques étatiques individuels. Même si ce droit objectif supranational [*sic*!] n'avait d'autre contenu que celui qui permet à la pensée juridique [*sic*!] d'envisager la coexistence des ordres juridiques étatiques individuels, il répondrait tout de même à une nécessité intellectuelle [*sic*!] ».

of monism or dualism would depend upon the covered areas or subject-matters. Rather widespread is the facile view — presented at times like a discovery! — that international law and municipal law are « complementary »: a term meaning entirely different things according to whether one refers to a factual-historical or a juridical complementarity (7). Both Triepel and Anzilotti envisaged intense interrelationship and even compenetration in a clearly factual sense. As regards the contemporary adherents to the theory of complementarity, they are obviously dualists or monists according to whether they take complementarity in a factual or in a juridical sense.

Be it as it may of the monist and of the middle course positions, the firm dualism formerly distinguishing the German and Italian schools seems to be in some disarray due to various causes, the main ones of which will hopefully be clarified in the following discourse. Nevertheless, the dualist construction has been, in my view, ever since its century-old formulation, the closest to the reality of international, « supranational » and transnational legal relations and the most convincing to any unprejudiced commentator. The developments in international relations following the first and the second World War, far from disproving the separation between international and national law, continue to contradict any theories postulating the unity of world legal phenomena. This applies with equal force, as I propose to show, to the area of international and « supranational » organization.

The undeserved favour enjoyed by the monist theory derives, in my opinion, from a number of not really decisive, *prima facie* impressive but disposable arguments. Only the most trite of these is the confusion between the relative, undisputable and undisputed, primacy of international law at the international, *scilicet* inter-State, level — a point that could only be questioned together with the very existence of international law as a normative system (or even a *bric-à-brac*) (*infra*, paras. 30 ff. and 39) — on the one hand, with a direct primacy of international law over national law in the latter's domestic sphere, on the other hand (8). None of the above-mentioned de-

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(7) Paras. 6 (*c*) and 8 (*b*), *infra*. See, for example, FERRARI BRAVO, *International Law and Municipal Law, the Complementarity of Legal Systems*, in *The Structure and Process of International Law* [note 1, *supra*], p. 715 ff. No dualist, including, I assume, the cited author, has ever doubted that coexisting legal systems may well (and frequently do) operate in (factual) complementarity, in the sense that they concur in governing a social relationship [note 5, *supra*]. This obviously applies, by virtue of (domestic) conflict of laws rules, also between two or more national legal systems.

(8) The sense in which I understand the expression « *direct* primacy » is explained *infra*, paras. 6, 11, 23 ff., esp. 26-29.

velopments in world society — from international organizations to the access of individuals to international bodies as employees, as claimants or as defendants — proves the direct primacy of international law in the national sphere.

But by far the most important factor of the favour enjoyed by monism is probably a scarce understanding of the meaning and arguments of dualism on the part of the latter's opponents. Such lack of understanding was due, in its turn, not so much to a lack of goodwill on the part of monists (although striking examples of superficiality must be registered) (9), as to some important shortcomings of the dualist theory (para. 12, *infra*), defects that have remained long unnoticed and uncorrected mainly because most members of the dualist school started turning their back to the theory before at least attempting to verify and develop it in the light of the evolving — although hardly revolutionary — realities of international relations and law. As regards the intermediate, compromise doctrines between dualism and monism, they frequently derive from misinterpretations of one or the other alternative, or both. These doctrines fall as soon as the main alternative is clearly resolved one way or the other.

4. The present writing attempts to review the essential points of the opposing doctrines, to clarify dualist tenets inadequately understood and more particularly to provide a remedy for two important shortcomings of the original formulation of the dualist doctrine.

Unless otherwise indicated, the following discussion will be confined to the more popular acception of monism, which is the primacy of international law over national law. I leave out, in principle, that alternative of Kelsen's monist theory, which envisages the primacy of national law.

As for dualism, it is perhaps not useless to point out that I use that term, like everybody, just as the simplified version of the pluralism existing between international law, on the one hand, and each one of the several (190 odd) domestic legal systems, on the other hand (not to mention other species of interindividual legal orders). It will be shown that the number of legal systems to be reckoned with is multiplied by the presence, at the side of national systems, of the internal legal systems of international and «supranational» bodies.

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(9) An example is Marek's position as discussed in para. 9 and note 39, *infra*.

As in the previous pages, the terms national, domestic and internal will be used indifferently to indicate the legal systems of national (interindividual) communities. The term internal is also appropriate, though, for the interindividual legal orders of international bodies as distinguished from those organs' (inter-State) constituent instruments.

## Part I - *The Untenability of the Monist Theory and Basic Soundness of Dualism. Important, Albeit not Decisive, Shortcomings of the Original Dualist Doctrine*

5. For any orthodox monist (rejecting the less palatable acception of monism, which is the *absolute* primacy of national law) the primacy of international law is a consequence of both Kelsen's postulate that national and international law could not coexist as independent normative systems ([10]) and the notion of national systems as «derivative» from international law. The basis of that «derivation» would be the principle of effectiveness. As Kelsen puts it:

> «It is according to this principle that international law empowers the "Fathers of the Constitution" to function as the first legislators of a State. The historically first constitution is valid because the coercive order erected on its basis is efficacious as a whole. Thus, the international legal order, by means of the principle of effectiveness, determines not only the sphere of validity, but also the *reason of validity* of the national legal orders ... the basic norm of the international legal order [being thus] the ultimate *reason of validity* of the national orders, too.» ([11])

It could not be clearer that the relationship between international law and internal law, with the primacy of the former, is envisaged in this passage (as confirmed by the context of Kelsen's relevant chapters) as qualitatively similar, despite the momentous differences implicit in Kelsen's own view that international law is a «pri-

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([10]) *General Theory* [note 1, *supra*], p. 373. As explained by Kelsen: «The relationship of international and national law must correspond to one of these two types. International law can be superior to national law or *vice-versa*; or international law can be coordinated to national law. Coordination presupposes a third order superior to both» (*ibid.*).

([11]) *General Theory* [note 1, *supra*], pp. 367-368, emphasis added.

mitive» law, to the relationship between the legal order of a federal State and the legal orders of the federate States (12). A similarly qualitative analogy is obviously envisaged with the relationship of the legal order of a State to provincial, departmental and municipal legal orders as well as the legal orders of any other subdivision of a national community, including the legal orders of legal persons (13). In other words, international law appears to be, in the most generally accepted form of monism (as well as in George Scelle's sociological conceptualization of that form), as the superior layer of a decentralized world legal order, national legal orders appearing as the several articulations of that order. Hence, a number of consequences ranging from the interindividual nature of the whole world system to the concept of States as organs of the world community, as well as the concept of international organizations as part of an ongoing process of «centralization» — or reduction of the «decentralization» — of the world order.

As a matter of pure speculation, the monistic theory marks a number of points, the main one surely being the physical unity of humankind. Another argument supporting monism is the interindividual nature of law *par excellence*, namely of domestic legal systems. A third obvious *datum* is the indispensable role played by human beings, through individual or collective actions or omissions, in the creation and implementation of any rule of international law. Another strong point of the monistic theory — in my view the most formidable, particularly in the Kelsenian version — is the theory's perfect congruity with Hans Kelsen's concept of the State as the legal order of a human society: a concept I have shared ever since I started studying the matter (14).

Theoretically substantial as they are, such merits do not pass the test of realities.

(*a*) Although the natural unity of humankind may well justify the prediction that there will be, at some time, a legal community of mankind that would mark an integration of international law

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(12) *General Theory* [note 1, *supra*], p. 316 ff.

(13) The main admitted differences are the various manifestations of the higher degree of decentralization of international law in comparison with the legal order of a federal or unitary State.

(14) Indeed, Kelsen's general theory of law and State offers, in so far as national law is concerned, the most convincing definition of the State, namely, as the legal structure of a human society. I deem this to be the theoretical strong point of the monist doctrine. It will be shown, though (para. 15 ff.), that it has no basis in positive international law.

and national law within a more or less decentralized political and legal order, the present fragmentation of the universal society into a number of separate, relatively exclusive, political communities, indicates that that prodigy is unlikely to come about soon. However important the few instances of integration at the regional level — hardly complete, anyway — do not significantly alter the situation, even at the regional level itself. Whatever the extent (in my view rather small) to which constitutional lawyers may be correct in forecasting the demise of the State in national societies, the study of international relations shows that State sovereignty, however labelled, remains by far the dominant factor in those relations and in international law [15].

(*b*) The unquestionable interindividual nature of species of law other than international law — particularly of national law — is not a valid argument either. For that argument to be valid, one should first demonstrate that international law is either the very same kind of law, or a kind of law much more similar to the law of national societies than it is generally — and rightly — deemed to be. On the contrary, I propose to show that this is far from being the case. The persistently inorganic structure of general international law, particularly the prevalent inorganic nature of the law-making, law-determining and law-enforcing processes of inter-State society, seems to show just the opposite (para. 30 f., *infra*). Indeed, much as one may be ready to accept that the rules operating among States and other independent entities are, despite their shortcomings, *legal* rules in a broad sense, they are not such in the *same* sense as the rules operating in national societies (*ibid.* and para. 39, *infra*).

This might also justify at least some doubt — or a lack of certainty — with regard to the interindividual nature of international law. The very uncertainty of such a feature might actually well explain, as will be shown further on, the peculiarities of international law. I refer particularly to the lack of an institutionalized sanctioning system, quite inappropriately identified by many in the UN collective security mechanism. The least that could be said about the alleged interindividual character of international law is that it should remain an open issue until some decisive evidence were provided to the effect that the position of individuals under general international law (and treaty law itself) is not so strikingly different as it appears to be from the position of individuals within the law of a national

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[15] Paras. 20 and 34 (*b*), *infra*.

community. No such evidence seems to have emerged so far; and contrary evidence will be discussed further on.

(*c*) The same should be said about the indispensable reliance upon individuals for States to participate in the creation and implementation of international rules. The fact that international persons — namely States and other independent collective entities — can only «will» and «act» through facts or acts of human beings undoubtedly represents, *prima facie*, a point of analogy between international persons, on the one hand, and the legal persons of national law, on the other hand. It is thus that monists claim that, just as the individuals willing and acting on behalf of legal persons of domestic law [16] are determined by the internal legal system of each legal person, the individuals willing or acting for a State as an international person are determined by the domestic law of that State. Firstly, however, this is untrue. There is clear evidence, in the law of treaties and the law of international responsibility, that national law is neither the last nor (except *prima facie*) the first element in the attribution of actions, omissions or volitions to a State as an international person (para. 31 (*b*), *infra*). Secondly, the legal persons' internal orders are unquestionably — one could say by definition — integral parts of the incorporating domestic system. By contrast, the question whether domestic law would play the same role as regards the national law of the State as an international person — namely, that that law is in any sense part of international law — depends precisely on the issue of the relationship between international and national law. Unless one begs that issue, the weight of the argument can only be measured on the strength of distinct, independent evidence: and it will be shown that the distinct, independent evidence is rather to the effect that the internal legal systems of States, as international persons, are in no sense or measure, *vis-à-vis* international law, in the position of the internal orders of legal persons *vis-à-vis* their incorporating national order.

(*d*) Coming finally to the point mentioned earlier in the present paragraph as the most formidable among the arguments put forward by the monist theory — namely, Hans Kelsen's identification of the State with its legal order (a concept I share from the standpoint of national law) — one faces again, at the present stage of this discourse, a vicious circle. I refer to the circular relationship established by Kelsen between the notion that States are legal orders,

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[16] Including of course the State itself as a legal person of domestic law.

on the one hand, and the notion that international law would be bound to be — as inter-State law — the law of the relations among national legal orders: a conclusion that is reached by taking for granted that the State of international law is the same thing as the State of national law. I immodestly believe that I gave that vicious circle at least a good shake fifty-odd years ago ([17]). Yet, I shall revert further on to the matter, which calls at least for some refreshing. I refer to paras. 15-22, *infra*. For the moment, I confine myself to expressing perplexity at the idea that a system of rules addressing themselves so obviously to entities of the tangible corporeity of independent States does not really deal with such «solid space-filling bodies», but rather, as maintained by Kelsen and other monist writers, with their respective legal orders, its only physical addressees being the individuals attained by international norms through the medium of those orders ([18]).

6. To the above-noted shortcomings of monism one must add a number of ambiguities and oxymorons surrounding the very notions of monism and dualism that confuse the issue.

(*a*) One of the main ambiguities relates to such terms as «primacy»: of international law or national law, according to the case.

The dualist theory does not question the primacy of international law at the international level, namely, in inter-State relations and before international tribunals and other international bodies. Dualists contest precisely — despite not rare inconsistencies ([19]) — that international law is endowed *per se* with primacy over national law *at the national level*, namely before political, legislative, administrative or judicial organs of national law. The dualist view, in other words, is that the *key* to the implementation of international law within national law is national law itself, as impersonated by the constituent, the legislator, or the courts, in the exercise of powers they respectively derive from national law and (except for natural law, morality or ethics) from that law only. For the dualist, the

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([17]) Kunz's opinion on that point is indicated in para. 38 and note 140 thereunder.

([18]) Kelsen's quoted words are from *General Theory* [note 1, *supra*], p. 364. The difficulties of this idea seem to have been perceived in principle by Fitzmaurice in his 1957 Hague lectures (pp. 74-80). Regretfully, he did not feel it necessary to obviate them by reviewing the concept of the State in the sense of international law (para. 27 (*c*), *infra*).

([19]) An example is in PAU, *Il diritto interno nell'ordinamento internazionale*, in *Comunicazioni e studi*, vols. XVII-XVIII, 1985, p. 23 ff. at p. 26.

*key* remains in the hands of national law even where it has already been turned in such a manner as to fully open the door to international law. It is so even where the opening has taken place in compliance with an international obligation to that effect (20).

Of course, the lack of direct effect, and in *that sense* of primacy, of international law at the *domestic* level finds an essential *correctif* in the general international law principle that «a State may not invoke provisions of its constitution or its laws as an excuse for failure to perform» the conduct required by its international obligations (21). It is not useless to remind, though, that despite the precedent of the cited provision of the 1949 draft Declaration of the Rights and Duties of States, no similar language can be found in the 1970 Friendly Relations Declaration's «principle that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter». The proposal that a specific provision to the above-mentioned effect be included in that text was not met with consensus in the Friendly Relations Committee; and the General Assembly did not find it necessary to fill in the gap caused by the USSR's and other States' opposition.

(*b*) Another striking ambiguity — a real oxymoron — is the recent widening trend of labelling national legal systems as «monistic» or «dualistic» according to whether they adopt more or less

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(20) A remarkable attempt has been made by BARILE, *Diritto internazionale e diritto interno. Rapporti fra sistemi omogenei ed eterogenei di norme giuridiche*, Milano, 1957, to demonstrate that the relationship between international law and national law is a monistic one in the area of unwritten customary law (conceived by him as «spontaneous» law), dualism prevailing instead between international and national «voluntary» law, namely, *grosso modo* (if I understand correctly), treaty law and domestic legislation in a broad sense. I am not convinced, particularly because of the key role played in that distinction by the notion of «spontaneous» law: a notion that is presumably close to the reality of the customary, unwritten law of national (interindividual) societies (ARANGIO-RUIZ, *Consuetudine*, in *Enciclopedia giuridica*, vol. VIII, Roma, 1988, paras. 4.1-4.2.2 ff.), but far less close to the reality of international (=inter-State) relations. I am unable to see much spontaneity (if any) in the formation of international customary law. I am equally perplexed by the similar distinction (proposed, *inter alios*, by Ago) between «diritto della coscienza» and «diritto della volontà». On the whole, the cited work, which is based upon the alleged homogeneity of unwritten international law and the court-applied or court-determined law of common law systems, takes inadequate account, in my view, of two crucial points. One is the nature of the State in the sense of international law and that entity's decisive, absolutely predominant rôle in the making and implementation of international law. The other point is that whenever the courts of any country (including common law countries) take international norms into account, they still act as organs of national, not international law.

(21) Article 13 of the draft Declaration on Rights and Duties of States of 1949; and Article 32 of the ILC Articles on State Responsibility.

thorough and automatic mechanisms for the adaptation of national law to international law: as if such an adaptation were not the result of a choice made, clearly on a dualistic premise, by each domestic system (see also para. 11, *infra*). An ambiguity within the same ambiguity is the notion that monism prevails wherever national courts apply international law also in the absence of express constitutional or legislative adaptation mechanisms: as if the courts of a State were organs established by international law instead of just instruments of the domestic order within which they operate.

Other examples can be found. One is the apparent inability of monists to explain satisfactorily either the obvious fact that no rule of general international law binds States to adapt their legal systems to international norms, or the equally obvious fact that there are no rules of international law under which national rules conflicting with international law are directly set aside (22). Another thing, of course, is the so-called «direct effect» of international norms, as more or less infrequently agreed upon by States at the international level (23). In any such case, the direct effect derives from the domestic law of the States involved, not from the affected international norms themselves.

(*c*) There are also examples of confusion over essential, elementary tenets of dualism/pluralism and monism. An egregious instance is Kelsen's odd, arbitrary deduction from one of Heinrich Triepel's *dicta*. I refer to the following piece, triumphantly quoted by Krystyna Marek (24):

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(22) Kelsen's admission in *Reine Rechtslehre*, Wien, 1960, p. 330 f. See also *General Theory* [note 1, *supra*], p. 371 f.

(23) Numerous examples of that phenomenon are evoked by CARREAU and JUILLIARD, *Droit international économique*, Paris, 2003 (paras. 123-124, 159, 532, 856 etc.). It is, in my opinion, just a matter of internationally binding adaptation of domestic law: something similar to the binding adaptation of national legal systems to international conventions carrying uniform substantive or conflict-of-laws rules. As well as in the case of *EC Law*, the direct «application» of international norms within the national sphere remains an effect of national, express or implied, norms. This view is not contradicted by the learned studies of VERHOEVEN, *La notion d'«applicabilité directe» du droit international*, in *Revue belge de droit int.*, 1980-1982, p. 243 ff.; BOSSUYT, *The Direct Applicability of International Instruments on Human Rights*, *ibid.*, p. 317 ff.; GANSHOF VAN DER MEERSCH, *La règle d'application directe, Conclusions à la réunion d'étude à l'Universitaire Instelling Antwerpen le 7 novembre 1980*, *ibid.*, p. 346 ff.; and VELU, *Les effets directs des instruments internationaux en matière de droits de l'homme*, *ibid.*, p. 293 ff.

(24) *Les rapports* [note 6, *supra*], at p. 264.

« Le droit international a *besoin* du droit interne pour remplir sa tâche. Sans lui, il est, sous de nombreux rapports, impuissant. Le législateur interne l'éveille de l'impuissance. Réseau flottant *au-dessus* des Etats, il veut être fixé *aux* Etats par des étais puissants. Il est semblable à un maréchal, qui ne donne ses ordres qu'aux chefs de troupes et ne peut atteindre son but que s'il est sûr que les généraux, se conformant à ses instructions, donneront de nouveaux ordres. Si les généraux lui font faux bond, il perd la bataille. Et de même qu'un ordre du maréchal provoque des douzaines d'ordres ultérieurs de la part des subordonnés, de même nous verrons qu'une seule règle du droit international produit parfois une végétation, aux nombreuses ramifications, de normes du droit interne, qui toutes se réduisent à ceci: "réaliser" le droit international dans la vie étatique. » ([25])

Kelsen's commentary (according to Marek) was:

« Mais cela est l'image parfaite de l'unité du droit international et de l'ordre juridique interne: le droit international — qui a besoin des ordres juridiques internes pour s'accomplir — comme ordre universel se trouvant au-dessus des ordres juridiques étatiques particuliers, les délimite et les réunit dans un tout supérieur » ([26]).

In Kelsen's view, of course, Triepel's generals, according to Triepel surely appointed by their State, were indirectly appointed by international law on the basis of the (international allegedly « le-

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([25]) TRIEPEL, *Droit international et droit interne* [note 1, *supra*], pp. 268-269.

([26]) MAREK, *Les rapports* etc. [note 6, *supra*], p. 265, translating from KELSEN, *Das Problem der Souveränität und die Theorie des Völkerrechts*, Tübingen, 1920, p. 150, note.

Kelsen's reading of what he considers to be an admission by Triepel would be justified only if one could assume that Triepel had accepted Kelsen's monistic view. Only on that condition could one understand Triepel's militaristic and botanical simile as a profession of monism. Only thus could Triepel have conceived the « production » of the national implementation rules as a direct effect of the international rule. Failing any profession of monism on the part of Triepel, his lucid similes can only be understood in the sense that the proliferation of domestic rules would be effected, according to Triepel, not by international law but by some lawmaking process or processes of national law activated by the constituent, the legislator or the courts. The interaction between international law and national law clearly remains (according to Triepel) purely factual.

gal») «principle of effectiveness» (paras. 5, *supra*, 17, 21, with note 84, and 22, *infra*).

A similar ambiguity characterizes the above-mentioned theory of the complementarity of international and municipal law. Unless that theory was intended merely as an adhesion to monism, it is just a repetition of Triepel's famous, above-quoted passage. But most impressive of all is the series of ambiguities assembled by what one could call the Guggenheim-Marek duet as it emerges from Krystyna Marek's 1962 frequently cited article in the *Revue générale* [27].

A curious, recent example of confusion about the meaning of monism can be found in a learned commentary to Protocol no. 6 (April 28, 1983) to the European Convention on Human Rights on the abolition of the death penalty. Article 1 of that Protocol presented a difference between the English version, according to which «The death penalty shall be abolished», and the French version, according to which «La peine de mort est abolie»: and one learned commentator remarked that the French version was d'«inspiration moniste» [28].

Another not negligible weakness of the monist theory, in the acception we are considering (of the primacy of international law), is the fact — ironically *invocable* perhaps as evidence of the triumph of monism — that, contrary to the general tendency of monist writers to adhere to the primacy of international law, the administrative

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[27] *Les rapports* [note 6, *supra*] and para. 9 with note 39, *infra*.

[28] It was rightly noted, on the one hand, that the French text seemed to confer to the provision a self-executing character in the countries whose constitutions provide for an immediate effect of the ratification of treaties (SCHABAS, *The Abolition of the Death Penalty in International Law*, Cambridge, 1997, p. 239). A commentator also noted, though, that «[l]a formulation de l'article 1, d'inspiration moniste, est originale. En effet elle ne fait pas obligation aux Etats Parties d'abolir la peine de mort, mais procède d'elle-même à cette abrogation en usant d'une rédaction qui semblerait à première vue plus appropriée pour une loi que pour une convention internationale» (GUILLAUME, *Protocole no. 6*, in *Commentaire à la Convention européenne des droits de l'homme*[2] (Decaux, Imbert and Pettiti eds.), Paris, 1999, p. 1068).

It seems clear that no monism was involved. Whatever the possible special intention of the drafters of one of the versions in self-executing terms — a distinction hardly conceivable within an instrument whose texts would all be equally authoritative — the last word would be that of each national legal system, regardless of whether one started from the English or the French version. It would all depend on the adaptation system through which the Protocol would be implemented at national level. In any case, the courts and administrative organs concerned could only proceed within the framework of the national law under which they would be called to operate. It is hardly necessary to evoke the egregiously clear examples of the international conventions of uniform law or uniform rules of private international law. See also para. 11 and note 47, *infra*.

and judicial organs of numerous States reveal a marked inclination to operate — due to ignorance, national convenience or arrogance, according to the case — on the basis of an even more questionable and far less «progressive» (if not outright retrograde) doctrine of the primacy of municipal law (29).

Regarding in particular the scholarly attitude towards the dualist theory, an important point is the allegation, not infrequently expressed in monist writings, that dualist theory is based upon — or closely interrelated to — the idea that the law is exclusively the product of the State's will: the so-called «statalismo giuridico». It will be shown further on that this allegation is unjustified (para. 8, *infra*). Anyway, the fact that any specimen of law can well exist independently from the State in any community of human beings, or independently from any number of given States at the inter-State level, does not necessarily mean that the world of law is *one* in the monist sense. A State's subjection to the law of the community over which it rules does not exclude that State's power independently to establish, as a sovereign, independent entity from the standpoint of international law, the extent to which that community is affected by international (*scilicet*: inter-State) legal norms. And the fact that any form or specimen of interindividual law operates among men at a universal or regional level (paras. 5 (*a*), *supra*, and 34 ff., esp. 36-38, *infra*) does not necessarily purport the subjection of States *qua* international persons to any norms other than those of international (*scilicet*: inter-State) law.

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(29) Consideration should also be given, in connection with this matter, to States' policies involving disregard for international obligations. A striking example is the statement made by US President Bush in mid-September 2002 with regard to the possibility that the United Nations might fail to authorize military action against Iraq. After expressing annoyance with congressional Democrats who had asked for time to consider any alternative to the use of force, President Bush was reported as having stated: «I can't imagine an elected member of the United States Senate or House of Representatives saying, "I think I'm going to wait for the United Nations to make a decision"... If I were running for office, I am not sure how I would explain to the American people and say, you know, "vote for me, and oh, by the way, on a matter of national security I think I'm going to wait for somebody else to act"» (*The Herald Tribune*, 14-15 September, 2002, p. 5). Utterances equally or even more severely disregarding the UN, the Charter and international law were frequently registered during the months that preceded the Anglo-American unilateral and illegal attack on Iraq.

One may also recall, among the numerous instances, the discussion caused in the Friendly Relations Committee by the Soviet rejection [para. 6, *supra*] of the proposal that the Friendly Relations Declaration expressly assert the principle that a State may not avail itself of its internal law to evade its international obligations. See, in this regard, *The Normative Role* [note 4, *supra*], pp. 576-577.

7. Unlike the imaginative but unrealistic construction of monist scholarship, the dualist theory appears to be a good portrait of the hard realities of the modern and contemporary condition of mankind as it gradually emerged from medieval relative unity ([30]).

As stated with clarity by Oppenheim and as demonstrated by Triepel and Anzilotti, the domestic law of each national community was, as it still is, distinct and separate — despite the most obvious, continuous interactions — from the internal system of each one of the others and from international law ([31]).

Regarding each national order particularly, on the one hand, and international law, on the other hand, they were shown to be distinct and juridically separate both from the viewpoint of the relations they dealt with — namely, from the viewpoint of their subjects — and from the viewpoint of their positive sources. It followed that international treaty or customary rules were taken into account in municipal law to the extent that they were expressly or implicitly incorporated — either by general written or unwritten constitutional rules or principles, by *ad hoc* legislation or simply by court decisions — into municipal law. On the only weakness of both distinctions, see para. 14.

8. (*a*) It will be noted — since not many students nowadays read Triepel's and Anzilotti's works — that although the *exposé* of their theory precedes, within their monographs, the analysis of the

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([30]) The origin of international law is briefly evoked in paras. 24 and 32, *infra*.

([31]) As everybody knows, the starting point of the dualist approach resides — according to such fundamental works as those of Laband, Oppenheim, Triepel and Anzilotti — in two or three distinctive features of international law and municipal law. To put it in Oppenheim's original language:

> « The Law of Nations and the Municipal Law of the single States are essentially different from each other. They differ, first, as regards their sources. Sources of Municipal Law are custom grown up within the boundaries of the respective State and statutes enacted by the law-giving authority. Sources of International Law are custom grown up within the Family of Nations and law-making treaties concluded by the members of that family. The Law of Nations and Municipal Law differ, secondly, regarding the relations they regulate. Municipal Law regulates relations between the individuals under the sway of the respective State and the relations between this State and the respective individuals. International Law, on the other hand, regulates relations between the member States of the Family of Nations. The Law of Nations and Municipal Law differ, thirdly, with regard to the substance of their law: whereas Municipal Law is a law of a Sovereign over individuals subjected to his sway, the Law of Nations is a law not above, but between Sovereign States, and therefore a weaker law. » (OPPENHEIM, *International Law*, vol. I (*Peace*), London, 1905, pp. 25-26).

legislative and judicial practice of States, it is clear that the theory was the outcome of an inductive process carried out within the framework of a positive law concept of the legal systems they considered. It was not drawn from ideological or philosophical premises, whatever the indirect influence of the latter may have been. Nor is it correct to blame Triepel's and Anzilotti's theory for an alleged subjection to the concept of law as just the product of the State's will (the so-called *statalismo giuridico*). Although both masters undoubtedly concentrated their analyses mainly on State legislation and jurisprudence, they both also took account of customary law, surely not — at the national level — a product of the State's will. Another matter, of course, is international (*i.e.* inter-State) custom. Contrary to monistic allegations, it is thus untrue that the dualist doctrine is based upon or inextricably interrelated with the notion that (national) law is only the product of the State's will. The best piece of evidence is Triepel's (*obiter* but not less significant) statement that « [p]ar droit interne, nous comprenons tout le droit établi à l'intérieur d'une communauté nationale, peu importe que ce soient des lois de l'État ou des règles du droit coutumier, ou des règles découlant de l'autonomie des communes ou d'autres corporations publiques » ([32]).

It is only « [p]our simplifier... » that Triepel bases his demonstration « sur le droit étatique, dans le sens restreint de ce mot, c'est-à-dire sur le droit établi par un Etat » (*ibid.*).

Heinrich Triepel repeatedly explained, in 1899 and 1923, that the dualist theory was not contradicted by the Anglo-Saxon countries' rule according to which « international law is part of the law of the land ». Triepel showed that that doctrine, in addition to presenting a clear natural law inspiration ([33]), brings no argument to the view that international law prevails on its own strength over the municipal law of Britain or the United States. Treaties in both countries are subject to a municipal law sanction ([34]). As for customary inter-

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([32]) *Les rapports* [note 6, *supra*], p. 80, emphasis added. The reference to custom is even more explicit in Oppenheim's passage quoted in note 31, *supra*.

([33]) On the rejection of natural law, viewed as a « material » (as opposed to positive or formal) source of law, see also ANZILOTTI, *Teoria generale della responsabilità dello Stato nel diritto internazionale*, Firenze, 1902, esp. pp. 72-74; and GAJA, *Positivism* [note 1, *supra*], pp. 124-134.

([34]) TRIEPEL, *Les rapports* [note 1, *supra*], pp. 87-91. After facetiously taking note of that « autre adversaire dangereux » (in addition to Kelsenian monism) which was the Anglo-American doctrine and jurisprudence according to which « international law is part of the law of the land » and the automatic adaptation provisions of the German and Austrian constitutions, Triepel stresses: first, that the application of in-

national law, it is implemented within the framework of English or American law insofar it is applied by the courts. It is perfectly understandable that in common law countries, where the administration of justice is more decentralized (namely, by allowing judges relatively broader law-determining roles) the adaptation to international law, operated elsewhere mainly by constitutional or legislative provisions, is left, to a certain extent, in the hands of the courts themselves. Also courts, though, are organs of national law. It follows that, even in the common law countries, the operation of international rules within the national system remains — whether through the constituent, the legislator, the executive or the judges — a municipal law operation carried out by national organs under municipal law rules or principles ([35]).

(*b*) It is further to be stressed that the two Masters' theory was significantly worked out, in the part of their monographs dealing with practice, in such a manner as to show in detail the many ways in which the distinct and separate systems of international and national law are related in a continuous reciprocal interaction. Both authors offered an accurate classification of the various ways in which municipal law is conditioned — although never directly affected — by States' international rights and obligations. Triepel and Anzilotti were so well aware of that interrelationship that they both worked out a refined theory of reciprocal *renvois* from national law to international law and *vice versa*. Their fundamental distinctions, especially between *rinvio recettizio*, or *materiale*, and *rinvio non recettizio*, or *formale*, have been accepted and finely developed by their disciples; especially, in Italy, by Perassi, Morelli, Ago, Bal-

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ternational law depends anyway — in the United Kingdom, in the United States and in Germany — on national « décisions judiciaires » (p. 90) or some « intervention de la puissance étatique » (p. 91); second, that « même s'il en était autrement, [la théorie dualiste] ne serait pas réfutée ni par la constitution américaine ("All treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land") ni par celle de l'Empire allemand (art. 4: "Die allgemein anerkannten Regeln des Völkerrechts gelten als bindende Bestandteile des deutschen Reichsrechts") ou par la constitution autrichienne. Car en tout cas ce serait la constitution de l'État, donc une source du droit interne, d'où finalement provient à l'intérieur de l'État la force obligatoire du traité... » (p. 91).

([35]) One need hardly recall, in addition, the practice of English and American courts to seek guidance from the executive on judicial matters affecting the relations with other States; and the executive's practice to address itself to courts (as *amicus curiae*) on such matters. Despite BARILE's cited work [note 20, *supra*] I am inclined to doubt that the performance of common law countries is more thorough or effective than that of civil law countries in the domestic implementation of international norms. Very interesting, in that respect, is MANN's *Foreign Affairs* etc. [note 1, *supra*].

ladore Pallieri, Quadri and Bernardini. I am using the Italian terminology, which has provided for some time, as it still does, the most refined tools for a proper treatment of the topic.

Both authors clearly distinguished internationally «indifferent» and internationally «relevant» municipal law rules (36). *Pace* the critics from the monist side, Triepel and Anzilotti were thus both very far from considering international law and national law as absolutely disconnected (as superficially alleged, *inter alios*, by Guggenheim and Marek). At the same time, both dualist Masters demonstrated that national legal rules are never *directly* affected by international law, even when they are not in conformity with States' obligations. Contrary to what was (later) arbitrarily asserted by some monist authors, municipal law not in conformity with international law was (as it still is) neither «*annulé*» (Guggenheim, Marek) nor «*abrogé*» (Scelle) by international law. As recognized by Kelsen, all that international law is able to do is to impose liability for breach upon the wrongdoing State.

9. There was, of course, no permanent international court at the time when Triepel and Anzilotti wrote their monographs. It is very significant, though, that, contrary to partisan monistic scholarship, every time the PCIJ dealt with the issue, it took a dualist stand: a stand on the strength of which it rendered persuasive and generally accepted judgments or opinions. Despite the frequently unfair criticism of the twenties and thirties, the Permanent Court's successor has consistently maintained, in its turn, the dualist stand whenever, as in connection with local remedies or domestic jurisdiction, national law came into consideration (37). Both courts firmly maintained that the relevance of national law in any case before them is that of a fact. It is taken into account by the Court not as a part of international law as applied by the Court under Article 38 of the Statute (*quaestio iuris*) but as an aspect of a State's conduct (*quaestio facti*).

The Hague Court's constant adherence to the dualist doctrine is generally acknowledged in the literature. An exception is Krystyna

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(36) Among the latter Triepel identified *völkerrechtlich bedeutsames, völkerrechtlich gleichgültiges, völkerrechtlichgemässes, völkerrechtswidriges Landesrecht*, not to mention *völkerrechtlich gebotenes, völkerrechtlich veranlasstes, völkerrechtlich erlaubtes*, etc. (*Völkerrecht* [note 1, *supra*], esp. pp. 272 ff., 382 ff., 386 ff.).

(37) A number of PCIJ and ICJ cases are reviewed in *Domaine réservé* [note 4, *supra*], p. 173 ff.

Marek's cited article (38), wrongly overestimated by some scholars. Not a single one of the four sections of that author's analysis of the Permanent Court's jurisprudence, or her oddly emphatic and triumphant conclusive paragraph brings about any evidence of weakness or inconsistency of the PCIJ's dualist approach or, for that matter, of the dualist theory. In addition to the bias inspired by Guggenheim, she unconsciously brings out a significant number of arguments supporting dualism (39). She brings no evidence whatsoever

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(38) Note 6, *supra*.

(39) The celebrity of Marek's cited article makes some closer comments indispensable on each one of the article's four sections and its conclusion.

Under the title « Examen de la conformité du droit interne au droit international » the author claims that cases such as *Certain German Interests in Polish Upper Silesia* (*A*, No. 7), *Moroccan Phosphates* (*A/B*, No. 74), *Minority Schools in Albania* (*A/B*, No. 64) and *Oscar Chinn* (*A/B*, No. 63) prove the « fictitious » and « artificial » character of the Court's assertion that it considered the municipal legal systems involved as « facts », namely, as I understand the Court's language, as a part of the question of fact (*quaestio facti*) as distinguished from the question of international law (*quaestio iuris*) it was called to decide. That assertion by the Court is considered by Marek erroneous because in all the said cases « c'est le droit interne des Etats, qui est la seule catégorie juridiquement valable, qui seul permet de poser le problème juridique et par lequel peut seul s'exprimer une "attitude" ou une "prise de position" » of the State; and she wonders whether the Court's assertion is not « un effort de priver la loi de son caractère normatif, en la réduisant à un simple fait ...? » (p. 276). It is clear, though, that in none of the four cases did the Court draw from national legal systems norms to pronounce itself on the legal merits. The Court only considered the behaviour of the States in question, as reflected in legislative, administrative or other legal « products » or measures, with a view to appreciating or appraising it in order to decide the claim, in other words in order to determine whether the State behaviour in question amounted to a breach of international law.

The cited author's analysis does not do any better under the further title « Effets de la non conformité du droit interne au droit international ». The effects are, she states, « l'affirmation nette ("directe" ou "indirecte") par la Cour de la primauté du droit international sur le droit interne, même si le terme est soigneusement évité » (p. 278). Noting that « [o]n pourrait multiplier les citations » of cases making the same point, the author cites three cases — *Wimbledon* (*A*, No. 1), *Greek-Bulgarian Communities* (*B*, No. 17), and *Free Zones of Upper Savoy* (*A*, No. 24) — where the Court unambiguously stated that internal legislation, legal acts or administrative measures could not prevail, for the purposes of its decision, on the provisions of treaties or any international obligations. In similar terms the primacy of international law was also asserted by parties before the Court, as was the case in pleadings by Gidel and Sauser-Hall (p. 279). Although it is apparent from both sets of quotations that the primacy recognised by the Court (and dualist writers) was confined to the international plane, Marek does not hesitate to argue therefrom — also distorting, *inter alia* (in her footnote 66 at pp. 279-280), Anzilotti's and Triepel's acknowledgement of the superiority of international law *to the State* and *not directly to internal law*! — that « [i]l y a donc accord général quant à la supériorité du droit international sur le droit interne ». In other words, according to Marek, who keeps stressing an inexistent equation between « primacy » (for international legal purposes), on the one hand, and « direct superiority » of international law, on the other hand, to assert that international law prevails at the inter-State level over any contrary provision of mu-

supporting Guggenheim's view that international law or the Hague Court's decisions «annul» municipal law rules or administrative

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nicipal law purports an inevitable adherence to Guggenheim's monist position that international law is directly superior to national law. To the dualist view that the national rules not in conformity with international law are not invalidated or annulled by international law (giving rise merely to international liability) Marek opposes, citing Verdross' *Einheit* and Kelsen's *Principles*, a very questionable analogy with the coexistence of incompatible norms within a national legal system (p. 280).

Marek admits though: that in one case (*A/B*, No. 49, p. 336) the Court has «affirmé *expressis verbis* la validité d'une règle interne contraire au droit international» (p. 281); that in another case (*A*, No. 7, p. 40) the Court «a clairement laissé entrevoir qu'elle admettait comme conséquence d'une déclaration de non conformité plutôt la responsabilité internationale que l'annulation de l'acte interne» (*ibid.*) ; that «[i]l est enfin tout aussi vrai que ce point de vue est admis par les Parties» (citing here as example the Yugoslav contre-mémoire, Series *C*, No. 78, p. 182, according to which «les tribunaux internationaux ne sont jamais entrés dans l'examen de la légitimité de la législation nationale d'un pays ...n'en ont pas ordonné l'abrogation ou la modification, mais se sont bornés à condamner l'État responsable à la réparation pécuniaire des conséquences dommageables»); lastly, that even in the *Prince Von Pless* case the possibility of invalidating a norm of national law was envisaged (in Kaufmann's pleading, Series *C*, No. 70, p. 291) only as the possible object of a special international commitment going beyond «engagements normaux d'ordre international», namely, as an obligation to be implemented by the State itself, no automatic abrogative effect being envisaged by the special commitment either.

Not content with the distortions introduced that far in the dualism/monism debate, the cited author proposes to look at this point more closely, she states, at the consequences of non conformity: and finds what she calls «exemples opposés à ceux qu['elle vient] de citer [and taken into account above], [c'est-à-dire] des cas où la Cour s'est prononcée *dans un tout autre sens* [emphasis being mine] sur la validité d'une règle interne contraire au droit international, et cela aussi bien directement qu'indirectement» (pp. 281-282). In dealing with these cases Marek surpasses herself by claiming that they mark a triumph of monism, namely of the direct *supériorité* of international law over municipal law: in the *Eastern Greenland* case (*A/B*, No. 53, pp. 22-75) the Permanent Court would, according to Marek (p. 282), have «directement déclaré nul» the royal act of occupation promulgated by the Norwegian Government on 10 July 1931. It is evident, though, that the Court's declaration of nullity does not directly touch upon the act under Norwegian law. The act's existence in Norwegian law only ceased in Norwegian law and by virtue of that law. The fact that the royal act was revoked within two days of the Court's judgment purports not that the revocation was a direct effect of the Court's decision or of international law. The Court's decision remained on the international plane, its only legal effect being the determination of the *international* invalidity of Norway's occupation. The point is correctly put by SANTULLI, *Le statut international* [note 1, *supra*], pp. 452-453. Regarding the *Free Zones* case, Marek overestimates again the rôle of international law. Of course, «[p]our que la sentence soit exécutée» by France, «la règle interne devra céder le pas, dans le domaine interne»: but it must «céder le pas» to an internal rule modifying the existing situation, not directly to the Court's judgment or the international rule it applied. Very similar considerations apply both to the *Albanian Minority Schools* case (pp. 283-284), wrongly argued monistically by Marek, as well as to the cases of alleged indirect invalidation of national rules (p. 284). Legality was re-established in any of those cases by national action under national law. No dualist in his senses could take seriously the following conclusion of the following section of the cited author's article: «nous pouvons (p. 284) donc résumer les résultats de notre

or judicial acts not in conformity with international law. Nor does Marek's analysis even support Guggenheim's view that the Court « applique » municipal law in any proper sense, namely in the sense

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examen comme suit. Il existe trois possibilités pour une décision judiciaire internationale d'atteindre la validité interne d'une règle de droit interne contraire au droit international: 1) déclaration directe par la Cour d'invalidité d'une telle règle; 2) en l'absence d'une telle déclaration directe: *a*) nécessité juridique pour l'Etat d'annuler ou de rapporter la règle, afin de pouvoir exécuter la sentence internationale; *b*) nécessité pratique pour l'Etat d'annuler ou de rapporter la règle ou d'en suspendre l'application, comme conséquence des décisions de la Cour. Ainsi, à la lumière de la jurisprudence même de la Cour [*sic*!], tombe [*sic*!] un des arguments prétendument décisifs de la doctrine dualiste, celui de l'impénétrabilité du droit interne par le droit international, en l'occurrence celui de l'intangibilité interne de la règle interne contraire au droit international » (pp. 284-285). The reader has only to compare these three maxims with the above-mentioned jurisprudence.

Marek's critique of the Court's approach to dualism (and of dualism *per se*) is not more successful with regard to what she calls « Examen... du droit interne en tant que question préalable ». She implicitly accepts that at least in considering the national law issues arising in *German Settlers* (*B*, No. 6), *Mavrommatis* (*A*, No. 5), and other cases, the Court was not deciding questions of national law; it was merely taking account of national law situations, acts or transactions as factual premises of the decision of the relevant issues of international law; and she admits that that is « convaincant et cadre parfaitement avec la doctrine dualiste ». But the monistic demon suggests to her, though, rather incomprehensibly, that « on doit se demander ce qu'il en est en réalité »; and the reality would emerge, according to Marek, from the *Danzig legislative Decrees* case (*A/B*, No. 65) where « le droit international et le juge international qui en est l'organe ont effectivement pénétré dans un ordre juridique interne »: although, she concedes, a dualist could always maintain that the opinion expressed by the Court in that case was actually « préalable » to a resolution of an international issue by the League of Nations and, mainly, involved no decision « sur le plan interne »: which is precisely what a dualist would rightly remark. According to Marek it would be otherwise, though, in the *Certain German Interests* etc. case (*A*, No. 7). In that instance, she argues, the Court would have been inconsistent in dealing with the validity, in German law, of the acquisition by Oberschlesische of the factory's ownership. After admitting at one stage that its positive finding (for international purposes) on that ownership would not exclude the possibility that that state of affairs be contested under internal law before a competent jurisdiction, the Court would have contradicted itself when at a later stage it declared that its initial positive finding would stand in any case. Marek reads this final pronouncement as a direct penetration of international law, through the Court, into an internal system of civil law, such penetration making practically inoperative the Katowice Tribunal's decision on ownership: « [l]'impénetrabilité du droit interne par le droit international [se révélant] encore une fois ...une fiction de la doctrine dualiste » (*sic*!). The « penetration », though, is entirely a product of the author's imagination. The Court did not interfere in the least with any finding by any internal jurisdiction on the civil law point for internal law purposes. It merely maintained, for the *international* legal purposes which were its direct concern, a positive finding on the issue of ownership that was the premise, and in that sense a part, of an international *res judicata*. In conclusion, Marek's analysis of the Permanent Court's cases does not manage — despite her inexplicable bias against dualism — to demonstrate any weaknesses, contradictions or snags in the Court's dualist approach. She demonstrates instead — and very persuasively — her (and Guggenheim's) inability to understand the meaning either of Trie-

of directly affecting juridical relationships (*i.e.* rights and obligations) of domestic law.

The perusal of the Permanent Court's jurisprudence proves *ad abundantiam* the perfect correctness and consistency of the Court's dualist approach. It proves notably that whenever the Court considers, examines, appreciates, or otherwise takes notice of municipal law rules or of national judicial or administrative acts in order to

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pel's and Anzilotti's dualism or of the Court's approach. The best evidence is Marek's comment on the Triepel's passage («le droit international a *besoin* du droit interne...») quoted by her at page 264 of *Les rapports* and reported, together with Kelsen's comment, in para. 6 (*c*), *supra*. My comment is in note 26 thereunder.

Be it as it may, it is hard to believe that Marek could thus conclude her cited article:

> «Sur tous les points examinés au cours de cette étude, nous avons rencontré une unité de système [*sic*!] entre le droit international et le droit interne [qui] s'est révélée plus forte que la doctrine dualiste de la Cour et que son souci réel d'enfermer sa jurisprudence dans le cadre de cette doctrine. [*sic*!] Nous avons vu le dualisme de la Cour fléchir chaque fois [*sic*!] devant les réalités et les nécessités [*sic*!] juridiques. Si, malgré son credo dualiste, la Cour a été amenée à examiner la conformité du droit interne avec le droit international, à proclamer la primauté de ce dernier, à atteindre une règle de droit interne, déclarée non conforme au droit international, dans sa validité interne [*sic*!], à faire pénétrer [*sic*!] le droit international dans le droit interne avec effet prépondérant [*sic*!] et, finalement, à appliquer le droit interne comme norme applicable au litige international [*sic*!], c'est parce qu'elle y a été contrainte par les nécessités de sa fonction. Cela fournit la réponse négative à la question que nous nous sommes posée au début de cet article: la juridiction internationale est-elle possible sur la base d'une théorie dualiste?
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> On nous dira que cette juridiction a tout de même fonctionné d'une manière satisfaisante sur la base de cette théorie. A cela nous répondrons que, trop souvent, la théorie s'est réduite à des mots qui ne correspondaient pas aux réalités. [*sic*!] Et ce n'est pas le nom — "*Schatt und Rauch*" — qui importe, mais précisément les réalités juridiques.
>
> Une doctrine dualiste, effective et conséquente, est incapable [*sic!*] d'assurer le fonctionnement adéquat de l'arbitrage et de la juridiction internationale, de même qu'elle est incapable d'assurer le développement et le progrès du droit international en général. Un tel progrès, au contraire, exige [*sic!*] la reconnaissance et l'application du principe de l'unité des deux ordres juridiques, avec pénétration croissante du droit international dans le droit interne» (p. 298).

One wonders how the author of the above passage would have reacted to the sensible assertion of most students of the conflicts of laws that «the terms of foreign law [absent recall by the forum conflict of laws rules] constitute *a fact* to be considered in the determination of the case». This is a quotation from BEAL, *A Treatise on the Conflict of Laws*, New York, 1935, vol. 1, p. 53, that I draw from PICONE, *Cours général de droit international privé (Les méthodes de coordination entre ordres juridiques en droit international privé)*, in *Recueil des cours*, vol. 276, 1999, pp. 35-36, note 23 (emphasis added).

An excellent antidote against Marek's discourse can be found in Anzilotti's contributions reviewed by RUDA, *The Opinions of Dioniso Anzilotti and the PCIJ*, in *European Journal of Int. Law*, 1992, pp. 102-122, esp. pp. 102-103, 110-111.

verify their conformity or difformity to international law or for any other international legal purpose, national law is acknowledged as *a fact* to be considered in the determination of the case. In other words, any aspect of national law considered by the Court belongs, as noted, to the *quaestio facti*. Any national law point has always been a factual conclusion or premise of the application of international norms and the determination of the international rights and obligations deriving therefrom (40).

10. In the period between the two World Wars and afterwards, Anzilotti's successors perfected the dualist-pluralist theory illustrating its various facets and applications, with regard to both the consequences of separation and the interaction of international and national law.

Among the consequences, Perassi and Morelli and their disciples illustrated especially the reciprocal «exclusivity» of international law and municipal law (41) and the relativity of their respective evaluations (42). Together with Ago, Balladore Pallieri, Quadri and their own disciples, both authors led the whole Italian school in the theoretical systematization, within the dualist framework, of the continuous and multiform interaction between international and national law, with regard to both the reciprocal *renvois* (43) and the various forms of adaptation of national law (44). The Italian

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(40) That fully confirms the dualist maxim formulated by the Permanent Court in the *Case Concerning Certain German Interests in Polish Upper Silesia (The Merits)* (*A*, No. 7) (and reiterated in the *Serbian Loans* Case (*A*, No. 20-21), p. 19, namely that «From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures».

This *dictum* is usefully completed by the lines which immediately followed it: «The Court is not called upon to interpret the Polish law as such; but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention» (*Case Concerning Certain German Interests in Polish Upper Silesia (The Merits)*, *A*, No. 7, p. 19).

(41) PERASSI, *Lezioni di diritto internazionale*, Roma, 1937, pp. 26-30; MORELLI, *Nozioni* [note 1, *supra*], pp. 74-75. I refer, in particular, to the distinction between «rinvio recettizio» and «rinvio non recettizio», the latter being the most frequent (whether implied or explicit) in the continuous interaction between international and national law before international and national organs and jurisdictions.

(42) PERASSI, *Lezioni, ibid.*; MORELLI, *Nozioni* [note 1, *supra*], pp. 73-74.

(43) MORELLI, *Nozioni* [note 1, *supra*], pp. 75-85.

(44) *Ibid.*, pp. 85-97. A remarkable monographic treatment of the matter is in Bernardini's book mentioned in note 1, *supra*. See, by the same author, *Produzione di norme giuridiche mediante rinvio*, Milano, 1966; and *Formazione delle norme interna-*

school profited considerably, as it partly still does, from the traditional yoking together in the specialization of Italian scholars — for scientific as well as academic purposes — of private and public international law. Rightly considered nowadays inappropriate from the viewpoint of the different legal relationships and subject-matters covered by the two disciplines respectively, the dual specialization of Italian scholars has surely contributed, as it still does, to their sensitivity for any problems related to the interaction of international law and national law.

11. Frequently misunderstood or ignored but never seriously challenged, the fundamental tenets of dualism are confirmed by the practice of States throughout the XXth century and up to the present time. The research recently directed by Eisemann, with the participation of scholars from a number of countries, corroborates this view. Together with the clearly persistent dualist approach in all the European countries considered, that research proves that the implementation of international law in those nations is effected by national means or procedures even in the rare instances where the relevant international instruments envisage the participating States' obligation to adopt given provisions, or given adaptation devices, in their respective systems ([45]). The systemic distinction of international and national law is acknowledged both in the *Synthesis Reports* by Eisemann himself and the numerous participating scholars (pp. 1-66) and the *National Reports* covering thirteen States (pp. 69-570). The decisive dualism found in that study is not diminished, in my view, by Professor Eisemann's conclusion (p. viii) that:

> «Just how is International and European Community Law being integrated into domestic legal systems is as yet none too well known. To gain a clear overview of this grey area requires more than knowing about the various constitutional rules. What is also needed is a study of little-known administrative practices and the attitudes of the national courts, where case-law is often as complex as it is diverse. When all these elements are taken into account, the general picture that emerges is a much more

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*zionali e adattamento del diritto interno*, Pescara, 1973. A clear synthesis of the subject is that of GIULIANO, SCOVAZZI, TREVES, *Diritto internazionale. Parte generale*, Milano, 1991, Chapter XI, pp. 539-605.

([45]) *L'intégration du droit international* etc. [note 1, *supra*].

subtle one, *transcending the classical positions based on the theories of monism and dualism*» (emphasis added).

The very fact that the study has been rightly conducted within the framework of national legal systems proves beyond any doubt that *any* juridical impact of international legal rules within the sphere of domestic legal relations is subject to some general or *ad hoc*, constitutional or legislative, express or implied, sanction of national law. This means that just as international law is supreme before international courts, national law is supreme at the national level. This obvious truth is *perfectly* described by the dualist theory as first formulated by Triepel in 1899. The «complexities» and «diversities» of «case law» rightly acknowledged by Eisemann reflect that very variety of *national* «adaptation» mechanisms that confirms the validity of the dualist approach (46): an approach that in my view must be extended, as shown further on, to the inter-State and the interindividual elements in the law of international organization (paras. 33 ff., *infra*). Again, the fact that a State's legal system is more perfectly adapted to international law does not imply any «transcending of the classical positions based on the theories of monism and dualism». As (wrongly) asserted by monists the direct superiority of international law would derive from international law itself, national law being in their view a subordinate system. Consequently, no monism in a proper sense could ever be achieved by a national legal system, or any number thereof, by means of their own constitutional or other legal provisions. From a proper monistic perspective it is simply inconceivable or just an oxymoron to say that a national legal system is monist or dualist according to whether it adapts or not, more or less automatically, to international law (47).

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(46) Para. 8, *supra*.

(47) Unless one begged or evaded the question by resorting to natural law principles or dogmas, no «subtleties» or «nuances» emerging from the fine work carried out under Eisemann's direction bring the slightest support to the monist theory. The only monism any such subtleties or nuances could sustain would be — to the extent that they demonstrated that any national system «opened» itself totally and unconditionally to international law — simply that kind of monism in reverse which is oddly attributed by some commentators to the national systems in which constitutional rules automatically transform international law into national law. In my view, even the presence of any such mechanisms (called by Perassi «trasformatori permanenti» of international law into national law) would be a sign of dualism, not of monism. A recent instance is in FLORIDIA, *Diritto interno* [note 1, *supra*], p. 1340 ff.

I find it thus rather difficult, with all respect to the concerns inspiring them, to follow some of the considerations about monism and dualism contained in comments

The experience of the EC and EU confirms this essential point. The said findings are further confirmed by the scholarly works devoted to the implementation of international law within national legal orders, notably in the constitutions of the most developed among modern national systems. It is unnecessary to recall the numerous monographs on the subject.

An equally dualistic approach pervades the 1986 *Proceedings of the German-Soviet Colloque on International Law* at Kiel University ([48]). The dualistic approach of English Courts emerges unambiguously from Mann's analysis of 1986 ([49]).

12. Despite its essential soundness, one must acknowledge, though, that the dualist theory presents some important shortcomings. None of them, however, if adequately corrected, is of a nature to disprove it. One shortcoming is an inherent fault dating back to Triepel's and Anzilotti's time; the other issue is, so to speak, an external gap.

(*a*) The inherent fault, first pointed out by Hans Kelsen as a fundamental inconsistency not adverted to by Anzilotti and his direct disciples, was the inadequate attention given to the concept of the State in the sense of international law.

(*b*) The second shortcoming is the relatively more problematic definition and systematization, within the structure of the original dualist theory, of the legal phenomena arising from the development of international and «supranational» organizations.

Issue (*a*) is dealt with in the following paras. 13-22. Issue (*b*) in para. 33 ff.

## Part II - *Making Dualism Consistent: The Nature of the State in the Sense of International Law and the Relationship Among Legal Systems.*

### A. *Anzilotti's and His Successors' State Concept*

13. To begin with the inherent fault, the founders of dualism failed to perceive fully the inextricable interrelationship of their theory with the concept of the State in the sense of international law.

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devoted in France to the decisions of cases such as *Koné* and others. Leaving aside, of course, the delicate issues of French constitutional and administrative law involved, I refer to ALLAND, *Un nouveau mystère de la pyramide: remise en cause par le Conseil d'État des traités conclus par la France*, in *Revue générale de droit int. public*, 1997, pp. 237-247; and POIZAT, *Réception du droit international et primauté du droit interne: histoire de dualisme*, in *Revue générale de droit int. public*, 2000, p. 811 ff. See also SANTULLI, *Le statut international* [note 1, *supra* ], pp. 19-20.

([48]) Cited in note 1, *supra*.

([49]) Cited in note 1, *supra*.

Indeed, Anzilotti and his more direct followers did realise that their dualist position implied or required what was called a *vindicatio in libertatem* of international law with regard to legal personality ([50]): and thus significant steps forward were taken by them in that respect.

Most important was the acknowledgment that the personality of a State under national law — namely, under the law of that State itself or any other national system — is one thing and that same State's personality under international law is another. In conformity with the dualist/pluralist tenet that one and the same fact (in the present case an entity) can be distinctly (and possibly differently) characterized by separate legal systems, the former does not necessarily entail the latter and *viceversa*.

It was also admitted that international personality was not confined to States. It extended to independent or quasi-independent entities other than States, such as Dominions, insurgent parties (the very anthitesis of States), the Holy See. Anzilotti's *vindicatio* went actually so far as to acknowledge (particularly with regard to Dominions and independent colonies) that

> «Si l'on veut parler d'Etats dans le droit international, et l'usage de ce mot a certainement des avantages, au moins de simplicité, il doit être bien clair que ce sont les Etats du droit international, non ceux de la sociologie, de l'histoire, ni non plus ceux du droit public interne: l'Etat, pour le droit international, vaut en tant que destinataire des normes et en tant que sujet de l'ordre juridique, que cette conception coïncide ou ne coïncide pas avec celle qui est propre aux autres disciplines» ([51]),

where it would seem that even the Holy See (or the Roman Church), a Dominion or an independent colony could be envisaged as a State for international legal purposes.

The dualists also saw — better than the monists although perhaps not quite thoroughly — that, for the purposes of both the conclusion of treaties and the attribution of responsibility, not to mention a host of other matters, international law did not «depend» — or not entirely depend — upon the domestic law of the State. It was thus admitted: (i) that a State can be bound by a treaty concluded not in conformity with the domestic rules on treaty-making (para.

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([50]) *Cours* [note 1, *supra*], p. 125.
([51]) *Ibid.*

31 (*b*), *infra*); and (ii) that a State could be liable for a breach of international law as a consequence of conduct of individuals not belonging to its structure according to its national law (*ibid.*). Such findings surely implied an incomplete — to say the least — coincidence between a State's structure for the purposes of national law and its structure for the purposes of international law.

Furthermore, Anzilotti distinguished the condition of the State as an international person, not only from its condition in its own legal system but also from its condition under any other State's internal system within the framework of which it established legal relationships with private or public parties, or even with the host State itself ([52]). He spoke — ambiguously as will be shown — of different « sujets » or « sujets juridiques ». Referring in particular to the latter hypothesis, he equated the position of the guest State to that of a « particulier quelconque » or an « individu quelconque » ([53]).

The distinction was corroborated by the same author (in a paragraph comparing treaty and legislation) where, after mentioning that « l'Etat lui-même » is subject to the (national) law, he stressed: « Le mot "Etat" indiquant alors le sujet d'un ordre juridique interne déterminé et partant un sujet différent de l'Etat sujet de droit international (*supra*, p. 53 s.) » ([54]).

However, despite what looks to me as a very significant array of differential features — and more could be added ([55]) — the classic dualist authorities did not feel it necessary to verify to what extent the entity personified by international law coincided with the entity personified by national law. In this respect all the dualists — Anzilotti in the first place — assumed that the entity was identical both ways, the only difference consisting in the distinct personalities — national and international — it enjoyed, and the different sources — national law and international law — of such personalities. Referring to the above-mentioned condition of the State in its own legal system and to the hypothesis where a State enters into transactions within the legal system of another State, Anzilotti specified:

> « Il n'est pas difficile de voir que dans ces cas le mot "Etat" désigne un *sujet juridique différent* de celui auquel se réfère le même mot en droit international. Ici, comme dans beaucoup

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([52]) *Cours* [note 1, *supra*], pp. 53-55.
([53]) *Cours* [note 1, *supra*], p. 55.
([54]) *Cours* [note 1, *supra*], p. 405.
([55]) *Gli enti* [note 4, *supra*], esp. pp. 30-39.

> d'autres occasions, la considération de l'*identité de substance du substratum de fait*, qui *sert de base à la personnification* (ce type donné d'organisation sociale), a prévalu sur les exigences d'une considération rigoureusement normative, laquelle est le propre de la science du droit qui, partant du concept que la personnalité exprime une corrélation entre *une entité et un ordre juridique déterminé*, ne peut pas ne pas voir *deux sujets différents là où le langage commun semble en désigner un seul*» ([56]),

where it could not be clearer that the entity to which personality would be separately attributed by national law and international law is assumed to be one and the same: namely, the so-called *substratum* of the State's legal person.

Even more explicit, if possible, Donato Donati, the author of the theory of «persona reale dello Stato» [note 58, *infra*]: «Lo Stato si pone come persona in un duplice ambiente sociale: in confronto agli altri Stati, cioè nella società internazionale, e in confronto ai soggetti ad esso sottoposti, cioè nella società interna» ([57]).

Dualists assumed, in other words, that the entity endowed with international personality was just the external face of the State of national law ([58]). A single medal — Anzilotti's *substratum* or Donati's

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([56]) *Cours* [note 1, *supra*], p. 54. Emphasis added.

([57]) *Stato e territorio*, Roma, 1924, p. 2.

([58]) Examples of adherence to this *Zwei-Seiten Theorie* are to be found also in other dualists like Perassi, Ago, Balladore Pallieri, Quadri and Giuliano. According to PERASSI, *Lezioni di diritto internazionale*, Roma, 1942, pp. 45-46:

> «[...] per uno Stato la personalità di diritto internazionale è una qualifica che gli è data dall'ordinamento giuridico internazionale e non preesiste rispetto a questo. Per analoghe considerazioni è da scartarsi la proposizione, che concepisce la personalità internazionale di uno Stato come connessa necessariamente con la sua personalità di diritto interno. Una tale interpretazione in tanto potrebbe essere sostenibile in quanto si considerassero le due personalità come due semplici direzioni di un'unica personalità, dipendente da un unico ordinamento giuridico: ma essa non è sostenibile se l'ordinamento internazionale e quello interno di ciascuno Stato si considerano, come è da farsi, come due ordinamenti diversi e fra loro distinti».

More explicitly so AGO, according to whom one must «tenere chiaramente distinti i soggetti dei due ordinamenti. Ciò non significa già che questi ultimi non possano rispettivamente considerare come propri soggetti i medesimi enti di fatto, cosa possibilissima e che in realtà si verifica. Ma significa invece, che malgrado *l'identità dell'ente di fatto, i due soggetti su di esso creati dai due ordinamenti rimangono del tutto distinti*, e non è in alcun modo lecito confonderli» (*Lezioni di diritto internazionale*, Milano, 1943, pp. 50-51, emphasis added).

Similarly «double face» are the positions expressed, within the framework of DONATI's concept of «persona reale dello Stato» (*La persona reale dello Stato*, in *Rivista di diritto pubblico*, 1921, I, pp. 1-22), by QUADRI, *La sudditanza nel diritto inter-*

*persona reale* — with two faces endowed with international personality and national personality, respectively: the *Zwei-Seiten Theorie*.

Much as the two personalities were distinct, though, the whole dualist school was practically unanimous, as well as monist writers, in envisaging the State of international law, as well as the State of national law, as a legal person (*personne morale*). According to Ago, for example: « les sujets [du droit international] sont constitués précisément par les plus typiques et les plus parfaites des personnes juridiques, par les personnes juridiques par excellence, c'est-à-dire par les Etats » ([59]).

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*nazionale*, Padova, 1935, pp. 34-49 and *Stato*, in *Nuovo Digesto Italiano*, vol. XII, Torino, 1940, p. 810 ff.; GIULIANO, *La comunità internazionale e il diritto*, Padova, 1950, chapter V. On the « due facce » theory of dualist scholars (including the latter two), see the precisions of PALMISANO, *Colpa dell'organo e colpa dello Stato nella responsabilità* etc. [note 1, *supra*], esp. pp. 663-664 (with note 106), p. 679 f. (with note 152 at pp. 680-681).

([59]) *Le délit international*, in *Recueil des cours*, 1939-II, p. 462. This view is confirmed throughout this and other works by the same author. In less drastic language, the concept of legal persons seems to be evoked by Triepel himself, *Les rapports* [note 1, *supra*], p. 97. A list of the innumerable adherents to the concept is in the two-page note 4 in *Gli enti* [note 4, *supra*], at pp. 26-27.

Ago's quoted 1939 position was attenuated, though, in his reports and draft articles relating to the so-called « imputation » to States of internationally unlawful acts (para. 31 (*b*), *infra*). For the relevant ILC comment, I refer to PALMISANO's *La colpa* [*supra*, note 1], p. 647, note 64. According to the latter author, Ago's view of the nature of the State as an international person was, in 1971-1972, « più vicina a quella dell'A.-R. che non a quella di persona giuridica "per eccellenza" sostenuta [da lui] nel 1939 ». Palmisano refers to *Yearbook of the International Law Commission*, 1971, vol. II, part one, p. 228, note 75). A more decided acknowledgment, on the part of the 1971 Special Rapporteur, of his change of mind, would have been surely more enlightening for the present writer. On the incidence of the matter on the rôle of fault in State responsibility, *infra*, para. 31 (*b*).

Significantly different is the position of Gaetano Morelli, of whom I had the high privilege to be one of the disciples. That author, who followed my work on *Gli enti* closely enough to advise me that before asserting that the State of international law was not a legal person I had to collect *all* the evidence thereof (which I believe I did), not only refrains, in his *Nozioni* [note 1, *supra*], p. 120 ff., from qualifying States (*qua* international persons) as « persone giuridiche » but describes them as « entità storico-politic[he] » (pp. 137-138) « concretamente esistent[i] come entità di fatto » (p. 120), repeatedly stressing the factual nature of the formation of States as international persons (pp. 120-128). Although Morelli also speaks of States as « *enti astratti* » (p. 183 f.), I am inclined to believe that that « abstraction » is viewed there by him (considering that he defines States as « entità storico-politiche ») not as the (juridical) operation effected by the legal order in creating a *personne morale*, but merely that *logical* (*factual*) operation of envisaging a collective entity as a unit, as distinguished both from the physical person of a human being and also, I assume, from a legal person proper. It is perhaps not insignificant that also Perassi, while repeatedly referring to the States of international law as « enti astratti » — *prima facie* synonym of legal persons — does not use, to my knowledge, either in his *Introduzione*, or in *Lezioni*, the term « persone giuridiche ».

14. It followed that the dualist theory rested, as it still rests for most of its adherents, upon theorems and tenets — from the dualism/pluralism of legal systems itself to the distinction of sources, subjects, or «fields of application» — the key element of which is that very concept of State in which, as noted earlier, the monists find their main argument against the separation of international law and municipal law ([60]).

(*a*) Indeed, if the State of international law were the same legal person as the State of national law — or, as properly a legal person as the latter — the very dualism of international and national law would be more than blurred. It would vanish as an irremediable inconsistency. Even those who do not share Kelsen's identification of the legal person with its legal system — a concept shared by the present writer for the State and any other legal person of national law — entertain no doubt over the relationship of the said legal order with the legal system under which the legal person exists as such. The legal person's charter, statute, by-laws or, in the case of the State, constitution, is a derivative legal order within the framework of the community's legal system. To conceive of the State in international law as a legal person is inconsistent with dualism. Compared with legal persons or other national subdivisions, the State's legal system — supposedly «derived» from international law —

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One finds a certain inconsistency, on the other hand, in Morelli's assertion that the organization of States (for international legal purposes) is governed somehow by international law (p. 183 ff., esp. p. 186 ff.): a position implying possibly an analogy with the organization of legal persons. The factual concept, however, prevails in the end where Morelli stresses that «l'ordinamento internazionale prende esclusivamente in considerazione [albeit within the framework of what I consider a questionable concept of legal imputation (*infra*, para. 31 (*b*))] l'organizzazione di fatto dei suoi soggetti» (p. 188 ff.). This is confirmed by Morelli's view that «Gli Stati acquistano la personalità internazionale mediante un procedimento analogo a quello mediante il quale la personalità è attribuita negli ordinamenti statali agli individui umani» (p. 127).

It is also significant that Morelli seems reluctant (p. 237 ff., esp. pp. 239 f. and 241 f.) to use the concept of legal person for international organizations. In my view, indeed, these are endowed, under general international law, with a merely *primary* personality, similar to that of States and other *primary* (namely, not legal) persons such as insurgent parties, national committees, organized liberation movements and the Holy See (*Rapporti contrattuali* [note 4, *supra*], at pp. 130-137; and *Federal Analogy* [*ibid.*], pp. 15-18; and para. 35 (*c*), *infra*).

Reservations on the characterization of States as legal persons were formulated — despite his adherence to Donati's *Zwei-Seiten Theorie* — by GIULIANO, *La comunità internazionale e il diritto* [note 58, *supra*], pp. 241 ff., 253; also in GIULIANO, SCOVAZZI, TREVES, *Diritto internazionale. Parte generale* [note 44, *supra*], p. 96 and note 32.

([60]) Para. 5 (*d*), *supra*.

would be characterized merely by a higher degree of « autonomy » in choosing the ways and means of the juridical involvement of its subjects and agents. The same blurring would affect the further tenets of dualism.

(*b*) To begin with the sources, the difference would vanish with regard to custom as well as treaty. The distinction between the « will », the « attitude » or the *opinio* prevailing in one State as the source of national law, and the « will », the « attidude » or the *opinio* of two or more States as a source of international law would disappear. If the State is an interindividual legal institution (or, better, a legal system) in international as well as national law, the State of international law would not be any more « factual » and not any less « juridical » than the State of national law. The ensuing result would be that a treaty between States A and B could not essentially differ from a piece of national legislation of A and B. As well as a collective labour contract or an agreement between two member States of a federation, the treaty would be a legal act under a « total » legal order embracing, in a universal « decentralized » fabric, the subjects and structures of the contracting States (61). Moreover, once States were conceived of as legal orders, the distinction between international and national customary law would become equally evanescent.

(*c*) It seems hardly necessary to point out how equally untenable would the distinction *ratione personarum* become, or, for that matter, the distinction *ratione materiae* which is but a corollary of the distinction *ratione personarum*. Once the State as an international person were conceived as a legal system, it would be impossible to question, in juridical principle, the international personality of individuals, private and public legal persons and other dependent entities. Any right or obligation of a State under international law would indirectly result, thanks to a supposedly automatic operation of the State's legal system, into rights, obligations, legal situations of private individuals, agents or other persons of national law. Only a difference of degree would survive between the manner in which individuals would be legally involved in the rights and obligations of States, on the one hand, and the manner in which they are legally involved in the rights and obligations of a private corporation under national law, on the other hand. Compared with legal persons or other national subdivisions, the State's legal system, supposedly « de-

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(61) This is the argument raised by Joseph Kunz in his review in *Österreichische Zeitschrift* [note 1, *supra* ].

rived» from international law, would be characterized merely by a higher *degree* of «autonomy» (para. 20, *infra*) in choosing the ways and means — and the degree — of the legal involvement of its subjects and agents. There would not be the qualitative *saltus*, or discontinuity, which is rightly maintained by the dualist school.

### B. *The State in the Sense of International Law Revisited*

15. (*a*) The cited dualist scholars' conception of the State's international person as the external face of a single *substratum* (as indicated in Anzilotti's passage quoted in para. 13 *supra*, or, for that matter, as implied in Donati's equally double-faced «persona reale dello Stato») appears to be inextricably interrelated with the questionable concept of legal persons — notably the State's legal person — expressly or implicitly professed by those scholars. I refer to the dominant concept of legal persons — private and public, including the State of municipal law — as «collective» entities or entities «other than human beings», namely, to the notion of legal persons as *given* entities consisting either of a group of members or of beneficiaries, or of an organization, or of assets or of a finality, or some combination or other of two or more such elements, bound together somehow by the law (62).

That is not, I believe, the proper concept of legal persons. Legal (or «juristic») persons — and the same should be said of non-personified subdivisions of a national legal system — are artificial entities created either on the initiative of private parties or by the legislator or the constituent directly. The legal person is, legally speaking, an artificial centre of attribution of rights and obligations set up for the pursuit of the relevant private or public interests. The so-called *substratum* (as mentioned by Anzilotti in the above-quoted passage) is not quite the person in the eyes of the law. It is just the underlying social and material element governed by the legal entity's statute. This is amply demonstrated by the manner in which legal persons are created, dissolved or modified in their membership, structure, capacities, aims, and by the functions carried out by the legal person's agents as instruments — as well as the entity itself — of legal relations among members, beneficiaries, subjects or third parties. It is by their juridical essence that legal persons are distin-

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(62) *Gli enti* [note 4, *supra*], p. 43 ff.; and *La persona giuridica* [note 4, *supra*].

guishable from physical persons, namely from *given* persons like human beings.

(*b*) With regard to national legal persons and subdivisions, I think not just of the Enabling Act of the U.S. Congress (by which most member States of the American Union have come into being in U.S. Territories), but, more generally, of national legislation creating provinces and cities and of the legal acts or transactions setting up private legal persons. An egregrious example, in Italian law, is the case of Regione veneta, reviewed in *Gli enti* (63). As regards the State itself (of national law), I share the view of those who think that the establishment of a human aggregation's governmental structure — and in that sense the birth of the State — is not to be envisaged, despite *prima facie* appearance, as the pre- or meta-legal phenomenon envisaged by the theory that the law is just a product of the State's will (namely that there is no law, within a society, before that society is organized into a State) (paras. 6 and 8, *supra*). The State's organization takes shape within a legal community, not within a lawless aggregation of humans. Rather than just a *posterius* of the State's, the community's law precedes in a relevant part the State's organization. The formation of any new secondary rules (in Hart's sense) are at most concomitant with the organisation. While not sharing Santi Romano's notion that the society's factual organization is a part of the law, I believe that that eminent author is essentially right where he stresses that concomitance (64).

By all means, the presence of a more or less cohesive and organized group of individuals underlying the legal person is an incontestable fact. Such a physical presence mostly precedes the very establishment of the corporate body. Obvious instances are: a group of individuals getting together in order to set up a company, a single person establishing a foundation, or a *de facto* committee promoting the establishment, by legislation or other normative act, of a new municipality, a new province or a new member State of a federation. More importantly, elements such as these will continue to be present in the course of the legal person's life-span.

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(63) [Note 4, *supra*], pp. 65-67.

(64) *L'ordinamento giuridico* (reprint, 1951), esp. p. 46 f.; *L'ordre juridique*, Paris, 1975, p. 34 ff. My position remains the one I took in 1951-1952 in *Gli enti* [note 4, *supra*], p. 98 ff., esp. pp. 100-109, and *La persona giuridica* [note 4, *supra*], p. 67 ff. Further developments in *L'Etat* [note 4, *supra*], *passim*. The concomitance is explained by ROMANO by the *mot célèbre* that « [l'] affirmation que la poule naît de l'œuf, ne contredit pas celle que l'œuf naît de la poule » (note 1, pp. 34-35 of the French translation; note 33-*bis*, at pp. 47-48 of the Italian 1951 edition).

However, as long as the legal person is there, the group underlying it is resolved, for any purposes of the incorporating legal order, into their individual members and agents. Much as it may serve the purpose of presenting the matter to first-year law students, the notion that a corporation would consist of the «group of individuals» while the physical person consists of a single individual, is a very poor approximation. It is not the group that acts or acquires rights or obligations under the law; and the «acts» of the corporation remain, under the relevant domestic law, the acts of one or more of the corporation's agents; in the eyes of the law they are not really «collective» acts. Much as it may be useful to speak of rights and obligations of a legal person as a legal situation of a collective physical unit, the rights and obligations of a company or subdivision are legally converted into rights and obligations of individual members or agents through the operation of the latter's charter, statute or by-laws, which are an integral part — an «articulation» — of the relevant domestic system. After coexisting with the legal entity during the latter's life-span, the so-called *substratum* may even survive for some time — although no longer as a legal unit — the corporation's or subdivision's liquidation, suppression or dismemberment. The *substratum* at this point will be a merely factual entity ([65]).

(*c*) Under a proper concept of the legal person, it is not correct to identify it with any *substratum*, except by way of saying. It is not correct, in particular, to identify the State of national law with the *substratum* of its legal order. The legal person of the State is — Kelsen *docet* — *the* legal order itself, or the portion of the legal order governing the State's structure, functions and status under the community's law. The *substratum*, or any part thereof, is either the concrete, *pro tempore*, materialization of the State's legal system, or an illegitimate entity antagonizing and eventually combating that system.

An egregious example of such a contrast were the *substrata* of the Confederate States in the course of the American civil war (1861-1865). The eleven States adhering to the rebel Confederation were not the correlative legal entities that were part — as dependent constitutional systems — of the Union sanctioned by the federal Constitution of 1789. The rebel States were the physical collective bodies underlying those legal orders, namely the *substrata* of the le-

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([65]) On intergroup relations, para. 24 (*b*), *infra*.

gitimate States' constitutions. The latter remained, in the course of the conflict, in «virtual» validity within the Union's federal order; and it was not those orders, surely, that fought the civil war. Other illustrations of the distinction between the legal person of a State in national law and the respective *substrata* possibly attaining international personality — or approaching its threshold — can be found in the situations where a State has undergone a temporary dismemberment into two or more political aggregations. Remarkable and problematic examples are the coexistence, in the course of the second World War, of Vichy's France with France Libre and the rebel Fascist Republic (RSI) of Northern Italy with the constitutionally legitimate King's Government in the South.

It is now in the light of the proper concept of legal persons (as opposed to their prevailing rudimental concept as corporeal entities «other than human beings») that one should determine the nature of the entities — States and independent entities «other than States» — composing the constituency of international law: a matter surely cognate to the dualism/monism alternative.

Confining our discourse to States, the study of juridical realities offers a host of data proving that, although endowed with legal personality under international law, States are in no sense creatures of that law (66): not in any sense comparable either to the sense in which dependent legal persons under national law are creations of that law, or in the sense in which the State itself of national law is a creation of the community's law. Four solid pieces of evidence to that effect are summed up in the following paragraphs (67).

16. Unlike legal persons and other subdivisions of national law, coming into being as juridical structures through private or

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(66) On the equally factual nature (from the standpoint of international law) of international persons «other than States», see *Dinamica* [note 4, *supra*], pp. 43 ff., 83, 87, and *L'Etat* [note 4, *supra*], pp. 39-44 (for the *Holy See*); *Dinamica*, pp. 48 ff. and 9 ff. and *L'État*, pp. 44-45 (for insurgent parties); *Dinamica*, p. 148 f., p. 151 ff. and *L'Etat*, pp. 45-50 (for governments in exile and national committees). I leave out, for the moment, international organizations, although their personality is, in my view, also of a primary nature (*The Federal Analogy* [note 4, *supra*], pp. 15-18, and references *ibid.*).

An authoritative constitutional lawyer's critical review of *Gli enti* was that by MAZZIOTTI, in *Rivista trimestrale di diritto pubblico*, 1953, pp. 152-159. *Adde* FABOZZI, in *La Comunità internazionale*, 1953, pp. 748-750.

(67) Although my seasoned 1951 work on the subject is, I believe, still valid, it calls, on a few essential points, for some revisions in the light of current developments in international law and scholarship.

public legal acts, and unlike the State of national law itself, the establishment of which coincides with the formation of the community's legal system, States as international persons come into being *de facto*, continue to exist *de facto* and are eventually modified or dissolved *de facto* from the standpoint of international law (68).

Indeed, the setting up and other vicissitudes of States are frequently contemplated not just by international political instruments but also by international treaties or, presumably, even customary norms. Such norms set forth rights and obligations relating to conduct that States should take with regard to the establishment, modification or dissolution of given States. There are also norms binding States to adopt or not, or to maintain or not, a given regime or a given kind of regime (69). All such rules are intended to favour or hinder — such as by recognition or, respectively, non-recognition by other States — the creation, modification, dismemberment or dissolution of a given State, or the change or maintenance of a given kind of regime, in one or more (but theoretically — possibly — even all) States. The last few decades have witnessed a relative frequency of interventions — through merely political action or on the basis of more or less strict rules — in the «making» and «un-making» of given States or governments; and it is not unlikely that some general rules exist — and more are coming into being — relating to the regimes of States, particularly democratic government. This is partly an effect of the «humanization» of international law through the promotion of protecting human rights, the international prosecution of crime and self-determination (70). Another question is, of course,

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(68) It is well-known that a majority of existing States or governments were set up by some violent secession, insurrection or revolution. Can one say in any sense that an insurgent party is a legal person under any law? There is nothing more factual than an insurgent-belligerent party. The only analogies one can find for an insurgent party within a national, integrated society, are criminal associations and other factual aggregations of individuals (para. 24 (*b*), *infra*). These are either illegal or indifferent to the national legal order. In international law, insurgents are instead persons (but not, I assume, *legal* persons).

(69) Although it is focused on the problem of democracy in international organizations, STEIN's recent article (*International Integration and Democracy: No Love at First Sight*, in *American Journal of int. Law*, 2001, p. 489 ff.), offers interesting data and thoughts with respect to the rôle of international law and organization in the development of democratic government at the national level (pp. 490, 493 and 534). More directly the topic of democratic State government is dealt with by FRANCK, *The Emerging Right of Democratic Governance*, in *American Journal of Int. Law*, 1992, p. 46 ff.

(70) On the impact of self-determination on States' régimes see PALMISANO, *Nazioni Unite e autodeterminazione interna. Il principio alla luce degli strumenti rilevanti dell'ONU*, Milano, 1997, esp. p. 335 ff. and pp. 422-470.

the rôle that also seems to be played by the more or less justified political or military pressure exercised by some States.

One cannot share entirely, therefore, the views expressed some time ago by Kelsen and Perassi about the «indifference» of international law with regard to States' régimes or the «liberty» of States with regard to their organization (71).

17. Contrary, though, to the prevailing, presumably monistic, understanding of such phenomena — a tendency emerging from the titles of some scholarly works — the treaty or customary rules in question do not perform any direct juridical function with respect to the relevant constitutional events. They do so neither with regard to the setting up, modification or dissolution of a State nor with regard to the legitimation of a government or government-modification *vis-à-vis* the State's people (or, for that matter, any other peoples): not, surely, in any sense similar to the sense in which the rules of a domestic legal order relating to the comparable vicissitudes of legal persons or other domestic law subdivisions — not to mention the State itself under domestic law — do perform a direct normative

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(71) I disagree with those eminent scholars, where they speak of «indifference» of international law to the formation or government of States (KELSEN, *The Communist Theory of Law*, London, 1955, pp. 169-170) or of a «freedom of organization» enjoyed by States with regard to their organization (PERASSI, *Lezioni di diritto internazionale*, Roma, 1955, p. 102 f.). Apart from the fact that, as noted in the text, this does not seem to be quite true at the present time, the question is not whether or to what extent (surely still very considerable) general international law is «indifferent» or to what extent (also very considerable) States are, or remain, «free» to organize themselves as they please. As explained further on in the text, the question is: (*a*) whether the real or supposed international State or government-making or un-making norms *juridically* attain the States' constituencies, namely, the target State's people and possibly other peoples; and (*b*) whether non-compliance with those norms has any *juridical* bearing upon the «target» State's or government's existence under international law and upon the consequences thereof. Subject to the qualifications following in the text, the setting up of a State or its régime may well be, surely, *legally relevant*, from the viewpoint of international rules restricting, in the sense explained hereunder, the liberty of States. This does not mean, however, as explained further on, that international law *creates* States or governments in any proper juridical sense (note 73, *infra*).

Issue might also have to be taken with Morelli's opinion that the formative process of the State (*qua* international person) is «irrelevant» (*Nozioni* [nota 1, *supra*], p. 127). To the extent that the formative process of a State is the object of international norms (notably treaty rules or decisions of a competent body) binding two or more (other) States, that process could be relevant in the sense of triggering obligations/rights situations as between the latter. Morelli's position could be only envisaged as a correct one, though, if it were understood just in the sense that the formative process of a State is of no consequence for the purposes of the acquisition, by that State, of international legal personality.

function *vis-à-vis* the membership, agents and/or beneficiaries of a legal person or of the State itself. In other words, the international norms in question do not directly bring about interindividual rights and duties legitimizing or de-legitimizing the target State or government. They do not bring about, in other words, *constitutional* effects. And this excludes any analogy between the rôle played by the allegedly «State-making» or «government-making» norms in question in the establishment of States or regimes, on the one hand, and the rôle played by norms of national law in the comparable vicissitudes of personified or not personified national subdivisions — and the State — on the other hand.

(*a*) Restraining the discourse for brevity to the making and unmaking of States or governments, two capital differences must be acknowledged that may partly explain Perassi's and Kelsen's above-cited drastically negative propositions.

It will firstly be noted that, however strictly the relevant international rules may have been complied with by the States involved, a State or government set up or modified in disregard of the applicable international rules may just the same obtain the allegeance of its people (as well as the respect of other peoples), the possible reaction of the interested other States not bearing a *direct* juridical effect at the interindividual national level or levels. *Viceversa*, a State or government set up or modified in conformity with the applicable international rules may well be lawfully resisted or otherwise opposed — at the national level — by the people and possibly by other peoples. The concerned States' possible reaction bears again no direct *constitutional* effect at the national level or levels. In other words, no direct effect on peoples — in terms of interindividual legal rights or obligations related to the legitimacy or illegitimacy of the event — derives from the relevant international rules and from compliance or noncompliance therewith. For such effects to occur there should come into operation *not just* international — namely, inter-State — legal rules. Only (international) *interindividual* rules ascribable to some kind of universal or regional *public law of men and women* could perform a directly interindividual legitimation/delegitimation function similar to the function performed by the rules governing, within any national legal system, the creation, modification or dissolution of legal persons or subdivisions, or of the State itself from the standpoint of its own law. Indeed, rules such as these are assumed to exist by scholars reasoning under the influence of scientifically untenable federal analogies; and it is to those scholars that must be ascribed such concepts as those of «State-making»

or «un-making» norms of international law. The fact remains that the rights and obligations — even where deriving from «constitutional» treaties — remain an inter-State affair just as well as — if not even more than — any other rights or obligations deriving from any other rule of international law.

(*b*) Secondly, even at the level of strictly inter-State relations, the relevant events' conformity or non conformity to the international provisions in question is not juridically decisive of the legal condition of the State or government possibly at stake from the viewpoint of international law itself. No doubt, the given State's or government's establishment or modification may be condemned as unlawful under those norms and possibly opposed by the other States concerned — by any measures including, possibly, refusal to establish or maintain diplomatic relations, or refusal of admission to international organizations. The target State will nevertheless be a State and its government the government (from the standpoint of general international law) for the purposes of international legal personality, for the purposes of the so-called international representation of the State, as well as for any other aspect of the international legal relations of the target State or government.

(*c*) It must be acknowledged in conclusion, if one wants to envisage the matter with the necessary rigour, that — from the standpoint of interindividual, as well as inter-State, legal relations — the situation differs in quality so radically from the comparable situations involving national legal persons or subdivisions, that to speak of the «creation» of States or the setting up of governments «*by*» (or «*through*») international law is an oxymoron. The vicissitudes of legal persons under any national law are governed within the legal system in such a way (para. 15, *supra*) that the establishment, modification or dissolution of the entity is universally and directly operative — as a *juridical event* — for any physical or legal person under that law. The same must be said, *mutatis mutandis*, of the State of national law and its subjects ([72]). The *primissima facie* similar — but, on reflection, incomparable — vicissitudes of States and governments from the viewpoint of international law (not to mention international persons «other than States») remain, whatever their

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([72]) References in notes 45-49 and PALMISANO, *Colpa dell'organo* etc. [note 1 *supra*], pp. 663-670. In the English and French languages my views are set forth in *The Normative Role* [note 1, *supra*], p. 631 ff., esp. pp. 646-654, and *The Friendly Relations Declaration* [note 4, *supra*], p. 201 ff., esp. pp. 216-224. More strongly perhaps in *L'Etat* [note 1, *supra*], pp. 6-14, 36 ff. and 265-310.

juridical regime from the viewpoint of national legal systems, factual, not juridical, events.

The point I am making can be summed up in the following terms. The setting up of legal persons of national law — and of the State itself under national law — is a juridical *event* (or *effect*) with regard to *both* the setting-up of the entity and its elevation to legal personality. The setting up of a State in the sense of international law, is a juridically relevant *fact*, the only juridical *event* (or *effect*) attached thereto by international law being the attribution (to the factual entity) of legal personality, namely, international rights and obligations, or the capacity thereof. The only tenable analogy applicable to the setting up of a State from the viewpoint of international law is thus — *mutatis*, of course, most fundamental *mutandis* — the biological coming into existence of a human being as a juridically relevant fact (*fatto giuridico*, *fait juridique*) to which (national) law attaches the legal *event* or *effect* consisting in the acquisition by the individual of a legal personality.

It is in that sense that I maintain that the setting up of States and governments is, from the standpoint of international law, a factual, not a legal event ([73]).

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([73]) The best way to clarify a position on *Staat im Sinne des Völkerrechts* that I have been defending since 1951, is perhaps to compare it with those expressed by MAREK, *Identity and Continuity of States in Public International Law*, Geneva, 1968, and by CRAWFORD, first in *The Criteria for Statehood in International Law*, in *British Year Book of Int. Law*, 1975, *passim*, esp. p. 95, and later in *The Creation of States in International Law*, Oxford, 1979, the latter author briefly mentioning, in his 1975 article (at p. 95) the position taken by the present writer in *L'Etat* [note 4, *supra*]: a mention not re-iterated, but perhaps implicitly maintained, in his 1979 book.

As explained in the text above, the so-called international State-or government-making norms make the birth and other vicissitudes of States or governments legally *relevant* in the sense that they create rights/obligations relationships among the States concerned; but unlike the allegedly similar rules of national law relating to legal persons and other subdivisions, those rules do not operate directly, at the interindividual or inter-State level, a legitimation or de-legitimation of the target State or government's birth, change or dissolution (see subparas. (*a*), (*b*) and (*c*) of the present paragraph). The cited authors, and a considerable number of other scholars seem not to advert this capital difference. See also the discussion of Kelsen's view considered in note 84, *infra*.

James Crawford's studies confirm, by a thorough analysis of international practice, that any entity large or small provided with some people, some government and (possibly but not indispensably) some territory, meets the requirements of international personality and in that sense of statehood (unless it is a church or an international organization): provided, of course, that it is not a structural dependency of another entity. Those very studies fail to demonstrate, however, that any of the evoked, allegedly State-making or government-making norms determine, in addition to primary inter-State obligations and rights relating to such makings (or unmakings) and possible «secondary» inter-State obligations and rights deriving from non-compliance

Kelsen's assertion that «the international legal order, by means of the principle of effectiveness, determines ... the reason of validity

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therewith, the legitimation or delegitimation of the resulting State or government's creation, modification or unmaking. The latter phenomenon occurs neither at the interindividual nor at the inter-State level. Similar considerations apply to Marek's views of the vicissitudes of States affecting their continuity or identity from the standpoint of international law.

The ineptitude, so to speak, of international law to legitimize or delegitimize a State or government not conforming to any relevant (international) norms, namely, that ineptitude of international law, I insist, which leaves the State's international person in the above-described merely factual condition (except, of course, for the attribution of international legal personality), is merely a consequence, and also a cause, of the fact that, not being the law of a legal community of mankind (paras. 23-24, *infra*), international law does not *create* States in the sense that national legal systems create legal subdivisions such as provinces, cantons, member States, municipalities, or any legal persons of private or public law, including the State itself. Were I able — which I am not — to devote a work to the topic treated by James Crawford, I would entitle the book «The creation of States *and* International Law» or, perhaps better, «International Law *and* the Creation of States». The reasons are, I assume, obvious.

Regarding in particular the comparison between Crawford's position and my own, I deem it (at least for me) necessary to point out that the cited author, after stating in the text (p. 95 of his earliest article) «[a]lthough it is sometimes suggested that *the concept of statehood has no separate place in international law*» (which is not quite what I wrote), specifies in a footnote (2) attached to that phrase: «Arangio-Ruiz, *L'Etat* [...], who identifies the notion of legal criteria for statehood with Kelsenian monism, which is rejected as inconsistent with the *reality of a decentralized system*. Instead he adumbrates the notion of "*puissances*": factual entities whose existence the international legal system takes for granted». While grateful for the kind attention, I must rectify. It was not suggested by me «*that the concept of statehood has no separate place in international law*». It was suggested instead rather firmly — also on the strength of previous research — exactly the opposite. It was contended (as I continue to contend) that, contrary to the general view (of dualists as well as monists) that international law assumes, or works out, the same concept of State (or statehood) that is assumed or worked out by, under, or for the purposes of, national law, international law assumes the State (and statehood) as *in fact made by history (the effective action of national law and international rules themselves included)*. It follows that there *is*, in my view, a *concept of the State* as a («given») person of international law, namely a *Staat im Sinne des Völkerrechts*, separate and distinct from the national law concept of the State (or statehood). The latter — namely, the State in the sense of national law — is simply either, as per Kelsen, an interindividual legal order or, as per Santi Romano, an (interindividual) institution. The former — namely, the State in the sense of international law — is a factual entity and *only* in that sense a «*puissance*» (see note 89, *infra*), taken by international law as a «given» entity. «Given» entity means precisely that the State as an international person is not moulded, set up, structured and in that sense created (and legitimized!) by international legal rules in a sense comparable to the sense in which a *personne morale*, and the State itself in the sense of national law, is moulded, fabricated, and in that sense created, by national law.

More than incidentally I must add that, in rejecting Kelsen's monism, I did not speak of international law as a «decentralized system». International law is not a decentralized form of a formerly centralized system (such as one generally assumes to have been *Respublica Christiana*); nor is it on the way to centralization (paras. 30-

of the national legal orders» (para. 5, *supra*) is unacceptable as a proposition of positive — namely existing — international law. The truth is clearly expressed by Kelsen himself when, within the same passage, he states: «The historically first constitution is valid *because the coercive order exerted on its basis is efficacious as a whole*», namely, I add, as a fact from the standpoint of international law. What Kelsen calls the *principle* of effectiveness is not a legal principle. It is just a tautological rule, namely, no (juridical) rule.

18. A second *datum* proving the weakness of the *Zwei-Seiten* theorie relates to the organization of States from the standpoint of international law. Unlike national legal systems, which contain (interindividual) rules appointing physical persons empowered to act as agents of legal persons or subdivisions, international law contains no rules appointing individuals empowered to «will» and «act» on behalf of the State for the purposes of international law (or, for that matter, national law itself): namely, for example, for such purposes as treaty-making and liability for internationally unlawful acts. A State «acts» or «wills» for international legal purposes through any individuals factually connected with it and/or factually behaving and accepted as that State's organs within the national community.

In other words, those organic theories of the so-called will and action of collective bodies, which are utterly inappropriate for legal persons or subdivisions of national law, suit very well, on the contrary, the will and action of a State from the viewpoint of international law (74). The attribution by the observer of individual wills or acts to a State as an international person is thus merely a factual operation based upon merely factual elements, the latter elements including any norms of national law. As shown further on, the at-

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32 and 33 ff., *infra*). Its «functions» (law-making, law-determining and law-enforcing) are in the hands of States simply *faute de mieux*, namely because of the absence of a center, not because any center — in a ... decentralizing mood — endowed States with those functions. The idea of any such center is either a logical postulate comparable to Kelsen's *Grundnorm*, or a mere, albeit respectable, natural law «product» or assumption.

It is not clear to me to what extent (if at all) the particular but essential detail in question — namely, the non-decisive and (in any case) non-interindividual effect of international norms affecting the creation of a State — was perceived also by MOUSKHÉLY, *La naissance des Etats en droit international public*, in *Revue générale de droit int. public*, 1962, pp. 469-485.

(74) The comparison is made in *Gli enti* [note 4, *supra*], pp. 121-173 and 319-371, respectively; and further developed in *L'Etat* [note 4, *supra*], pp. 311-331.

tempts to «juridicize» international «imputation» in general or in some special instances are unconvincing (75).

19. A third *datum* proving the untenability of the *Zwei-Seiten Theorie* relates to the international status of the members of the States' populations. As a matter of positive law it is not proved that individuals and national corporate bodies have so far acquired rights and obligations by direct operation of international law. Whenever, as frequently is the case, interests or behaviours of individuals or corporate bodies are the object of international rules aimed at the protection of such interests or the conditioning of such behaviours, the relevant individual rights or duties do not flow directly from international rules. They derive either from national legal systems as adapted to the States' obligations set forth by the applicable international rules or from the legal orders of international bodies as established by States under the relevant international instruments (76).

Monists contend in vain that private parties become, nevertheless, subject to international law through States' or international bodies' legal systems, just as they can be subject to rights and duties under national law through the legal systems of legal persons and other subdivisions of national law. There remain two obvious, capital differences between the situation of individuals under international law and their situation under national law. Firstly, the members of the national community are the basic components of the constituency of the legal system. Within the framework of that system, they are the primary persons in the law. Under municipal law, in other words, the members of any private or public subdivision are legally subject to the nation's overall legal order as the original, primary members of the community, subject as such to the whole legal system *before* belonging to a province, a city or a private association. Their national bond with the national (unitary or federal) State is supreme. Their being subject to the partial legal orders of legal persons or other subdivisions is just a *secondary*, derivative legal phenomenon.

Under international law, even according to the most optimistic views, private parties would *only* acquire rights and obligations in-

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(75) Para. 31 (*b*), *infra*. A lucid description of attribution, particularly, of such «subjective» elements of a delict as fault and *dolus*, is that of PALMISANO, *Colpa dell'organo* [note 1, *supra*], p. 670 ff.

(76) References to my works on the subject in PALMISANO, *Colpa dell'organo* [note 1, *supra*], pp. 667-668.

directly, through «secondary» legal orders. Private parties would *only* be «secondary» persons of international law. Furthermore, the monists' contention could be persuasive only if it were proved that the States' and international bodies' legal systems coming into play, are *derivative* or *partial* legal orders within the framework of international law, which obviously begs the main question of the relationship between international law on the one hand and the internal law of States, or international bodies (77), on the other hand.

20. The *data* collected so far (on the nature of *Staat im Sinne des Völkerrechts*) find their completion in a fourth *datum* encompassing the previous ones. I refer to the independence of States, as distinguished from autonomy. Indeed, the term autonomy, not infrequently used as a synonym for independence to describe the condition of the State *vis-à-vis* international law (78), is hardly appropriate. «Autonomy» is the term generally used in the area of constitutional and administrative law to designate the condition of private or public subdivisions within national law. That term, precisely, indicates the sphere of the normative, administrative or judicial powers attributed to such entities by the law of the whole community. *Raison d'être* of this phenomenon is to accommodate, within the framework of the whole community's system, the exigency of diversity together with that of unity. Autonomy consists in fact of two sets of interacting elements. On the one hand, there is a set of rights, obligations, powers and entitlements attributed, through the subdivision's statute, to the persons related to the latter as agents, members, beneficiaries or subjects. On the other hand, there is the direct, active presence, in those very situations, of the national legal system. Such a presence manifests itself in everybody's (members', beneficiaries' and agents') sub-

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(77) Amends — for improperly alluding to «irrilevanza» of individual acts in international law (a *lapsus* in *Rapporti contrattuali* [note 4, *supra*]) — are made in *Soggettività nel diritto internazionale*, in *Digesto delle discipline pubblicistiche*, vol. XIV, Torino, 1999, note 232, pp. 253-254. Following a notation by MORELLI, *Stati e individui* [note 1, *supra*], p. 9, note 10, the same amends had previously been made in *Normative Role* [note 4, *supra*], p. 638, note 24, and in *The Friendly Relations Declaration* [note 4, *supra*], note 24, p. 208. I had only meant that acts of individuals are not acts *of international persons*. See also *Gli enti* [note 4, *supra*], p. 250 ff. An ambiguous concept of «irrilevanza» is also used by ANZILOTTI (irrelevance of international law for the subjects of national law) in *Il diritto internazionale nei giudizi interni*, Bologna, 1905, p. 443 f.

(78) Thus, for instance, ANZILOTTI, *Il diritto internazionale nei giudizi interni* [note 77, *supra*], pp. 41, 42, 49; *Cours* etc. [note 1, *supra*] 9, p. 122; *Teoria generale* [note 33, *supra*], p. 30 f. speaks of «autonomia».

jection to that whole legal system, as well as in the legitimation and control, by the latter, of the subdivision's statute (79).

Such a yoking of unity and pluralism — and autonomy with control — is afforded by the integrated and thoroughly interindividual nature — despite the exceptions we shall see in para 24 (*b*), *infra* — of the whole nation. The main condition is the presence of a sociologically continuous *milieu* and an equally continuous legal system, within which there are no juridical gaps between the rights and obligations of the subdivision as a legal unit, on the one hand, and the rights and obligations of members, beneficiaries or agents, on the other hand. Unless one erroneously identified the subdivision or the corresponding legal person with the underlying factual (social) entity — a point discussed in para. 15, *supra* — it is only by way of saying that one speaks of « collective » rights and duties. Once the subdivision is merged into the national society, and its statute is integrated in the total legal system, the « collective » entity will only exist — in a sociological sense — as the *substratum* of the legal person. Quite different from autonomy is, even within a national society, the condition of those merely factual associations that are not legitimized by the State's legal order (para. 24 (*b*), *infra*).

The features of autonomous subdivisions seem to be totally absent in States, or, for that matter, in international persons « other than States », considered from the standpoint of international law. Of course, States as international persons are collective entities, similar to the entities in which one recognizes the *substrata* of legal persons of national law. Nevertheless, States do not possess, from the viewpoint of the universal human society — or any regional portions thereof — *any* of the features of the corporations or subdivisions of national law (80).

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(79) I have in mind in particular Kelsen's concept of legal person (*General Theory of Law and State* [note 1, *supra*], pp. 96-109).

(80) One finds here neither the positive nor the negative features of autonomy. On the positive side, one does not find the total order's legitimation of the association or of the leaders' power. On the negative side, one does not find the controls normally exercised by the total order over the interindividual *milieu* — members, beneficiaries and agents — with regard to which the subdivision plays its private or public role. One finds, in other words, none of the elements characterizing the autonomy of a subdivision as a legal phenomenon within the body of the whole (domestic) legal system. On factual groups within a national community, para. 24 (*b*), *infra*.

It is because of the confusion between the legal persons and their *substratum* that a number of dualist authorities (para. 13, *supra*) are led to think that the relationship of States to international law is qualitatively similar to the relationship of autonomous administrative or constitutional entities (cities, countries, *départements*, provinces, cantons, *Länder* or member States) to the law of a unitary or federal State.

In conclusion, while legal persons and subdivisions of national law are characterized by «autonomy», States as international persons are characterized instead by independence; and independence is a factual condition: a synonym, as such, of (external) sovereignty, another name for that very same factual condition from the standpoint of international relations and law ([81]). Unlike the governmental functions of subdivisions, attributed by the law of the whole nation, the governmental functions of sovereign States, although frequently the object of restrictive or other international rules, are not delegated by international law. They derive from their respective national law; and in that sense, they are «original». The fallacy of the view that international obligations bring about restrictions of sovereignty has been authoritatively denounced ([82]).

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([81]) «Sovereignty is supreme authority which is independent of any other earthy authority. Sovereignty in the strict and narrowest sense of the term includes, therefore, independence all round, within and without the borders of the country» (OPPENHEIM, *International Law. A Treatise*, vol. I (*Peace*) [note 31, *supra*]. That «[d]iverging theories of sovereignty have come and gone» is stressed and well explained in WILDHABER's, *Sovereignty and International Law*, in *The Structure and Process of International Law:* etc. [note 1, *supra*], p. 425 ff., at pp. 428-429. As rightly pointed out in that writing, those theories can be reduced to a few cardinal problems of statehood, justice and good governance. I am not concerned here, however, with the concept of sovereignty within, or above, national law. For the present purposes I confine myself to stressing that the concept of external sovereignty as a synonym of independence, as opposed to autonomy (and as a factual *quality* from the viewpoint of international law), seems to find comfort in both Oppenheim's quoted definition and in Wildhaber's article.

I fail instead to understand SPERDUTI, *Le principe de souveraineté et le problème des rapports entre le droit international et le droit interne*, in *Recueil des cours*, 1976-V, when he writes (pp. 333-334) of «mythe d'une souveraineté originaire». It is obviously so from the viewpoint of positive international law. It is otherwise in domestic law, where the State is born and lives under the law (para. 15 (*b*) and note 64, *supra*). I would thus agree with SPERDUTI, *ibid.*, p. 339, where he defines «l'Etat de droit» comme un «produit», so to speak, «du système juridique». From the viewpoint of international law, though, sovereignty is the *factual* condition of independence, not an (international) *legal* attribute. I would not speak, therefore, of a «principle of sovereignty in ... international law» (as does instead STEINBERGER in his highly learned *Sovereignty* [note 1, *supra*], esp. at pp. 500 and 511-513.

I leave out not only the concept of sovereignty under natural (or divine) law but also the concept of «absolute sovereignty» as a synonym of lawlessness (HOLZMANN, *Organisations internationales* [note 1, *supra*], p. 14; and I do not accept, of course, the notion that international obligations bring about direct restrictions of sovereignty-independence; they restrict, or otherwise condition, the freedom or liberty of States. As noted further in the text, the concept of restriction of «compétences» of States (HOFFMANN, *ibid.*, p. 157) is misleading as it conveys the idea (cherished by numerous French scholars under the manifest influence of domestic public law) that State competences are attributed by international law. The French relevant doctrine is cited and discussed in *Le domaine réservé* [note 4, *supra*], pp. 435-439.

([82]) The *PCIJ* in the *Wimbledon* case (series *A*, No. 1, p. 25) stated: «The

In other words, the legislative, judicial and executive *competences* of States are not delegated or *octroyées* by international law. Independence (and sovereignty) in the said factual sense is not restricted either by a State's participation in an international or «supranational» organization. In either case — short of real federation — it is only a matter of obligations, namely, mere restrictions of liberty. The distinction of limitations of liberty from limitations of sovereignty — regretfully ignored with increasing frequency by constitutional as well as international law scholars (not just in connection with EC and EU) — is lucidly expressed in Anzilotti's opinion relating to the PCIJ advisory opinion on the *Custom Union between Germany and Austria* ([83]).

21. Data such as the «missing» international legitimation of States at *interindividual* level, the «missing» international-*interindividual* structuring of States, the «missing» *direct* international personality of individuals clarify and confirm each other; and all of them are summed up together in the factual nature of independence (= external sovereignty) as opposed to the juridical autonomy within national systems. It all proves that, unlike legal persons and other

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Court declines to see, in the conclusion of any treaty by which a State undertakes to perform or refrain from performing a particular act, an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right to enter into international engagements is an attribute of State sovereignty».

According to the arbitrator in the *Island of Palmas* case (*Reports of International Arbitral Awards*, vol. II, p. 829 ff., at p. 838), «Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise herein, to the exclusion of any other State, the functions of a State. The development of the national organization of States during the last few centuries, and, as a corollary, the development of international law have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations».

As clearly put by AKEHURST, *A Modern Introduction to International Law*[4], London, 1982, pp. 43-44: «When international lawyers say that a state is sovereign, all they really mean is that it is independent, that is, that it is not a dependency of some other state. They do not mean that it is in any way above the *law*. It would be far better if the word "sovereignty" were replaced by the word "independence". In so far as "sovereignty" means anything in addition to "independence" it is not a legal term with any fixed meaning, but a wholly emotive term».

I doubt whether the term is just «emotive». As a synonym of independence, as understood in the text, it sounds to me quite acceptable as a description of the status of a community and its government *vis-à-vis* others.

([83]) Series *A/B*, No. 41, pp. 57-58. The Court's *dictum* is quoted in RUDA, *The Opinions of Judge Anzilotti* [note 39, *supra*], at pp. 110-111.

subdivisions of national law, and unlike the State itself in the sense of national law, States as international persons are not — contrary to current assumptions — legal persons. They are taken by international law as given, historical collective entities in a sense comparable (as stressed in para. 17 (*c*), *supra*) to the sense in which human beings are viewed by (national) law as given biological entities (84).

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(84) I am intrigued by the manner in which Hans Kelsen compares, in one of his writings, the State as an international person, on the one hand, and the physical person of a human being, on the other hand. That comparison is so strangely put in Kelsen's 1932 Hague Lectures, *Recueil des cours*, 1932-IV, pp. 117-351, at p. 263, that I am inclined to suppose that the relevant lines were inserted in that text either as a hasty translation of one of the author's previous works (in the less widely known German language) or by a misinterpretation of Kelsen's manuscript by the Academy's French language editor. According to the following passage of that course:

> «La naissance et la mort des individus sont bien des problèmes biologiques, mais en tant que conditions de conséquences juridiques, ce sont aussi des faits juridiques, déterminés par l'ordre juridique. En n'imposant d'obligations et en ne donnant de droits qu'aux êtres vivants nés et constitués d'une certaine façon, le droit interne détermine ce fait qu'on appelle l'individu au sens de l'ordre juridique.
>
> Le droit des gens ne provoque pas davantage la naissance et la fin des Etats que le droit étatique ne provoque la naissance et la mort des individus. Mais en attachant à un fait social ou sociologique déterminé, comme conséquence de droit, la validité d'un ordre juridique dans un certain domaine territorial et personnel — et encore d'autres conséquences de droit —, il détermine le fait "État" au sens du droit international.»

There is here — surprisingly in a piece by Kelsen — a curious confusion between what I have been used to understand as the legal relevance of a fact (see, for example, PERASSI, *Introduzione alle scienze giuridiche*[2], Roma, 1953, pp. 55-57), on the one hand, and a legal phenomenon (or legal «effect» or «event»), on the other hand, in the sense evoked in the conclusive part of para. 17 (*c*), *supra*. No doubt, the biological (and social) fact of the existence of a human being is a juridically relevant fact under the relevant national law or laws, the relevance consisting in the attribution, to the born individual, of a legal personality under the applicable law or laws. It seems difficult to accept, though, that the fact in question (namely the birth of the individual) is «determined» by the law. To the extent that the latter verb were understood to mean not just «ascertained» (by or under the law) but rather «caused» or «effected» by the law (as it seems to be the case within the quoted passage) the statement would be too absurd for it to be acceptable as a genuine Kelsenian proposition. Be that as it may, a different matter altogether would instead be, within the framework of Kelsen's monism, the coming into being of a State in the sense of international law as theorized by Kelsen, namely as a legal (or «juristic») person of international law. Within Kelsen's theory (although not in the view of the present writer) the coming into being of the State in the sense of international law would be *much more than just a fact conditioning, causing or triggering* (as a juridically relevant fact) the *mere* attribution to that State of international legal personality. As explained in para. 17 (*c*), *supra*, it would be, *in addition* to a juridically relevant fact, also a legal *event*, a legal *creation* or a legal *phenomenon* — in that the State, prior (or in addition) to acquiring an international legal personality, comes into being, according to Kelsen, under that same (international) law, *as a legal entity, notably as a legal order — more precisely, as a partial legal order within international law* — something that a human

This indicates that the State in the sense of international law is neither Kelsen's (national) legal order nor Santi Romano's (interindividual) juridical «institution» ([85]). It is the factual entity that, under some «control» from the national community's legal order and other (internal or external) sociological and historical factors — *but no comparable «control» of international law at interindividual level* — handles the community's external relations. It is indeed that entity — not the national society, the community or its legal order — that is the member of the constituency of positive international law ([86]).

The fact that the State in the sense of national law is subject to the (national) community's legal order — coinciding with that order

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being is surely not from the standpoint of (national) law. It follows that one could not say, if my understanding of Kelsen's own theory is correct, that «[l]e droit des gens ne provoque pas davantage la naissance et la fin des Etats que le droit étatique ne provoque la naissance et la mort des individus». Such a simile is inconsistent with Kelsen's (in my view correct) statement that «[l]a naissance et la mort des individus sont bien des problèmes biologiques, mais en tant que conditions de conséquences juridiques, ce sont aussi des faits juridiques, déterminés par l'ordre juridique».

One must conclude, curiously, that Kelsen would have suggested in 1932, by the quoted passage (assuming that he meant what one reads therein), nothing less than an analogy of the birth of a State with the birth of a human being: the very kind of analogy upon which I see a support of a dualism considered «absurd» by Kunz. Kelsen's simile suits the dualist, rather than the monist construction. I had not adverted in 1951, despite the thorough study I made of Kelsen's masterly works, that I could have quoted Kelsen himself — the very champion of the modern monist theory — for admitting that the birth of a State in the sense of international law was as factual as the birth of an individual human being under domestic law. Another matter, of course, is the person of a State within the legal system of another State and before the latter's courts and administrative organs. Here the guest State is obviously — as well explained in Anzilotti's passage quoted in para. 13, *supra*, and reconsidered in note 85 below — something different from the person of international law, and notably a legal person.

([85]) This would seem to be admitted, somehow, by Anzilotti — despite his noted *Zwei-Seiten Theorie* (para. 13, *supra*) — where he distinguishes (*ibid.*) the State as an international person, on the one hand, and the same State as a person under the law of another State, on the other hand. Although in that case Anzilotti puts twice the guest State on the same footing as «a particulier quelconque» or «un individu quelconque» — literally, then, a physical person — within the legal system of the host State, I find it difficult not to assume that the cited author really thought of the guest State as a legal person. A *personne morale*, I presume, within the guest's own legal system as ... grafted for the relevant purposes, still as a legal person, into the host State's legal order: this should have implied, despite the questionable concept of legal person apparently entertained by Anzilotti, something more than just a factual *substratum*. For a precision, in connection with this hypothesis, on the inapplicability of the maxim *par in parem non habet imperium*, *Le domaine réservé* [note 4, *supra*], p. 464, note 868: — another argument against monism.

([86]) *Contra*, it seems, ALLOTT, *Eunomia*, Oxford, 1990, *passim*, esp. pp. 332-333 and 393.

in the Kelsenian sense — and as such a legal person of national law (87), does not necessarily imply (contrary to the prevailing inexplicable belief) that the same should be said of the State in the sense of international law. In order to prove that such was the case one should demonstrate that international law is not the law of inter-State relations but the law of the legal community of mankind, embracing and conditioning *per se* from within — and at interindividual level — the national communities' legal orders as subdivisions of its own: this is precisely the arbitrary monistic assumption that begs the question.

22. It follows that it is not correct to envisage the national and international person of the State just as two distinct legal personalities of one and the same *substratum*, as a number of dualist scholars so firmly seem to do, together with the monists (*Zwei-Seiten Theorie*). The difference goes deeper than the surface ... fleece or pellicle represented by the distinct personalities respectively granted by national and international law. The difference to be reckoned with is a difference between two distinct entities. One, the State of national law, is a legal person, namely a creation of national law (88). The other one, the State of international law, is — from the standpoint, of course, of international law — a factual, given entity, the *substratum*, in a sense, of the State's legal person of national law: an entity with regard to which international law exercises no comparable direct creating or moulding rôle (89). This corroborates the tautological nature of that so-called « principle of effectiveness »

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(87) See para. 15, *supra*.

(88) I say « creation of national law » in the belief — stressed in para. 15 (*b*), *supra* — that the State is a result of an interaction among the members of (national) society, such interaction giving rise to legal rules even prior to the structuring and functioning of law-making and law-implementing organs, namely the essential elements of the State. On Romano's « œuf et poule », note 64, *supra*.

(89) I have occasionally, in the past, tried to find, for such entities, a name less inapt to describe their factual collective essence. *Faute de mieux*, I ended up, at some stage, to use that same term « power », « potenza », or « puissance » (without any military implication) by which sovereign States occasionally describe themselves in peace as well as in war (and even, sometimes, within the framework of international organizations). As a synonym of independent entities participating in international relations, the term power is also used at times (to indicate a State) by students of international relations. I believe that it is quite acceptable — in view of both its qualities of factuality and independence — for *Staat im Sinne des Völkerrechts*. But the name is clearly the least of the problems. The use I made in 1954 (*Dinamica* [note 4, *supra*]) of the term « potentato » was a juvenile impropriety. That term was justified only for the marginal, questionable phenomena of international personality (Napoleon, Haile Selassié etc.) I then commented upon (cited work, pp. 101-110).

thanks to which, according to Kelsen, the validity of national constitutions would rest upon international law (paras. 5 and 17 (*c*), *supra*).

The State of international law is not, therefore, the *same entity* as the State of national law. It differs from the latter as much as the *substratum* differs from the legal person of the State of national law (90). The difference is huge between a legal entity, created and conditioned from within by the interindividual domestic order of a nation, on the one hand, and a factual collective entity conditioned by international law only from the outside, on the other hand (91).

The perception of the factuality of States and other primary persons from the standpoint of international law also explains the essentially factual nature of the problems of identity and continuity of international persons as opposed to the legal essence of the problems of identity and continuity of legal persons in domestic law (92).

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(90) Para. 15, *supra*.

(91) This dualism of the State is not a *unicum* of the relationship between international law and national law. An interesting example is the « dual State » envisaged by Fraenkel within the framework of the national community when he analyzed the two States coexisting within Nationalist Socialist Germany: the « Prerogative State », namely the [Nazi] « power system [Nazi party, *Gestapo, Sicherheitsdienst* etc.], which exercise[d] unlimited arbitrariness and violence unchecked by any legal guarantees », on the one hand, and the « normative State », namely the « administrative body endowed with absolute powers of safeguarding the legal order as expressed in statutes, decisions of the courts, and activities of the administrative agencies » on the other hand (FRAENKEL, *The Dual State, a Contribution to the Theory of Dictatorship*, Oxford, 1941, p. XIII).

(92) *Dinamica* [note 4, *supra*], p. 127 ff., esp. pp. 131-136.

A complete misunderstanding of my work on international persons is shown by PAU, *Il diritto interno nell'ordinamento internazionale*, in *Comunicazioni e studi*, vol. XVII-XVIII, 1985, p. 23 ff., esp. pp. 30-31 (while Giuliano's position is considered and equally misunderstood at pp. 32-34). Ignoring any proper concept of legal persons (including in particular the one I worked on), the cited author wrongly reads my assertion that States are not created and organized by international law — and therefore do not qualify as legal persons of international law — as an assertion (I never made) that international law does not define its subjects (citing *Gli enti* [note 4, *supra*], p. 188 and *Dinamica* [*ibid.*], p. 36). The same author seems also to confuse my (consequential) negation of the existence of a *legal community* of mankind — as a source of legitimation of States or governments at interindividual level — with an absurd negation (on my part) of the very existence of a universal human *society*. He cites here from *The Normative Role* [note 4, *supra*], p. 646 ff.

A confusion between the concept of State under national law (together with the proper concept of legal persons in general), on the one hand, and factual collective entities (including the State in the sense of international law), on the other hand, is even more striking in SAULLE, *L'errore negli atti giuridici internazionali*, Milano, 1963. Jumping from one part of *Gli enti* to another, that author mixes up the *juridical* concept of the acts of legal persons with the *factual* concept of the acts of the State in the sense of international law. She thus ends up completely misunderstanding my

The difference between the two entities is manifest, again, in Anzilotti's above-registered hypothesis of a State acting within the legal system of another. It is clear that the guest State is subject to the host's legal order as a legal person recognized as such by that order ([93]).

## C. *The Factual Nature of the State in the Sense of International Law and the Relationship Among Legal Systems*

23. The above-described state of affairs determines — and is in turn determined by — a situation that is dramatically different,

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view of the attribution to the State of « procedimento volitivo » of the organs thereof. I have dealt with that confusion in *Stati e altri enti* (*Soggettività internazionale*), in *Novissimo Digesto italiano*, vol. XVIII, Torino, 1971, para. 30, last footnote (pp. 74-75 of the contemporaneous offprint titled *Diritto internazionale e personalità giuridica*, Bologna, 1972).

I would refrain from mentioning the poor defence of monism presented by PIERSILLO MAZZESCHI, *La dottrina pura di Kelsen e la realtà del diritto internazionale contemporaneo*, in *Diritto e cultura*, 1994, no. 1, p. 43 ff., were it not for my inability to accept without comment the author's lack of understanding of the decisive impact of the State's concept upon the monism/dualism alternative (not to mention the very essence of international law). Contradicting practically the *raison d'être* of the debate, including the foundation of the monistic theory that he espouses, he states at p. 58 « ... quasi tutti gli internazionalisti si fondano sull'idea che il diritto internazionale si dirige essenzialmente agli Stati, vengano essi concepiti come persone giuridiche o come enti reali... »: as if « persone giuridiche » and « enti reali » were the same kind of animals from the standpoint of any law, or it made no difference what a legal person really is: for example according to Hans Kelsen, the author to whose very theories the cited writing was dedicated.

I can only hope that whoever may come across any of the pages cited in the present note were sufficiently curious to get deeper into the matter as to compare them, if not with my works, with the keen analysis of those works contained in PALMISANO's *Colpa dell'organo e colpa dello Stato* etc. [note 1, *supra*], esp. Sect. V, pp. 663-678 and ff.

([93]) According to Kelsen (*General Theory* [note 1, *supra*], pp. 376-378): « This absurd consequence [namely, the distinction of *Staat im Sinne des Völkerrechts* from the State of national law] is not accepted by the pluralists » (*General Theory*, p. 377); « the pluralists assert that the international and the national personality of the State are distinct... But they mean only that the same identical State has both an international and a national personality, just as a human being has both a moral and a juristic one » (*ibid.*). The present writer is a pluralist who « absurdly » thinks otherwise.

As Kelsen also puts it, the dualists (or pluralists) « visualize the State as a solid, space-filling body, with an interior structure and exterior relations to other objects »; and he adds: « When we try to find the thought behind the metaphor, or to formulate it without employing a metaphor, we arrive at the conclusion that the thought is wrong » (*General Theory*, p. 364). At p. 377 Kelsen rejects the notion of the State as a « superhuman individual ».

Whether the latter, ugly definition is preferable to that of « factual collective entity » or « power » matters little. It is just a question of names (note 89, *supra*). What matters (for the purposes of the monism-dualism debate) is the entity's undisputable factuality.

however difficult it may be for monist scholars to acknowledge it, from the situation obtaining, for instance, among the member States of a federal system. Whereas one finds in that system *one* interindividual legal order of the whole nation, embracing a number of dependent (equally interindividual) legal orders, in the universal society one must distinguish between the situation «below» and the situation «around» the «summits» of the coexisting national communities. «Below» the level of those «summits» there are as many systems of interindividual law as there are independent States. «Around» the said «summits» one finds, instead of a public law of mankind as an interindividual public law, a body of *sui generis* norms the *raison d'être* of which is the regulation of the relations among States as separate, factual, collective entities.

National legal systems govern the relations of individuals and the relations of the private and public legal persons established within their framework. International law, for its part, governs nowadays — when it is no more the law of the relations of kings or feudal lords — just the relations among the collective entities corresponding to States or similarly independent aggregations [94].

24. (*a*) The fact that international law finds its *raison d'être* in the coexistence of States outside of the framework of a public law of mankind indicates, in its turn, that it is not that very public, constitutional law. It is open to speculation how and when such a public law of mankind may come into being. International law itself may, of course, play a rôle in bringing about such a portent through appropriate inter-State cooperation. In principle, though, between a universal constitutional law of men, on the one hand, and international law, on the other hand, there is a relationship of reciprocal exclusion [95]. A similar reciprocal exclusionary relationship characterized the coexistence of the failing hierarchical legal order of the «universal» medieval State with the formation of those early norms of egalitarian relations among *regna*, *civitates* and *seigneurs* from which international law originated, long before Westphalia (para.

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[94] On a Fitzmaurice *variante* of the *Zwei-Seiten Theorie*, see para. 27 (*c*), *infra* and note 111 thereunder.

[95] Whenever an aggregation among States has developed beyond the *con*federal stage, the relations among the component units have ceased to be governed by international law; and whenever a State has been dismembered into a number of States, international relations (and law) have superseded interindividual constitutional law. It is hard to believe that the phenomenon is a matter of centralization and the second a matter of decentralization of international law.

32, *infra*). A vicious circle seems actually to have supervened, in the course of centuries, between the inter-State system, on the one hand, and the chances that it be replaced by the upper layer of a legal community of mankind, on the other hand.

(*b*) In that perspective, international relations and law reveal even more vividly their analogy with intergroup relations: not just, or not so much, in primitive societies ([96]) but within modern national societies themselves.

Indeed, in modern, integrated societies no factual groups are in principle likely to prosper among which one could envisage the existence of relations and possibly rules of conduct. The groups coex-

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([96]) I just recall some of the scholarly studies dealing with such relations within primitive societies and in the ancient world. On the former, one finds interesting analogies in the work by Shapera on tribal societies and in Bull's study of the anarchical society (SHAPERA, *Government and Politics in Tribal Societies*, New York, 1956, Chapter 1; BULL, *The Anarchical Society, A Study of Order in World Politics*, London, 1977, p. 601 ff. and footnotes 2-6 to Chapter 3, at pp. 323-324).

With regard to the ancient world one reads with profit, *inter alia*, the pages devoted by Heinrich TRIEPEL to intertribal relations in ancient Palestine (TRIEPEL, *L'egemonia* (It. transl. of *Hegemonie*, 1938), Firenze, 1949, pp. 339-349, and 359 ff.); SUMNER MAINE, *Ancient Law*, London, 1930 and CYRICHOWSKY, *Das antike Völkerrecht*, Breslau, 1907, and *Das alte und das neue Völkerrecht*, in *Archiv für öffentliches Recht*, 1908, p. 586 ff.

Interesting analogies can also be found in the speculative theories of a number of historians of Roman law, a few of whom thought that some legal features of the public and private law of ancient Rome could be explained by the theory that the Roman *civitas* originated from a federal process involving families, *gentes* or clans, such entities (*gentes* especially) having previously coexisted as separate political units. One spoke of a «diritto intergentilizio», an expression suggesting perhaps some analogy with international law.

I refer to BONFANTE, *Teorie vecchie e nuove sulle formazioni sociali primitive, Scritti giuridici*, I (*Famiglia e successione*), Torino, 1916, pp. 1 ff. e 18 ff.; LUZZATTO, *Per un'ipotesi sulle origini e la natura delle obbligazioni romane*, Milano, 1934, p. 27 ff.; ID., *Le organizzazioni preciviche e lo Stato*, Modena, 1948. More recently, DE MARTINO, *Storia della costituzione romana*[2], vol. I, Napoli, 1972, Chapters 1-6; and CASSOLA and LABRUNA, *Storia delle istituzioni repubblicane*[3], Napoli, 1991, Chapters I-III. The latter authors also refer to a number of preceding works (other than those cited above) by authoritative Roman law scholars like Grosso, Coli, De Francisci and Voci.

Indeed, Bonfante's and other scholars' theory of «diritto intergentilizio» — and of a «federal» origin of the Roman *civitas* — was sharply criticized by ARANGIO-RUIZ (V.), *Le genti e la città*, inaugural lecture, University of Messina, 1914, reprinted in *Scritti di diritto romano*, vol. I, Napoli, 1974, pp. 521-587. The latter author actually extended to international law his doubts about the reality or the juridical nature of «diritto intergentilizio». In his words: «Da prima la valutazione delle offese e dei mezzi di ritorsione fu nell'arbitrio delle singole genti; ma successivamente si formò fra le genti una comune opinione, che si può chiamare diritto intergentilizio *con la stessa catacresi con cui oggi si parla di diritto internazionale*» (p. 12, emphasis added).

isting within the community are normally so thoroughly penetrated by the nation's legal order as to be absorbed within the legal fabrics of legal persons or similarly public or private subdivisions (para. 15, *supra*). Nevertheless, even in the most cohesive national communities integration is rarely, if ever, so absolute as to totally exclude the presence of factual groups and intergroup relations. Apart from the aggregations of human beings constituting — as shown *ibidem* — the so-called *substrata* of corporations and personified or non-personified subdivisions of the national community, important examples are ethnic minorities and majorities, religious groups, non-personified political parties or factions, trade unions, and unlawful or legally indifferent associations (97). Entities like these frequently take postures of such a nature as to thwart the national legal system's normal operation with regard to both their internal and external relations. In situations of ethnic, political or social tension some groups appear in such a stance as to be viewed as «States within the State». With regard to some instances of group relations in contemporary societies, one must actually register more than just analogies. A typical case is that of political parties aiming at a change of the country's régime. Whenever such groups engage in civil strife, they assume the features of an insurgent party and eventually of a general or local *de facto* government, becoming thus participants in international relations proper and subjects of international law. The conflictual situations in Yugoslavia and Somalia are recent instances.

(*c*) Be it as it may of such occurrences, inter-State relations do present, on the other hand, unique features in comparison with other forms of intergroup relations. Unlike the intergroup relations marginally present within a national society, the relations among States do not adversely confront themselves with an interindividual legal order «of a whole». International relations are thus a far more firmly settled phenomenon. The partial integrative processes that at times have led to the formation of larger political aggregations are more than counterbalanced by disaggregative processes resulting in a multiplication of the coexisting units. It is hardly necessary to recall the recent dismemberment of the USSR or Yugoslavia.

Notwithstanding the striking increase of the interdependence among peoples and despite the development of international communication facilities in the course of the last century, the most per-

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(97) Interesting suggestions in ROMANO, *L'ordinamento giuridico* [note 64, *supra*], pp. 146 ff., esp. pp. 151 and 211 f. On group relations in primitive societies, see also KELSEN, *General Theory* [note 1, *supra* ], pp. 55-57.

ceptive scholars seem still to be convinced, unlike a growing number of constitutional lawyers, that the inter-State system is as firmly established as ever ([98]). And it is precisely the centuries-old firmness of the inter-State system that determines, together with all its other features, the dualistic relationship of international law and interindividual law.

(*d*) Indeed, international law remains essentially inter-State even where its norms extend their object — as they do with increasing frequency — to the consideration of interests or behaviours of individual human beings and legal persons of national law. The rights/obligations legal *relationships* directly instituted by such norms are relations between States or similarly independent entities. Interindividual interests or behaviours, and their regulation under the municipal law of the various States or under the law of international bodies, is just the object of international norms addressing themselves to States ([99]). It is therefore difficult to share the widespreading view (Parry, Jennings) that the structure of the international legal system has altered significantly as a consequence of relatively recent developments *ratione materiae*. These developments only affect the *contents* of international rules — contents that have been impressively expanding, especially in the years following the second World War. I do not believe, in particular, that such developments justify the notion that international law, formerly *exclusively* inter-State, would now be inter-State « primarily ». Another matter, in my view, is what I would call « international-interindividual law » (paras. 33 ff., *infra*).

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([98]) I refer to Eric STEIN's very remarkable *International Integration and Democracy* [note 69, *supra*], particularly to the following passage of his conclusive thoughts: « History has taught us not to underestimate the power of utopia. Too often in the past it has proved difficult to foresee a systemic change that would turn a utopian vision into a "political project" (Falk)... But some of the ideas adumbrated in this section, especially the world legislature, postulate a radical transformation of the present international system. As international integration advances, new actors — intergovernmental, subgovernmental, and nongovernmental — have appeared on the international scene; their number and influence on the behavior of states have grown over the last few decades and hold "the potential [for] spillover of democratic practices". However, in view of the enormous differences in the size, population, and powers of states (which are not about to fade away), as well as the persistent, deep-rooted differences in the peoples — cultural-ethnic, economic, and political — there is little evidence that the democracy-legitimacy gap can be filled by "Great and desperate Cures," [John BUNYAN's *Good News for the Vilest of Men. The Advocateship of Jesus Christ* (Greaves, ed., 1985) (1668)] at the global level at any rate. On the other hand, there is ample evidence that creative, idiosyncratic arrangements commensurate with the respective level of integration are called for in both the national and the international institutions. » (at p. 534).

([99]) Further precisions in paras. 33 ff., *infra*.

One must stress that it would be incorrect to understand the fact that international law only creates rights and obligations for States and similarly independent entities as a limitation comparable to the conventional *ratione personarum* delimitations of given norms or sets of norms in any (national) legal system. That kind of limitation derives from a choice made by the «corps social», or the legislator, in order to distinguish, among the *potential* addressees of given legal norms, those who shall from those who shall not be subject to the obligations, or enjoy the rights, deriving from such rules. This may also happen of course, *mutatis mutandis*, in international law. For instance, international organizations and the Holy See are generally considered to be «incapable» of participating in certain kinds of international legal relationships or otherwise excluded from the sphere of the addressees of the relevant rules. A different matter, however, is the exclusion of States' dependent entities — such as individuals, private corporations and public subdivisions of municipal law — from the *emprise relationnelle* of international law. This is an inherent limitation deriving from the uniqueness of the kind of relations international law establishes, and it is only apt to establish ([100]).

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([100]) The notion of the existence of any matters excluded from the scope or domain of international law was entertained for about three quarters of a century within the framework of the superficial concept of «domestic jurisdiction» as a *ratione materiae* delimitation. Vainly amended by the concept of domestic jurisdiction as the area of «*non réglé*» (by international law) as opposed to «*réglé*», that theory has been — in my view successfully — set aside by a «vertical» concept of «domestic jurisdiction» (*Le domaine réservé* [note 4, *supra*] and *The Plea of Domestic Jurisdiction: Substance or Procedure?*, in *Fifty Years of the International Court of Justice* [note 4, *supra*], pp. 440-464).

The perception of the vertical limitation of the scope of international law explains the sense in which one can say that international law and national law operate in different spheres, fields or domains. Considering that the vertical limitation excludes that international law may create, namely «institute» — instead of merely covering by inter-State obligations — interindividual rights/obligations relationships, and considering that it is also excluded that the competences exercised by States *vis-à-vis* their subjects are attributed by international law, one can rightly say that interindividual relations within national societies remain essentially within the domain of national systems. In so far as international law is concerned, interindividual relations within a national society are actually within the *exclusive* domain of the legal system of that society.

This proposition is actually a reciprocation. Just as the relations between States as independent collective entities escape by their nature the scope of municipal law, in the sense that it is not for any national law to create legal relationship between two or more States *qua* persons of international law, it is right to say that the relations between States (*qua* international persons) are within the *exclusive* scope or domain of international law.

25. It seems clear at this point on what basis and in what sense international law and national law are distinct and separate.

International law and national systems have distinct sociological *raisons d'être*, are created by distinct rule-making, rule-determining and rule-implementing procedures, operate within distinct aggregations of subjects. Another way to put this is that the ultimate cause of the separation resides in the fact that international law and municipal law are not homogeneous normative systems ([101]). While belonging both, despite their marked qualitative differences (paras. 30-32, *infra*), to the world of law in a broad sense (as distinguished from morality and religion), they differ *in radice*, in view of the kind of relations they create and from which they emanate, also from the viewpoint of their effectiveness (para. 39, *infra*).

The discontinuity between international law and each national system — as between international law and interindividual law in general (para. 35, *infra*) — is actually even more pronounced than the discontinuity between any two or more national systems. In the latter case, it is a matter of separation between the primary and secondary law-making processes of distinct interindividual communities and the several sovereignties of their respective States (but see para. 27 (*b*), *infra*). In the case of international law and national law, the separation of *milieux* and law-making processes is deepened by the qualitative difference between inter-State rules and interindividual rules: between rules finding their *raison d'être* in inter-State relations and rules finding their *raison d'être* in the relations among individuals ([102]).

It follows that both systems are, as original legal orders, supreme within their respective social bases (*milieux*). International law is supreme on the inter-State plane; national law is supreme in each State's domestic sphere. International law has the last word before international courts; national law has the last word within the national community.

On the other hand, dualism does not mean, unless grossly misunderstood, reciprocal ignorance between international law and national law. On the contrary, the founders of the dualist doctrine

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([101]) *Le domaine réservé* [note 4, *supra*], p. 451 ff., esp. notes 858-862 and pp. 458-463.

([102]) When I speak of intergroup rules I do not refer, of course, to rules concerning relations of legal persons (*personnes morales*) which also are, in my view, interindividual rules [para. 15, *supra*]. By «intergroup rules» I mean the rules governing the relations between factual groups: a matter dealt with in para. 24 (*b*), *supra*.

made clear (paras. 8 and 10, *supra*) that international law and national law are factually and permanently interdependent and factually interrelated. Despite such an intense interrelationship, however, national norms and legal situations are factual from the viewpoint of international law. This is just an application of what Perassi and Morelli call *exclusivité* of separate legal orders and the *relativity of legal values* ([103]).

It will be shown further what is the impact, on this state of affairs, of the law of international and «supranational» bodies (paras. 33 ff.).

26. Considering the misunderstandings of which the dualist theory is not infrequently the object, it may be useful to clarify the matter by comparing the present writer's understanding of dualism with a few particularly significant scholarly positions.

Rightly to begin with Kelsen, it is perhaps not entirely superfluous to take note of the fact that that eminent Master of monisn was originally a dualist ([104]). Nevertheless, he presents dualism rather am-

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([103]) These and other aspects of the systemic distinction and factual compenetration of international law and national law are thoroughly analyzed and espounded, especially in the Italian and German doctrine. For the former see in particular MORELLI, *Nozioni di diritto internazionale* [note 4, *supra*], pp. 75-97, and PERASSI, *Lezioni di diritto internazionale* [note 41, *supra*], pp. 26-30.

Another matter is, of course, that particular kind of interaction by which international law draws terms, concepts and models from municipal law. On this phenomenon see SHAHABUDDEEN, *Municipal Law Reasoning* [note 1, *supra*], pp. 90-103; and *infra*, para. 31 and notes 122-125 thereunder.

([104]) I find this surprising information in KUNZ, *La primauté du droit des gens*, in *Revue de droit int. et de législation comparée*, 1925, pp. 556-598, at pp. 566-567. Kunz refers to Kelsen's *Über Staatsunrecht*, in *Zeitschrift für das privat- und öffentliche Recht der Gegenwart*, 1914, p. 1 ff. I can only rely, for the moment, on Joseph Kunz's reading. However in this writing Kelsen appears to consider the State only from the standpoint of *Staatsrecht*. No hint, it seems, at an international aspect of the matter.

Be that as it may, some of the language used by Kunz at pp. 566-568 of his *La primauté* makes me rather curious about how and when precisely Hans Kelsen happened to move from a dualist *prima maniera* of this *Unrecht* to his monist *seconda* (and definitive) *maniera*. I am intrigued, in particular, by Kunz's reflection (p. 567 of *La primauté*): «Pourquoi ne pas pousser plus loin ce recours [le recours ...à "la norme d'origine d'un Etat"], au-dessus de la Constitution d'un seul Etat, jusqu'au droit des gens? Le besoin de ramener à l'unité tout ce qui est droit devait poser impérieusement le problème de la relation entre le droit national et le droit des gens». Kunz points here at Verdross as «[le] premier à adapter les doctrines de Kelsen à la théorie du droit des gens» [en formulant] «les différentes solutions possibles du problème de la relation entre droit interne et droit international» (*ibid.*); and cites Verdross' *Zur Konstruktion des Völkerrechts* of 1914; but he does not add any enlightment with regard to Kelsen's very first monistic stand. I envy my Austrian and German colleagues for their ability to get directly to the available sources.

biguously when he states that according to dualists « the two systems regulate different subject matters. National law, it is said, regulates the behaviour of individuals, international law the behaviour of States » ([105]). This is not a genuine dualist point. For a dualist, international law and national law deal perfectly well, as explained in the preceding paragraph, with the same *materiae*, namely the same « subject matters ». Nationality is just one example of many; uniform private law or private international law conventions are other examples.

The dualist distinction, far subtler than one of just « subject matter », is one of relationships and *milieux*. International law may well contemplate nationality, as it obviously does, for a number of international legal purposes, namely in order to tell States what they may, may not, or must, do about nationality or nationalities; but only national law is able to endow an individual or a company with a given nationality or revoke it. An international legal rule granting nationality to an individual or a company would make no sense. More correct, of course (in Kelsen's passage quoted in note 105, *supra*), is the distinction based upon the subjects.

Another ambiguity, however, lurks therein behind the verb « regulate ». International norms dealing with nationality do not regulate nationality; they regulate the relations among States — and their rights/obligations — relating to nationality, leaving to States the task of regulating the matter. Similarly, a convention on the uniform law of sale or on uniform conflicts of laws rules on the bill of exchange does not regulate the sale or the conflicts of laws it contemplates. It regulates simply the participating States' obligations relating to the regulation of the relevant matter.

Of course, *relations* between States are the typical « subject matters » of international law, while *relations* among individuals or legal persons are the typical « subject matters » of national law. In a proper dualist view that excludes surely neither: (*a*) that relations between two States *in the sense of national law*, namely relations between States as legal persons in their respective (national) legal sys-

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([105]) KELSEN, *The Principles of International Law*, New York, 1952, p. 404: « The mutual independence of international law and national law is often substantiated by the alleged fact that the two systems *regulate* different subject matters. National law, it is said, regulates the behaviour of individuals, international law the behaviour of States. We have already shown that the behaviour of States is reducible to the behaviour of individuals representing [*sic*!] the States. Thus the alleged difference in subject matter [*sic*!] between international and national law cannot be a difference between the kinds of subjects whose behaviour they *regulate* ».

tems [para. 13 and note 85, *supra*], are «governed» — namely established as juridical relations — by the national law of one of them; nor, (*b*) that international uniform law conventions set forth — as the object of States' international obligations to adopt them in their respective legal systems — rules intended to govern, within the said systems, relations among individuals or legal persons (of national law).

Kelsen's presentation of dualism is also questionable where, in the same quoted passage, he describes as State representatives the individuals that dualists describe as State organs.

27. Fitzmaurice's dualistic position is firmly announced from the beginning of his very interesting pages:

> «First of all..., a radical view of the whole subject may be propounded to the effect that the entire monist-dualist controversy is unreal, artificial and strictly beside the point because it assumes something that has to exist for there to be any controversy at all — and which in fact does not exist — namely a *common field* in which the two legal orders under discussion both simultaneously have their spheres of activity. It is proposed here to state the case for this view. In order that there can be controversy about whether the relations between two orders are relations of *co-ordination* between self-existent independent orders, or relations of *subordination* of the one to the other, or of the other to the one — or again whether they are part of the same order, but both subordinate to a superior order — it is necessary that they should both be purporting to be, and in fact be, applicable in the same field — that is to the same set of relations and transactions» ([106]).

(*a*) This surely dualistic stand, summed up further on in a two-page «Resulting position» — starting with a footnote showing the author's reluctance to depart from Kelsen ([107]) — is weakened, in my view, by some ambiguous conceptualisations.

One ambiguity is the presentation of the difference between international and domestic law in terms of «fields» of application: a

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([106]) *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, in *Recueil des cours*, 1957-II, p. 71 (emphasis in the original).

([107]) Note 1, p. 79.

concept, that of «fields», that might convey — perhaps less easily but not quite unlike Kelsen's presentation of the dualist theory in terms of different «subject matters» — the notion of a surely inexistent *ratione materiae* separation ([108]).

A second even more serious ambiguity is inherent in the author's insistence — in two instances at least — on a questionable equation of the relationship between international law and domestic law with an allegedly identical relationship between two national legal systems, such as the French and the English. In one of those instances one reads that the «supremacy of international law in [the international] field»:

> «is, rather, a supremacy of exactly the same order as the supremacy of French law in France, and of English law in England — *i.e.* a supremacy not arising from *content*, but from the *field of operation* — not because the law is *French* but because *the place, the field,* is *France*» ([109]).

(*b*) This passage shows three inconsistencies with regard to dualism proper. Firstly, while international law and domestic law are made radically different by the nature of their respective social *milieux* — the former operating in a *milieu* of factual collective entities and the latter in interindividual communities — domestic legal systems all relate to interindividual communities. This heterogeneity of national law and international law explains not just separation but a host of qualitative differences accentuating the separation (paras. 23 f., *supra*, and 30-32, *infra*). With regard to interaction, in particular, while domestic legal systems are so interchangeable as to «borrow», so to speak, chunks of private law one from the other by means of conflicts of laws rules, international law and domestic law are far less interchangeable, their interrelations (as particularly explored and classified by dualist scholars) usually involve not direct «exchanges» of rules but less invasive forms of interaction (para. 8 (*b*), *supra*). Secondly, the ambiguity inherent in the equation with the relationship between domestic legal systems is emphasized, in the quoted passage, by the yoking of the reference to «France» (as the seat of the French legal system) with such terms as «the place, the field» ([110]). Apart from the difficulty of identifying the

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([108]) *Le domaine réservé* [note 4, *supra*], *passim;* but see also note 100, *supra.*
([109]) *The General Principles* [note 106, *supra*], p. 72. Italics are in the original.
([110]) *Ibidem.*

scope of any domestic legal system by a merely territorial criterion, it is hard to see in what sense international law has a geographical «place» or «field» (or «place, field») distinguishing it from France in a sense comparable to the sense in which the French legal system may be distinguished (for all or given purposes) from England's legal system. Is the scope or «field» of international law — *qua* inter-State legal system — not simply universal?

(*c*) Much as they affect, *à la rigueur*, the consistency of the cited author's dualism, the noted ambiguities are somewhat compensated by the thoughts set forth within the same context about what he calls the «difficulties of the view that the State is only an aggregation of individuals». This paragraph's five pages contain a critique of what Sir Gerald calls the «artificial», or «fiction[al]», «conception» of the State as an «aggregation of individuals»: a keen critique which although in my view unjustified with regard to Kelsen's (correct) conception of the State from the standpoint of domestic law, seems to me appropriate for the State in the sense of international law. Had these pages been available to me in 1949-1951, when I worked on *Staat im Sinne des Völkerrechts*, I would have found therein some support in my search for that factual concept I finally worked out; and had Sir Gerald been able and willing to read, before his 1957 Hague course, my 1951 book's difficult Italian, he might have seen perhaps some reason to push his analysis of the said «difficulties» far enough to conclude — as I had rightly or wrongly concluded — that the problem did not consist, or not so much, in questioning Kelsen's or anybody else's juridical (or «fictional», or «artificial») concept of the State from the standpoint of both national as well as international law, but rather the problem of whether the State of international law was really the same animal as the State of national law, whether, indeed, the State of international law was not a visible corporeal entity passively acknowledged by international law, rather than the legal person *created* by national law ([111]).

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([111]) Fitzmaurice's concurrence is interesting — p. 78, note 1 of the cited *General Course* — with those who stress that a *common field* exists between international law and national law «because *the State is common to both the national and the international field*, and has obligations and relations *in both*». My answer is that it is not the same entity in the two fields. In each field there is the State that belongs to it. In national law there is the interindividual institution, the legal order. On the international plane — there is the State of international law. Each system «produces», or respectively merely acknowledges, the State which ... becomes it. It will be noted incidentally that two separate «fields» are not conceivable for the legal per-

28. Account must also be taken of the important, moderately undecisive dualism expressed by Jennings and Watts in their 1992 edition of Oppenheim's treatise. According to these authors:

> « These differences in doctrine [between monists and dualists] are not resolved by the practice of states or by such rules of international law as apply in this situation. International developments, such as the increasing role of individuals as subjects of international law, the stipulation in treaties of uniform internal laws and the appearance of such legal orders as that of the European Communities, have tended to make the distinction between international law and national law less clear and more complex — than was formerly supposed at a time when the field of application of international law could be regarded as solely the relations of states amongst themselves. Moreover, the doctrinal dispute is largely without practical consequences, for the main practical questions which arise — how do states, within the framework of their internal legal order, apply the rules of international law, and how is a conflict between a rule of international law and a national rule of law to be resolved? — are answered not by reference to doctrine but by looking at what the rules of various national laws and of international law prescribe » ([112]).

This passage, significantly different from Oppenheim's above-quoted thinking of 1905, calls for the following comments: (i) far from not resolving the differences between monists and dualists, the practice of States has been and still is decisive; the differences in doctrine *are* resolved « by the practice of states and by ...rules of international and national law », as shown by Triepel (in 1899 and 1923), and by Anzilotti (in 1902, 1905 and 1929); (ii) although the evoked « international developments » make the distinction more « complex », they do not make it less « clear »; in particular, the presence of international and even « supranational » organs — and their internal law (paras. 33 ff., *infra*) — makes the matter more complex,

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sons (or other subdivisions) of national law. Within the latter, the entity is the same both within and outside of its (partial) order. That Fitzmaurice (as well as Anzilotti) misses the concept of the State in the sense of international law is noted in *Le domaine réservé* [note 4, *supra*], p. 455. With respect, he also misses, though (as well as Anzilotti), the proper concept of the legal person.

([112]) *Oppenheim's International Law*[9], vol. 1 (*Peace*) (Jennings and Watts eds.), London, 1992, p. 54.

surely, but not less clear (para. 35, *infra*); (iii) although the so-called humanization of international law has obviously intensified in the course of the last decades, human interests and behaviours have always been, *inter alia*, among the objects of international law. The increased international legal relevance of the treatment of individuals (including the existence of international bodies open to them) does not make international law less inter-State or more interindividual than it formerly was. One thing is the content of international rules and the object of the obligations placed by them upon States, another thing is the basic *ratione personarum* scope of international relations and law, such scope remaining inter-State (para. 24 (*d*), *supra*); (iv) the question definitely *has*, as explained in para. 2 and note 5, *supra*, «practical consequences»; (v) the statement that the «practical questions» — namely «how is a conflict between a rule of international law and a national rule to be resolved» — are «answered not by reference to doctrine but looking at what the rules of various national laws and of international law prescribe» is — from my viewpoint — a rather ambiguous proposition. It depends on what one means by doctrine. Triepel's and Anzilotti's was, and I believe still is, legal doctrine and it was based, clearly, on *data* drawn from the practice of States as well as the rules of international law and national law. It is not contended, surely, that those scholars worked out their theory from pure speculation (para. 8 (*a-b*), *supra*); (vi) the fact that the issue is resolved not «by reference to doctrine» (alone!) does not mean that doctrine should refrain from tackling it, precisely, «by looking at what the rules of various national laws and of international law prescribe», after which the doctrine may well provide useful data; (vii) that one should look at the rules «of various national laws» in the first place is already a decisive dualist/pluralist sign (para. 11, *supra*).

On the other hand, I fully share the quoted authors' view that:

> «It is of importance not to confuse, as many do, the question of the supremacy of international law and of the direct operation of its rules within the municipal sphere. It is possible to deny the latter while fully affirming the former» ([113]),

provided, though, that it be understood that the supremacy of international law is direct only on the international plane, notably before

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([113]) Footnote 1 to para. 19, p. 54.

international tribunals. In the domestic sphere national law is supreme, international law prevailing only where national law implicitly or explicitly so provides. It follows that, *à la rigueur*, a « direct » operation of international law takes place in the national sphere only by way of saying, namely, only where an international rule is implemented, by the operation of some constitutional, legislative or judicial rule (of national law), which means not, really, « direct »; and surely not direct by virtue of international law itself (not even where the automatic adaptation of national law were the object of an international obligation) (paras. 6 (*a-c*) and 24 (*c*), *supra*) ([114]).

29. As a persistent dualist I could perhaps be content with the fact that more than a few authoritative scholarly pronouncements acknowledge that the dualist construction is, in essence, pretty close to the relevant realities. That acknowledgement, however, is mostly, in my view, incomplete or ambiguous. According to Partsch, for example, it would be « premature to state » whether « the rule of the supremacy of international law has been accepted everywhere in the domestic sphere » ([115]). One matter, though, is whether this is true, another matter, clearly, is whether the actual relationship between international law and municipal law is one of supremacy of the former over the latter also within the sphere of national law. The confusion between these two *dicta* is one of the main sources of obscurity and misunderstandings. Nor does it seem correct to conclude, as the same author does:

> « Whether a conclusive formula can be given for the actual relationship between international law and municipal law remains in question. It certainly cannot be found in adherence to either of the traditional theoretical approaches. Dualists have had to introduce so many elements from the opposing concept that their position appears weakened. Likewise monists have had to make considerable concessions in the light of State practice, which has deeply affected their initial idealistic concept. » ([116])

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([114]) The prevalently dualist approach of the quoted authors does emerge, however, from the comparative overviews of a number of national systems at pp. 54-86 of the treatise cited in note 112.

([115]) PARTSCH, *International Law and Municipal Law*, in *Encyclopedia of Public International Law*, vol. 10, Amsterdam, 1987, p. 238 ff.

([116]) *Ibid.*, p. 255. See also in the same volume 10 of the *Encyclopedia*, RAMBAUD, *International Law and Municipal Law: Conflicts and Their Review by Third Sta-*

Dualism has surely weakened in the literature of international law, not in world juridical realities.

In a vein similar to Partsch's, another scholar states:

> «Le monisme a certes connu, pour des raisons idéologiques et pratiques, une nette promotion au cours des dernières décennies. Il est pourtant loin de rendre raison de l'état du droit positif. Un fond dualiste subsiste, sans doute de façon irréductible. Le monisme résulte en effet d'un choix, constitutionnel ou jurisprudentiel suivant les cas, de sorte qu'il constitue non seulement une dérive mais à la limite une modalité du dualisme.» (117)

I believe that there is far more than just a «fond dualiste». There is just «dualisme»; and that «monisme résulte ... d'un choix, constitutionnel ou jurisprudentiel» is an oxymoron. The constitutional or jurisprudential choice manifestly occurs at the national level, namely, as I understand it, on a dualist, not a monist premise.

### D. *Samples of Unique Features Distinguishing International Law from National Law*

30. The dualist/pluralist theory is sufficiently grounded in the works of its founders and considerably invigorated, I immodestly believe, by the proper concept of the State in the sense of international law as updated in paras. 15-22, *supra*, for any further demonstration to be necessary. It is worth adding, though, that the soundness of the theory is in perfect accordance with the uniqueness of the features revealed by international law when compared with national systems.

This applies, first of all, to the «horizontal» structure of the system, lacking as it is in that kind of «secondary» norms (in Hart's sense) that, even in the less advanced national systems, provides for the organized creation, determination and implementation of the law. Euphemistically described by monists as a simple matter of «decentralization» — presumably as hypothetical as Kelsen's *Grundnorm* or the *Grundnormen* of national legal systems — the

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*tes*, and SCHREUER, *International Law in Municipal Law: Law and Decisions of International Organizations and Courts*, pp. 257-268.

(117) SUR, in COMBACAU and SUR, *Droit international public*[3], Paris, 1977, pp. 178-179.

nature of international relations and international law is such that the only means to develop the necessary rules are in the hands of States as factual political entities, namely, as persons but not institutions of international law; and the only available legal instrument for States to use — reluctant as they are to resort to any revolutionary processes — is the purely inter-State compact. States are well aware, indeed, that the inter-State compact is inapt, even when it sets up international bodies and even where the contracting parties refrain from expressing sovereignty-saving clauses, to establish real organization, namely «secondary» rules (in Hart's sense) subjecting States to authoritative law-making, law-determining and law-enforcing procedures. All that the inter-State charters establishing international organs seem apt to bring about, as will be recalled further on (para. 34, *infra*), are systems of more or less perfect inter-State obligations, the implementation of which remains basically in the hands of the member States themselves — Kelsen *docet* also here with his lucid theory of collective security ([118]). The present writer regrets to have used the term «ordinamento» in an early work of his [note 4, *supra*]. «Diritto» would have been more appropriate ([119]).

Just as it affects dramatically the structure of the system, the inter-State nature of the sources of international law affects the contents of its rules, which explains why a distinguished scholar from Cambridge can say, about international law, that

> «[a] legal system which does its best to make sense of murder, theft, exploitation, oppression, abuse of power, and injustice perpetrated by public authorities in the public interest, is a perversion of a legal system» ([120]).

It is hardly necessary to specify that international law goes so far in «perversion» as to have tolerated for ages, and still tolerates (or ineffectively condemns), war, whether just or unjust, defensive or aggressive, not to mention the uses of force «short of war» and the

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([118]) KELSEN, *Collective Security under International Law, International Law Studies*, vol. XLIX, Washington, 1957.

([119]) I (inconsistently) also regret, though, to be unable to agree, in that respect, with ALLAND, *De l'ordre juridique international*, in *Droits*, 2002, pp. 79-101. Much as I share the ideal motivations of the author's article, I believe that to speak of an «ordre juridique international» is not the best way to make laymen — and students in the first place — aware of the nature of international law proper. More in para. 38 and note 142, *infra*.

([120]) ALLOTT, *Eunomia* [note 86, *supra*], p. xvii.

most recent, inadequately resisted, attempt to resuscitate that «preventive» war that we all thought had been disposed of by the Charter and customary law. The fact that the conduct of war and other forms of armed conflict are, so to speak, «regulated» — in growing detail — does not reduce the antinomy ([121]).

31. The lack of general «secondary» norms providing for authoritative law-making, law-determining and law-enforcing leaves the bulk of inter-State legal relationships imprisoned, so to speak, within the strait-jacket model of an inorganic «private law writ large» ([122]). This was stressed long ago by Holland's *mot célèbre* and confirmed by Sir Hersch Lauterpacht's «private law sources and analogies» ([123]): — analogies egregiously collected although less consistently brought to bear, in my view, upon the monistic trend of the latter scholar's thought. Indeed, examples of an ubiquitous pattern of inorganic law can be found in all the chapters of any treatise on international law.

(*a*) The status of territory (and spaces in general) under international law is unique as compared to the status of territory in the national law of any unitary or federal State. The difference is clearly between the private law model of inter-State relationships on the one hand, and public law relationships within national legal systems orders on the other hand ([124]). The legal relations among

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([121]) To such an inorganic, merely horizontal set of primary rules, hardly sustained by secondary rules, the monists oppose the vertical construction of rules directly embracing the world human society, as recalled in paras. 2 ff., esp. 5, *supra*. Within that imaginary construction monist writers do not hesitate to place international organizations (paras. 33 and 35, *infra*).

([122]) HOLLAND, *Studies in International Law*, Oxford, 1898, p. 152, and TRIEPEL, *Les rapports* [note 1, *supra*], pp. 99-100.

([123]) *Private Law Sources and Analogies of International Law*, London, 1927. But see also Shahabuddeen's learned contribution cited in note 103, *supra*.

([124]) In addition to *Dinamica* [note 4, *supra*], at pp. 55-75, *L'Etat* [note 4, *supra*], p. 50 ff. On spaces in general see BATTAGLINI, *La condizione dell'Antartide nel diritto internazionale*, Padova, 1971, p. 971, esp. Chapter II of the first Part (p. 142 ff.), and Chapter II of Second Part (p. 235 ff.), and MENGOZZI, *Il regime giuridico del fondo marino*, Milano, 1971, esp. p. 122 f.

The status of territory and the interindividual relations relating thereto are characterized in national law by the public law nature of the relevant interests and relationships. If not a constitutive element in the physical sense (a question we leave aside for the present purposes) the territory is definitely qualified by any national constitution as an essential element of the State (*Dinamica* [note 4, *supra*], p. 55 ff., esp. pp. 60-63). The study of the relations among States concerning territory shows instead that in international law the territory appears to be a very important pertinence of most States as international persons (although not absolutely indispensable for in-

States concerning nationals and aliens suggest not less clear analogies with the private law of ownership ([125]). However great the merits of the development of an international law of human rights, that pattern remains essentially unaltered at regional as well as at universal level. The exceptions only concern circumscribed integrated and institutionalized systems of human rights protection or international criminal jurisdiction within the framework of the legal systems of the member States or within the internal law of the relevant international bodies ([126]).

(*b*) Peculiar models also prevail — despite widespread *prima facie* evaluations — in the determination of the «acts» or «omissions» of States and their «acts of will». A considerable part of the doctrine seems inclined to see a role of national and/or international law in a supposedly «legally conditioned» imputation. What happens seems instead to be the mere factual appurtenance of a fact to a factual entity, the attribution of that fact to the State by an essentially factual process carried out by the observer (hopefully a judge), the act or omission ultimately to be evaluated and possibly sanctioned according to the applicable (international) norms ([127]).

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ternational personality), but in any case an (external) object in the State's dominion, rather than a constitutive element (*Dinamica*, pp. 63-75).

([125]) *Dinamica* [note 4, *supra*], Chapter IV, Sect. 2 (pp. 75-92).

([126]) Paras. 34 ff., *infra*.

([127]) It is perhaps the noted dominant view of «imputation» that prompts Professor CHINKIN's preoccupation (*A Critique of the Public/Private Dimension*, in *European Journal of Int. Law*, 1999, p. 387 f.) that the «private dimension» might negatively affect the attribution to a State of liability for human rights violations. The distinction between public and private (in internal law) is not relevant for the purposes of attribution (by Chinkin called «imputation») of the fact or omission to the State; it is relevant for the imputation of liability for actions or omissions that appertain to the State as a matter of fact. The gap rightly lamented by Chinkin resides not in non-attributing given facts or omissions to the State. It resides in not qualifying those acts or omissions as violations or breaches involving liability. It is not clear to me in what sense CRAWFORD (*Revising the Draft Articles on State responsibility*, *ibid.*, 1999, pp. 438-440, esp. p. 439) responds to Chinkin's concerns. I suspect (from his citations) that he also shares that dominant concept of legal imputation (on the basis of international and/or national law) that is a consequence of the arbitrary concept of the State of international law as a legal person, not to mention the impropriety of the concept thereof.

As explained in *Gli enti* [note 4, *supra*], pp. 335-360 where the matter is treated comprehensively in comparison with the so-called actions of legal persons (*ibid.*, pp. 121-170), the international legal scholars' tendency to «juridicize» the action and will of the State and other primary persons of international law is favoured somehow (due to the predominance of rudimentary concepts of legal persons), by the diametrically opposite tendency of domestic law theorists of legal persons to «factualize» the «action» and «will» of the latter.

My position on the so-called «imputation» of «facts» or «acts» to the State as

The Vienna Convention on the Law of Treaties indicates that not much has changed — except for a few presumptions — since Donato Donati explored the relationship of constitutional law and international law in the conclusion and the effects of treaties ([128]). Articles 4-11 of the ILC draft on State responsibility confirm — as well as Articles 5-15 of the 1996 first-reading draft — the essential factuality (except, here again, for a few presumptions) of the conditions and the process of attribution of an unlawful act to a State for the purposes of liability under international law.

One finds unique features also in the frequently confused treatment of the problem of fault from the viewpoint of international law, wrongly neglected, in my view, by the ILC throughout its work on State responsibility ([129]). In addition to fault in general, one must stress the perfect admissibility of a *mens rea* (namely of *dolus* or wilful intent) on the part of a State in the sense of international law. The arbitrary extension to States (as international persons) of the

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an international person (also set forth in *L'Etat* [note 4, *supra*], pp. 311-331) is well understood and espoused by PALMISANO, *La colpa* [note 1, *supra*], p. 671 f. The latter author's position is maintained in *Les causes d'aggravation de la responsabilité des Etats et la distinction entre crimes et délits internationaux*, in *Revue générale de droit int. public*, 1994, pp. 629-674. I refer to both works also for the citation and discussion of the views of authors representing the above-mentioned tendency to «juridicize» (as a rule, or by way of exception) the so-called «imputation» of facts or acts. Condorelli, in particular, while taking in principle, as noted by Palmisano, a position identical to mine, sees instances where international law would take instead — by way of «stratification normative» — an active role in the «imputation» (of «facts» or «acts») process (PALMISANO, *La colpa*, p. 672, note 29). If in this «stratification» one envisages the addition of an international legal role to the role (allegedly) played by national law (or, in my view, just by fact as possibly reflected in national law) in the «imputation» process, one would envisage, in substance, an instrumentality through which the State would «act», for international legal purposes, in cases where in fact it does not.

On the «apparent» exception (to the «factuality» of the organization of States for international legal purposes) represented by diplomatic agents and military commanders, *Gli enti* [note 4, *supra*], pp. 360-371.

([128]) DONATI, *I trattati internazionali nel diritto costituzionale*, Torino, 1906. See also FERRARI BRAVO, *Diritto internazionale e diritto interno nella stipulazione dei trattati*, Pompei, 1964.

([129]) My position on fault is set forth in *State Fault and the Forms and Degrees of State Responsibility: Questions of Attribution and Relevance*, in *Mélanges Michel Virally*, Paris, 1991; and in the *Addendum* to my *Second Report on State Responsibility*, UN Doc.A/CN.4/425/Add.1, paras. 181-188. I deeply regret that an unfortunate circumstance (*Fine prematura* [note 4, *supra*], esp. pp. 110-114) deprived me of the chance to try to review (*inter alia*) the ILC's position on the role of fault in the law of State responsibility. Important reflections on the subject of fault are those of PALMISANO, *Colpa dell'organo* [note 1, *supra*], *passim* and esp. p. 671 ff. Further developments by the same author in his *Les causes d'aggravation* [note 127, *supra*], esp. pp. 645 f., 654 f., 661 f. and, conclusively, pp. 666-668.

maxim *societas delinquere non potest* is another serious consequence of the unrealistic concept of the State in the sense of international law. The realization that that State is a factual entity should dispel the superficial, albeit widespread, notion — manifestly contradicted every day by the perpetration by States of the most serious delinquencies — that States do not commit crimes. This obvious fact was vainly evoked within the ILC in order to reduce the unjustified opposition to the inclusion, in the articles on State responsibility, of adequate provisions for the determination of State crimes and their consequences.

32. A dualistic view of international law and national law and the perception that they grow and operate in distinct *milieux* are also indispensable in understanding domestic jurisdiction reservations as set forth in the Covenant, in the Charter and in instruments relating to the Hague Court's jurisdiction. The study of both the practice of the League and UN bodies and the jurisprudence of the Hague courts shows the untenability of the century-old concept of domestic jurisdiction as the area in which the State is not bound by international obligations. The only way to dispose of that concept — a concept sustained by monistic theories and their express or implied federal analogies — is to acknowledge that the domestic jurisdiction reservations relate not to fanciful *ratione materiae* distinctions of international law from municipal law but only to the vertical distinction between the domain of (interindividual) national law, on the one hand, and the inter-State function and scope of international law, on the other hand ([130]).

The unique features of international law also help to understand what the plausible origin of international law must have been. Contrary to a common monist belief, international law came into being not by a process of decentralization of the medieval *Respublica Christiana* (as maintained lately also by Grewe). It came into being — first among *seigneurs* and kings and later among cities, principalities, kingdoms and republics — as a distinct formation of inter-sovereign rules in the course of the centuries that marked the failing, and finally the demise, of the «universal» hierarchical order under Emperors and Popes ([131]).

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([130]) See para. 24 (*d*) and note 100, *supra*.

([131]) In other words, it originated not within the universal law but within the «gaps», and because of the «gaps» — temporal and spatial — in the increasingly ineffective universal law of Empire and Church. So, independent (sovereign) entities,

## Part III - *Completing the Dualist Theory: A Dualist View of the Law of International and «Supranational» Organs*

33. As noted in para. 5, *supra*, the second important shortcoming of dualism's original formulation is its scarce aptitude to offer a plausible systematization for a phenomenon that was only at its inception in 1899 and 1905. I refer to international and «supranational» organizations. We all miss, as a consequence, the views that Triepel and Anzilotti could have expressed over the impact of the constituent instruments of the League or the United Nations upon the structure of the international system. I guess, though, that they would have been very hesitant to accept the construction of international organizations proposed by the monist school.

The dominant, tendentially monistic, view is that inter-State compacts establishing international organs are perfectly suitable instruments to create legal supra/subordination relationships both as among the participating States and as between the international organ, on the one hand, and the member States and their respective constituencies (as, so to speak, one people), on the other hand. Indeed, monist writers place the whole law of international organizations — encompassing both the constituent instrument and the organs' internal law — under the all-embracing, *bon à tout faire*, umbrella of a universal legal system undergoing a centralizing process.

This is an unrealistic, arbitrary construction. In light of the nature of the State in the sense of international law and the features of international law deriving therefrom, one must distinguish two elements within the law of international and «supranational» organizations. On the one hand, there are the constitutive treaties and on the other hand, the internal legal orders of international organs. This is the essence of what I consider to be the dualist theory of interna-

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whether seigneurs, monarchs or States, did precede, historically and sociologically, whatever their names, international law. They were not, and never became later, creatures of international law.

I am unable to agree, in that respect, with BALLADORE PALLIERI (*Le dottrine di Hans Kelsen e il problema dei rapporti fra diritto interno e diritto internazionale*, in *Rivista*, 1935, p. 24 ff.) where he asserts a continuity between «l'antica Comunità cristiana, dipendente dal Papato e dall'Impero» and the modern international Community. While he rightly dates back the birth of international law to the centuries preceding Wesphalia, he implicitly accepts, by envisaging the said continuity, the monistic view that modern international law is the product of a «decentralization» of the Empire or *Respublica Christianorum*. I refer particularly to para. 7, pp. 64-74 of the cited article.

tional organization. Having dealt with the matter repeatedly since 1951 ([132]), I can get to the points that matter for the present purposes rather quickly.

34. (*a*) The constitutive treaties — for example, the UN Charter — remain, as shown elsewhere, within the sphere of ordinary treaty law. Neither the rules setting forth direct obligations and rights for the member States, nor the rules contemplating the establishing and financing of organs, bring about a significant alteration of the inorganic, horizontal structure of the international system. Nor is that structure altered by the rules contemplating the acts of the entity's organs and the legal consequences they bring about for the member States. Indeed, the rules in question introduce neither a change of the member States' condition of «sovereign equality» among themselves (under general international law), nor a relinquishment of their independence or external sovereignty to the organization. Such prodigies are achieved neither in the sense of placing the organization «over and above» the member States, nor in the sense of placing given member States (such as the permanent members of the Security Council) «over and above» other member States. Similar considerations apply to any international organ or organization. To put it bluntly, the relations governed by the constituent instrument are by no means «hierarchized» as in any national law organization worthy of the name.

(*b*) Turning to the other element to be singled out in the study of international organizations, a different matter from the constituent treaties are the mechanisms through which international bodies, large or small, carry out their activity. I refer to the interindividual structures composed of the members of the secretariats' staffs, of the delegates to collective bodies, and any other persons involved in the organs' activity. Obviously, the individuals manning those bodies are organized under legal rules; and the rules in question

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([132]) *Rapporti contrattuali*, reviewed by KUNZ as indicated in note 1, *supra*, was considered by CARNELUTTI, in *Rivista di diritto processuale*, 1951, I, pp. 376-77, by QUADRI, in *La comunità int.*, 1952, pp. 180-181, by ODDINI, *Elementi internazionalistici ed elementi interindividuali nell'organizzazione internazionale*, in this *Rivista*, 1953, pp. 403-412, and, more importantly, approved by MORELLI, *Stati e individui* [note 1, *supra*], *passim*. See also AGO, *Considerazioni su alcuni sviluppi dell'organizzazione internazionale*, in *La comunità int.*, 1952, pp. 527-567. Further developments on the matter are contained in *The Problem of Organization* [note 4, *supra*], the *Appendix* to *The Normative Role* [*ibid.*] and *The Friendly Relations* [*ibid.*], pp. 629 ff. and 199 ff., respectively. Add *The Federal Analogy* [note 4, *supra*].

have now for a long time been more or less sharply distinguished from the inter-State rules of the constituent instruments.

The size and complexity of these numerous (but very sparse) systems of interindividual law vary, of course, with the dimensions and functions of each organization or organ. There is a great difference, for example, between the relatively small number of rules governing the operation of an *ad hoc* arbitral tribunal or claims commission, on the one hand, and the huge fabric of the internal law of the United Nations, of a Specialized Agency or the EC, on the other hand. More important are some qualitative differences. Where organs perform strictly inter-State functions — such as addressing decisions, judgments, directives or recommendations to States (namely, international activity *stricto sensu*) — the subjects of the relevant organization's legal system are just the members of the organization's staff. Where, however, the organ is called by its statute, or by *ad hoc* arrangement, to carry out the so-called «operational» activities — namely, what I call «vicarious State activities» — its legal system's scope extends, beyond the staff, to all the persons involved in the organ's action, within the territory of one or more States ([133]).

35. (*a*) The relationship of the internal systems in question with international law on the one hand, and with national legal systems on the other hand, is a difficult topic not yet adequately investigated, in my view, by international legal scholarship (including the present writer) ([134]). These are no good reasons, however, for one to adhere to the unrealistic, wantonly optimistic presentation of the

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([133]) Although egregious examples are also to be found in the EC's and EU's legal system, important instances are the interindividual rules governing the dozens of UN field operations classifiable under the various generations of UN peace-keeping. A current impressive specimen is UNMIK. I refer to BOTHE and MARANLAN, *The United Nations in Kosovo and East Timor*, in *International Peacekeeping*, July-Dec. 2000; STAHN, *Constitution without a State? Kosovo Under the UN Constitutional Framework for Self-Government*, in *Leiden Journal of Int. Law*, 2001, p. 531 ff.; SANTORI, *The UN Interim Administration Mission in Kosovo and the Sovereignty and Territorial Integrity of the Federal Republic of Yugoslavia* (forthcoming).

([134]) The dualist view of international organization defended in *Rapporti contrattuali* [note 4, *supra*], was at the time particularly well received by CARNELUTTI, [note 132, *supra*]. Within the Italian school of international law I found considerable encouragement in Quadri's cited review but more particularly in MORELLI, *Stati e individui* [note 1, *supra*], esp. pp. 4-9, and ODDINI's article [note 132, *supra*]. A rather generic support came from AGO's *Considerazioni* [note 132, *supra*], p. 544, note 28 (referring to *Rapporti contrattuali*, p. 99 ff.). Despite his reiterated view (*ibid.*, note 27, and *L'organizzazione internazionale dalla Società delle Nazioni alle Nazioni Unite*, in *La Comunità int.*, 1950, p. 21) that the UN Charter did not alter the structure of the international society, AGO's *Considerazioni* was preceded, though, by the *caveat*

phenomenon offered by monist scholars, who — as shown *supra* — place the whole law of international organizations — encompassing both the constituent instruments and the organs' internal law — within their imaginary universal legal system. Regarding particularly the construction of the internal legal systems of international organs, the monist theory seems to take no account of the undeniable signs of diversity and discontinuity that mark the relationship between those systems on the one hand, and both the relevant constitutive treaties (together with general international law) and the several participating States' national systems on the other hand.

Such a view is untenable. From the standpoint of international law, the internal legal orders of international organs might appear, *prima facie*, to be sufficiently affected by the organ's constituent instrument as to be acknowledged, unlike national systems, as «derivations» of international law. On the other hand, the internal systems in question are direct creations, not so much of the respective constituent instruments themselves, as of the instruments' implementation by the participating States and by the individuals manning each mechanism. Secondly, the various organs' internal rules

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that in that writing he would *not* deal with the legal nature of international organizations, their personality and the character of their internal legal orders.

In a more appropriate context I propose to deal with both the critical remarks of the above-cited authors and with Balladore Pallieri's and others' criticism. I confine myself for the moment to referring to MORELLI's *Stati e individui*, where the status of the internal law of international bodies (including the so-called «supranational» ones) is dealt with at pp. 7 and 19-25. It contains a masterful condensation of that scholar's thought on the subject (not to mention a justified correction of an oversight mentioned in note 77, *supra*).

Regarding the status of the internal law of international organs I refer in addition to the views expressed by the monist and dualist scholars cited in *Rapporti contrattuali* [note 4, *supra*], notes 157 ff., and *Gli enti* [*ibid.*], notes 234-235, pp. 269-271; furthermore, to some of the (possibly numerous) views differing from mine. One is QUADRI's, according to whom (p. 180 of the review cited in note 106, *supra*) «[t]ali ordinamenti [of international organs], derivando dagli accordi internazionali, in conformità al principio che nel mondo del diritto "derivare" equivale ad "essere" sono senza dubbio "internazionali" (ordinamenti dei territori internazionali, delle unioni internazionali ecc.)»: where the cited reviewer, though, omits to specify whether the term «internazionali» purports appurtenance to international law or simply the acknowledgement (which I share) that the legal orders in question are just not «domestic», «national» or «municipal». The other different view is that expressed by SANTULLI, *Le statut international* [note 1, *supra*], note 17 at p. 14, where he explains his preference to speak of national law as «droit étatique» rather than «interne» by the wish to avoid confusion with «droit interne des organisations internationales, qui est entièrement "dérivé" du droit international dont il fait donc partie». I hope to be able to give soon more attention to these and other important views. In the meantime I also refer any interested reader to the discussion contained in *Gli enti* [note 4, *supra* ], p. 263 ff., esp. pp. 269 f. and 298-310.

address themselves to entities — individuals — whose international personality is not only generally viewed as problematic but is rightly contested, as noted in para. 19, *supra*, by dualist scholars. It is contested even where, as under instruments relating to human rights and criminal liability, individual rights or liabilities are expressly covered by the relevant treaty (paras. 24 (*d*)-25, *supra*). Furthermore, the internal legal systems of international bodies are characterized by a sufficient degree of hierarchical organization to appear strikingly different, in structure, from the inorganic, «horizontally» shaped inter-State system. The legal systems in question are characterized by that fully-fledged range of organised functions that is typical of national legal systems, including legislation, administration compulsory adjudication and enforcement. It is particularly so within the framework of UN operations recalled in the preceding paragraph.

(*b*) Factors such as hierarchical structure, indirect relationship with the constituent instrument, lack of international personality of addressees, thus seem to render the relationship of international organs' legal systems to international law similar to that of national systems. One might even conclude in the sense that the legal systems in question present such a degree of autonomy, as to approach, perhaps «originality», *vis-à-vis* both the constituent instrument and general international law. This would in turn seem to afford some basis for that relative independence enjoyed by the organization in dealing with its external relations, which qualifies it as a *primary* person under general international law. They are growths of interindividual law under the aegis of the constitutive instruments, but not a derivation thereof (no *couche* either).

However, a further in-depth exploration is indispensable, in my view, with regard to the problem of the necessary adaptation of international bodies' legal systems to both their respective constituent instruments and general international law. This is actually the aspect of the matter which I deem to be in the greatest need of more adequate study. One of the main issues in this respect is how far the international duty of automatic adaptation of the organs' legal orders to the rules of the constituent instrument and general international law — a duty in principle not present, in international law, in the case of national legal systems — is incumbent upon the participating States and how far it incumbs upon the individuals manning the organ's legal order. A difference must probably be acknowledged, here, from the problem of adaptation of national legal systems.

(*c*) As regards the status of the organ's legal order *vis-à-vis* States' legal systems, since the organ is established as a dependent body of the participating States, its legal order might again be seen in principle, *prima facie*, as a derived one. Considering, however, that the dependent relationship is established with all the participating States together, the generality of the latter sharing an interest in maintaining the organ's and its legal systems' impartiality, the resulting situation seems to be one of distinct, however relative and limited, independence from any one of the several relevant national systems. This seems to indicate, again, a high degree of autonomy, and perhaps « originality » of the organ's internal system *vis-à-vis* the participating States: an element offering a further basis for that *primary* personality of the organ under general international law referred to earlier.

Be it as it may of its analogies with, and differences from, national legal orders, the internal systems of international bodies interact — as well as national law — with both international law on the one hand, and national legal systems on the other hand. (They also interact, incidentally, *inter sese*: an area that is even less explored). Although some peculiarities would most likely emerge from further research on the subject, the interactions involving the internal law of international bodies in either direction (namely, international law and the several national systems) might well not reveal much more unity — or much less distinction and separation — than between national and international law. At most, the internal law of international organs might present, as suggested under (*b*), *supra*, a greater inclination to adaptation.

36. The relatively high degree of distinction of the myriad of international organs' internal systems from both their respective constituent treaties on the one hand, and the several participating States' national systems on the other hand, seems to indicate that the narrow dichotomy between international law and each one of the 190 odd national systems — namely, the old albeit solid dichotomy originally proposed by the dualist/pluralist doctrine — should be replaced, in order to expand the theory's coverage of legal realities, by a broader dichotomy. One must distinguish, precisely, international law from any *species* of interindividual law. The latter *genus* would include both the several national systems, on the one hand, and the several internal systems of international bodies, on the other hand, the latter systems to be acknowledged, in order to mark their international character, as unassembled bits and pieces of « *interna-*

*tional-interindividual*» law (as opposed to *national* interindividual law).

It will be noted incidentally that the *genus* of international interindividual law seems also to encompass those sets or formations of (mostly unwritten) rules of private law that can be ascribed neither to international law proper nor to the private law (and conflicts of laws rules or principles) of national legal systems. I refer particularly to «*droit privé des peuples*» ([135]) and *lex mercatoria* ([136]). To the same class it might be possible to ascribe the rules applying to the transactions between States and private parties, namely the rules rightly or wrongly classified by some scholars, together, at times, with the law of international organs, as «transnational law» — to the extent, of course, that sufficient reason cannot be found for such rules to be ascribed to one or more national legal systems. To the species of international interindividual law — to the extent, here again, that it cannot be ascribed to given national legal systems — also seem to belong many of the rules governing international non-governmental organizations (NGOs) ([137]).

## Part IV - *A Broader Dichotomy: International Law and Interindividual Law as Different Normative Species*

37. The realistic concept of the State and the keener perception of the inter-State nature of international law, combined with the broadening of the dualist theory to encompass, at the side of national systems, the internal law of international bodies, suggests that the classical dichotomy of international/national law should be superseded by a broader dichotomy between international and interindividual law, and the distinction emphasizes the peculiarity of both elements.

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([135]) DEKKERS, *Le droit privé des peuples*, Bruxelles, 1953.

([136]) From the vast literature on *lex mercatoria*, see GOLDMAN, *Frontières du droit et lex mercatoria*, in *Archives de philosophie du droit*, 1964, p. 177 ff., and *The Applicable Law - General Principles of Law and Lex Mercatoria*, in *Contemporary Problems in International Arbitration*, 1986, p. 113 ff.; LAGARDE, *Approche critique de la lex mercatoria*, in *Etudes en l'honneur de B. Goldman*, Paris, 1982, p. 125 f.; BERNARDINI (P.), *Contratti internazionali e diritto applicabile*, in *Diritto commerciale int.*, 1987, p. 393 ff.; GIARDINA, *Diritto interno e diritto internazionale nella disciplina dei contratti fra Stati e privati stranieri*, in *Studi Sperduti*, Milano, 1984, p. 43 ff.; ID., *Les principes Unidroit sur les contrats internationaux*, in *Journal du Droit int.*, 1995, p. 547 ff.; LEBEN, *Le droit international des affaires*, Paris, 2003.

([137]) BENVENUTI, *Organizzazioni internazionali, II) Organizzazioni internazionali non intergovernative*, in *Enciclopedia giuridica*, vol. XXII, Roma, 1990.

To begin with that most problematic part of the latter, which consists of the internal law of international bodies, it presents, on the whole, a relatively high degree of uniform traits contrasting with the typical features of international law as sampled in Part II.D, *supra*. In addition to the interindividual composition of their constituencies, the internal legal systems of international bodies are mainly characterized by that hierarchical structure that is so pervasively present, for good or evil, in national legal systems and so dramatically absent in international law. Despite their international origin and the international or transnational activities they govern, they are hardly recognizable as part of international law proper, either directly or as a stratification or *couche* thereof.

It is known, indeed, that interindividual systems of international bodies have occasionally, in the past, become the core, first of a more or less integrated confederation and later of the constitution of a federal State. An interesting instance is the interindividual law of the confederal apparatus established by those Articles of Confederation of 1776 (not to mention the earlier short-lived association established by the thirteen rebel colonies), which prepared the ground for the United States Constitution of 1789. No American constitutional lawyer, to my knowledge, believes that either the legal system of the confederal machinery, or the 1789 Constitution, were juridically a product or a part of international law or some stratification or *couche* thereof. The same could be said if at any time the body of interindividual law operating within the EC and the EU became the core of a federal system of a really United Europe ([138]).

In the light of such historical or speculative integrative processes, the legal orders in question could perhaps be envisaged, from an immeasurable distance, as the scattered fragments or embryos of

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([138]) As shown in *Rapporti contrattuali* [note 4, *supra*], p. 99 ff., the « original », not « derivative » nature of the internal legal orders in question is also proved by the analysis of integrative processes ranging from consensual incorporation of a State, to organic alliance, confederation of States, and federal State. The matter is also dealt with in paras. 143-146 of the *Appendix* cited in note 132, *supra*. I find great comfort, in maintaining that position, in MORELLI's analysis in *Stati e individui* [note 1, *supra*], esp. pp. 18-25; less in AGO's *Considerazioni* [note 132, *supra*], note 28, p. 544.

I find now a most welcome confirmation in PICCHIO FORLATI's considerations (*Il diritto dell'UE* [note 1, *supra*], pp. 471-473) on the European Union's apparatus. If I understand correctly, the internal (interindividual) order of that apparatus should find its place, within the above-mentioned sequence, *just before* organic alliance and *long before* the legal order of a confederal machinery.

what could at some future time come about as a public law of a world or regional legal community.

International law proper is another matter. As a system of rules finding their *raison d'être*, whatever their objects and contents, in the relations among States as factual entities, international law is not envisageable as the summit of a universal legal system originating from an alleged « decentralization » of the medieval « world State » and turning, through a process of more or less gradual « centralization », from inter-State to interindividual, from inorganic to organic, from « private law writ large » to the supreme layer of a universal public law, ultimately into the constitution of the legal community of mankind. International law should not be envisaged, *per se*, as an early stage of that community. It is far less. All it seems able to provide — in addition, hopefully, to preserving the peace — are the inter-State compacts by which governments, without necessarily renouncing their independence and equality could accept the limitations of their liberty necessary to improve the governance of all nations for these to become more universally democratic and for States themselves to turn, in the long run, into legal subdivisions of an integrated community of mankind. At that stage one could say, at last, that States would have become the legal subdivisions of the world community's law ([139]). For the time being, however, it is very difficult to see a systemic unity between the inter-State « private law writ large » and the scattered internal orders of the myriad of multiform international organs.

Regrettably, contemporary developments in both international law proper and what I call international interindividual law are not of a nature to induce optimism. The former, centered since 1946 on the United Nations system, is being challenged in the Charter's most vital principles, such as the prohibition of war and armed reprisals, much too arrogantly labelled as self-defence (if not rejected altogether by novel, arbitrary « doctrines »). International in-

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([139]) The dichotomy I am trying to describe has perhaps a vague resemblance with Denis Alland's learned presentation of Emmanuel Kant's distinction between *Völkerrecht* (viewed, though, by Kant, as « law of nature » among States) on the one hand, and « cosmopolitan law » (as a law of mankind), on the other hand. I refer to ALLAND's article, *Droit des gens et droit international*, in *Dictionnaire de philosophie politique*[2], Paris, 1988, p. 152 ff., at pp. 155-156. *Inter alia mutanda*, it must be recalled that the most important among the fragments of the contemporary « cosmopolitan » law — mainly, the internal systems of innumerable international bodies — are just scattered fragments and are created by inter-State agreements namely by instruments of international law: the latter viewed, of course, though not without hesitation, as something more than just Kant's *ius naturae*.

terindividual law, for its part, frequently marks deep discrepancies between, on the one hand, the loftiest ideals of humanity inspiring the creation of the most advanced among its institutions (human rights courts and commissions and international criminal jurisdictions), and, on the other hand, the shortcomings some of those institutions at times reveal from the viewpoint of their independence, impartiality and non selectivity, not to mention the political factors weightily conditioning their operation. At times inherent in their very establishment — as in the case of the hastily created ICC — the said shortcomings are inevitably aggravated by ongoing armed conflicts inadequately controlled by the law of the Charter.

38. Before closing, I deem it useful to add a few words about the dualism that was repeatedly qualified as «absurd» by Joseph Kunz in the reviews mentioned at the outset ([140]).

Compared to Triepel's — if I may say so without sounding conceited — «my» dualism seems to me to be firmer and more flexible at the same time.

It is firmer in that international law and national law are viewed not just as separate but as qualitatively different *genera* of law, the latter being interindividual (as a *species* of the *genus* interindividual law) and the former inter-State (as a *species* of inter-group law para. 24 (*a-c*), *supra*).

The distinction is at the same time more flexible, in that it leaves room for phenomena — such as international interindividual law — which are not easy to classify, to say the least, within Triepel's and Anzilotti's kind of dualism. Even there, though, «my» dualism is strengthened by its firmness and by its very insertion within the framework of the broader dichotomy between the «inter-State» and the «interindividual». It is indeed that firmness that helps systematize the «snips» and «snippets» of international interindividual law (notably the internal legal systems of international organs)

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([140]) According to KUNZ's review of *Gli enti* [note 1, *supra*], at p. 513, despite my «highly interesting, deep-searching work» that «repaid study», the «wish to found anew the dualist doctrine must be regarded as frustrated». The reviewer acknowledged, though, that «[w]hile the author's theses must be rejected as untenable, viewed as theoretical constructions of positive international law, they are not without merit if looked at from the point of view of the critique of positive international law; in this light they contribute to the understanding of the necessary precariousness of merely "international" as distinguished from "supranational" organization» (*ibid.*). Similar opinions are expressed by KUNZ in his joint review of *Rapporti contrattuali* and *Gli enti* in *Österreichische Zeitschrift* [note 1, *supra*].

in such a manner as to escape the facile, deceptive monistic systematization of those important phenomena within the framework of a purely imaginary public law of mankind.

To the pluralism of legal systems that is attested by the coexistence of international law with the one-hundred and ninety co-existing national systems, one must add the pluralism deriving from the existence of an even higher number of internal legal orders of great and small international bodies, from the United Nations, and the United Nations family agencies, to the EC, the EU, arbitral tribunals, international criminal courts, etc. Within such a pluralism, one must reckon a host of bilateral dualisms between each national or international-interindividual system and each one of the others on the one hand, and between each one of those systems and international law proper — namely, inter-State law — on the other hand.

It is a maze of dualistic relationships that cannot be ignored by scholars and practising lawyers — while awaiting more adequate study — for the elementary reason indicated in para. 2 and note 5, *supra*. It would be simply impossible to deal properly with such interrelationships within the framework of a science-fictional notion of a universal juridical monism.

In addition to being scientifically questionable (for its lack of any positive basis in an international constitutional law worthy of the name) the monist doctrine seems also to be questionable *de lege ferenda*. It is indeed under monist influence that an increasing number of authoritative scholars are not content with enhancing and emphasizing that «public» law character of international law, which is implied in that doctrine and so hard to detect from a dispassionate observation of inter-State relations. They are also led lately to promote international law from that rank of a «set» or «system of norms» that is implied in its current realistic denomination (especially among English-speaking scholars) to the loftier and rather pretentious rank that would be implied in the expression «ordre juridique international» ([141]). Combined with the «public» (law) connotation implicit in the monist conception, the concept of «order» seems to me to introduce into the system's identity a questionable proclivity to accommodate — for precisely the sake of order — with unilateral initiatives of States and, worse, unilaterally proclaimed and

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([141]) See, for example, ALLAND, *De l'ordre juridique international*, *Droits*, 2002, pp. 79-101.

practised doctrines — which a ... modest set or system of norms would be perhaps more inclined, in principle, to submit to a severe ... *normative* scrutiny (142).

39. One final remark about the nature of international law proper.

The notion that the State of international law is not a legal person, which in my view is at the root of universal juridical pluralism, is not unrelated to the question of the nature of the international system. Indeed, an obvious condition for international law to be viewed as law is the possibility for States to be envisageable as units

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(142) I refer again to Denis Alland's thought-provoking article *De l'ordre juridique international* [nota 141, *supra*]. After describing the merits of substituting « Ordre juridique international » for the less savoury « Droit international », the author also advocates the extension to international law (and, of course, to the « international community ») of the concepts proposed by Santi Romano in his *L'ordre juridique* [note 64, *supra*]. Alland refers in particular to para. 17 of that very remarkable book that is entitled « *Le concept d'institution et l'ordre juridique international* ». With great respect for Santi Romano as well as Denis Alland, I dare say that if « *ordre* juridique international » scares me, I find the yoking of that denomination with Romano's « istituzione » terrifying. Whatever its merits — surely great — in enlightening the relationship of law with society and the society's structuring, Romano moves too far, in my view, from the concept of law as a normative system with regard to any legal system. He gets even farther, though, in the cited paragraph, with regard to international law. It follows that to look at international law through Romano's lenses would open the way to accepting, as part of the very body of international law, much more sociology than the average international legal scholar — who works, hopefully, essentially on the basis of norms — is ready to accept. Indeed, Romano's concept of law or legal order is too rich in pre-, meta- or extra-juridical elements for its extension to international law and the international community not to open the way to unacceptable, undemonstrated theories, such as Lasswell's and McDougal's concept of international law as « a process of authoritative decision ». Norms, hopefully, are less difficult to circumvent by such theories, that seem to be conceived for the very purpose of legitimizing unilateral actions, initiatives and doctrines.

One need hardly recall, in that connection, the questionable sublimation of hegemony as an integral part of international law, made throughout his book by GREWE, *The Epochs of International Law* (transl. from German by Byers), Berlin, 2000, and the possibly related considerations set forth by BYERS, *The Shifting Foundations of International Law*, in *European Journal of Int. Law*, 2002, pp. 21-41, particularly with regard to the sources of international law. The « processes of authoritative decision », hegemony and the shifting foundations would fit beautifully, I am afraid (as well as the novel substitute for the UN collective security system proposed by PESCATORE, *The US-UK Intervention in Iraq*, in *ASIL Newsletter*, May/July 2003, pp. 1 and 6), within the framework of Romano's « institutionalised » international law. The proposed "institutionalization" of international law would also offer a fertile ground for the growth of appalling doctrines such as those proposed (not without significant references to the above-mentioned Lasswell's and McDougal's theory) in the letter addressed to ASIL President Slaughter by Frederick S. Tipson (a former consultant with the US Senate Foreign Relations Committee) in *ASIL Newsletter*, March/April, 2003, pp. 1, 4 and 14.

capable of being effectively addressed and conditioned in their behaviours by norms of conduct which could be defined as law. An answer could be that the unity that is not ensured by that mechanism of juridical incorporation, which is typical of legal persons (*personnes morales*), is ensured to a sufficient extent, in the case of the State in the sense of international law, by the sociological factors, including national law, cementing, so to speak, each human aggregation and its statehood.

This state of affairs has nevertheless an impact on the aptness of international law effectively to condition the behaviour of its addressees. Indeed, one matter is the aptness of norms decisively to affect the behaviour of a legal person through agents and members they directly attain as primary persons, another matter is the aptitude of norms to affect the behaviour of a sociological unit over the constituency of which, namely its members and agents, they have no direct, positive legal control. Considerable as it is, such a difference explains the comparatively low degree of effectiveness of international law that is universally perceived by monists as well as dualists/pluralists, although euphemistically presented by the former as a simple matter of « decentralization » or « primitiveness ».

One could not exclude, however, an even more pessimistic conclusion that some current world affairs might suggest: namely, that the impact of the factual nature of States upon international relations is too overwhelmingly ponderous for any norms worthy of the name of law to be apt to govern effectively such relations. Considering the implied or express opinions of not a few statesmen and scholars, such a pessimistic conclusion seems, regrettably, neither implausible nor disgraceful. Far better men than the present writer have felt obliged to admit, however reluctantly, that most of what we know as international law does not possess the essential features of positive law in a proper sense [143].

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[143] ARANGIO-RUIZ (V.), *Le genti e la città* [note 96, *supra*], at p. 12 of the offprint, and p. 528 of the cited reprinted edition. Some perplexity is also expressed in *Gli enti* [note 4, *supra*], p. 90, note 152-*bis*.