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The Mystery of the State and Sovereignty in International Law

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THE MYSTERY OF THE STATE AND SOVEREIGNTY IN INTERNATIONAL LAW

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INTRODUCTION

The concept of sovereignty and the concept of state are two fundamental pillars upon which the entire architecture of contemporary international law, including its theories and practices, rests.[1] Without these two concepts there would be no international law at all, for the core of it is the law between sovereign states, which has been created by the states for themselves.[2] To put it simply, international law is primarily inter-states law, in which a state is viewed as a sovereign geopolitical entity.[3]

And, yet, both concepts—that of sovereignty and state—present an unsurmountable difficulty and challenge to the contemporary theory of international law, which seems unable to formulate coherent and logically consistent scientific definitions of state and sovereignty. As Professor James Crawford acknowledges: "Despite its importance, statehood 'in the sense of international law' has not always been a clearly defined concept."[4] Even the International Law Commission, while drafting the Declaration on the Rights and Duties of States, was not able to reach an agreement on the definition of "state."[5] Professor Crawford himself in his voluminous work devoted to statehood in international law seems to have failed to present a clear-cut definition of the state.[6]

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1. GIOVANNI DISTEFANO, FUNDAMENTALS OF PUBLIC INTERNATIONAL LAW: A SKETCH OF THE INTERNATIONAL LEGAL ORDER 89 (2019).

2. LUIGI CONDORELLI, CHAPTER 7: CUSTOM, IN INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS 179 (Mohammed Bedjaoui ed., 1991).

3. HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 102, 201 (The Lawbook Exchange, Ltd. ed. 10th prtg. 2010).

4. JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 31 (2d ed. 2006).

5. *Id.*

6. *Id.*

Against this background this paper deals with the concepts of state and sovereignty from the perspective of the scientific, i.e. psychological, approach, as developed by Leon Petrażycki in his psychological theory of law.[7]

Petrażycki viewed legal phenomena as consisting of unique psychical processes expressed:

> [I]n the unique form of ascribing to different beings (not only to people, but to beings of various other classes, conceived of in the mind), or to certain classes of such beings, "duties" and "rights;" so that these beings, so conceived of, are seemingly found in certain peculiar conditions of being bound or of possessing special objects ("rights"), and the like.[8]

According to this theory, law, including international law, is a psychical phenomenon which originates in human psyche and which influences human psyche.[9] Simply put, according to the psychological theory of law, if we wish to explore the true nature of such phenomena as international law, state, sovereignty, as well as of other institutions of international law, we should turn to the study of those psychical processes which take place in the minds of individuals, instead of looking for them in the external world, where these phenomena, obviously, do not exist.[10]

Thus, based on the methodological basis of this theory, I will present the concepts of state and sovereignty, as well as the concept of subjects of international law.

I. THE CONCEPT OF THE STATE IN INTERNATIONAL LAW

The second most difficult issue for legal theory (after the eternal question "What is law?") is the question "What is the state?"—in fact, both questions are inextricably linked and interrelated, because logically the state, as the legal positivists claim, on the one hand, produces law (i.e. is a major law-maker) and, on the other hand, is based upon law and is being regulated by law.[11] This point equally holds true for the relationship between the concept of the state and international law, as Alf Ross pointed out:

> We have here a vicious circle: in order to determine whether or not a certain rule is international we must know whether or not the legal community bound by it is a state. But in order to decide this question we must know precisely whether or not the rule in question is international. The term "International Law" is defined with reference to the term "state" and the definition of the term "state"

7. LEON PETRAŻYCKI, LAW AND MORALITY 6 (Hugh W. Babb trans., Harvard Univ. Press ed. 1955).

8. *Id.* at 8.

9. *Id.* at 12, 146.

10. *Id.* at 6–7.

11. KRZYSZTOF MOTYKA, LEON PETRAŻYCKI, CHALLENGE TO LEGAL ORTHODOXY 35 (2007).

> again refers back to the term "International Law[."] A definition thus biting on its own tail is circular. The consequence is that on the point in question the definition is in reality a blank.[12]

Not being able to solve this mystery of the relationship between law and state logically, some theorists, for instance Hans Kelsen, went as far as offering to equate law (normative order) and the state.[13]

On the other hand, we can see in the international-legal literature a long-standing tradition to personify the state. For example, Polish scholar Ludwik Ehrlich in his book "Law of Nations" ("Prawo narodów") pays attention to the personification of states, which he considers to be an important phenomenon in international law.[14] In principle, notes Ehrlich, the state is treated as if it was a natural person, possessing will and able to use this will within its territory with respect to persons.[15] In this sense the state was substituted for the sovereign monarch. In human psyche, the state is often represented not as an abstraction but as a sort of super-human being or creature like Leviathan.[16] Relations between the states are often perceived of as relations between living persons.[17]

To Professor MacCormick, the state is a "personification" exactly in the same sense that we envisage states as acting beings.[18] In MacCormick's view the state is "an acting subject, a subject which acts in (at least) the spheres of politics, international relations, international law, and domestic public law."[19]

Contemporary international law also attributes to the states certain inalienable rights, as if they were individuals. The doctrine of these rights originates from the naturalist teachings. As V.D. Degan notes,

> The theory of natural law assimilated States with individual human beings in a society. According to this teaching, just as natural persons are entitled to some inherent and absolute rights, so all States being members of the international community possess some inalienable, indivisible and unassignable rights, simply because they exist.[20]

12. ALF ROSS, A TEXTBOOK OF INTERNATIONAL LAW: GENERAL PART 12 (The Lawbook Exchange, Ltd. ed. 2006).

13. HANS KELSEN, GENERAL THEORY OF LAW AND STATE 182 (Anders Wedberg trans., The Lawbook Exchange, Ltd. ed., 3d prtg. 2000).

14. LUDWIK EHRLICH, PRAWO NARODÓW 102 (1948).

15. *Id.*

16. CARL SCHMITT, THE LEVIATHAN IN THE STATE THEORY OF THOMAS HOBBES: MEANING AND FAILURE OF A POLITICAL SYMBOL 79 (George Schwab & Erna Hilfstein trans., The Univ. of Chicago Press ed. 2008).

17. George Lakoff, *Metaphor and War: The Metaphor System Used to Justify War in the Gulf*, UNIV. CAL. BERKELEY (1991), https://www.arieverhagen.nl/cms/files/George-Lakoff-1991-Metaphor-and-War.pdf [https://perma.cc/82P7-LDAY].

18. NEIL MACCORMICK, QUESTIONING SOVEREIGNTY: LAW, STATE, AND NATION IN THE EUROPEAN COMMONWEALTH 40 (1999).

19. *Id.*

20. V.D. DEGAN, SOURCES OF INTERNATIONAL LAW 83 (1997).

Among these inalienable states' rights the following are mentioned: (1) the right to existence or preservation, i.e. survival; (2) the right to independence or sovereignty; (3) the right to juridical equality, i.e. equality in law; (4) the right to be respected; and (5) the right to international communications.[21]

These rights look like typical "human" rights, as if the states were human beings communicating between each other and deserving "respect" from each other.

What are the most common theoretical mistakes made by the international-legal theorists writing on the enigma of the state, which prevent them from understanding the true nature of it?

First of all, contemporary legal theorists are looking for the state in the wrong place. In fact, the legal theorists still do not know where to locate the state, searching for it in different kinds of localization beyond human psyche.

These theorists often forget the obvious fact that, from a certain point of view, everything in the universe can be either a thing (i.e. something material, tangible), or a person (to be more precise, a living organism), or an idea (i.e. a content of human psyche). It is apparent that the state is neither a thing nor a person, even though some theorists tend to perceive the state as some sort of super-human being. Hence, the state can be located only in our minds; it can be only a content of human psyche as an idea.

As Petrażycki put it,

> The content of traditional legal science is tantamount to an optical illusion: it does not see legal phenomena where they actually occur, but discerns them where there is absolutely naught of them—where they cannot be found, observed, or known—that is to say, in a world external to the subject who is experiencing the legal phenomena.[22]

According to the Polish logician Tadeusz Kotarbiński, one of the serious logical mistakes is committing a hypostasis (the so-called "hipostaza"), that is, imagining the existence of some entities merely because there are certain nouns.[23] Hypostasis (hipostaza), according to him, is the result of hypostatization, i.e. attribution of real identity to something (e.g., to a concept, idea) which does not exist in reality.[24] Kotarbiński argued that hypostatization is dangerous—not so much in practical work of a lawyer but in the course of creation of scientific legal theories because it can lead to the emergence of erroneous legal philosophies which ascribe real existence to ideal norms as if they were persons or things.[25]

21. *Id.* at 84.
22. PETRAŻYCKI, *supra* note 7, at 8.
23. TADEUSZ KOTARBIŃSKI, KURS LOGIKI DLA PRAWNIKÓW 16 (1975).
24. *Id.*
25. *Id.* at 18.

In terms of Kotarbiński's logic, we can argue that in the legal theory based upon the psychological theory of law we are dealing with judgments (statements, assertions) in a psychical sense (psychical act of judging), whereas in the juridical dogmatics law is described by means of judgments in the logical sense.[26] When someone, holds Kotarbiński, expresses a statement which is comprehended by the listeners, then in the minds of the listeners appear the judgment in the psychical sense, and there are as many such judgments as there are listeners.[27] So, for example, when a professor of law is telling his students about the state, each of the students in the auditorium has his or her own concept of the state in his or her mind.

Judgment in the logical sense, according to Kotarbiński, is the meaning (contents) of the sentence.[28] Kotarbiński argues that he who subscribes to the existence of the judgment in the logical sense thereby creates an impression that to all judgments in the psychical sense corresponds one and the same judgment in the logical sense as a sort of ideal object called "logical judgment."[29] However, cautions Kotarbiński, claims regarding existence of the judgment in the logical sense create a temptation leading to the mistake of the hypostasis.[30] To put it differently, when we talk about an ideal phenomenon which does not exist in time and space (e.g. a legal norm) and which, nevertheless, we can imagine as if it is a person or thing, then we create an illusion that this object exists in reality. In a word, a legal scholar should be aware of the mistake of hypostasis when constructing scientific legal theory. In terms of Petrażycki, he should avoid "naïve realism," i.e. mistakenly ascribing to the words or to the psychical phenomena in our mind's real existence.[31]

Despite this obvious fact, the legal theorists in their efforts to conceptualize the state continue to commit one of the following mistakes.

First, they make the mistake of what Petrażycki calls "naïve realism" or "naïve projection" point of view, i.e. they tend to wrongly ascribe a real existence to the state just because it exists as a psychical reality, as an idea, in our minds.[32] This erroneous approach to the state stems from the anthropomorphic tendencies of the human mind: to the human mind, states look like (or are psychically represented as and experienced in our minds as) persons, who communicate with each other, quarrel with one other, make treaties, and

26. *Id.* at 54.
27. *Id.*
28. KOTARBIŃSKI, *supra* note 23, at 54.
29. *Id.* at 54–55.
30. *Id.* at 55.
31. PETRAŻYCKI, *supra* note 7, at 9–10.
32. *Id.* at 129.

become friends or enemies.[33] In the international legal documents this anthropomorphic approach is discernible when we encounter such concepts as "will" of a state or "intent" of a state, i.e. when we ascribe to the states psychical attributes as if the states were living persons.[34]

A typical example of such a mistake in contemporary international-legal theory is a currently popular concept of international law by Professor Koskenniemi, who writes:

> A law which would lack distance from State behaviour, will or interest would amount to a non-normative apology, a mere sociological description. A law which would base itself on principles which are unrelated to State behavior, will or interest would seem utopian, incapable of demonstrating its own content in any reliable way. To show that international law exists, with some degree of reality, the modern lawyer needs to show that the law is simultaneously normative and concrete – that it binds a State regardless of that State's behavior, will or interest but that its content can nevertheless be verified by reference to actual State behavior, will or interest.[35]

In these words Professor Koskenniemi paints a picture of states' "behavior" as if the states were living creatures possessing their own "will" and "interests."[36] He does not explain here what exactly he means by "reality" of international law: is it a physical, psychical, or some kind of other "reality?"

As Petrażycki pointed out, "the terminology of jurists and their ideas of law rest upon a naïve-projection point of view which accepts as real legal phenomena impulsion phantasmata: norms ('commands' and 'prohibitions') addressed to persons subject to the law and the legal relations between individuals (their obligations and their rights)."[37]

This naïve-projection point of view, maintained Petrażycki, raises a whole series of essentially insoluble problems as to the nature of the corresponding realities, including the state, and the jurists resort to fictitious, arbitrary, and fanciful speculations like nonexistent "wills" of the states.[38]

The second mistake made by legal theorists is the "naïve-nihilistic" approach to the state and other subjects of international law. This occurs when some legal theorists mistakenly deny, as Petrażycki would put it, "the existence of a subject (which undoubtedly exists and can be readily found in the subject's

33. George Lakoff, *Metaphor and War: The Metaphor System Used to Justify War in the Gulf*, UNIV. CAL. BERKELEY (1991), https://www.arieverhagen.nl/cms/files/George-Lakoff-1991-Metaphor-and-War.pdf [https://perma.cc/82P7-LDAY].

34. PETRAŻYCKI, *supra* note 7, at 128–129.

35. MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 17 (Cambridge Univ. Press 2005).

36. *Id.* at 59.

37. PETRAŻYCKI, *supra* note 7, at 62.

38. *Id.*

very judgement) and therefore the existence of the judgement itself, because of disbelief in the existence of an irrelevant object in an improper sphere."[39]

For instance, this mistake is made by those theorists who deny the existence of the state as any kind of reality just because we cannot find the state in the external world as a material thing or a living organism.[40] To these theorists, the state is, in the final analysis, nothing but an aggregate of individuals.[41]

For example, to Hans Kelsen the state is a sort of "fictitious person" to which we attribute (or impute) the acts of certain natural persons; and this "attribution" is also a fiction to him.[42]

Finally, there is a group of legal theorists who, instead of exploring the true nature of the state as a psychical phenomenon, engage in the construction of diverse fantastic concepts (e.g. state as an "organic whole," social organism, person, etc.).[43] Such erroneous theories were described by Petrażycki as the "naïve-speculative" or "naïve-constructive" theories because the legal theorists are trying to postulate the state's existence beyond human psyche.[44]

The contemporary international-legal scholarship seems perplexed by the true nature of the state. An example of this is the following statement by Professor Crawford, who wrote: "A State is not a fact in the sense that a chair is a fact; it is a fact in the sense in which it may be said a treaty is a fact: that is, a legal status attaching to certain state of affairs by virtue of certain rules . . . ."[45]

As we can see from this statement, Professor Crawford, on the one hand, acknowledges that the state is not a thing, is not "a fact" in material sense, yet, on the other hand, he does not explain where this "fact" can be found: in the human mind or beyond it.[46]

At the same time, Professor Crawford's comparison between the state and a treaty is quite correct, for both the state and treaty have the same psychical nature, both of them are the psychical "fact," existing in the minds of individuals.[47]

Hans Kelsen, who was also a critic of the naïve-realistic perception of the state, came very close to the understanding of the true nature of the state.[48] Kelsen, writing about the state as a specific legal order, rightly pointed out that

39. *Id.* at 10.

40. DAVID RUNCIMAN, THE CONCEPT OF THE STATE: THE SOVEREIGNTY OF A FICTION, IN STATES AND CITIZENS: HISTORY, THEORY, PROSPECTS 28–29 (Quentin Skinner & Bo Strath eds., 2003).

41. KELSEN, *supra* note 13, at 255.

42. HANS KELSEN, PURE THEORY OF LAW 299–300 (Univ. Cal. Press 1967) (1934).

43. LEON PETRAŻYCKI, TEORIJA PRAVA I GOSUDARSTVA V SVJAZI S TEORIJEJ NRAVSTVENNOSTI 165–66 (2000)

44. *Id.* at 167.

45. CRAWFORD, *supra* note 4, at 5.

46. *Id.*

47. PETRAŻYCKI, *supra* note 43, at 362.

48. KELSEN, *supra* note 3, at 430.

"the state is believed to be an object of regulation only because the anthropomorphic personification of this order leads us first to liken it to a human individual and then to mistake it for a superhuman individual."[49]

In other words, he was critical about what he called "the inadmissible hypostatization" of the state.[50]

Interestingly enough, in his early works, Kelsen, being aware of the psychical nature of the state, conceived of the state as "a personifying fiction," an idea which formed a parallel to the idea of God.[51] Kelsen considered "the meta-legal state, transcending the law" to be nothing else than the hypostatized personification.[52] According to him, the unity of the state, postulated as real, was similar to "the supernatural deity transcending nature, who is nothing else than the grandiose anthropomorphic personification of the unity of nature itself."[53]

It can be argued that in principle Kelsen, just like Petrażycki, postulated the psychical nature of the state as an idea in the mind of the individual.[54] At the same time, he was not quite consistent in his reasoning, because he had stopped short of acknowledging the psychical nature of law, which is created by the state (as legal positivists claim) or which is the synonym of the state (as Kelsen thought).[55]

It is of interest to us that Kelsen tried to comprehend and describe the socio-psychical evolution of the state. To him, the state, as a social phenomenon ("social bond"), manifested itself in "the idea of a certain community, of common organization, of common territory, etc."[56] In his view, the state is "the guiding idea," an ideology, the realization of which is a psychical process leading to the closer ties between the members of the social group.[57]

At a certain point in the socio-psychical evolution of the social group the idea of the leader of the group (as a personification of this group in the minds of its members) yields to the abstract idea of the state.[58]

Kelsen recognized that only the subjective psychical processes in the mind of an individual are real, and that this is a psychical reality.[59] As for the "objectivity" of the social institutions, including the state, it remained to him

49. *Id.*

50. *Id.*

51. Hans Kelsen, *The Conception of the State and Social Psychology With Special Reference to Freud's Group Theory,* 5 INT'L J. OF PSYCHO-ANALYSIS 1, 37 (1924).

52. *Id.*

53. *Id.*

54. *Id.*

55. KELSEN, *supra* note 13, at 182.

56. KELSEN, *supra* note 51, at 6.

57. *Id.* at 6, 23.

58. *Id.* at 23.

59. *Id.*

enigmatic how the real psychical subjectivity can, by mere aggregation or multiplication, become an equally real social objectivity.[60]

Parallelism of the psychical processes taking place in a society, argued Kelsen, can create a tendency to declare the "folk-spirit" or "common will," "common emotion," to be a psychical reality differing from the individual psyche, whereby these conceptions might acquire the metaphysical character of the Hegelian "objective spirit."[61]

Kelsen's thoughts on the state can be compared to that of Mikhail Reisner, who tried to elaborate his own socio-psychological concept of the state on the methodological foundation of Petrażycki's teaching.[62] In his seminal book, "The State," Rejsner, having consistently applied psychological method to the teaching on the state, had presented it as a socio-psychical phenomenon, as an ideology, as well as an organized by means of this ideology "mass human behavior."[63] Three elements of the state (territory, population, and power), according to Rejsner, are not tangible, material phenomena but, rather, concepts or ideas, by means of which the political behavior of people is being organized.[64] In the state's structure Rejsner distinguishes three elements: (1) human psyche, as a major source of the state's ideology; (2) ideology itself, which is dependent upon concrete historical conditions; and (3) political behavior of people, as a result of the expression of state's ideas in human life and activities.[65] He also came to the conclusion that from the scientific point of view such concepts as "the omnipresent state power," "unity of people in the state," and "territorial supremacy" are nothing but fictions.[66]

In regard to Kelsen's teaching, it can be argued that he tried to find the answers to the same questions as Petrażycki and, at least initially, had been looking for those answers in the same place as Petrażycki did, that is, in the psyche of individuals.[67] However, at the end of the day, he chose a different methodological path in the legal science by opting for the juridical-dogmatic, instead of psychological, approach to law and state.[68]

Later on, Kelsen had started to draw parallels between the state and the corporation. He wrote:

> The state is, of course, not a natural or physical person, not a man or a superman. It is a so called juristic person, or, what amounts to the same, a

60. *Id.*

61. KELSEN, *supra* note 51, at 23.

62. MIKHAIL REISNER, GOSUDARSTVO, CHAST' I. KUL'TURNO-ISTORICHESKIE OSNOVY 18 (1911).

63. *Id.*

64. *Id.* at 14.

65. *Id.* at 16.

66. *Id.* at 17.

67. Kelsen, *supra* note 51, at 2.

68. KELSEN, *supra* note 42, at 105.

> corporation. As a juristic person the state is personification of a social order, constituting the community we call "state." If we try to characterize the phenomenon "state" without using a personification, we have no other possibility than to say that the state is a social order, or the community constituted by this order . . . .[69]

In this passage from Kelsen we have a rather typical example of conflation of three different concepts of the state: (1) state as a psychical representation in the minds of individuals ("personification" of social or legal order in the psyche of individuals); (2) state as a social group (sociological concept of the state); and (3) state as a formal-legal construction, as a range of legal norms (juridical-dogmatic concept of the state).[70]

The point is that we should not mix together these three different concepts of the state, but instead we should carefully distinguish them from one another.

Another error, often made by the legal theorists in their attempts to conceptualize the state, is a conflation of the theoretical and practical approaches, which should be strictly distinguished. The theoretical approach explores the state as a phenomenon of reality as it is, not what it should be.[71] This is the only scientific approach, if we understand by science the realm of knowledge dealing with reality, not metaphysics.[72] Practical approach to the state is, in its turn, about the state as it should be, as it is expressed in the legal norms.[73] In terms of the Kelsen theory we can say that legal theory studies the state as a phenomenon of "isness," whereas practical approach explores the state as belonging to the realm of "oughtness."[74]

But what is the state in international-legal theory; how is it presented?

There are no international-legal norms of general international law which would define the state. International-legal theory is also helpless, when it comes to the scientific definition of the state.

The international document most widely quoted in connection with the concept of statehood in international law is the Montevideo Convention on Rights and Duties of States of 1933, which holds: "[t]he State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States."[75]

69. KELSEN, supra note 3, at 100.

70. *Id.*

71. L.I. PETRAŻYCKI, TEORIJA I POLITIKA PRAVA. IZBRANNYE TRUDY, 241 (2010).

72. *Id.*

73. *Id.* at 421–22.

74. CARLOS MIGUEL HERRERA, LA PHILOSOPHIE DU DROIT DE HANS KELSEN, UNE INTRODUCTION 17 (2004).

75. Montevideo Convention on Rights and Duties of States, art. 1, *signed with reservations* Dec. 26, 1933.

This formulation, sometimes with slight nuances, has been widely accepted in international-legal theory.[76] So, traditionally, the state in international law is described as an entity constituted by three elements: (1) territory, (2) population, and (3) government.[77]

From the traditional international-legal theory perspective a state exists as long as these criteria are met, and there is no need in its recognition on the part of the other states.[78]

To illustrate how ludicrous and far from reality this concept of the state can be, we can give the following examples from the field of international relations.

The case in point is Taiwan (officially "The Republic of China") which possesses all the attributes of a sovereign state and, yet, does not consider itself to be a de jure independent state.[79] Taiwan presents a hard case for those theorists who believe that the best hallmark of statehood in international law is membership in the UN, because Taiwan used to represent China on the Security Council until 1971.[80]

Another example is Kosovo. The question here is whether or not it is a sovereign state under international law. If we apply the criteria of statehood that are offered by the international-legal doctrine, then we should regard Kosovo as a sovereign state, because it has its territory, population, and government. Moreover, it is recognized as a state by a number of states and maintains diplomatic relations with them. It seems that Kosovo is a state for some states (e.g. for the US and a number of the European states), while for the other states it is not an independent state.[81] For Serbia, for instance, Kosovo is not a sovereign state, but an integral part of its territory.[82]

Interestingly, from the juridical-dogmatic point of view, the legal status of Kosovo remains indeterminate. So, those who recognize Kosovo as a sovereign state refer to the normative fact in the form of the ICJ's advisory opinion on the unilateral declaration of independence in respect of Kosovo, whereas those who view it as a part of Serbia refer to the UN Security Council Resolution 1244 (1999) in which the UN member-states reaffirmed their "commitment to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia."[83]

76. LUNG-CHU CHEN, CONTEMPORARY INTERNATIONAL LAW, A POLICY-ORIENTED PERSPECTIVE 26 (3d ed. 2015).

77. *Id.*

78. THOMAS D. GRANT, THE RECOGNITION OF STATES, LAW AND PRACTICE IN DEBATE AND EVOLUTION, 5–6 (1999).

79. FRANCK CHIANG, THE ONE-CHINA POLICY: STATE, SOVEREIGNTY, AND TAIWAN'S INTERNATIONAL LEGAL STATUS xix (2018).

80. *Id.* at 274.

81. JOHN DUGARD, THE SECESSION OF STATES AND THEIR RECOGNITION IN THE WAKE OF KOSOVO 206 (Brill & Nijhoff eds., 2013).

82. GERGANA NOUTCHEVA, EUROPEAN FOREIGN POLICY AND THE CHALLENGES OF BALKAN ACCESSION, CONDITIONALITY, LEGITIMACY AND COMPLIANCE 141 (2012).

83. S.C. Res. 1244, 10 (June 10, 1999) (on the situation regarding Kosovo).

These examples clearly indicate that in the realm of juridical dogmatics, the logical law (principle) of the excluded third does not hold.

Another example is Northern Cyprus (officially "the Turkish Republic of Northern Cyprus"), which is a sovereign state for Turkey, but not for other states.[84]

There is also a number of other such states, the so-called "unrecognized states" or "semi-recognized" states.[85] Again, if we apply the abovementioned criteria of statehood, we can argue that they are sovereign states. Moreover, it can be equally argued that ISIS is also a sovereign state, because it has its own, however specific it might be, territory, population, and government.[86]

These criteria, which are offered for the determination of statehood, are also unreliable when taken separately.

First of all, as regards territory, history of mankind knows examples of states which did not have permanent territory, such as nomadic empires. That is why the statement that "a state without a territory is not possible" is historically wrong.[87]

The definition of the state territory given in international-legal doctrine is circular and contains logical mistake *definitio per idem*. Let us consider as an example of this mistake the following definition: "[s]tate territory is that defined portion of the globe which is subjected to the sovereignty of a state."[88]

This definition is logically erroneous because X (state territory) is defined through X (state territory as a constitutive element of state). Additionally, there is another X in this formula: state sovereignty, which also constitutes an element of the state.

Different states and individuals can consider the same territory as belonging to different states. A case in point is Crimea.[89]

The concept of population might be equally confusing, because in reality there is no such a thing as a permanent population: people are born, die, travel abroad, come as immigrants, and leave as emigrants. There is also such subject of international law as the Holy See which has no population, apart from resident functionaries, with the purpose to support it as a religious organization.[90]

84. MEHMET NECATI MÜNIR ERTEKÜN, THE STATUS OF THE TWO PEOPLES IN CYPRUS: LEGAL OPINIONS 104 (Turkish Republic of Northern Cyprus, Public Information Office 1997).

85. *See* UNRECOGNIZED STATES IN THE INTERNATIONAL SYSTEM 3–4 (Nina Caspersen and Gareth Stansfield eds. 2011).

86. FAWAZ A. GERGEZ, ISIS: A HISTORY 42 (2016).

87. OPPENHEIM'S INTERNATIONAL LAW 563 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992).

88. *Id*.

89. Oleksandr Merezhko, *Crimea's Annexation in the Light of International Law, A Critique of Russia's Legal Argumentation,* KYIV-MOHYLA LAW AND POLITICS JOURNAL 2, 37–39 (2016).

90. JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 124 (8th ed. 2012).

As for the government, in the case of a civil war within given territory there might be not one, but several different "governments" claiming to be the only "legitimate" government.

All these examples illustrate to us the point that territory, population, and governments are not something material, nor are they some kind of things, but, rather, they are ideas present in the minds of individuals.

The same also holds true for the state: for it is not a thing or person, but a psychical representation in the consciousness of an individual. In other words, in the consciousness of one individual a certain social group might be a sovereign state, while for the other it might be not an independent state, but something else: for instance, a social group within a state.

Such a difference between legal convictions of different individuals on the existence or non-existence of a particular state is, at least potentially, a cause of serious conflicts in international relations. Each of these disputing individuals to substantiate his or her position might refer to different legal rules and documents. And one of the best ways to settle such a dispute would be to refer it for solution by a third party, for instance, to an international tribunal or a court of arbitration.

The mystery of the state in international law can be unraveled only on the basis of the psychological theory of law. This theory of law, as a phenomenon of the psychical (not physical) reality, is a specific imperative-attributive impulsion (in terms of Leon Petrażycki, a "legal emotion").[91] As an imperative-attributive impulsion, law represents a psychical experience of bilateral character: it combines both obligation (duty) and claim (right).[92]

To put it simply, law is in the mind of that person who experiences legal judgment and we should not confuse law with the forms of its expression and objectivation (such as legal text).

Petrażycki wrote:

> The prevailing view holds that possession of a definite territory is an essential element of a state. Tradition distinguishes three elements in the state: territory, population, and authority. It must, therefore, be emphasized with particular force that neither a definite territory nor a settled population is of any significance whatsoever from the point of view of the psychological theory that the state organization consists of impulsive-intellectual phenomena . . . plus the corresponding coordinated behavior. Even nomad social groups, or groups formerly settled but later shifting to other territories under the power and leadership of their princes are to be included in the class "state". . .[93]

91. PETRAŻYCKI, *supra* note 7, at 35.

92. *Id.*

93. *Id.* at 135.

In other words, the elements of a state, such as territory, population, and government, are also objects of representation in the human psyche.[94]

To sum up, in Petrażycki's teaching the state is either a social group in which the supreme power belongs (that is to say, is projected; ascribed by the national legal mentality) to various beings (such as gods, monarchs, supreme councils, parliaments, etc.) or an object of representation in a human psyche.[95] He also does not deny the juridical-dogmatic concept of the state.[96]

Thus, talking about the nature of the state we can distinguish three approaches to its analysis leading to three different concepts of the state: (1) psychological approach, (2) sociological, and (3) juridical-dogmatic.

All three approaches to the state differ, and the concepts built upon them should not be conflated and should be kept apart.

From the psychological perspective the state is a psychical projection in the mind of an individual. At the same time the state might be (but not always is) a psychical representation of a certain social reality in the psyche of the individual. In other words, the idea of the state in the mind of an individual might "mirror" a certain social reality.[97]

The sociological concept of the state postulates the state as a social reality, as an independent social group united by the legal convictions of the people which are manifested in their coordinated behavior.[98] It should be also noted that the Weberian sociological view of the monopoly on the legitimate use of force as the principal hallmark of statehood is dubious.[99] The trouble with this definition of the state is that the term "legitimate" presupposes existence of law, and the question arises: what is the law and who makes it? If it is the state which makes the law, then we have circularity in this definition.

In our opinion, the juridical-dogmatic concept of the state views it as a range of normative facts or as a set of legal norms linked to each other logically.

The interesting and complicated issues arise when we try to understand the relationships between these three concepts of the state. The scheme of these relationships might look as follows: the psychical representation of a state in the mind of an individual represents a certain "social reality" in the form of the coordinated behavior of individuals which can be observed.[100] On the other hand, in our opinion, the psychical representation of the state in the individual's mind does not necessarily represent any "social reality," or it might "distort" the "social reality." For instance, despite such "social reality" as Taiwan in the

94. *Id.*

95. *Id.*

96. PETRAŻYCKI, *supra* note 7, at 132–136.

97. *Id.* at 133.

98. *Id.* at 136.

99. ANDREAS ANTER, MAX WEBER'S THEORY OF THE MODERN STATE, ORIGINS, STRUCTURE AND SIGNIFICANCE 31–32 (Palgrave Macmillan 2014).

100. PETRAŻYCKI, *supra* note 7, at 133.

capacity of an independent social entity, different international lawyers view it differently.[101]

The psychical reality of the state, in turn, might find its expression in the legal norms with which deals juridical dogmatics. At the same time, different dogmaticians can refer to different normative facts to "prove" or "disprove" the existence of a particular state.[102] For example, Turkish lawyers might refer to the normative fact related to the recognition of Northern Cyprus as a sovereign state by Turkey; while other lawyers might refer to the corresponding Security Council resolution as a normative fact precluding recognition of Northern Cyprus as a sovereign state.

The best way to solve such conflicts of different normative facts is to refer the issue to the third party, i.e. to an international court or arbitration.

A. Identity and Continuity of States

Basically, the concept of the state's continuity is about the idea that a state's existence is undisturbed by any change of its government.[103] Before the seventeenth century there was the notion that each reign was a separate sovereignty unfettered by earlier treaty commitments, and it was due to the fact that national legal consciousness ascribed sovereignty (i.e. the highest authority in the state) to the individual (i.e. to the monarch or sovereign).[104] Over the course of the seventeenth century in the mass legal consciousness, a psychical revolution occurred as a result of which the sovereignty started to ascribe not to the idea of the monarch but to the abstract idea of the state.[105] As M.J. Peterson puts it:

> The new rule posited that a monarch's public treaties bound any successor – whether an heir, a usurper, or revolutionaries establishing a non-monarchical government. Well before 1815, then, there was consensus that the state's own international legal personality, and with it the rights and duties it holds under both general international law and the specific treaties to which it is a party, remained undisturbed by any change of government.[106]

Another idea which took hold in the mass legal consciousness at that time was that the state is possessor of complete legal personality under international law, whereas the governments are only "the human agents" of states having only those rights and obligations which are necessary to perform this role.[107] In other

101. CHIANG, *supra* note 79, at xxiv.

102. PETRAŻYCKI, *supra* note 7, at 33.

103. M.J. PETERSON, RECOGNITION OF GOVERNMENTS, LEGAL DOCTRINE AND STATE PRACTICE, 1815–1995 20 (St. Martin's Press, Inc. 1997).

104. *Id*.

105. *Id*.

106. *Id*.

107. *Id.* at 185.

words, in the legal consciousness the idea of the government was subjected to the idea of the state.[108]

In the interwar period, due to a wave of revolutions in Europe, an idea emerged that a great enough transformation (e.g., social revolution in Russia in 1917) might amount to the creation of a new state.[109] First Soviet lawyers, for instance, had argued that there is no identity or continuity between the new Soviet state and the Russian Empire, that they are two different states and two different subjects of international law.[110] The European states, however, continued to see Soviet Russia as the same state subject to international law and considered the Soviet government to be obliged to pay the Tsarist debts.[111]

In contemporary international law, continuity and identity of states basically mean that a state continues its existence (preserves its identity) as the same person, despite changes (sometimes considerable) in its population, territory, and government.[112] For example, a state might undergo substantial transformation (change its name, constitution, political regime, borders, etc.) and yet continue to be regarded as the same state and the same subject of international law.[113] A case in point is Germany, which despite tremendous changes in territory, political system, and population during the twentieth century, had preserved its identity as a state. Poland preserved its identity since 1918 even when it was under occupation during World War II.

An even more curious example is Russia's status as the self-proclaimed "continuator" of the USSR despite the fact that Russia (the Russian Soviet Federative Republic) and the USSR were two different states.

These examples illustrate to us how artificial the concept of the state can be when taken beyond its psychical nature. The thing is that the identity/continuity of the state is not something existing in the external world, but a psychical phenomenon. In reality, the state's identity/continuity exists in the minds of individuals, e.g. politicians and statespersons. For example: in the minds of the Soviet statespersons the FRG had emerged in 1949, whereas German statespersons believed that there has been continuity of the German State since 1871, despite all political transformations.[114]

The birth and death of a state also occurs in the minds of individuals. Hans Kelsen with respect to the birth and death of a state writes:

108. PETERSON, *supra* note 103, at 185.

109. TARJA LÅNGSTRÖM, TRANSFORMATION IN RUSSIA AND INTERNATIONAL LAW 435 (Martinus Nijhoff Publishers 2003).

110. *Id*.

111. *Id.* at 188–89.

112. CRAWFORD, *supra* note 90, at 412–13.

113. *Id.* at 128.

114. S.V. CHERNICHENKO, KONTINUITET, IDENTICHNOST' I PRAVOPREEMSTVO GOSUDARSTV 26 (1998).

> It is generally recognized that the question whether a new state has come into existence or an old state has ceased to exist is to be answered on the basis of international law. The relevant principles of international law are commonly stated as follows: A state comes into existence when a group of individuals living on a definite territory are organized under an effective and independent government; and a state ceases to exist when it loses one of its essential elements—population, its territory, or its independent effective government. A government is independent if it is not legally under the influence of the government of another state; and it is effective if it is able to obtain permanent obedience to the coercive order issued by it.[115]

From the psychological theory's perspective, the situation looks different. A state comes into existence when a majority of the individuals living in the given territory start to believe that they live in one state, i.e. when they ascribe in their minds the corresponding rights to those people whom they consider to be their government. On the other hand, a state ceases to exist when the majority of its population stops believing in this state and stops ascribing the highest authority to the individuals constituting the government of this state. Sometimes, to make a psychical revolution in the minds of the population of the given territory, leading to the death of a state, it is enough to adopt a normative fact, e.g. a declaration of independence, as was the case with the Soviet republics in 1991 after the aborted coup d'état in Moscow.

As for the government's "effectiveness," Kelsen writes, it does not depend on the government's ability "to obtain permanent obedience to the coercive order," because legal order and the state are not based on coercion, but rather on the people's voluntary submission, stemming from their natural psychical tendency to ascribe the highest authority to the individuals whom they consider to be their government.[116]

B. Recognition of States

Historically, international law, as a European international law (*Jus Publicum Europaeum*), had been a sort of rules of the exclusive club of the European states, which considered themselves to be "civilized" and which decided who, and on what conditions, should be admitted to membership in this club.[117] In fact, to be admitted to that international community of the "civilized" states, an entity should have been "recognized" by the members of that community.[118] Hence, this is the constitutive effect of recognition and popularity of the constitutive theory of recognition among legal theorists at that time.[119]

115. KELSEN, *supra* note 63, at 258–259.

116. KELSEN, *supra* note 13, at 220.

117. PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 13 (Routledge 7th ed. 1997).

118. *Id.* at 83.

119. *Id.*

Later on, in view of the emergence of the new national-states on the ruins of the empires, especially after World War I and during the decolonization of the sixties, the constitutive theory of recognition yielded to the declaratory theory, which claims that the state is being born from the fact, which does not need recognition on the part of other states.[120] The proponents of the declaratory theory of recognition liked to recall the story with Napoleon, who, when offered to recognize the existence of the French Republic, responded that it "did not require or desire recognition," because "it is already as the sun on the horizon in Europe."[121]

However, nowadays we can observe a sort of revival of the constitutive theory of recognition, because in the disputable cases the best criterion to determine the existence of the state is its admission to the United Nations as a member-state.[122] This admission might be viewed as having a constitutive effect for the state's existence as a subject of international law.

In traditional international-legal doctrine, recognition remains a riddle because there are no clear and objective criteria to determine conditions for recognition. According to some international-legal theorists, "premature" recognition of an entity seeking to secede from an existing state before that entity's consolidation as an independent state amounts to violation of the general rules of international law.[123] Such premature recognition might be viewed as an unlawful intervention.[124] However, as the case of the "unrecognized" or de facto states indicate, international law does not provide any reliable guidance as to the moment when a given entity becomes an independent state.

Hans Kelsen points out that international law leaves the decision on the recognition of a given community as a state to the interested governments, because, according to him, legal recognition of a community as a state is "only a particular case of the general principle according to which the existence of facts to which international law attaches legal consequence has to be ascertained by the governments which are interested in these facts in a concrete case."[125]

In reality it means that those individuals, of whom the government is composed, should decide whether or not the given community is a state.

An interesting case in connection with the issue of states' recognition in international law presents the case of Kosovo which became the subject matter

120. *Id.*

121. IN THE WORDS OF NAPOLEON: THE EMPEROR DAY BY DAY 41 (R.M. Johnston ed., Frontline Books 2016).

122. DAVID RAIC, STATEHOOD AND THE LAW OF SELF-DETERMINATION 41 (2002).

123. *See* Christian Tomuschat, *Recognition of New States—The Case of Premature Recognition in Kosovo and International Law, in* KOSOVO AND INTERNATIONAL LAW 32 (Peter Hilpold ed., 2012).

124. RAIC, *supra* note 122, at 82–83.

125. KELSEN, *supra* note 3, at 269.

of heated debates among international lawyers from different countries. For instance, Christian Tomuschat in this respect notes:

> The recognition of a State must be considered as unlawful if the territorial entity concerned is unable, under any conceivable aspect, to meet the minimum requirement of statehood. States enjoy a wide margin of appreciation. But their discretion is not boundless. In principle the criteria of statehood are beyond question.[126]

This statement might be interpreted in the following way: the freedom of states to recognize other entities as states is not unlawful in so far as the entity in question possesses the necessary features of a state, such as territory, population, and government. If so, then any of the "unrecognized states" can be recognized by other states and this move will not be regarded as a violation of the existent states' territorial integrity.

At the same time, Professor Tomuschat acknowledges that "as far as the population is concerned, the first question is who decides about its composition."[127]

Again, it can be argued that for some theorists or statesmen in case of Kosovo "the population" means population of Kosovo, whereas for others there is only one "population," which is the population of the whole of Serbia, its "people" which has the right to self-determination.[128]

Nowadays the states' practice supports the declaratory theory of recognition, according to which "the legal effects of recognition are limited: recognition is a declaration or acknowledgment of an existing state of law and fact, legal personality having been conferred previously by operation of law."[129]

This approach is an example of the naïve-realism in law, for by "operation of law" it implies that there is some sort of "law" existing out there (i.e. beyond human psyche) in itself and capable of "conferring" legal personality upon the candidates.[130] In reality this "conferral" of legal personality, as well as "acknowledgment of an existing state of law and fact" occurs in the human mind.[131] A case of unrecognized states is indicative here, because in the minds of some individuals they are states, whereas in the minds of others they are not.

Constitutive theory of recognition, which has fallen out of favor with the contemporary legal theorists, in its "extreme form . . . implies that the very personality of a state depends on the political decision of other states."[132]

Is this theory more correct than the declaratory theory?

126. Tomuschat, *supra* note 123, at 36.

127. *Id.*

128. MILENA STERIO, THE RIGHT TO SELF-DETERMINATION UNDER INTERNATIONAL LAW 120 (2013).

129. CRAWFORD, *supra* note 90, at 145.

130. PETRAŻYCKI, *supra* note 7, at 9–11.

131. *Id.* at 11.

132. CRAWFORD, *supra* note 90, at 145.

When we take as an example such a "community" as ISIS, then yes, because despite all the attributes of a state (territory, population, and government), the states (to be precise, their leaders) have taken the "political decision" not to recognize it as a state, but to consider it to be an international terroristic organization.

In the literature connected with the issue of recognition were considered the concepts of such states as: de facto state and quasi-state.[133]

De facto states, according to Scott Pegg, are "entities which feature long-term, effective, and popularly-supported organized political leadership that provide governmental services to a given population in a defined territorial area," which "seek international recognition and view themselves as capable of meeting the obligations of sovereign statehood."[134]

Among examples of such de facto states this author mentions: Eritrea before independence, the republic of Somaliland, the Turkish Republic of Northern Cyprus, Biafra, Chechnya, Krajina, Taiwan, Kosovo, and South Sudan.[135] Among these de facto states, Eritrea and South Sudan gained broad recognition by becoming UN member-states.[136]

The so called "quasi-states" are viewed as the flip-side of the de facto states coin. Quasi-states, in contrast to de facto states, are primarily juridical.[137] The quasi-states are internationally recognized, are UN members and regarded as sovereign states, but they do not function positively as viable governing entities.[138] Sometimes in the territory of a quasi-state might be a de facto state.[139] To put it differently, when we talk about the dichotomy of de facto state and quasi-state, we have an issue of social reality versus legal form.

The issue of whether a de facto state is a subject of international law boils down to the question of "whether statehood is considered a fact existing outside the realm of law or whether it is a legal status determined by law."[140] According to Roland Portmann:

133. SCOTT PEGG, INTERNATIONAL SOCIETY AND THE DE FACTO STATE 4 (1998).

134. *Id.*

135. *Id.* at 249.

136. Patrick Worsnip, *South Sudan admitted to U.N. as 193rd Member*, REUTERS (Sept. 27, 2019), https://uk.reuters.com/article/uk-sudan-un-membership/south-sudan-admitted-to-u-n-as193rd-member-idUKTRE76D3I120110714 [https://perma.cc/7HTS-5WXE]; *UN welcomes South Sudan as 193rd Member State*, UN NEWS (Sept. 27, 2019), https://news.un.org/en/story/2011/07/381552 [https://perma.cc/C7ZK-BPZF]; *Eritrea Becomes a Member of the United Nations*, S. AFRICAN HISTORY ONLINE (Sept. 27, 2019), https://www.sahistory.org.za/dated-event/eritrea-becomes-member-united-nations [https://perma.cc/BJ3K-F8VG].

137. ROBERT H. JACKSON, QUASI-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS AND THE THIRD WORLD 21 (1990).

138. *Id*.

139. DE FACTO STATES: THE QUEST FOR SOVEREIGNTY 130 (Tozun Bahcheli, et al. eds., 2004).

140. ROLAND PORTMANN, LEGAL PERSONALITY IN INTERNATIONAL LAW 248 (2010).

> [S]tatehood is not simply a matter of effectiveness, but is to a considerable degree regulated by international law. A state does not simply exist as a matter of fact: the existence of a state is determined by meeting international legal standards and failure to do so implies denial of statehood in international law. The state is then not a given fact from which international law simply starts, but a legal entity deriving its status and its powers from the international legal system itself.[141]

However, in this definition of statehood we once again have circularity. When to understand what the state (or statehood) is, we need first to know what international law (or international legal system) is; but to know what international law is we need to have a concept of the state in advance because international law is created by the states and governs relations between them. Besides, proceeding from the abovementioned definition, we also need to know who is that person or institution (social or legal) that would decide on whether or not the given social entity meets "international legal standards" of statehood.

According to Professor Portmann, "statehood is a legal status derived from or denied by international norms."[142] Here again we might ask a question: who exactly grants or denies this legal status? "International norms" as such, or individuals who represent states and who interpret and apply international norms?

In reality, the existence of a state for other states (to be more precise for the statesmen representing their states) might depend on their recognition of the given entity as a state.[143]

Psychological theory of law offers the following explanation of the issue of recognition in international law.

Recognition in international law is a normative fact which creates a change in the individual and national legal mind (psyche, consciousness).[144] By means of this normative fact takes place the change of attitude of individuals with respect to a social fact (de facto state).[145] In other words, recognition, as a normative fact, creates in the minds of people the psychical representation of the given community as a state under international law. In this sense recognition as a normative fact is constitutive.

There are several kinds of such normative facts. The first kind of normative fact is recognition of a given state by the certain government by means of the act of national legislation.[146] Of special interest and importance is recognition

141. *Id.* at 253.

142. *Id.* at 254.

143. PETRAŻYCKI, *supra* note 43, at 477.

144. *Id.*

145. *Id.*

146. Hans Kelsen, *Recognition in International Law: Theoretical Observations*, 35 THE AM. J. INT'L L. 605, 605 (1941).

granted by the state to the secessionist entity in its territory.[147] An example of this is Russia's recognition of the independence of Chechnya in 1996. Such a recognition might stop a bloody war for independence of a secessionist movement and lead to the psychical revolution in the minds of people.

Second, there is recognition by means of the admission of a given community to the UN membership.[148] In this case such an admission is viewed as the most authoritative normative fact.[149]

Sometimes an advisory opinion of the UN International Court of Justice can be a normative fact, to which statespersons and politicians can refer to prove the international-legal existence of a state.[150] A known example of that is the advisory opinion of the International Court of Justice (ICJ) on Kosovo's declaration of independence.[151]

Recognition of a state can also be collective and take the form of the joint declaration (i.e., normative fact), as was the case after the First World War with the declaration issued by the Allied Supreme Council.[152]

C. The Concept of Sovereignty in International Law

Sovereignty, as was pointed out above, is a cornerstone of the whole system of international law without which it cannot exist, because international law by its nature is a system of law governing relations between sovereign entities.[153] It can even be argued that international law was born with sovereignty and that it will wither away along with sovereignty.

Despite this, the very concept of the sovereignty seems unclear and controversial. So, for example, one of the leading researchers of this concept defined the sovereignty as a "specific feature of the state or the state power, due to which it is legally highest and independent."[154]

In other words, the sovereignty is ascribed to the state, or ascribed to its power, as a certain feature or quality. Hence, everything depends on how we define the state: as a psychical phenomenon, as a social phenomenon, or as a set of legal rules.

It means that we have not one, but three different concepts of sovereignty: (1) juridical-dogmatic concept, (2) psychological, and (3) sociological.

147. DUGARD, *supra* note 81, at 181.

148. *Id.* at 65.

149. *Id.*

150. *Id.* at 205–06.

151. *Id.*

152. CRAWFORD, *supra* note 90, at 150.

153. HERMANN MOSLER, THE INTERNATIONAL SOCIETY AS A LEGAL COMMUNITY 15 (1980).

154. N.N. PALIENKO, SUVERENITET, ISTORICHESKOE RAZVITIE IDEI SUVERENITETA I JEJA PRAVOVOE ZNACHENIE XXI-XIII (1903).

The juridical-dogmatic concept of sovereignty might be purely symbolic, even formalistic and sometimes having nothing to do with the social reality.[155] An interesting illustration presents the case of Ukraine's sovereignty before declaration of independence in 1991.

Symbolic sovereignty, as expressed in the text of the constitutions of the USSR and Soviet Ukraine (which was a sort of dormant constitutional norm), was used as a normative fact by Ukrainian political elites in 1991 to proclaim independence and to create a truly sovereign state.[156]

In this example we see a contradiction between the juridical-dogmatic concept of the Ukrainian state, as expressed in the Ukraine's and Soviet constitutions, on the one hand, and the social reality, on the other hand. We can say that in the case of Ukraine, the juridical-dogmatic concept of sovereignty had transformed into the social reality only then, when in the collective psyche of the Ukrainian elites the highest authority (supremacy of power) had shifted from the USSR (government in Moscow) to the Ukraine (government in Kyiv).

Supremacy of power can be explained in the terms of the psychological theory by the natural tendency of a human being in the case of conflicting commands from different subjects to obey only one of these subjects.[157] Here is how Petrażycki explains this tendency:

> Endowing more than one subject with the right to exert authority over identical subordinates would, in accordance with the attributive and adversary nature of the law, lead to more or less sharp (and possibly sanguinary) conflicts if the various persons possessing that authority could issue different (perhaps diametrically opposed) commands with a like claim to require the execution thereof. Characteristically, the legal consciousness tends so to adapt the relevant convictions and the actual experiences (the consciousness of a duty of subordination and of a right to obedience) that in individual cases—in particular where the orders of various superiors are contradictory—the actual duty of obedience is acknowledged with regard to one, and not to two or more, of those who issue the commands. In precisely the same manner, the legal consciousness of those who issue the commands ordinarily the idea that substantially diverse commands of others be obeyed at the same time. Thereby conflicts are prevented.[158]

Thus, within the given territory of a state, the holder of the supreme power (a sovereign) is he to whom the legal consciousness of the majority of a

155. Marcus Benzing, *Sovereignty and Responsibility to Protect in International Criminal Law*, *in* INTERNATIONAL LAW TODAY: NEW CHALLENGES AND THE NEED FOR REFORM? 17, 17 (Doris Königet al. eds., 2008).

156. KATARYNA WOLCZUK, THE POLITICS OF CONSTITUTION MAKING IN UKRAINE IN CONTEMPORARY UKRAINE. DYNAMICS OF POST-SOVIET TRANSFORMATION, 120 (Taras Kuzio ed., 1998)

157. PETRAŻYCKI, *supra* note 7 at 132–33.

158. *Id.*

population acknowledges the duty of obedience.[159] To secure this obedience, a state apparatus might use different instruments and mechanisms, including persuasion, propaganda, manipulation, terror, and "brainwashing."[160] If democratic states rely more on persuasion, the dictatorial and totalitarian regimes might reach for open terror and "brainwashing."[161]

Where does an individual get the deceptive feeling of the "objectivity" of the sovereign's power from? The fact is that the behavior of those people who surround this individual creates in his mind an additional psychical pressure to obey the commands of the sovereign.[162] An individual is psychologically prone to follow the pattern of behavior of people surrounding him. There is something which Petrażycki called "the emotional-intellectual contagion (infection)."[163] Under the influence of this "contagion" an individual is inclined to obey the sovereign.[164]

If a population of a given state splits with regard to its obedience to different centers of power within the state, it might lead to civil war and state's disintegration, as was the case with the former Yugoslavia.[165]

What is called sovereignty in international legal theory Petrażycki called "supreme social authority" and defined it as the "general social authority above which there is none in the hierarchy—so that the subject of this authority is bound to be concerned about the general welfare only as regards subordinates or definite social groups—but not as regards any subject of higher authority."[166]

Supreme power in the state might be ascribed by national legal mentality to various beings (to the gods, prince, king, parliament, president, etc.).[167]

It is noteworthy that Kelsen's concept of sovereignty bears a striking resemblance to that of Petrażycki. First of all, Kelsen argues that in the "world of physical reality, there is no such thing as sovereignty."[168] Hence, we can argue that sovereignty belongs to the realm of the psychical reality. This point finds corroboration in the following words by Kelsen: "The state is sovereign if *we conceive* it to be sovereign, if *we conceive* the order of the state to be highest. It

159. *Id.*

160. Louis Althusser, *Ideology and Ideological State Apparatuses*, https://www.marxists.org/reference/archive/althusser/1970/ideology.htm [https://perma.cc/CG2W-TZZE] (last visited Oct. 4, 2019).

161. SAMUEL P. HUNTINGTON, THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS 82 (1957).

162. NICHOLAS S. TIMASHEFF, AN INTRODUCTION TO THE SOCIOLOGY OF LAW 186–187 (2002).

163. PETRAŻYCKI, *supra* note 7, at 329.

164. *Id*.

165. POLITICAL LOYALTY AND THE NATION-STATE 13 (Michael Waller & Andrew Linklater eds., 2003).

166. PETRAŻYCKI, *supra* note 7, at 133.

167. *Id.* at 135.

168. HANS KELSEN, LAW AND PEACE IN INTERNATIONAL RELATIONS 78 (1942).

is not sovereign if we proceed from a different assumption."[169] The words "we conceive" in this phrase indicate to us that we deal here with a psychical experience. Besides, just like Petrażycki, to Kelsen the term "sovereignty" means "the highest authority."[170]

According to some theorists of international law, behind the concept of sovereignty is the state's "competence-competence," i.e. the full state's ability to determine the forms in which the state's functions are performed.[171] This state's ability (i.e. sovereignty) does not emerge from the state's self-determination, but from international law.[172]

German legal philosopher Gustav Radbruch in his "*Rechtsphisophie*" also argued that sovereignty is nothing but an "international legal feature of the subject" and that "the state is a subject of international law not because it is sovereign, but, on the contrary, it is sovereign because it is a subject of international law."[173] Radbruch was confident that the notion of sovereignty should be developed not from natural legal views independently from international law, but rather directly from international law, following its method.[174]

If we accept the thesis that sovereignty is derived from international law then we ascribe in our psyche sovereignty (i.e. the highest authority) not to the state but to the abstract idea of international law or to the international community. In this case the object of representation of the international law or international community manifests itself as a sort of God who bestows upon states the highest authority. Logically, we have a vicious circle here because sovereign states create international law and international law confers sovereignty upon the states.

Criticizing the concept that the state is sovereign when its power is limited solely by international law Alf Ross wrote:

> The attempt to characterize the subject of International Law, the sovereign state, by the criterion of "sole subjection to International Law" is evidently meaningless if with the prevailing doctrine we take it for granted—as most of the adherents of the theory do—that International Law is defined as the law binding upon states. It is said first that International Law is the law binding upon states; next that states are the communities which are bound solely by International Law. This is evidently a vicious circle. In order to decide whether or not a community is a (sovereign) state we must first know whether or not the

169. *Id.* (emphasis added).

170. *Id.* at 77.

171. ROMAN KWIECIEŃ, SUWERENNOŚĆ PAŃSTWA, REKONSTRUKCJA I ZNACZENIE IDEI W PRAWIE MIĘDZYNARODOWYM 196 (2004); ZAKAMYCZE, KANTOR WYDAWNICZY ZAKAMYCZE, 196 (2004).

172. *Id.*

173. GUSTAV RADRBRUCH, FILOSOFIA PRAVA 216 (2004).

174. *Id.*

> rules by which it is bound are international. But to know whether or not a rule is international we must first know whether or not the subjects bound by it are (sovereign) states. It is a disgrace to us that such an obvious absurdity marks the current theory of International Law.[175]

Thus, the concept of sovereignty means a certain psychical experience, when individuals (subjects of the sovereign) ascribe the highest authority (the supreme power) to this sovereign, who can be a person (e.g. a monarch or a president), a group of persons (e.g. a government), an imaginary person (e.g. God), or an idea (e.g. idea of law).[176] On the other hand, the sovereign (e.g. a person to whom collective legal consciousness ascribes the highest authority) might ascribe to himself certain "sovereign" rights and duties to other individuals or groups of persons.[177] He might ascribe to other states a duty not to interfere with his state's internal or external affairs (to be more precise, in what he considers to be those affairs).[178] Hence we have a concept of two aspects of sovereignty in the mind of the sovereign: (1) an internal aspect (i.e. an idea about the right to the supreme and exclusive authority within a state's territory), and (2) an external aspect (a duty ascribed to other states and persons not to interfere into what he considers to be his exclusive competence).[179]

These two aspects of sovereignty are sometimes described as negative and positive sovereignty.[180]

In the terms of the psychological theory, a person who considers himself to be a representative of a sovereign state (e.g. a head of the state, prime-minister, or a minister of foreign affairs) typically ascribes to his state the following rights in international relations: the right to be treated as equal to other states; the right of respect from other states and their representatives; and the right not to be attacked by military force of the other state.[181] On the other hand, he ascribes to other states and their representatives the corresponding duties.[182]

At the same time, some states' leaders might ascribe to themselves and to their states some rights which do not exist in the eyes of other leaders, which might lead to international conflicts.[183] For instance, a head of a powerful state might ascribe to his state the right to interfere into the affairs of those

175. ROSS, *supra* note 12, at 41.

176. PETRAŻYCKI, *supra* note 7, at 135.

177. *Id.* at 136.

178. *Id.*

179. THOMAS J. BIERSTEKER & CYNTHIA WEBER, STATE SOVEREIGNTY AS SOCIAL CONSTRUCT 9–10 (Thomas J. Biersteker & Cynthia Weber eds., 1996).

180. *See* ROBERT H. JACKSON, QUASI-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS AND THE THIRD WORLD 26–31 (1996).

181. PETRAŻYCKI, *supra* note 42, at 477.

182. *Id.*

183. *Id.* at 147–48.

neighboring states which he considers to be within the sphere of his country's "special" interests.[184]

II. SUBJECTS OF INTERNATIONAL LAW AND THE INTELLECTUAL STRUCTURE OF INTERNATIONAL-LEGAL EXPERIENCE

In the contemporary international-legal theory subject of international law is typically defined as an entity possessing international rights and obligations, and having the capacity to: (a) maintain its rights by bringing international claims; and (b) to be responsible for its breaches of international legal obligations.[185] However, as James Crawford notes, this definition, though conventional, is circular since, "while the indicia referred to depend in theory on the existence of a legal person, the main way of determining whether the relevant capacity exists in case of doubt is to inquire whether it is in fact exercised."[186]

The international-legal doctrine is helpless in the face of the need to explain the legal nature of such "anomalous" subjects of international law as "belligerent communities," "governments in exile," the Sovereign Order of Malta, Taiwan, etc.[187] This helplessness manifests itself in the use of the term "entities sui generis," because legal theorists do not know under which theoretical heading to place these entities.[188] For example, in the case of civil war in a state, the other states might recognize as a legitimate representative of the given state, not its government, but an armed opposition (e.g. civil war in Syria). A "government in exile" might be recognized as a legitimate representative of state A by state B but not by state C.

Taiwan is officially considered by many states as a part of the territory of the People's Republic of China and at the same time as a separate subject for some purposes (e.g. as a "fishing entity" for law of the sea and as separate customs territory for the WTO's membership).[189] The Sovereign Order of Malta, lacking state territory and population, nevertheless maintains diplomatic relations with more than one hundred states.[190]

There are also such anomalous entities to which international law ascribes certain rights as "the international community as a whole," "mankind," and the "future generations."[191]

184. SUSANNA HAST, SPHERES OF INFLUENCE IN INTERNATIONAL RELATIONS: HISTORY, THEORY AND POLITICS 90 (2016).

185. CRAWFORD, *supra* note 90, at 105.

186. *Id.*

187. *Id.* at 114–15.

188. *Id.* at 114.

189. *Id.* at 115.

190. Noel Cox, *The Acquisition of Sovereignty by Quasi-States: The Case of the Order of Malta* MOUNTBATTEN J. LEGAL STUDIES (forthcoming).

191. KEMAL BASLAR, THE CONCEPT OF THE COMMON HERITAGE OF MANKIND IN INTERNATIONAL LAW 74 (1998).

According to the ICJ, *erga omnes* obligations are those obligations that a state has toward "the international community as a whole."[192] In other words, in the minds of the ICJ judges, "the international community" is a psychical representation to which they ascribe certain rights.[193] Mankind, as another psychical representation, in the minds of individuals possesses "heritage."[194]

In international environmental law, the "future generations" which are not yet born, have certain rights (e.g., access to the cultural and natural resources which the current generation enjoy).[195] For instance, the Philippine Supreme Court in Manila held that:

> [E]very generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology. Put a little differently, the minors' assertion of their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come.[196]

In national law, rights and legal personality can be ascribed even to rivers, ecosystems, and nature.[197] Traditional legal theory equally stands helpless before these anomalous subjects of law, not being able to explain their true nature.

The true legal nature of these "anomalous" entities, for the legal scholars, can be explained only by the psychological theory of law. From the standpoint of the psychological theory of law, the subject of international law can be defined as an object of representations in the human psyche to which a given individual ascribes rights and obligations in the field of international relations.[198] As for the concept of international relations, it has to do with the belief (which may exist or not in social reality) that the given subjects of international law (e.g. states) are in legal relations with one another.[199]

For an individual (e.g. international-legal theorist) to whom the primary subjects of international law are states, all other subjects of international law

192. Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain) Judgment, 1970 I.C.J. Rep. 50 ¶ 33 (Feb. 5).

193. Ardit Memeti & Bekim Nuhija, *The Concept* of *Erga Omnes Obligations in International Law*, NEW BALKAN POLITICS, https://www.newbalkanpolitics.org.mk/item/the-concept-of-erga-omnes-obligations-in-international-law#.XZuE9uf0kWo [https://perma.cc/Y6QX-QWWU] (last visited Oct. 7, 2019).

194. BASLAR, *supra* note 191, at 71.

195. Simone Borg, *Guarding Intergenerational Rights Over Natural Resources*, *in* Future Generations and International Law (Emmanuel Agius, et al. eds., 1998).

196. Minors Oposa v. Sec'y of the Dep't of Env't and Nat. Res., G.R. No. 101083 (July 30, 1993) (Phil.).

197. Robin R Milam, *Rivers and Natural Ecosystems as Rights Bearing Subjects*, THE RIGHTS OF NATURE, https://therightsofnature.org/rivers-and-natural-ecosystems-as-rights-bearing-subjects/ [https://perma.cc/LL9G-N5U5] (last visited Oct. 7, 2019).

198. PETRAŻYCKI, *supra* note 43, at 325.

199. *Id.* at 332.

might by experienced as those entities which are recognized as subjects by the states and who depend upon these states for their "existence."[200] In this psyche, states as objects of representation create other subjects of international law or "recognize" their existence.[201]

Other individuals might ascribe rights and obligations under international law directly to various beings.[202] There are also individuals who consider the international legal community of states as a whole as an authority which conferred international legal subjectivity upon various entities.[203]

In case of a disagreement about the "existence" of a particular subject of international law, the international lawyer often tries to find and refers to the corresponding normative fact in order to substantiate his or her position, (e.g., he or she might refer to the court's decision or an international treaty). For example, to substantiate the view that an international governmental organization (e.g. the UN) is a subject of international law, international lawyers refers to the advisory opinion of the ICJ: "Reparation for Injuries Suffered in the Service of the United Nations."[204]

As was mentioned, *supra*, Hans Kelsen has drawn parallels between the concept of state and the concept of juridical person.[205] This comparison might be helpful for us to explain the true nature of the concept of the subject of international law or international-legal person in legal theory.

From the perspective of the psychological theory of law, most of the concepts of juristic persons in the legal scholarship are naïve-realistic because those subjects of law (e.g. juristic persons) are naively dealt with as realities actually existent, or, on the other hand, these concepts can be "naïve-nihilistic, insofar as—failing to find in the external world anything real which seems appropriate—they concede the impossibility of finding, and refuse to believe that there exist, innumerable subjects of rights (which undoubtedly do exist or have previously existed.)"[206]

The modern legal science, continues Petrażycki, mistakenly denies the "existence (actual or potential) of all those categories of subjects not coming under the heading of 'living people,' 'physical persons,' 'human organizations,' or 'juristic persons,' which (particularly in earlier stages of culture, including

200. GIOVANNI DISTEFANO, FUNDAMENTALS OF PUBLIC INTERNATIONAL LAW: A SKETCH OF THE INTERNATIONAL LEGAL ORDER 56 (2019).

201. *Id.*

202. PETRAŻYCKI, *supra* note 43, at 312, 333.

203. KELSEN, *supra* note 3, at 173.

204. Reparation For Injuries Suffered in The Service of The United Nations, Advisory Opinion, 1949 I.C.J. 9 (Apr. 11, 1949).

205. KELSEN, *supra* note 13, at 105–06.

206. PETRAŻYCKI, *supra* note 7, at 186.

the Middle Ages) played an important part in the legal mentality and in official law . . . ."[207]

Such an attitude of the modern legal theory, which is also characteristic for the international-legal theory, is unscientific because it ignores early forms of international law. Such as ancient international law (e.g. international law of the Sumerian civilization), which was primarily viewed by the ancient mind as law between deities standing behind city-states.[208]

Petrażycki also states that "the existence of a social organism is not a condition precedent to the emergence of juristic person."[209]

Petrażycki criticized naïve-constructivist teachings on the subjects of law, which instead of exploring actually existing phenomena in the sphere of their real existence (which is human psyche), are building different fantastic creatures in the inappropriate spheres (e.g., theories of "social organisms," theories of different kinds of metaphysical "wills," etc.).[210]

It is worth recalling that the Soviet theory of international law viewed its essence in "the concordance of the wills of states."[211]

The truly scientific doctrine of subjects of law, according to Petrażycki, can be built only when we seek subjects of law in the mind of a person who ascribes to these "subjects" rights and obligations and not in some kind of "external reality."[212] Petrażycki points out: "As in other fields of legal science, the sphere where the relevant phenomena are found and studied is transferred from the external world to the mind of the person experiencing legal processes and ascribing obligations and rights to various beings . . . ."[213]

For example, in the field of international law, rights and obligations are ascribed to such phenomena as "future generations," "mankind," "national minorities," "indigenous peoples," "Sovereign Military Order of Malta," etc.[214]

As Petrażycki points out, when jurists ascribe to juristic and physical persons certain rights and obligations—when they experience the corresponding legal judgment—they actually have the relevant subjects "extremely close at hand," in their minds, where it is very easy to become acquainted with their nature.[215] Using "the treasury has such and such rights" as an illustration of his point, Petrażycki holds that the subject of the right ascribed is the logical subject of this judgment—that is conceived of and to which is referred the logical

207. *Id.*

208. DAVID J. BEDERMAN, INTERNATIONAL LAW IN ANTIQUITY 22–23 (2001).

209. PETRAŻYCKI, *supra* note 7, at 182.

210. *Id.* at 186–87.

211. G.I. TUNKIN, THEORY OF INTERNATIONAL LAW 214 (William E. Butler trans., Harvard Univ. Press 1974).

212. PETRAŻYCKI, *supra* note 7, at 188.

213. *Id.*

214. CRAWFORD, *supra* note 90, at 114–15.

215. PETRAŻYCKI, *supra* note 7, at 185.

predicate: "has the right;" the content or object of the idea to which the word "treasury" corresponds.[216] He stresses the point that "treasury" here is undoubtedly "the real, logical, and juristic subject."[217] This line of reasoning by Petrażycki is applicable to the subjects of international law, which also exist as logical and juristic subjects of the judgments. For example, it would be futile to look for the "future generations" as a person or thing to which mankind owes certain obligations with respect to protection of the environment, in the external world, but, nevertheless, "future generations" are real in a sense of being a logical and juristic subject.

Of particular interest to us is the old debate between international-legal scholars regarding the question whether a human being is a subject of international law. To some scholars, a human being (natural person) is not a subject but merely an object of international law.[218] To others, individuals are "derivative" subjects in that they draw their existence from the formal decisions of other subjects, primarily states.[219] The third group of scholars sees in individuals the only actors and subjects of international law.[220]

One of the common mistakes made by the scholars in their assessment of an individual as a subject of international law is related to what Petrażycki calls "the (mistakenly) realistic doctrine of 'physical' subjects of law ('living human individuals')."[221]

The truth is that an individual (human being or natural person) is a subject of international law only as a logical or grammatical subject existing in our minds (i.e. as a psychical representation) and not as a "living human individual."[222]

According to Petrażycki, the intellectual structure of the legal mentality (legal psychical experience) comprises of the following elements:

(1) Object ideas (i.e. psychical representations)—ideas: (a) of objects of obligations (of obligatory actions), and (b) of objects of rights (of acquisitions which are due and owing);

(2) Subject ideas—ideas: (a) of subjects of obligations, and (b) of subjects of rights;

216. *Id.*

217. *Id.*

218. JOHN A. C. CARTNER ET AL., THE INTERNATIONAL LAW OF THE SHIPMASTER 20 (2009).

219. WILLIAM R. SLOMANSON, FUNDAMENTAL PERSPECTIVES ON INTERNATIONAL LAW 336 (1990).

220. Nicolas Leroux, *Non-state Actors in French Legal Scholarship: International Legal Personality in Question, in* PARTICIPANTS IN THE INTERNATIONAL LEGAL SYSTEM: MULTIPLE PERSPECTIVES ON NON-STATE ACTORS IN INTERNATIONAL LAW 85 (Jean d'Aspremont ed., 2011).

221. PETRAŻYCKI, *supra* note 7, at 10.

222. *Id.*

(3) Ideas of relevant legal facts; and

(4) Ideas of normative facts.[223]

This scheme of the intellectual structure of law, which is complete and exhaustive, is applicable to international law. This scheme allows us to answer the following questions in the field of international legal relations: (1) who is bound (who is the subject of the international-legal obligation)?; (2) to what action or actions is this subject bound (what is the object of the international legal obligation)?; (3) who is the subject of the relevant right?; and (4) to what does the subject have a right—what is due to him (the object of the right)?

Answering these questions helps us to better understand the essence of the subjects of international law and their rights and obligations under international law.

A. The Relationship Between International and National Law

In international-legal theory there are several competing approaches striving to explain the relationship between international and national law; in particular, trying to answer the question of which rules of law, international or national, should take precedence in a case of conflict between these rules.

The proponents of the dualistic approach claim that international and national law are two distinct legal orders, having nothing to do with each other.[224] These two legal orders have different objects (the subject matter) of regulation (i.e., interstate relations in case of international law and intrastate relations in case of national law), different subjects (i.e., primarily states and international organizations in case of international law and private persons [natural and legal persons] in case of national law), and different sources (e.g., treaties and customs in international law and, mostly, acts of legislation in case of national law).[225] The dualistic approach, which seems rather popular among international-legal scholars, does not give a direct answer to the question of which legal norm, international or national, should be applied in the case of a conflict between them. Theoretically assuming that international law and national law are two different legal systems regulating different kinds of social relations, there cannot be any conflict between them. At the same time, the proponents of dualism might argue that in the realm of national law international-legal rules can be applied only on the basis of national-legal rules—for example, on the basis of the constitutional norms.

223. *Id*. at 58–59.

224. Andreas L. Paulus, *The Emergence of the International Community and the Divide Between International and Domestic Law*, *in* NEW PERSPECTIVES ON THE DIVIDE BETWEEN NATIONAL AND INTERNATIONAL LAW 217 (André Nollkaemper & Janne Elisabeth Nijman eds., 2007).

225. D.B. LEVIN, AKTUALNYE PROBLEM TEORII MEZHDUNARODNOGO PRAVA, Moscow: Nauka, 195–196 (1974).

The monistic approach to the relationship between international and national law postulates that both laws constitute one single legal system, something like a hierarchically organized pyramid of legal norms.[226] The question is only about what law (international or national) should be at the apex of this legal pyramid.

In Kelsen's legal theory, international and national law are parts of one legal system, with primacy belonging to the international-legal rules.[227] To Kelsen, in this hierarchy of legal norms the lower-level legal norms derive their validity from the validity of the higher legal norms, thereby logically leading to a single basic norm, which is not real but "hypothetical."[228] What this "basic norm" is remains somewhat a mystery, because initially Kelsen put at the top of the legal pyramid a general principle of law and one of the fundamental principles of international law "*pacta sunt servanda*," but later on came up with logically circular "basic norm" according to which: "The states ought to behave as they have customarily behaved."[229]

In reality, however, for the judges of national courts even in those legal systems which are regarded as "monistic," and in which the primacy in case of a conflict between international treaties and national law belongs to the former, the part of "the basic norm" is played by constitution.[230]

From the psychological perspective, to understand the relationship between international and national law we need to look at this issue from two different angles: the point of view of an international lawyer (e.g., a judge of an international court) and, on the other hand, from the perspective of a national lawyer (e.g., a judge of a national court).

An individual has a natural psychological tendency to build in his mind a hierarchy of normative facts. For example, a judge of an international court tends to view himself as an organ of international justice or a servant to international law. In other words, he is inclined to give primacy to international, rather than national law. From his perspective in the case of a conflict between international-legal and national-legal rules the priority will belong to international-legal rules, especially to such as the UN Charter, basic principles of international law, as expressed in such normative facts as the "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations" (1970) and

226. PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 63 (7th ed. 1997).

227. KELSEN, *supra* note 13, at 363.

228. UTA BINDREITER, WHY GRUNDNORM?: A TREATISE ON THE IMPLICATIONS OF KELSEN'S DOCTRINE 77–78 (2002).

229. CRAWFORD, *supra* note 90, at 49.

230. DAVID ROBERTSON, THE JUDGE AS POLITICAL THEORIST: CONTEMPORARY CONSTITUTIONAL REVIEW 12 (2010).

the Helsinki Final Act, as well as norms *jus cogens* and obligations *erga omnes*.[231]

To give priority to an international treaty, the judge of an international court can refer as to authoritative normative facts to the articles 26 and 27 of the 1969 Vienna Convention on the law of treaties, according to which "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith" (Art. 26) and the state "may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[232]

In a word, in the mind of an international lawyer, international-legal facts take precedence over national-legal normative facts.

The picture in the mind of a national lawyer might look differently. For instance, to the judge of the national court, the highest authority as a normative fact is the national constitution. Unlike the international lawyer, who tends to view the international treaty as one normative fact, in the eyes of the national judge there are three different normative facts: international inter-state treaties, international inter-governmental treaties, and international agreements of inter-ministerial character.[233] In the mind of the national judge the hierarchy between international and national normative facts is more complicated and he tends to apply international normative facts insofar as it is required by the national normative facts.[234]

In summary, there is no issue about the relationship between international and national law but rather an issue of how to build the hierarchy of international and national normative facts; constructing this hierarchy the national and international lawyers tend to proceed from different assumptions. The international lawyer assumes that the hierarchy of normative facts should be built with the preference for international normative facts, whereas the national lawyer gives preference to the national normative facts but first of all to national constitution.[235]

231. ANDRÉ NOLLKAEMPER, NATIONAL COURTS AND THE INTERNATIONAL RULE OF LAW 152 (2011).

232. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (available at http://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf [https://perma.cc/CB9B-HW4M]).

233. ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 15 (3d ed. 2013).

234. NOLLKAEMPER, *supra* note 231, at 151.

235. Sibilla Bondolfi, *Controversy in Parliament*: *Put National Law Before International Law? Other Countries Do*, SWI (May 30, 2018, 2:00 PM), https://www.swissinfo.ch/eng/directdemocracy/controversy-in-parliament-_put-national-law-before-international-law—other-countries-do-/44154932 [https://perma.cc/37CY-7Z8S]; Anthea Roberts, *Comparative International Law? The Role of National Courts in Creating and Enforcing International Law*, 60 INT'L & COMP. L.Q. 57, 75 (2011).

III. CONCLUSION

The psychological theory of international law allows us not only to shed new light on the most important issues of the international-legal theory and practice, which cannot be solved by the traditional theory of international law, but also lays the necessary groundwork for the creation of the true science of international law.

The future of international law to a great extent depends on whether or not the new science of this law will be built, and this science should be based upon three pillars: (1) psychological theory of international law; (2) sociological theory of international law; and (3) juridical-dogmatic theory of international law.

To become the science in the true sense of the word, international law should jettison those quasi-scientific theories which are rooted in the logical errors as to the true nature of law and to use the psychological theory of law's methodology as a reliable instrument of the scientific research.