Relations between the International Legal Order and the Municipal Legal Orders— a "Perspectivist" View

By Ilmar.Tammelo

Reader in International Law and Jurisprudence, University of Sydney

Mag.Iur. (Tartu), Dr.Jur. (Marburg), M.A. (Melbourne), LL.M. (Sydney).

The so-called problem of the relations between international law and municipal (or internal or State) law has been discussed almost *ad nauseam* without achievement of a generally acceptable solution. International and municipal legal practice do not appear to have been essentially affected by various suggested solutions of this problem; they seem to follow calmly ways of their own. Sir Gerald Fitzmaurice has declared that "the entire monist-dualist controversy" (in which the two principal views of the issue clash) "is unreal, artificial and strictly beside the point".[1] Nevertheless noted international legal scholars continue to discuss the problem, for example, Kelsen,[2] Verdross,[3] O'Connell,[4] Starke,[5] and Fitzmaurice himself. Whatever the net result of the solutions offered by them and others may be, the time has not yet arrived simply to dismiss the problem. The way in which it has been discussed and its attempted solutions have created confusion which must be cleared away in order to have free access to theoretical and practical problems in which the relations in question play a role.

As in many juristic and jurisprudential controversies, the continuation of the doctrinal debate and the zeal with which it is conducted is, in part, due to the fact that the present problem has been badly formulated and defectively analysed.[6] Strictly speaking, the question here is not about relations between international *law* and municipal *law*. It is to be noted that "international law" means the law of a concrete legal entity—a legal *order*, whereas "municipal law" means an abstraction of the law of various here-and-now existing legal *orders*. In other words, what is called "international law" forms today a single legal system, whereas what is called "municipal law" does not—the latter term covers a plurality of single legal systems. The two poles whose relations are attempted to be clarified are hence not international law and municipal law but the international legal order (or

1 Sir Gerald Fitzmaurice, "The General Principles of International Law" (1957), 92 H.R., p. 71.
2 H. Kelsen, *Pure Theory of Law* (1967), pp. 320-47.
3 A. Verdross, *Völkerrecht* (5th ed., 1964), pp. 11-122.
4 D. P. O'Connell, Vol. 1 (1965), International Law, pp. 37-88.
5 J. G. Starke, *Studies in International Law* (1965), pp. 21-30.
6 Cf. H. Wagner, "Monismus und Dualismus: eine methodenkritische Betrachtung zum Theorienstreit" (1964), 89 Archiv des öffentlichen Rechts, pp. 212-41.

system), on the one hand, and the legal orders (or systems) of various States, on the other. Another circumstance which has created confusion disturbing even the approach to the present problem is the lack of clarity about the question as to whether it is one of legal theory or legal practice. Nor is it settled as to whether the relations in question pertain to theory *about* law or to a theory *in* law.[7] Moreover not only the actual import of this distinction, which plays a key role here and elsewhere in legal thought, but also the mutual relations between theory about law and theories in law are hazy.

It is, therefore, no wonder that the proponents and opponents of antagonistic doctrines concerning the relations between the international legal order and the municipal legal orders often talk at cross purposes and are incapable of reaching a minimal common basis for a really fruitful discussion. In view of this situation, it is my present purpose to examine certain presuppositions on which a proper posing of the problem of the relations between the international legal order and the municipal legal orders would rest and to pave the way to a "perspectivist" conception which, in my opinion, is conducive to the clarification of the relevant problem-situation. The "perspectivist" conception does not constitute any new theory, a theory which would further increase the doctrinal tumult by adding another to already existing competing theories. This conception seems to be implicit in certain views which some international scholars have expressed about the relations in question. Perhaps it will prove to be nothing else but a version of the "dualist" or "pluralist" conception passed through a jurisprudential filter.

The controversy about the problem of the relations between the international legal order and the municipal legal orders has assumed the form of a dispute between opposing theories. Since in the area of legal thought the meaning of the word "theory" is ambiguous and even vague, it is necessary to draw the distinction between theory *about* law and theories *in* law in order to gain a basis for the treatment of the theme of the present essay. Theory about law or jurisprudential theory is an intellectual construction *instrumental* for the apprehension, description, analysis, and systematization of legal phenomena. As such it has no juridic (or jural) character, that is, it is not a part of enacted law. Therefore it is not a source for providing solutions to legal problems. It can be employed only as a *tool* of juristic or jurisprudential thought. In contrast, a theory in law is a juridic thought-formation. It is a specific way to present legal thoughts within a legal order. Examples of such juridic thought-formations are the theories of corporate personality in municipal legal orders and the theories of recognition of States in the international legal order. In certain historical conditions of law such theories, including those which appear to be completely artificial and even fantastic, may be most expedient for regulation of social relations, as metaphors, allegories, and fables may be appropriate to convey poetic, philosophic, and even scientific

7 Cf. H. L. A. Hart, "Definition and Theory in Jurisprudence" (1954), 70 L.Q.R., pp. 37-60.

ideas. Cognitively worthless, they can nonetheless be most useful expedients for the expression or gestation of legal norms. Such theories may have the property of normative expansion and irradiation and as such they can offer answers or essential components of answers where the law is otherwise silent or incomplete. In certain cultural circumstances it is quite possible that they constitute the most practicable ways for producing a great number and variety of particular legal provisions. Whether they are expedient or inexpedient is a question which can be answered only for given cases.[8]

After these preliminaries it can now be asked whether the conceptions of the relations between the international legal order and the municipal legal orders entertained today belong to theory about law or to theories in law. The two main categories of those theories: the monist doctrine and the dualist (also called "pluralist") doctrine seem, at first glance, to belong to both. This is understandable if it is considered that the difference between the analytic and normativistic problems, between the problems of normative meta-language and normative object-language, is often not properly appreciated by lawyers. It may be mentioned that even in the area of ethics the corresponding problems are frequently commingled; the difference between ethics as an analytic discipline of thought (which is a branch of philosophy) and ethics as a body of normative principles (which constitutes morals or ethos) is not always sufficiently observed. It is quite conceivable to postulate a universal and unitary legal order so that all positive legal orders constitute only partial legal orders within it. This ultralegal normative order may provide a normative basis for the ultimate answer to any legal problem whatsoever. This postulated normative order is, however, not an order of positive law; it can be considered to be only an order of transempirical law—natural law. It may univocally determine the relations of super-, sub-, or co-ordination between the orders or norms of positive law and contain principles according to which the validity of the norms of these legal orders within each of them in their relations to all others can be determined. An intellectual authority can be lent to this universal order of transempirical law by offering "strong reasons" or "good grounds" for its principles in an appropriate procedure of argumentation.[9] However, the available authoritative material of positive law lends no support for the construction of such universal legal order. Should it be the case that all relevant orders of positive law have certain points of convergence or agreement so that a universal legal order can be constructed out of them—a total legal order which would embrace both the international legal order and all municipal legal orders—it would still be only an historical contingency and not a transcendental necessity. It may prove or happen to be transepochal but need not be so.

A treatment of the relations between the international legal order

8 Cf. J. Stone, *Legal System and Lawyers' Reasonings* (1964), p. 49.

9 I. Tammelo, *Treaty Interpretation and Practical Reason* (1967), pp. 36-47.

and the municipal legal orders as an enterprise of theory about law has for its task, above all, to provide an exposition of the possibilities of these relations, which possibilities may become realized in the actuality of positive law. Its other tasks are to explain why the actual relations have come about and to offer reasons why the relations in question ought to be or ought not to be such as they actually are or are contemplated to be. Thus theory about law pertinent to the relations between the international legal order and the municipal legal orders has analytical, sociological, and ethical problem areas. Performance of its tasks in the last-mentioned area can lead only to setting up desiderata which are ethically or politically well founded, that is, what the relevant norms of positive law *ought* to prescribe in the sense of what ought to be in the light of proper appreciation of all pertinent facts and factors, not what these norms actually prescribe in the sense of what ought to be according to positive law itself. These desiderata do not provide the answer to the question as to whether in a given case a municipal legal order is or is not subordinated to the international legal order. This question can be answered only by recourse to the relevant norms of positive law belonging either to a municipal legal order or to the international legal order—it can be answered only from the point of view of a legal order at a given point of time. It is conceivable (but unlikely) that in every instance the answer proves to be exactly the same; but it is also conceivable that the answers prove to be different.

In the doctrinal dispute about the problem here under discussion, alleged or actual differences between the international legal order and the municipal legal orders are often invoked. Thus it has been argued that they are fundamentally different, because international law is a law of co-ordination whereas municipal law is a law of subordination; because the sources of international law are treaty and custom, whereas the sources of municipal law are statute and (to a minor degree today) custom; and because the norms of international law are addressed to States whereas the norms of municipal law are addressed to individuals. Although it is to be conceded that international law is fundamentally different from municipal law in many respects, the above-mentioned differences are no longer as great as they used to be and they have no incisive significance for the problem of the relations between the international legal order and the municipal legal orders. It is to be stressed that the international legal order has, potentially and actually, a common field with the municipal legal orders; for norms of all legal orders here in question can regulate or do regulate the same matters and they are addressed or can be addressed to the same persons. Thus there are norms of international law whose direct addressees are individuals and there are norms of municipal law whose direct addressees are States.

As to the international legal order, it does not seem that there are any absolute legal restrictions as to the contents of its norms. If a norm is enacted in a proper international legal procedure and corresponds otherwise to existing relevant international law, it can be contended to be valid whatever its content may be. The constitution of the inter-

national legal order as it exists today appears to be completely flexible; there is nothing that can be regarded as "entrenched provisions" in this constitution.[10] There are municipal legal orders whose constitutions contain norms which cannot be abolished or altered in any legal procedure; but there are also municipal legal orders whose constitutions are extremely flexible. By a breach of legal continuity—by a revolution in the legal sense—even entrenched provisions in the constitutions of municipal legal orders can be set aside and inflexible constitutions can be replaced by flexible ones. Hence conflicts between norms of the international legal order and norms of a municipal legal order can always eventuate; it is a question of fact to what extent the international legal order and the municipal legal orders relate to the same object of legal regulation. At any rate, the contention of Fitzmaurice that the international and municipal legal orders have no common field at all[11] is untenable.

It follows from the above considerations that the question as to whether the international legal order or a municipal legal order has primacy or whether neither of them has primacy over the other can be answered only "perspectivistically", that is, from the viewpoint of a given legal order.[12] From the viewpoint of the international legal order of today, this order is "sovereign", and every municipal legal order is subordinate to it. This does not mean that a legal norm of municipal law which is inconsistent with a norm of international law is, therefore, invalid as a norm of *municipal law*. Its legal validity or invalidity (in the sense of positive law) is decided in the relevant municipal legal order only by recourse to criteria contained in this legal order. There are municipal legal orders from whose viewpoint the given municipal legal order is supreme and every other legal order, including the international legal order, is subordinate to it. Thus, British Parliament can make or unmake any law whatsoever.[13] The present British legal order, likewise the present Australian legal order,[14] is not ultimately subordinated to the international legal order from their respective points of view. As to the former, it is even questionable whether British Parliament has legal competence to effect such a subordination.[15] For the corresponding measures would abrogate the sovereignty of Parliament, and this has proved to be not feasible in British legal experience, that is, the British Constitution is inflexible at least on one point: the principle of parliamentary sovereignty.

---

10 Cf. J. Stone, *Legal Controls of International Conflict* (1954), pp. xxxi-xxxiii, 34-7.

11 Sir Gerald Fitzmaurice, n. 1, *ante,* at p. 70.

12 Cf. I Tammelo, "The Antinomy of Parliamentary Sovereignty" (1958), 44 Archiv für Rechts-und Sozialphilosophie, p. 510.

13 A. V. Dicey, *Introduction to the Study of the Law of Constitution* (9th ed. by E. C. Wade, 1952), pp. 36, 37.

14 Cf. Ch. H. Alexandrowicz, "International Law in the Municipal Sphere According to Australian Decisions" (1964), 13 I.C.L.Q., pp. 80-4, 92-5.

15 Tammelo, n. 10, *ante,* at p. 509.

The fact that the international legal order and those municipal legal orders which are not or cannot legally be ultimately subordinated to any other legal order, admit norms of conflicting content indicates that between norms of international law and municipal law, legally unresolvable antinomies may occur. It is to be noted that in this statement the word "antinomies" is used in a rather broad (or even loose) sense. Antinomies in the strict sense of the word, viz. contradictions or contrarieties of norms,[16] can occur only *within* a normative system. Conflicts between the contents of norms which belong to independent legal orders are not logical inconsistencies. Inconsistency between the content of a norm of international law and the content of a norm which belongs to the law of a legal order which is not subordinated to the international legal order in the relevant respect is of the same kind as the conflict between antagonistic norms of two independent municipal legal orders. Under certain circumstances the person affected by such norms may be placed into a real plight (e.g. a person of double nationality being required to enter into military service of two States conducting war against each other), and principles of justice ought to be resorted to here in order to provide relief by annulment of effects of one or both of the conflicting norms. If the legal orders in question ignore this demand of justice, a deplorable but not an unusual situation arises in which the affected person must infringe one of the norms addressed to him and may be punished whatever he does or leaves undone. The conflicting norms involved in this situation may both be valid: each valid by reference to diverse criteria of validity belonging to different legal orders.

This suggests that the word "validity" as used by lawyers signifies a relational concept. Validity in the absolute sense would be nothing else but a version of the concept of good in the absolute sense. Nothing of this elevated nature is involved in the validity of legal norms. The validity of a norm as a legal norm is decided by the lawyers dealing with positive law by the answer to the question: Does this norm correspond to the principles of law-creation or to those governing the contents of the kind of norms at issue? If a cosmic legal order of ubiquitous and sempiternal scope is postulated, then it is conceivable that any legal norm in the universe can be qualified as valid or invalid according to the validity criteria of this order. But even under this hypothesis, validity is determined from a certain point of view. Only from this point of view is it possible to qualify, for example, satanic decrees as being ultimately legally invalid (because their content may not correspond to certain fundamental requirements of the hypothetical cosmic ultimate legal order). However, from the viewpoint of the order created and sustained by the devil they may still be valid or invalid for their addressees according to the relevant criteria of validity of this order. Incidentally, it may happen even in the real world that a given legal order contains antinomic norms and no principles according to which such antinomy can be resolved. In this case both

16 I. Tammelo; *Outlines of Modern Legal Logic* (1969), pp. 102-5.

conflicting norms are equally valid; the persons affected and also the judges who have to pass decisions to be based on such norms are in an unenviable quandary: either to sigh and let the law have its course or to rebel against the law.

The relations between the international legal order and the municipal legal orders appear in the perspectivist view as those of super-, sub-, or co-ordination determined by points of view assumed for the legal appraisal of the given legal situations. The total picture can be described as follows: Every legal order is partially or totally included by another or is completely excluded from another. The municipal legal validity of a norm which belongs to a municipal legal order is primarily decided according to the criteria which are specific to this legal order, and only then according to the criteria of the international legal order, provided that the given municipal legal order admits the international legal order to have a bearing on the question of the validity of this norm. The "monist" doctrine of the relations between the international legal order and the municipal legal orders appears to hold for the international legal order as it exists today. Thus this doctrine can be styled as a theory *in* present international law. The "monist" doctrine holds also for some municipal legal orders, namely, in two alternative ways: either a municipal legal order contains a principle according to which it is supreme and thus, from its point of view, its constitution is super-ordinated to the international legal order, or it contains a principle according to which it is completely subordinated to the constitution of the international legal order. For some municipal legal orders the "pluralist" doctrine holds in the sense that in certain respects (e.g. as regards customary international law) they are subordinated to the international legal order and in other respects (e.g. as regards international treaty law) they are super-ordinated to or co-ordinated with the international legal order—here again, of course, from the point of view of the relevant municipal legal order. Co-ordination of the international legal order and a municipal legal order in certain respects means, in the present context, that from the point of view of the given legal order a municipal legal norm and an international legal norm are on the same level of validity, so that the former can be repealed by the latter and vice versa. The "pluralist" doctrine in the above sense is conceivable as a theory in international law, but it is unlikely that such a theory will become a part of the international legal order.

The above-outlined perspectivist conception belongs to theory *about* law; in other words, it is a jurisprudential theory: it presents what appears to a legal scholar to be the situation with respect to the relations between the international legal order and the municipal legal orders not from the point of view of a specific legal order, but from a viewpoint extrinsic to any legal order, from the viewpoint, as it were, of a "detached spectator". As such it describes, analyses, and systematizes the actual or potential states of legal affairs in which the relations in question eventuate. What such a theory could contribute is important for the understanding of the problem situation of these relations, through which understanding the solution of certain prob-

lems of legal practice would be facilitated. In conclusion, it may be said—to employ the words of Sir Gerald Fitzmaurice quoted above—that "the entire monist-dualist controversy" about the relations between the international legal order and the municipal legal orders is "unreal, artificial and strictly beside the point", if the competing theories are claimed to be universalized theories *in* positive law. The universalization of either of them can be attempted only for a natural law system. On the plane of positive law the question as to which of these doctrines is tenable and in which way can be answered only by reference to principles contained in each relevant legal order.