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Miloš Rajović[*]
Faculty of Law, University of Belgrade
ORCID: 0000-0001-6221-3122

THE RELATIONSHIP BETWEEN DOMESTIC AND INTERNATIONAL LAW IN ACCORDANCE WITH THE CONSTITUTION OF MONTENEGRO[**]

ABSTRACT: The relationship between domestic (state) law, or more precisely domestic laws, and international law is one of the most complex and dynamic issues, both in *foro interno* and in *foro externo*, resulting in different and numerous theoretical and practical solutions. Beginning with basic theoretical starting points (monism and dualism), through comparative constitutional practice, this paper seeks to provide a detailed analysis of the provisions of the Constitution of Montenegro from 2007 concerning the relationship between domestic and international law, especially Article 9. Opting for a monistic approach with a relative primacy of international law, the Montenegrin Constitution prescribes that international treaties and generally accepted rules of international law are an integral part of the internal order. The analysis of the Constitution in the manner of *de lege lata* pointed out some basic errors and shortcomings of the positive legal solution of the relationship between domestic and international law found in Article 9, and resulted in a proposed correction in the manner of *de lege ferenda*, with the aim of reducing the potential international legal responsibility of Montenegro.

[*] e-mail: milos_rajovic@yahoo.com, Ph.D. Student at the Faculty of Law, University of Belgrade.

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INTRODUCTORY CONSIDERATIONS

The relationship between domestic[1] and international law, although simple *prima facie*, represents one of the most significant and written-about subjects, both within the domain of international law as well as other fields of law (e.g., constitutional law), taking on the characteristics of repetition and depletion.[2] The *differentia specifica* of this paper in relation to the many scientific articles regarding this topic is the analysis of the example of a relatively new member of the United Nations and candidate for membership to the European Union, the state of Montenegro. The *hoc loco* relationship between domestic and international law is a subject matter regulated and standardized by constitutions without exception, at least in the European-continental legal circle. The constitution, as the *lex superior*, is the basis of the entire legal order, thus creating norms for this subject matter in a constitution is neither arbitrary nor accidental. Founded on theory, comparative law solutions are characterised either by dualism (domestic and international law are two separate and independent systems) or monism (domestic and international law are segments of a unique legal order). However, by utilizing the comparative law method, we can conclude that the "extremism of monism and dualism" is inadequate to explain the complexity and dynamic of the relationship of these two legal systems.[3] Montenegro had regulated the relationship between domestic and international law by its Constitution from 2007. Pursuant to normative continuity, Montenegro accepted the concept of monism, in particular monism with the primacy of international law, by Article 9 of the Constitution. Accordingly, the norms of international law and the norms of domestic Montenegrin law constitute segments of a unique legal system. In this paper, the relationship between domestic and international law is succinctly presented through the fundamental theoretical perspectives (monism and dualism); then, the normative framework of the

[1] Besides the term "domestic" law, terms like "state", "national", "internal" law, etc. are also used.

[2] Krivokapić, B. (2013). Odnos međunarodnog i unutrašnjeg prava. *Strani pravni* život 2, 59–103; Ferreira, G. (2013). Legal Comparison, Municipal Law and Public International Law: Terminological Confusion?. *The Comparative and International Law Journal of Southern Africa* 46 (3), 337–364. Available at: www.jstor.org/stable/23644808. Accessed on June 20, 2021.

[3] Paust, J. J. (2013). Basic Forms of International Law and Monist, Dualist, and Realist Perspectives. *Basic Concepts of Public International Law Monism & Dualism, PF, IUP and IMPP, Belgrade*, 244–265.

positive Constitution is analysed in detail, with a special focus on Art. 9. Relying on comparative constitutional praxis, a list of elucidated recommendations for improving the constitutional text is provided. Namely, pointing to flaws and insufficiencies, a strong need for revising the constitutional provisions that are the *ratione materiae* regarding the relationship of domestic and international law is presented, and whose amendments would need to encompass provisions regarding human rights in order to harmonize the domestic legal order with international standards.[4] Additionally, a brief overview of the insufficient application of international law by courts and other state bodies of Montenegro is provided, with a focus on the role and importance of the European Convention for the Protection of Human Rights and Fundamental Freedoms from 1950 (hereinafter: the European Convention) and the case law of the European Court of Human Rights (hereinafter: the ECHR).

A GENERAL OVERVIEW OF THE RELATIONSHIP BETWEEN DOMESTIC AND INTERNATIONAL LAW

One of the most respected legal authorities, professor Slobodan Jovanović, qualifies the relationship between domestic and international law as one of the "most difficult and most important issues of legal science."[5] Although discussions surrounding this topic re-emerged near the end of the 19th century, this subject matter has not been resolved until today, neither for theoreticians or practicing legal experts.[6]

The theoretical field is characterised by discord between the two different, mutually opposite, concepts – monism and dualism. Dualism, as the older concept, stems from the writings of the German legal author and philosopher Heinrich Triepel,[7] and was accepted by others, particularly D. Anzilotti[8]. The fundamental premise of the dualistic theory is the existence of two fully separate and independent systems that can influence one another but cannot

[4] See: Novaković, M. (2013). Neophodnost direktne primjene sporazuma o ljudskim pravima u XXI vijeku. *Basic Concepts of Public International Law Monism & Dualism, PF, IUP and IMPP, Belgrade*, 218–228.

[5] Jovanović, S. (1935). *Iz istorije političkih doktrina: Druga knjiga*. Belgrade: Geca Kon, 300.

[6] Đajić, S. (2004). Teorije o odnosu međunarodnog i unutrašnjeg prava. *The Yearbook of the Association for International Law of Serbia and Montenegro* 1, 49–71.

[7] Triepel, H. (1923). Les Rapports entre le Droit Interne et le Droit International. *Collected Courses of the Hague Academy of International Law* 1, 73–121.

[8] Anzilotti, D. (1929). *Cours de droit international: Premier volume; Introduction – Théories Générales*. Paris: Recueil Sirey, 49–65.

overlap. Namely, one legal act can exist, be in force and have a legal effect in one system (be it in the domestic or international one), while being "unknown" in the other.[9] Because they exist as two independent and separate legal orders, the question of conflict or pre-eminence should not, or cannot, be asked. Here, it should be noted that dualism leans on the issue of the nature of international law (the denial of its objective legal nature, i.e., it cannot bind, without consent, those that it should bind), and primarily the dogma of the absolute sovereignty[10] of states[11]. By negating the objective legal nature of international law, thus qualifying domestic law not only as primary, but also as perfect and the legal model for international law, a state had to explicitly state that it accepted a certain rule of international law, otherwise, a specific rule would not bind it.[12] In practice, by transformation, formally and legally, a norm which had the "international" prefix or was categorized as a norm of international law, in a specific case, loses that nature and becomes a norm of the domestic order, thus acquiring the prefix "state". The relationship and subordination of these two legal orders, according to dualism, is impossible, as between them there is a distinction between the source of law[13], the subject to the law[14] and

[9] Triepel, H. (1923). Les Rapports entre le Droit Interne et le Droit International. *Collected Courses of the Hague Academy of International Law* 1, 103.

[10] "One word which recurs frequently in the writings of Vattel's followers is 'sovereignty', and it is doubtful whether any single word has ever caused so much intellectual confusion and international lawlessness," Malanczuk, P. (1997). *Akehurst's Modern Introduction to International Law,* Seventh revised edition. London: Routledge, 17.

[11] Based on the concept of the absolute sovereignty of states, developed in Hegel's philosophy, international law is viewed as exterior, "external state law". Andrassy, J., Bakotić, B., Vukas, B. (1998). *Međunarodno pravo I*. Zagreb: Školska knjiga, 4.

[12] "Government bodies and courts within a state do not acknowledge any sovereign authority over its own national sovereignty and, consequently, only apply those rules of international law which they are ordered to via domestic legal norms, which is their obligation." Bartoš, M. (1954). *Međunarodno javno pravo I*. Belgrade: Faculty of Law, 40–41.

[13] Permanent sources of international law are international customs and conventions, but also others sources listed in Art. 38 of the Statute of the International Court of Justice. The sources of state law are the constitution, laws and other bylaws, that is, sources that came into existence via legislative activities of a state. Thus, the source of international law is an agreement derived for the will of multiple states, while the source of domestic law is the law which derives from the will of territorial sovereignty.

[14] International law is characterised by autonomy – it is created by the subjects themselves (states), while domestic law is characterised by heteronomy – it is created by a sovereign authority and imposed upon the subjects of the law, natural and legal persons. From autonomy, it stems that international law is the law of coordination in the spirit of *par in parem non habet imperium* and domestic law the law of subordination of "non-sovereign individuals subordinate to the sovereignty of the state." Vladimir, I. (1957). Odnos međunarodnog i unutrašnjeg prava. *Naša zakonitost* 11–12, 425–431.

the different relationships[15]. Today, the dualistic theory is, mostly, abandoned, although it is present in, for example, Art. 10 of the Constitution of the Italian Republic[16]. However, Italian case law displays a tendency of applying international norms which are non-conforming with the internal regulations, through the rules of derogation or by qualifying international agreements, as it stems from the "precedent" set by the Supreme Court of Cassation of Italy in the *Juan Carlos Medrano* case, as general legal principles (in this specific case, the European Convention).[17]

The new theory, monism, comes into existence as a reaction to dualism and its founder is Hans Kelsen.[18] Qualifying these two laws as segments of a unique legal system, monism's starting point is the unity of law. Namely, a concrete relationship can be regulated in different ways, so the questions of which law should be given precedence within the framework of a legal system is asked – international[19] or domestic[20]. In constitutional systems, monism

[15] International law regulates the relations between its subjects, primarily states and then international organizations, as well as relationships between other entities of international interest. Domestic law is a law that regulates the relationships between the subjects of internal law, natural and legal persons, including the relationships between themselves and their relationship with the state on whose territory they are located. Račić, O. (1999). Odnos između međunarodnog i unutrašnjeg prava. *Međunarodni problemi,* 3–4, 358–381.

[16] "The Italian legal system conforms to the generally recognised principles of international law." Constituzione della Repubblica Italiana, G.U. n. 298, ediz. straord., del 27 dicembre 1947; G.U. n. 2 del 3 gennaio 1948. Available at: https://www.senato.it/Leg18/1024. Accessed on June 20, 2021.

[17] Đajić, S. (2003). *Međunarodni i nacionalni sudovi: od sukoba do saradnje*. Novi Sad: Faculty of Law in Novi Sad, 137–138.

[18] Kelsen, H. (1952). *Principle of International Law*. New York: Rinehart & Co, 401–447.; Kelsen, H. (1926). Les rapports de système entre le droit interne et le droit international public. *Collected Courses of the Hague Academy of International Law* 14, 227–331.

[19] The adherents of monism that choose the primacy of international law are, on one hand, on the side of general, universal interests, and, on the other, on the weakening of the dogma of state sovereignty. Today, it is almost uncontested that international law has taken dominance over domestic law, which has had several results: first, a significant change to the legal position of individuals in international law; second, a large number of international organizations (the European Union should be particularly emphasized, as the supranational international organization); third, the number of international courts (the change from optional jurisdiction towards mandatory jurisdiction); fourth, the process of the unification of law, be it universal or regional. See: Krivokapić, B. (2013). Primat međunarodnog prava. *Strani pravni* život 3, 45–62.

[20] Adherents of monism that choose the primacy of domestic law, on one hand, see international law as external state law, which results in a negation of international law and also the very construct of monism, while on the other, it rests on state sovereignty. Monism determined by the primacy of domestic law was particularly developed within the framework of Marxism-Leninism, that is, it was the doctrine in states where this ideology was dominant. Emanuel Margolis stresses that the communist approach was

ranges from qualifying international law as a part of domestic law (e.g., Art. 6, para. 2 of the Constitution of the United States of America[21]), over the primacy of international law over state law (e.g., Art. 25 of the Constitution of the Federal Republic of Germany[22]), to the absolute dominance of domestic law (e.g., Art. 8 of the Constitution of the Republic of Belarus[23]). Regarding the technique of establishing a relationship, monism leans on adoption, as a specific international rule is "adopted" through the norm of a domestic rule, be it constitutional or legislative, or even by court decision, but without any transformation, that is, without changing the addressee or the content of the rule, i.e., without losing the prefix "international". Today, pursuant to the dominance of the monism doctrine with the primacy of international law (at least in Europe), the adoption technique is dominant, although conditionally, as the techniques of establishing a relationship, on one hand, are not "in a harmonious relation with the understanding of the general relationship of domestic and international law," and, on the other, pure forms are a rarity, i.e., hybrid combinations are the most common.[24] It is also necessary to note that the techniques of establishing a relationship as the "methods by which a state fulfils

orthodox, dualistic-consensual, and concludes that it was quite ironic for such a strong and revolutionary doctrine – communism – that breaks down traditional models to accept very "bourgeoisie" models. See: Margolis, E. (1955). Soviet Views on the Relationship between National and International Law. *The International and Comparative Law Quarterly* 4 (1), 116–128. Available at: https://www.jstor.org/stable/755769. Accessed on June 20, 2021.

[21] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." The Constitution of the United States of America, 17 September, 1787. Available at: https://www.senate.gov/civics/constitution_item/constitution.htm. Accessed on June 20, 2021.

[22] "The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory." Basic Law for the Federal Republic of Germany, 23 May, 1949. Available at: https://www.gesetze-im-internet.de/englisch_gg/. Accessed on June 6, 2021.

[23] "The Republic of Belarus recognizes the supremacy of the universally recognized principles of international law and ensures that its laws comply with such principles. The Republic of Belarus in conformity with principles of international law may on a voluntary basis enter into interstate formations and withdraw from them. The conclusion of international treaties that are contrary to the Constitution shall not be permitted." Constitution of the Republic of Belarus of 1994., with changes and additions adopted at the republican referenda of November 24, 1996 and of October 17, 2004. Available at: http://law.by/document/?guid=3871&p0=V19402875e. Accessed on June 20, 2021.

[24] Kreća, M. (2016). *Međunarodno javno pravo*. Belgrade: Faculty of Law, University of Belgrade, 78.

its obligations," even though regulated by domestic law, are not of interest to international law.[25]

Even though these two theories are still "in force" as the foundation, following the faith of almost diametrically opposed theoretical concepts, they are supplemented by, so-called, compromise or co-ordination theories.[26] These theories are based on the opinion that the monism-dualism controversy is "unrealistic", that it stems from a "common field", which does not exist in reality.[27]

However, even with the plurality of normative solutions by states[28], international law does not follow the logic of domestic law. Namely, while one legal order – the domestic – regulates the application of international, and domestic, rules, the other – the international – is mostly silent, without prescribing the manner in which it should be applied within the legal orders of states, but relinquishes it to domestic law.[29] The dynamics and complexity of these two legal systems is manifested through the "amortization" of the legal rules of the domestic legal order and the rules, standards, and principles of international law, as the law of the international community as a whole.[30]

Thus, international law explicitly and directly leans on domestic law and its application is dependent on the will of the territorial sovereign. However, international law presupposes and calculates that a specific state will not act in opposition to international legal rules and only obligates states to honour international law, which derives from the principles *pacta sunt servanda* and

[25] Seidl-Hohenveldern, I. (1963). Transformation or Adoption of International Law into Municipal Law. *The International and Comparative Law Quarterly* 12 (1), 88–124. Available at: https://www.jstor.org/stable/756522. Accessed on June 20, 2021.

[26] Fitzmaurice, G. (1957). The general principles of international law considered from the standpoint of the rule of law. *Collected Courses of the Hague Academy of International Law* 92, 1–227.

[27] *Ibidem*.

[28] The continual practice of referring to international law in national constitutions has not created any formulation that has been generally accepted. Wilson, R. R. (1964). International Law in New National Constitutions, *The American Journal of International Law* 58 (2), 432–436. Available at: https://www.jstor.org/stable/2196220. Accessed on June 20, 2021.

[29] Cassese, A. (2005). *International Law, Second Edition*. Oxford University Press, 217-224.

[30] "Discussing the actualization of international law means discussing its relations with domestic law," that is, the question of the existence of international law "is predicated on the actual existence of domestic law: without domestic law there is no state and without states there is no international law." Kožev, A. (2012). *Nacrt za jednu fenomenologiju prava*. Sremski Karlovci/Novi Sad: Izdavačka knjižarnica Zorana Stojanovića, 423.

bone fides.[31] The Vienna Convention on the Law of Treaties (1969), in Art. 26 stresses that "Every treaty in force is binding upon the parties to it and must be performed by them in good faith," and in Art. 27 it is stated that "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[32] *A fortiori*, Art. 3 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts from 2001, that was adopted by the International Law Commission of the United Nations, notes that "The characterization of an act of a State as internationally wrongful is governed by international law," and "Such characterization is not affected by the characterization of the same act as lawful by internal law." Also, in Art. 32 (Irrelevance of international law) it is stated that "The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this Part."[33] Namely, we are dealing with a principle according to which a state cannot refer to its state, domestic law to relieve itself or justify not fulfilling obligations that are imposed by international law. The practice of international judicial bodies is also based on this principle, and particularly indicative are the following cases: *Wimbledon*[34], *Certain German Interests in Polish Upper Silesia*[35], *Greco-Bulgarian "Communities"*[36], *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*[37], and in newer practice the "*LaGrand*" case[38].

[31] The relationship between domestic and international law, according to Bronwlie, is primarily determined by the capacity and readiness of a state, that is, it's government bodies, to honour and fulfil international obligation, which includes the interpretation of the international legal norm and its application to a concrete case. See: Brownlie, I. (2002). *Principles of Public International Law, Fifth Edition*. Oxford University Press, 34–55.

[32] The Vienna Convention on the Law of Treaties entered into force in 1979. Montenegro adopted this convention pursuant to succession on October 23, 2006. The text of the Convention is available at: https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf. Accessed on June 20, 2021.

[33] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001., Supplement No. 10 (A/56/10), chp.IV.E.1. Available at: https://www.refworld.org/docid/3ddb8f804.html. Accessed on June 20, 2021.

[34] Permanent Court of International Justice, Ser. A., No. 1., 29–30.

[35] Permanent Court of International Justice, Ser. A., No. 7., 19.

[36] Permanent Court of International Justice, Ser. B., No. 17., 32–33.

[37] Permanent Court of International Justice, Ser. A/B, No. 44., 24.

[38] ICJ Reports, 2001., 466.

THE RELATIONSHIP OF DOMESTIC AND INTERNATIONAL LAW PURSUANT TO THE CONSTITUTION OF MONTENEGRO FROM 2007

Belonging to the European-continental circle and applying its permanent right, in accordance with sovereignty, Montenegro regulated the relationship between domestic and international law by constitutional material. Namely, constitutional regulation is neither arbitrary nor accidental, as it is one of the most important legal, and political, issues. The qualification of the relationship between domestic and international law, as an issue of essential interest, can be concluded from the very position of the constitutional norm that regulates the concrete issue. The Constitution of Montenegro, adopted on October 22, 2007, in the very first part, named "Basic provisions", contains a provision that refers to international law and its position within the state-legal order.[39] Art. 9 of the Constitution, titled "Legal order" states:

> "The ratified and published international agreements and generally accepted rules of international law shall make an integral part of the internal legal order, shall have the supremacy over the national legislation and shall apply directly when they regulate relations differently than the national legislation."[40]

Thus, the Constitution of Montenegro is founded on the monist doctrine, determined by the primacy of international law. Similar solutions are found in the countries in the region, so the concrete constitutional solution of Montenegro is not characterised by significant differences.[41] It could be claimed that the mentioned provision of the Constitution is based on the Preamble, in particular, the part where "The dedication to cooperation on equal footing with other nations and states and to the European and Euro-Atlantic integrations," is prescribed and Art. 15, which prescribes that

[39] Professor Šuković notes that basis provisions are a "type of "ID" of the state of Montenegro and its state order," and that "their entirety constitutes a conceptual unit that binds all provisions of the Constitution and permeates the content of them all." Šuković, M. (2009). *Ustavno pravo: Univerzalna ustavna tematika i ustavno pravo Crne Gore*. Podgorica: CID, 175.

[40] The Constitution of the Republic of Montenegro, *Official Gazette of Montenegro* no. 1/2007 and 38/2013 – Amendments I–XVI. Available at: https://www.paragraf.me/propisi-crnegore/ustav-crne-gore.html. Accessed on June 21, 2021.

[41] See: Art. 16 of the Constitution of the Republic of Serbia from 2006; Art. 134 of the Constitution of the Republic of Croatia from 1990; Art. 8 of the Constitution of the Republic of Slovenia from 1991; Art. 8 of the Constitution of the Republic of North Macedonia from 1991; Art. 2, para. 2 of the Constitution of Bosnia and Herzegovina; Art. 5 of the Constitution of the Republic of Albania from 1998.

> "Montenegro shall cooperate and develop friendly relations with other states, regional and international organizations, based on the principles and rules of international law."

However, it needs to be asked whether the primacy of international law is absolute in Montenegro or, in fact, relative? The answer is, definitely, relative, because the absolute primacy of international law is limited in relation to the Constitution.[42] *A fortiori,* the Constitution is the *lex superior* in the territory of Montenegro, the regulation of the highest legal force, from which it stems that international treaties and generally-accepted rules may only be applied if their content is not in opposition or unharmonized with the Constitution. This means that "not only should they not violate any individual provision of the Constitution of Montenegro – which is the content of the term "in opposition"- but also that they are not unharmonized with the essence and aims of the Constitution of Montenegro as a comprehensive whole – which is the content of the term "unharmonized".[43] In other words, Montenegro, by Art. 9 of the Constitution, as a norm of a constitutional character, formally and legally limits its legislative sovereignty but not its constitutional one.[44]

The supposedly clear and precise formulation of Art. 9 of the Constitution suffers from a certain degree of impreciseness and legal vagueness, which results in the possibility of different interpretations and applications. This is particularly relevant regarding a few points.

The naming problem

The title of the article, that is, it's naming (the so-called *rubrum*) – "Legal order" – is inadequate regarding its content because the primacy of international law is prescribed only in relation to national, domestic legislature and not for the legal order in its entirety. Legal order is defined as "the unity of legal norms"[45], i.e., law as a whole. It is particularly important to note that

[42] Peters, A. (2009). Supremacy Lost: International Law Meets Domestic Constitutional Law. *ICL Journal* 3 (3), 170–198. Available at: https://doi.org/10.1515/icl-2009-0306. Accessed on June 21, 2021.

[43] Šuković, M. (2009). *Ustavno pravo: Univerzalna ustavna tematika i ustavno pravo Crne Gore*. Podgorica: CID, 231.

[44] "Certainly, one can argue that the primacy of international law established by constitutions is relative since, ultimately, it is subject to the provisions of the highest domestic law (the constitution)." Vereshchet, S. V. (1996). New Constitutions and the Old Problem of the Relationship between International Law and National Law. *European Journal of International Law* 7 (1), 29–41. Available at: https://doi.org/10.1093/oxfordjournals.ejil.a015502. Accessed on June 21, 2020.

[45] Lukić, D. R., Košutić, P. B. (2008). *Uvod u pravo*. Belgrade: Faculty of Law, University of Belgrade, 123–125.

primacy over the Constitution is not established. Consequently, the title "Legal order" is clearly not in lockstep with the content and the entirety of the constitutional norm. Additionally, such a title is not adequate for an article that regulates the relationship between domestic and international law, so it should be changed, that is, renamed, to "Relationship towards international law", "Relationship between domestic and international law", "Primacy of international law" or similar.

The problem of the content of Art. 9

The other impreciseness relates to the very content of the constitutional provision, as the legislator utilizes a somewhat restricting and narrow terminology. Although it falls within the field of monist theory, the Constitution distances itself from the absolute primacy of international law, given that Art. 9 provides for the primacy of international treaties and generally accepted rules of international law over domestic legislature, but omits the Constitution, bylaws and other acts of state bodies. In this specific case, the impreciseness of the wording can create uncertainty in practice, particularly if it is related to the part of the provision where it is explicitly stated that international legal instruments are to be directly applied when they regulate relations "differently from the internal legislation". The deficiency of the text is particularly worrying if a comparative legal analysis is performed. For example, the Constitution of the Republic of Serbia from 2006 contains one, unlike the Montenegrin positive constitution, wider and better conception, stating that

> "...Generally accepted rules of international law and ratified international treaties shall be an integral part of the legal system in the Republic of Serbia and applied directly."[46]

Further, on one hand, in the continuation of the same article, it is stated that "Ratified international treaties must be in accordance with the Constitution," and on the other, a hierarchy of legal acts with the Constitution at the top is established, as it is stated in Art. 194.

The positive provision of Art. 9 does not follow the normative continuity of the constitutional solution present in the Constitutional Charter of the State Union of Serbia and Montenegro, where the primacy of international law over domestic was explicitly and precisely ascertained.[47] It could be said that

[46] Art. 16 of the Constitution of the Republic of Serbia from 2006, *Official Gazette of the RS*, no. 98/2006.

[47] Art. 16, named "Primacy of international law" states: "Ratified international treaties and generally accepted rules of international law have primacy over the law of Serbia

the new, positive solution is a step backwards, particularly if we keep in mind that that could result in different interpretations in practice. The relevance of the dilemma can be specifically spotted in the area of human rights and freedoms.[48] Namely, the current of international instruments, which are by the nature of their subject matter tied to the area of human rights and freedoms, has not circumvented Montenegro.[49] As a signatory to the European Convention, Montenegro can be a party before the European Court of Human Rights.[50] Consequently, the judgements and standards of the ECHR may, both *in concreto* and *in abstracto*, emerge in opposition to the positive solution from the Constitution. In practice, the judiciary will *de facto* find itself, in this specific situation, torn between the Constitution, which it must apply as the foundation, and the standards which stem from the ECHR.[51] In other words, Art. 9 obligates the courts of Montenegro, but also other state bodies, to primarily apply the Constitution and not the standards from the judgements of the ECHR, regardless of the fact that from such an application Montenegro may be liable for violations of the European Convention with its protocols.[52] It would seem obvious that here, there was a degree of confusion between the hierarchy of the orders (domestic and international) and the hierarchy of the legal acts from those orders, as

> "...in the domain of human rights, priority is given to international law and the acts from this legal order have priority over the acts of domestic law, which includes the Constitution."[53]

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and Montenegro and law of the member states." Constitutional Charter of the State Union of Serbia and Montenegro, *Official Gazette of Serbia and Montenegro*, no. 1/2003.

[48] De Londras, F. (2009). International Human Rights Law and Constitutional Rights: In Favour of Synergy. *International Review of Constitutionalism* 9 (2), 307–328. Available at: https://ssrn.com/abstract=1568879. Accessed on June 21, 2021.

[49] Concerning the implementation of international instruments, Art. 56 of the Constitution is of particular importance, which states: "Everyone shall have the right of recourse to international institutions for the protection of own rights and freedoms guaranteed by the Constitution."

[50] Law on the ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Its Protocols. *Official Gazette of Serbia and Montenegro* – International Treaties, no. 9/2003, from December 26, 2003.

[51] See: Harris, D., O'Boyle, M., Bates, E., Buckley, C. (2014). *Law of the European Convention on Human Rights, 3rd edition*. Oxford University Press, 5–8.

[52] Wildhaber, L. (2007). The European Convention on Human Rights and International Law. *The International and Comparative Law Quarterly* 56 (2), 217–231. Available at: www.jstor.org/stable/4498068. Accessed on June 21, 2021.

[53] Vučinić, B. N. (2008). Garancije ljudskih prava u novom Ustavu Crne Gore – odnos unutrašnjeg i međunarodnog prava. *Međunarodni standardi ljudskih prava i ustavne garancije u Crnoj Gori*, *Akcija za ljudska prava*, 36.

By applying domestic law, including the constitutional norms, state bodies, primarily the courts, may raise the question of responsibility for violating provisions of the European Convention and its protocols, which opens the issue of damage compensation. This is of particular importance because, as prof. Đajić notes, "the efficiency of international institutions and standards is also dependent on the support that national courts provide to the international order."[54]

It is particularly troubling that the constitutional-legal scope of human rights and freedoms does not follow the dynamic of positive obligations that are derived from jurisprudence of the ECHR and the interpretation of the, so-called, "living instrument" – the European Convention.[55] Thus, in the domain of human rights and freedoms, primacy is awarded to international law, both in relation to "national legislation" and the Constitution. The wording of the Article should be amended and instead of primacy "over the national legislation" it should state "over the domestic (or legal) order". Maybe it would even be prudent to go a step further and incorporate the European Convention and its protocols in a future revision of the Constitution in a better and more precise manner, as the idea and ideal of the European public order, which seems inevitable, as is the example of Art. 2, para. 2 of the Constitution of Bosnia and Herzegovina, with the distinction that it also has primacy over the Constitution in additional to "other laws."[56] The constitutional solution of Albania is also interesting, where the constitutional "rank" of the European Convention is regulated in Art. 17, but in the context that potential limitations "may not infringe the essence of the rights and freedoms and in no case may exceed the limitations provided for in the European Convention on Human Rights."[57] Additionally, Art. 10, para. 2 of the Constitution of Spain should not be passed over during a future revision of the constitutional text, where it is stated that:

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[54] Đajić, S. (2003). *Međunarodni i nacionalni sudovi: Od sukoba do saradnje*. Novi Sad: Faculty of Law in Novi Sad, 33.

[55] See: *Airey v. Ireland*, app. no. 6289/73, from 9. 10. 1979., Ser. A, no. 32, para. 24, ECHR.

[56] The Constitution of Bosnia and Herzegovina, *Annex IV of the General Framework Agreement for Peace in Bosnia and Herzegovina and Official Gazette of Bosnia and Herzegovina, no. 25/2009 – Amendment I;* Also see: Drzemczewski, Z. A. (1998). *European Human Rights Convention in Domestic Law: A comparative study*. Oxford: Clarendon Press, 330-342.

[57] Albania's Constitution of 1998. with Amendments through 2012., *Comparative Constitutions Project.* Available at: https://www.constituteproject.org/constitution/Albania_2012.pdf?lang=en. Accessed on June 21, 2021; Additionally, in some cases brought before the Higher Court of Albania, this court referred primarily to the European Convention and only then to the Constitution. See: Cozzi, A. et al. (2016). *Comparative study on the implementation of the ECHR at the national level*. Belgrade: Council of Europe, 10.

> "The principles relating to the fundamental rights and liberties recognised by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by Spain."[58]

The legal and terminological insufficiencies of the constitutional text, be they intentional or unintentional, are especially troublesome when they are brought into relation with Art. 17 of the Constitution, which states: "Rights and liberties shall be exercised on the basis of the Constitution and the confirmed international agreements." In a narrow sense, this Article makes a double distinction: on one hand, it gives primacy to domestic law, thus, the Constitution, and on the other, it limits the *corpus* of international law in a formal-legal manner to international agreements, disregarding the other sources of international law.

The problem of the "legal void"

The part of Art. 9 which states "shall be directly applicable when they regulate the relations differently from the internal legislation" is not without a lack of clarity, either. The Venice commission, in its opinion, stressed that these words

> "...were unnecessary" and that "[a] reference to the need to implement human rights treaties in the light of the practice of the respective monitoring bodies would have been welcome."[59]

The question of a legal void is raised when the domestic legislation is "quiet" regarding certain rights, interests and freedoms, that is, when it has not regulated a specific relationship, state, or situation. The previous constitutional solution stated that international standards are to be directly implemented.[60] Further, unlike the positive solution, here we are dealing with adoption, perfect and unconditional. Accordingly, a value judgment could be given – that

[58] Constitución Española, BOE-A-1978-31229. Available at: https://www.boe.es/eli/es/c/1978/12/27/(1). Accessed on June 21, 2021.

[59] European Commission for democracy through law (Venice Commission). Opinion on the Constitution of Montenegro adopted by the Venice Commission at its 73rd Plenary Session (Venice, 14–15 December 2007), CDL-AD(2007)047-e. Available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2007)047-e. Accessed on June 21, 2021.

[60] Art. 10 of the Constitutional Charter of the State Union of Serbia and Montenegro, titled "Direct implementation of international treaties", stated: "The provisions of international treaties on human and minority rights and civil freedoms applying to the territory of Serbia and Montenegro shall be directly implemented."

the newer, positive legislation, at least that of a constitutional character, is a step backwards, at least from the perspective of human rights and freedoms. Professor Vučinić, a former judge of the ECHR, notes that

> "...the reasons that motivated the authors of the Constitution of Montenegro not to accept this manner of regulating the relationship between international and domestic law in the domain of human rights are unclear and scientifically incomprehensible."[61]

The problem of the sources of international law

By Art. 9, Montenegro bound itself to a wide construction regarding the application of international law, encompassing both ratified and published international treaties and the generally accepted rules of international law. The issue with this type of construction concerns the very "nature" of international law, a law that is, when viewed from the perspective of national, domestic law, quite abnormal.[62] Besides the non-existence of a judiciary and legislation in the true sense of the word, international law is characterised by a wide array of regulations of different natures (contractual and customary) and legal force (obligatory and non-obligatory), codified and non-codified, particularly when peremptory norms are kept in mind.

As it concerns the ratified and published international treaties, the situation is relatively clear.[63] Namely, the Parliament of Montenegro, pursuant to

[61] Vučinić, B. N. (2008). Garancije ljudskih prava u novom Ustavu Crne Gore – odnos unutrašnjeg i međunarodnog prava. *Međunarodni standardi ljudskih prava i ustavne garancije u Crnoj Gori*, *Akcija za ljudska prava*, 37.

[62] Shaw notes that the core of all discussions on the nature of international law is precisely the comparison of domestic law with international law and the presupposition on the analogy between national systems and the international order. Shaw, N. M. (2014). *International law, Seventh Edition*. Cambridge, 2–3.

[63] Montenegro is a signatory of many international treaties and we should specifically stress those relate to human rights and freedoms, such as: the International Covenant on Civil and Political rights, including the Optional Protocol aiming at the abolition of the death penalty; the International Covenant on Economic, Social and Cultural Rights (including the Optional Protocol); the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention on the Rights of the Child, including the Optional Protocol on the involvement of children in armed conflict and the Second Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography; the Convention on the Prevention and Punishment of the Crime of Genocide; International Convention on the Suppression and Punishment of the Crime of Apartheid; the International Convention Against Apartheid in Sports; the Convention on the Non-Applicability of Statutory

its competency as established by Art. 82, para. 17 of the Constitution and in accordance with the Law on Concluding and Implementing International Treaties, "confirms international treaties".[64] The term "confirms", as it is found in the mentioned law, "means instituting laws which express the acceptance of Montenegro to be bound by an international treaty" (Art. 4, point 3). Thus, a specific international treaty becomes a part of the domestic legal order by ratification[65]; from the moment of ratification, it has legal effects within the territory of Montenegro, unless it is otherwise specified.[66] Unlike the generally accepted rules of international law, which directly and automatically become a part of domestic law, international treaties are determined, on one hand, by ratification and, on the other, by the publishing of the so-called laws on ratification.[67] Here, we can notice that the Constitution says nothing regarding the validity of an international treaty and its implementation into the national order, which can results in problems in jurisprudence. Namely, as it is stated in Art. 146 of the Constitution, laws and other regulations in the legal order of Montenegro, which includes the Law on Ratification, "shall be published prior to coming into effect, and shall come into effect no sooner than the eighth day from the day of publication thereof," and "Exceptionally, when the reasons for such action exist and have been established in the adoption procedure, law and other regulation may come into effect no sooner than the date of publication thereof." In the Law on Concluding and Implementing International Treaties it

Limitations to War Crimes and Crimes Against Humanity; the *Framework Convention for the Protection of National Minorities;* the European Charter for Regional or Minority Languages; the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, etc.

[64] Law on Concluding and Implementing International Treaties, *Official Gazette of Montenegro,* no. 77, from December 16, 2008; Also see: Todić, D. (2018). Zaključivanje i izvršavanje međunarodnih ugovora u pravnom sistemu Bosne i Hergcegovine, Crne Gore i Hrvatske. *Strani pravni* život 62 (2), 103–117.

[65] Art. 2, 1), b) of the Vienna Convention on the Law of Treaties: "ratification", "acceptance", "approval" and "accession" mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty."

[66] See: Đurić, V. (2007). *Ustav i međunarodni ugovori*. Belgrade: Institute of Comparative Law, 22–35. and 165–176.

[67] Art.21 of the Law on Concluding and Implementing International Treaties: "The law on the ratification of an international treaty is published in the "*Official Gazette of Montenegro – International Treaties*" before it enters into force pursuant to international law. In the "*Official Gazette of Montenegro – International Treaties*" other international treaties and administrative international treaties that are decided by the Government shall be published, as well as announcements on the start and temporary or permanent cessation of the effects of an international treaty. The Ministry is responsible for the publishing of the announcements on the start or cessation of the effects of international treaties from point 2 of this Article."

is stated that "an international treaty comes into effect pursuant to the provisions of the treaty thereof and this law," and

> "...if an international treaty does not contain provisions regarding coming into effect, that international treaty comes into effect for Montenegro when all signatories accept to bound by it," Art. 19.

In practice, Montenegro could face discrepancies, as an international treaty becomes a part of domestic law when the law on ratification is published, even though that specific international treaty has come into force *in foro externo*. In accordance with this potential situation, Montenegro may obligate itself to fulfil a concrete treaty before it becomes obligatory for signatory states. Given that an analysis of the law as it is has shown a problem, a suggestion of an addendum or an amendment of Art. 9 that would remove or lessen the problem is unavoidable. Namely, the phrase "which are in force" should be inserted into the article. A comparative legal analysis shows us that such a mistake was avoided in Art. 134 of the Constitution of Republic of Croatia, where it is stated that

> "International agreements concluded and ratified in accordance with the Constitution and made public, and *which are in force* [emphasis added], shall be part of the internal legal order of the Republic of Croatia and shall be above law in terms of legal effects."[68]

A similar solution, with differing terminology, can be found in Art. 55 of the Constitution of France.[69] Comparing the examples of Croatia and France, there is no doubt that the Croatian constitutional solution is better as a model for correcting the Montenegrin solution, particularly considering that the French solution is determined by reciprocity.

In the Constitution, it is explicitly stipulated that "The law shall be in conformity with the Constitution and confirmed international agreements, and other regulations shall be in conformity with the Constitution and the law," (Art. 145). Thus,

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[68] The Constitution of the Republic of Croatia, *Narodne novine*, no. 56/90., 135/97., 113/00., 28/01., 76/10. and 5/14. (consolidated text, Constitutional Court of the Republic of Croatia, January 15, 2014). Available at: https://www.usud.hr/hr/ustav-RH. Accessed on June 21, 2021.

[69] "Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party." France's Constitution of 1958. with Amendments through 2008, *Comparative Constitutions Project*. Available at: https://www.constituteproject.org/constitution/France_2008.pdf?lang=en. Accessed on June 21, 2021.

> "...in a word, the Parliament of Montenegro is obligated to secure that the legal order of Montenegro is compatible to the international order."[70]

This is particularly important when we consider the Recommendation of the Committee of Ministers to member States on the verification of the compatibility of draft laws, existing laws and administrative practice with standards laid down in the European Convention on Human Rights, adopted by the Committee of Ministers on May 12, 2004 at its 114th Session.[71] Further, it is prescribed that "The court shall rule on the basis of the Constitution, laws and confirmed and published international agreements," (Art. 118) and that the Constitutional Court decides on the "Conformity of laws with the Constitution and confirmed and published international agreements," (Art. 149, point 1). However, by analysing the articles we listed, we can state that the wording of Art. 118 should be changed, that is, the position of laws and international agreements should be swapped so that international agreements come second, so that the Article states that courts shall rule on the basis of confirmed and published international agreements and only then laws. This is prescribed by Art. 149, which qualifies confirmed and published international agreements as sub-constitutional and super-legislative.

A situation where an international agreement, confirmed and published, automatically becomes part of the domestic legal order while its content is in opposition and not in harmony with the Constitution is particularly interesting. This raises the question – is it justified to allow a legislative body that is politically determined (thus, not a body composed of experts) to confirm an international agreement, without prior consent of or consultation with the Constitutional Court, particularly considering the Vienna Convention on the Law of Treaties and the Draft Articles on Responsibility of States for Internationally Wrongful Acts?[72] The answer is most certainly no, although that means a certain deviation from the praxis of constitutional court from the European-continental system.[73] Additionally, when listing the jurisdictions of

[70] Šuković, M. (2009). Tri različita ustavna uređenja Crne Gore. *Revus [Online]* 11, 9–43. Available at: https://doi.org/10.4000/revus.1092. Accessed on June 21, 2021.

[71] Recommendation of the Committee of Ministers to member States on the verification of the compatibility of draft laws, existing laws and administrative practice with standards laid down in the European Convention on Human Rights, adopted by the Committee of Ministers on May 12, 2004 at its 114th Session. Available at: http://www.mhrr.gov.ba/PDF/UredPDF/PREPORUKA%20CM%20(2004)5.pdf. Accessed on June 21, 2021.

[72] See: Pejić, I., (2008). Ustavni sud i kontrola ustavnosti međunarodnih ugovora. *Pravni* život*: special issue Pravo i međunarodne integracije* 14, 741–756.

[73] The Constitutional Court, by not delving into the prior control of the constitutionality and legality of normative acts, including laws on ratification, protects itself from the political sphere, thus reserves a right to perform its function exclusively by making

the Constitutional Court, the authors of the Constitution omitted to explicitly state that the Court also decides on the conformity of confirmed and published international agreements with the Constitution, as can be found, for example, in the Constitution of Serbia (Art. 167, point 2). Professor *Šuković* notes that it is explicitly and clearly determined that "The Constitution Court does not have the jurisdiction to determine the conformity of a confirmed and published international agreement with the Constitution," either before or after the confirmation, "nor to repeal its content, even if it were to ascertain its non-conformity," and this is because of "the rule that agreements are amended only by the will of the signatories, and this rule does not permit changes to the content by decision of individual signatory states," but there is the possibility to "ascertain the conformity of the law that confirms, that ratifies, an international agreements with the Constitution."[74] Thus, by intervening indirectly instead of directly, without going into the essence and content of an international agreement, the Constitutional Court

> "...may bring about that an international agreement is not confirmed, not ratified, or that in a revision, by applying certain "reserves" in the law on ratification, prevent the provisions of an international agreement that are non-conforming with the Constitution of Montenegro from becoming a part of the domestic legal order."[75]

However, none of this impacts the obligation of Montenegro regarding the rules of international law, so in a future law, with the purpose of legal security and removing responsibility, the Constitutional Court should take a more active part, that is, ratification by the Parliament should be conditioned on a positive opinion of the Constitutional Court. For example, Art. 54 of the Constitution of France prescribes a preventive control of the constitutionality of international agreements, that is, in case the Constitutional Council of France expresses that a certain "international undertaking" is contrary to the Constitution, "authorization to ratify or approve the international undertaking involved may be given only after amending the Constitution." The same situation can be seen in Spain.[76]

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decisions and judgments, and not by providing opinions, suggestion, or recommendations. For more, see: Šuković, M. (2009). Tri različita ustavna uređenja Crne Gore. *Revus [Online]* 11, 401–402.

[74] *Ibid*.

[75] Šuković, M. (2009). Tri različita ustavna uređenja Crne Gore. *Revus [Online]* 11, 401–402.

[76] See: Art. 95, para. 1 and 2 of the Constitution of Spain; Izquierdo, C. S. (1997). Parliamentary Procedure in the Conclusion of International Treaties in Spain.

Conversely, the generally accepted international rules have a wide scope so interpretation is necessary, as the Constitution is silent on this matter, i.e., it omits to define what the exact international rules are. It can be said that unlike the homogenous structure of international agreements, heterogeneity is the main characteristic of generally accepted rules of international law. This encompasses international conventions and the general principles of law recognized by civilized nations, with all the problems they include, that is, these rules include all the sources of international law as they are listed in Art. 38 (1) of the Statute of the International Court of Justice, because they are characterized by general acceptance.[77] However, here we are referring to, both *de lege* and *de facto*, to the general legal principles of international law, which can be of a contractual and customary nature and which affect all. Namely, we are dealing with the principles which are found in Art. 2 of Charter of the United nations (e.g., the principle of sovereign equality of all states, the principle of settling international disputes by peaceful means, the principle of respecting the territorial integrity of states, etc.), but also other principles of international law, such as the principle of self-determination of people, the principle forbidding genocide, etc. Although the list of the principles of international law is not defined, it regards the most important international legal customary rules – of a cogent nature (*ius cogens superviniens*). It is particularly important to note the fact that, on one hand, the *corpus* of the generally accepted rules of international law at that point in time was directly and automatically incorporated into the internal legal order by the positive Constitution, while on the other, this *corpus* is not static but, quite the opposite, dynamic, thus some future rules that fulfil the criteria or acquire the status "generally accepted rules of international law" will become a part of the legal order of Montenegro. Further, it should be noted that the generally accepted rules of international law are subject to assessments of constitutionality and legality.

Spanish Yearbook of International Law Online 5 (1), 1–41. Available at: https://doi.org/10.1163/221161297X00018. Accessed on June 6, 2021.

[77] Dimitrijević, V. et al. (2012). *Osnovi međunarodnog javnog prava*. Belgrade: Belgrade Centre for Human Rights, 26.

The application of international law in the practice of Montenegro

International law, as it was state above, is an integral part of the domestic, Montenegrin legal order. Although the positive constitutional framework prescribes a stimulating application of international law, in judicial practice, and in the practice of other state bodies, it is not adequately represented, which can be mostly observed in the area of the protection of human rights and freedoms. In other words, international law and standards are still *terra incognita* for the government bodies of Montenegro, that is, there is no consciousness regarding the adequate implementation of international instruments and honouring international standards in the Montenegrin legal order. References to the universal system of protection for human rights in the decisions of the state bodies, primarily in the decisions of courts, is provisional and a rarity, and is an exception to the rule. However, in recent years, the influence of the European Convention and judgements of the European Court of Human Rights have increased.[78] Further, these references have resulted in official instructions regarding the forms of referrals to the judgments of the ECHR in the explanations of the national courts.[79]

On one hand, the European Convention with the protocols thereto is of particular importance to the Montenegrin legal order since the admission into the Council of Europe,[80] as the minimal standard, the basis, while on the other, the practice of the ECHR, which represents the legal interpretation

[78] "… as the acting legal order of Montenegro has been expanded compared to the previous period by the new Constitution from 2007, an integral part of the order are the European Convention for the Protection of Human Rights and Freedoms, as well as the other confirmed and ratified international agreements and generally accepted rules of international law (Art. 9 of the Constitution). Thus, although judicial practice in Montenegro is not a source of law, the consistency of it and the harmonization of the practice of national courts with the practice of the European Court of Human Rights must be taken care of, as the standard of the right to a fair trial in the sense of Art. 6 (1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which, along with the protocols thereto, is applied to Montenegro since March 3, 2004…", the Supreme Court of Montenegro, Rev. no. 661/16 from 16.11.2016.

[79] See: Supreme Court of Montenegro, the Department for tracking the judicial practice of the European Court of Human Rights and the law of the European Union, Su I no. 27/17, Podgorica, 07. 02. 2017.

[80] Montenegro had become the 47th full member of the Council of Europe on May 11, 2007. However, pursuant to the resolution of the Committee of Ministers of the Council of Europe (Resolution CM/Res(2007)7) from the supplemental 994th meeting, held on May 9, 2007, Montenegro is considered a party of the Convention with effect from June 6, 2006, i.e., since the declaration of its independence.

of the principles by the Court.[81] *A fortiori,* the first judgement of the ECHR regarding Montenegro was passed on April 28, 2009 (*Bijelić v. Montenegro and Serbia*), which would mean that the Montenegrin legal order has been directly "struggling" with the application of the Convention for more than a decade. Over the years, there have been efforts, relatively unsuccessful efforts, for the Convention and the judgements of the ECHR to be truly applied by domestic courts. This situation has resulted in the creation of strategic guidelines in the document named "Action Plan for the Implementation of the Strategy for a Reform of the Judiciary 2014–2018".[82] However, the data found in report of the non-governmental organization Civil Alliance from 2014 is worrying.[83] Although a lot had been done to implement the Plan, there was still room for improvement, which gave rise to the new Strategy for a Reform

[81] "…Montenegro should be deemed responsible for any and all violations of the Convention and/or its Protocols committed by its authorities as of 3 March 2004, which is when these instruments had entered into force in respect of the State Union of Serbia and Montenegro." *Bijelić v. Montenegro and Serbia*, app. no. 11890/05, from 28.04.2009, para 68, ECHR.

[82] "3.3. Montenegrin judiciary as part of European judiciary. The strategic guidelines in this area are: 3.3.1. Further development of international and regional judicial cooperation. 3.3.2. Further development of institutional cooperation on the international and regional level. 3.3.3. Improvement of capacities of judicial office holders and employees with judicial institution under the scope of the European Union acquis." Action Plan for the Implementation of the Strategy for a Reform of the Judiciary 2014–2018. Available at: file:///C:/Users/User/Downloads/11_63_3_4_2014.pdf. Accessed on June 23, 2021.

[83] "As the Department for tracking the judicial practice of the European Court of Human Rights and the law of the European Union was founded at the Supreme Court in 2012, it was surprising that 48 % respondents did not know or did not have sufficient knowledge about the activities of this department, and 52 % stated that they are familiar with the activities of this department… The presupposition of the application of the rules of international law was confirmed by the responses of 55.7 % of the respondents, 14.9 % and 13.5 % sometimes were not in a position to apply them, an insufficient application was noticed by 5.8 % of the respondents, while 7.7 % did not provide an answer. The sources of international law which are mostly used in the practice of judges are international conventions and protocols (63,74 %), the European Convention for the Protection of Human Rights was listed by approximately 12 %, and about 4 % of the respondents had not used international law as the foundation for proceedings and a source for judgements. About 11.5 % of the respondents did not have a comment. One of the strategic guidelines of the Draft Strategy for the Reform of the Judiciary 2014–2018 is the equalization of the national judicial practice and practice of the European Court of Human Rights. On the questions regarding the accessibility of the practice of European courts and whether they use these judgements in their practice, approximately 42 % of judges responded that they had not or had minimally used European jurisprudence and accessibility could be higher. About 55 % of judges are familiar with the standards of European court courts and utilize their practice to a greater or lesser degree." Civil Alliance of Montenegro. (2014). Report Stanje u oblasti krivične pravde u Crnoj Gori sa aspekta kvaliteta presuđenja, konzistentnosti sudskih odluka, ujednačenosti sudske prakse i transparentnosti rada. Podgorica. Available

of the Judiciary 2019–2022.[84] Numerous meetings, round tables and seminars have also taken place. The Supreme Court of Montenegro has concluded that "the judgements that the European Court has issued in relation to Montenegro represent a source of law for the national legal order, pursuant to Art. 9 of the Constitution."[85] The factual situation leads to the conclusion that this source of law has not yet been accepter or, at least, not to a sufficient degree by the judiciary, which has resulted in Montenegro being the leader in applications against it before the ECHR per capita – almost thirteen times more (accurately, 6,86) than the European average (0.52). According to a Report by the Court, 427 applications were submitted in 2019, which is nearly 99 more than in 2018, when there were 328.[86] Further, statistical data from 2017 shows that there were 138 applications, which would mean that for 2018, the percentage of submitted applications went up for 130 %. Up until January 21, 2020, the ECHR had issued 52 judgments in relation to Montenegro and established a violation of the Convention in 47 of them, no violation in four of them and in one case reject the application as unfounded. The largest number of applications, 36 of them, relate to a violation of Art. 6 of the Convention, that is, a violation of the right to a fair trial, then to a violation of the right to the peaceful enjoyment of possession (5 cases), the right to an effective remedy (5 cases), a violation of the prohibition of torture (4 cases), a violation of the right to freedom of expression (2 cases), a violation of the right to liberty and security of person (3 cases), a violation of the right to life (1 case) and a violation of the prohibition on discrimination (1 case).[87] Here, it can be concluded that the status of the "definitive leader" is a consequence, in part, of political interference with judicial authorities, that is, its subservience to the executive

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at: http://www.gamn.org/images/docs/cg/izvjestaj-o-uskladjenosti-sudske-prakse-2014.pdf. Accessed on June 22, 2021.

[84] See: The Strategy for a Reform of the Judiciary 2019–2022. Available at: file:///C:/Users/User/Downloads/Strategija%20reforme%20pravosu%C4%91a%202019-2022.pdf. Accessed on June 20, 2021.

[85] Analysis of the judgement of the European Court of Human Rights in relation to Montenegro, November 2018, p. 113. Available at: file:///C:/Users/User/Downloads/Analiza-presuda-ESLJP-u-odnosu-na-CG-2019.pdf. Accessed on: June 21, 2021.

[86] See: Council of Europe – European Court of Human Rights, Annual Report 2019. Available at: https://echr.coe.int/Documents/Annual_report_2019_ENG.pdf. Accessed on: June 21, 2021; Council of Europe – European Court of Human Rights, Annual Report 2018. Available at: https://www.echr.coe.int/Documents/Annual_report_2018_ENG.pdf. Accessed on: June 21, 2021. Report on the Office of the Representative of Montenegro Before the European Court of Human Rights in Strasbourg for 2018, 17.

[87] See: Akcija za ljudska prava, "Evropski sud za ljudska prava i Crna Gora – tabelarni prikaz presuda." Available at: http://www.hraction.org/wp-content/uploads/2020/01/Tabela-1.pdf. Accessed on June 21, 2021.

branch and the political situation in force at the time, while, in part, a consequence of the fact that the Convention and its *longa manus* – the practice of the ECHR – have still not fully become a part of the legal tradition, that is, the legal system of Montenegro. It seems reasonable that this issue should receive more attention and that there should an inclination to "force" the bodies of the state to not base their decisions exclusively, or at least primarily, on national law, but that they should include international law, the law of the Convention, not only as secondary or subsidiary, but as a primary law together with the internal legal regulations.

CONCLUDING REMARKS

The relationship between domestic (state) law, or more precisely domestic laws, and international law is one of the most complex and most dynamic issues, both *in foro interno* and *in foro externo*, which results in numerous theoretical and practical solutions. Doctrinal conceptions on the relationship of these two legal orders are traditionally embroiled in the monistic-dualistic controversy. However, the conclusion that these conceptions are "limited" by their nature imposes itself, for several reasons: a) they are bound to the historical circumstances during which they were developed and formulated, and they are unable to respond to the dynamics of the relationship between domestic and international law today[88]; b) the doctrinal concepts within them differ to a large degree; c) there exist, so-called, compromise theories; d) they are considered "fiction"[89], i.e., they have "more of a legal-political than a legal-technical meaning"[90]; and e) unlike the exact sciences, the theories on the relationship between domestic and international law (and other social science theories) do not have the qualification of an absolute value, but, quite the opposite, are relative[91].

[88] Conforti, B. (1993). *International Law and the Role of the Domestic Legal Systems*. Dordrect/Boston/London: Martinus Nijhoff Publishers, 13–17; "The international reality, that is, the international judicial and arbitration practice and the legal systems in states, cannot entirely fit into any of the mentioned teachings (monism and dualism). Consequently, none is correct." Degan, V. Đ. (2011). *Međunarodno pravo*. Zagreb: Školska knjiga, 17.

[89] Matejka, J. (2000). Is the Dualist-Monist controversy in International Law simply a fiction?. *Juristic*. Prague. Available at: http://mezinarodni.juristic.cz/51001/clanek/mpv1.html. Accessed on June 6, 2021.

[90] Kreća, M. (2016). *Op. cit.*, 71.

[91] See: Šušnjić, Đ. (2018). *Metodologija: kritika nauke*. Podgorica: Faculty of Arts, University of Donja Gorica, 237–253.

Montenegro, belonging to the European-continental legal system and utilizing its permanent right based on sovereignty, has qualified the issue of the relationship between domestic (state) and international law as *materia constitutionis*. Choosing the monistic concept with a relative primacy of international law, given that it is subject to the provisions of the *lex superior* (the Constitution), Montenegro is on the plane that has, effectively, become the rule in regulating the relationship between domestic and international law. *A fortiori*, "The ratified and published international agreements and generally accepted rules of international law shall make an integral part of the internal legal order, shall have the supremacy over the national legislation and shall apply directly when they regulate relations differently than the national legislation." Although at first reading this provision is clear and precise, it has certain insufficiencies, mostly regarding to the terminology. Namely, a *de lege lata* analysis of the Constitution has demonstrated some basic mistakes and inadequacies of the positive solution on the relationship between domestic and international law, as it is found in Art. 9, and has resulted in recommendations for corrections for future legislation, all with the aim of lessening the potential international legal responsibility of Montenegro. The question of international responsibility is particularly relevant in light of Arts. 26 and 27 of the Vienna Convention on the Law of Treaties from 1969, Arts. 3 and 32 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts from 2001, and the practice of international courts.

In this paper, I have presented the comparative constitutional practice and the need to correct the given norm, starting from the name itself (which is the most benign mistake), to the content of the norm and the problems with the sources of international law, to its relationship with other norms that relate to the relationship of these two legal orders. Comparing the positive legal solution on the relationship of domestic and international law, particularly those in this region, it is quite clear that the Montenegrin solution can be qualified as the worst. Given that a revision of the Constitution is inevitable, during such an occurrence these important yet often disregarded norms should not be forgotten, as the provisions on human rights and freedoms found in Part 2 of the Constitution of Montenegro should and need to rely on international standards and practice. The process of European integration will ultimately result in the introduction of a clause on the primacy of European law into the constitutional text, which will be reflected in the *corpus* of human and minority rights, particularly civil rights, foreign policy, etc.

In concrete terms, pursuant to all that was written, the positive legal solution on the relationship between domestic and international law from Art. 9 of the Constitution should be amended with the aim lessening the potential legal responsibility of Montenegro, on one hand, and the improvement of the

constitutional text, on the other. Namely, the existing Article should be revised and corrected, in two ways. First, the name of the Article should be changed into "Relationship towards international law" or something similar. Second, the Article should state: "Confirmed and published international treaties which are in effect and the generally accepted rules of international law are an integral part of the internal legal order, shall be directly applied and shall have primacy over domestic legislation." The proposed solution is mostly a result of the existing terminological and essential flaws. However, the question of whether we should be satisfied only with such a type of change or whether we should look for a better, more daring solution that departs from the normative framework should be raised. One such solution could be supporting the absolute primacy of international law and, in that sense, it would be in harmony with the proposed name of Art. 9 – "Primacy of international law"; it could state: "Confirmed and published international treaties which are in effect and the generally accepted rules of international law are an integral part of the internal legal order, shall be directly applied and shall have primacy over the legal order of Montenegro." Further, the question of the importance and role of the Constitutional Court during the accession of Montenegro to a specific international treaty, that is, its more active participation, is a question on its own, potentially more for the "constitutionalists" than the "internationalists".

Finally, the inspiration for and purpose of this paper is to enable a better and safer realization of the international obligations of Montenegro through an analysis of the existing articles of the Constitution which are the *ratione materiae* for the relationship between domestic and international law, but also to expand them in order to harmonize the domestic order with international standards, particularly in the domain of human rights, which would create one of the foundations for the rule of law.

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