

Relationship between national and international law

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Structure

1. (Traditional) theories
2. International law's perspective on national law
3. National law's perspective on international law
4. Beyond the divide of national and international law: some more recent developments

Theories

Dualism and monism

- Capture some, but not all of multifaceted relationship between domestic and international law today

Dualism (Triepel/Anzilotti)

- international and domestic legal order exist as two separated, distinct sets of legal orders
- Differences in: subjects, sources, content
- Requires 'transformation' of int. law into domestic law to make int. law binding on domestic authorities (incorporation)
- States decide on modes of incorporation (how)
- National law has priority over int. law that has not been incorporated
- But: by doing so, a state may not violate its national laws, but it might incur international responsibility

Theories

Monism (Kelsen)

- Nat. law and int. law as one unitary, coherent system
- Int. law at top of pyramid, (in)validating acts of domestic legal systems
- In case of conflict, int. law prevails
- No need for 'transformation' of int. law into domestic law
- No strict distinction between subjects of nat. and int. law; role of individuals

Theories

Different visions of the international legal system

Monism

- international law above domestic law, controlling domestic legal systems
- open to the view that international values can override domestic values
- more likely to see international law as legal system that ultimately aims to protect interests of all individuals
- some distrust towards states

Dualism

- ultimately, national (state) interests can overrule international law
- emphasises role of states as most important subjects of international law; international law protecting state's interests
- international law first and foremost founded upon state consent

Today: pluralism as *the* characteristic of the relationship of nat. and int. legal system?

International law's perspective on national law

National law in international treaties/custom

VCLT

- Nat. law cannot be invoked to justify non-compliance with int. law (Art.27)
- Art.46:
 1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was *manifest* and concerned a rule of its internal law of fundamental importance.
 2. A violation is manifest if it would be objectively evident to *any* State conducting itself in the matter in accordance with normal practice and in good faith.

International law's perspective on national law

National law in international treaties/custom

VCLT

ICJ Cases:

- *Case concerning the land and maritime boundary between Cameroon and Nigeria, 2002*
- *LaGrand (Germany v US), 2001 and Avena and Other Mexican Nationals (Mexico v US), 2004:*
 - ‘the rights granted under the Convention [on consular Relations] are treaty rights which the US has undertaken to comply with in relation to the individual concerned, *irrespective* of the due process rights under the US constitutional law.’ (para.139)
 - ‘the *remedy* to make good these violations *should* consist in an obligation on the US to permit review and consideration of these (foreign) nationals’ cases by the US courts ... with a view to ascertaining whether in each case the violation of Art.36 [of the Convention on Consular Relations] committed by the competent authorities caused actual prejudice to the defendant in the process of the administration of criminal justice.’ (para.121)
- Sensible approach? Or need for ‘more’ implementation freedom/discretion?

International law's perspective on national law

National law in international treaties/custom

General duty to bring national law in conformity with obligations under international law?

PCIJ (1925), *Exchange of Greek and Turkish Populations*

'self-evident' principle in international law, 'according to which a state which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken' (p.20)

But: a failure to bring about conformity will not in itself be a breach of int. law; breach usually only occurs when state fails to observe obligation on a *specific occasion*

National law in international treaties/custom

National law in international treaties/custom

General duty to bring national law in conformity with obligations under international law?

- Treaties posing duties on states to enact national legislation or take various other measures to implement an int. obligation
- Some examples:
 - Human rights law:
 - ‘...each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such *laws or other measures* as may be necessary to give effect to the rights recognized in the present Covenant.’ (Art.2(2) ICCPR)
 - States undertake ... ‘(a) To *embody* the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realisation of this principle.’ (Art.2(a) CEDAW)
 - Effective domestic remedies/right to fair trial: requires establishment of a well-functioning court system
 - Establishment of domestic bodies: obligation to establish National Preventive Mechanisms, which are independent national bodies for the prevention of torture and ill-treatment at the domestic level (Art.17 OP-CAT)

National law in international treaties/custom

National law in international treaties/custom

General duty to bring national law in conformity with obligations under international law?

- Treaties posing duties on states to enact national legislation or take various other measures to implement an int. obligation
- Some examples:
 - international humanitarian law/arms control
 - Convention on Cluster Munitions:
Art.3(2): ‘Each State Party undertakes to *destroy or ensure the destruction* of all cluster munitions ... as soon as possible but not later than eight years after the entry into force of this Convention for that State Party.’
Art.6: ‘Each State Party shall take all appropriate *legal, administrative and other measures* to implement this Convention, including the imposition of *penal sanctions* to prevent and suppress any activity prohibited to a State Party under this Convention undertaken by persons or on territory under its jurisdiction or control.’
 - Art.49 Geneva Convention I-IV
‘The High Contracting Parties undertake *to enact any legislation necessary to provide effective penal sanctions* for persons committing, or ordering to be committed, any of the grave breaches of the present Convention...’.

National law in international treaties/custom

National law in international treaties/custom

General duty to bring national law in conformity with obligations under international law?

- Treaties posing duties on states to enact national legislation or take various other measures to implement an int. obligation
- Some examples:
 - International criminal law
 - Art.88 ICC Statute:
'State parties shall ensure that there *are procedures available under their national law* for all the forms of cooperation which are specified under this part [Part 9 on international cooperation and judicial assistance]'.
 - ICTY, *Prosecutor v Furundzija* (Trial Chamber, IT-95-17/1-T) case:
Ius cogens character of rules prohibiting and criminalising torture requires states to *enact domestic legislation* prohibiting torture under domestic law

International law's perspective on national law

national law in treaties/custom

Domestic law and international custom

- State practice and *opinio iuris*
- domestic legislation, administrative acts, decisions of domestic courts as evidence of state practice
- But: practice must be widespread and (relatively) uniform
- ICJ *Arrest Warrant* case (DRC v Belgium), 2002:
‘The Court has carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation. It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.’ (para.58)

International law's perspective on national law

international courts' use of domestic law

- Different approaches of different int. courts
- Our focus: ICJ
- Art.38(1)(d) ICJ Statute:

‘The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: ...
(d) ..., judicial decisions ..., as *subsidiary* means for the determination of rules of law.’
- No direct sources of law, but subsidiary sources
- ICJ can rely on
 - decisions of other international courts
 - decisions national courts, when they deal with a question of international law

International law's perspective on national law

international courts' use of domestic law

Domestic law/decisions of domestic courts as facts

- National law/domestic court decisions are among the 'facts' that can cause a dispute and/or breach of int. law

'From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures. The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention.' (*Certain German Interests in Polish Upper Silesia*, PCIJ, 1926, p.19).

International law's perspective on national law

international courts' use of domestic law

Domestic law/decisions of domestic courts as facts

- Int. courts are no appeal courts for matters of domestic law
- Differentiate between
 - pure inter-state cases
 - cases involving individuals, and/or
 - cases where a matter that has been dealt with by national court before, and where nat. court applied int. law
 - room for 'dialogue'/constructive interaction in the latter two scenarios: attempts in *LaGrand* and *Avena* (ICJ); ECtHR
 - 'exhaustion of domestic remedies', 'margin of appreciation' (discretion) (ICC, ECtHR)
- Int. courts cannot declare domestic law 'unconstitutional' when domestic law breaches int. law

National law's perspective on international law

- no general rule on *how* states should implement int. law -> implementation freedom
- Territorial jurisdiction: domestic law making as sole domain of the state
 - Result: lack of uniformity concerning int. law's place within domestic legal systems
 - Need for comparative studies

National law's perspective on international law

Treaty making and ratification

- competence to make/ratify treaties: usually head of state (president or king)
- Often on recommendation of government
- Involvement of parliament: consent, authorisation or approval of most treaties before conclusion (usually before ratification)

National law's perspective on international law

International law's place in the domestic legal order

- Automatic standing incorporation
 - internal rule provides in a permanent way for automatic incorporation of int. rules into domestic law
 - No need for *ad hoc* implementing legislation (Exception: non-self-executing treaties)
 - Constant adjustment of int. and nat. law
 - Usual for customary law in most systems

National law's perspective on international law

International law's place in the domestic legal order

- Legislative *ad hoc* incorporation
 - Int. rules only become applicable within state's legal system after parliament passed specific implementing legislation
 - statutory *ad hoc* incorporation
 - parliament adopts an act translating various treaty provisions into national legislation (detailed)
 - automatic *ad hoc* incorporation
 - incorporation of whole treaty through short piece of enabling legislation
 - courts and state officials must infer how treaty provisions are to be applied/interpreted within domestic law
 - Treaties are often incorporated through this mode

National law's perspective on international law

International law's place in the domestic legal order

- Self-executing treaties and non-self-executing treaties
 - self-executing treaties: directly incorporated into domestic law; can be directly applied in domestic system
 - non-self-executing treaties: directly incorporated, but need for additional implementing legislation before application in domestic system
- Example from Russia: 'The provisions of the officially published international treaties of the Russian Federation which do not require the adoption of internal acts for their application are directly applicable. Corresponding legal acts shall be adopted for the application of *other* provisions of the international treaties of the Russian Federation.' (Art.5 of the Federal Law on International Treaties of the Russian Federation, 1995)

National law's perspective on international law

International law's place in the domestic legal order

- The rank of international law in domestic law
 - considerable variation
 - rare: int. law above all domestic law, including Constitution
 - international treaties *can* have superiority over both previous and subsequent legislation (conditional)
 - most common: treaties only have force of law, i.e. equal to ordinary statutes
 - Problematic: later or more special statutes may overrule int. law

National law's perspective on international law

International law's place in the domestic legal order

- Steps to ensure conformity between domestic and international law
 - prior monitoring mechanism
 - specific clauses in statutes
 - consistent interpretation
 - example: 'only where a treaty is irreconcilable with a later enacted statute and Congress has clearly evinced an intent to supersede a treaty by enacting a statute does the later enacted statute take precedence.' (Southern District Court of New York, *US v Palestine Liberation Organisation*, 1987, para.386)
 - priori checks by parliaments/administrative bodies

National law's perspective on international law

Use of international law by domestic courts

- Domestic courts need to determine meaning of an int. treaty rule
- Domestic courts apply customary international law
- Conflict-solving between different int. rules
 - state immunity \leftrightarrow prohibition of torture (ICJ, *Italy v Germany*, 2012)
 - UNSC Res \leftrightarrow ECHR (ECtHR, *Al-Jedda v UK*, 2011; and *Nada v Switzerland*, 2012): solved through 'harmonious interpretation'
- Conflicts between int. and nat. law before domestic courts
 - often solved through consistent interpretation
 - misapplication of int. law
 - open conflict

National law's perspective on international law

Discuss

- Does your country have explicit rules on the relationship between domestic and international law? If so, where? And what do they say? (as far as applicable to the legal system of your country, try to consider the distinction between *automatic standing incorporation* and *legislative ad hoc incorporation* as well as between *self-executing* and *non-self-executing* treaties)
- What is the rank of international law in domestic law? Is a distinction drawn between treaty and customary law? Does the rank that international law has within domestic law cause any problems for the correct application within the legal system of your country?
- Do national courts use international law? If so, do they do so only when a question of international law is to be solved or do they also use international law in their interpretation of national law?

Beyond the divide

Nijman/Nollkaemper, 2007

- ‘situation of global pluralism’
- Tendencies that undermine strict dualism
 1. Common values
 - hierarchically higher common values in int. law with a special place in domestic legal order?
 - some states give human rights treaties a higher rank in their domestic legal order; supported by regional human rights courts
 - Open: Why should some rules be on a higher level? Which?
 - Constitutionalisation of international law?

Beyond the divide

Nijman/Nollkaemper, 2007

- ‘Tendencies that undermine strict dualism

2. Dispersion of authority

- Vertical and horizontal shift of authority away from states
- Growing role of individuals and corporations
- Development of ‘private international order’ separate from nat. and int. law
- Divide between international and national legal order too simple?

Beyond the divide

Nijman/Nollkaemper, 2007

- Tendencies that undermine strict dualism

3. 'Deformalisation'

- Normative pull of international law that is not primarily based on legal bindingness
- Circumvention of formal channels of communication between international legal obligations and domestic legal order
 - adoption of policies by local authorities inspired by int. norms 'their' state is not bound by
 - Domestic courts citing int. law/judgments of int. courts not directly binding on 'their' state
- Networks
- Deformalisation of int. law: 'soft law' on the increase
 - States give effect to 'soft' as well as to binding int. law
- Some open legitimacy questions since state consent is not necessarily there

Cases and literature

Cases

a) ICJ

ICJ, ... LaGrand

ICJ, *Case concerning Avena and Other Mexican Nationals* (Mexico v US), Judgment, 31 March 2004, ICJ Reports 2004, p.12.

ICJ, *Case concerning the Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v Nigeria), Judgment, 10 October 2002, ICJ Reports 2002, p.303.

b) PCIJ

PCIJ, *Exchange of Greek and Turkish Populations*, Advisory Opinion No 10, 25 February 1925, Publications of the PCIJ, Ser.B, No 10.

PCIJ, *Certain German Interests in Polish Upper Silesia*, Judgment, 25 May 1926, Publications of the PCIJ, Ser.A, No.7.

Literature covering various sub-topics

Eileen Denza, 'The Relationship between International and National Law' in Evans (ed.), *International Law* (Oxford: OUP 2010, 3rd edn.), ch.14.

Antonio Cassese, 'The Implementation of International Rules within National Systems', in Cassese, *International Law* (Oxford: OUP, 2005), ch.12, pp.213-241.

Andre Nollkaemper, 'The Role of Domestic Courts in the Case Law of the International Court of Justice' (2006) 5 *Chinese Journal of International Law* 301.

Yuval Shany, 'Towards a General Margin of Appreciation Doctrine in International Law?' (2006) 15 *European Journal of International Law* 907.

For those who are particularly interested in this topic:

Janne Nijman and Andre Nollkaemper (eds) *New Perspectives on the Divide between National and International Law* (Oxford: OUP, 2007).