COMPREHENSIVE NOTES FOR PUBLIC INTERNATIONAL LAW (LAWS3381)

3 International Legal Personality; Relationship between international and domestic Law

Two questions:

(i) How does international law affect decisions before international courts; and

(ii) How does international law affect decisions before national courts.

3.1 Theories

3.1.1 Monism

- The **monist theory** supposes that international law and national law are simply two components of a single body of knowledge called 'law'.
    - International and national law operate in the same sphere of influence and are concerned with the same subject matter.
    - Because they operate over the same subject matter, they may conflict. In a concrete case, international law is said to prevail.
- Monist suppose the **superiority of international law**. There are different explanations for this.
    - Kelsen: it is a direct consequence of his 'basic norm' of all law. Monist-positivist theory: international law derives from the practice of states and national law derives from the states as established in international law. International law is thus a 'higher' legal order.
    - Lauterpacht: international law is superior because it offers the best guarantee for the human rights of individuals.
    - Monist-naturalist theory: international law is relatively superior; both systems of law are subject to a higher legal order, the law of nature.

3.1.2 Dualism

- **Dualism** denies that international law and national law operate in the same sphere but accepts that they deal with the same subject matter.
    - **International law** regulates the relations between states whereas **national law** regulates the rights and obligations of individuals within states.
    - International law deals with that subject matter on the **international plane** while national deals with the subject matter internally.
- **Rationale** for the dualist theory is to prevent the Executive from being able to create law for its citizens without observing the domestic constitutional requirements necessary for law creation.
    - Although, Lord Steyn notes that constitutional objections may not apply where the effect of international law is to confer a right as opposed to an obligation.
- International law cannot invalidate domestic law or vice versa; the rights and obligations arising under one system cannot automatically be transferred to the other.

3.1.3 Different subject matter

- **Fitzmaurice and Anziloti** deny that international law and national law ever operate in the same sphere or they are concerned with the same subject matter.
    - The relationship is like English and French law: they never contradict each other as systems of law.
    - Obligations of each system may come into conflict, but then which obligation is to prevail is settled by the 'conflict of laws' rules.
- Similar to the dualist theory, and there is little practical difference in terms of consequences.
- **Distinction** lies in the theoretical point that this is a theory of **coordination** (two systems do not conflict as systems), whereas monism and dualism are theories of **confrontation**.

- The effect of international law depends on the particular constitutional rules of each state and the perceive effect of domestic legislation. This is not dictated by any pre-conceived theory.
- The third theory may be the most accurate from a descriptive point of view but it only tells us how the systems interact and not why they do it in a particular way.

3.2 National law before international courts and tribunals

3.2.1 Sources

- The **decisions of national courts** and **certain national law concepts** may be used as 'sources' of international law.
- National law is used to **determine the content** of international law rather than directly resolve a dispute.

3.2.2 National law and international obligations

- A state cannot plead the provisions of its national law as a valid reason for violating international law.
- Treaties:
    - State 'may not invoke its internal law as justification for its failure to perform a treaty': Art. 27 VCLT 1969

- State may not rely on non-compliance with national law in order to deny that it has consented to be bound by a treaty: Art. 46 VCLT

- State cannot plead before an international court that its national law authorises it to do something which amounts to an internationally unlawful act.
- In other words, when a binding international obligation exists for a state, it must fulfil that obligation irrespective of whether its national law permits it to do so or forbids it from doing so.
    - If a change in national law is required so that a state may fulfil its international obligations, then that state is under an international duty to make that change or otherwise mitigate its international responsibility.
    - If a state does not make the necessary changes in its domestic law, it **does not** incur international responsibility simply for failing to bring its national law 'into line' with international obligations.
    - **International responsibility arises only when the state fails, in a concrete case, to fulfil its international obligations.**

3.2.3 Defining concepts for use in international law

- An international tribunal may be required to make reference to concepts defined in the national law of either party (e.g. determining whether the offender or victim was a 'national')
- In this situation, the international court is determining the obligations of the state on the international plane, but because the substantive issue involves national law concepts, it must make reference to that national law.

3.2.4 Evidence before international tribunals

- National law may serve as **evidence of 'facts'** before international tribunals.
- National law can provide strong evidence of **state practice**, thus helping to determine whether any rule of customary law has developed.
- National law can be **evidence of compliance** with international obligations – may be used to prove the state has not ignored its duties under treaty or customary law.
    - However, it remains form the international court to determine whether the national law is **sufficient** to fulfil an international obligation.
    - The mere existence of the national law will not be enough.
- Before it is considered by an international tribunal, the **precise content** of the national law must be proven. The international tribunal will hear evidence from local law experts.

3.2.5 National law as a basis for a tribunal's decision

- It is possible for an international tribunal to be given jurisdiction to decide a dispute **solely** or **primarily on the basis of national law.**
    - e.g. In the *Serbian Loans Case*, the Court had jurisdiction as the dispute was submitted by **'special agreement'** within the terms of the ICJ Statute.
- **Interpretation** of national law on the international plane:
    - When an international court must apply national law directly, it will pay 'the **utmost regard to decisions of the municipal courts** of a country' (*Brazilian Loans Case*) so as not to adopt an interpretation of that law different from that which applies inside the state itself.
    - Where the **correct interpretation of national law is unclear**, the international court will 'select the interpretation which it considers most in conformity with the law' of that state (*Brazilian Loans Case*)

3.3 Theories about international law in the national legal system: incorporation, transformation and implementation

Methods of giving effect to international law

- **The doctrine of incorporation**: a rule of international law becomes part of national law without the need for express adoption by the local courts or legislature.
    - The rule is incorporated into national law because it is a rule of international law.
    - This **automatically** operates unless there is some clear provision which precludes the use of the international law rule by the national Court.
- **The doctrine of transformation:** rules of international law do not become part of national law until they have been expressly adopted by the states.
    - A national court cannot apply a rule of international law until that rule has been deliberately **'transformed'** into national law in the appropriate manner, e.g. legislation.
- Note: the *apparent* approach in the UK is that it adopts incorporation for customary international law, but prefers transformation for treaty law.
- Note: there is no necessary correlation between incorporation and monism or transformation and dualism (p 99)