Supra-State Order: International Law and National Law

To employ a metaphor usually attributed to Arnold Wolfers (Discord and Collaboration: Essays on International Politics (1962); c.f. Simma and Pulkowski, below), twentieth century positivist thought understood States in the international system as billiard balls. States, when viewed from an international perspective, were considered opaque. The State's internal affairs were entirely and exclusively its own business.

Of course, even if this were ever true, it no longer applies in the modern international legal system. International humanitarian law regulates conflicts between States and non-State actors; international human rights law gives rights to individuals within States, and international criminal law gives individuals obligations which are internationally judiciable (even if a State has not consented to the jurisdiction of the ICC, its citizens and those within its territory can be judged by ad-hoc tribunals established by the Security Council); international investment law regulates the interactions between States and foreign corporations.

The Billiard Balls analogy neatly compartmentalised the international system into the international order and the national legal orders. Each existed, the analogy implies, independently, in blissful ignorance of the others. In modern international affairs, however, international and domestic legal orders interact in various ways, and certain rules and expectations have evolved to enable, avoid or ease this interaction, depending on the circumstances.

A prime example of such a rule is the doctrine of State immunity, most recently and authoritatively expressed by the International Court of Justice in its 2012 judgement in the Jurisdictional Immunities of the State case. That judgement concerned a case before the courts of Italy, which had attempted to hold Germany liable for certain damage done in the course of the Second World War. Germany claimed, in line with the doctrine of State immunity, that as it had not consented to Italy's jurisdiction, the courts of Italy were not competent to judge it. The ICJ agreed, holding that Germany was immune from Italy's jurisdiction notwithstanding that the alleged wrong was of jus cogens character.

A similar rule operates in reverse. Although the State may not be subject to the jurisdiction of other States (without its consent to their jurisdiction), its international obligations may be subject to adjudication by competent courts and tribunals on the international plane. In disputes before these bodies, it is established law that no State may rely on its domestic characterisation of a rule or action as a defence to a charge brought at international law. In other words: a State which commits a wrongful act on the international plane, cannot rely on the fact that that act is legal (or even obligatory) according to its domestic law as a defence to the charge. The rule, which was laid down in the case of Serbian Loans by the Permanent Court of International Justice, has subsequently been expressed by the ICJ in its Kosovo Advisory Opinion, and has been included in the International Law Commission's draft articles on the Responsibility of States for Internationally Wrongful Acts.

While rules have been established to lubricate the interface between international and national law, there remain significant philosophical questions about the relationship. Historically, these questions have found expression in the monism/dualism debate, and the debate still has great relevance today. There are two aspects to the question. The first is primarily practical: the United Kingdom, like many common law

jurisdictions, has a dualist legal system. That is to say, it conceives of international and national law as two separate legal orders. International norms to which the United Kingdom consents only become part of its national law if they are incorporated – in the manner of the UK Human Rights Act (which incorporated parts of the European Convection on Human Rights), and the Torture Convention (which was incorporated in the UK Criminal Justice Act 1988, and which was the subject of dispute in Ex Parte Pinochet). Other States (such as the Netherlands) have monist legal systems. They conceive of international and national law as a single system, and international obligations to which the State consents are automatically incorporated into its national law. The second aspect of that question is primarily theoretical, although it has real world applications. Is there a single system of law which encompasses international law and all the various domestic legal orders as constituent parts of a hierarchy of norms, or is the world made up of a multiplicity of legal systems? Starke's 1936 article is an excellent introduction to this controversy, and the thought of its intellectual fathers: Kelsen (monism) and Anzilotti (dualism).

Another debate (more recent in origin, but dealing with many of the same themes) is that initiated by the subaltern studies and Third World Approaches to International Law (TAWIL) movements. These movements question whether the fact that the structure of international law requires its actors to behave in particular ways, to constitute themselves in particular forms, and to speak with particular voices reduces the legitimacy of the system. In effect, international law requires any group that wishes to gain system-legitimacy to adopt the form of the State, and to act accordingly. Non-States are treated as non-plenary subjects of international law, and have a reduced set of rights and competences accordingly. Otto argues that these aspects of international law, in forcing all those who wish to treat as equals to adopt a highly Euro/Western-centric model of State, society and governance structurally excludes subaltern voices. The increasing requirement for new States to be democratic (as shown, for example, by the EC declaration) in order to achieve recognition and personhood may be one aspect of this process.

The relationship between international law and national law is highly complex, whether from a practical, procedural standpoint, or from a theoretical perspective. Those wishing to further explore some of the procedural aspects may wish to consult Fox, Hazel, The Law of State Immunity (Oxford University Press 2008), and Crawford, James, State Responsibility: the General Part (Cambridge University Press 2014); while those wishing to explore the philosophical aspects further may find Orford, Anne (ed.), International Law and its Others (Cambridge University Press 2006) of interest.

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