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Recurring Themes / Thèmes récurrents

Introduction Theme I: The relationship between international law and national law

ANDRÉ NOLLKAEMPER* & ELLEN HEY

In a world where it is becoming increasingly difficult to distinguish between what is national and what is international, the relationship between international law and national law merits revisiting. The topic is one of the traditional subjects of international legal discourse, a status reflected in the fact that it is the standard subject of one of the first chapters of any text book on public international law.

Text book treatment of the topic has changed little over the years, suggesting a serene continuity. Standard treatment focuses on the theoretical foundations of monism and dualism and the limited power of these two concepts in explaining practice. Thereafter, a pragmatic and anti-theoretical approach dominates.

Yet, for all its 'text book continuity', the topic is one of change as international and national law are increasingly becoming more intimately related. Partly because of the topics that they cover, but partly also because of the recognition that the key to their effectiveness is in the national sphere, treaties rely heavily on national law for their implementation. National judicial decisions also indicate an intensification in the relationship between international and national law. There is much evidence that international law and national law, as with international and national aspects of life, are increasingly becoming more entangled.

The development outlined above raises a number of questions. Is the apparent entanglement of international and national law a development in quantitative terms only – reflecting the fact that there is simply more international law and that there thus are also more contacts between international law and national law – or are we also witnessing a qualitative change in the relationship between international law and national law? Is any change, either qualitative or quantitative, truly international, or is it confined to a limited number of western states? And, to the extent that there is a change in quality, is it desirable? A further relevant question in this context is, for instance, whether international law, given current decision making procedures at the international level, has sufficient legitimacy to control the content of national law and the substance of national judicial decisions. More theoretical questions also emerge. Is the traditional treatment of the topic still valid for an understanding

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of the actual relationship between international law and national law? And if not, what new theoretical conceptions may enlighten our understanding? Finally, instrumental questions arise. Assuming that it is desirable that international law increasingly rely on national law for its implementation, should steps be taken to increase the ability of national legal systems to digest international law and thereby the effectiveness of international law? And, if such steps are found to be desirable, should they be taken in the sphere of constitutional law, law-making, in the courts or within various spheres at the same time?

The above sets out only a few of the very many questions that arise in revisiting the relationship between international law and national law. However, as is so often the case, it is much easier to pose the questions than to produce the answers. We left the latter difficult task to the four contributors to the present 'recurrent themes' column. We asked each of the experts to share with us their views on the relationship between international and national law, in general, and to highlight problematic aspects of this relationship, in particular. One point that definitely emerges from the contributions is that the serene continuity, suggested in standard public international law text books, merits revision. The object of such a revision should above all be to reflect the dynamic character of the topic.

A fundamental perspective on the evolution of the relationship between international law and national law is taken by Phillip Allott. Continuing a line set forth in his previous writings on the topic, Allott criticizes the long dominant idea that there are two separate 'mind-worlds', the highly socialized and regulated national sphere and the primitive international sphere. He finds that the beginning of this century provides evidence of a fundamental end to this separation of mind-worlds: we are witnessing an evaporation of the national-international frontier and a de-nationalizing of the national legal systems. The emerging body of law constitutes international constitutional law, a fundamental new development. In the wake of this finding, Allot emphasizes, further questions arise – most significantly questions of legitimacy and accountability: given the de-nationalizing of national legal systems, how can the people keep or attain control over developments in the international public realm that will affect them directly?

Benedetto Conforti takes a no less fundamental approach. Departing from the assumption that international law relies primarily for its effectiveness on implementation by national organs, he presents the view that international law and national law should be treated on the same footing in the national legal order. This, he argues, is essential if the progress made during the last fifty years in developing the content of international law is to be mirrored by progress in the implementation of international law. Conforti subsequently analyses to what extent national organs are persuaded, and should be persuaded, to ensure that international

law is complied with within the national legal order.

More instrumental aspects are covered in the contribution by Gilbert Guillaume. He reviews the work of the International Law Association (ILA) on the role of international law in the practice of national courts. The ILA considered how national courts find and apply rules of international law in domestic proceedings and offered a number of suggestions on how the implementation of international law by national courts might be enhanced. These suggestions included giving a more prominent place to international law in the law school curriculum.

A slightly different focus is taken by Laura Picchio Forlati, who examines the role of cultural values in private international law. Her contribution illustrates how the international harmonization of private law, and thus the increased entanglement between the national and international, may diminish the role accorded to cultural divergence, often enshrined in national law. It is in this respect that there may be lessons to be learned from private international law when public international lawyers engage in efforts to revisit the relationship between public international law and national law. The questions regarding legitimacy and accountability, raised by Allot, are of paramount importance in this context.

While the contributions recognize that in practice international law and national law have become more entangled, and acknowledge that international law relies for its effectiveness on national legal systems, one broad question remains unanswered: where do we go from here, or put otherwise, how to progress?

Two dimensions to this all important but difficult question need to be distinguished.

First there is the more theoretical dimension. Given that national law is so internationalized, should anything be changed in the procedures for the making of international law? Should international law be subjected to comparable procedures of law-making to those which now govern national law? Should we develop more safety valves that allow states to protect their own (cultural) values? Or should we change our understanding of the legitimacy of the law and develop new methods of law-making?

Second, there is a more instrumental dimension. If it is true that international law relies for its effective implementation on national organs, and at the same time we witness, as Conforti illustrates, a gap between the normative requirements of international law and the actions of national organs, what is to be done to close that gap? Should we rely on the evolution that brought us to where we are now? Or is there a case for a true legal project, for instance in the Institut de Droit International, the ILA or the International Law Commission to enhance the position of international law in the national legal order? And if so, what should be the content and the envisaged end-result of such a project?