International Law

Discussion Questions

Gleider Hernández, *International Law* (2nd edition, Oxford University Press, 2022)

Chapter 4, International Law and Municipal Law

Question 1. '*Dualism and monism are simply explanatory theories as to how international law is incorporated into domestic law; they serve no other function*'. *Analyse critically.*

It is true that 'dualism' and 'monism' refer to how different domestic jurisdictions address the place of international law. Dualist jurisdictions regard international law as being distinct, and not supreme, over domestic law. They tend to require, in addition to the ratification and entry into force of international law obligations, an additional incorporation of international law into municipal law by statute. Monist jurisdictions take no such step, with ratification and entry into force of international obligations being sufficient for international law to be directly applicable in domestic law. This is, in part, due to a degree of supremacy of international law that is recognised in monist jurisdictions.

In this respect, monism and dualism go further than merely explaining the place of international law within a given municipal legal system. Though at this level of understanding, only very generalised accounts can be made of the theories (as they are potentially different in every single different legal order), a few major points can be made. Dualism as a theory emphasises the autonomy and distinctive character of a municipal legal system, and rejects the potential for legal principles external to that order being made directly applicable without some intervening transformation. In part, this could be rooted in a respect for democratic legitimacy and the separation of powers within a municipal legal order; otherwise, a government could undermine statutes and legislation by accepting international legal obligations. Monist jurisdictions conceive law and legal rules to be part of a

unified, overarching legal order: international law and domestic legal orders are all emanations from one legal system, perhaps united under what Kelsen called the *Grundnorm.* Hersch Lauterpacht suggests that international law lays out the conditions through which the domestic legal orders of States can exist, and that these domestic systems must abide by fundamental principles of international law. Finally, an extra point of reflection is whether monism and dualism are two necessary opposites, with no third way. It is not unreasonable to suggest that either there is domestic incorporation necessary, or not at all, with nothing in between. But some scholars, for example Fitzmaurice and Rousseau, have suggested that various rules of conflict resolution (e.g. State responsibility—see *Nottebohm*) can accommodate the two legal orders, without taking a view as to whether dualism or monism is to be preferred as an explanatory framework.

Question 2. '*Whether dualist or monist, once an international obligation is directly applicable in municipal law, it can have no status within municipal law that is higher than that of ordinary legislation'. Is this true? Discuss, using relevant examples.*

There is no hard-and-fast rule as to the place of international obligations within municipal legal orders. All are different and all set out specific rules as to the place of international law. A comparative approach across the jurisdictions reviewed in Chapter 4 demonstrates that diversity. Starting with civil law jurisdictions, where no incorporating legislation is necessary, Article 94 of the Dutch Constitution accepts the supremacy of certain international legal obligations above their own constitution. Spain and France place treaty obligations above ordinary legislation but below their constitutions (in the case of Spain, the Constitution is to be amended, if incompatible with a treaty). Common law States are somewhat different: once duly transformed into domestic law with appropriate incorporating legislation, treaties override ordinary legislation, but that carries with it a duty to construe ordinary statues, as much as possible, in conformity with international law (*Saloman v Commissioner of Customs; Alcom v Colombia and Ors*). However, if a statute is designed unequivocally to override a treaty obligation, the legislature has

the power to do so and the obligation cannot be construed otherwise (*United States v PLO and Ors).*

Question 3. What happens if there is a conflict between an international obligation and an obligation under municipal law? Does one prevail?

One of the most important provisions in the VCLT is Article 27, which stipulates that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. In principle, this rule establishes the primacy of international obligations: a State may not justify a breach of international law by reference to municipal law.

What happens in practice when there is a conflict between international and municipal obligations? The municipal legislation or act is not invalidated by virtue of its conflict with international law. However, if an international obligation is breached, and that breach is attributed to a State under the law on State responsibility, then the State bears international responsibility vis-à-vis an injured party, or indeed any party with a legal interest (art 12, Articles on State responsibility).

An illustration that would be useful would be to consider how the ICJ decided the *LaGrand* and *Avena* cases. In these cases, the USA had argued that it would breach its Constitution to give effect to a provision in the VCCR (Vienna Convention on Consular Relations) on consular notification. The ICJ determined that the USA's acts had in fact breached the VCCR. Students would be well advised, however, to recall that the legal consequence was not that the ICJ nullified or in any way ordered a change of US internal law, but simply to declare there to be a breach of an international obligation and what remedy might apply.