INTERNATIONALIST DIALOGICAL MONISM*

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The unprecedented issue I bring today for my readers' reflection aims to propose a new monistic solution to the problem of the relations between International Law (of Human Rights) and domestic Law. What I explain below will be incorporated in the 5th edition of my *Course of Public International Law*, published by the Revista dos Tribunais, and expected to arrive to the readers later this year of 2010.

The so-called *internationalist monistic* doctrine of relations between International Law and domestic Law is already well known.[1] What it preaches is the uniqueness of the legal order under the primacy of the foreign Law, to which all domestic orders should be adjusted. This is the stand whose major exponent was Kelsen. According to this view, domestic Law *derives* from International Law, which represents a higher rank legal order. International Law sits then at the very apex of the pyramid of norms (its fundamental rule being *pacta sunt servanda*), from which comes domestic Law, its subordinate. In other words, International Law ranks now above State domestic Law as a whole, just like constitutional norms do above ordinary laws, and so forth. The reason is that its foundation rests on the *pacta sunt servanda* principle, which is the world most elevated norm (the maximal norm) of the legal order, from which derive all other norms, representing the States' duty to meet their obligations. Moreover, if the International Law rules do govern the international society conduct, they may not be revoked unilaterally by any of their actors, whether States or International Organizations.

It is quite understandable, then, that the internationalist monistic solution to the question of the hierarchical position between International Law and domestic Law is a rather simple one: an international act *always prevails* over a domestic normative rule that could contradict it. That is, the internal legal order, in case of conflict, must always yield to the international order, which outlines and governs the limits of responsibility of the State domestic jurisdiction. In this case, it is International Law that will determine both the foundation of validity and the territorial, personal and temporal validity dominion of each State national legal system. In other words, there are not two coordinated legal systems as in the dualist conception, but two individual legal systems, one of them (domestic Law) being subordinated to the other (International Law), which is superior to the first.

This internationalist monistic solution has fitted in with the traditional International Law, being supported by the best doctrine (in Brazil and elsewhere in the world). Now, when it comes to the "Human Rights" theme, a more fluid solution can be adopted, one that is neither monistic nor internationalist, but refined with dialogism (which is the possibility of a

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1. *See* VALERIO DE OLIVEIRA MAZZUOLI, *Course of Public International Law*, 4th ed., São Paulo: Revista dos Tribunais Publishing, 2010, pp. 72-80.

"dialogue" between international and domestic sources, in order to choose which would be the "best standard" applicable to such case).

So, when it comes to the Human Rights issue, it is possible to speak of the existence of an internationalist dialogical monism.[2] If it is true that, in the light of International Law, the international treaties always take precedence over the domestic legal order (a classical internationalist monistic conception), it is also correct to say that, in the case of instruments that deal with Human Rights, there may be *coexistence* and *dialogue* between these same sources.[3] The prevalence of the International norm over the internal one continues to exist even when the International protection instruments authorize the implementation of the most beneficial internal standard, since the application of the internal standard, in such case, is granted by the International standard itself, which is of higher rank. This demonstrates the existence of a hierarchy rather typical of the internationalist monism, but much more fluid and totally differentiated from that which existed in the traditional International Law (*e.g.*, as provided in the article 27 of the Vienna Convention on the Law of Treaties of 1969).[4] That is, the internationalist monism is still prevalent here, but with dialogism. Hence our proposal for an "internationalist *dialogical* monism" when the conflict between International and domestic standards concerns the "Human Rights" theme.

This "authorization", which is present in the International Human Rights standards to allow the application of the *most favorable* norm (which can either be the internal norm or the international norm itself, in honor of the "international *pro homine* principle") can be found in certain provisions of these treaties named *communicating vessels* (or "clauses of dialogue", or "dialogical clauses", or "feedback clauses").[5] They are responsible for linking the international legal order to the internal order, thus removing the possibility of contradictions between one order and the other, in any case, and causing such orders (the international and the domestic) to "dialogue" and endeavor to resolve which standard should prevail in such case (or whether both should prevail simultaneously) when a normative conflict situation is present. In the American Convention on Human Rights, *e.g.*, this "clause of dialogue" is found in the article 29, *b*, according to which none of the dispositions of the Convention can be interpreted as to "restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said States is a party".[6]

This "two-way road" that connects the International system of Human Rights protection with the internal order (which is legally embodied in the so-called *communicating vessels*) also gives rise to what might be called *transdialogism*.

In our understanding, this is the tendency of post-modern Law when the relations between International Law (of Human Rights) and domestic Law are concerned.

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2. On dialogism and its application to the relations between the International Law of Human Rights and domestic Law, *see* VALERIO DE OLIVEIRA MAZZUOLI, *International Human Rights treaties and domestic Law*, São Paulo: Saraiva Publishing, 2010, pp. 129-145.

3. The expression "dialogue of sources" is ERIK JAYME's, *in* Identité culturelle et intégration: le droit international privé postmoderne, *Recueil des Cours*, vol. 251 (1995), p. 259.

4. *See* VALERIO DE OLIVEIRA MAZZUOLI, *International Human Rights treaties and domestic Law*, cit., pp. 166-167.

5. For a complete study of these clauses, *see* VALERIO DE OLIVEIRA MAZZUOLI, Idem, pp. 116-128.

6. *See* LUIZ FLÁVIO GOMES & VALERIO DE OLIVEIRA MAZZUOLI, *Inter-American Convention on Human Rights Commentaries (The San José of Costa Rica Pact)*, 3rd ed., São Paulo: Revista dos Tribunais Publisching, 2010, pp. 205-211.