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Domestic Applicability of Customary International Law in Estonia

Introduction

Customary international law becomes topical in the domestic context in areas where international treaty norms are missing, are not binding on the state or have become obsolete. Although the formation and modification of rules of customary law is generally a long process, it is often the case that customary rules are the first response to problems that need to be solved in international life. Despite codifications of customary rules, life is constantly changing and new rules of customary law take their place alongside treaties all the time. Several issues today are still under the exclusive regulation of customary law — for example state immunity, state responsibility or status of foreigners.¹

The domestic status of rules of customary international law differs from state to state. If a state is not a party to major multilateral treaties or for any reason such treaties are domestically not applicable, the domestic role of customary law may be significant. For example, the United States has been cautious with becoming a party to human rights agreements and there are numerous cases in the US courts where customary international law is applied.² Estonia is not a party to the 1958 or 1982 sea conventions which all codify to a large extent customary law. Such rules could be invoked before domestic courts only as customary international law.

The present article is going to explore the notion of domestic application of international customary rules and important prerequisites for their application: domestic validity of a customary rule and its status with respect to other domestic norms. To this end, the article will analyse the 1992 Estonian Constitution and case law of the Estonian Supreme Court.

¹ P. Malanczuk. *Akehurst's Modern Introduction to International Law*. 7th revised ed. London, New York: Routledge, 1997, p. 35; C. Economides. *The elaboration of model clauses on the relationship between international and domestic law. – The relationship between international and domestic law. Proceedings*. Strasbourg: Council of Europe Press, 1993, p. 105. See also, *First Report: Summary of Questionnaire Responses*. By ILA Committee on International Law in Municipal Courts. – Report of the 66th Conference held at Buenos Aires, Argentina, 14–20 August 1994. Buenos Aires: International Law Association, 1994, p. 356.

² Cf. B. E. Carter, P. R. Trimble. *International Law*. 2nd ed. Boston: Little, Brown and Company, 1995, pp. 249–261.

1. Meaning of domestic applicability of customary international law

What is meant under the domestic application of a rule of customary international law is the application of the rule in relations between individuals or individuals and the state in a way that the applied norm is used to derive the rights and obligations of the parties (direct application). Indirect application is also possible — then customary international law is used only to interpret domestic legal rules.³ It is also possible to apply customary international law domestically by way of constitutional review — when courts review the conformity of domestic legislation with the customary rule.⁴ The present article will focus on direct applicability of customary rules. Several issues treated here (first of all as concerns international validity and binding force of customary rules) pertain also to indirect application as well as to application in the course of constitutional review. This article does not cover one further possibility when the validity and binding force of a customary rule may come to the attention of domestic legal operators — if a customary rule regulates the relations between the state and a foreign state or state's agent or an international organisation and a dispute arising from such a relationship is being settled in a domestic court.

Although customary international law has developed for the purpose of regulating relationships between states, there has recently been an important change and obligations imposed on states or competence assigned to them sometimes keep in mind the rights and duties of individuals. First and foremost this concerns human rights. International human rights like several other fields of international law to a certain extent exist in parallel in treaties and as customary international rules.

Indeed, domestically directly applicable are primarily rules of customary international law that grant private persons rights against the state. These rights correlate to the state's international obligation the performance of which an interested private individual may demand (*e.g.* granting asylum to a refugee, equal treatment of foreigners and citizens in certain issues and guaranteeing of certain rights to foreigners, *etc.*).⁵

The above should not be taken to mean that customary international law could not directly grant rights or impose obligations on private individuals. Direct obligations include for example: prohibition of genocide, piracy, torture or slavery.⁶ Then states are only intermediaries who (in the absence of an international court) implement the will of the “international legislator”. In the case domestic courts settle an issue directly on the basis of a customary rule and do not assume rewriting of the customary rule into a domestic act of law, it would also be correct to talk about direct applicability of customary international law. Although here the principle of legal certainty arises sharply, it concerns very few rules the violation of which (*e.g.* committing of genocide), due to its extent and extraordinary character, could be clear to every individual. Primarily for the sake of clarity states tend to rewrite such rules into domestic law (transform) or at least make a reference to them in domestic penal legislation or elsewhere.⁷

2. Preconditions for domestic applicability of customary rules

Like in the case of international treaties, in order to be applicable an international customary rule must meet certain conditions. The rule must:

- exist and be valid internationally (the latter means, among other things, that there must be no other rules of international law that prevail over the customary rule);

³ J. J. Paust. Customary International Law in the United States: Clean and Dirty Laundry. – German Yearbook of International Law, Vol. 40, 1997, p. 85.

⁴ Cf. A. Verdross, B. Simma. Universelles Völkerrecht. Theorie und Praxis. 3., new, fully revised ed. Berlin: Duncker & Humblot, 1984, p. 550, § 864.

⁵ Cf. J. J. Paust (Note 3), pp. 106–114.

⁶ *Ibid.*, p. 90, fn. 85; D. H. Joyner. A normative model for the integration of customary international law into the United States law. – Duke Journal of Comparative and International Law, Vol. 11, 2001, No. 1, p. 134.

⁷ *E.g.* § 92 of the new Estonian Penal Code (*karistusseadustik*. – Riigi Teataja (The State Gazette) I 2001, 61, 364 (in Estonian)) only refers to international law while several other crimes described in the same chapter are transcripts of the rules of international law. Nevertheless, all such penalties must be imposed in accordance with international law and it would be advisable to use customary international law for interpreting respective provisions.

- be binding on the state which seeks to apply the rule domestically (in the case of a general customary rule it means that the state is not a persistent objector with regard to the rule, and in the case of a particular custom that the state has consented to the customary rule);
- be valid as part of domestic law of the state which seeks to apply it domestically (it derives from the state's constitutional approach to the domestic status of international law and it may be, and often is, different for different sources of international law);
- prevail over all the colliding norms of national law (it means that in the case of conflict of the customary rule with a domestic rule, be it a constitutional, statutory or secondary law rule, the customary law rule must be in a position in the normative hierarchy that enables it to prevail over the conflicting domestic rule); and
- be sufficiently clear and concrete to be applied.

International validity of a customary rule, its relationship with other rules of international law and its binding force on states are beyond the scope of this article. Hence we start from the third item — domestic validity of the rules of customary international law.

3. Domestic validity of customary rules

The issue of domestic validity of customary international law is the debate among monists and dualists. Today all states themselves decide whether and which sources of international law they recognise as part of their domestic law.⁸ But even when the state's approach is strictly dualist it will be internationally liable for domestic violation of the rules of international law that are binding on it.⁹

Different states have different approaches. In the centuries old Anglo-American tradition, customary law is considered as law of the land.¹⁰ In the continental European tradition generally recognised principles of international law have been mentioned in several constitutions since World War I (e.g. Germany, Austria, Estonia, Greece, Portugal, the Russian Federation).¹¹ Very few constitutions expressly mention customary international law (e.g. Republic of South Africa).¹² Still many other states recognise rules of customary international law as part of their domestic law and apply customary rules without express guidelines in their constitutions (e.g. France, Italy, Switzerland, the Netherlands).¹³

As concerns international treaties, Estonia's approach is monist in a somewhat modified meaning of this term — treaties that are internationally in force and are binding on Estonia are part of the domestic law without their domestic validity or transformation to domestic law being explicitly mentioned anywhere separately.¹⁴ Modification means that the Estonian legal order contains the so-called rules of recognition whose effect makes international treaties entered into by Estonia as part of the domestic law. This claim is grounded on the second paragraph of § 123 of the 1992 Constitution by the effect of which international treaties ratified by the *Riigikogu* become part of the domestic law in Estonia. The practice of ratification and domestic application of treaties is a proof of it. Although there is no written rule of recognition for interna-

⁸ R. Geiger. *Grundgesetz und Völkerrecht. Die Bezüge des Staatsrecht zum Völkerrecht und Europarecht. Ein Studienbuch. 2.*, revised ed. München: Beck, 1994, pp. 158–159; L. Wildhaber, S. Breitenmoser. *The Relationship between Customary International Law and Municipal Law in Western European Countries. – Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 48, 1988, pp. 164 and 169.

⁹ L. Wildhaber, S. Breitenmoser (Note 8), pp. 167–169.

¹⁰ See Blackstone's quotation in: A. Verdross, B. Simma (Note 4), p. 542, § 853. See also, J. J. Paust (Note 3), pp. 84 *ff.*

¹¹ Article 9 (1) of the 1920 Austrian Federal Constitution; article 25 of the 1949 German Federal Basic Law; article 28 (1) of the 1975 Greek Constitution; article 8 (1) of the 1976 Portuguese Constitution and article 15 (4) of the 1993 Constitution of the Russian Federation.

¹² Article 232 of the 1996 Constitution of the Republic of South Africa.

¹³ Second Report of the Committee on International Law in National Courts. – Report of the 67th Conference held at Helsinki, Finland, 12 to 17 August 1996. London: International Law Association, 1996, p. 573; F. Ermacora. *Völkerrecht und Landesrecht. – Österreichisches Handbuch des Völkerrechts. Vol. 1. H. Neuhold et al. (eds.)*, Wien: Manz, 1991, pp. 116–117, line No. 569. A. Verdross and B. Simma use in this context a term “unwritten constitutional law”: A. Verdross, B. Simma (Note 4), p. 542, § 853. In some cases rather declaratory provisions of constitutions (such as paragraph 14 of the preamble of the 1946 French Constitution and Article 10 of the 1948 Italian Constitution) are considered as rules of recognition whereby customary international law is transferred into domestic legal order: I. Seidl-Hohenveldern. *Transformation or adoption of international law into municipal law. – International and Comparative Law Quarterly*, 1963, Vol. 12, pp. 91–92. About Switzerland, see L. Wildhaber, S. Breitenmoser (Note 8), p. 196.

¹⁴ The author of this article has expressed his view on the topic in: H. Vallikivi. *Status of International Law in the Estonian Legal System under the 1992 Constitution. – Juridica International*, Vol. 6, 2001, pp. 222–232 (unfortunately, in the course of editing several remarks made by the author were omitted from the published version of the article); H. Vallikivi. *Välislepingud Eesti õigussüsteemis. 1992. aasta põhiseaduse alusel jõustatud välislepingute siseriiklik kehtivus ja kohaldatavus (International Treaties in the Estonian Legal System: Domestic Validity and Applicability of Treaties Concluded under the 1992 Constitution)*. Tallinn: Õiguskirjastus, 2001 (in Estonian).

tional treaties approved by the Government of the Republic, the so-called executive treaties (*Verwaltungsabkommen*), the practice of application gives reason to claim that these treaties are valid as part of the domestic law of Estonia, too.

Customary international law is not explicitly mentioned in the Estonian Constitution. However, the second sentence of the first paragraph of § 3 stipulates: “Generally recognised principles and rules of international law are an inseparable part of the Estonian legal system.” Similar provisions were contained in the earlier Estonian constitutions of 1920 and 1937.¹⁵ Two main questions arise on the basis of the quoted provision:

- to which sources of international law does the phrase “generally recognised principles and rules of international law” refer? And
- what is the meaning of the phrase “inseparable part of the Estonian legal system”?

3.1. Generally recognised principles and rules of international law

The similar provision in the previous Estonian constitutions or in the current Austrian and German constitutions does not and did not distinguish between “rules” and “principles” of international law. On the other hand, they are distinguished in article 8 (1) of the 1976 Portuguese Constitution and article 15 (4) of the 1993 Constitution of the Russian Federation. Does the first paragraph of § 3 of the Estonian Constitution have in mind other sources of international law besides international customs, for example (i) general principles of law recognised by civilised nations that article 38 (1) (c) of the Statute of the International Court of Justice refers to, or (ii) universal multilateral conventions to which most states of the world have acceded but which are not binding on Estonia? Another question arises in connection with the adjective phrase “generally recognised”. Differently from the Weimar Constitution the phrase is no longer in the current German Constitution. Is it a condition limiting the range of rules of customary international law — for example by reference to *ius cogens* rules only?

The Supreme Court of Estonia has several times referred to the first paragraph of § 3 in its decisions, both in connection with treaties which are either binding or not binding on Estonia and also simply in connection with international law without specific reference to any source.¹⁶ The prevalent view in literature seems to be that the first paragraph of § 3 of the Constitution is meant to include both customary law rules and legal principles.¹⁷ As the present article focuses on (customary) rules and not on general principles, let us see what gives reason to believe that the first paragraph of § 3 is a reference to rules of customary law, and which customary rules it applies to.

Similarly to the German Federal Basic Law which contains separate rules on customary law (article 25) and treaties (though only treaties ratified by legislator) (article 59 (2)), the Estonian Constitution also contains separate rules on treaties (in this context the second paragraph of § 123). As we saw above, international treaties ratified by the *Riigikogu* become part of the domestic law in Estonia as a result of the effect of the second paragraph of § 123 of the Constitution and executive treaties as a result of the effect of the unwritten rule of recognition. Separate provisions can be considered the reason why the first paragraph of § 3 of the Constitution does not mean international treaties that have entered into effect in respect of Estonia, no matter how general they are, *i.e.* no matter how many states of the world they bind.¹⁸ Be it mentioned that if

¹⁵ Subsection 4 (1) of the 1920 Estonian Constitution and § 4 (2) of the 1937 Estonian Constitution. The provision was borrowed to the Estonian constitutions from article 4 of the 1919 Weimar Constitution and article 9 (1) of the 1920 Austrian Federal Constitution. Allegedly, the latter two borrowed it from the United States court practice: I. Seidl-Hohenveldern (Note 13), p. 92.

¹⁶ See the case-law of the Supreme Court: judgment of the Criminal Review Chamber of the Supreme Court, 21 December 1994 (III-1/1-34/95; *U. Torop's Case*). – Riigi Teataja (The State Gazette) III 1995, 7, 83 (in Estonian); judgment of the Criminal Review Chamber of the Supreme Court, 26 September 1995 (III-1/3-28/95; *M. Rein's Case*). – Riigi Teataja (The State Gazette) III 1996, 1, 3 (in Estonian); judgment of the Plenary Session of the Supreme Court, 22 January 1998 (3-1-1-123-97; *M. Mägi's Case*). – Riigi Teataja (The State Gazette) III 1998, 23, 228 (in Estonian); judgment of the Criminal Review Chamber of the Supreme Court, 7 November 1995 (III-1/3-40/95; *H. Vaibla's Case*). – Riigikohtu Lahendid 1995 (Collection of Supreme Court judgments for 1996). Tallinn: Õigusteabe AS Juura, 1996, p. 419 (in Estonian); judgment of the Criminal Review Chamber of the Supreme Court, 7 February 1995 (III-1/3-28/95; *V. Uprus' Case*). – Riigi Teataja (The State Gazette) III 1995, 2, 22 (in Estonian).

¹⁷ U. Lõhmus. Rahvusvahelise õiguse üldtunnustatud põhimõtted Eesti õigussüsteemi osana (Generally Recognised Principles of International Law as the Part of Estonian Legal System). – *Juridica*, 1999, No. 9, pp. 425 ff. (in Estonian); K. Merusk, R. Narits. Eesti konstitutsiooniõigusest (On Estonian Constitutional Law). Tallinn: Juura, 1998, pp. 28–29 (in Estonian); L. Madise. Rahvusvahelise õiguse käsitlusest 1992. aasta Eesti põhiseaduses (Treatment of International Law in the Estonian 1992 Constitution). – *Juridica*, 1998, No. 7, pp. 364–365 (in Estonian); H.-J. Uibopuu. Eesti põhiseadus, rahvusvahelised suhted ja rahvusvaheline õigus (Estonian Constitution, International Relations and International Law). – *Juridica*, 1998, No. 4, p. 191 (in Estonian); *Cf.* F. Ermacora (Note 13), p. 118, line No. 578.

¹⁸ *Cf.* R. Geiger (Note 8), p. 164.

a state is in parallel bound by a customary law rule and similar rule contained in a treaty then both rules can be valid domestically. Such double validity has importance when it comes to application — if for example the degree of validity of a treaty rule is lower than that of a national law and in the case of conflict with the legislative rule the treaty rule cannot be applied, the customary rule may turn out to be applicable if it prevails over the legislative rule. For a discussion of normative hierarchical position of customs see below.

“Generally recognised rules of international law” could also be contained in international treaties to which Estonia is not a party but which are important by substance and/or which have a large number of contracting parties. It could be claimed that if rules of such treaty are simultaneously not rules of customary law then they are not applicable as part of the domestic law in Estonia. A claim to the contrary would presume that the first paragraph of § 3 of the Constitution is a reference rule that is used to transfer to domestic law any rules of international law which are non-binding for the state internationally. What makes a treaty as source of international law particular by nature is that it allows states to decide whether they wish to participate in the treaty or not. Thus it would be correct to read the first paragraph of § 3 of the Constitution as only applying to customary law and not international treaties.

The term “generally recognised” refers to the consensualist approach which does not conform to today’s concept of customary law. Therefore the extension “generally recognised” does not presume that Estonia should have recognised the rule (either explicitly or tacitly). Formerly the German constitutional law used to attribute such meaning to the term and the view was also supported in Estonian specialist literature.^{*19} The exclusion of the word “recognised” (*anerkannt*) from the Bonn Constitution was allegedly meant to emphasise that the state’s own recognition is not necessarily needed.^{*20} Estonia’s more liberal approach, despite the term “generally recognised”, was already noted when the previous 1937 Constitution was drafted.^{*21}

The term “generally recognised” does not mean either that absolutely all states of the world should be bound by the relevant rules of customary law. If we presume that all states should be bound then only *ius cogens* rules would remain under this category, but this approach would probably be too restrictive. What is meant here is rather the differentiation between general rules of customary law and regional or particular rules. The extension is thus referring to general but not universal customary rules.^{*22} Accordingly there could be occasional persistent objectors among the states bound by the customary rules mentioned in the first paragraph of § 3 of the Estonian Constitution.^{*23}

3.2. Inseparable part of Estonian legal system

Like in the case of international treaties, the ways of transferring customary international law to domestic law can be different. When brought to the domestic sphere the rule of international law may change its character or may remain valid as international law. In the first case the state’s approach is monist and an international rule is adopted (or incorporated) into domestic law. In the second case the approach is called dualist and a rule of international law is transformed into domestic law.^{*24} The consequences of using the two methods are somewhat different.

The adopted customary rule changes and terminates in accordance with its international modification and termination, and it has to be interpreted in conformity with international interpretation.^{*25} Automatic synchronicity helps to avoid potential infringement of international law by the state. When a transformed customary rule changes internationally domestic legislation has to be brought in line with the changes; in the case of failure to do so or in the case of arbitrarily interpreting a customary rule transformed into domestic law the state is liable for an infringement of its international obligation.^{*26}

Some authors have based the differences of the two approaches on extreme subtleties. For example, I. Seidl-Hohenveldern has distinguished between the adoption and transformation of customary rules on the basis of the wording of a relevant constitutional rule: if according to the constitutional rule the rule of

¹⁹ L. Wildhaber, S. Breitenmoser (Note 8), p. 179; A. Piip. *Rahvusvaheline õigus* (International Law). Tartu, 1936, pp. 33–34 (in Estonian).

²⁰ R. Geiger (Note 8), pp. 164–165; K. J. Partsch. *International Law and Municipal Law*. – *Encyclopedia of Public International Law*. R. Bernhardt (eds.). Vol. II, 1995, p. 1198; R. Streinz. *Sachs, Grundgesetz*. 2nd ed. München: Beck, 1999, art. 25, paragraph No. 25.

²¹ A speech explaining the draft constitution given by J. Uluots before the National Assembly in 1937: *Põhiseadus ja Rahvuskogu. Koguteos* (The Constitution and the National Assembly. A Collection). Tallinn, 1937, p. 132 (in Estonian).

²² Cf. R. Streinz (Note 20), art. 25, paragraph No. 24.

²³ Cf. R. Geiger (Note 8), p. 164.

²⁴ See, e.g., A. Verdross, B. Simma (Note 4), pp. 545–546, § 858; K. J. Partsch (Note 20), pp. 1190–1192; F. Ermacora (Note 13), pp. 117–118. It should be noted that essentially the same techniques are called with different names in the literature.

²⁵ K. J. Partsch (Note 20), p. 1198; I. Seidl-Hohenveldern (Note 13), pp. 93 and 98.

²⁶ Differences of the two approaches and advantages of one and another have been described, e.g. in: I. Seidl-Hohenveldern (Note 13), pp. 93–94; K. J. Partsch (Note 20), pp. 1191–1192.

international law “is valid as part of the domestic law” (*gelten als*) it is considered as statement reflecting that the rule has been adopted into domestic law. If the constitutional rule stipulates that the rule of international law “is part of the domestic law” (*sind*) it is an expression of the legislator’s wish to transform the relevant rule to domestic law.^{*27} Many authors find that in states where domestic validity of customary international law is recognised the rules transfer to domestic law directly without any additional national procedures.^{*28}

Unlike the previous Estonian constitutions the current Constitution seems to use the wording that refers to transformation. However, such differentiation seems artificial, at least in the case of the Estonian language. There is also no unanimity among German and Austrian authors concerning the meaning of the provisions that Seidl-Hohenveldern considers as adoption rules.^{*29} Of primary importance is national practice — whether courts apply rules of customary international law without requiring that they be transformed to domestic legislation. In addition, it is also important whether national courts take into account the international changes of validity and interpretations of the rule.

The Estonian Supreme Court by way of constitutional review has applied customary international law at least on one occasion. In a decision of 21 December 1994 the Constitutional Review Chamber of the Supreme Court had to consider the legality of the transactions that the former Soviet troops in Estonia had carried out with real estate situated in Estonia.^{*30} The Supreme Court came to the conclusion that foreign troops illegally occupying Estonia could not become owners of the real estate and were thus not entitled to dispose of the property. The court summarised its decision: “The property of the military belongs to the state. The real estate — land, buildings and installations — in possession and in use of the former Soviet Union armed forces belonged and continue to belong to the Estonian state. /.../ Arising from international law and the continuity of the Republic of Estonia, the armed forces of the Soviet Union and its structural units were not legal subjects of the transactions made with the lands, buildings and objects situated in the territory of the Republic of Estonia.”

The Constitutional Review Chamber concluded that upon occupying Estonia the troops of the Soviet Union became only users of the real estate situated in the occupied territory. The chamber referred to customary international law as expressed in article 55 of the annex to the 1907 Hague Convention IV. Article 55 stipulates: “The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.” Thus even if the property that was possessed by the Soviet Union armed forces was in private ownership at the moment occupation started, the Republic of Estonia nationalised the property in the process of regaining independence in 1991.^{*31}

Estonia has never been a party to the Hague conventions concerning the laws of war. The Hague conventions are indeed considered as an expression of customary international law.^{*32} As such, the above provision of the Hague Convention IV is binding both on the Republic of Estonia as well as the Soviet Union and its legal successor, the Russian Federation. Although the Estonian Supreme Court has only briefly discussed the substance and validity of the customary rule in its decision, it is clearly an instance of domestic application of customary international law.

Another example of domestic application of customary international law dates from 1995. In its judgment of 23 May 1995 the Supreme Court Criminal Review Chamber noted that “in accordance with the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 which, pursuant to § 3 of the Constitution of the Republic of Estonia, is an inseparable part of the Estonian legal system, everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law (§ 6 (2)).”^{*33} The Supreme Court narrowed down the scope of charges in the part that was not proved. If we take into account that the European Convention of Human Rights (ECHR) became binding on Estonia as an international treaty only on 16 April 1996, the Supreme Court in the above case had to apply the rule of presumption of innocence as a rule of customary international law — in the way as it is codified in the ECHR (and several other instruments preceding or subsequent to the ECHR).

²⁷ I. Seidl-Hohenveldern (Note 13), p. 92. See also R. Geiger (Note 8), pp. 165–166.

²⁸ L. Wildhaber, S. Breitenmoser (Note 8), pp. 176–177; C. Economides (Note 1), pp. 104–105.

²⁹ Cf. M. Schweitzer. Staatsrecht III. Staatsrecht, Völkerrecht, Europarecht. 7., revised ed. Heidelberg: Müller, 2000, p. 163, paragraph No. 476; R. Geiger (Note 8), pp. 165–166.

³⁰ Constitutional Review Chamber of the Supreme Court, 21 December 1994 (III-4/A-10/94). – Riigi Teataja (State Gazette) I 1995, 2, 34. See unofficial translation into English thereof – <http://www.nc.ee/english/const/94/4a9410i.html> (05.06.2002).

³¹ Decisions of the Supreme Council of Estonia dated 29 August 1991 and 23 January 1992.

³² Documents on the Laws of War. 2nd ed. A. Roberts, R. Guelff (eds.). Oxford: Clarendon Press, 1989, pp. 3–4, 44.

³³ *U. Torop's Case* (Note 16).

In addition to the above, legal scholars have also treated § 3 (1) of the Estonian Constitution as a rule by which rules of customary international law are adopted into Estonian law.^{*34} Hence due to the effect of this provision all rules of general customary international law binding on Estonia are adopted to the Estonian legal system and are valid as part of the domestic law. Accordingly, if Estonia is a persistent objector to any of the general customary rules those rules have no domestic validity. The adopted rules continue to live their international life, *i.e.* they change and terminate in the domestic sphere simultaneously with their modification and termination on the international plane.

3.3. Particular customary rules

It was explained above, that § 3 (1) of the Estonian Constitution has in mind rules of general customary international law. The Constitution lacks any references to particular customary rules. The author of this article is also not aware of any court practice in Estonia that would recognise or apply such customary rules. However, considering the generally favourable attitude towards international law (*Völkerrechtsfreundlichkeit*) in the Estonian Constitution, one cannot exclude that also particular customary rules could have domestic effect.^{*35}

Particular customary rules transfer to the domestic law in a similar way as general rules — becoming internationally binding on Estonia; and they leave the domestic legal system upon their international termination. However, considering the nature of particular rules their existence has to be proved by reference to explicit or tacit recognition of the states bound by the custom.

4. Position of customary rules in domestic hierarchy of norms

Monism that gives priority to international law would assume that rules of customary international law prevail over all rules of domestic law, including constitutional rules.^{*36} The so-called modified monism that takes reality into account is forced to recognise the right of states to determine for themselves what hierarchical status customary international law has in domestic law.

The position of a customary rule depends certainly on whether we are dealing with a general or particular rule. In some states general customary rules have been ensured the status to prevail over laws but the status of particular customary rules is unclear or in any case inferior to laws.^{*37} A customary rule containing *ius cogens* may enjoy a special position. For example, in Switzerland a doctrine has developed lately according to which customary rules containing *ius cogens* prevail over all rules of domestic law, including constitutional rules.^{*38} On the other hand, the position of customary rules in the hierarchy of norms can be different for different domestic legislation issued by the same body or the body of the same branch of power (*e.g.* for constitutional or ordinary laws or acts of the head of state and government).

As both the rules of domestic law as well as rules of customary international law are legal norms, in the case of conflict one of them has to surrender. Which rule prevails is determined by the maxims of *lex superior*, *lex posterior*, *lex specialis*, and others. As it was said, every state decides for itself what the status of customary rules is. But while doing so, it will have to take into account that the state will be internationally liable for an infringement of a customary rule that was left unapplied because of a status inferior to a conflicting domestic rule.

The status of customary international law may be determined *expressis verbis* by the constitution but in most cases the constitution does not provide an answer to this question. In that case the status is determined by national courts applying (or refusing to apply) customary rules. The status may be derived first of all from the status of the adoption or transformation act, *i.e.* in the absence of a different regulation the interna-

³⁴ H.-J. Uibopuu (Note 17), p. 192; K. Merusk, R. Narits (Note 17), pp. 28–29; L. Madise (Note 17), p. 366; R. Streinz (Note 20), art. 25, paragraph No. 38; R. Geiger (Note 8), pp. 165–166; F. Ermacora (Note 13), p. 118, line No. 578.

³⁵ Cf. M. Schweitzer (Note 29), pp. 165–166, paragraph No. 481. See also, A. Verdross, B. Simma (Note 4), p. 544, § 855; B. Simma, *Das Völkergewohnheitsrecht*. – Österreichisches Handbuch des Völkerrechts. Vol. 1. H. Neuhold *et al.* (eds.). Wien: Manz, 1991, pp. 53–54, line No. 267.

³⁶ I. Seidl-Hohenveldern (Note 13), p. 94.

³⁷ M. Schweitzer (Note 29), pp. 165–166, paragraph No. 480–481.

³⁸ Second Report ... (Note 13), p. 573. See also, C. Economides (Note 1), p. 106.

tional customary rule that has transferred to domestic law acquires legal force equal to the rule by which it found its way to the domestic law.^{*39} The situation is unclear when there is no written adoption norm.

There are many different possibilities to set the hierarchy. The most widespread in practice are the situations where the customary rule:

- is ranking below constitutional rules but prevails over acts of legislation (*e.g.* Germany, Greece, Italy, Russian Federation, Switzerland)^{*40};
- is equal with laws (Austria)^{*41}; or
- is inferior to laws but superior to acts of executive bodies (*e.g.* the UK, the USA, Sweden, Finland, Luxembourg, Republic of South Africa).^{*42}

The first paragraph of § 3 of the Estonian Constitution, unlike the third paragraph of § 123 that regards international treaties, does not refer to the status of generally recognised rules of international law. For determining the status of general rules of customary law binding on Estonia we could look for guidance in the status of their adoption rule. Accordingly, such customary rules could have equal status with the constitutional rules.

Having a rank higher than laws does not yet mean that domestic legal acts conflicting with a customary rule are invalid. In the case of conflict, if it is indeed a real and not imaginary conflict — the latter can be avoided by interpreting domestic law in conformity with the customary rule — the customary rule will be applied instead of a domestic rule.^{*43}

As concerns particular customary rules, because of the absence of written adoption norm there is no similar basis for determining the status of a rule. There is apparently also no court practice regarding this issue. Particular customary rules could be considered as occupying a position not higher than that equal to the laws. Then the legislative power can decide whether to allow domestic applicability of such rules or to establish different regulations. It is also quite conceivable to grant particular customary rules even lower status that would be equal to acts of the executive. The executive power plays an important role — through its activities and statements — in binding the state with customary law and especially with particular customary rules where states' consent is necessary. Therefore the executive power may claim to have a competence to decide whether to allow domestic applicability of such rules or whether to establish regulations overruling adopted customary rules.

The collision of international customary rules and treaty rules should also be addressed. It may well be that both rules are internationally binding on the state and are also valid domestically. This is the situation in Estonia. What is their domestic validity or applicability in the case when they enjoy different positions in the domestic hierarchy of norms?^{*44} It should first be noted that the range of addressees of these rules may be different (indirect addressees of a treaty rule are usually persons connected with or subordinate to the contracting party). In relations with some states the state is bound by a treaty rule and in relations with others by a customary rule.^{*45} Which one to apply depends on the object of regulation of an individual rule and its scope of validity. Let us bring a hypothetical example to illustrate the relationship. If Estonia enters into a treaty with Lithuania to treat the Lithuanian minority in Estonia in a certain way, then for Lithuanians the provisions of the treaty will replace the minimum requirements for the treatment of aliens contained in customary international law. This does not mean, that other minorities, for example Finns, living in Estonia could benefit from the treaty and demand its application to them, or that this treaty would in any way affect the rights and duties of Finns as arising from international customary law. Thus the treaty rules entered into to regulate the same issue do not necessarily dislodge customary rules from the domestic sphere. With

³⁹ See also, M. Schweitzer (Note 29), p. 165, paragraph No. 479a.

⁴⁰ C. Economides (Note 1), p. 106. About Germany, see article 25 of the 1949 German Federal Basic Law; R. Geiger (Note 8), pp. 168–169; K. J. Partsch (Note 20), p. 1199; R. Streinz (Note 20), art. 25, paragraph No. 88; M. Schweitzer (Note 29), pp. 164–165, paragraph No. 479. At the same time, no equal rank with the constitution or even primacy over the constitution is fully excluded: M. Schweitzer (Note 29), p. 165, paragraph No. 479a; R. Streinz (Note 20), art. 25, paragraph No. 86. See also, K. J. Partsch (Note 20), p. 1199. About Italy, see L. Wildhaber, S. Breitenmoser (Note 8), p. 184. About Greece, see article 28 (1) of the 1975 Greek Constitution. About the Russian Federation, see I. T. Lukashuk. *Mezhdunarodnoye pravo. Obschaya chast* (International Law. General Part). Moscow: BEK, 1999, p. 238 (in Russian). About Switzerland, see L. Wildhaber, S. Breitenmoser (Note 8), pp. 198–199.

⁴¹ A. Verdross, B. Simma (Note 4), p. 547, § 861; F. Ermacora (Note 13), p. 118, line No. 578; I. Seidl-Hohenveldern (Note 13), pp. 94–95; L. Wildhaber, S. Breitenmoser (Note 8), pp. 186–187.

⁴² See generally, C. Economides (Note 1), p. 106. For the UK, see I. Brownlie. *Principles of Public International Law*. 5th ed. Oxford: Oxford University Press, 1998, pp. 42–43. For the USA, see F. L. Kirgis. *Federal Statutes, Executive Orders and “Self-Executing Custom”*. – *American Journal of International Law*, Vol. 81, 1987, p. 373. Article 232 of the 1996 Constitution of the Republic of South Africa.

⁴³ *Cf.* R. Streinz (Note 20), art. 25, paragraph No. 93.

⁴⁴ *Cf.* I. Seidl-Hohenveldern (Note 13), pp. 96–98.

⁴⁵ *Cf.* R. Streinz (Note 20), art. 25, paragraph No. 93.

respect to certain persons customary rules may be applicable while with respect to others treaty rules will be applied. However, when the addressees of a treaty rule are identical to those of the customary rule and there is a conflict between the two rules, the domestic applicability of one or another may depend on the rank of colliding rules in the domestic sphere.

5. Some further issues related to domestic applicability of customary international law

Different possibilities of domestic applicability of international law were described in the first section above. Any kind of application aside from indirect application would definitely assume domestic validity of a customary rule. It would not be possible to apply a rule that is non-binding on the parties to the legal relationship, nor is it possible to check the conformity of a domestic act to a customary rule if the latter is not valid domestically or does not prevail over the rule that will be reviewed. Indirect application of an international customary rule is not as strict. Nevertheless, it would be equally unconceivable to use for interpretative purpose a customary rule that is not valid or that is not binding on the state (although it is less important to consider the domestic validity and domestic status of such customary rule).

Above, some examples were given to illustrate the domestic application of customary rules in Estonia. In addition we could mention the Supreme Court Criminal Review Chamber judgment of 21 March 2000 as an interesting example.⁴⁶ Karl-Leonhard Paulov had been prosecuted under § 61¹ (1) of the Estonian Criminal Code for having killed, as an NKVD agent, three “forest brothers” (persons hiding in the forest and offering armed resistance to the Soviet occupying regime in Estonia) in October 1945 and October 1946. The relevant section of the Criminal Code has complex wording: “Committing crimes against humanity, including genocide, as those crimes are defined in the rules of international law, that is wilful acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, a group offering resistance to the occupying regime or other group, killing or causing serious or permanent or life threatening bodily or mental harm or torturing members of such group, forcibly taking away children, armed attack, deportation or banishment of native population in the time of occupation or annexation, depriving or limiting economic, political and social rights — is punishable by eight to fifteen years’ imprisonment or by life imprisonment.” The three instances of domestic courts debated about the characteristics of the objective side of the elements of the crime (*corpus delicti*) contained in this provision.

The Supreme Court found that there are two main sets of elements in this provision: the one of the crime against humanity (this is referred to by the wording “Committing crimes against humanity /.../ as those crimes are defined in the rules of international law /.../”) and the other of the crime of genocide (this is referred to by the rest of the wording). The Supreme Court determined the substance of the crime against humanity by using the characteristics in article 6 (c) of the Charter of the Nuremberg Tribunal and article 5 of the Statute of the Yugoslavian Tribunal (ICTY). The Court thereby mentioned that the list of characteristics of the crime against humanity in these statutes is not exhaustive. It should be noted that these instruments by themselves are not binding on Estonia today nor were they binding at the time of commission of the crimes by K.-L. Paulov. But nevertheless they are an expression of customary international law. The chamber stated that depriving people of the right to life and fair trial could be considered as a crime against humanity.

Assumably for the sake of clarity, the criminal chamber also opened up the notion of the crime of genocide, and to do this article II of the 1948 Genocide Convention was used. The court emphasised the importance of the group motive in defining the substance of this crime and found that also a group offering resistance to an occupying regime falls under the characteristics of the crime of genocide. However, somehow the court failed to pay attention to the fact that both in the Genocide Convention and in the ICTY Statute the list of characteristics of the crime of genocide is exhaustive.⁴⁷ Therefore attributing of the whole description of acts in § 61¹ (1) of the Criminal Code to the crime of genocide is questionable. It would have been less questionable to include some objects (*e.g.* group offering resistance to the occupying regime) and types of assault (*e.g.* deportation or deprivation of human rights) to the list of characteristics of the crime against humanity. It should also be taken into account that although no statutory limitations are applicable to such crimes, when punishing for them today it should be checked that they were also punishable at the time of the commission of the acts. The court did not expressly address those issues.

⁴⁶ Judgment of Criminal Review Chamber of the Supreme Court, 21 March 2000 (3-1-1-31-00). – Riigi Teataja (The State Gazette) III 2000, 11, 118 (in Estonian).

⁴⁷ The language in both provisions is identical likewise article 6 of the Statute of International Criminal Court contains identical language.

Although the Supreme Court itself did not finally solve the matter, Paulov's case could be considered as another instance of direct application of a rule of customary international law — the characteristics of the objective side of the crime (crime against humanity) which is a precondition for punishment derive directly from international law. The use of rules of international law for defining the crime of genocide can be considered indirect application (assistance in interpreting). However, the Supreme Court's decision in the Paulov case can be criticised for certain laconism and limited explanation of the substance of these crimes (elements of the crime, time of formation of the rule, *etc.*). Clarity in those questions would be that more important that there are several further trials expected to be held on active collaborators of the Soviet occupation regime.^{*48}

Domestic application of rules of customary international law is not an easy task for legal operators. It may happen that the courts or administrative bodies take the line of least resistance and fail to pay any attention to a customary rule, or they misinterpret it and apply it wrongly.^{*49} To avoid it, in some states trial courts may refer to the constitutional court for preliminary ruling regarding interpretation of international law rules. The 1949 German Federal Basic Law, for instance, contains a special provision to encourage the courts and ensure uniform application of generally recognised rules of international law. According to article 100 (2), where, in the course of litigation, doubt arises whether a rule of public international law is an integral part of the federal law and whether such rule directly creates rights and duties for individuals (article 25), the court will obtain a decision from the Federal Constitutional Court.^{*50}

In Estonia there is no such possibility. The Supreme Court that in practice provides guidelines to lower level courts for the application of law has itself made decisions in which reasons for applying or not applying customary international law could and even should have been motivated in more detail. For instance, in its order of 30 October 1998 the Supreme Court Administrative Review Chamber failed to pay any attention to the cassator's references to several acts of international law which might reflect customary law.^{*51} Juri Bozhko, an elected member of a local government council was discharged from the council because of his non-understanding of the Estonian language. The first two instances of administrative court upheld the discharge. In his application Juri Bozhko's counsel referred to article 21 (1) of the Universal Declaration of Human Rights, and some provisions of the CSCE Helsinki Document of 1992: The Challenges of Change, and the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (1990). The chamber dismissed the application without responding how the allegedly applying rules expressed in those instruments are irrelevant or non-applicable.

There are several other cases where the Estonian Supreme Court has simply referred to international law without mentioning where the applied rules derive from and what their substance is.^{*52} Although it is evident that what is meant in those cases are rules of customary law. One must point out such lapses but should not forget that equally important with the courts' ability to know and understand international law is the counsels' capability to handle rules of international law.

Conclusions

Rules of customary international law are valid as part of domestic law in Estonia. The first paragraph of § 3 of the 1992 Constitution contains the so-called rule of recognition by which general customary rules are adopted into domestic law. The transfer of particular customary rules to domestic law can be derived from the general "international law friendly" approach in the Constitution. This means that rules of customary law binding on Estonia are valid simultaneously as part of the domestic law, beginning from their formation until their termination.

⁴⁸ M. Püüa. Raugaeas Harjumaa küüditaja Karpov läheb kohtu alla (Aged Karpov, Deportee from Harjumaa to be Tried). – Postimees, 2 March 2002 (in Estonian).

⁴⁹ K. J. Partsch (Note 20), p. 1198.

⁵⁰ The same is in Greece: article 100 (1) (iv) of the 1975 Greek Constitution. See also, L. Wildhaber, S. Breitenmoser (Note 8), pp. 180–182; R. Streinz (Note 20), art. 25, paragraph No. 94–96; K. J. Partsch (Note 20), p. 1200; First Report ... (Note 1), p. 329; Third Report of the Committee on International Law in National Courts. – Report of the 68th Conference held at Taipei, Taiwan, Republic of China, 24 to 30 May 1998. London: International Law Association, 1998, p. 666.

⁵¹ Judgment of Administrative Review Chamber of the Supreme Court, 30 October 1998 (3-3-1-33-98; *J. Bozhko's Case*). – Riigi Teataja (The State Gazette) III 1998, 29, 294 (in Estonian).

⁵² See, for instance, judgment of the Criminal Review Chamber of the Supreme Court, 22 March 1994 (III-1/3-22/94; *E. Mäelde's Case*). – Riigikohtu lahendid 1994–1995 (Collection of Supreme Court judgments for 1993 and 1994). Tallinn: AS Juura (in Estonian); judgment of the Civil Review Chamber of Supreme Court, 21 November 2001 (3-2-1-140-01; *K. Kuusik Case*). – Riigi Teataja (The State Gazette) III 2001, 32, 341 (in Estonian); judgment of the Administrative Review Chamber of the Supreme Court, 4 May 2001 (3-3-1-21-00; *I. Popov and N. Popova Case*). – Riigi Teataja (The State Gazette) III 2001, 16, 170 (in Estonian).

Rules of customary law which are valid as part of the domestic law, depending on their object of regulation, are applicable in different ways. Firstly, they may be directly applied on relations between individuals or on relations between individuals and the state. Secondly, they may be applied as support for interpreting domestic rules, and thirdly, they may be applied in the course of constitutional review. For application one should still keep in mind their self-executing nature, *i.e.* at least customary rules that justify states (and thereby indirectly obligate individuals) cannot be directly applied. Likewise, customary rules that are too ambiguous cannot be applied for deriving rights of individuals (which normally correlate to the obligations of the state). In addition, the applied rule of customary law must have sufficient status in the hierarchy of norms. The customary rule over which domestic rules prevail cannot be applied.

Rules of general customary international law could have equal legal force with the Estonian Constitution as they are adopted into the domestic sphere by provisions of the Constitution itself. The status of particular customary rules is less clear and probably not tested in practice. They could be attributed the status either equal to laws or inferior to laws but equal to executive acts.

In applying rules of customary law the main problem lies in the difficulty of finding out the existence of a customary rule and identifying its substance. Despite that, Estonian courts have applied customary rules on various occasions. However, there seems to be room for improvement in explaining the substance of customary rules to meet the high standards of legal reasoning.