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Status of International Law in the Estonian Legal System under the 1992 Constitution

The dispute between monists and dualists about the domestic status of international law has continued over a century and is still in progress. Today, the shield of sovereignty of states is still too strong for the states to unconditionally accept the rules of international law as a part of domestic law, especially so that the domestic legal acts in conflict with the rules of international law are repealed or at least repealable. However, no state is able to escape the recognition of the impact of international law on domestic law. Disregarding the assault of European Community law, the impact may be detected, above all, in the area of the protection of human rights. Also countries having a so-called dualist approach have transported the European Convention on Human Rights (ECHR) to their domestic law and courts apply this instrument directly.*¹

The jurists who are accustomed to a practical approach have therefore abandoned their legaltheoretical discussions and search for the differences and common ground between international and domestic law. They claim that these two legal systems do not overlap, except when the state decides to transpose the rules of international law into the sphere of domestic law.*² If the state does not recognise the rules of international law as a part of domestic law and does not apply them, or if it recognises them but applies them incorrectly, the state bears international responsibility for the consequential breach of its international obligation entailed thereby.

Thus, the methods of transporting particular sources of international law to domestic law (adoption, incorporation, transformation) are brought into focus and the consequences of using one or another

¹ See, e.g., on Denmark – Act No. 285 of 29 April 1992 and explanations: B. K. Olsen. *Incorporation and Implementation of Human Rights in Denmark*. – *International Human Rights Norms in the Nordic and Baltic Countries*. Ed. by M. Scheinin. The Hague: Martinus Nijhoff Publishers, 1996, pp. 227–232 and 248–249; Sweden – Law on the European Convention for the Protection of Human Rights and Fundamental Freedoms (1994:1219) and explanations: G. Melander. *Ibid.*, pp. 295–300 and 305; and the United Kingdom — 1998 Human Rights Act. Available at: <http://www.hmso.gov.uk/acts/acts1998/19980042.htm>.

² See Oppenheim's *International Law*. 9th ed. Ed. by Sir R. Jennings and Sir A. Watts. Vol. I. London/New York: Longman, 1996, pp. 54, sections 18 and 82–85, section 21; K. J. Partsch. *International law and municipal law*. – *Encyclopedia of Public International Law*. R. Bernhardt (ed.). 1995, Vol. II, p. 1186; see also M. Schweitzer. *Staatsrecht III. Staatsrecht, Völkerrecht, Europarecht*. 7. neubearb. Aufl. Heidelberg: Müller, 2000, p. 141, paragraph No. 418; R. Geiger. *Grundgesetz und Völkerrecht: die Bezüge des Staatsrechts zum Völkerrecht und Europarecht*. 2nd ed. Munich: Beck, 1994, pp. 158–159; G. Fitzmaurice – cited in: D. J. Harris. *Cases and Materials on International Law*. 4th ed. London: Sweet & Maxwell, 1991, pp. 69–72.

method are examined instead.^{*4} Strictly speaking, it is a dualist approach — a state itself decides on the choice of the method and the implementation thereof. Nevertheless, some methods transport the rules of international law to domestic law more immediately than others and therefore they could be classified (though in a modified manner) as monist or dualist.

The purpose of this article is firstly to describe briefly the content of each method and the nuances of the impact of international law transported to domestic law thereby, and secondly to evaluate the position of international law arising from the applicable Constitution in the Estonian legal system.

1. Rule of recognition and techniques of transporting international law to domestic law

1.1. Main concepts

Before describing each method, let us introduce the notion of the rule of recognition into discussion.^{*5} A rule of recognition is a written or unwritten rule in the order of the state due to which international law binding on the state becomes a part of its legal order. If the rule of recognition exists, the state may be deemed to be monist with regard to the sources of international law covered by the rule of recognition; if the rule does not exist, the approach of the state is dualist.

The following terms have been used in different meanings in literature to describe the methods of transporting international law to domestic law. In this article, the following meaning has been given to these methods.

Transformation is a method characteristic of the dualist approach as a result of which the rules of international law are transported to domestic law by means of a domestic transforming act. The transforming act need not be the enforcement act of a treaty. The transforming act may serve to amend, specify or supplement the wording of the treaty or any other written source of international law. The transformation method has been divided into general transformation and special transformation. In the latter case, each international law instrument (*e.g.* an agreement or a decision of an international organisation) is transported to domestic law separately; in the former case, all the rules of some source of international law (*e.g.* rules of general international law), including the rules to be to be created in the future, are deemed to have been transported to domestic law.^{*6} In special transformation, the transforming rule is contained in the transforming act.

As a result of **adoption**, the rules of some source of international law are, similarly to general transformation, automatically transported to the sphere of domestic law.^{*7} Adoption is a monist technique whereas the adopting rule serves as a rule of recognition. Adoption is, as a rule, applied to general international law the rules of which (with certain exceptions) are binding on the state irrespective of its consent.

Another monist method is **incorporation** which, unlike adoption, requires means and presumes an act on the part of the state, as a result of the performance of which the rules of the source of international law become a part of domestic law.^{*8} An enforcement act of a treaty is the best example. Unlike in special transformation, the incorporating rule (being the rule of recognition) and the incorporating act are usually separated from each other. The incorporating act that is, as a rule, the enforcement act of the treaty, transports the treaty to domestic law by virtue of an incorporating rule.

⁴ See, *e.g.*, R. Geiger (Note 2), pp. 159–160. One of the most up-to-date comparative analyses of treaties is: Expression of consent by states to be bound by a treaty. Analytical report and country reports. Secretariat memorandum prepared by the Directorate General of Legal Affairs (CAHDI (2001) 3). Strasbourg: Council of Europe, 2001 (particularly pp. 74–84).

⁵ Here one should not draw parallels with Hart's secondary rule validating the law (H. L. A. Hart. *The Concept of Law*. 2nd edition. Oxford: Clarendon Press, 1997, pp. 100 *ff.*).

⁶ See also M. Schweitzer (Note 2), p. 145, paragraph No. 430–431.

⁷ See also *ibid.*, pp. 141–142, paragraph No. 420–421.

⁸ Similar to this is the German implementation theory (*Vollzugslehre*), where a domestic act approving the rule is also regarded as an order to apply the rule in domestic law. – See M. Schweitzer (Note 2), p. 143, paragraph No. 423.

1.2. Impact of rule of recognition

Monist approach differs from the dualist one mainly by the fact that international law remains the basis for the validity of the rule of international law transported to domestic law.⁹ Therefore, in the case of monist approach, it is extremely important to examine the following: (a) changes in validity of the international law rule — suspension of the treaty and expiry thereof, creation of a rule prevailing over the treaty or customary rule under the principle of *lex superior*, *lex posterior* or *lex specialis*; (b) changes in the content of the international law rule irrespective of whether they are approved by the state or not (the latter is possible for example in the case of a simplified procedure of amendment or upon the alteration of the general customary rule), and (c) restrictions on validity of such rules (above all, reservations to the treaties). All these changes occur in international and domestic law in synchrony. The domestic body implementing laws has to take account of the circumstances pertaining to international law. In the case of monist approach, the implementor also has to proceed from the international and legal interpretation of the applied rule of international law.

Dualists have claimed that their doctrine relieves most of these concerns experienced by the implementor (and also the subjects) of law — the task of the executive power is to ensure (together with the legislator, if necessary) that domestic law is in compliance with the international obligations of the state. The implementors continue to apply the rules of international law until the transforming acts are valid and in the manner prescribed by the transforming acts. In order to interpret a rule of international law, easily available domestic sources of interpretation are used.¹⁰

Dualist approach appears simple and attractive at first glance only. If the basis of validity of a rule of international law is domestic, the asynchronous validity of the transformed rule or the domestic validity application thereof which ignores international interpretation may entail a violation of international law, or oblige the state to observe a rule that is no longer restricting its activities internationally. Hence, the proponents of mitigated dualism prefer the view that primary (regulating) rules of international law are transformed to domestic law together with the rules determining their validity and other secondary (ancillary) rules.¹¹ Thus, the domestic implementor of law is not exempted from the obligation to observe international and legal validity and interpretation of the transformed rule of international law and adhere thereto.

Consequently, the distinction between revised monism and dualism is largely dependent on what branch of power has the largest share in monitoring the validity of the rules of international law and the compliance of the rules of domestic law therewith and in clarification of the content of the rules of international law transported to domestic law: in monism the primary care rests with courts, in dualism — with the executive. Perhaps the establishment and strengthening of judicial control over the activities of the administrative power (incl. state bodies responsible for international relations) has also contributed to the increase in the domestic impact of international law. Domestic judges and other implementors of law need thus be prepared to assess the validity of international law on the domestic level whereas the validity of the rule depends on the international validity thereof.

1.3. Form of rule of recognition and bases for identification

The rule of recognition may be worded as a rule determining the domestic validity or status of international law (Lithuania, France) and as a conflict of laws rule (Estonia) or a combination thereof (Germany, Russia).¹² Problems arise in connection with identification of the rule of recognition. The

⁹ For the consequences of monist techniques see A. Verdross, B. Simma. *Universelles Völkerrecht. Theorie und Praxis*. 3., new, fully revised ed. Berlin: Duncker & Humblot, 1984, p. 546, section 858; K. J. Partsch (Note 2), p. 1192.

¹⁰ See K. J. Partsch (Note 2), pp. 1191–1192.

¹¹ See A. Verdross, B. Simma (Note 8), pp. 545–546, section 858; M. Schweitzer (Note 2), pp. 145–146, paragraph No. 432–435.

¹² Article 138 (3) of the Lithuanian 1992 Constitution (“International agreements which are ratified by the Parliament of the Republic of Lithuania shall be the constituent part of the legal system of the Republic of Lithuania.”); article 55 of the French 1958 Constitution (“*Les traités ou accords régulièrement ratifiés ou approuvés ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve, pour chaque accord ou traité, de son application par l’autre partie.*”); article 25 of the German 1949 Constitution (“*Die allgemeinen Regeln des Völkerrechtes sind Bestandteil des Bundesrechtes. Sie gehen den Gesetzen vor und erzeugen Rechte und Pflichten unmittelbar für die Bewohner des Bundesgebietes.*”); article 15 (4) of the Russian Federation 1993 Constitution (“The generally recognised principles and norms of international law and international treaties of the Russian Federation are a constituent part of its legal system. If an international treaty of the Russian Federation stipulates rules other than those stipulated by the law, the rules of the international treaty apply.”). For the relevant provision of the Estonian Constitution, see the text below.

pursuit of sovereignty of states is also evident in the fact that an obvious rule of recognition is not deemed to be one, and the transformation method is preferred. An identical rule in constitution may be interpreted as a rule of recognition or it may not.^{*13} The choice of one or another interpretation thus characterises the political willingness of the state to effectively implement international law.

The clearest answer about the approach of a state is provided by the practice of that state at domestic implementation of international law. Here also careful attention is required since we notice that the distinction between the impacts of the techniques described above is not very significant. Implementation consists in, for example:^{*14}

- application of the rules of international law to the relationships between private individuals or private individuals and the state (direct application) — if the international validity of the rule is adhered to upon application (*i.e.* synchrony is accepted), the international interpretation of the rule is examined, and no reference is made to the transforming act as the domestic basis of the rule, *etc.*, such approach may be considered monist;
- exercise of supervision over the conformity of any domestic rules with the rules of international law — if courts (above all, the constitutional court) exercise supervision over such conformity, such approach is monist;
- issue of secondary legislation on the basis of the rules of international law — an approach where the enforcement or ratification instrument of a rule of international law (*e.g.* the enforcement law or a law approving the enforcement of a treaty) rather than the rule itself is referred to as the basis upon the issue of a regulation may be considered dualist;
- use of rules of international law as ancillary means for interpreting domestic legislation.

In addition thereto, the manner of enforcing rules of international law helps to clarify the status of international law (this is valid, first and foremost, with regard to treaties). If the above-mentioned methods of implementation do not operate without special mention of their domestic validity or applicability in the enforcement law of the treaty (Finland, Italy) or without the adoption of a separate law or any other legal act to validate them (United Kingdom), it is indicative of the dualist approach of the state.^{*15} Hence, to distinguish between incorporation and transformation, it is extremely important to first examine by what domestic legal acts of what bodies the state enforces or ratifies treaties. It is essential to answer this question also in order to determine the domestic status of an enforced treaty, which is outside the scope of this article.

Further, we will examine how “simple” or “complicated” the life of judges in Estonia has been rendered — whether any rules of international law are introduced into the legal system of Estonia, and if they are, on what basis they are valid. Due to the limited volume of the article only the domestic validity of the rules of international law is examined. The status of these rules in the hierarchy of domestic legislation and the conditions for their direct applicability are excluded. As the approach of the state to various types of sources of international law differs, the position of treaties and custom and other sources is discussed separately.

2. Validity of international law in the Estonian legal system

2.1. Treaties

2.1.1. Enforcement of treaties

In Estonia, treaties are prepared by the Ministry of Foreign Affairs or other institutions concerned in co-operation with the Ministry of Foreign Affairs. Draft treaties are approved by the Government of the Republic by adopting an order (individual instrument). Any less-important agreements are

¹³ See *e.g.* M. Schweitzer (Note 2), p. 144, paragraph No. 428. Article 25 of the German Constitution has been considered both an incorporating rule and a general transformation rule — see R. Geiger (Note 2), pp. 165–166. Germany has no such clear rule of recognition with regard to treaties (interpreted according to subsection 59 (2) of their Constitution); it is still unclear whether special transformation or incorporation is used for transporting treaties to German law — see M. Schweitzer (Note 2), pp. 152–153, paragraph No. 446–448.

¹⁴ See A. Verdross, B. Simma (Note 8), p. 550, section 864.

¹⁵ See Expression ... (Note 3), pp. 78–79.

enforced by the Government of the Republic (intergovernmental agreements).^{*16} The above-mentioned order serves as the enforcement act for bilateral and plurilateral (closed) treaties. Although rare in practice, some multilateral treaties are enforced by the government by its regulation (general instrument). Both orders and regulations are enacted according to the same procedure as other government instruments.

Although unusual in international practice, the enforcement acts of the more important treaties are adopted by the *Riigikogu* (Estonian Parliament). Section 121 of the Constitution lists five cases when a treaty is enforced by the *Riigikogu*:

- if the treaty alters state borders;
- if implementation of the treaty requires the passage, amendment or repeal of Estonian laws;
- if the treaty provides that the Republic of Estonia joins international organisations or unions;
- if the Republic of Estonia assumes military or financial obligations by the treaty;
- if the treaty itself prescribes ratification.

Although the Constitution and Foreign Relations Act do not specify the instrument by which the *Riigikogu* should enforce treaties, the enforcement is carried out by an act that is processed according to the same procedure as the other acts.

In Estonian constitutional law, a distinction is made between constitutional and simple laws. The former are the laws specified in subsection 104 (2) of the Constitution, for the passing of which a majority of the membership of the *Riigikogu*, *i.e.* over 51 votes is required. The list contains, *inter alia*, “laws pertaining to foreign and domestic borrowing, and to financial obligations of the state”. The question of the number of votes needed for the enforcement law of the *Riigikogu* became particularly burning in relation to the ratification of the WTO Agreement or Marrakesh Agreement in the *Riigikogu* on 29 September 1999. The *Riigikogu* adopted the ratification law by 48 votes given in favour. The opposition claimed that at least 51 votes should have been given in favour to pass the law as the Agreement clearly provides for the making of a contribution to the Working Capital Fund and the payment of the membership fee. The Legal Chancellor to whom some members of the parliament made an inquiry has not given an adequate answer concerning the constitutionality of such act.

Enforcement acts are laconic, usually providing merely “To ratify the appended /.../ treaty”, or “To accede to the appended /.../ treaty.” A state agency competent to perform the contractual acts is appointed in the following section of the act if necessary. Reservations to or interpretative declarations of the treaty are also contained in the following sections of the enforcement act. Thus, enforcement acts serve as individual instruments from the substantive aspect and from the constitutional aspect, the *Riigikogu* could also enforce treaties by decisions.

In accordance with the generally applicable procedure, the enforcement acts shall be proclaimed by the President of the Republic (section 107 of the Constitution). The President has the right of suspensive veto. The President may finally refuse to proclaim an enforcement act when he or she finds that the law is unconstitutional while in such case the issue is automatically passed to the Supreme Court for adjudication. On the international arena, instruments of ratification of treaties that require ratification are exchanged or, in the case of multilateral treaties, deposited with the depositary. The country is usually represented by the head of state. In Estonia, the Constitution also provides that the President of the Republic shall sign instruments of ratification (subsection 78 (6) of the Constitution), although this act has been rendered to merely “affixing a rubber seal”. The President of the Republic has, due to his or her limited powers, no right to decide on the purposefulness of the enforcement of the treaty (however, as indicated above, the President may intervene in the enactment of the enforcement law to a certain extent).

2.1.2. Domestic validity of treaties

In order to ascertain the domestic validity of treaties, a rule of recognition has to be found in the constitutional order of Estonia. The Constitution provides for two relevant rules. Subsection 3 (1) of the Constitution reads; “/.../ Generally recognised principles and rules of international law are an inseparable part of the Estonian legal system”, and subsection 123 (2) provides; “If laws or other

¹⁶ See clause 5) of subsection 7 (1) of the Estonian 1993 Foreign Relations Act (*Välissuhtlemisseadus*) (Riigi Teataja (The State Gazette) I 1993, 72/73, 1020; last amendment 1997, 73, 1200) (in Estonian). In respect of such term, a distinction must be made between parties to the agreement and the bodies enforcing the agreement — in the Estonian practice, the Government of the Republic has also enforced international conventions that are not identified as intergovernmental agreements.

legislation of Estonia are in conflict with international treaties ratified by the *Riigikogu*, the rules of the international treaty shall apply.”

The first one of the quoted rules has been related to international customary law in other states and we will examine it in detail below. Subsection 123 (2) of the Constitution, however, refers to treaties directly. It has been claimed that a contradiction may arise only between the rules that belong to the same legal system, due to which the rule evidences the monist approach of Estonia.^{*17} Nevertheless, the contradiction may be firstly interpreted not as a formal conflict between two rules but as a substantive contradiction. Secondly, the rule does not regulate the applicability of treaties if the contradiction does not exist and if the relevant rule is not found in domestic law. Hence, in order to clarify the meaning of subsection 123 (2) of the Constitution, we have to resort to the implementation practice of treaties.

As a rule, no secondary legislation has been issued on the basis of treaties enforced by the *Riigikogu*. Such practice would anyway be restricted by subsections 87 (6) and 94 (2) of the Constitution. Those provisions allow to issue regulations only on the basis of legal acts issued by the parliament. The lack of such practice is also justified with the principle of legal certainty of domestic subjects. The rule concerned with the delegation of authority, arising from international law, may easily disappear independently of the domestic acts, compromising thereby the legal foundation of the implementing provision. At the same time, the issue of regulations on the basis of the enforcement laws of treaties would be indicative of a dualist approach as in such case, the domestic law may be considered as the basis of the validity of the treaty. Such practice has also not been applied.

In several European states (e.g. Bulgaria, Slovenia, Poland), constitutional courts are competent to repeal domestic legislation that are in conflict with the rules of international law binding on the state.^{*18} Sections 15 and 152 of the Estonian Constitution enable the courts not to apply or appeal any law or other legislation that is in conflict with the Constitution. The legislation does not refer to the opportunity of courts to refuse to apply or repeal any domestic legal act due to its conflict with a rule of international law. Nevertheless, the Constitutional Court of Estonia (the Constitutional Review Chamber of the Supreme Court) has repeatedly detected conflicts between domestic legislation and treaties binding on Estonia.^{*19} Although it is apparent from the examples that the Supreme Court has applied a provision of the Constitution in parallel with the rule of a treaty, not all references to the treaties (or any other rules of international law) in the judgements have carried merely the meaning of *obiter dictum*. This demonstrates that the Supreme Court still (although to a limited extent) exercises supervision over conformity between domestic legal acts and treaties binding on Estonia, and implements thereby the rules of international law in the legal order of Estonia.

During the eight years of operation of the Supreme Court since the restoration of Estonia's independence, the Court has repeatedly referred to the rules of international law. As a court of cassation, the Supreme Court does not generally implement law directly (except in the case of procedural law rules), but examines the correctness of the interpretation of substantive law. The majority of the judgements of the Supreme Court that make use of international law state that the interpretation of domestic law is supported by some international law rule; under particular circumstances, such use could be regarded as interpretation assistance.^{*20} A rule of international law is certainly interpreted when the court states that it is not applicable to the particular case.^{*21} The frequently criticised apprehension of international law manifests itself also in the practice of the

¹⁷ T. Sillaste. *Rahvusvaheliste inimõigusnormide rakendatavusest Eestis* (On Applicability of International Human Rights Norms in Estonia). – *Juridica*, 1993, nr. 1, lk. 13 (in Estonian).

¹⁸ See article 149 clause iv of the Bulgarian 1991 Constitution; article 160 of the Slovenian 1991 Constitution; article 188 (2) and (3) of the Polish 1997 Constitution.

¹⁹ See, for instance, 10.05.1996 decision in Case No. 3-4-1-1-96 (Riigi Teataja (The State Gazette) I 1996, 35, 737) (in Estonian), where the provisions of the 1989 Convention on the Rights of the Child were applied in parallel with those of the Estonian Constitution; 27.05.1998 decision in Case No. 3-4-1-4-98 (Riigi Teataja (The State Gazette) I 1998, 49, 752) (in Estonian), where ILO Convention No. 108 was interpreted and possibly applied; 05.03.2001 decision in Case No. 3-4-1-2-01 (Riigi Teataja (The State Gazette) III 2001, 7, 75) (in Estonian), where article 8 of the ECHR was applied.

²⁰ See, for instance, 26.08.1997 decision in Case No. 3-1-1-80-97 (“*Tammer Case*”) (Riigi Teataja (The State Gazette) III 1997, 28, 285) (in Estonian). The majority of the references to treaties in the opinion section of the Supreme Court's judgements are to the ECHR (some 50 cases, though not all of them are just interpretation assistance).

²¹ See e.g. 4.03.1999 decision in Case No. 3-2-1-29-99 (Riigi Teataja (The State Gazette) III 1999, 9, 99) (in Estonian); 18.05.2000 decision in Case No. 3-3-1-11-00 (“*Ushakova Case*”) (Riigi Teataja (The State Gazette) III 2000, 14, 149) (in Estonian).

Supreme Court — if the domestic basis for satisfying an appeal in cassation has been adequate, references to the rule of international law made by the appellant in cassation have simply been ignored in the opinion section of the judgement.^{*22} (However, examples of different kind can be found too, where the appeal is dismissed and no attention has been paid to the complainant's references to international law.^{*23}) Nevertheless, there are several judgements indicating that only a treaty has been implemented.^{*24} As the enforcement acts of the treaties applied contain no references to the validity and applicability of the treaties on domestic level, while the Supreme Court has not established an order of validity issued by the legislator or executive as a condition for their applicability, it shows the direct domestic impact of such treaties.

In addition to implementation practice, the enforcement practice — the enforcement law of the treaty, the wording thereof, references to the time of entry into force of the law in the rules regulating the enforcement of the treaties, *etc.* — also evidences monist approach. As said already, the enforcement acts — laws adopted by the *Riigikogu* — make no reference to the validity or applicability of the treaty on the domestic level. Although it has been claimed by some scholars that any treaties ratified by the *Riigikogu* enter into force in domestic law on the tenth day after the publication of the enforcement law (*i.e.* according to the general procedure for the entry into force of legislation)^{*25}, it is not supported by the implementation practice or the majority of the authors.^{*26} Thus, treaty rules transfer into domestic law only as of the moment when the treaty enters into force internationally in respect of the state (and are excluded therefrom automatically upon the expiry or termination of the treaty; change automatically upon the amendment of the treaty, *etc.*).

Consequently, on the basis of the wording of subsection 123 (2) of the Constitution and the enforcement and implementation practice of treaties, we may claim that Estonia's approach to treaties (at least those enforced by the *Riigikogu*) is monist.^{*27} The enforcement laws of treaties also serve as the incorporation acts thereof, as a result of which and by virtue of the rule of recognition found in subsection 123 (2) of the Constitution, the treaties transfer to the legal system of Estonia to be valid without altering their basis for validity.

The above discussion applied only to a part of the international agreements of Estonia. Subsection 123 (2) of the Constitution does not govern the domestic validity of the intergovernmental agreements. If we take into account the constitutional approach to ratifiable treaties and the fact that some of the purest examples of direct applicability concern the intergovernmental agreements^{*28}, we may presume that an unwritten rule of recognition exists in the legal order of Estonia, under which the agreements enforced by the Government of the Republic transfer to the domestic law of Estonia.

²² See, for instance, 22.04.1998 decision in Case No. 3-2-1-51-98 (“*H. Tähemaa v. T. Taavel*”) (Riigi Teataja (The State Gazette) III 1998, 15, 168) (in Estonian); 18.06.1998 in Case No. 3-2-1-78-98 (“*M. Sarv-Kaasik and R. Kaasik v. A. Reedik and the State*”) (Riigi Teataja (The State Gazette) III 1998, 23, 233) (in Estonian); 22.06.1999 in Case No. 3-3-1-27-99 (“*Lahtikov Case*”) (Riigi Teataja (The State Gazette) III 1999, 22, 208) (in Estonian); and 29.05.2000 decision in Case No. 3-1-1-62-00 (“*J. Mishin, L. Kashnova, E. Shur and H. Truusa Case*”) (Riigi Teataja (The State Gazette) III 2000, 17, 183) (in Estonian).

²³ See 30.10.1998 decision in Case No. 3-3-1-33-98 (“*Bozhko Case*”) (Riigi Teataja (The State Gazette) III 1998, 29, 294) (in Estonian).

²⁴ See 23.10.1997 decision in Case No. 3-2-1-117-97 (“*A. Einseln v. Security Police*”) (Riigi Teataja (The State Gazette) III 1997, 31/32, 333) (in Estonian); 23.12.1997 decision in Case No. 3-2-1-138-97 (“*L. Karamoesheva v. O. Pavlov*”) (Riigi Teataja (The State Gazette) III 1998, 4, 40) (in Estonian); 26.03.1998 decision in Case No. 3-2-1-38-98 (“*AOZT Eesti Ärikeskus v. AS Rapla Veod*”) (Riigi Teataja (The State Gazette) III 1998, 11, 121) (in Estonian).

²⁵ See R. Maruste. Põhiseadus ja selle järelevalve (Constitution and its Review). Tallinn: Õigusteabe AS Juura, 1997, p. 118 (in Estonian).

²⁶ See, for instance, P. Roosma. Rahvusvahelise ja siseriikliku õiguse vahekorrad Eestis (On the Relation Between International and Domestic Law in Estonia). – Konstitutsioonikohtud põhiõiguste ja vabaduste kaitsel. Tartu: Riigikohus, 1997, p. 40 (in Estonian); A. Albi. Rahvusvaheliste lepingute iserealiseeruv olemus ja otsekohaldatavus (Self-executing Nature and Direct Applicability of International Treaties). – Juridica, 1998, No. 1, p. 39 (in Estonian); Final Report of the Expert Commission for the Estonian Constitution: section 123, subsection 2.2. Available at: <http://www.just.ee/index.php3?cath=1606> (in Estonian) (1).

²⁷ J. Pöld, for example, has expressed a similar opinion: Põhiseaduslikkuse järelevalve menetluse algatamine halduskohtus (Initiation of review of Constitutionality in Administrative Court). – Kohtuniku käsiraamat. Tartu: Sihtasutus Eesti Õiguskeskus, 1998, p. 10 (in Estonian); see also R. Maruste (Note 24), pp. 117–124 (especially p. 123); K. Merusk, R. Narits. Eesti Konstitutsiooniõigusest (Estonian Constitutional Law). Tallinn: Õigusteabe AS Juura, 1998, pp. 26–32 (in Estonian). L. Madise has had a different opinion: Rahvusvahelise õiguse käsitlusest 1992. aasta Eesti põhiseaduses (International Law in the Estonian 1992 Constitution). – Juridica, 1998, No. 7, pp. 366–368 (in Estonian).

²⁸ See Case No. 3-2-1-38-98 referred to in Note 23; similar are 8.05.1997 decision in Case No. 3-2-1-60-97 (“*AS Rutsan v. AS Vikta, II round*”) (Riigi Teataja (The State Gazette) III 1997, 18/19, 186) (in Estonian); 20.06.1996 decision in Case No. 3-2-1-85-96 (“*AS Rutsan v. AS Vikta*”) (Riigi Teataja (The State Gazette) III 1996, 22, 296) (in Estonian) and 10.04.1996 decision in Case No. 3-2-1-54-96 (“*AS Assotrans v. AS Sampo and A. Hallasoo*”) (Riigi Teataja (The State Gazette) III 1996, 14, 199) (in Estonian), in which the Convention on the Contract for International Carriage by Road (CMR) was applied which was enforced by the Government of the Republic regulation No. 61 of 9.03.1993 (Riigi Teataja (The State Gazette) II 1993, 9, 8).

2.2. International custom and other sources

Although treaties have become the most widespread source of international law to date, international custom, general principles of law and any binding resolutions of international organisations have not lost their importance — this also applies to domestic subjects.^{*29}

2.2.1. International custom and general principles of law

The above-quoted subsection 3 (1) of the Constitution refers to the general principles and rules of international law which are, according to that provision, an inseparable part of the Estonian legal system.^{*30} This gives rise to two questions:

- what sources of international law are implied by the phrase “generally recognised principles and rules of international law”, and
- what does “an inseparable part of the Estonian legal system” mean?

Starting from the second question, we may conclude, referring back to the definition provided at the beginning of the article, that subsection 3 (1) of the Constitution is an adoption rule that automatically transports generally recognised rules of international law (whatever they mean) to the Estonian legal system.^{*31} The Supreme Court has referred to this provision in its decisions and applied the rules of international law transported to the Estonian legal system under that provision. Thus, the Criminal Chamber of the Supreme Court stated in its decision of 23.05.1995: “in accordance with the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, being, pursuant to section 3 of the Constitution of the Republic of Estonia, an inseparable part of the Estonian legal system, shall everyone charged with a criminal offence be presumed innocent until proved guilty according to law (article 6 (2))” and charges dropped to the extent not substantiated.^{*32}

This leads us to the first question. If we take into account that the ECHR as a treaty became binding on the Republic of Estonia from 16.04.1996, the Supreme Court had to apply the rule of presumption of innocence in the case quoted above as a rule of international customary law — as it has been codified in the ECHR (and several other instruments before and thereafter). Indeed, subsection 3 (1) of the Constitution has been considered a provision by which the rules of international customary law are adopted into Estonian law.^{*33} Yet many questions remain unanswered. The former Estonian Constitutions and the constitutions of Austria and FRG referred to do not distinguish between the “rules” and “principles” of international law.^{*34} Hence, does the adoption rule include, in addition to custom, other sources of international law, *e.g.* the general principles of law recognised by civilised nations to which a reference has been made in article 38 (1) (c) of the ICJ Statute, or universal multilateral conventions to which most of the countries in the world have acceded? Another question is related to the phrase “generally recognised”. Unlike in the Weimar Constitution, it is no longer found in the applicable constitution of FRG. Does this serve as a condition restricting the rules of international customary law?

²⁹ Besides the last one, article 38 (1) of the Statute of the ICJ also refers to the sources listed — nearly everyone dealing with the domestic position of international law has referred to that rule. For the domestic impact of international custom in general, see the recent comparative study: S. Stirling-Zanda. *L'application judiciaire du droit international coutumier. Étude comparée de la pratique européenne*. Zürich: Schulthess, 2000, pp. 115–135.

³⁰ The earlier Estonian Constitutions also contained similar provisions: subsection 4 (1) of the 1920 Constitution provided: “.../ Generally recognised prescriptions (*määrused*) of international law shall be valid in Estonia as an inseparable part of her legal order.”; subsection 4 (2) of the 1937 Constitution reads: “Generally recognised prescriptions (*eeskirjad*) of international law shall be valid in Estonia as an inseparable part of her legal order.” It is rather obvious that these rules have been derived from the Weimar State 1919 Constitution article 4 that states: “*Die allgemein anerkannten Regeln des Völkerrechts gelten als bindende Bestandteile des deutschen Reichsrechts*”, and from article 9 (1) of the 1920 Austrian Federal Constitution: “*Die allgemein anerkannten Regeln des Völkerrechts gelten als Bestandteil des Bundesrechts.*”

³¹ K. Merusk, R. Narits, for example, are of the same opinion (Note 26), p. 29; H.-J. Uibopuu. *Eesti põhiseadus, rahvusvahelised suhted ja rahvusvaheline õigus* (Estonian Constitution, International Relations and International Law). – *Juridica*, 1998, No. 4, p. 192 (in Estonian). For the interpretation of a similar rule in the FRG constitution (section 25), see R. Streinz. – *Sachs, Grundgesetz*. 2nd ed., article 25, paragraph No. 38; R. Geiger (Note 2), pp. 165–166. For Austria, see, *e.g.* F. Ermacora. – *Österreichisches Handbuch des Völkerrechts*. Hrsg. von H. Neuhold *et al.* Wien: Manzsche Verlags- und Universitätsbuchhandlung, 1991, p. 118, paragraph No. 578.

³² Case No. III-1/1-34/95 (“*Torop’s Case*”) (Riigi Teataja (The State Gazette) III 1995, 7, 83) (in Estonian).

³³ See H.-J. Uibopuu (Note 30), p. 192; K. Merusk, R. Narits (Note 26), pp. 28–9; L. Madise (Note 26), p. 366. For the FRG, see R. Streinz (Note 30), article 25, paragraph No. 38; R. Geiger (Note 2), pp. 165–166. For Austria, see, *e.g.* F. Ermacora (Note 30), p. 118, paragraph No. 578; see also A. Verdross, B. Simma (Note 8), pp. 542–543, sections 853–854.

³⁴ However, a distinction is made in the Portugal 1976 Constitution (article 8 (1)) and the Russian Federation 1993 Constitution (article 15 (4)).

The prevailing opinion seems to be that subsection 3 (1) of the Constitution covers both the customary law rules and the principles of law.^{*35} When referring to the principles of “international law”, the modifier has been subject to criticism since several general principles used in international law originate from the domestic legal orders.^{*36} This is also implied in article 38 (1) (c) of the Statutes of ICJ. It would be incorrect, however, to furnish the phrase only with the rule found in the Statutes of ICJ as international law also makes use of general principles that are characteristic of solely international law.^{*37} Insofar as these principles arise from international law or through international law, placing them under the adoption rule of the Constitution should not entail any problems.

In German law, the treaties subject to approval by law are excluded from the scope of application of article 25 of their Constitution as their status in domestic law is regulated by a special provision (article 59 (2)).^{*38} This leads to the peculiar conclusion that intergovernmental agreements could fall within the scope of article 25 provided that the other conditions have been met. The Constitution of Estonia also contains a separate rule of recognition for certain treaties. One could claim that the treaties to which Estonia has not acceded but which could contain “generally recognised rules of international law” due to their significance and numerous body of acceded parties serve as an inseparable part of the Estonian legal system. In reality, however, such treaties rather represent international customs (or create one themselves), and if Estonia has not clearly rejected such custom (e.g. by declaring its refusal to enforce the treaty), we could speak about the binding nature of the rules of that treaty as generally recognised customary rules and there is no need to extend the scope of application of subsection 3 (1) of the Constitution to include treaties that are not binding on Estonia as such. Neither does subsection 3 (1) of the Constitution extend to the intergovernmental agreements binding on Estonia, even if they contained “generally recognised rules of international law”, as these agreements are valid, due to the tacit rule of recognition, as a part of domestic law. In the last case, another question arises with regard to the hierarchical status of the rules of such treaties in the Estonian domestic law, compared to the status that they would have if they were deemed to be adopted under subsection 3 (1) of the Constitution, but this discussion no longer falls within the framework of the current topic.

Hence, subsection 3 (1) of the Constitution at least includes:

- generally recognised rules of international customary law;
- generally recognised principles of international law itself, and
- general principles of law originating from domestic law but widely applicable in international relations.^{*39}

Generally, international customary rule is such as to become binding, due to its validity in many states, also on the states that have not rejected the customary rule at the time of its evolvement (*i.e.* that are not persistent objectors). The existence of particular or regional and even bilateral custom is not precluded and ICJ recognised them “as evidence of a general practice accepted as law”.^{*40} On the one hand, one thing is clear: the modifier “generally recognised” does not presume that the Republic of Estonia itself has recognised the rule *expressis verbis*.^{*41} On the other hand, if Estonia

³⁵ See, for example, K. Merusk, R. Narits (Note 26), pp. 28–29; L. Madise (Note 26), pp. 364–365; H.-J. Uibopuu (Note 30), p. 191. U. Lõhmus seems to be of the same opinion. *Rahvusvahelise õiguse üldtunnustatud põhimõtted Eesti õigussüsteemi osana* (Generally Recognised Principles of International Law as Part of the Estonian Legal System). – *Juridica*, 1999, No. 9, p. 425 ff. (in Estonian). H.-J. Uibopuu has alternatively proposed that the expressions “generally recognised rules” and “generally recognised principles” refer to two ingredients of international conventional law (Note 30, pp. 190–191).

³⁶ See R. Maruste (Note 24), pp. 85–86.

³⁷ See H. Mosler. – *Encyclopedia of Public International Law*. Vol. II. R. Bernhardt (ed.), 1995, pp. 522–524, enumerating in this connection, for instance, principles of sovereign immunity of states, prohibition of genocide, equidistance method in delimitation of sea boundaries, Martens’ Clause etc.

³⁸ See R. Geiger (Note 2), p. 164.

³⁹ See U. Lõhmus (Note 34), p. 426.

⁴⁰ See A. Verdross, B. Simma (Note 8), pp. 359–361.

⁴¹ See J. Uluots’ introductory speech about the 1937 Constitution in the National Assembly (*Rahvuskogu*) – cited in: H.-J. Uibopuu (Note 30), p. 189. An earlier opposing opinion was based on the Weimar interpretation, see: A. Piip. *Rahvusvaheline õigus* (International law). Tartu, 1936, p. 33–34 (in Estonian). See also the interpretation of the Bonn Constitution: R. Streinz (Note 30), article 25, paragraph No. 25. The change in the German constitutional law has been explained by the elimination of the word “recognised” (*anerkannt*) from the Bonn Constitution, see R. Geiger (Note 2), pp. 164–165. It could also be pointed out that in customary law, *opinio iuris* is often expressed by tacit consent and the consent of the state concerning the binding nature of the rule of customary law is often simply presumed, see I. Brownlie. *Principles of Public International Law*. 5th ed. Oxford: Oxford University Press, 1998, p. 7.

has acted as a persistent objector, such rule of customary law cannot be regarded as binding on Estonia in international law and thus it cannot transfer to the Estonian domestic law.^{*42}

The German practice indicates that the general rules of international law are those which have been recognised by all the states in the world or the majority thereof, while the latter is not estimated by the number of states involved but also by their “weight”.^{*43} The same principle should be observed when developing the Estonian approach — although all the states in the world need not be related to the custom (moreover, it would be difficult to ascertain that), a certain number of states exceeding the critical limit is required. Or *vice versa* — if a particular number of weighty states have objected to the binding nature of the evolving custom, it cannot be considered “a generally recognised rule”. The *opinio iuris* expressed by the countries belonging to the European legal culture area could be more meaningful for Estonia than that of those countries of some more distant area. In addition to the above-mentioned case, the Supreme Court has interpreted the rules of customary law upon adjudicating a crime against humanity, for instance.^{*44} The Criminal Chamber of the Supreme Court used charters of different international tribunals (Nurnberg and Yugoslavia) and other instruments when explaining the difference between crime against humanity and the crime of genocide. The differentiation was essential for sentencing a special agent of the Soviet intelligence service (NKVD) for killing members of the Estonian resistance movement in 1945–1946.

2.2.2. Binding decisions of international organisations

There are decisions of some international organisations that are adopted by a majority, not consensus, and that are binding on all the member states of the organisation. The most important of them are undoubtedly the decisions of the UN Security Council^{*45}, but also decisions of the Ministerial Conference of the WTO^{*46}, not to mention the decisions of the bodies of the European Community. Such decisions derive their legal force from treaties to which the member states of an organisation have acceded by ordinary procedure. Therefore, the decisions have been referred to as derived treaty law (*abgeleitete Vertragsrecht*).^{*47}

Estonia joins international organisations on the basis of treaties enforced by the *Riigikogu* (subsection 121 (3)). The Constitution of Estonia does not provide for the domestic status of the resolutions of international organisations.^{*48}

There is one case when the Republic of Estonia transformed a UN Security Council resolution into domestic law — by Government of the Republic regulation No. 298 of 23.08.1994, Estonia established sanctions against the Republic of Haiti on the basis of Security Council resolution No. 917 of 06.05.1994.^{*49} The regulation assigned to the particular agencies of Estonia the tasks corresponding to the content of the resolution, but it also extended to private persons — *e.g.* the financial resources (if any) of the Haitian officers and other officials in all Estonian credit institutions were frozen by the regulation. The regulation was repealed on 03.11.1994 by regulation No. 412, which, in turn, relied on Security Council resolution No. 944 of 29.09.1994^{*50}. As it appears, a significant temporal dissonance occurred both upon the enforcement of the sanctions on the domestic level and the termination thereof, as compared to their validity on the international level.

There is no information about the direct transposition of the Security Council resolutions into the Estonian domestic law. The later practice concerning the imposition of sanctions has been based on the approval of the European Union Common Foreign and Security Policy — thus, for example, by

⁴² See R. Streinz (Note 30), article 25, paragraph No. 25.

⁴³ *Ibid.*, paragraph No. 24. It should be taken into account that “generally recognised” has replaced “general” in the applicable German Constitution.

⁴⁴ Decision of 21 March 2000 in Case No. 3-1-1-31-00 (“*Paulov’s Case*”) Riigi Teataja (The State Gazette). — III 2000, 11, 118 (in Estonian).

⁴⁵ See article 25 of the Charter of the United Nations.

⁴⁶ Article IX (1) of the Marrakesh Agreement Establishing the World Trade Organisation.

⁴⁷ See also M. Schweitzer (Note 2), p. 88, paragraph No. 268.

⁴⁸ Neither do the constitutions of other countries. Article 93 of the Netherlands 1983 Constitution is an exception (“Provisions of treaties and of resolutions by international institutions, which may be binding on all persons by virtue of their contents shall become binding after they have been published.”) as well as the provisions concerning the resolutions of the bodies of the Community included in the constitutions of some other European Union member states (*e.g.* article 8 (3) of the Portugal 1976 Constitution).

⁴⁹ Riigi Teataja (The State Gazette) I 1994, 61, 1021 (in Estonian). The text of Resolution S/RES/917 (1994) is available at: <http://www.un.org/Docs/scres/1994/9420793e.htm> ().

⁵⁰ The text of the Security Council Resolution S/RES/944 (1994) is available at: <http://www.un.org/Docs/scres/1994/9438017e.htm> (19.07.2001).

approving European Union common position No. 1999/206/CFSP of 15.03.1999 and the common positions extending and amending it, the arms embargo imposed on Ethiopia and Eritrea by UN Security Council resolution No. 1298 of 17.05.2000 has been recognised.^{*51} The domestic impact of such recognition is another question. The approved common positions comprise non-binding European Union law^{*52}, including positions that need not directly arise from the UN regulations. Hence, the relevant orders of the Government of Estonia cannot be regarded as the incorporation acts of the underlying Security Council resolutions. Yet it may be regarded (with reservations) as an act incorporating international soft law and thereto also establishing thereof as a recognised set of legal provisions.

As Estonia has, by approving treaties that serve as the basis for the binding nature of the resolutions adopted by international organisations, also agreed to the mechanisms for issuing secondary legislation, arising therefrom, they could be considered as adopted into the Estonian domestic law as from the moment that they became internationally binding on Estonia. Such decisions have been indirectly legitimised by the legislator. In practice at least the Supreme Court has not yet discussed the domestic applicability of the binding resolutions of international organisations.

The validity of the binding resolutions of international organisations on the domestic level does not determine their applicability. The purpose of the UN Security Council instruments presented as an example was to restrict the behaviour of the domestic subjects of all states, *i.e.* impose indirect obligations on domestic subjects. Although the rules of international law valid on the domestic level should be presumed to be directly applicable, it is the self-executing nature of the rules imposed on private individuals that is questionable.^{*53}

To sum up the above discussion, we may state that treaties binding on Estonia, generally recognised rules of international customary law binding on Estonia, general principles of international law itself or law used thereby and the resolutions of international organisations binding on Estonia are all valid as a part of the Estonian domestic law. The basis of their validity is international and legal, *i.e.* Estonia follows the modified monist doctrine. However, the domestic validity of international law does not provide a clear answer to the status of such rules (and principles) in the hierarchy of rules or to their direct applicability.

⁵¹ Clause 1 of Government of the Republic order No. 822-k of 18.10.2000 (Riigi Teataja (The State Gazette) II 2000, 24, 151) (in Estonian). For the text of the common position (1999/206/CFSP) see http://europa.eu.int/eur-lex/en/lif/dat/1999/en_499X0206.html (1.04.2001); for the text of the Security Council Resolution S/RES/1298 (2000) see <http://www.un.org/Docs/scres/2000/res1298e.pdf> ().

⁵² See, *e.g.*, T. Kerikmäe. Euroopa Liit ja õigus (European Union and Law). Tallinn: Õiguskirjastus, 2000, pp. 31–33 (in Estonian).

⁵³ This applies primarily with regard to the legal certainty of the domestic subjects — they must have an opportunity to foresee the impact of the directly applicable binding rule. This presumes completeness and clarity of the rule. See, for example, judgement of the European Court of Human Rights in *the Groppera Radio and Others v. Switzerland* case of 28.03.1990 (Series A, No. 173, sections 65–68), where the Court accepted a radio regulation adopted by the International Telecommunications Union and applied by Swiss authorities against the applicants as an accessible legal ground with foreseeable influence on radio operators for restricting international broadcasts.