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THE RELATIONSHIP BETWEEN INTERNATIONAL AND DOMESTIC LAW

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This study was carried out on the basis of national replies to the questionnaire on this subject, adopted by the Venice Commission.

27 States have replied to the questionnaire: Albania, Croatia, Czechoslovakia, Denmark, Germany, Greece, Liechtenstein, Lithuania, Norway, Poland, Sweden, Switzerland, the United Kingdom, the United States, Finland, Hungary, Luxembourg, Slovenia, Bulgaria, Italy, Portugal, Turkey, Austria, France, Romania, Russia and San Marino. In the preparation of this study, account has also been taken of the replies by 22 States to the questionnaire on the expression by States of consent to be bound by a treaty (see the relevant Council of Europe publication, Strasbourg 1987)[1], drawn up by the Council of Europe's Committee of Experts on Public International Law.

This comparative study comprises five parts:

1. International treaties and domestic law

2. International customs, general legal principles and domestic law

3. Decisions of international institutions and domestic law

4. Judicial and arbitral rulings and domestic law

5. Other questions of international law contained in national constitutions

I. INTERNATIONAL TREATIES

Nearly all constitutions contain provisions concerning international treaties, but these provisions differ in a number of respects.

1.The organ invested with treaty-making power

1.1 The Head of State

The organ authorised to bind the State on the international level by means of treaties, which thus possesses treaty-making power, is usually the Head of State (King or President). It is therefore

[1] *The States in question are the following: Austria, Belgium, Cyprus, Denmark, Spain, France, Greece, Iceland, Ireland, Italy, Luxembourg, Norway, the Netherlands, Portugal, the Federal Republic of Germany, the United Kingdom, Sweden, Switzerland, Turkey, Australia, Canada and the United States.*

he who "ratifies"[2] treaties and thereby establishes on the international plane the consent of his country to be bound by the treaty thus ratified[3]. That is the case for the following countries: Austria, Denmark, Greece, Italy, Luxembourg, the United States, Finland, Norway, the United Kingdom, Turkey, Czechoslovakia, Germany, Spain, France, Iceland, the Netherlands, Portugal, Albania, Poland and Liechtenstein.

For example, Article 68 of the Belgian Constitution provides that "the King makes treaties", whereas Article 87 para. 8 of the Italian Constitution provides that "the President of the Republic ratifies international treaties"[4].

1.2 The Government

In exceptional cases, however, treaty-making power is vested in the Government: for example, under the Swedish Constitution, "any international agreement with another State or with an international organisation shall be concluded by the Government". In Switzerland, the Federal Council is responsible for the ratification of international treaties.

1.3 The Parliament

Consequently, treaty-making power is nearly always a prerogative of the executive: the supreme organ of the State (as a rule) or the Government (in exceptional cases). However, some States assign the right to conclude treaties to the legislature, ie the Parliament. Bulgaria is one such State. Similarly, in Russia, the most important treaties are ratified by the Supreme Soviet of the Federation. In Hungary too, the Parliament "concludes international treaties of primordial importance from the standpoint of external relations". It is worthy of note that this approach which, all things considered, is relatively exceptional, is followed by emerging democracies which previously belonged to the socialist bloc.

1.4 Apportionment of responsibilities between the Head of State and the Government

With few exceptions (Luxembourg, for example), the Head of State does not conclude all treaties, only the most important ones, and in so doing he acts on the proposal of the Government, at least in the republican systems. Other treaties are concluded - with or without

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2 *The same is true of accession which is another method of concluding treaties equivalent in several respects to that of ratification.*

3 *See Article 2, section 1, para b, of the Vienna Convention on the Law of Treaties.*

4 *Ratification - like the other methods of concluding treaties - is an act of international law whereby the State, through its competent organs invested with treaty-making power, expresses its wish to be bound internationally by the treaty concerned. It is also an optional act which depends on the discretionary authority of the State; the latter may thus legally refuse to ratify a treaty without being exposed thereby to any claim of international liability. In practice, there are instances of conventions which, though signed, have ultimately not been ratified. In fact, however, refusal to ratify is the exception rather than the rule. Normally, once conventions have been signed, especially bilateral ones, they are ratified promptly. Thirdly, unless the treaty itself provides otherwise, ratification is comprehensive and must relate to the convention as a whole, not just one of its parts. Reservations, of course, are a case apart, as they enable States legally to limit their treaty obligations, for example by excluding particular provisions of the treaty or by restricting its scope. Lastly, ratification cannot be made subject to conditions which are not authorised by the treaty itself.*

the authorisation of the Head of State - by the Government and, in particular, by the Minister for Foreign Affairs, acting on behalf of the Government. Some countries (France, Portugal) distinguish between formal treaties which are concluded by the President of the Republic on behalf of the State and treaties in simplified form which are concluded by the Minister for Foreign Affairs on behalf of the Government. Other countries (Germany, Austria) distinguish between State treaties concluded by the Head of State, intergovernmental agreements concluded by the Federal Government, and interministerial agreements concluded by the Federal Ministers. In another case (Ireland), treaties concluded between Heads of State are distinguished from other treaties concluded by the Government. Constitutional provisions in other countries expressly define the categories of treaties which can only be concluded by the Head of State. For example, the Greek Constitution provides that the President of the Republic shall conclude "treaties of peace, alliance, economic co-operation and participation in international organisations or unions".

As a rule, therefore, treaties which neither require ratification by the Head of State, according to domestic law, nor themselves provide for such ratification, may be concluded by the Government[5], by acceptance or approval, by exchange of notes or letters or by simple signature[6]. The treaties in question are usually the least important ones. Responsibility for assessing their importance lies, of course, with the individual State. The following examples of such treaties may be mentioned:

- those relating to questions which, according to domestic law, come within the exclusive purview of the Executive;

- treaties concluded for the implementation of a duly approved prior agreement;

- administrative and technical agreements of secondary importance[7].

1.5 Legislative approval and administrative approval

As has already been noted, leaving aside exceptional cases where the Parliament possesses treaty-making power, this prerogative belongs to the executive, to the Head of State in the case of important treaties and to the Government for treaties of lesser importance. However, as will be shown below, in order to be lawfully concluded[8] under domestic law, some categories of treaties require the authorisation or approval of Parliament, which is usually granted by means of a statute. This is particularly true of treaties which come under the responsibility of the Head of State and are concluded by means of ratification or accession, as well as treaties which are the responsibility of the Government and are in most cases concluded by means of acceptance or approval.

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5 *This is also the case where the Head of State delegates his authoritiy to the Government, provided that such delegation is permissible under the law of the country concerned.*

6 *See Article 11 et seq of the Vienna Convention on the Law of Treaties.*

7 *See, for instance, the replies of Switzerland, Liechtenstein, Turkey, Greece etc.*

8 *Conclusion of a treaty comprises the following stages: negotiation for the sake of its elaboration, signature and the act whereby the State establishes on the international plane its consent to be bound by the treaty.*

It should be emphasised at this point, however, that even treaties which are concluded by simple signature, and do not therefore need legislative approval, are usually approved by the Government by means of a decree or ministerial decision (administrative approval) and are then published in the Official Gazette for subsequent application within the country concerned (Italy, Germany, Finland, Austria, Liechtenstein, Greece).

In fact, only agreements of genuinely minor importance, requiring no enforcement, and those of a confidential nature, are not published in the Official Gazette. The constitutions of several countries authorise the conclusion of confidential agreements which are more or less a relic of the past.

Thus, agreements which the Government concludes independently are incorporated in domestic law by means of publication in the Official Gazette of the administrative act approving them. In some cases, the mere publication of the agreement is sufficient.

1.6 Self-executing agreements

The term "self-executing agreements", irrespective of the required method of conclusion (ratification or approval, with or without parliamentary authorisation, or simple signature), refers in principle to agreements which are in themselves sufficiently explicit and precise to permit of easy application in domestic legal systems. In a sense, all agreements should be self-executing and those which are not usually exhibit defects from the standpoint of legal technique, usually due to a lack of political willingness on the part of parties to the treaty. In practice, however, States sometimes deliberately draw up their agreements in very general terms, thereby giving rise to extremely flexible and supple conventions. These agreements are a little like European Community directives, which give a general outline of the aims to be pursued "leaving the decision as to form and means up to the national courts". It goes without saying that in all these cases, these incomplete agreements must nevertheless be clarified and completed as far as possible by the Contracting States, by means of internal implementing provisions, whether legislative or administrative.

1.7 Recommendations

a. The assignment of treaty-making power to the executive branch (the Head of State in most cases) is a logical and effective policy, and one that is backed up by long years of constant practice. It is the pre-eminent formula adopted by the Western democracies. This formula is indeed logical, as it is the executive which governs and therefore also bears responsibility for the management of the external affairs of the State, rather than Parliament as a rule - at least directly - or the judiciary.

In the final analysis, this traditional approach, which has proved its worth, is based inter alia on the principle of the effectiveness of State action in the international sphere[9].

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[9] *It is essentially for this reason that Article 7 para. 2 of the Vienna Convention on the Law of Treaties provides as follows:*

> *"By virtue of their functions and without having to produce full powers, the following are considered as representing their State:*

b. It is desirable for agreements signed subject to ratification or approval, and bilateral agreements in particular, to be ratified or approved promptly by States.

c. It is also desirable that all agreements not requiring legislative approval should nevertheless be approved by administrative means and/or published in the Official Gazette or elsewhere, so that the authorities and private individuals may take note of them and conform to them.

d. Whenever additional measures of a legislative or administrative nature are required for the enforcement of a treaty within a State (as in the case of treaties which are not self-executing), such measures must be taken as quickly as possible by the State concerned, in order for the latter to give full effect - as required - to its contractual commitment.

2. Parliamentary intervention in the procedure for the conclusion of treaties

2.1 Introduction

As mentioned above, it is the executive which as a rule possesses the power to conclude treaties, but Parliament nevertheless intervenes in the conclusion procedure to give its consent, its authorisation or its approval of the treaty to be concluded.

2.2 Extended parliamentary intervention

In some cases, the Parliament has broad powers of intervention which, apart from some more or less minor exceptions, are applicable to all international treaties. This is the case with Luxembourg, Cyprus, Switzerland, Turkey and Russia, among others.

2.3 Categories of treaties subject to approval

In other cases, which are much more numerous in practice and constitute the rule so to speak, the consent or authorisation of Parliament is required for certain categories of more or less precisely defined treaties[10]. The categories most frequently referred to in constitutional provisions are the following:

- peace treaties;

- political and military treaties (in particular alliances);

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a. Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty".

[10] *Some Constitutions require the consent of Parliament for conventions "of particular importance", with no further clarification (Norway, Denmark, Sweden). Consequently, the question whether a treaty obligation is or is not of particular importance depends on a political assessment by the State concerned. However, in cases of doubt about the importance of the treaty, consent will normally be required, which is a point in favour of the Parliament.*

- treaties with territorial implications;

- treaties concerned with matters that fall within the purview of the legislature[11];

- treaties concerning participation in the work of international organisations;

- treaties entailing a burden on State finances.

In other cases and more rarely, parliamentary approval is also required for treaties in the following fields:

- trade;
- economic co-operation;
- personal status;
- settlement of disputes by arbitration or legal proceedings.

2.4 Significance of parliamentary approval

Unlike ratification and other means of concluding treaties which are acts of international law, parliamentary approval is a measure of domestic law. By this measure, Parliament approves the treaty and authorises the executive to go ahead with ratification or acceptance, ie to bind the State on the international plane[12]. Strictly speaking, the legislature does not itself have a hand in the act of ratification which as a rule is the exclusive responsibility of the executive[13], but its intervention is nonetheless an essential condition for the legality of the treaty under domestic law. Without parliamentary approval, the treaty will not be valid and will produce no effects in the domestic legal system. That is the general rule[14].

2.5 Anteriority of approval

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11 *This is a very broad category comprising several sub-categories of international conventions: eg conventions for the recognition and enforcement of foreign judicial decisions, conventions on mutual assistance in civil and criminal matters, extradition treaties, conventions on establishment, consular treaties (especially in so far as they provide for privileges and immunities) etc.*

12 *According to United Kingdom practice, parliamentary intervention is less concerned with authorisation than with the enforcement of the treaty through the adoption of all statutory provisions needed for its application.*

13 *This explains the executive's power to reject ratification of a treaty, even one approved by Parliament, or to postpone such ratification for a variable length of time, if the national interest so requires. The executive may also, as a rule, accept the treaty after it has been approved by Parliament, with certain reservations, provided of course that the latter are admissible from the standpoint of international law. It may also denounce the treaty - provided that such denunciation is admissible from the standpoint of international law - without normally needing the authorisation of Parliament, even if such authorisation had been required for the conclusion of the treaty.*

14 *The situation is different, however, from the standpoint of international law. Under international law, a treaty is valid unless there has been a manifest violation of internal law concerning a rule of internal law of fundamental importance (Article 46 of the Vienna Convention).*

As parliamentary authorisation is a necessary condition for the conclusion of a treaty, it follows that such authorisation must be granted before ratification or acceptance. If it is to act within the framework of the law, therefore, the executive needs the prior consent of the Parliament. In fact, however, there are occasional - not to say frequent - instances where the executive, in order to cope with emergency situations, concludes treaties and only submits them to Parliament afterwards.

It is true that, for the most part, this can be put down to the habitual slowness of the parliamentary approval procedure. Nevertheless, this modus operandi is unacceptable in a democracy. Indeed, it is obvious that Parliament's right to approve a treaty also includes the right not to approve it. Consequently, if the treaty is concluded by the executive prior to its approval by Parliament, there is a fait accompli and a fundamental responsibility of Parliament as a representative body is ignored. In such cases, Parliament loses its real powers and becomes a rubber stamp.

2.6 Form of approval

Parliamentary authorisation or approval usually takes the form of a statute which, subject to exception, is adopted in accordance with the customary procedure applicable to the passage of any legislation and is then published in the Official Gazette. The Parliament approves the treaty as a whole. Needless to say that it cannot approve it partially or conditionally, or amend some of its provisions. The approving statute may, on the contrary, contain special provisions to facilitate the application of the treaty within the State.

Thus, as a rule, it is by means of a single measure, namely the adoption of the approving statute, that: a. Parliament authorises the executive to conclude the treaty; b. the latter is incorporated in the internal legal system of the State; and c. the authorities and the citizenry are required by law to implement the treaty within the country.

In other more or less exceptional cases, however, parliamentary authorisation may take the form of a resolution or a decision, or even a letter. In some cases, mere publication of the treaty may be sufficient.[15]

2.7 Tacit approval

In nearly all cases, Parliament gives its express authorisation, but in particular instances such authorisation may be tacit if, after a certain period of time following the deposit of the treaty with the legislative authorities, the latter do not request the application of the customary legislative procedure. The treaty is then deemed to be tacitly approved. This simple and rapid formula is applied on an extremely limited scale (Netherlands).

2.8 Federal States

In the case of federal States, when treaties affect the rights and obligations of the component States, or are of particular importance to them, the latter must also give their consent or

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[15] *However, in certain countries (Finland, for example) the State takes measures, apart from the act of approval which is relatively formal and if the treaty so requires, necessary for the integration and application of the treaty within the domestic legal system. More often than not, this is in the form of a separate statute.*

participate in some other way in the procedure for adoption of the treaty. This is particularly true of the German Länder and the Swiss cantons.

2.9 Referendum

Lastly, as regards certain treaties of the utmost importance, the people themselves are required to give their consent through a referendum. The Swiss Constitution provides for recourse to referenda, either optionally or on a compulsory basis. Referenda are compulsory in respect of treaties providing for accession to collective security organisations or supranational organisations[16]. In France, a referendum is possible for treaties which have "implications for the functioning of institutions". This is also the case in Austria.

2.10 Legislative authorisation

It should be pointed out that Parliament may as a rule grant its consent in advance, by authorising the Government to conclude a specific agreement or agreements of a specific type. Such legislative authorisation must, of course, be specific, clear and precise. In such cases, agreements concluded on the basis of prior legislative authorisation obviously do not require parliamentary approval, since such approval has already been bestowed by the enabling act. This practice is undeniably useful, particularly for certain categories of agreements which are more or less identical and are frequently repeated in practice. The jurisdiction of the Parliament is preserved and the Government is enabled to act quickly on the international level.

2.11 Approval of treaties establishing international organisations of a supranational nature

When issues of major importance are at stake, the Parliament does not content itself with the usual voting rules for the purpose of giving its authorisation, but takes its decision on the basis of an increased majority, that is to say a special majority which is more difficult to achieve. For example, treaties establishing international organisations of a supranational nature, which assign national responsibilities to such organisations, are often approved by a special majority. In Greece, an increased majority is required for the approval of such treaties, namely three-fifths of the total number of deputies. The same is true of other countries (Norway, Luxembourg, Denmark, Finland, Croatia and Austria). Elsewhere (Switzerland, Austria), a referendum is held on the question of acceptance of such a treaty. In other cases, before a treaty setting up a supranational organisation can be ratified, the Constitution has to be revised, in accordance with the customary procedure, in order to bring it into line with the provisions of the treaty (France).

2.12 Recommendations

a. The extensive participation of Parliament in the State's international treaty-making activity is on the face of it a positive factor which must be approved and encouraged. Parliament should play a role, at least as far as agreements of some importance are concerned. The even

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16 *In Liechtenstein also a referendum can be required at the request of a certain number of citizens or the Parliament itself.*

indirect involvement of the general public in the process of concluding treaties is a requirement of democracy.

b. It lies with each State to strike its own balance in this field - in accordance with its traditions, its needs and the principles of democracy - with regard to the apportionment of responsibilities between the executive and the legislature.

c. The treaties listed above (see para. 2.3), for which parliamentary approval or authorisation is required, represent a satisfactory solution on the whole, which is based on long years of practice.

d. In nearly all cases, parliamentary authorisation should be a preliminary, that is to say that it should come after the signature of the treaty and before the act of ratification, accession, approval or acceptance.

e. It is natural for States to take greater precautions for treaties which substantially limit their sovereignty and, more particularly, for those which set up international organisations of a supranational nature.

It is therefore only logical that, in such cases, parliamentary votes on approving statutes should be subject to special majorities.

f. If secret agreements are permitted by the Constitution or in State practice, they must in no case belong to the category of treaties that come within the purview of Parliament, ie treaties for which the approval or authorisation of the latter is needed.

g. All States should take appropriate measures to shorten, as far as possible, the length of the parliamentary procedure for approval of international treaties, which is often too slow, complex and surrounded by excessive formalism.

h. Legislative authorisation for the executive to conclude treaties belonging to certain specific categories is a useful and efficient instrument for States in their international treaty-making activities and should be more widely used in practice.

3. The standing of an international treaty in domestic law

3.1 Introduction

The legal standing of international treaties within States varies considerably. For example, their level of importance in relation to the rules of domestic law is far from uniform. In some cases, national solutions are based on the Constitution itself (eg France, the Netherlands, Spain, Greece, Portugal), while in others they have emerged from practice and in particular from the case-law of the higher courts (Belgium, Italy, Switzerland, Luxembourg, etc).

3.2 Superiority over domestic law

In some States - though not many - a duly concluded treaty takes precedence over domestic law as a whole, including the Constitution (the Netherlands, Belgium, Luxembourg).

In the relatively exceptional cases where a treaty has a direct impact on the Constitution (for example, if it amends the Constitution or provides for derogations from it), other States recognise the treaty's status as superior or equal to the Constitution, provided that it has been approved by Parliament by an increased majority (Finland, Austria). Finally, particular treaties of the utmost importance, such as those establishing the European Community, sometimes occupy a position within the State which is often superior to that of certain provisions of the Constitution (Italy).

3.3 Superiority over statutes

Another category of States recognises the superiority of treaties over both previous and subsequent legislation (France, Spain, Switzerland, Portugal, Greece, Bulgaria, Cyprus, Croatia, Slovenia). The States in question lay down certain conditions for this purpose: approval of the treaty by the legislature, entry into force and, in many cases, fulfilment of the condition of reciprocity, ie application of the treaty by the other party.

Other States close to this category do not give precedence to all treaties over their own legislation, but only to some of them, such as treaties for the protection of human rights, which thus prevail over any contrary statute (Liechtenstein, Russia, Romania, Czechoslovakia).

3.4 Equality with statutes

Most States adhere to the rule that treaties simply have the force of law. Thus, by virtue of the principle *lex posterior derogat priori*, treaties take precedence of earlier statutes, but may be affected by later statutes (Germany, Austria, Denmark, Finland, Hungary, United States, Ireland, Italy, Sweden, United Kingdom, Turkey, Norway, Iceland, Liechtenstein, San Marino, Romania, Albania, Czechoslovakia, Poland and Lithuania).

Although these countries do not formally recognise the superiority of treaties over subsequent national legislation, they accept it in fact and take various steps to prevent any conflict between domestic law and the international treaty concerned.

Those steps include the following:

- a priori monitoring, particularly by constitutional courts, of the constitutionality of the treaty, so that in the event of conflict between the treaty and the Constitution, the latter can be amended before the international commitment is accepted (France, Hungary, Italy, Bulgaria, Spain, Romania);

- incorporation in specific statutes of a clause stipulating that they will only be applied if they do not conflict with international conventions governing the same question or questions, to which the States concerned are Parties (Romania, Czechoslovakia, Albania);

- interpretation of the statute by the administration and, more particularly, by the courts, so that it is in harmony with the treaty, thus taking for granted the State's determination to respect the international obligation and secure pride of place for that obligation in its domestic legal system. This measure, which consists in interpreting laws in a manner consistent with treaties, is widely applied in practice (Finland, Luxembourg, United States, Denmark, Romania, Norway, Sweden);

- a posteriori checks, mainly by the courts, on the constitutionality of treaties and a priori checks, mainly by the administration, on the conformity of draft legislation with existing treaties, so as to exclude any conflicts between the international treaty and domestic law which might involve the international liability of the State in the event of violation of the provisions of the treaty.

3.5 Inferiority in relation to statutes

Lastly, the status of some treaties may be inferior to that of statutes. This is the case with treaties which come under the exclusive responsibility of the administration, or which are concluded by the latter on the basis of parliamentary authorisation. In such cases, the treaty has the force of the executive act (decree, ministerial decision, etc) through which it is applied in the domestic legal system (Austria, Sweden, Denmark, Ireland, Germany, Greece). However, this is a relatively exceptional solution which usually concerns treaties of secondary importance.

3.6 Recommendations

a. The fact that international law has priority over domestic law is not at all contested. This self-evident truth is a requirement of international law.

Suffice it here to recall Article 26 (*pacta sunt servanda*) and Article 27 (internal law and observance of treaties) of the 1969 Vienna Convention which codified the rules of international law in relation to Conventions. Moreover, all international law, and the rules concerning the international liability of States in particular, are based on this fundamental principle.

As was shown above, the pre-eminence of international law is fully accepted by States, either in law or in fact.

This state of affairs is made even clearer and more significant by the existence of more select international legal systems, such as that of the European Community. The particularity of international law is that it is legally binding on States, but leaves to them the task of application within their domestic systems. They are therefore not required - at least formally - to recognise its pre-eminence in relation to national law, but they must conform to it fully, in the manner they themselves decide.

However, it would be desirable and would no doubt constitute a step forward if States - and the new democracies in particular - increasingly recognised the superiority of international law over domestic law in their constitutions and legislation. One of the advantages of such an internationally-minded approach would be to bring States closer together on the basis of international legal principles and to facilitate the application of international law in the domestic legal systems.

b. Before accepting an international treaty obligation, every State must make sure that it is compatible with its domestic legislation and, more particularly, its Constitution. If there is any incompatibility and the State wishes to become a party to the treaty, it must first adapt its Constitution or legislation to eliminate any conflict with the rule of international law.

c. All States, especially those which place international treaties on an equal footing with domestic statutes, must take steps through their executive and legislative powers to ensure that

no new laws are adopted which could infringe the provisions of current treaties already accepted and in force.

d. When applying and interpreting an international treaty, every State - and its judiciary in particular - should ensure the pre-eminence of the treaty whenever that is feasible. Otherwise, it should make every possible effort to reconcile the rule of domestic law and the international treaty, so that the former does not violate the latter.

e. If conflict between an international treaty and a rule of domestic law is inevitable, the State must amend the latter as quickly as possible in order to bring it into line with the international obligation.

f. When adopting legislation to regulate the relations which are or may be governed by the international treaty to which it is or may become a party, every State should include in such legislation saving clauses to protect the international treaty: for example, non-applicability of the statute in so far as it runs counter to the treaty.

II. INTERNATIONAL CUSTOMS AND GENERAL LEGAL PRINCIPLES

4.1 Introduction

National constitutions establish a major distinction between international treaties, on the one hand, and international customs and general legal principles, on the other.

4.2 Inadequate recognition in constitutional texts

While nearly all constitutions - as has already been mentioned - deal expressly with treaties, the same is not true of customs and general principles. Furthermore, even if these two sources are recognised by constitutional provisions, their role is on the whole more limited than that of treaties. The reason no doubt lies in the fact that customs and general principles are classed as unwritten international sources of law, and the degree of clarity, precision and -in the final analysis - security which they bring to legal relationships in general does not even remotely rival the corresponding qualities of international treaties.

4.3 Part and parcel of domestic law

It is true that the constitutions of some countries recognise international customs and general legal principles at the outset as an integral part of their internal law. The German Constitution provides that "the general rules of public international law shall be an integral part of federal law". Similarly, the Greek Constitution contains the following provision: "the generally accepted rules of international law shall be an integral part of internal Greek law". The same is true of other countries (Austria, Italy, Albania, Slovenia, San Marino, Hungary, Portugal).

In other cases, the same approach emerges from the constitution, albeit implicitly (France, Bulgaria), while other countries refer to the "universally recognised rules of international law", not in general terms, but in relation to certain specific questions concerning the protection of human rights. In Russia, these rules of international law relating to human rights "are directly productive of the rights and duties of citizens".

Other countries settle this matter by statute, in connection with specific questions as well. Romania does so for certain questions relating mainly to the law of the sea, Sweden for certain criminal law matters and Norway for other specific subjects.

4.4 Recognition in judicial case law

On the other hand, the constitutions of many countries remain silent with regard to international customs and general legal principles, and their recognition - when they are recognised - is left to judicial case law (United States, United Kingdom, Switzerland, Poland and others).

4.5 Automatic application

As a rule, international customs and general principles are automatically incorporated in domestic law. This automaticity is their distinguishing feature. Indeed, no act or procedure of incorporation is necessary. Contrary to the situation as regards treaties, the solution adopted in this case is therefore based on monistic theory. In most cases, the courts have recourse to international customs and general legal principles and apply them directly within the State.

There are, however, highly exceptional cases of countries which do not adhere to the principle of automaticity and, on the contrary, require an act of incorporation for customs and general principles, which may take the form of, say, an international treaty or a domestic statute (Norway, Denmark and Russia - where human rights principles are not involved).

4.6 Equality of treatment or differentiation

In constitutional terms, several countries adopt a comprehensive approach to international customs and general principles, place them on an equal footing and frequently include them in general expressions such as "general rules of public international law" (Germany), "generally accepted rules of international law" (Greece), "rules of general international law" (San Marino) and "generally accepted principles of international law" (Slovenia).

On the other hand, some countries draw a more or less clear distinction between international customs and general principles, according pride of place to the former in relation to the latter which are left with an essentially subsidiary role (Luxembourg, Hungary and to a lesser extent France).

4.7 Treaties and other sources: their respective roles

An important distinction can be made between international treaties on the one hand and customs and general principles on the other, in respect of their scope and their overall function as sources of law. Treaties are undeniably the pre-eminent international source whose function is considerable and constantly expanding, whereas international customs and general principles occupy a more or less secondary position - distinctly subordinate to treaties - in the classification of sources[17].

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17 *It should be noted that, in international law, although treaties are the first of the sources listed in Article 38 of the Statute of the International Court of Justice, it is acknowledged that there is no difference in rank between the three sources (treaties, customs and general principles), which are thus equal and identical in value from the legal standpoint.*

However, the latter two sources, and customs in particular, frequently play a relatively important role, which is referred to by the domestic courts, in respect of areas of international law which have not yet been codified, such as State immunity, international liability, the status of aliens etc (Luxembourg and Poland). Apart from these cases, however, the sources in question - and general principles in particular - fulfil a relatively limited function.

Indeed, their role is essentially subsidiary, supplementary and interpretative. They are used mainly to fill in gaps in domestic legislation or to interpret the latter in relation to questions of international law (United Kingdom, Norway, Sweden, Finland).

4.8 Status in domestic law

With regard to the standing of international customs and general legal principles in domestic law, the responses vary even more considerably than in the case of treaties.

A number of countries explicitly or implicitly recognise customs and general principles as taking precedence over all statutes, whether adopted earlier or later (Germany, Italy, San Marino, Greece, Switzerland, Slovenia, Bulgaria, Portugal, Albania and Russia - the latter solely in respect of human rights).

In contrast, other countries - the majority - assign a lower status to customs and general principles than to statutes (United Kingdom, United States, Sweden, Finland, Luxembourg, etc).

Lastly, some countries (Hungary, Switzerland) rightly observe that the peremptory rules of general international law (*jus cogens*) should be given a higher status than other international rules, including treaties.

4.9 Recommendations

a. In the context of constitutional provisions, the pre-eminence of international custom and general principles in relation to domestic legislation is not as widespread and as clearly stated as in the case of treaties. However, this pre-eminence is established under international law and the recommendation made in respect of treaties (see para. 3.6 a.) is just as valid for customs and general principles, although the role of these two sources - as has already been mentioned - is not as important as that of treaties. It would therefore be desirable for States, especially those which are adopting new constitutions, increasingly to recognise this pre-eminence.

b. In addition, States should ensure that their domestic legislation - including statutes and administrative measures - is compatible with international customary rules and general legal principles.

c. States should give preferably automatic effect to international customs and general legal principles in their domestic legal systems. All categories of courts - and the ordinary courts in particular - should use these sources more frequently, especially in areas of international law that have not yet been codified. The generally limited use made of these sources is largely attributable to the fact that they are not sufficiently familiar to the national courts. In any event, it is sound policy on the part of some States (Greece, Bulgaria) to have a specialised judicial authority (Constitutional Court) settle any disputes concerning the existence or exact scope of a custom or general legal principle.

d. All States, especially those adopting new constitutions, should give absolute priority to the peremptory norms of general international law (*jus cogens*) over their domestic legislation, including their constitutions. This requirement is today almost universally accepted.

III. DECISIONS OF INTERNATIONAL ORGANISATIONS

5.1 Non-recognition in constitutional texts

In contrast to the situation regarding the other sources of international law (especially treaties and, to a much smaller extent, customs and general principles), the national constitutions, except that of Portugal, make no mention of the decisions of international organisations which constitute international institutional law. The Portuguese Constitution allows for the automatic incorporation of such decisions in domestic law, provided that their direct applicability is prescribed in the treaty setting up the organisation. The other constitutions ignore the problem, and no doubt because the question of international institutional decisions is a relatively recent one and Article 38 of the Statute of the International Court of Justice does not mention them as a source of international law.

5.2 Transfer of responsibilities to supranational international organisations

The constitutions of some States, however, contain special provisions relating to the transfer of national responsibilities to international organisations. For example, the German Constitution provides that "the Federation may by a formal law transfer sovereign powers to intergovernmental institutions".

Similar provisions are found in some other constitutions (Austria, Greece, Luxembourg). Such provisions, like the domestic instruments for the approval of treaties setting up international organisations of this type - in practice, only the European Community is concerned - constitute the legal basis, from the standpoint of internal legislation, for the transfer of national responsibilities and the direct and automatic applicability of European Community decisions in the legal systems of its member States. In fact, in this particular case, it is the treaty setting up the organisation itself, covered by the above-mentioned internal instruments, which settles the question of the direct application of Community decisions.

5.3 Other international organisations

On the other hand, the situation is different for the other international organisations known as organisations of inter-State co-operation. In their case, even when their decisions are binding, the treaties establishing them never provide for immediate enforcement of those decisions in national legal systems. There can therefore be no automatic application of those decisions and their enforcement within States necessarily depends on the intervention of the States themselves which are required, in principle, to introduce and apply them in their domestic systems[18]. This is therefore a mediate system which to some extent resembles the one applied to international treaties. Consequently, any binding institutional decision is incorporated and enforced within the State by means of domestic legal instruments adopted by the latter, which may be of a legislative or administrative nature, according to the requirements of its legal system - requirements which usually vary according to the content of the decision. Thus, action is taken on a case-by-case basis (inter alia: Austria, San Marino, Greece, Norway, Sweden, Luxembourg, Denmark).

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[18] *States which apply the Anglo-Saxon system are concerned less with the incorporation of international decisions than with their enforcement within the State by means of domestic statutes.*

However, this approach often presents drawbacks. For one thing, recourse to the legislative process in each particular case causes delays, whereas the enforcement of institutional decisions calls for rapid action, particularly in the case of UN Security Council resolutions adopted under Chapter VII of the Charter. To overcome this handicap, in cases which are fairly exceptional, the solution adopted involves settling the question in advance through authorisations from Parliament to Government. Such authorisations may be contained in the Act approving the treaty under which the organisation was established, and the Act in question then settles the problem of the incorporation and enforcement of decisions by the organisation on an ad hoc basis[19].

In other cases, such authorisation is contained in an ordinary statute of permanent validity which usually takes the form of outline acts applicable to one or more categories of institutional decisions. For example, since 1967 Greece has had a special law for the application of decisions by the United Nations Security Council concerning the imposition of sanctions under chapter VII of the Charter. This is also the case for the United States and Liechtenstein.

5.4 Status in domestic law

As regards the legal standing of institutional decisions, a distinction must be made between those which, under the treaty setting up the organisation, are binding and immediately enforceable in the domestic legal systems of the member States, and those which are binding but not immediately enforceable.

The first category includes decisions of the European Community, which member States usually recognise as superior in standing to their own domestic legislation, including the Constitution. The second category comprises the decisions of traditional international organisations, which have the same standing as the domestic measures (statute or decision of the administrative authority) which incorporate them in domestic law, for the purpose of application.

5.5 Recommendations

a. What was said above, in paragraphs 3.6 a. and 4.9 a., is entirely applicable to this further source of international law represented by the decisions of international organisations. When such decisions are binding on States, they produce legal effects and are elevated to the same status as treaties, customs and general principles. It would therefore be advisable to recommend that national constitutions, particularly those in process of elaboration or revision, should make express provision for the recognition of binding institutional decisions. There is a deficiency in the present situation which should be remedied. Moreover, the legal status to be assigned to such binding decisions in relation to the rules of domestic law should, in principle, be identical to the recognised status of the other sources of international law: treaties, customs and general principles. All these sources have the same legal standing and should be treated in the same way by States.

b. Leaving aside the European Community system which presents no difficulties, mainly because the problem is settled by the actual treaty establishing the Community, it should be noted that, as far as the binding decisions of other international organisations are concerned,

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[19] *In Greece, for example, the Act approving the NATO treaty provides that the obligations assumed under the treaty and the protocol of accession thereto will be enforced by decrees issued on the proposal of the competent ministers.*

States have not yet succeeded in introducing a coherent, effective and practical set of legal rules for their incorporation and rapid enforcement in domestic legal systems. This gives rise to irresolution, improvised action and, more often than not, the adoption of empirical solutions which are not usually characterised by either speed or efficiency. This situation could well hamper the work of the international organisations and undermine the interests of their member States. One possible way out of this difficulty could be afforded by domestic statutes for the approval of treaties establishing international organisations or by other outline Acts which, through appropriate authorisation clauses, could easily provide for ad hoc, detailed solutions, capable of quick and easy application and, above all, adapted to the individual needs of international organisations.

IV. INTERNATIONAL JUDGMENTS AND RULINGS, WHETHER LEGAL OR ARBITRAL

6.1 Introduction

The national constitutions make no provision for the incorporation and enforcement in domestic law of the judgments and rulings of arbitration tribunals and courts[20]. On this question also, the constitutional texts remain silent.

6.2 Decisions of the Court of the European Communities

Regarding decisions of the Court of the European Communities, as with other binding Community decisions, the question is settled directly by the treaty of the EEC (Articles 187 and 192). The decisions of the Court are directly enforceable in the internal legal systems of member States. From the specifically constitutional standpoint, legal support for the judicial decisions of the Community is provided by either the constitutional provision - where one exists - authorising participation in the EEC or, in all cases, the domestic instrument of approval of the EEC Treaty, which was adopted in accordance with constitutional rules.

6.3 Judgments and rulings of other judicial or arbitral organs

As regards the judgments and rulings of judicial or quasi-judicial organs belonging to other international organisations (for example, the International Court of Justice or the European Court of Human Rights) or of permanent or ad hoc arbitration tribunals, a distinction should be made between, on the one hand, acceptance of the binding nature of decisions by such bodies, and on the other hand, their enforcement in domestic law.

6.3.1 With regard to the acceptance of such decisions, it goes without saying that their binding effect is determined directly and automatically by the treaty establishing the organisation or the treaty setting up the judicial body or the arbitration tribunal[21]. As such treaties have previously been approved in due form by the member States or States Parties, in accordance with their constitutional rules, it follows that the legal coverage of the domestic instruments of approval, in terms of internal legislation, extends to binding rulings and judgments given in pursuance of such treaties. This interpretation appears to be generally accepted.

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20 *The tribunals and courts in question are of course those set up under public international law.*

21 *Indeed, there would be no point in asking States to reiterate their acceptance of decisions which are already binding on them.*

6.3.2 On the other hand, as far as the enforcement of judgments and rulings in domestic law is concerned, it appears that States do not apply any particular system. In some cases, after the arbitral award or judicial decision has been given, an agreement is concluded between the States Parties to the dispute for the enforcement of the judgment and the final settlement of the case. In such cases, the application of the international judgment or ruling is done by means of a treaty, which is usually approved by law in the States Parties[22].

However, the customary procedure for the enforcement of judicial decisions is the following: in each instance, the State adopts the necessary administrative or legislative instruments of enforcement, in the context of its domestic legal system, in order to comply with the judgment or ruling (see inter alia the replies from Denmark, Germany, Greece and Norway).

6.4 Recommendations

6.4.1 States are naturally under an obligation, by virtue of international law, to enforce strictly and in full the decisions of international courts or arbitration tribunals hearing disputes to which they are parties. This obligation takes precedence of their domestic law.

6.4.2 In the case of international judicial decisions which are not automatically enforceable in domestic law, especially those which are taken somewhat frequently, such as the judgments of the European Court of Human Rights, it would be desirable for States to set up in advance a special system capable of ensuring swift and full enforcement.

6.4.3 States should consider the possibility of expressly recognising the primacy of international judgments compared with the judgments of domestic courts, by providing inter alia that the former produce a binding effect in relation to the latter.

22 *See the reply from Greece.*

V. OTHER QUESTIONS RELATING TO INTERNATIONAL LAW

7. Apart from the sources of international law, including treaties in particular, national constitutions also contain provisions of direct or indirect relevance to international law. The following are noteworthy examples of such provisions:

7.1 Protection of human rights

Nearly all States give constitutional recognition to the protection of human rights and fundamental freedoms, and this protection is frequently confirmed by legislation and case law. In addition, numerous States are parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), the two United Nations Covenants concerning economic, social and cultural rights on the one hand, and civil and political rights on the other (1966), and other international instruments relating to human rights. It is worthy of note that the international instruments mentioned above have in varying degrees influenced certain constitutional texts recently adopted, inter alia by the new European democracies. Moreover, it should be emphasised that some constitutions are found to contain provisions requiring accession to the international human rights conventions (San Marino) or prescribing a method of interpretation in conformity with the 1948 Universal Declaration of Human Rights (Portugal), or again recognising the superiority of human rights conventions over national laws (Russia).

7.2 Protection of aliens and stateless persons

Several constitutions contain general provisions for the benefit of aliens and stateless persons (Italy, Portugal, United States, Russia, Hungary, Romania, Albania, Luxembourg). In other States, aliens enjoy a number of rights and freedoms which are guaranteed by the Constitution (Germany, Sweden, Denmark, Greece). Finally, special provisions in some constitutions expressly recognise the right of asylum (France, Italy, Portugal, Russia, San Marino, Bulgaria, Croatia) and in some cases the principle of non-repatriation (Switzerland, Bulgaria).

7.3 Protection of national minorities

Members of minority groups enjoy the same rights and are subject to the same obligations as all other citizens. In addition, however, a number of constitutions contain general provisions for their protection (Denmark, Portugal, Romania, Czechoslovakia, Albania, Croatia, Lithuania), and more especially for the protection of linguistic minorities (Italy, Switzerland, Russia, Bulgaria). The Hungarian Constitution contains detailed provisions for the protection of minorities. Other constitutions provide direct protection for specific minorities (Finland, Norway, Slovenia). It should be noted that the constitutions of the new democracies of Central and Eastern Europe are the ones most likely to contain provisions concerning minorities, this being an issue which acquired major topical importance after the recent events which radically changed the face of Europe and the world.

7.4 Provisions prohibiting the use of force

Not only war but any recourse to the threat or use of force in international relations are outlawed (Article 2 para. 4 of the United Nations Charter). Some constitutional texts, particularly the most recent ones, repeat this preemptory rule word for word (Hungary, Slovenia, Czechoslovakia), while others, following the same general line, expressly prohibit aggression or

explicitly provide that force will only be used for defence (Portugal, Denmark, Norway, Turkey, Albania). It goes without saying, however, that even long-established constitutions which contain general provisions on the declaration of war have to be interpreted, on the basis of international law, as authorising recourse to war only for defensive purposes.

Depending on the country concerned, the authority to use force may be vested in the Head of State without restriction, in the Head of State subject to parliamentary authorisation or in the Parliament. Lastly, some constitutional texts expressly rule out war as a means of settling disputes (Italy, Hungary, San Marino), while the German Constitution provides that the Federation shall accede to agreements concerning arbitration of a general and compulsory nature.

7.5 Recommendations

a. States are obliged to provide permanent protection, both in their constitutions and at all other levels of State activity, for human rights and fundamental freedoms, including the rights and freedoms of the members of national minorities and those of aliens and stateless persons. Such protection must also be as extensive and effective as possible. This is a task which has to be pursued tirelessly, unremittingly and unfailingly.

b. States which have not yet done so should, in particular, accede to all the international conventions on human rights, whether of universal or European scope.

c. States should incorporate in their constitutions, in the most forceful manner possible, the two cardinal obligations of international law, viz the settlement of international disputes by exclusively peaceful means and non-recourse to force or the threat of force in their international relations.

d. It would also be worthwhile for constitutions to contain an ever greater number of general provisions favouring international peace and security, respect for international law and justice, co-operation and development of friendly relations between peoples and States[23]. Such provisions may in particular have a salutary effect from the standpoint of interpretation.

e. Lastly, and speaking generally, more encouragement should be given to the incorporation of international law in domestic constitutional systems, and conversely to the incorporation of the principles of democracy, human rights and the rule of law in the international legal system. This interaction can only benefit the society of nations.

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[23] *See, for example, Article 2 para. 2 of the Greek Constitution.*