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REPORT

"THE IMPACT OF INTERNATIONAL LAW INSTRUMENTS ON NATIONAL LEGISLATION"

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General

International law governs legal relations between states and, as we all know, has its roots in natural law and in the thinking of the Dutch diplomat Hugo Grotius, sometimes referred to as the father of international law. It is based on certain traditional legal concepts such as '*usus'*, established intergovernmental practice, '*opinio iuris'* the legal views and convictions expressed by states, '*pacta sunt servanda'* respect for treaties and agreements, '*ius cogens'* such international obligations that a state can never lawfully depart from, and '*bona fide'* the obligation to act in good faith. There is often a moral dimension in international law and when you interpret it.

Today, international law has developed into a complex set of norms to which states are bound in many different areas. Binding obligations can arise out of established state practice but in most cases they flow from the many different treaties to which states have acceded. A complicating factor is that some of these treaties may be mutually contradictory. Thus, as with national law, conflicting legal obligations also exist in the field of international law. Today, the picture is regarded by some as so complex that we talk about 'fragmentation of international law'.[1]

International law covers many areas, some of the most important being:
- Traditional public international law, including Humanitarian Law or the Laws of War
- International Human Rights Law
- Private International Law
- International Trade Law
- The Law of the Sea
- International Environmental Law
- International Criminal Law
- Law on Immunity
- Diplomatic Law

One of the characteristics of international law common to all areas is that it restricts the sovereignty of states. National governments and parliaments are not always free to make decisions or enact legislation to meet what they think is in the best interest of the individual state. International law sets limits for states. The issue of to what extent international law also sets limits for national courts and public agencies will be addressed below.

Some national lawyers, judges and government officials at times regard international law and states' obligations in this field with a certain degree of scepticism. When things get difficult, this can also be seen at political level. International law is sometimes regarded more as political commitments within the field of a state's foreign policy than as legal obligations imposed on states.

In my country, Sweden, the increased impact of international law can be seen on our national law, in legislative work and in national jurisprudence. This is largely due to the European Convention on Human Rights and the jurisprudence of the European Court. And later, of course, European Union Law – regarded as a law *sui generis* and applicable only within the EU – contributed to this development.

[1] Cf Report of the UN International Law Commission (ILC), Conclusions of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law (Yearbook of the ILC 2006).

International tribunals

In many areas, international bodies, courts, tribunals or other institutions monitor that states' obligations under international law are observed.

Among the international tribunals, the International Court of Justice in the Hague plays a special role in resolving disputes between states in the entire field of international law. This Court was set up under a special statute annexed to the Charter of the UN as an integral part of the Charter.[2]

For disputes regarding the law of the sea, we have the International Tribunal for the Law of the Sea in Hamburg, set up under the UN Convention on the Law of the Sea.[3]

In Europe, we have the European Court of Human Rights in Strasbourg, set up under the European Convention on Human Rights.[4]

Within the EU, we have the European Court of Justice for the interpretation of EU law, but I will not go into its role in detail here today.

Mention should also be made of the different international criminal courts. In particular, I wish to mention the International Criminal Court (ICC) set up by the UN under a special statute adopted in Rome in 1998.[5] This is an international criminal court with general jurisdiction over individuals who have committed war crimes or crimes against humanity or genocide.

The Rome Statute is a good example of a treaty that requires legislation at national level. This is particularly the case since the court's jurisdiction is founded on the principle of complementarity, that is, the court is a court of last resort. According to the Statute, it rests primarily on all state parties to ensure that individuals suspected of war crimes, crimes against humanity and genocide can be prosecuted and be brought to trial before national courts. Consequently, states must provide for this in their legislation. If the crime has been committed in another state, there is in any event a legal obligation to extradite for trial in a state where the individual can be brought to trial in accordance with the principle '*aut dedere aut iudicare*'.

Finally, one should not forget the various UN treaty bodies set up under the different UN Human Rights conventions, the International Covenant on Civil and Political Rights of 1966, the International Convention against all Forms of Racial Discrimination of 1965, the Convention against Torture, and Other Cruel Inhuman or Degrading Treatment or Punishment of 1984, to mention the most important.[6]

There are also other judicial or quasi-judicial organs monitoring the treaty obligations of states.

Since it has been entrusted to international courts to deliver legally binding judgments on the interpretation of treaties that they are set to apply, the states are not the sole rulers over these treaties. The jurisprudence developed by these institutions sometimes gives the treaty content that the treaty makers, i.e. the states, perhaps did not expect. This is particularly true with

[2] Statute of the International Court of Justice of 19 45.

[3] United Nations Convention on the Law of the Sea of 1982.

[4] European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950.

[5] The Statute of the International Criminal Court of 1998.

[6] The Human Rights Committee (HRC), The Committee on the Elimination of Racial Discrimination (CERD), The Committee against Torture (CAT).

respect to the European Court of Human Rights in Strasbourg.

It is a complex procedure to amend a treaty as a result of states disagreeing with the interpretation by a court given the task of interpreting the treaty in individual cases.

To what extent a state has an obligation under international law to comply with a judgment of an international court, tribunal or supervisory body is sometimes disputed. The European Convention on Human rights clearly stipulates that states are under obligation to abide by a judgment of the European Court of Human Rights.[7] With respect to the European Court of Justice, this is fundamental EU law. As regards the International Court of Justice, it follows from the fact that you have accepted the Court's jurisdiction – which is optional – that you shall abide by its judgments in cases where you are a party to the proceedings.

Before the European Court of Human Rights, there was in its earlier jurisprudence an issue of whether a state had to comply with an interim order issued by the court, e.g. to request that a certain decision at national level should not be enforced until the Court had examined the case.[8] Such interim orders have mostly been issued in aliens cases concerning expulsion or deportation when an alien has been refused a residence permit, or in extradition cases. However, in more recent case-law, it has been made clear that a state that refuses to comply with an interim order issued by the Court violates its obligations under the European Convention.[9] In Sweden, this has led to an amendment in our Aliens Act to the effect that if such an interim order has been issued, the enforcing authorities shall not enforce the decision to deport the alien.[10]

With respect to the UN treaty bodies, e.g. the Human Rights Committee and the Committee against Torture, the situation is not entirely clear. Here, the states and the committees tend to have different views of whether the decisions of these committees in individual cases are legally binding upon states. In any case, there is no explicit provision to that effect in the relevant conventions that they are set to apply. These committees can hardly be regarded as international courts or tribunals even if they have been given the competence to examine complaints from individuals regarding alleged violations of the relevant convention.

Implementation and conflicts of law

In a number of states, the supremacy of international law over and above national law is advocated. This goes back to the concept of international law seen as natural law. But perhaps it is a little more complicated than that.

When a state becomes a party to an international treaty, the state is bound to respect the treaty as a matter of international law and can be held accountable if it does not. A state can express its consent to be bound by the treaty by ratification, signature or by an exchange of instruments constituting the treaty. This is governed by the Vienna Convention on the Law of Treaties of 1969[11].

The ratification procedure at national level, whether decision on ratification is made by a minister, a government or has to be approved by the national parliament, is an issue under

[7] Article 46.

[8] The case of Cruz Varas and Others v. Sweden, judgment of 20 March 1991.

[9] Cf. e.g. the case of Mamatkulov and Askarov v. Turkey, judgment of 4 February 2005, and Aoulmi v. France, judgment of 17 January 2006.

[10] Chapter 12, Section 12 of the Aliens Act (2005:716).

[11] Article 11 of the Vienna Convention on the Law of Treaties.

national constitutional law in each state. The procedure and legal requirements are different in different states. In my country, Sweden, the approval of parliament is needed under three conditions:

- if the treaty requires an amendment of national law or new legislation,
- if the treaty concerns an issue requiring a decision by the Parliament, or
- if the treaty is considered to be of such general importance that the Parliament's approval is required.

A decision to accede to a treaty is always made by the Government.[12]

I think there are similar criteria in many other states.

But under international treaty law, it is the actual signing of the instrument of ratification that gives rise to the legal obligationunder the treaty.

What is perhaps more interesting is to see how international treaties can be implemented in national law.

Here, we need to distinguish first of all between those states where an international treaty applies directly as domestic law, – **the monistic state** – on the one hand, where the treaty has direct effect under national law,
and states where a treaty applies domestically only in as far as the treaty has been implemented as national law – the **dualistic state** – on the other.

When implementing a treaty by means of legislation, two methods may be used:

– incorporation, when a national law is adopted under which the treaty is incorporated to apply as national law, and

– transformation – when the content of the treaty is transformed into one or more national laws in accordance with the legal tradition of the state concerned.

There is no general obligation to incorporate a treaty into national law unless explicitly provided for in the treaty itself. The content of a treaty may well be respected in practice even though it has not been incorporated. It is a question of which legal technique you prefer.

In my country, where we have a strong dualistic tradition, transformation is the method most frequently used. But there are also examples of incorporation, the most well-known being the European Convention on Human Rights, which was incorporated into Swedish law in 1994. The Vienna Convention on Diplomatic Relations of 1961 is another example and, most recently, the UN Convention on the Jurisdictional Immunity of States and Their Property of 2004 was incorporated into Swedish law by means of a special Act passed in 2009.[13]

Regardless of the method used, this only concerns how the treaty is implemented and at what level in national law the treaty shall apply as a matter of domestic law. It does not affect the state's obligation under international law to respect and observe the content of the treaty.

For this reason, it is most important that states, when acceding to a treaty, screen their national law to avoid any conflicts with the treaty, and that amendments to existing laws or new legislation are enacted at the same time as the treaty enters into force.

[12] The Instrument of Government, Chapter 10, Section 2.

[13] The Act on Immunity for States and their Property (SFS 2009:1514).

In this context, it should be mentioned that accession to many treaties follows a two-step procedure: signature followed by ratification. Even if, as I have said, it is the ratification that in most cases makes the state bound by the obligation under the treaty, provided that the treaty does not stipulate anything else, signing the treaty also has certain legal effects. Under the Vienna Convention on the Law of Treaties, a state that has signed a treaty subject to ratification is obliged to refrain from acts that would "defeat the object and purpose of the treaty".[14] A state that has signed a treaty can be said to be expected to be loyal to the treaty even if it is not bound by its content until the treaty has been ratified.

In monistic states, if there is a conflict between a state's obligation under an international treaty and national law, preference is given to the treaty in most cases.

In a dualistic state, this is not so self-evident. In such a state, the courts can take the view that the international treaty obligation applies only in as far as it has been implemented as national law by means of incorporation or transformation. If the conflict between a national law and a treaty obligation is clear, the national courts might choose to apply the national law despite being aware that this might imply that the state's obligation to respect the treaty is violated. In such a case, it will be up to the legislator to react and solve the problem to avoid similar problems occurring in the future.

But there is another solution that the courts in my country apply: the principle of treaty conform interpretation of the law. It is based on the assumption that the Government (and parliament, if it has approved ratification), when ratifying the treaty, had the intention that the content of the treaty should be applied faithfully. To avoid the conflict, the courts can apply this principle, meaning that the relevant national law is given an interpretation which, when the law allows for that, is in conformity with the content of the treaty. By using this method, the conflict between the treaty obligation and national law can be avoided. Only if there is a clear conflict between national law and the treaty obligation does the problem remain, and there is a risk of violation of the State's treaty obligations.

The conflicts between national law and international law that have sometimes occurred in my country have mostly been related to the interpretation of the European Convention on Human Rights. Such conflicts have made us change our legislation in a number of different fields.

With respect to rules on detention, amendments were made as early as in 1988 in the Code of Judicial Procedure with a view to introducing a system whereby the courts could also hold hearings during special holidays such as Christmas or Easter in order to comply with the notion of prompt access to a judge to examine the justification and legality of a detention order as required by Article 5.3 of the European Convention.

The legislation on child care has been amended to provide for clear rules on enforceable access rights for biological parents of children taken into public care due to mistreatment or very poor social conditions in their families. The amendments were made in order to comply fully with Articles 6 and 8 of the European Convention in child care cases.

Most importantly, the right to access to court was introduced with respect to administrative decisions, which can be considered to affect the individual's civil rights within the meaning of Article 6 of the Convention. This has resulted in most administrative decisions concerning the granting or withdrawal of specific licences required by law for carrying out certain activities (e.g. building permits, licenses to run certain business establishments, etc.) are subject to court review under a special Act to that effect. Since 1988, Government decisions affecting civil rights

[14] Article 18 of the Vienna Convention on the Law of Treaties.

of individuals rights can also be subject to court review with regard to their legality, which was not possible before.

Finally, mention should be made of the Aliens Act, which in Chapter 12, Section 1 stipulates that an expulsion order may never be enforced to a country where there are reasonable grounds for believing that the alien would be at risk of being exposed to the death penalty or to corporal punishment, torture or inhuman or degrading treatment or punishment. This provision is designed to meet Sweden's obligations under the UN Convention against Torture of 1984 and under Article 3 of the European Convention on Human Rights as interpreted by the European Court in expulsion cases.

The jurisprudence developed under the European Convention goes deeply into the national legal system of the Convention States in a manner which from time to time requires changes in legislation. It is therefore important that states observe and follow the case-law and jurisprudence of the European Court also in cases where they have not been parties to the proceedings, in order to be able to assess the content of existing 'convention law'. The development of the jurisprudence must viewed in its entirety to be able to make an assessment.

The situation can be very complex in federal states where the obligation of the federation to respect its commitments under international law is not always implemented at state level.
An interesting case in the US illustrates this. The case concerns the Vienna Convention on Consular Relations of 1963 and the UN Charter. Article 36 of the Vienna Convention stipulates that if a national of another state is arrested or committed to prison or custody pending trial or is otherwise detained, the state in question shall inform the consul of the state of which the detained person is a citizen about the arrest, and without delay. And the detained person shall be informed of his or her rights in this respect. In the case of **Avena** before the International Court of Justice (ICJ),[15] the Court held that the US had violated its obligations under the Convention in this respect since it had failed to inform 51 Mexican citizens of their rights under the convention and also that no information about their arrest had been given to the Mexican consul. These Mexican citizens had been prosecuted and convicted of several serious crimes in the state of Texas. In some cases, the death penalty was imposed. The ICJ held that this omission on the part of the US authorities was so serious that the Mexican citizens were entitled to review and reconsideration of their convictions and sentences by the Texas courts. With reference to the ICJ judgment, one of the Mexican citizens, Mr Medellin, filed a request for review with the Texas Court of Criminal Appeals. The President of the United States issued a memorandum in which he argued, on legal grounds, in favour of the state of Texas providing review and reconsideration of the case regardless of whether there were any state default procedural rules that could apply domestically. Thus there was a recommendation from the President to give direct effect to the judgment of the ICJ in the state of Texas. It was based *inter alia* on the obligation of the United States to respect the UN charter and the acceptance by the United States of the jurisdiction of the ICJ in cases of this character.

Mr Medellin's request was rejected by the Appeals Court and the case went to the US Supreme Court. The Supreme Court made a thorough analysis of whether the President had the right to intervene in a case like this and concluded that he did not. On the merits, the Supreme Court reached the same conclusion as the Appeals Court and Mr Medellin's request for a review was not granted.[16]

The main argument for turning down Mr Medellin's request was that the ICJ's judgment was not enforceable as domestic law in a state court since neither the UN Charter nor the Statute of the

[15]Case concerning Avena and Other Mexican Nationals (Mexico v. U.S) judgment of March 31 2004.

[16] Decision of the Supreme Court of March 25, 2008 in the case of Medellin v. Texas.

ICJ adopted under the Charter had created federal law in the absence of implementing national legislation. And no such legislation had been enacted. Nor were there any indications that, when the Senate ratified the treaty, it intended to vest judgments of the ICJ with immediate legal effect in the domestic courts of the United States. There was thus no obligation on a US court to comply with a judgment of the ICJ.

In a later judgment, the Supreme Court for similar reasons declined a request from Mr Medellin and the ICJ to take all necessary measures to ensure that neither he nor any other of the 51 Mexicans would be executed until a review had been conducted in accordance with the previous judgment of the ICJ.[17] Mr Medellin was executed.

This case illustrates quite dramatically the conflict that can arise between a state's obligation under international law – which in the view expressed in *inter alia* Justice Breyer's separate opinion should prevail – and national law. Of particular interest is, of course, the fact that the US Constitution states that US treaty obligations constitute the 'law of the land'. I recommend a reading of Justice Breyer's separate opinion.

The reasoning of the Supreme Court is clearly similar to the reasoning that could be expected from a court in a dualistic state. So it is legitimate to ask whether this judgment should be taken to mean that the US has abandoned a monistic tradition in favour of a dualistic system.

Another illustrative example is given in a case before the European Court of Justice (the case of **Kadi and Al Barakaat.**[18]) This case touches upon the obligation of states to abide by Security Council resolutions under Chapter 7 of the UN Charter, and their obligations under EU law including human rights law. The case concerns the implementation of individual sanctions imposed by the UN Security Council on individuals suspected of giving support to certain terrorist groups. Such sanctions imply *inter alia* the freezing of all the suspect's assets. A resolution of the Security Council adopted under Chapter 7 of the UN Charter prevails over all other legal obligations.[19] At EU level, such resolutions are implemented through EU regulations adopted by the European Council (which is composed of all EU Member States). In the case, the European Court of Justice concluded that such resolutions can be implemented as EU law only as long as fundamental human rights standards are upheld with relevant procedural safeguards. The Court held that the rights of the defence had not been respected and that the freezing of assets constituted an unjustified restriction of Mr Kadi's right to property as long as his rights had not been observed.

The Court gave the Council a certain time limit to remedy the infringements found. However, in a new case brought by Mr Kadi before the Court he argues that this has not been done in a satisfactory manner and within the time limit set. There is now an imminent risk that the Court will declare the EU regulation implementing the UN resolution invalid. This may ultimately mean that the resolution cannot be respected within the EU.

This case has created a tension between the EU states' obligation under EU law, which includes relevant European Human Rights law, and their obligations under the UN Charter. It will be interesting to see to what extent it will be considered relevant whether a state has implemented the UN Charter into its domestic law if invoking its obligations under the UN Charter against the state's obligation to abide by EU law. We have a problem here that is probably worth an in-depth study of the relation between EU law and public international law. I am afraid we will see more problems of this kind if cases of this character are brought before the Supreme or Constitutional Courts in other non-EU countries.

[17] Decision of the Supreme Court of August 5, 2008 in the case of Jose Ernesto Medellin v. Texas.

[18] Judgment of the European Court of Justice of 3 September 2008.

[19] Articles 25 and 103 of the UN Charter.

International law is also relevant in asylum cases. I am not thinking only of how the UN Convention of the Status of Refugees is treated at national level, but also how other international law sources might be of immediate relevance to the application of national law. In a case before the Supreme Court of Migration in Sweden last year, the Court made an in-depth analysis of what is meant by ' armed conflict' in international humanitarian law. Under the Swedish Aliens Act, an asylum seeker has a right to protection if he/she has fled from a country or an area in a state where there is an ongoing armed conflict. Relying primarily of sources of international law, among others the Geneva Conventions and the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia, the Court arrived at the conclusion that there was a state of armed conflict in Mogadishu, Somalia, for which reason individuals from that region were entitled to protection in Sweden.[20]

The judgment implies a change of the jurisprudence of the migration courts developed so far under which the notion of 'armed conflict' had been given an autonomous interpretation under the Aliens Act, not necessarily in conformity with international humanitarian law. The case illustrates well how a national court can use international law and sources of international law in the interpretation of national law.

There are, of course, many other examples where you can see international law interact with national law in our courts. Sometimes there are clear conflicts of laws but often it is possible to harmonise the two by using the principle of treaty conform interpretation.

Before concluding, I would like to say a few words about international arbitration. It is not unusual that states act as parties in arbitration. This forms part of the general principle of peaceful settlement of disputes laid down in the UN Charter. But accepting that disputes are settled through arbitration also means that the parties should be loyal to the decisions of the tribunals they have set up for settling the dispute. This implies respecting the outcome of the proceedings, for example, by paying compensation decided by the tribunal when its decision has gained legal force. This is not always the case with respect to certain states. It is a treaty obligation to respect such decisions when you have accepted settling the dispute this way. Not doing so undermines the whole arbitration system, which will be detrimental to the long-term interest of all states.

[20] Judgment of the Supreme Court of Migration of October 6, 2009.