INTERNATIONAL LAW AND MUNICIPAL LAW

1. Dualist Doctrine
2. Monist Doctrine
3. Transformation
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5. Adoption
6. Reception
7. The Attitude of International Law to Municipal Law
8. Direct Legal Effect
9. The Attitude of National Legal Systems to International Law
10. Public International Law and Private International Law

Literature:

Malanczuk 2010 8 edn., alternatively 7 edn. 63-74
Brownlie 2008 31-55
/Kiviorg et al 2010 48-54/
• WHAT IS THE RELATIONSHIP BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW?

• WHICH RULE PREVAILS IN THE CASE OF CONFLICT?

• HOW DO RULES OF INTERNATIONAL LAW TAKE EFFECT IN THE INTERNAL LAW OF STATES?
There are two basic theories\(^1\) on the relationship between international law and domestic law – the dualist view,\(^2\) and the monist view.

\(^1\) With a number of variations – Malanczuk at 63.
\(^2\) Named also pluralist view – ibid.
1. THE DUALIST DOCTRINE

The dualist doctrine is also called pluralism. The doctrine assumes that international law and municipal law are two separate legal systems which exist independently of each other. The central question here is – whether one system is superior to the other.

Peter Malanczuk says that – as a rule of thumb – the ideological background to dualist doctrines is strongly coloured by an adherence to positivism and an emphasis on the theory of sovereignty.

Some supporters of the dualist doctrine: Ch. Rousseau, G. Fitzmaurice, D. Anzilotti.
2. THE MONIST DOCTRINE

The monist doctrine has a unitary perception of the „law“ and understands both international and municipal law as forming part of one and the same legal order.

Malanczuk considers the most radical representative of the monist approach Hans Kelsen, in whose view, the ultimate source of the validity of all law derived from a basic rule (Grundnorm) of international law. Kelsen’s theory allowes the conclusion that all rules of international law are supreme over municipal law, that a municipal law inconsistent with international law is automatically null and void and that rules of international law are directly applicable to the domestic sphere of States.

Some other international lawyers supporting monism are Hersch Lauterpacht, A. Verdross. Ants Piip, an Estonian author who has written about world politics, is in favour of monist understanding of international law.

The monist schools are more inclined to follow natural law thinking and liberal ideas of a world society.

• In reality, these opposing schools of dualism and monism do not adequately reflect actual State practice and consequently, recognized are elements of both doctrines (and the doctrines have been brought closer to each other).
3. TRANSFORMATION
Transformation is one form of techniques used for transposing international law into internal law, meaning that norms of international law form part of internal law only in so far as they have been accepted by internal legislative acts and judicial decisions. That way, transformation reflects the dualist doctrine.

4. INCORPORATION
Brownlie understands incorporation so as norms of international law are to be considered part of internal law and enforced as such, but only so far as consistent with internal legislative acts and prior judicial decisions of final authority. That way, incorporation also reflects the dualist doctrine.

5. ADOPTION
A norm international law naturally becomes part of internal law. Adoption, thus, reflects the monist doctrine.

6. RECEPTION
History knows reception of Roman law, or transposition of it into internal law according to the need. States received Roman law differently.
EXERCISE: APPLY THE PREVIOUS TOWARD EUROPEAN UNION LAW:

SOURCES OF EU LAW

1. Sources of Primary Law

<table>
<thead>
<tr>
<th>Year</th>
<th>Treaty/MoU</th>
<th>Date</th>
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<tbody>
<tr>
<td>1951</td>
<td>Treaty of Paris (ECST)</td>
<td>(1952)</td>
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<td>1957</td>
<td>Treaties of Rome (EEC and Euratom)</td>
<td>(1958 both)</td>
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<td>1986</td>
<td>Single European Act</td>
<td>(July 1987)</td>
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<td>1992</td>
<td>Treaty of Maastricht</td>
<td>(1 November 1993)</td>
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<td>1997</td>
<td>Treaty of Amsterdam</td>
<td>(1 May 1999)</td>
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<td>2000</td>
<td>Treaty of Nice</td>
<td>(1 February 2003)</td>
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<tr>
<td>2004</td>
<td>Treaty Establishing a Constitution for Europe</td>
<td>(voted against)</td>
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<td>2007</td>
<td>Treaty of Lisbon</td>
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### ACTS OF EU INSTITUTIONS

**(288 TFEU)**

- **LEGAL ACTS**
  - --- REGULATION
  - --- DIRECTIVE
  - --- DECISION

- **ACTS WITH NO BINDING FORCE**
  - --- OPINION
  - --- RECOMMENDATION

REGULATION

- **DEFINITION**
  - Of general application
  - Binding in its entirety
  - Directly applicable

- **ONE-STAGE ACT**
  - After entry into force, a regulation becomes part of Member States’ law;
  - A Member State must not and cannot transpose a regulation with an internal act.

- **PREScribing ACT (Regulatory act)**

DIRECTIVE

■ DEFINITION

--- Binding, as to the result to be achieved
--- Leaves to the national authorities the choice of form and methods

■ TWO-STAGE ACT

--- Adoption and entry into force
--- Application by a Member State by the time foreseen in the directive

■ UNIFYING ACT

e.g. internal market, environment, social policy

**DECISION**

■ DEFINITION

--- binding in its entirety
--- to whom it is addressed

■ FIELD OF USE

  e.g. competition

7. THE ATTITUDE OF INTERNATIONAL LAW TO MUNICIPAL LAW

International law does not entirely ignore municipal law. For instance, municipal law may be used as evidence of international custom or of general principles of law. International law, having “grown out” of municipal law, leaves certain questions to be decided by municipal law. An example: to determine, whether an individual is a national of State X, international law, as a rule, looks first at the law of State X, provided that the law of State X is not wholly unreasonable.

A State cannot plead a rule of or a gap in its own municipal law as a defence to a claim based on international law. Thus, in the Free Zones case, the PCIJ stated:

It is certain that France cannot rely on her own legislation to limit the scope of her international obligations.

The rule has also been written to the first sentence of Article 27 of the 1969 Vienna Convention of the Law on Treaties:

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

Moreover, there is a general duty for States to bring domestic law into conformity with obligations under International law. International law leaves the method of achieving this result to the domestic jurisdiction of States who may choose between transformation, incorporation, adoption or reception (and the States have generally been and are free to decide how best to translate their International obligations with internal law and to determine which legal status these have domestically (– meaning lack of uniformity in the different national legal systems)), but international law may also predict the method.
8. DIRECT LEGAL EFFECT

The doctrine of direct effect is part of the more general doctrine of primacy. Direct effect means that an international norm may create direct rights and obligations toward individuals (incl. citizens of a State) which can be demanded by courts without requiring further implementing measures, if certain conditions are fulfilled:

a) States own no legislative discretion (= not a dualist system);
   b) the norm is clear, precise, and unconditional.

Direct effect is different from direct applicability which applicability belongs to all binding legal norms.
Dutch company, N.V. Algemene Transport - en expeditie onderneming Van Gend & Loos, imported ureaformaldehyde. On 1st of January 1958, the EEC Treaty entered into force with its Article 12 that at that time stipulated:

Member States shall refrain from introducing, as between themselves, any new customs duties on importation or exportation or charges with equivalent effect and from increasing such duties or charges as they apply in their commercial relations with each other. (NB! – The text and number of Article 12 have been changed by today, the new Article still having direct legal effect).

The Dutch court stayed the proceedings and asked from the European Court of Justice inter alia, whether Article 12 of the EEC Treaty had direct application within the territory of a Member State.

The government of the Netherlands even expressed the doubt that since agreements entered into by the Netherlands require incorporation into Dutch national law (dualist type of argument – Jan Klabbers), the ECJ may not have jurisdiction to decide whether the provisions of the EEC Treaty prevail over Netherlands legislation or over other Netherlands agreements.

In order to answer the question, the ECJ considered the spirit, the general scheme and the wording of Article 12. The ECJ explained that the EEC Treaty is more than an agreement which merely creates mutual obligations between the contracting states - this view is confirmed by the Preamble to the Treaty which refers not only to governments but to peoples; it is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens …

The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of
Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community …

The wording of Article 12 contains a clear and unconditional prohibition which is not a positive but a negative obligation. This obligation, moreover, is not qualified by any reservation on the part of states which would make its implementation conditional upon a positive legislative measure enacted under national law …

The implementation of Article 12 does not require any legislative intervention on the part of the states …

It follows from the foregoing considerations that, according to the spirit, the general scheme and the wording of the Treaty, Article 12 must be interpreted as producing direct effects and creating individual rights which national courts must protect …

The ECJ also explained that EC law should be implied uniformly (the same way) in all Member States. – If the effect of EU law depends on domestic law, there would be no uniform application of EU law.

Thus, direct effect of EU law does not depend on domestic law, but on EU law itself.

So, Van Gend en Loos could directly rely on Article 12.
EXERCISE 1:
What degree of liberty does a Member State enjoy in view of a new EU regulation? What are the consequences of this situation with regard to direct effect?
(Christa Tobler; Jacques Beglinger)

EXERCISE 2:
In the context of the direct effect of directives – why is the notion of State so important?
(Christa Tobler; Jacques Beglinger)
9. THE ATTITUDE OF NATIONAL LEGAL SYSTEMS TO INTERNATIONAL LAW

The laws of different States vary greatly. The basic principles usually lie in States’ constitutional texts, but important are also internal legislation, administrative and court practice (often ambiguous and inconsistent).

By Malanczuk, the prevailing approach in practice appears to be dualist, regarding international law and internal law as different systems requiring incorporation of international rules on the national level. That way, the effectiveness of international law generally depends on the criteria adopted by national legal systems.

The most important questions of the attitude of national legal systems to international law have been held the status of international treaties and of international customary law (including general principles of international law).

a. International Treaties

The status of treaties in national legal systems varies considerably.

In the United Kingdom an international treaty is usually not binding without the consensual act of Parliament. This is named incorporation of an act by legislative act. A problem occurs if the Parliament repeals with its subsequent act its previous act giving effect to a treaty – in such cases international law regards the UK still being bound by the treaty, but the English courts cannot give effect to that treaty (named „conflict between international law and internal law“ by Malanczuk).

In Continental-European States, the legislature or part of the legislature participates in the process of ratification, so that ratification becomes a legislative act, and the treaty becomes effective in international law and in municipal law simultaneously.

In Estonia an international agreement is enforced by:
- signature;
- instrument of ratification;
- instrument of acceptance and approval;
- instrument of accession;
- enforcement note;
- other instrument of agreement;
- in another manner prescribed in the agreement.

Pursuant to Paragraph 121 of the Estonian Constitution:
The Riigikogu shall ratify and denounce treaties of the Republic of Estonia:
1) which alter state borders;
2) the implementation of which requires the passage, amendment or repeal of Estonian laws;
3) by which the Republic of Estonia joins international organisations or unions;
4) by which the Republic of Estonia assumes military or proprietary obligations;
5) in which ratification is prescribed.

Separate types of international agreements are also governmental international agreements and inter-agency international agreements.
STATUS OF INTERNATIONAL AGREEMENTS IN THE SYSTEM OF ESTONIAN LEGAL ACTS
(normative hierarchy)

Please, fill in the blanks (on the position of Estonian legal acts and international agreements)

● ………………
● ………………
● ………………
● ………………
● ………………

Paragraph 123 (2) of the Estonian Constitution: If laws or other legislation of Estonia are in conflict with international treaties ratified by the Riigikogu, the provisions of the international treaty shall apply.

Paragraph 123 (1) of the Estonian Constitution: The Republic of Estonia shall not enter into international treaties which are in conflict with the Constitution.

Paragraph 3 of the Foreign Relations Act: inter-agency international agreement – a written agreement between a state agency or local government of the Republic of Estonia and an agency of a foreign state or an international organisation which is concluded according to their competence and regulated by international law.
b. International Custom and General Principles

The rules for the recognition of customary international law in the internal sphere may be also lied down in constitution, or be gradually formulated by the national courts. A procedure for transformation of customary international law into municipal law is considered impracticable (as it would require a regular review of all changes of international norms and principles, and as custom is less clear than treaties, and has decreased in its significance as source of international law).

The second sentence of Paragraph 3 of the Estonian Constitution states: „Generally recognised principles and rules of international law are an inseparable part of the Estonian legal system“ that is named incorporation.

(As in case of transformation, the wording of Para. 3 should reveal that the generally recognized principles and rules of international law are an inseparable part of the Estonian legal system to the extent they have been adopted by the Estonian legislative acts (and recognized by case law)).
10. PUBLIC INTERNATIONAL LAW AND PRIVATE INTERNATIONAL LAW

E. A. Posner understands public international lawyers as working as lawyers in the State Department or the Justice Department; for an international organization, or an international NGO („with a legal agenda such as Human Rights Watch“), or have an academic or intellectual interest in international law and international relations.


But there are other international lawyers (J. Adler, M. Scharf) who do not draw distinctions so radical between public international law and private international law, but see the lines between these two disciplines blurred. Indeed, although not writing about choices of law, even Akehurst (Malanczuk) includes Chapters on application of treaties (Brownlie has also a Chapter about treaty interpretation), customary law, the law of international organizations, economy as one of the substantive international law areas (but also international trade law and international environmental law), peaceful settlement of disputes. The same appears toward European Union law, where most of the general courses and books include Chapters on general issues concerning free movements and remedies (included introduction to non-contractual liability). In addition, there exist general principles of law applicable to most choices of law (to both international public and private law).

Strictly, Malanczuk defines private law as conflict of laws – as choice of when to apply foreign law (already existing law of a State) in the case involving foreign element (where a legal relationship has relation
with more than one State’s law). Malanczuk defines public law as law between States (the principles of which law may be applied in private relationships).

The only connection between public international law and private international law is the transborder element of the facts being regulated.

The term „international law“ used without any qualification, almost always means public international law.