



UNIVERSITÀ
DI SIENA 1240

FUNDAMENTALS OF INTERNATIONAL LAW

Master's Degree Course in International Sciences (LM-52)

Academic Year 2022-2023 – I Semester

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Topic Four

International Law and Domestic Legal Systems

International and Domestic Law

- Biunivocal relation
- IL primarily implemented at national level
- IL as a product of national interests

“Many of the things IL tries to do have to be done at the national level”
(J. CRAWFORD)

“The compliance with IL by one state is primarily entrusted to domestic legal practitioners and to the organs of that state in particular” (B. CONFORTI)



The Monist Approach

- Law as a unitary global phenomenon governed by IL (H. Kelsen, H. Lauterpacht)
- IL hierarchically superior to DL, which is grounded in the former and is a mere part of it
- Prevalence of IL in case of conflicts
- Direct effect of IL into DL (same legal position of states and individuals)



The Dualist Approach

- IL and DL are two separated legal orders (D. Anzilotti, H. Triepel)
- IL governs relations between states and IOs, while DL regulates relations between individuals, or private companies, *inter se* or between them and the national public administration
- Each order has prevalence on the other from its own perspective
- Prevailing approach today being the closest to the reality of international practice



Domestic Law in International Law

- Clear separation between the two in the practice
- Treaty law: DL cannot be invoked for non-compliance with a treaty (art. 27 VCLT)
- Law of international responsibility: DL has no bearing on the unlawfulness of a certain conduct under IL (art. 3 ARS)
- DL as set of mere facts for IL, but not irrelevant
- DL can't affect legal effectiveness of international decisions (ICJ, *GER v. ITA*, 2012)



International Law in Domestic Law

- Majority of national systems operate as separate from IL
- Which rules prevail in DL in case of conflict?
- Prevalence of IL over DL would enhance consistency of national legal systems
- IL is the product of national interests and is based on states' consent



Ordinary and Special Procedures of Adaptation

- Ordinary procedure: the international norm is reformulated in DL (“static” role of the legislator)
- Special procedure: DL refers to (*rinvia*) IL without reproducing the international rule
- Special procedure to be preferred (dynamic role of the interpreter), but sometimes the ordinary procedure is necessary (non self-executing norms)

General Effects of Incorporation

1. Direct applicability by state organs
2. Duty of consistent interpretation
3. Individual judicial action
4. Parameter of legitimacy of ordinary legislation



International Law in Common Law Jurisdictions: UK

- Incorporation doctrine (English common law)
- Any change in CIL is a change in English law
- CIL is directly applicable in DL
- Tempered incorporation in most recent years
- Conclusion and ratification of treaties by the Executive in UK and Commonwealth; parliamentary scrutiny in England



International Law in Common Law Jurisdictions: US

- Tempered incorporation doctrine
- IL as part of federal law subject to the Constitution
- Restrictive approach to the incorporation of CIL since 2004
- Treaties as “Supreme Law of the Land” above state constitution and law (1787 Constitution, Art. VI.2)
- High discretion by the Supreme Court → distinction between self-executing and non-self-executing agreements



International Law in Civil Law Jurisdictions: Italy

- Article 10 Constitution as permanent *a priori* transformer of general IL into DL (special procedure of adaptation)
- CIL prevailing over incompatible legislation, but not over constitutional rights (e.g. decision 238/2014)
- IL (both custom and treaties) prevailing over ordinary legislation under Article 117.1, with the exception of constitutional rights
- Treaties as “interposed norms” (incorporated via a law authorizing ratification)



Italian Constitution

Art. 10

The Italian legal system conforms to the generally recognized rules of international law.

[...]

Art. 117

Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations.

[...]

LEGGE 4 novembre 2016, n. 204

Ratifica ed esecuzione dell'Accordo di Parigi collegato alla Convenzione quadro delle Nazioni Unite sui cambiamenti climatici, adottato a Parigi il 12 dicembre 2015. (16G00214)

(GU n.263 del 10-11-2016)

La Camera dei deputati ed il Senato della Repubblica hanno approvato;

IL PRESIDENTE DELLA REPUBBLICA

Promulga

la seguente legge:

Art. 1

Autorizzazione alla ratifica

1. Il Presidente della Repubblica e' autorizzato a ratificare l'Accordo di Parigi collegato alla Convenzione quadro delle Nazioni Unite sui cambiamenti climatici, adottato a Parigi il 12 dicembre 2015.

Art. 2

Ordine di esecuzione

1. Piena ed intera esecuzione e' data all'Accordo di cui all'articolo 1, a decorrere dalla data della sua entrata in vigore, in conformita' con quanto disposto dall'articolo 21 dell'Accordo medesimo.

International Law in Civil Law

Jurisdictions: France, Germany and Russia

- 1958 French Constitution: automatic transformation of general IL (preamble) and prevalence of treaties over legislation (art. 55)
- 1949 German Constitution: general IL as part of federal law, prevailing over the laws and directly applicable (art. 25); treaties as part of German law and directly applicable if self-executing (art. 59)
- 1993 Russian Constitution: transformation of general and treaty law into DL (art. 15.4); prevalence of treaty law over national legislation (amended in 2020: today the Russian Constitution should take precedence over IL)



The Crux of the Matter: Conflict and Precedence

- Mitigated dualism
- Generally, IL takes precedence over DL unless subsequent statutes are passed to supersede prior treaty law
- Constitutional limitations nearly always apply
- Role of Constitutional and Supreme Courts



Upsurge of Nationalist Trends

- Unilateralist attitudes
- Assertion of absolute supremacy of DL and justice over IL
- Several threatening challenges
- Diminished openness to IL, but all is not lost...