International Law and Municipal Law (Domestic/Internal)

General Rule on the Relationship

- **Art. 27** of the 1969 Vienna Convention:
  - "A party may not invoke the provisions of its internal law as j ustification for its failure to perform a treaty. This rule is with out prejudice to article 46."
- **Art. 46:** A state may invoke➔ that its consent to be bound by has been taken in violation of its internal la w on competence to conclude treaties (clear violatio n + concerned a rule of fundamental importance)
- **But the main question is**: "How can we explain use of int law rules by national courts?"

“How can we explain use of int law rules by national courts?” Int law-Domestic Law

- Two Main Approaches to Explain this Relationship
  - 1- Dualist Approach
  - 2- Monist Approach
- Under the Monist Approach rules of int law are part o f national law unless excluded (**presumption of incl usion**)
- Under the Dualist Approach they are part of national law only if included deliberately (**presumption of ex clusion**).

Dualist Approach

- Two main thesis:
  - 1- international law and municipal law **exist separately** and one d oes not affect the other
  - 2- They are **different and independent** from each other
- There are two main reasons for this:
  - A- b/c **inter-state** and **intra-state** relations are fundamentally differ ent
    - Relations between state-citizens➔subordination➔citizens are dependent
    - Relations between states are based on equality in principle
  - B- b/c Norm-creating **sources** of the two are different
    - Rules of int law➔result of “common consent”➔concurring will
    - Rules of municipal law➔ result of unilateral consent

Dualist Approach

- If a municipal system accepts Dualist Approa ch➔ There are three consequences:
  - 1- A rule from one ➔ cannot have effect within th e other➔➔ "**No direct implementation**"
  - 2- No possibility of **conflict** of rules
  - 3- If one of these legal orders wants to utilize a rul e from the other➔ change the "shape/formalistic structure" of the rule➔ This is called as "**transfor mation**"

Dualist Approach

- "**Doctrine of Transformation**"➔ Rules of int law d o not become part of domestic law until they have be en accepted by the state
- Therefore➔ int law is not *ipso facto* (by the very fact) part of national law
- A national court cannot directly apply a rule of int law ➔ until that rule has been transformed into national l aw properly
- This is the position of UK with respect to rules of int l aw deriving from int treaties

Monist Approach

- Main argument: “There is only one single le gal order➔ int law and internal law are parts of this whole
- They are two separate components of one “law”
- There may be a conflict between the two leg al systems➔ for most of them➔ int law is su perior ➔ has priority over the domestic law

Monist Approach

- Possible consequences:
  - 1- implementation of one in the other➔ automatic
  - 2- "**Doctrine of Incorporation**":
    - ➔ "a rule of int law becomes part of national law without a need of clear acceptance by domestic authorities"
    - ➔ Such rule is **automatically incorporated**➔ automatic adoption➔ unless there is a provision of national law which precludes the use of such rule by the national court (presumption).

Monist Approach

- Exp: German Basic Law Art. 25:
  - "**Article 25 [Primacy of international law]**

    The general rules of international law shall be an **integral part** of federal law. They shall **take precedence over the laws** and **directly create rights and duties** for the inhabitants of the federal territory."
- Exp: Netherlands

Monist Approach-Netherlands

- According to Dutch Cons.➔➔All internal law, even c onstitutional law must be disregarded if it is incompat ible with the provisions of treaties or decisions of inte rnational organizations that are binding on all person s
- Dutch courts must overrule acts of Parliament on the ground that they may conflict with certain treaties or r esolutions of int organizations
- But➔ Dutch Parliament must consent to treaties whi ch conflict with the Const. by a majority necessary fo r const amendment

Two important questions:

- 1- The way rules of int law are made part of d omestic legal system? Capacity of individuals to invoke such rules before national courts?
- 2- Legal effect (force) of such rules in domest ic law
- We will use Turkish legal system as an exam ple➔ Art 90 of the Turkish Constitution

Turkish System

- Turkish system is mainly Dualist➔ because int treati es should be subject to a process of ratification (tran sformation) to have effect in Turkish Law
- Process: Council of Ministers ➔ Turkish Grand Natio nal Assembly ➔ Ratification of treaties shall be subj ect to adoption by the TGNA **by a law approving thi s ratification *(uygun bulma kanunu)***
- This law is sent to the President for its adoption
- Art. 104➔ int agreements shall be binding for Turkey with their adoption by the President

Turkish system

- Two categories of treaties:
- A- Treaties that can be put into effect through promul gation by the Council of Ministers
  - regulating economic, commercial and technical issues
  - Agreements for the implementation of a previous treaty
- B- Treaties that can be put into effect only through a l aw from the parliament (ratification)➔ normal proced ure➔ why?

Turkish system

- Legal force (value) of Treaties in Turkish Law:
- Art. 90➔ Constitution:
- “The ratification of treaties concluded with foreign states and international org anisations on behalf of the Republic of Turkey, shall be subject to adoption by t he Turkish Grand National Assembly by a law approving the ratification.... **Inter national agreements duly put into effect carry the force of law**. No appeal t o the Constitutional Court can be made with regard to these agreements, on th e ground that they are unconstitutional”
- Amendment in 2004➔ “International agreements duly put into effect bear the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. In case of con tradiction between international agreements regarding basic rights and freedom s approved through proper procedure and domestic laws, due to different provis ions on the same issue, the provisions of international agreements shall be con sidered.”
- Mainly “transformation”

Turkish System

- Treaties shall have the force of law➔ but exempte d from constitutional review➔ **a privileged positi on➔ Why?**
- But rules of international law deriving from **Arts 15, 16, 42 and 92** of the Constitution (examined below)➔ have **constitutional force**
- What about the principle "*lex posterior*"?
- Technically possible➔ but reserved position for hu man rights treaties

Exceptional cases for Turkish System

- Some rules of international law (treaties + general principles of law + customary rules) are directly applicable (self-executing) in Turkey without a need to transform:
- Art. 15 + 16 + 42 + 92
- With reference to rules of international law➔ ➔ in these limited areas certain rules of int law are deemed to be “incorporated” in Turkish legal system

Exceptions

- **Art. 15**: in time of war, mobilization, martial la w or state of emergency exercise of fundame ntal rights and freedoms can be partially or e ntirely suspended➔ provided that obligations under int law are not violated.
- **Art. 16**: Fundamental rights and freedoms of foreigners may be restricted by law in a man ner consistent with international law

Exceptions

- Art. 42➔ No language other than Turkish shall be thought as a mother tangue to Turkish citizens at any institution of traning or education➔ “but the provisions of int law are reserved” (Tre aty of Laussanne)
- Art. 92➔ the power to authorize declaration of war is vested in t he Turkish Parliament➔ but restricted to cases deemed legitim ate by international alw
- Art. 92➔ Power to send Turkish armed forces to foreign countri es and to allow foreign armed forces to be stationed in Turkey i s vested to Turkish Parliament➔ but this power is subject to the provisions of international treaties to which Turkey is party to (N ATO and treaties for US bases)

International law and domestic law

- How about the attitude of Turkish Courts?
- ***Different system in the UK:***
  - Accepts “transformation” for treaty law
  - Accepts “incorporation” for customary rules of int law
- ***Parliamentary sovereignty*** ➔No sitting Parliament can bind the succ essor Parliament nor be bound by the predecessor
- ***Before 1998:***
  - Treaties were not self-executing-giving no right to invoke before co urts (not enforceable before UK courts)
  - Obligations created over UK at int law level while no such obligatio n on British Parliament or Courts
  - Parliament and courts very rarely made use of the jurisprudence of the E CtHR

UK

- After 1998➔ ***The Human Rights Act of 1998***
  - Does not incorporate the ECHR (as was the case in 1972 European Comm unities Act);
  - Lists articles of the ECHR and calls them as «Convention Rights»
    - Government's responsibility➔Compatibility of proposed bill with Conve ntion rights;
    - «To the extent that it is possible to do so»➔Legislation must be read a nd interpreted in a way COMPATIBLE with the Convention Rights➔➔ BUT if the legislation is clear and does not allow such an interpretation !!!
    - 1998 Act empowers some courts to make «declaration of incompatibilit y»➔➔consequences? This does not affect validty or enforcability➔ g overnment➔remedial order➔fast track➔ultimate decision rests with t he Parliament

UK

- "**Executive certificates**" in UK➔
  - In UK a court must ask a certificate from the go vernment on a factual matter or a question of i nternational law
  - Whether an entity is deemed as a "state" by th e UK government or not?➔ to be consistent
  - Domestic court cannot inquire int law to see if t he rules related to statehood are satisfied➔ thi s is determined by the executive certificate