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THE APPLICATION OF INTERNATIONAL LAW BY THE ADMINISTRATIVE JUDGE

GENERAL REPORT

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Introduction

The general theme of the VIth Congress of the International Association of High Administrative Jurisdictions (AIHJA) is **The Application of International Law by the Administrative Judge**. This is subdivided into three more specific themes, viz. *(i)* the norms of international law and their articulation with national legislation; *(ii)* definition and interpretation of the norms of international law by the judge; and *(iii)* enforcement and effects of the rules of international law. In the questionnaire on the basis of which the national reports were drafted, and of which this general reports purports to be a synthesis, it had been specified that this Congress would not dwell on the rules and regulations of the European Community nor on the norms relating to the defence of Human Rights, the first because the Community legislation does not encompass all the jurisdictions which participate in the Congress, which cover various continents, the latter, because they constituted the theme of a symposium recently convened by the Constitutional Courts[1].

The theme of this Congress is a logical follow-up of the themes that have been broached in the five previous Congresses.

- The Congress held in Paris in 1983 dealt with *the jurisdictional supervision of the legality of unilateral acts of procedure on the part of the public administration,* from the triple point of view of the competence of jurisdictions to carry out the supervision of the administration, the acts subjected to such control and of the conditions under which decisions can be appealed, in connection with the ambit of such control and the relevant powers of the judge;

- The Congress in Tunis, held in 1986, concerned itself with *the access of citizens to the administrative jurisdictions,* with a survey of who is legally empowered to such access, and who actually resorts to it, which are the acts that can be contended by each category of applicants, and under which conditions the Tribunal can be called to intervene;

- The Congress of Helsinki, in 1989, analysed *the progress of proceedings before the supreme administrative jurisdictions* in particular with respect to the structure of administrative jurisdictions and to the principles which underpin the process, the working methods of the high courts, the various phases of the proceedings and the award regarding the petition;

- During the Congress held in Luxembourg (1992), *the legal and practical effects of awards in administrative matters* were compared, specifically

[1] This was the IXth Conference of European Constitutional Courts, held in Paris in May 1993, under the general theme of *Constitutional Protection and International Protection of Human Rights.*

with respect to the powers of the judge, the legal value and impact of the awards, and their implementation;

- The Congress of Rome (1995) studied *the provisional emergency measures and the accelerated proceedings* and, particularly with respect to the former, the powers of the judge, the conditions of admissibility of petitions and the procedure.

Consequently, while the first three Congresses characterised the specificity of the various models of administrative jurisdictions in an institutional perspective, and analysed, in general terms, the access to these jurisdictions, their rules of procedure and the normal course of proceedings, the fourth and fifth Congresses focalised on specific themes of this process (the binding force and implementation of awards of the administrative tribunals and the specific attributes of urgent and precautionary proceedings).

The time has come now to review matters related to the enforcement of international law by the administrative judge. This theme is of particular interest for an international organisation such as AIHJA, and will enable it to compare the several procedures according to which international law(general and conventional, multilateral and bilateral) is acknowledged by national legal systems (monistic or dualistic), the tools for such acceptance (ratification, approval, publication), the ups and downs of its enforcement, its ranking with respect to national law (constitutional and ordinary, prior or subsequent), its definition and interpretation by the national judge, the possibility for applicants to invoke it directly, the possibility of an informal control, by the judge, of any breach, and the admissibility of a responsibility of the State for infringements to international law through the adoption of rules of national legislation.

The preparation of this general report took into account national reports received from the following countries before the end of February 1998: Austria, Burkina Faso, Burundi, Canada, Cyprus, Columbia, Egypt, Finland, France, Germany, Greece, Hungary, Israel, Italy, Luxembourg, Mali, the Netherlands, Panama, Poland, Portugal, Spain, Sweden, Switzerland, Thailand, Tunisia and Turkey.

It has to be stated as from now that some of the queries in the questionnaire were not interpreted uniformly through the national reporting authorities and that in some instances, presumably in view of problems encountered by the reporting authorities in the translation into the official languages of the Congress, some doubts arose as to the exact meaning of some statements included in these country reports; it is hoped that some errors may be corrected during the sessions of the Congress.

First Theme

The rules of international law and its articulation with national legislation

1. The rules of international law [2]

1.1 Multilateral rules

- Original legislation

As the rules of law of the European Community and the conventions pertaining to Human Rights are excluded from the ambit of this Congress, the major international instruments which are most frequently referred to before administrative jurisdictions are, according to information covered in the country reports, in addition to the Charter of the United Nations: the Geneva Convention of 1951 on the Status of Refugees (Canada, France, Germany, Hungary, Israel, Luxembourg, the Netherlands), the Convention of 1954 relating to the Status of Stateless Persons (Germany, Sweden), the Geneva Convention of 1949 relative to the Protection of Civilian Persons in Time of War (Canada, Israel), the Geneva Convention relative to the Treatment of Prisoners of War (Canada), the Convention of Paris of 1983 on the Protection of Industrial Property (Israel), the Convention of the Hague (1961) on the Protection of Minors (Germany), the Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Case of Multiple Nationality (Germany), the ILO Conventions (Finland, France, Greece), the Conventions relating to the Protection of Nature and in particular the Convention of Bern (France) and of Vienna relating to the Protection of the Ozone Layer (Canada, Finland), the Conventions for the Protection of the Cultural Heritage (Finland, Greece), the Convention of the Hague on the Protection of Cultural Property in Case of Armed Conflict, the Convention relating to the Protection of the European Architectonic Heritage (Finland), the Convention of Chicago of 1944 relating to the International Civil Aviation (Finland, France, Israel), the Vienna Convention on the Law of Treaties (Finland, Germany, the Netherlands, Sweden), the Vienna Convention on Diplomatic Relations (Canada, France), the Vienna Convention on Consular Relations (Canada, Cyprus, the Netherlands), the Conventions relating to Co-operation on Legal Matters and Extradition (Switzerland), the Convention on Mutual Administrative Assistance on Tax Matters (Finland, Sweden).

[2] Despite the fact that some country reports covered the mechanisms of the conclusion and adoption of international conventions under this item, this matter will be surveyed under 2.1.

- Derived Law

Beyond the European Community, the number of international organisations producing binding derived legislation that might be enforced by administrative tribunals is rather limited (Germany, France). Meanwhile, resolutions and recommendations from the Committee of Ministers of the Council of Europe are sometimes called upon or from the United Nations General Assembly or Security Council are sometimes referred to (Switzerland).

1.2 *Bilateral rules*

The bilateral conventions most frequently referred to concern extradition (Canada, France, Israel), entry and stay of aliens (Germany, France), migrant workers (Germany, Switzerland), reciprocate recognition of passports and other documents (Germany), social security (Finland, the Netherlands, Sweden, Switzerland), double taxation (Canada, Finland, France, Sweden, Switzerland) and tax evasion (Finland), legal co-operation (Canada), air transport (Canada).

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1.3 International custom and general principles of law

International custom, even in countries that acknowledge its legal value (Austria, Canada, Germany, Israel, the Netherlands, Sweden, Thailand) sees its practical relevance being reduced, either because of its incorporation in the general principles of international law (Finland), or because it is being codified in international conventions [3] and consequently there is an alteration of the nature of its source, or because of its scarce relevance in administrative jurisdictions [4].

On the other hand, it is generically recognised that the general principles of international law may be invoked before administrative jurisdictions (Austria, Hungary, Luxembourg, the Netherlands, Sweden) but their role has been reduced too since they are being incorporated in treaties (Thailand) or by national legislation (Canada). In any event, in cases of ambiguities, or where there is a gap in the interpretation of international law, it may be useful to refer to the general principles of law (Thailand).

As far as Portugal is concerned, among the multilateral rules that bind the Portuguese State and are applicable in the national ambit, one will have to quote: those that ensue from the principles that structure the international

[3] For example, the Law of the Sea, sometimes called upon, which has, for a long time, been common law has now been codified by the Convention of Montego Bay.

[4] E.g., in France, for quite a long time, the Council of State rejected the invocation of custom and it was not until 1997 that, by virtue of an award, that it admitted that it could be invoked in all types of disputes.

community, i.e. the stipulations of art. 7, n° 1 and 3 of the Constitution, the Universal Declaration of Human Rights, as well as the basic rules of the UN Charter, the norms of international law that guarantee permanent basic rights inherent in other Statements, Treaties or general Conventions, the norms that underpin universal Charters, Treaties or international Agreements not included under item 1, and the international general or common law (whether or not codified in statements, treaties or conventions) including custom and the general principles of international law (that are applicable under Portuguese national legislation, acknowledged generically and directly by art. 8, 1 of the Constitution); all other multilateral treaties including, with respect to derived law, measures taken by the Security Council of the United Nations according to the terms of Chapter VII of the Charter, as well as prescriptions emanated by the bodies set up under a multilateral treaty that foresees such source of legislation in its prescriptions.

2. Connection between the rules of international law and national legislation

2.1 Incorporation into the internal legislation

- Ratification and approval (existence and lawfulness)

In this matter, the major division occurs between States that follow a monist model and those which adopt a dualistic pattern; yet in each of these groups, differences exist, with respect to the methods of incorporation of international law into the internal legislation and to the powers of the judge to control the existence and lawfulness of these methods, as we will see:

In **Austria,** "political" treaties and such other that modify or complement the legislation in force can only be concluded with the sanction of the *Nationalrat* (National Council) and, when they cover matters which pertain to the autonomous competence of the *Länder*, the approval of the *Bundesrat* is also required. An adjustment is required whenever the treaty is not self-executing, i.e. when it does not include the specifications necessary for the tribunals to deliberate on their proper implementation by the public administration or by the lower courts.

In **Canada,** considering the parliamentary nature of the system of government, the federal executive power may not directly create legislation - in the exercise of its prerogatives in the field of foreign relations – without prior approval of the legislative body. Once signed and ratified, the treaty obligates Canada at the international level, but only constitutes a formal source of internal law once it has been integrated into the national legislation established to this effect. As far as appropriate implementation of a treaty requires a modification of pre-existing legislation, the treaty must be expressly adopted in the internal legal order by means of new empowering legislation. It

follows that in the absence of legislative confirmation, a treaty does not create rights or obligations between individuals or between persons and the State. Treaties which merely have an impact on the international order, or which do not require any modification of the internal order do not, therefore, require a legislative intervention for their incorporation (example: peace treaties). The implementation of a treaty can take on three forms: (1) an international agreement may be directly put into effect by the law; (2) a brief introductory law incorporates into the Canadian legislation all or part of the provisions of a treaty, the text of which is annexed to the law; (3) more frequently, the law is inspired by the provisions of the treaty, without reproducing them, and sometimes hardly refers to the treaty which it implements.

In **Egypt**, it pertains to the President of the Republic to conclude international treaties. He then informs the Parliament. However, some treaties, such as peace treaties, alliances, commercial agreements, shipping agreements, and those which require a modification of the State territory or financial levies not foreseen in the budget, must be previously agreed to by the Parliament.

In **Finland**, according to section 33 of the Constitutional Law, treaties have to be approved by the Parliament whenever they contain clauses pertaining to its legislative sphere or if parliamentary approval is required in any other way by the Constitution. As a rule, treaties and conventions are incorporated by means of empowering laws or decrees (the text of the treaty is annexed).

In **France**, according to art. 55 of the Constitution of 1958 "from the time of their publication and conditioned by their implementation by the other party, regularly ratified or approved treaties and agreements have a higher ranking, as to their authoritativeness, than laws, ". The same article stipulates also the ratification process, with the intervention of the President of the Republic, and government approval for agreements in simplified form. The Constitution is not very specific about cases when ratification is required and instances in which approval will suffice. Independently from this matter, art. 53 of the Constitution establishes that the ratification or publication must be preceded by a parliamentary authorisation in the cases listed. According to constant case law, the Council of State considers that it is not up to the administrative judge to determine the lawfulness of the ratification process or approval of an international treaty. The decision to ratify or to approve a treaty or agreement cannot be separated from the conduct of international affairs, which is closely connected to the well-defined category of government actions and therefore is beyond the field of competence of the administrative jurisdiction. The Council of State therefore does not carry out any control on the selection between approval and ratification, nor on the decision to request – or not – prior approval by the Parliament. It merely supervises the existence of such approval or ratification.

In **Germany**, the transposition of international law in the internal legislation differs according to the nature of the former: the general rules of international law, by virtue of Art 25 of the Basic Law, are an integral part of federal legislation. In other words, the general principles of law, as well as of custom, are incorporated into the internal legislation by the Constitution itself, and are objectively part and parcel of the German legal order (*objektive Rechtsordnung*). If and when they are invoked in court, they will be directly applicable. Treaties (*Staatsverträge*) with respect to matters of federal legislation are submitted by the Federal Government, after signature, to the Lower House of the Federal Parliament (*Bundestag*) and then to the Higher House (*Bundesrat*) for approval. The approval of the *Bundestag* is required in any case, while the approval of the *Bundesrat* is only required when the treaty impinges on matters on which the Federation is not able to legislate without its consent. After approval by the legislative bodies, the Federal President may ratify the treaty, such ratification being valid only after having been counter-signed by the Chancellor or the Federal Minister in charge. On the other hand, administrative agreements (*Verwaltungsabkommen*) are transposed in the internal legal order in accordance with the rules which control the federal administration and which establish a distinction between agreements with the Federal Government and agreements with the Federal Departments: the former obligate after signature by the Federal Government while the latter after having been signed by the relevant federal department and notification to the other party.

In **Greece**, while the text of art. 28 par. 1 of the Constitution leads to the assumption that the ratification by a formal law is a mandatory requirement to integrate an international convention into the internal legal order, art. 36 par. 2 states that the ratification through a formal law is not required for the implementation of an international convention by the internal legislation unless such convention applies to matters listed in that same article. The most appropriate interpretation is that any convention not related to one of the matters listed in that paragraph is applicable in the internal legal order without any need for formal ratification by a specific law.

In **Hungary**, the most important international treaties are ratified by a decree of the Parliament after having been signed, and then promulgated by a law. Agreements concluded between governments are approved and promulgated by the government by decree.

In **Italy**, the President of the Republic ratifies the most important international treaties, after approval of the Houses of Parliament whenever the treaty is of a political nature, stipulates an arbitration or legal undertaking, implies a modification of the territory or a financial burden, or if they modify legislation in force.

In **Luxembourg**, to be internally valid, international treaties must have international existence at the time of their implementation, have been legally approved by the legislative bodies, by a law of approval, and published in the official gazette. The provisions of formally approved treaties will have to be immediately implemented in the internal order (i.e. self-executing), and any infringement will lead to the annulment of the contrary administrative action.

In the **Netherlands**, according to art. 91 of the Constitution, treaties may neither become binding, nor be abrogated without prior formal or tacit approval by the Assembly. Treaties that constitute a departure from constitutional clauses must be formally approved by at least 2/3 of voting members of both Houses of the Assembly. Some exceptions to the need for approval are known, such as when the new treaty merely purports to implement an already approved treaty, or when the new treaty amends an annex of an executive nature. Once the approval has been secured, the State may proceed with the ratification, and deposit the ratification instruments.

In **Panama**, international treaties and agreements, once negotiated by the executive, have to be submitted to the legislative authorities (National Assembly), for approval. When this has been secured, they become law of the Republic, and must be publicised in the official gazette. At a later stage, they have to be accompanied by a ratification process carried out by the executive authority which, in this manner, shows the international community that it accepts to subject to the treaty approved by the National Assembly.

In **Portugal**, the State becomes bound by the international law through ratification of the treaties and approval of the other agreements. It has to be stressed that the approval procedure required by the Constitution is more complex than the signature foreseen in the Vienna convention inasmuch as in order to give effect to the relevant article 24, n° 4, Portugal has to resort to the notification to parties involved in the negotiations, as foreseen under art. 47 of the Vienna Convention.

In **Sweden**, the government may conclude an international agreement/treaty that commits the State, and the consent of the Parliament is only required whenever the agreement demands legislative measures which fall into its sphere of competence. There are no specific rules with respect to the mode of integration of the international law. The administrative judge does not exercise any type of supervision with respect to the lawful incorporation of the international law.

In **Switzerland**, monism is in force, with the supremacy of international law. The Federal Tribunal has recognised since the 19th century that international public law is an integral part of the internal legal order without a specific empowering act being required (general clause of full reception).

In **Thailand**, the king exercises the right to conclude treaties through the Council of Ministers and the several government departments, although the conclusion of some treaties is subjected to parliamentary approval by virtue of art. 224 of the Constitution.

The Constitution of **Tunisia** foresees two distinct processes for the incorporation of treaties into the internal order. One is general, the other, specific to treaties concluded in the interests of the Major Arab Maghreb. In any case, regarding the preparation of treaties, Tunisian practice is conform to that applied by the vast majority of States and requires the four traditional phases (negotiation, signature, ratification and publication). Regarding ratification, there are differences between various positions of doctrine. However, in the face of art. 33 of the Constitution, it is considered that the ratification of treaties is the sole responsibility of the legislative authorities. In fact, not all international agreements require ratification. Tunisia applies a particular procedure with respect to ratification, instituted by art. 2 of the Constitution, which reads: " The Tunisian Republic is an integral part of the Major Arab Maghreb, for the unity of which it has to consider the common interest. Treaties concluded in this perspective, the nature of which entails any amount of modification of the present Constitution, will be submitted to a referendum by the President of the Republic after having been approved by the Chamber of Deputies". The importance of this mechanism is such that it requires agreement between the Chamber, the President of the Republic and the people. The competence, regarding ratification, is neither of the President, nor of the Chamber of Deputies, as its vote is merely a condition to the approval by the Tunisian population of the agreement (this last decision being the only relevant one). We are confronted with a very special system, basically equivalent to a ratification by the people.

- **Publication**

  In most countries, the law that conveys a treaty into the internal order, as well as the text itself of the agreement are published in the official gazette, together with relevant reservations and interpretative statements, additional amendments and claims.

  As a rule, such publication conditions the internal validity of the convention which, however, takes effect from its entry into force on the international level which, in some countries (including Portugal), is subject to an announcement similarly published in the official gazette.

  In fact, the possibility of jurisdictional control of the lawfulness of the publication, either does not exist, or is extremely limited. For instance, in France, neither the contents of the convention, nor the lawfulness of the ratification procedure, can be appealed against, before an administrative jurisdiction, which could only censor formal flaws of the decree regarding

publication (competence of the author, counter-signature rules, etc.) and the accuracy of the text published, with respect to the original treaty.

Entry into force and continued enforcement (clause *rebus sic stantibus* and clause of reciprocity)

As a rule, treaties enter into force in the internal order after they have been ratified and publicised, and in any case, never before their entry into force at the international level. Sometimes it has been admitted, nevertheless, that the national legislator provide that a treaty may be implemented as national law even before its entry into force at the international level. This happened in Germany with respect to the Geneva Convention regarding refugees, of 1949.

Treaties that do not foresee time limits to their implementation, or which stipulate an extinguishment by unilateral decision are to be considered permanent. An alteration of circumstances enables the party against which it occurs to suspend or denounce the treaty.

Also as a rule, the control of the respect, by the other party, of the reciprocity clause (legislative or real), as embodied in an international convention, is not carried out informally by the administrative tribunals. It pertains to the interested party to invoke before them the appropriate means, and to secure all the required proofs, while the tribunals retain the right, at all times, to require from the relevant officials of the Ministry of Foreign Affairs information as to the implementation of the conventions by the other signatory parties.

In **France**, the faculty to suspend or denounce a treaty or agreement is an act of government, the legality of which, as such, eludes the control of the administrative judge. He does not exercise control over its basis or the application of the rule *rebus sic stantibus*. He may verify if the decision exists and that it may be objected to by virtue of its notification.

In **Portugal**, it may be considered that the Constitution (art. 8, n° 2) admits international release from the norms of a convention due to alteration of circumstances.

2.2 ***Legal strength of the rules of international law incorporated in the internal order***

- **Rules of international general law and constitutional law**

In the majority of countries, the rules of general international law do not prevail over constitutional prescriptions.

In **Luxembourg**, however, international law is prevailing, at a par with constitutional law and no case of conflict between both is known. In **Switzerland**, a recent award of the Federal Tribunal states that international law prevails over internal legislation, including constitutional law, which entails invalidity of any internal rule contrary to general international law.

In **Portugal,** it is considered that the rules of international general law which structure the international legal order, i.e., the *jus cogens*, and the norms of international law applicable to the protection of human rights prevail over the Constitution. All others are at a par with statutory national law.

- **Rules in international law of treaties and constitutional law**

Here again, the general principle is that of primacy of constitutional law over the rules of the international law of treaties although cases have been quoted in which countries had to alter their Constitution when an international treaty contained provisions that violated it (Panama).

Finland constitutes a particular case, where conflicts between the Constitution and the rules of international law are resolved from the point in time when the international rule has been integrated in the internal order: the position of international treaties in the hierarchy of the norms of national legislation depends on the hierarchic position of the corresponding clause of amendment. Such parts of treaties as are conflicting with the Constitution are adopted through an act of Parliament emanated in accordance with the procedure required for constitutional norms.

In **France**, any treaty incorporating provisions that are contrary to the Constitution cannot be ratified before the latter has been amended. The constitutionality of an international undertaking may be impugned before the Constitutional Council and if the Council considers that the treaty is in opposition with the Constitution, its ratification is prohibited, unless an amendment of the Constitution, or a reservation in the treaty overrules the contradiction. The Constitution does not, however, foresee any mechanism for the control of the constitutionality of a treaty that has already been ratified. The administrative judge has never been confronted with a proper contradiction between an international treaty and a rule of a constitutional nature. It has, nonetheless, been decided that international treaties should, as far as possible, be interpreted in such a way as to conform to the Constitution. It appears, in the final analysis, that the administrative judge can not repel the application of a ratified treaty.

- **Rules of the law of international organisations and constitutional law**

In Portugal, with regard to the rules emanated by international organisations which are not norms of international general law, only such measures as are adopted by the Security Council of the United Nations in terms of Chapter VII of the Charter and such as are enunciated by an institution set up under a treaty that confers them immediate legal strength in the internal order produce internal effects as legal norms. . Such norms prevail over ordinary legislation and any conflict with constitutional law is either avoided by appropriate mechanisms with respect to the derived law of bodies of the international organisations such as the EEC, or have to be resolved by the necessary prevalence inasmuch as special measures of the Security Council are concerned.

Rules of international law and written or unwritten rules of normal legislation

The policy that apparently prevails confers appropriately ratified treaties and agreements authority beyond that of normal legislation.

With respect to norms in unwritten international law, it would appear that the general inclination is that they cannot prevail over internal law.

Second Theme

Definition and interpretation of international rules by the judge

1. Definition of the rule of international law

1.1 *Knowledge, by the judge, of rules not integrated in internal legislation*

- ***International custom and practice, law of nations***

In countries that apply a monistic system, the international rules, including the unwritten ones, may be applied as such in the internal legislation and there is not, therefore, any reason of principle for considering rules that are not incorporated in internal legislation.
Where dualistic systems apply, the judge is expected to consider rules of international law that are binding, yet not incorporated, whenever internal legislation connected to similar matters is applied.

1.2 *Qualification of a text as an international treaty*

In some countries, such as **Switzerland**, it is understood that an internal jurisdiction has no competence to classify arbitrarily international prescriptions as being or not being treaties as such classification follows from the categories of international law, with particular stress on the Vienna Convention of 1969 with regard to international rules regarding conventions.

In other states, that follow a dualistic system, the administrative judge has no need to define a given text as an international treaty, considering that such treaties, when incorporated in the internal legislation, will be implemented as national legislation.

2. Interpretation of the norms of international law

2.1 *The case of clear acts*

As a rule, country reports refer that, with respect to interpretation, the judge applies the rules spelled out in art. 31-33 of the Vienna Convention of 1969 on the Law of Treaties (good faith, giving each word its literal meaning taking into consideration its context and the object and purpose of the treaty).

In **France**, before an award in 1990, the Council of State did not deem itself competent to interpret an international treaty in which France was a party. Whenever a dispute was dependent on the interpretation of an international text, a question of principle was submitted to the Minister of Foreign Affairs, and the Council of State did not express an opinion (suspended its deliberations) until such time as the reply of the Minister was known. This reply could not be challenged by the judge. In all the cases in which the interpretation of the treaty did not raise any doubts, the Council of State deemed that, as the text was clear, there was no requirement to present a question of principle to the Minister of Foreign Affairs. Nonetheless, after 1990, the Council of State has been considering that it falls within the ambit of competence of the administrative judge to interpret international texts and agreements applicable to the concrete case. Whenever it comes across serious difficulties of interpretation, it may request the Minister of Foreign Affairs to provide comments about the meaning or scope of the treaty. It is, however, under no obligation to follow the Minister's interpretation. The Council of State endeavours, in its interpretation, to decrease the risks of contradictions between the treaty and the Constitution.

In **Luxembourg**, in case of a discrepancy with respect to the applicability of the doctrine of the clear act, the practice is to consult with the Government as to the interpretation of international treaties. The same applies in case of conflicting norms of international law.

In **Canada**, as the Canadian judge interprets international law in treaties as a matter of law and in the light of the law, the rules of general interpretation are applicable, although with some departures. Any law without international precedents is interpreted merely on the face of the text, of case law and of the awards in common law. With respect to a text of international origin, the judge appeals to the text of the treaty and seeks his inspiration in it, to give a law a meaning or an effect which it would otherwise be impossible to state as being the intention of the legislator. The reference to the international text in the interpretation of the law contributes to the full implementation of the treaty. The quest for the intention of the legislator may not be abstracted from the context of the adoption of the legislative clause. It follows that the text of the law, despite its being perfectly clear and devoid of explicit ambiguity, may encompass some ambiguity which derives from factors that are extrinsic to the law being interpreted – namely the convention to be adopted. It is therefore reasonable to refer to the international text from the outset of the interpretation.

2.2. *The case of conflict between norms of international law*

Some very few cases of conflicting norms in international law have been reported.

As a rule, the discrepancy is considered equivalent to a departure between norms of internal law, and such conflicts are resolved according to the usual principles (*lex superior*, *lex posterior*, hierarchy of values, of lesser damage, of caution and of relative reconciliation of interests).in cases when it is not possible to determine an interpretation that will harmonise the norms.

In **Switzerland**, in case of conflict between rules regarding the international law of agreements and a domestic norm regarding the protection of human rights, the latter prevails, according to the case law of the Federal Tribunal. Consequently, articles 3,5 and 6 of the European Convention of Human Rights and art. 3 of Chapter II of the European Convention on Extradition are considered *jus cogens* and therefore prevent Switzerland from extraditing a person to a country which does not observe such principles, even when such extradition is stipulated in a treaty.

Third theme

Acknowledgement and effects of rules of international law

1. Ability for a claimant to invoke a rule of international law

1.1. *Petition to the rules of international law with respect to conventions*

Here too, one has to discuss the adoption of a monistic or dualistic system.

According to the former, as is the case in **Germany**, or in **Greece**, the claimant may invoke an international treaty if this has been integrated into the German legal order, if this is directly applicable (*unmittelbar anwendbar*) and confers subjective rights to the claimant, it being deemed that a prescription in a treaty is directly applicable whenever no complementary legislation is required – in other words, when legal effects may be derived from the treaty in individual cases by the administrative authorities and tribunals.

On the other hand, in countries such as **Canada** or **Finland**, where international law is introduced in the internal order through legislative action, parties to a dispute on internal law may not directly claim an infringement of the rules of international law in respect of conventions. What they can do is invoke a norm of national law in force on the basis of an international treaty.

1.2 *Call upon the general principles of law*

As in the previous item, if one takes the paradigmatic cases of **Germany** and **Canada**, it may be stated that:

- in **Germany**, the claimant may call upon the general rules of international law – international common law and general principles of international law – in legal proceedings whenever these rules are part and parcel of the German legal order, which happens quite frequently in criminal suits and extradition cases, but only exceptionally before administrative tribunals.

- in **Canada**, as the major part of the general principles of law pertaining to the systems of civil right and common law (good faith, equity, abuse of authority, acquired rights, undue enrichment, standard of fairness, authority of *res judicata)* are already an integral part of the Canadian

national law, whether by common law or by statutory law in civil matters, they may be called upon as such.

- In **France**, whenever a prescription of international common law has been identified, the judge has to ponder about the direct effect of such norm, i.e. whether it creates rights and obligations for the individual and whether it is sufficiently precise and unconditional to be applied in individual cases, or whether it merely refers to states.

- In **Portugal**, individuals before an administrative tribunal may call upon general principles of international law which, being acknowledged as to their existence and content, will be applied in the issue challenged like any other rule of positive law. Nevertheless, the general principles of international law, unless they integrate *jus cogens*, tend to be of a complementary nature, which entails that they do not have any value if the existence of a general custom, or even of a treaty that regulates the matter has been determined. With this exception, their hierarchic value is the same as that of general or common international law.

2. Competence of the judge to deal with infringements of a rule of international law

2.1 *Possibility for the judge to consider, ex officio, an infringement of a rule in international law*

The possibility for a judge to consider, ex officio, an infringement of a rule in international law depends simultaneously on the system according to which the international law is being integrated and on the specific rules for the analysis of vices existing in the administrative act challenged in the proceedings. Actually, in countries that operate a distinction between vices that entail nullity and vices that generate the mere possibility to nullify the challenged act, the judge is commonly granted competence to scrutinise the former *ex officio* and, consequently, if the vice has been generated by the infringement of a rule of international law, he may consider this infringement. Contrariwise, if the vice that would be generated by the infringement by the administrative act of a rule in international law merely generates the possibility to annul the act, and if the claimant has not argued this vice, the judge may not appraise it nor, consequently, consider *ex oficio* the infringement of the rule of international law.

2.2 *Direct infringement of a rule of international law either by an administrative act or by a norm in national law on the basis of which the administrative act was produced*

For the purpose of comparison, again the case of **Germany** and **Canada** come up as being particularly significant:

-In **Germany,** if an *administrative act* violates international law, the administrative tribunal has to annul it. If the infringement of the international legislation has been particularly serious and obvious, the act will be declared null and void. If a norm of *domestic legislation* on the basis of which an administrative act was carried out violates international law, the administrative tribunal may annul the administrative act – assuming that it is consonant with the internal legislation - only if the norm of the international law prevails over national legislation, which depends, basically on its nature. This entails that *(i)* a general rule of international law takes precedence over the internal law and, in case of doubts as to the integration of the alleged general rule of international law in the internal legislation or as to whether it establishes directly or not rights and obligations for the individual in cause, the administrative tribunal must obtain in the first instance an award by the Federal Constitutional Tribunal as to this question.; *(ii)* if a norm in internal law violates an international treaty and if the discrepancy cannot be resolved in favour of the international prescription by virtue of mere interpretation, the tribunal has to implement the internal law without any possibility of declaring the nullity of the internal law on the basis of which the administrative act has been taken. This is because only the Constitutional Tribunal may declare the nullity of laws, and only in cases when they are unconstitutional, not for a violation of an international treaty, in which hypothesis the discrepancy can only be resolved by the legislator. On the other hand, if a tribunal, in the proceedings of a case, considers that the prescriptions of a treaty to be applied in the case are unconstitutional, it must suspend proceedings and secure an award from the Constitutional Tribunal with respect to the constitutionality of the law that incorporated the treaty in the national legislation.

In **Canada**, in view of the specific way in which the international law derived from agreements is integrated ("transformation system") and of the monistic doctrine on the basis of which the domestic legislation adopted for customary international law prevails, the direct violation of a rule of international law may not be claimed before a Canadian judge.

The case of **France** can also be cited, where an administrative act that is directly contrary to a treaty calls for annulment for abuse of power (*excès de pouvoir*) when it occurs within the scope of a treaty. In cases of regulatory acts, they may be declared illegal within the framework of an appeal lodged against an individual administrative enforcement act. It is also possible, within the ambit of an appeal against an administrative act, to challenge the compatibility of the law, on the basis of which it has been taken, with an international treaty. And if the judge ascertains that the law is contrary to the treaty, he will conclude that, consequently, the act is devoid of a legal basis.

In **Portugal**, whenever an administrative act violates directly a rule in international law, the relevant sanction is the possibility of annulment, inasmuch as any infringement upon a legal standard gives rise to the vice of violation of the law. If the administrative act implemented an internal law that is contrary to the international norm applicable, the administrative tribunal states that the internal standard is contrary to the norm of international law, which it considers of prevalent hierarchy and, therefore, the act itself is also annulled, for breach of law. However, the judge has no competence to express an opinion as to the validity of the international norm – even at the request of the parties – either as an immediate or as a subsidiary matter, inasmuch as the international norm, even with respect to conventions, internally in force, pertains to a legal order that is beyond the validity control of national tribunals.

2.3 *Degree of invalidity or inefficiency of a standard of internal legislation that infringes upon a rule of international law*

Whereas in systems such as that of **Germany**, if an internal law infringes upon a rule of international legislation – whether a general rule or a treaty – and where the international norm prevails over the internal order, it can not be applied and therefore becomes ineffective without, however, being null and void, in the **Canadian** system, once the international law has been transformed into an internal law, the matter becomes one of conflicting internal laws, that may be resolved according to the principles of prevalence of the later law, and that of the special law.

3. Consequences with respect to the responsibility for the infringement of a rule of international law by a norm of the national legislation

3.1 *Responsibility for faulty action*

In most countries, the possibility of establishing a fault of the State (and in particular before the administrative jurisdictions) with respect to legislative actions gives rise to many doubts..

In **Germany**, for instance, if the legislator adopts a national law that violates a standard of international law, he will normally not be called to responsibility for such action before the German tribunals. The responsibility of the State and of other public bodies is in principle dependent on the fact that one of its civil servants has carried out negligently his duties with respect to a third party in the execution of public duties. Now, as the legislator acts in the interests of the general public and not in the interests of specific individuals, the conditions for claiming the responsibility of the State are not fulfilled, unless the

legislator should legislate in a concrete case, which is hardly likely, as this would be unconstitutional. Therefore, should an individual be affected in his rights by a law that infringes upon international law, he will not normally be entitled to file an action against the legislator for prejudice caused, but he may lodge an appeal in an administrative tribunal, which would result in the annulment of the administrative act based on the law whenever the conflict between the two sources of law is resolved in favour of the relevant international rule of law.

In **Greece**, on the other hand, the possible basis for an action to claim damages aiming at atoning damage caused to an individual by the violation of a rule of international law by a rule of internal origin may be found in art 105 of Law 2783/1941, regarding the entry into force of the (Civil) Code of Law, which establishes the principle of the responsibility of the State for all illegal actions or omissions of its organs "in carrying out the public authority with which they have been entrusted". If it is quite certain that the case law has been traditionally reticent at recognising the responsibility of the State for actions or omissions of its legislative bodies on the basis of that prescription, a slow but certain change is emerging in view of the fact that this provision has already been acknowledged as a basis for actions of redress aiming at restoring the damage sustained by individuals either through internal provisions that are contrasting with Community law, or through the transposition into the internal legislation of a Community directive.

In **Italy**, judges are not empowered to declare the State responsible because of the issuance of a law that is contrary to the international law and therefore, no-one will be entitled to receive from the tribunals a condemnation of the State to pay compensation for damages produced by that law, even though it has been annulled by the Constitutional Tribunal for being contrary to an international rule adopted as a constitutional rule and even though it may be certain that the Parliament has adopted the law fully cognisant of the fact that it was contrary to international law.

In **Portugal**, the adoption, by virtue of a convention, of a given material regulation impinging in the individual, as well as the failure to adopt internal rules deriving from an international obligation, and thus causing damage to specific individuals, does not entail administrative responsibility. Such responsibility is political or legislative and in entailing the responsibility of the State (and the determination of the conditions of civil responsibility would be required, while in practice, difficult to figure out) pertains to ordinary tribunals. Only a violation of rules of international law, that are in force and applicable, by the bodies and agents of the State, in their duties of public management, when they cause prejudice, may give rise to claims for remedy – for which the administrative tribunals are competent – and, in such case, in determining such responsibility, the same occurs as in the parallel case in

which a private person wants to establish the responsibility on the grounds of violation of national legal rules.

3.2 *Responsibility for risk*

In **France**, in an award of 1966, it was admitted that the responsibility of the State may be claimed, on the basis of the equality between citizens before public authorities, to ensure compensation for damages originating in conventions concluded between France and other countries and regularly incorporated in the internal legal order inasmuch as neither the convention itself, nor the law which had eventually authorised its ratification may be deemed to have excluded any compensation, and, on the other hand, the prejudice for which compensation is claimed is severe enough and of an exceptional nature.

In **Portugal**, the civil responsibility is, in principle, based on fault. Nevertheless, tribunals may, in some cases, be called on to find the responsibility of the State and other public authorities, independently from any fault, in the following cases: (*i*) when they provoke special and abnormal damage because of the operation of particularly dangerous services, or for things and activities of the same nature (with the exception of acts of God, *force majeure* or fault of the damaged party); (*ii*) when they entail, in the interests of the general public, through lawful action, special and abnormal prejudice; and (*iii*) when, in case of need or for stringent reasons of public interest, they have sacrificed especially things or rights of a private person.

In **Tunisia**, Law N° 39 of 3 June 1996, which explicitly admitted the notion of responsibility for risk, limited, however, its implementation to prejudice caused by public works and dangerous activities of the administration. The responsibility of the Government entailed by its legislative action therefore can only be declared on the basis of fault.

It was therefore concluded that the possibility to claim the responsibility of the State, whether or not based on fault, on grounds that its lawgiving actions (or omissions) infringe upon rules of international law, is either not legally admissible or, whenever this is not the case, it does not pertain to the administrative tribunals to appreciate this reponsibility. In any event, such a claim can hardly be expected to be very successful.