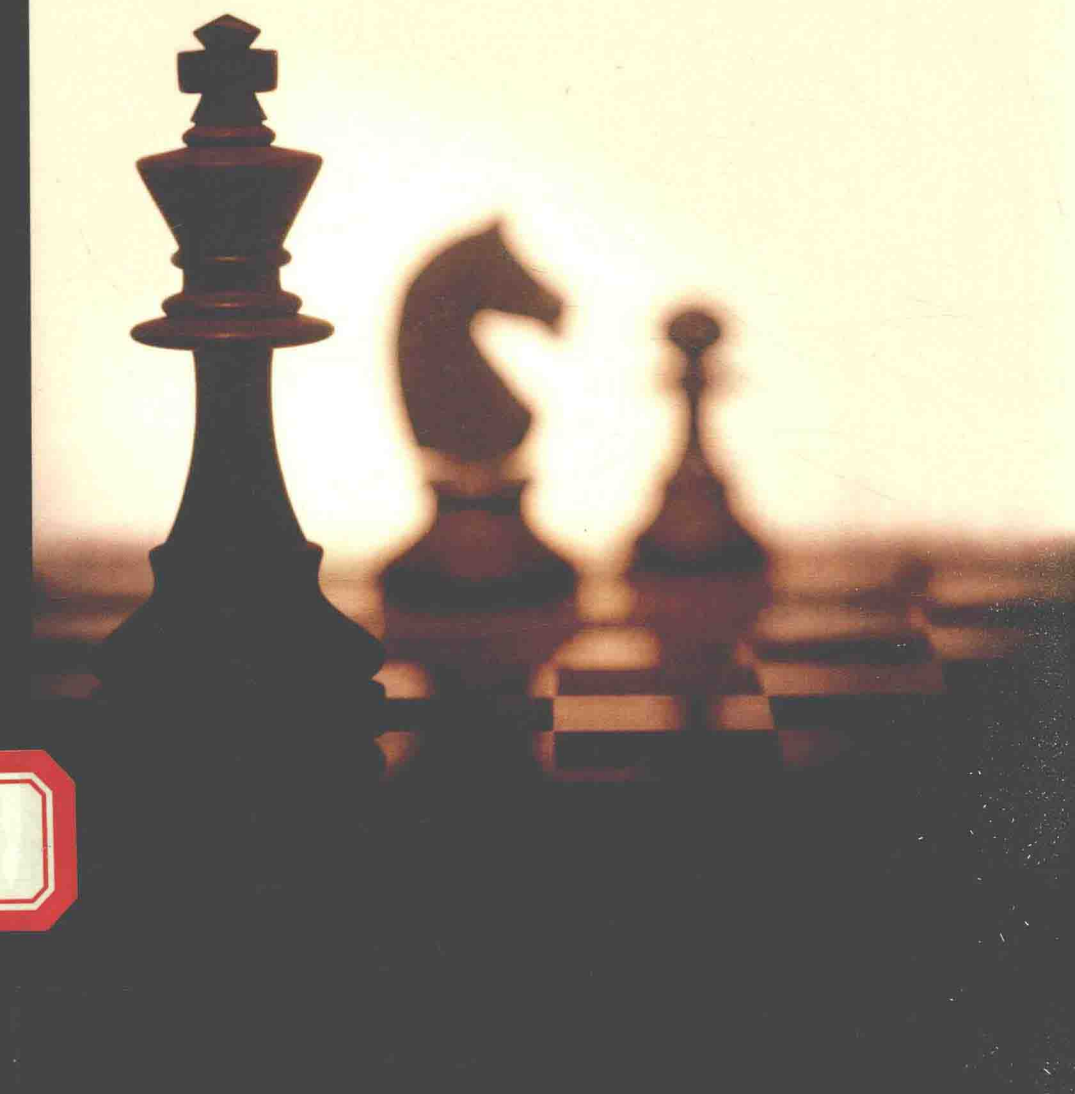


David Thór Björgvinsson



# The Intersection of International Law and Domestic Law

A Theoretical and Practical Analysis



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# Preface

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One of the most important developments in Nordic law and law enforcement in the last part of the twentieth and early twenty-first centuries is increased internationalisation. This has been due to the growing participation of these countries in international cooperation of all kinds. This has led to an added number of international treaties in many different fields being signed and ratified, as well as to membership of international organisations, which in some cases are empowered to take binding decisions. In addition, many of these treaties aim at having a direct effect on the legal status of individuals and legal persons (economic operators). This development has influenced law in the Nordic countries as well as traditional academic views regarding international law as a source of law and its application in the domestic legal system.

The Nordic states covered in this book are among those states which, in principle, adhere to the doctrine of dualism when defining the relationship between international law and domestic law. Traditionally, according to case law and academic theory, it means: (a) international law and domestic law are two distinct legal orders; (b) international law will not be directly applicable on the domestic level unless the legislature take specific measures to implement or incorporate it as law; (c) individuals and legal persons cannot claim rights on the basis of a rule of international law *vis-à-vis* each other or *vis-à-vis* the state until it has been incorporated; and (d) in case of conflict between domestic law and international law, the former prevails.

This book offers an examination and analysis of this development. Initially it discusses the general theories of monism and dualism and their present-day relevance. Then it discusses how these theories transpire in practice. First, it examines rules relating to treaty-making and ratification of treaties. Then it discusses the doctrine of automatic incorporation and the doctrine of transformation. After this it discusses direct effect of international norms in the domestic system. This is followed by a discussion of the principle of consistent interpretation and a short chapter on remedies and reparations. Finally there is a chapter on the application of incorporated treaties, focusing mainly on the European Convention on Human Rights.

It is argued that both in incorporation and on behalf of the legislature and in its application on behalf of the judiciary, the restraints as to the impact of international law traditionally inherent in the dualistic approach have been relaxed considerably. As a consequence, a mere reference to dualism when describing the relationship between international law and domestic law falls short of capturing the actual and complex practical reality. It is argued that the traditional and persistent reference to dualism in preparatory works, judgments and academic literature in these countries used to describe the relationship between international law and domestic law is insufficient. Therefore reference to dualism in the traditional sense, as illustrated above, must be replaced by a much more thorough and detailed analysis of the real impact international law has on the domestic legislation and judicial and executive practice in the countries examined.

The material in this book relates mostly to six countries, namely: France, Germany, the United Kingdom, Denmark, Norway and Iceland. Of the Nordic countries, the material relating to Iceland is the most detailed. This material is based on the author's thorough study of the Icelandic situation presented at the University of Strasbourg in 2013 as part of obtaining the degree of Docteur de droit international: *Theoretical and Practical Intersection of International Law and Domestic Law*. This book is an extract from this more thorough and detailed study, with special emphasis on the Icelandic situation. It is believed that the analysis offered may be of general interest for the study concerning the relationship between international and domestic law. In this study many judgments are cited and analysed in detail which will not be repeated in this book. For those interested in a more detailed account of the Icelandic case law, a reference is made thereto.

I would like to thank Professor Dr Florence Benoît-Röhmer, University of Strasbourg, and Professor Dr Guðmundur Alfredsson, University of Akureyri, for their support and advice. I moreover would like to extend my thanks to Suzanne Grand-Clemant at the European Court of Human Rights in Strasbourg, Svala Ísfeld Ólafsdóttir, associate professor at Reykjavik University, and Dr Terry G. Lacy for their contribution.

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iCourts, University of Copenhagen, 30 March 2015  
*Daði Þór Björgvinsson*

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# 1. Introduction

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## 1.1 THE AIM OF THE BOOK

The development of international law in the twentieth century has four main characteristics.<sup>1</sup> *First*, the number of international treaties has increased and new treaties are constantly being entered into. *Second*, with the expansion of the role of the state and expansion of interdependent relations between countries, there has been an increase in the variety of the subject matter of treaties and agreements. In line with this development, international agreements are no longer limited to topics of peace and security but have expanded to such areas as trade, the economy, taxation, the environment, education, culture and human rights. *Third*, there has been a corresponding increase in the variety of forms, functions and techniques of treaties. *Fourth*, although treaty-making is primarily conducted between states, modern development also reflects an increased tendency to create rights and obligations on the basis of treaties, not only for states and international organisations, but also for private and legal persons, including economic operators. Numerous international human rights treaties in the twentieth century bear witness to this development. They reflect the fact that protection of human rights is not seen exclusively as an internal matter for states but has become a concern for the international community.<sup>2</sup> In the field of human rights there is a constant process of internationalisation where more and more rules, principles and standards are incorporated in international law instruments

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<sup>1</sup> See for example: COUNCIL OF EUROPE (CONSEIL DE L'EUROPE) (Ed.), *Treaty Making (Conclusion des Traités)* (2001), pp. 1–2.

<sup>2</sup> See for example ALFREDSSON, Gudmundur and MÖLLER, Jakob, 'Mannréttindayfirlýsing Sameinuðu þjóðanna' (United Nations Declaration on Human Rights) (2009), p. 32 and REHMAN, Javaid, *International Human Rights Law* (2003) pp. 1–3.



and become universally binding.<sup>3</sup> However, although international protection of human rights is still far from being as effective as protection on the domestic level, it has been asserted that the gap is narrowing.<sup>4</sup>

In addition, there are an increased number of international organisations and institutions which have been established, in particular during the second part of the twentieth century. This has been accompanied by their growing importance in a variety of fields. These organisations play an important role in adopting new rules as well as in supervising their application and enforcement, and thus play a pivotal role in ever closer integration. These organisations also have an important function in defining the problems that need to be tackled and to set forth proposals for rules and regulations to deal with them, including by adopting binding international legal instruments.<sup>5</sup> As Noëlle Lenoir has stated, 'The legal world is now an open world.'<sup>6</sup>

From this development it follows inevitably that legal issues relating to the relationship between national law and international law have become more topical, both in theory and practice.<sup>7</sup> Accordingly national courts in many countries have increasingly taken notice of and refer to international treaties and agreements when applying and enforcing law on the national level. Thus, to use the words of Nollkaemper, the national courts have become an 'important force in the protection of the international rule of law',<sup>8</sup> not least in the field of human rights. The aim of this book is to address, from the perspective of the classical theories of monism and dualism, some issues relating to the intersection between international law and domestic law.

Traditionally monism is the view that national and international legal systems form a unity, and that international law is automatically a part of the national legal system. The standard description of the theory of dualism includes the following elements: (a) international law and

<sup>3</sup> GARLICKI, Lech, 'Cooperation of Courts. The Role of Supranational Jurisdiction in Europe' (2008), p. 510.

<sup>4</sup> ALFREDSSON, Gudmundur and MÖLLER, Jakob, (2009), p. 24.

<sup>5</sup> ALVAREZ, José E, *International Organizations as Law-makers* (2005), pp. ix–x.

<sup>6</sup> LENOIR, Noëlle, 'The Response of the French Constitutional Court to the Growing Importance of International Law' (2000), p. 163.

<sup>7</sup> A major source of information on these topics is the *Oxford Reports on International Law (International Law in Domestic Courts)*, which brings together decisions on public international law from international law courts, domestic courts, and ad hoc tribunals. See <http://www.oxfordlawreports.com/>.

<sup>8</sup> NOLLKAEMPER, André, *National Courts and the International Rule of Law* (2011), p. 1.

domestic law are two separate spheres of law (the philosophical element); (b) international law will not gain the force of domestic law unless it is specifically enacted (the principle of no-direct applicability); (c) individuals cannot base rights on international law unless it has been made a part of the domestic order by the legislature (principle of non-direct effect and principle of transformation); and (d) where there is conflict between domestic law and international law, domestic law has priority and international law yields (principle of primacy of national law). Then it is added, although not in itself a part of the theory, that it is a recognised rule of interpretation that domestic law shall be interpreted in light of international law that is binding for the state. This is sometimes referred to as the principle of treaty-friendly interpretation or consistent interpretation.

In the book it is, among other things, argued that, although the principle of dualism is still useful to describe the purely formal status of unincorporated international law in the national legal system of the dualist countries covered, the substantive convergence or fusion of international law and national law in reality far exceeds what may be expected under the dualistic approach.

As regards the organisation of the book, it first discusses the general theories of monism and dualism and their present-day relevance (Part I). Then it discusses how these theories transpire in practice. In that regard the situation in mainly six countries is addressed, that is, France, Germany, the United Kingdom and the Nordic countries: Denmark, Norway and Iceland. France is usually labelled as monist and Germany as well (with some reservations, as explained later). All the others are usually labelled as dualist.

The substantive content of Part II is further organised in the following way: first, it examines rules relating to treaty-making and ratification of treaties in the above-mentioned countries. Then it discusses the doctrine of automatic incorporation and the doctrine of transformation, the former normally seen as the offspring of the monist approach and the latter of dualism. After this, it discusses direct effect of international norms in the domestic system. This is followed by a discussion of the principle of consistent interpretation and a short chapter on remedies and reparations. Finally, there is a chapter on the application of implemented treaties, focusing mainly on the European Convention on Human Rights. The material resorted to clearly shows a significant normative influence of international law in the domestic system driven forward, of course, by the principle of *pacta sunt servanda* and the so-called *Alabama principle*, under which states must comply with their international obligations and should organise their national legal order in such a manner as to allow for

the effective performance of international obligations. It shows that, at least in some of the countries covered, national courts find themselves in a situation which Nollkaemper refers to as a psychological double-bind, where one can only comply with one norm by violating another, that is to say, in the context of this study, between the dualist approach and the doctrine of transformation on the one hand and the real and irresistible force of international law on the other.<sup>9</sup>

Some reservations are in order already at this stage. The relationship between domestic law and international law has different facets. It should be stressed that this study is focused only on topics relating to the status of international law within the domestic system. It therefore leaves out issues relating to the status and relevance of domestic law and domestic laws as ‘facts’ or relevant material before international tribunals. Though this aspect of the relationship between domestic law and international law has caught some attention by scholars,<sup>10</sup> it will not be covered in this study.

Another reservation – and for the purpose of this book – means that it is useful to reiterate the distinction between what is termed above horizontal and vertical international law provisions.<sup>11</sup> As regards horizontal provisions of international law, domestic courts are rarely called upon to apply them. Such provisions are therefore mostly automatically excluded from this study to the extent it examines court practice. However, vertical provisions are frequently invoked before national courts and will thus automatically become the main focus of the book.

The third reservation relates to EU and EEA law and domestic law. One of the most important aspects of the relationship between national law and international law in Europe relates to the status of EU law in the national system. The most important limitation of this book is the fact that this aspect of the relationship has been left out and the focus set on other international law not following directly from the EU or EEA Agreement (the latter being relevant for Norway and Iceland). The main justification for this is that, to a great extent, separate principles apply to the relationship between EU and EEA law and national law which are set out in the relevant treaties, and which distinguishes them

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<sup>9</sup> NOLLKAEMPER, André, *National Courts and the International Rule of Law* (2011) op. cit., pp. 13–15.

<sup>10</sup> See for example: BROWNLIE, Ian, *Principles of Public International Law* (2008), pp. 36–8; JENKS, C. Wilfred, *The Prospects of International Adjudication* (1964), pp. 547–603.

<sup>11</sup> SLOSS, David, *Treaty Enforcement in Domestic Courts. A Comparative Analysis* (2009), p. 1.

from other international treaties. Therefore, the decision not to cover the EEA/EU-related issues does not as such diminish the importance of the subject matter of the book as regards the relationship between national law and other international law.<sup>12</sup>

## 1.2 TERMINOLOGY AND PRELIMINARY ISSUES

### 1.2.1 Terminology

*International law* refers to international law in general, that is, international customary law as well as treaty law. As regards treaty law, the phrase refers to express agreements under international law as well as international organisations. In the book a treaty may also be known as an international agreement, protocol, covenant, convention or exchange of letters, among other terms. Regardless of the terminology, all of these forms of agreement are, under international law, equally considered treaties and the main principles as regards their status (or lack thereof) in domestic law are the same.<sup>13</sup>

Works in English refer to *domestic law*, national law, municipal law, state law or internal law. The meaning of these different wordings is the same. All these different phrases pertain to the law that is valid (and usually rooted) internally within the state. Most commonly, it refers to the internal legal order regardless of the source of the relevant rule, whether it is statutory legislation, ministerial regulations, case law or others. For the purpose of this study it usually refers to statutory law and sometimes ministerial regulations.

The concepts of *monism* and *dualism* will be discussed in Part II. Related to this are different constitutional principles which have been developed on the basis of these theories, namely, in the context of monism, the *doctrine of incorporation*, and in the context of dualism, the *doctrine of transformation*. By referring to transformation, international law is transformed into national law and is in the strict theoretical sense no longer international law from the point of view of its application on

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<sup>12</sup> The author offers a thorough study of the relationship between EEA law and national law in his work *EES-réttur og landsréttur* (EEA law and national law) (2006).

<sup>13</sup> See a similar approach in NOLLKAEMPER, André, 'Netherlands' (2009), p. 326.

the national level.<sup>14</sup> However, incorporation means that international law is incorporated: it will continue to be international law, but function as a part of the national system.

What is relevant at this stage is that these words used in this theoretical context are references to a certain theoretical understanding of the difference in nature of international law on the one hand and domestic law on the other hand. The idea is that when under the classical dualist ideal international law is, by a decision of the legislature, made a part of the internal legal order, its nature is transformed and it becomes domestic law and is no longer international law. In contrast, under the monist ideal, international law is incorporated in internal law and continues to be international law as part of the internal legal system.<sup>15</sup> For the purpose of this book these concepts of incorporation and transformation, as described here, are of limited practical significance, although they are interesting from a theoretical point of view and despite the fact that they, to some extent, have dictated the dialogue on these issues in dualist countries, for example in Iceland, as will be shown later. See further Part II (9.4.1) on Article 2 of the European Convention on Human Rights (ECHR) Act No. 62/1994.

### 1.2.2 Incorporation

Of more practical significance is the terminology used to describe what will be termed here as incorporation of international law into the national order under the dualist model. This is an important concept in this book and needs clarification.

In texts in English, different words are used to describe the way in which international law is made a part of domestic law. The most common words are *incorporation* and *transformation*. But there are also others, such as conversion, transportation, enactment, implementation, adoption, adaption, adaptation, integration, importation.<sup>16</sup> However, the

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<sup>14</sup> On the basis of this, it has been contended that there cannot be any conflict between the international law norm and the national law since the act of incorporating or adopting the international law norm renders the international law norm a domestic norm. See for example CHARLESWORTH, Hilary and others, 'International Law and National Law: Fluid States' (2005), p. 1.

<sup>15</sup> See for comparison WALKER, Kristen, and MITCHELL, Andrew D., 'A Stronger Role for Customary International Law?' (2005), pp. 125 ff.

<sup>16</sup> See for example DETTER, Ingrid, *The International Legal Order* (1994), p. 170; SLOSS, David (2009), p. 18; ROTHWELL, Donald R. 'Australia' (2009), p. 159; CAMPBELL, Bill, 'The Implementation of Treaties in Australia' (1997),

exact definition of these words in the context of theoretical discussion on the relationship between national law and international law is difficult to detect.<sup>17</sup>

The most commonly used word in scholarly literature is ‘incorporation’. The problem is, however, that the word is used in different ways. In scholarly literature on English law ‘incorporation’ in the context of the relationship between international law and national law refers to *automatic* application in internal law under the monist doctrine without the legislature taking any further measures to incorporate a treaty as statutory law or others.<sup>18</sup> Other authors use the word in a wider sense as covering also the act of the legislature to implement a treaty, or other international obligation, into legal order by a way of statutory legislation, including under the dualist doctrine. Thus, incorporation in this sense signifies the conversion of a treaty into internal law by a legislative order providing that a certain treaty, which is annexed to the legislation, will have the force of law on the domestic level. This can be labelled as *incorporation by an act of the legislature* as opposed to *automatic incorporation*. It would seem that the UN Human Rights Committee for International Covenant on Civil and Political Rights in its General Comment No. 31 [80] uses the word incorporation in this sense when it states:

Article 2 [of the Covenant] allows a State Party to pursue this in accordance with its own domestic constitutional structure and accordingly does not require that the Covenant be directly applicable in the courts, by incorporation of the Covenant into national law.<sup>19]</sup> The Committee takes the view, however, that Covenant guarantees may receive enhanced protection in those States where the Covenant is automatically or through specific incorporation part of the domestic legal order. The Committee invites those States Parties in which the Covenant does not form part of the domestic legal order to consider incorporation of the Covenant to render it part of domestic law to facilitate full realization of Covenant rights as required by article 2.<sup>20]</sup>

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p. 145; NOLLKAEMPER, André, *National Courts and the International Rule of Law* (2011) op. cit., p. 7.

<sup>17</sup> DETTER, Ingrid, op. cit., pp. 170–71.

<sup>18</sup> DIXON, Martin, *Textbook on International Law* (1990), p. 41.

<sup>19</sup> This must be understood as a reference to automatic incorporation, meaning that the Covenant does not require that its provisions be automatically incorporated.

<sup>20</sup> International Covenant on Civil and Political Rights. General Comment No. 31 [80]. *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant Adopted on 29 March 2004* (2187th meeting). It should be added that Article 2, para. 2, requires that states parties take the necessary steps to give effect to the covenant rights in the domestic order. It follows that,

The use of the word transformation is also in a similar way characterised by lack of consistency in the scholarly literature. On the most theoretical and general level, and as a direct offspring of the dualist doctrine, it refers to all different steps and methods that the legislature or other authorities actually take to give effect to international obligations on the domestic level.<sup>21</sup> Thus, it refers to incorporation by statutory legislation as well as to methods of conversion of international obligations by rewriting and/or reformulating it and adopting it as part of the domestic order. Hence, it is quite common that the words incorporation and transformation are used at least partly synonymously, which occasionally may be a source of confusion or misunderstanding.<sup>22</sup> In short, as regards the common terminology used to describe the different modalities, there does not seem to be a general academic consensus.<sup>23</sup>

It is suggested here that the terminology used to describe the different methods aiming at giving effect to international law on the national level does not adequately cover the complex reality in many states. The reason is that these methods are very different in nature and they have different aims, depending on the depth of the integration and the effectiveness a given international norm is meant to have in the national order.

In this book the following terminology will be used: the concepts *doctrine of incorporation* and *doctrine of transformation* refer on the one hand to *automatic incorporation* under the traditional monist model, according to which international obligations automatically become a part of the national order and, on the other hand, to the need for a specific domestic measure (usually a legislative measure) to give effect to an international obligation in the national system under the traditional dualist model.

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unless covenant rights are already protected by their domestic laws or practices, states parties are required on ratification to make such changes to domestic laws and practices as are necessary to ensure their conformity with the covenant. Where there are inconsistencies between domestic law and the covenant, Article 2 requires that the domestic law or practice be changed to meet the standards imposed by the covenant's substantive guarantees.

<sup>21</sup> Save for the principle of consistent interpretation which applies equally under the monist and dualist doctrines, although there are practical differences. The principle of consistent interpretation is discussed separately in Chapter 6, 'Principle of consistent interpretation'.

<sup>22</sup> DETTER, Ingrid, *op. cit.*, pp. 170–71.

<sup>23</sup> See also PARTSCH, Karl Josef, *International Law and Municipal Law* (1995), p. 1191.

However, in line with the most commonly used nomenclature, the word 'incorporation' will be used to cover not only automatic incorporation in the monist sense, but also the legislative measures on the domestic level to give effect to international legal obligations in the national legal system. Based partly on Sloss,<sup>24</sup> with further details, the following terms will be used:

*Full incorporation* will be used for situations where statutory legislation includes the text of a treaty as an attachment to the statute and declares that the attached treaty shall have the force of law.

*Partial incorporation (quasi-incorporation)* is used for all other 'types' of statutory legislation which is based on or refers to international treaties in one way or another. There are different types, and in Part II (4.2.3) below, which examines the different modalities that the legislature has used to incorporate international treaties and conventions, the following classification is used:

1. Partial incorporation by adaptation<sup>25</sup> of a treaty to national law. This refers to statutory legislation which is based on an international instrument and is clearly designed to give effect to certain provisions of the relevant international instrument. It does not, however, fully incorporate the treaty because the statutory legislation adapts the treaty or individual provisions thereof to domestic requirements.<sup>26</sup>
2. Partial incorporation of a treaty by reference to it in the text of statutory legislation. Under this heading different versions appear:
  - (a) statutory law refers to international treaties which shall prevail over the statutory law or, as the case may be, limits the scope of application of the law;
  - (b) the law empowers the minister to adopt general ministerial regulations to enforce international obligations contained in treaties;
  - (c) the law authorises the executive authorities to see to it that international obligations are respected or orders them to exercise their discretion in conformity with such obligations.All these versions have in common that international treaties

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<sup>24</sup> SLOSS, David, op. cit., p. 22.

<sup>25</sup> Sometimes the word 'adaption' is used in this context.

<sup>26</sup> Ibid., p. 22.



are specifically referred to in the text of the statutory legislation, although their text is not as such incorporated as law.<sup>27</sup>

3. Impact of international instruments on the content of statutory legislation or the constitution. This is the 'weakest' form of incorporation, if it can be called incorporation at all. This category covers situations where international instruments are referred to in the *Explanatory Reports* attached to a draft bill. In some cases, these references are extensive and decisive for the content of the legislation, which in itself justifies that it is dealt with in relation to incorporation.

### 1.2.3 Comments on Analysis and Interpretation of Judgments

In the following several judgments will be analysed. Therefore, before proceeding further, several remarks on analysis of judgments are in order.

One of the problems is that references to international law in the judgments of national courts, not least the Supreme Court of Iceland, especially international human rights treaties, are at times arbitrary or incidental as it is not at all clear when such references are considered appropriate or relevant and when they are not. It is in fact very difficult to identify any particular rule which is followed as regards the need or appropriateness of referring to the ECHR or other international human rights treaties. In some cases arguments, either by the parties or by the district court judge, relying on international treaties are simply ignored. In addition, the references tend to be indecisive at times and are characterised by some inconsistencies where they can be found, or even errors.<sup>28</sup> Occasionally such references are very broad in nature and refer to treaties or agreements in general. Sometimes it is even unclear to which particular treaties a reference is made and/or to which provisions of these treaties.<sup>29</sup> These references are therefore every so often very peripheral, imprecise and vague. Sometimes the court notes that certain

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<sup>27</sup> Other authors have used a similar classification of the different incorporative techniques, although not entirely the same. See for comparison for example: ROTHWELL, Donald R. (2009), *op. cit.*, pp. 158–64; KRETZMER, David, 'Israel' (2009), pp. 283–5 and AUST, Anthony, 'United Kingdom' (2009), p. 479.

<sup>28</sup> See for example the case of *M v K* (no. 279/2007 of 4 June 2007), where the CRC is wrongly referred to as it had already been incorporated as statutory law, which was not done until 2012.

<sup>29</sup> See for example the *Bragadóttir* case (no. 419/1995 of 10 January 1996). The judgment of the Supreme Court refers to the provisions of the 'constitution and human rights treaties on freedom of expression' without any further specification.