

The role of domestic courts in applying international law

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Abstract

The study exposes the view according to which domestic courts may prove an essential element in ensuring State compliance with international law, thus contributing essentially to the rule of law on international level. The functions of domestic courts are often dependent upon constitutional provisions, and, for this reason, the paper examines consequences of theories and techniques which may be relevant for drawing constitutional texts relevant for the relation between international law and domestic law. Thus, the first part of the study focuses on theoretic models and their relevance.

*National constitutions are rarely perfect. For this reason, the paper examines inherent deficiencies in the national constitutions that may lead to “gaps” in the way in which national courts may enforce international law. In this situation, courts are faced with an interpretative dilemma: choosing between “literal” interpretation and “purposive” interpretation. The former would lead to the possibility of applying domestic law that runs contrary to international obligations, while the latter might ensure primacy of international law, even in the absence of an express constitutional provision. The paper argues in favour of the “purposive” interpretation of domestic constitutions, based on the general principle *pacta sunt servanda*.*

Keywords: *priority of international law, rule of law, pacta sunt servanda, constitutions.*

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Introduction

International law is a de-centralized system, characterized by the lack of a compulsory jurisdiction [1]. International law relies essentially on the will of the states, and its execution, rooted in the well-known dictum *pacta sunt servanda* [2], is ensured by the general principle of good faith. In international law, good faith may enjoy a far greater importance than in domestic law, as the international system does not provide for enforcement possibilities, as it is the case in domestic law systems.

The answer to the question “why do States chose to comply with international law?” is often a very complex and difficult one [3]. In certain cases, it is a matter of principle that, even if international law may impose restrictions on State behavior, a State will never declare that it chose to ignore international law: the authorities of that State will find the necessary arguments in order to propose an interpretation favouring their view on the respective norms of international law. Therefore the question of

enforcement in international law refers is linked in only very rare cases to the question of whether States comply or not with international law, but more often with respect the question about what the law really is or how it should be interpreted. Thus, the principle of good faith appears to be essentially important not only in execution, but also in interpreting international obligations [4].

International courts rarely deal with the core issues of international law. Nevertheless, in an important number of cases, international law obliges States to adopt a certain conduct that is reflected through domestic law. On one hand, the execution of international obligations is done through the adoption of domestic law; on the other hand, a certain domestic norm can be seen as evidence of breaching an international obligation. International case-law has constantly held that domestic law represents, in international law, a simple element of fact. Thus, the principle *pacta sunt servanda* in international law imposes also that a State cannot invoke its domestic law in order to justify the non-execution of an international obligation [5].

Nevertheless, the question concerning the legal consequences of domestic law in international law is rarely put to an international court. More often, it is the role of domestic courts to analyze the effect of international law in the domestic systems. This is why it may be considered that domestic courts – while ensuring an objective and impartial overview of State behavior - represent an essential link in the international enforcement of the rule of law. Thus, in certain conditions, “the national courts can fill the missing link in the international rule of law by providing relief when public powers act in contravention of their international obligations” [6]. It does not mean that national courts may “replace” what could be seen as a utopian world under international mandatory jurisdiction: national courts may help achieving the compromise of creating a “world under law” without affecting national sovereignty of States [7].

However, the effect of international law in domestic law depends largely on the system adopted by the respective States and on the provisions of its constitution. Traditionally, the doctrine has advocated for the systems of monism and dualism. A legitimate question may be: is a constitutional system helpful for the correct enforcement of international law in the domestic system?

This study proposes to outline the importance that the domestic courts may have in international law enforcement by referring to the way in which these courts may interpret the constitutional system in order to give effect to international law. Thus, it will first propose a new pragmatic approach to the traditional “divide” between monism and dualism (A). The study would also use the case of the Constitution of Romania in order to exemplify certain inherent deficiencies (B). Thirdly the study will offer some examples of the way in which interpretation by domestic courts may be very important for good faith execution of international obligations (C).

A. Beyond traditional theoretical models [8]

Monism and dualism represented, traditionally, the two “opposite” theoretical models related to the relation between international law and domestic law [9]. Indeed, it is important to point out that the origin of these systems lies in the mere conceptions about the nature and features of the systems of international law and domestic law. Do the theories have any impact on the way in which national constitutions are written? Indeed, someone may speak about a “monist constitution” or a “dualist constitution”. The fact that the theoretic models have an impact on the way in which constitutional provisions concerning the relation between international law and domestic law are drawn cannot be denied [10].

Dualism (also called „pluralism”) postulates that the rules of the system of international law and domestic law exist separately and, for this reason, there is no possibility that they overrule each other and there can be no influence between the two legal orders [11]. The two systems are different through their sources, through the scope of the relations they attempt to regulate and through the substance of the regulation [12]. For these reasons, the mere nature of international law does not allow its rules to be by themselves applicable within domestic law. According to Anzilotti, one of the „fathers” of this theory, two conditions are needed for an international law norm to be applicable within the domestic law: first, a decision of the State authority should ensure that the norm enters the domestic law system – practically, it is the State that decides to apply the international rule in its domestic law; and, second, a transformation of the rule, which should be done through a domestic act; such an act should not only „copy” the substance of the international rule, but also must „adapt” it: a rule designed

for governing inter-State relations should be made applicable to relations between subjects of the domestic legal order [13].

Monism is the theory which stresses the unitary character of the legal system, notwithstanding its international or domestic nature. On one hand, monism has been supported by the general concern about the well-being of individuals. According to this view, international order is characterized by the sense of moral purpose and justice founded upon respect for human rights and welfare of individuals [14]. Both international law and domestic law are rooted on the same concept of justice and rule of law [15]. On the other hand monism is grounded on the Kantian view that law is an order which lays down patterns of behaviour that ought to be followed. The same definition applies both to international law and domestic law. It is international law that postulates State sovereignty and that formulates the "basic norm": either sovereign equality, or the rule according to which States must behave as they ordinarily use to [16]. Notwithstanding the fundamentals the theory, monism has the merit of arguing that international law is *per se* and must be applied directly within the sphere of domestic law and is a superior legal order (that should have precedence in case of conflict between the two orders) [17].

Do the theoretical models have an impact upon how constitutions are written? Can we speak about "monist constitutions" or "dualist constitutions"? The Romanian constitution is a good example of generating different views between scholars: on one hand, it has been argued that the Romanian constitution represents a "dualist" model, based on the argument that "ratification" is a condition for a treaty to become a source of domestic law: thus, ratification is the process by which the international norm would be "incorporated" within the domestic law [18]; on the other hand, it may be argued that the Romanian constitution reflects a monist view, because, firstly, international treaties are sources of domestic law *per se*, according to article 11 (2) and, secondly, ratification represents the way by which Romania expresses its consent to be bound by a treaty: without ratification, the treaty is not binding neither in international law, nor in domestic law [19].

However, qualifying a constitutional system as "monist" or "dualist" would have little impact on the concrete result in case of a conflict between an international norm and a domestic one. What really would matter would be the way in which the relevant

constitutional provision works. Thus, what should be proposed is a pragmatic analysis and interpretation of constitutional provisions (or systems) of each State.

It is argued that international law is "neutral" with respect to the way in which it should be made valid within the domestic law [20]. International law does not make its rules automatically part of domestic law [21]. Based on this "freedom of choice", two patterns have developed in State practice.

The first pattern may be called "*automatic incorporation*": the domestic law – often constitutional law - of a State provides that international law is generally authorized to be part of the domestic legal system, without any further formality. There is no need for transposition, implementing legislation or transformation of the norm [22]. Indeed, it is only a technique: international law is not part of domestic law *per se*, but on the basis of the State will. However, the incorporation is "general". The following examples may be given: Benin (art. 147), Cape Verde (art. 11), China (case-law), Ivory Coast (art. 87), Czech Republic (art. 10), Dominican Republic (art. 3), Egypt (art. 151), Ethiopia (art. 9 (4)), France (art. 55), Japan (case-law), Netherlands, Portugal (art. 8(2)), Russian Federation (art. 15 (4)), Senegal (art. 91), Switzerland (case-law), Turkey (art. 90 (5)), United States (art. VI) [23].

A second pattern would be called "*transformation*" of the international obligation, in order to be adapted to fit the domestic law system. In certain States, domestic Courts may apply international law only after the legislature has adopted a specific act giving effect to an international act [24]. Indeed, in various systems there may be differences according to the source of international law: for example, in the United Kingdom, treaties that are not subject to "transformation" are not sources of domestic law, while the doctrine of incorporation operates with respect to customary international law [25]. In any case, the following States have been quoted as embracing the "transformation" technique: Australia, Botswana, India, Israel, Italy, Kenya, Malawi, Norway, Uganda, and Zambia [26].

The question that remains is whether the identification of the two patterns in the way in which constitutions are written is sufficient to determine the real effect of international law in domestic law. As the following section will expose, it could be argued that this is may not be the case.

B. Inherent deficiencies in constitutional texts

In an important number of cases, the techniques of „automatic incorporation” or „transformation” apply only with respect to limited sources of law. For example, the constitutions of Italy (art. 10) and Germany (art. 25, 59) opt for „automatic incorporation” of international custom, while leaving the technique of „transformation” applicable for international treaties [27].

In many cases, constitutional systems opt for the automatic incorporation, targeting only treaties for which consent has been expressed by ratification. For example, in Lithuania „international treaties ratified by the *Seimas* shall be constituent part of the legal system of the Republic of Lithuania” [28]. Is the incorporation limited to treaties which are “ratified”? The same situation may be encountered in Poland, on the basis of article 87 of the Constitution: As decided by the Supreme Court, only treaties subject to ratification are part of domestic law [29].

In Romania, article 11 (2) refers to the fact that “treaties ratified by the Parliament, according to the law, shall be part national law”. This text may be regarded as reflecting the technique of automatic incorporation. The question that persists is whether this text should be interpreted: either in the sense of limiting the incorporation to treaties subject to ratification (based on a “literal” interpretation of the Constitution) [30]; or in the sense that the phrase should be interpreted in correlation with article 11 (1) [31] which deals with treaties “to which Romania is a party”, thus covering all forms by which consent to be bound is expressed [32]. However, article 11 of the Romanian Constitution deals essentially with treaties. It is article 10 that may be argued to deal with international custom: however, its wording does not lead towards a firm conclusion of incorporating international customary law [33]. It may be left for case-law to determine the effect of international custom.

One of the most important questions is whether a constitutional provision aiming for “automatic incorporation” offers sufficient guarantees for ensuring enforcement of international law in case of a conflict between an international norm and a domestic one. The difficulty is proved by the system embraced by the Romanian Constitution. Even if treaties are incorporated into domestic law, an express provision ensuring priority of international treaties over conflicting domestic law exists *only with respect to*

treaties in the field of human rights and fundamental freedoms, according to article 20 (2) [34]. What would happen in case of a conflict between domestic laws and “other” treaties? More concretely: if there is no express indication, can it be assumed that treaties have a superior legal force than ordinary laws? Two different opinions have been expressed in the doctrine. Firstly, on the basis of a literal and *per-a-contrario* interpretation of article 20 (2), it was assumed that treaties other than ones in the field of human rights have the same legal force as laws. One argument in this sense is the fact that ratification is done by the Parliament, through the adoption of a law [35]. Secondly, a different opinion has been expressed in the sense that treaties would enjoy *implicit* superiority over domestic law, by applying the principle *pacta sunt servanda* which is enshrined, *inter alia*, by article 11 (1) of the Romanian Constitution itself [36]. What would be the correct interpretation? Even if the second variant should be retained as being in line with the rule of law goal at international level – it should be for the case-law of domestic courts to establish it.

A comparative study would reveal the fact that besides “automatic incorporation”, certain constitutions introduce “priority clauses” by which treaties (or generally, international law) are given primacy in case of conflict with domestic law. As mentioned above, the Romanian “priority clause” is limited to human rights treaties. For example, the Constitution of the Czech Republic provides that “*Promulgated international agreements, the ratification of which has been approved by the Parliament and which are binding on the Czech Republic, shall constitute a part of the legal order; should an international agreement make provision contrary to a law, the international agreement shall be applied*”. [37] Another example may be the Constitution of France, which provides that “*Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party*” [38]. Other examples of this kind may be represented by the Constitutions of countries like Bulgaria (art. 5 (4)), Cyprus (art. 169.3), Greece (art. 28 (1)), Estonia (art. 123), Poland (art. 91 (2)), Croatia (art. 134), Germany (art. 25 – special case, referring only to general rule of international law, not to treaties) Spain (art. 96), Slovenia (art. 153 (2)) [39].

As a preliminary idea, two main inherent deficiencies could be envisaged within national constitutions. These may be illustrated plainly by the system established by the Constitution of Romania. Firstly, there is a difference between “automatic incorporation” and “priority clauses”. A combination of these two would be ideal. However, the first is not sufficient to ensure, without any doubt, priority of international law in case of conflict with domestic law. Secondly, there is a difference between sources of international law (treaties and custom), and, sometimes, between categories of treaties (as treaties in the field of human rights or treaties subject to ratification).

C. Solutions provided by domestic case-law

The establishment by case-law of the priority of international law in case of conflict with a domestic provision, even in the absence of a “priority clause”, represents a viable solution for ensuring effective enforcement of international law within domestic law. This would be the solution towards which the Romanian constitutional case-law may aspire.

An interesting analogous example was provided by the Constitutional Court of Latvia in the case of *Linija* [40]. The applicant requested the invalidation of a law (Code of Administrative Penalties), providing for fines to be imposed on shipping companies, arguing that it was running against the obligations assumed by Latvia by the Convention on Facilitation of International Maritime Traffic of 9 April 1965. It could be noted that the Code of Administrative Penalties was *lex posterior* in Latvian law, in relation to the Convention. Even if the Latvian Constitution did not contain a “priority clause” [41], the Constitutional Court held that:

“Article 68 of the Constitution of the Republic of Latvia provides *inter alia* that all international agreements which settle legislative matters need to be ratified by the Saeima. When the Constitutional Assembly included this norm into the Constitution, it did not envisage it to be possible that Latvia shall not perform its international obligations. The requirement to have the respective international agreements ratified by the Saeima was included into the Constitution with an objective to preclude such international obligations, which regulate legislative matters, without the approval of the Saeima. Thus, it is evident that the Constitutional Assembly has been guided by the

presumption that international obligations “settle” issues and that they must be fulfilled. [...]

Therefore, it is evident from the national legislation as well as from the international obligations of the Republic of Latvia under the Vienna Convention on the Law of Treaties, in particular, the obligation to perform treaties in good faith, that in case of a contradiction between rules of international law, which have been approved by the Parliament, and national legislation, provisions of international law must be applied. Moreover, international obligations, which Latvia has undertaken by international agreements approved by the Saeima are binding also on the Saeima. It may not adopt legislation that contradicts these obligations”.

It can be observed how the Latvian Constitutional Court applied a „purposive” interpretation of the constitutional text, in order to give effect to the principle *pacta sunt servanda* in international law.

Nothing would prevent the Romanian Constitutional Court for adopting a similar interpretation, even without an express „priority clause” Moreover, as opposed to the Latvian Constitution, the principle *pacta sunt servanda* is mentioned in the Romanian constitutional text article 11 (1). Nevertheless, certain developments could be mentioned as important signs of „opening” of the Romanian Constitutional Court to an interpretation in accordance with the principle *pacta sunt servanda*.

As mentioned above, automatic incorporation and primacy of customary international law is not expressly regulated by the Romanian Constitution. Article 10 refers generally to the conduct of international relations [42]. However, in its Decision no 1292/2002 *SDG v Canada* [43], the Supreme Court held that jurisdictional immunity of States is binding on national courts, as „it expresses the principle *par in parem non habet jurisdictionem*” and because „this rule was recognized by various national tribunals of States and was applied as of customary nature”. In practice, the Supreme Court ordered that the customary international rule of State immunity should apply before domestic courts.

Implicit priority of international treaties (other than human rights treaties) over domestic legal provisions appears to be firstly envisaged in a Constitutional Court Decision of 2014. Decision 2/2014 [44] concerned the alleged unconstitutionality of an

amendment to the Criminal Code (which attempted to restrain the scope of certain corruption crimes). The Constitutional Court invoked the United Nations Convention [45] against Corruption and the Council of Europe Criminal Law Convention on Corruption [46] in order to rule on the unconstitutionality of the domestic law [47]:

The privileged legal status created for elected persons that are accepted from art. 147 of the Criminal Code in force and from article 175 of the New Criminal Code runs against the provisions of article 11 (1) of the Constitution, according to which “the Romanian State pledges to fulfil as such and in good faith its obligations as deriving from the treaties it is a party to”. Thus, ratifying or acceding to the above mentioned international conventions, the Romanian State assumed the obligation to comply with international provisions and to implement them into the domestic law, in particular with respect to the obligation to criminalize active corruption of persons that fall within the categories of “public agent”/“member of national public authorities”/“national civil servant”/“public officer”, notions that correspond, in Romanian criminal law, to the ones of “public officer”/“officer”.

Even if this case did not concern an actual dispute between private persons, but an *ex ante* constitutional review, it is very important for exposing the general argument that a domestic law that runs against an international treaty is contrary to article 11 (1) of the Constitution, which embraces the principle *pacta sunt servanda*. It is an important development in Romanian Constitutional case-law that may prove crucial for ensuring priority of international treaties over domestic law in all domains – not only in the field of human rights. Of course, it remains for further case-law to establish the priority of international treaties in a concrete case involving a dispute between the parties.

Ground for such further development may be encouraging: even if „direct effect” [48] of international law is not provided expressly by the Constitution, Romanian courts have already accepted the concept: the High Court of Cassation and Justice ruled that „*International treaties ratified by the Parliament are integral part of national law, according to article 11 of the Constitution, and are applicable upon natural and legal persons*” (emphasis added) [49]. Indeed, the „direct effect” may also be a „jurisprudential creation”, based on the purposive interpretation of the domestic Constitution, as inspired by the principle *pacta sunt servanda*. An analogous example

may be the Supreme Court of Justice of the Dominican Republic, which held that „tribunals must apply treaty provisions that are relevant to the resolution of a legal dispute”) [50].

It is true, not in all cases domestic courts have upheld primacy of international law, especially when the relation between the Constitution and an international norm is at issue. The German Constitutional Court decision related to the *Lisbon Treaty* could be an eloquent example envisaged the possibility that the State “exceptionally” disregarded treaty obligations, as long as this was the only means of safeguarding the structural principles of the Constitution [51]. Nevertheless, for a large spectrum of treaty obligations, developments of domestic case-law could be very useful for “supplementing” the constitutional techniques aimed at ensuring correct enforcement of international law within the domestic legal order.

Conclusion

As concluding remarks, it would be useful to point out that enforcement of international law through domestic courts may represent an essential element in reinforcing compliance with international law. Even if the State applies the “*dedoublement fonctionnel*” by establishing an independent and impartial control through domestic courts, it is very important to see whether these Courts have the necessary tools for enforcing international law, sometimes against the State itself.

The way in which domestic constitutions are written and are interpreted is a key element in understanding the role of national courts. Even if, traditionally, scholars presented the theoretical models of monism and dualism, it has been argued that, in practice, Constitutions use “techniques”, not theories. It is true that in certain cases the techniques may have their source of inspiration in theoretic models. Thus, constitutions chose either “automatic incorporation” or “transformation” techniques.

However, the option towards one of there might not be sufficient to determine the legal effect the international norm enjoys in domestic law. In certain cases, in addition to one of the incorporation techniques, Constitutions may choose to have a “priority clause”. In many cases, such priority clause may not be covering all situations: for example in may refer only to treaties, or to certain categories of treaties (in the field of

human rights – as in Romania – or treaties which have been ratified – as in Poland and Romania).

In the absence of a “priority clause”, the role of case-law of domestic courts may be essential to establish the effect of international law. The domestic Court may choose between a “literal” interpretation, which may lead to the possibility of international norms being superseded by domestic laws, and a “purposive” interpretation, which would ensure primacy of international law even in the absence a priority clause. Such an interpretation would be based on the assumption that giving priority to international law in case of conflict with domestic law is self-understood in general principles of both international law and domestic law, such as *pacta sunt servanda* and good faith.

It is this latter “purposive” interpretation that we are advocating for. Good faith is an essential element of the rule of law: State power must be exercised within limits prescribed not only by law, but also by common sense. Therefore, respect for international law might be seen as a value *per se*. Such an affirmation would not be void of legal consequences: by purposive interpretation techniques, the principle of *pacta sunt servanda* should lead the way in which domestic Courts exercise their control on State actions, enforcing the limits the State itself had assumed through international law.

Recent case-law of the Romanian Constitutional Court, as well as examples by way of analogy from other States, confirm this assumption. Of course, it would be desirable for the Romanian Constitution to have: a general “automatic incorporation” clause, covering both treaties (notwithstanding the way in which consent was expressed) and customary international law; a general “priority clause”, providing priority in case of conflict between international law and domestic law; and, desirably, a “direct effect clause”. However, Constitutional amendment may often be difficult to achieve in practice. For this reason, jurisprudential confirmation of primacy of international law and of its direct effect may represent a pragmatic and, maybe better solution, than the amendment of the Constitution itself.

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- [11] M.N. Shaw, *op. cit.*, p. 122; Ian Brownlie, *Principles of Public International Law*, 7th Ed., Oxford University Press, 2008, p. 32;
- [12] D. Anzilotti, *Cours de droit international*, Sirey, Paris, 1925, p. 62; H. Triepel, *Volkerrecht und Landesrecht*, 1899 ; H. Triepel, *Volkerrecht und Landesrecht*, Recueil des Cours de l’Academie de la Haye, vol. 1, 1923, p. 77-121 ;
- [13] D. Anzilotti, *op. cit.*, p. 63; Ion Gâlea, *loc. cit.*, p. 22;
- [14] Hersch Lauterpacht, *International Human Rights*, Oxford, 1950, p. 29;
- [15] Oppenheim, *International Law, A Treatise*, Longman, London, 1967, p. 47;
- [16] Hans Kelsen, *General Theory of Law and State*, London, 1945, p. 363; Schwarzenberger, *Power Politics*, 2nd Ed., Oxford, 1951, p. 218-231; Wenzel, *Juristische Grundbegriffe*, 1920, p. 387;
- [17] Hans Kelsen, *Principles of International Law*, 2nd Edition, London, 1966, p. 557-559; M.N. Shaw, *op. cit.*, p. 123;
- [18] Ioan Muraru, Simina-Elena Tănăsescu, *Drept constituțional și instituții politice*, vol. I, Ed. Ch. Beck, 2011, pg. 32
- [19] Ion Gâlea, *loc cit.*, p. 24;
- [20] André Nollkaemper, *op. cit.*, p. 68; *Interpretation of the Statute of the Memel Territory (United Kingdom v France)*, PCIJ, Ser A/B, no. 49, p. 336-337;
- [21] André Nollkaemper, *op. cit.*, p. 69; J. Verhoeven, *Article 21 of the Rome Statute and the Ambiguities of Applicable Law* (2002) 33, Netherlands Yearbook of International Law, p. 15;
- [22] André Nollkaemper, *op. cit.*, p. 73-74;

- [23] *Ibidem*; See also Ion Gâlea, Bogdan Biriş, Irina Munteanu, Radu Şerbănescu, *Aplicarea tratatelor în dreptul intern al statelor membre ale Uniunii Europene. Studiu comparat al prevederilor constituţionale relevante*, in Cezar Manda, Cristina Nicolescu, Crina-Ramona Rădulescu (ed.), *Probleme actuale ale spaţiului politico-juridic al UE*, Supplement Revista Română de Drept European, 2013, p. 116 – also quoting Bulgaria, Greece, Spain, Finland, Croatia, Hungary, Lithuania, Poland, Romania;
- [24] André Nollkaemper, *op. cit.*, p. 77-78;
- [25] Ian Brownlie, *op. cit.*, p. 41;
- [26] André Nollkaemper, *op. cit.*, p. 77;
- [27] In Italy, see *EP v Municipality of Avellino*, Case no 349/2007 (2008) 91 Riv Diritto Internazionale p. 230
- [28] Ion Gâlea, Bogdan Biriş, Irina Munteanu, Radu Şerbănescu, *loc. cit.*, p. 116;
- [29] *Stanislaw K v Zaklad Techniczno-Budowlany P Spolka zoo*, II PK 100/50 ILDC 388 (PL 2005) (available at Oxford Public International Law (<http://opil.ouplaw.com>), subscriber, 7 June 2015);
- [30] Ioan Muraru, Simina-Elena Tănăsescu, *op. cit.*, p. 32;
- [31] Article 11 (1) provides: “The Romanian State pledges to fulfill as such and in good faith its obligations as deriving from the treaties it is a party to”;
- [32] Gheorghe Iancu, *Drept constituţional şi instituţii politice*, Ed. CH Beck 2011, p. 22; Ion Gâlea, *loc. cit.*, p. 26; in any case, the “incorporation” of treaties which are not subject to ratification may be seen as grounded on article 31 (2) of Law no. 590/2003 concerning treaties;
- [33] Article 10 provides: “Romania fosters and develops peaceful relations with all the states, and, in this context, good neighbourly relations, based on the principles and other generally recognized provisions of international law”
- [34] Article 20 (2) provides: “Where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favourable provisions”;
- [35] Ioan Muraru, Simina-Elena Tănăsescu, *op. cit.*, p. 33;
- [36] Bogdan Aurescu, Ion Gâlea, *loc. cit.*, section II.2; Ion Gâlea, *loc. cit.*, p. 24; the argument has been supported by various texts of domestic legal provisions: article 31 (2), (4), (5) of Law no 590/2003 concerning treaties, article 21 of Law no 24/2000 concerning the legislative technique norms related to the elaboration of normative acts;
- [37] Article 10; see also Ion Gâlea, Bogdan Biriş, Irina Munteanu, Radu Şerbănescu, *loc. cit.*, p. 117;
- [38] Article 55;
- [39] Bogdan Aurescu, Ion Gâlea, *loc. cit.*, section I.2; Ion Gâlea, Bogdan Biriş, Irina Munteanu, Radu Şerbănescu, *loc. cit.*, p. 116;
- [40] *Linija v Latvia*, Judgment of the Constitutional Court of the Republic of Latvia on a request for constitutional review, Case No 2004-01-06, Latvian Herald, No 108, 3056, ILDC 189 (LV 2004), 7th July 2004 – available at <http://opil.ouplaw.com/view/10.1093/law:ildc/189lv04.case.1/law-ildc-189lv04?rskey=zFoToi&result=5&prd=ORIL> (subscriber 3 November 2014); see also Bogdan Aurescu, Ion Gâlea, *loc. cit.*, section II.2.;
- [41] Article 68 of the Latvian Constitution provided only for the obligation to ratify certain international treaties “All international agreements, which settle matters that may be decided by the legislative process, shall require ratification by the **Saeima**.”;
- [42] *Supra*, note 34;
- [43] *SDG v Canada and Prosecutor General* (joining), Decision on annulment of appeal, File No 1781/2002, No 1292/2003, ILDC 1024 (RO 2003), 1st April 2003, Civil Division, Supreme Court of Justice;
- [44] Decision no. 2/15 January 2014 on the objection of unconstitutionality of art. I point 5 and art. II point 3 of the Law concerning the modification of certain normative acts and of the sole article of the Law modifying art. 2531 of the Criminal Code, Official Journal no. 71/29 January 2014;
- [45] Adopted in New York on 31 October 2003, United Nations, *Treaty Series*, vol. 2349, p. 41, Doc. A/58/422;
- [46] Adopted in Strasbourg on 27 January 1999, Council of Europe Treaty Series no. 173;
- [47] Quoted also by Bogdan Aurescu, Ion Gâlea, *loc. cit.*, section II.2;
- [48] André Nollkaemper, *op. cit.*, p. 117;
- [49] High Court of Cassation and Justice, Decision no. 331/2014, File no 24165/2011, 31 January 2014, quoted also by Bogdan Aurescu, Ion Gâlea, *loc. cit.*, section II.2;

[50] *Gallardo Montilla v Gallardo Concepción*, ILDC 1490 (DO 1997), Supreme Court of Justice of the Dominican Republic, quoted by André Nollkaemper, *op. cit.*, p. 119;

[51] Germany, Federal Constitutional Court, *Lisbon Treaty Case*, 2 BvR 182/09;