Arbeiten der 1. Studienkommission der DGVR, in: Die Anwendung des Völkerrechts im innerstaatlichen Recht - Überprüfung der Transformationslehre, Berichte DGVR Heft 6, Karlsruhe 1964

# Anhang

## Übersetzungen der Thesen

## Resolution

adopted by the 1st Commission of the German Society for International Law on June 15-16, 1963

### Preliminary remarks

1. The topic of this study is one part of the more general theme of the application of international law within municipal law: Need there be state-action of any kind to furnish the basis for the internal application of international law (general rules and treaty-law)? What must, can or may the state do for this purpose? What are the results of its actions?

The special problems of the law of the European Communities are not discussed in this resolution. (Introduction 1)

2. The problem is one of international law, but must be studied from the viewpoint of the municipal legal system. (Introduction 2)

3. According to the transformation-doctrine rules of international law are not capable of being applied directly and without change within municipal law but need to be transformed into municipal law (likewise the adoption into the municipal legal system without changing the meaning of the rules is thought impossible). Thereby the rules get a new legal basis, they reach the subjects of municipal law and they change their meaning by being transformed into a different legal system. Most important is the

change of the subjects. The status (rank) of the rules transformed within the hierarchy of municipal law is determined by the transforming state. (Introduction 3)

4. According to the adoption-doctrine there must also be state-action to make a rule of international law applicable within the municipal sphere. This action, however, merely permits the internal application of the international law rule without changing its legal basis, its subjects or its systematical connection. Apart from the rule of international law the application-order has no independant material meaning but fulfills only a requirement for the application of international law within the municipal sphere. The states take it for granted, however, that they may determine the status of international law in relation to municipal law. This state-practice is recognized here. It is not supposed that the status is determined by rules of international law. (Introduction 4)

In some municipal legal systems (USA, The Netherlands, Switzerland) there is an express application-order only for treaty-law, while the general rules of international law are applied within the municipal sphere without any express authorization. The problems arising thereby are not considered in this study.

5. Neither the transformation-doctrine nor the adoption-doctrine follow necessarily from a specific definition of the relation between international law and municipal law in the sense of the dualist or the monist theories. The transformation-doctrine presupposes that international law and municipal law are two separate legal systems. This dualist construction does not, however, lead by itself to the transformation-doctrine but leaves the possibility of applying the adoption-doctrine. The adoption-doctrine is consistent not only with a dualist construction but also with the view that international and municipal law are part of a single legal system. Even the view that the municipal legal system is derived from international law does not preclude the application of the adoption-doctrine, as long as the states are thought to have the right to decide upon the internal effect of international law rules, and the system of delegation is not to mean that all municipal law may be superseded by rules of international law.

Therefore the conflict between the dualist and the monist theories need not be discussed anew in this study. (Introduction 5/6)

## Section A

## General remarks

6. There is no general rule of international law stating that — without any state-action — subjects of municipal law or internal organs applying the law are normally bound to follow the provisions of international law. There are, however, a limited number of international law rules — possibly increasing at present — the nature and basic character of which order the immediate observance by internal organs applying the law as well as by subjects of municipal law. Some of the very basic rules supposedly even supersede municipal laws to the contrary. (Question I)

7. Besides the rules mentioned under section 6 (sentences 2 and 3) the states may generally require an order of application before international law has any effect within the municipal sphere. (II)

8. It is left to the states to determine the form and the effect of the application-order for the purpose of insuring the effective application of the rules of international law within the municipal sphere. Therefore, according to present-day international law, the transformation of international law rules into municipal law is permitted as is the application of these rules within the municipal sphere authorized by an application-order. Furthermore, the requirements of international law may be fulfilled internally by independant legislation or other municipal rules. (III/IV)

9. The adoption-doctrine corresponds in a higher degree with present-day international law and with its goals; it does not neglect the desire of the states to reserve to their law-making-bodies the decision as to which rules of international law should habe internal effect. (V/VI)

10. In regard to both the general rules of international law and the treaty-law, the Basic Law of the Federal Republic of Germany does not preclude either doctrine. (VII)

## Section B

## The internal application of the general rules of international law

11. The general rules of international law, which are developed by the practice of the states and change therewith, do not lend themselves to a transformation into municipal law because of this variability of their content. To refer to an anticipated transformation of the actual content of these rules is hardly consistent with the basis and with the concern of the transformation-doctrine. It amounts to a disguised application of the adoption-doctrine which adjusts itself easily to the variability of the rules. (XI)

12. There is no rule of international law determining the status of the general rules of international law in relation to municipal law. An exception must be made only for those general rules, the nature and basic character of which require a direct application within municipal law (see paragraph 6). Furthermore, according to both doctrines the status of the general rules is determined by the states. They are under an international obligation, however, to prevent any rule of municipal law — whatever its position within the municipal system — from interfering with the fulfilment of international legal requirements.

There was no agreement within the Commission as to the effect of art. 25 of the German Basic Law on the status of the general rules of international law in relation to the provisions of the Basic Law. (VIII)

13. The rule of international law, „*pacta sunt servanda*", does not refer to the internal effect of treaties. Therefore, according to the adoption-doctrine, treaties do not have the status accorded to the general rules by art. 25 of the Basic Law. The law-making-bodies maintain control over the internal effect of the treaties. They can, contrary to valid international obligations, abrogate the internal application-order and they can enact laws internally valid but in contradiction to a requirement of international law. (IX)

14. International law permits municipal organs to interpret rules of international law with binding effect in the municipal

sphere. It follows from the nature of the matter, and it is therefore advisable, that these organs should take into consideration the jurisdiction of international organs. (X)

## Section C

## The internal application of treaty-law

15. According to legal theory treaty-law may be transformed into municipal law. A rigid application of the transformation-doctrine, of course, destroys the unity of the treaty and the synallagmatic relation between its provisions. It leads to a less perfect harmony between treaty-law and municipal law than would be the case with the adoption of the treaty into municipal law. With the transformation, the authority of the legislator is used to sanction treaty rules which might never come into force. (XVI)

16. The transformation of treaties has the practical advantage, that the international provisions are fully incorporated into the municipal categories of legal sources and into the system, to which the national organs are accustomed. It is technically possible to accord a preference to the national language before the other languages of the treaty — although such a practice destroys the harmony between international and municipal law. (XIV/XVIII)

17. The status of an international treaty in relation to municipal law and the solution of conflicts between treaty-law and municipal law do not depend on the choice of one of the doctrines. These questions are left to the states according to both doctrines. (XIV)

18. The problem of judicial review of treaty-law regarding its conformity with the constitution should be solved by special legislation. The objective should be that international and internal validity coincide. Therefore, a preventive control of treaties would be more suitable than a repressive one. (XV)

19. For the following practical reasons the adoption of treaty provisions is preferable to their transformation into municipal law:

(a) The date of the internal applicability follows from the application-order and need not be regulated expressly. (XII)

(b) The municipal application-order refers to the content of the treaty as it becomes binding under international law; a conclusive use of reservations is possible only under the adoption-doctrine. (XIII)

(c) Under the adoption-doctrine it is also possible to apply the rule *"lex posterior derogat legi priori"* in the following conclusive manner: The treaty supersedes municipal law of the same status which was enacted before the treaty came into force — even if this law was enacted later than the one giving the consent to the treaty. (XIV)

(d) If a treaty, as a whole or in part, is no longer applicable under international law — as result of a denunciation or for other reasons — this treaty is to the same extent inapplicable internally. The result is different only if the provisions of the treaty have become an independant part of municipal law. If a treaty (or some of its provisions) becomes ineffective, therefore, no *"actus contrarius"* is necessary, although the fact should be published for reasons of legal certainty. (XVI/XX)

(e) An interpretation of the treaty in conformity with international law is assured to a higher degree than with the transformation into municipal law. (XVII)

(f) For the internal application of the treaty the authentic texts in different languages are equally conclusive. As long as there are no doubts about the conformity of the texts, however, the states may use the text in the national language for the internal application, assuming, the text is authentic. A text in the national language providing an incorrect meaning of the treaty can never be given preference. As a result of the adoption-doctrine the rules of interpretation developed in international law concerning the language-problem are to be applied, especially the rule referring to the working-language. (XVIII)

(g) In case of a revision of the treaty the application-order is issued by the same organs and in the same manner as in the case of the original treaty. The unity of the treaty is thereby respected also internally. According to the transformation-doctrine, however, the result might be different depending on what is viewed as being transformed — the whole treaty or only parts of it. (The question of adaptation-clauses within the treaty is left aside here). (XIX)

## Section D

## Conclusions

20. (a) It can be said as result of the study that there are systematic reasons for ensuring the application of general rules of international law within municipal law by an application-order rather than by transformation.

(b) Regarding treaty-law there are mainly practical reasons leading to the conclusion that the internal application should be explained by reference to an application-order rather than by reference to a transformation into municipal law. Essential problems arising out of the application can only be solved conclusively by the adoption-doctrine. This fact becomes evident in states following the transformation-doctrine. The practice of these states and the decisions of their courts oftentimes reach results which can be explained by the adoption-doctrine and are not consistent with the idea of transformation (see section 19, especially concerning interpretation, language, reservations and validity). There are no such difficulties, on the other hand, if the adoption-doctrine is applied. In addition, with the adoption-doctrine the synallagmatic relation between the provisions of the treaty is maintained.

The concern of the transformation-doctrine in facilitating the task of the internal organs applying the law and in preventing them from having to think within a foreign legal system, can be met by legislation in a particular case if necessary. (XXI)

21. No revision of the Basic Law is necessary for the application of the adoption-doctrine. In case of a revision, however, — especially if it affects the provisions concerning external affairs — the articles dealing with the application of international law within the municipal sphere should be redrafted, in order to state clearly that international law is declared applicable as such. This proposal should be taken into consideration particularly in case of the preparation of an all-German constitution. (XXII)

(Übersetzung: Dr. Jochen Frowein)