

Bridges and Developers

— Monistic Tendencies in the Icelandic Maritime Zones Act

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1	Introduction	426
2	The Relationship between International Law and the Icelandic Legal System	427
3	Bridges between International and Domestic Law	429
4	The Icelandic Maritime Zones Act	430
4.1	Introduction	430
4.2	Rules of International Law	432
4.3	International Law.....	434
4.4	International Agreements to Which Iceland Is a Party	435
5	References to UNCLOS by the Icelandic Supreme Court	436
6	Conflicts between International and Domestic Law	437
7	Developments of International Law	438
8	Conclusions	439
	References	440

1 Introduction

This article addresses a legal phenomenon that does not fit the framework for the relationship between international law and domestic law in legal systems that supposedly view them as separate realities, such as the Icelandic. The phenomenon is provisions in domestic law that make references to international law in a general manner. In dualistic legal systems, the provisions can be described as bridges between two legal worlds. An important side effect of such provisions is that, in many circumstances, they bring the developments of international law through the fences of the domestic legal system without any further input from the legislator.

This article will focus on one of the clearest examples of such provisions in the Icelandic legal system that is found in Act no. 41 of 1 June 1979 concerning the territorial sea, the exclusive economic zone (EEZ), and the continental shelf (Maritime Zones Act).¹ The act incorporated a few important provisions of the 1977 Informal Composite Negotiating Text (ICNT),² the draft of the treaty that later became the 1982 United Nations Convention on the Law of the Sea (UNCLOS).³ It includes four provisions that make references to international law in three different manners.

The purpose of the article is twofold: to show that the relationship between the Icelandic law and international law in this area is far from being dualistic and that developments in international law have a direct impact on the Icelandic legal system. The forthcoming discussion is divided into six parts. The *first* gives a short introduction into the main aspects of the relationship between the Icelandic legal system and international law. The *second* discusses statutory provisions in Icelandic law that make references to international law. The *third* deals with four such provisions of the Maritime Zones Act. The *fourth* deals shortly with the judgements of the Icelandic Supreme Court that mention UNCLOS. The *fifth* addresses a certain type of conflict between international and domestic law. The *sixth* discusses how the provisions

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1 Adopted 1 June 1979, entry into force 1 June 1979. An English translation of the act can be found at “www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/ISL_1979_Law.pdf”, accessed 7 November 2013.

2 Third United Nations Conference on the Law of the Sea, Official Records Vol. VII (Informal Composite Negotiation Text, Sixth Session) (15 July 1977) UN Doc. A/CONF. 62/WP.10 (United Nations 1984). Available online at “legal.un.org/diplomaticconferences/lawofthesea-1982/docs/vol_VIII/a_conf-62_wp-10.pdf”, accessed 17 December 2013.

3 Adopted 10 December 1982, entered into force 16 November 1994, 1833 UNTS 396. “Chronological lists of ratification of, accessions and succession to the Convention and related agreements as at 29 October 2013”, “www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm”, accessed 7 November 2013 (List of ratification). Iceland was the first European state to ratify the Convention, 21 June 1985. For simplification reasons, references will be made to UNCLOS instead of the ICNT since the relevant articles discussed herein did not change, substantively, from the introduction of the ICNT to the opening of signature of UNCLOS.

automatically develop the domestic legal system in line with the developments of international law without any input from the legislator.

2 The Relationship between International Law and the Icelandic Legal System

The interrelationship between the Icelandic legal system and international law has every now and then been in the spotlight, in Iceland, for the last decades, primarily in the context of the European Convention on Human Rights⁴ and the Agreement on the European Economic Area.⁵ The Icelandic legal system is categorised as dualistic.⁶ According to dualism, “international law and domestic law are regarded as two distinct legal spheres which, moreover, have very little to do with one another.”⁷ The two branches of law not only govern different actors, but they also deal with different topics.⁸ Thus, they would hardly make contact, and where they would be in contact, it would obviously be a matter of domestic law to decide to deal with the matter.⁹ Dualism sees international law “to have effects only in the international sphere. For an international rule to become effective in the domestic legal order, it needs to be transformed into the sort or rule recognized by that legal order.”¹⁰

No provision of the Icelandic Constitution addresses directly the standing of international law in the Icelandic legal system. On the other hand, scholars have described how dualism generally appears in the Icelandic legal system:

4 Convention for the Protection of Human Rights and Fundamental Freedoms, adopted 4 November 1950, entered into force 3 September 1953, 213 UNTS 222; See e.g. Davíð Þór Björgvinsson, *Mannréttindasáttmáli Evrópu. Meginatriði, skýring og beiting* in Björg Thorarensen et al. (eds), *Mannréttindasáttmáli Evrópu. Meginreglur framkvæmd og áhrif á íslenskan rétt* (Mannréttindastofnun Háskóla Íslands and Lagadeild Háskólans í Reykjavík, 2005) 31–4; Róbert Spanó, *Stjórnarskráin, Mannréttindasáttmáli Evrópu og meginreglur refsiréttar* (Bókaútgáfan Codex, 2012) 16.

5 Adopted May 2 1992, entered into force 1 January 1994, 1795 UNTS 4; Gunnar G. Schram, *Evrópska efnahagssvæðið. Meginatriði og skýringar* (Alþjóðamálastofnun Háskóla Íslands, 1992) 26–34; Stefán Már Stefánsson, *Evrópusambandið og evrópska efnahagssvæðið* (Orator, 2000) 111–2.

6 See e.g. Ármann Snævarr, *Almenn lögfræði* (Bókaútgáfa Orators, 1988) 262–3; Gunnar G. Schram, *Stjórnskipunarréttur* (Háskólaútgáfan, 1997) 40; Davíð Þór Björgvinsson, *Lögskýringar* (JPV útgáfa, 2008) 259; Björg Thorarensen and Pétur Dam Leifsson, *Þjóðaréttur* (Bókaútgáfan Codex, 2011) 31, 161; Björg Thorarensen, *Tengsl þjóðaréttar við íslenska stjórnskipun og áhrif alþjóðasamninga á íslenskan rétt* [2012] 65 *Úlfjótur* 269, 271; Halvard Haukeland Fredriksen, “The EFTA Court 15 years on” [2010] 59 *ICLQ* 731, 734–7.

7 Jan Klabbbers, *International Law* (Cambridge University Press, 2013) 289. See also e.g. Malcolm N. Shaw, *International Law* (5th edn, Cambridge University Press, 2003) 122; Martin Dixon, *Textbook on International Law* (Oxford University Press, 2007) 89.

8 Jan Klabbbers (n 7) 289.

9 Ibid.

10 Ibid.

1. International law and domestic law are two separate independent systems of legal order.
2. The rules of international law do not apply in domestic law without being incorporated.
3. Individuals are not entitled to rights based on a rule of international law until they have been incorporated into the law.
4. Where a conflict between domestic and nonincorporated rules of international law appear, domestic law prevails.¹¹

In addition, the principle of presumption applies. In other words, it is presumed that Icelandic law corresponds with its international legal obligations.¹² Consequently, Iceland's Supreme Court has sought to interpret Icelandic law in accordance with Iceland's international obligations,¹³ including the constitution.¹⁴

This sounds plain and simple, but reality is more complex. For instance, the Icelandic Supreme Court has made references to international instruments that have not been incorporated into Icelandic law, mainly in the realm of human rights.¹⁵ In these instances, the usage of the Supreme Court of treaties is closer to the principle of monism than dualism. Monism views international law and domestic law as part of the same universal legal order.¹⁶ According to monism, international law is superior to domestic law and consequently prevails over a conflicting rule of domestic law. In addition, where international law does not need any further implementation, they are possibly directly effective in the domestic legal order.¹⁷

As will be discussed below, the judiciary is not the only branch of the Icelandic government that has blurred the dualistic boundary between domestic and international law. The legislator has done so as well even before the

11 Davíð Þór Björgvinsson, *Lögskýringar* (JPV útgáfa, 2008) 259.

12 Ibid.

13 See e.g. *Ákærvaldið v. Sveinn Eiríkur Sigfússon*, Hrd. 8 May 1995 case no. 103/1994; *Tryggingastofnun Ríkisins v. Öryrkjabandalag Íslands*, Hrd. 19 December 2000 case no. 125/2000; *Alþýðusamband Íslands v. íslenska ríkið*, Hrd. 14 November 2002 case no. 167/2002.

14 See e.g. Rán Tryggvadóttir, Thordis Ingadóttir, and Erna Mathiessen, *Researching Icelandic Law* (2010) GLOBALEX available at "www.nyulawglobal.org/globalex/iceland1.htm", accessed 17 December 2013.

15 See e.g. *Ákærvaldið v. Guðmundur Breiðfjörð Ægisson*, Hrd. 8 January 1990 case no. 120/1989; *Ákærvaldið v. Þorbjörn Gunnarsson*, Hrd. 6 February 1992 case no. 494/1991; *Ákærvaldið v. Daniel Allan Pollock*, Hrd. 28 January 1993 case no. 211/1992.

16 See Hans Kelsen, *Principles of International Law* (New York: Rinehart & Co., 1952) 403.

17 Klabbars (n 7) 290.

beginning of the Europeanization of the Icelandic legal system in the last decade of the twentieth century.

3 Bridges between International and Domestic Law

International norms are imported into many areas of the Icelandic legal system. The importation takes place through either transformation or incorporation. This is often referred to as sector monism. *Transformation* refers to the transformation of language and content of a treaty into the national legislation often as a part of a larger act. *Incorporation* refers either to the adoption of the text of a treaty or to a short reference in the law giving the treaty status as Icelandic law.¹⁸

As noted in the introduction, the provisions discussed below create a bridge between international law and domestic law. They have in common that the sources of international law are referred to in the text of a statutory legislation, although these sources—usually the text of a treaty—are not as such incorporated. The provisions are far from being a unique feature in Icelandic law¹⁹ and are not a new legal phenomenon, although the numbers of such provisions seem to have increased in the last decades perhaps in direct relation to the globalisation of law.

Little has been written about these provisions in the Icelandic legal literature, with a few exceptions. Professor Ólafur Jóhannesson addressed them in his major work *Stjórnskipun Íslands* (The Icelandic Constitutional Order). Jóhannesson mentions that Icelandic law refers sometimes to the rules of international law, for example, Article 11 of the Penal Code.²⁰ In such instances, these rules of international law, as they are at the moment, are Icelandic sources of law, in the field that the law is applicable to.²¹ Jóhannesson neither discussed these provisions in any more detail nor cited any sources to substantiate his assertions.

18 See e.g. Malcolm N. Shaw, *International Law* (5th edn, Cambridge University Press, 2003) 128–62.

19 For instance, Article 6 of the Norwegian Marine Resources Act states that the “Act applies subject to any restrictions deriving from international agreements and international law otherwise.” An English translation is available at “www.regjeringen.no/upload/FKD/Vedlegg/Diverse/2010/MarineResourcesAct.pdf”, accessed 17 December 2013.

20 The provision read (in its English translation): “The provisions of Articles 4–6 of this Act [provisions concerning criminal jurisdiction] shall be applied taking into account the limitations resulting from International Law.” See Excerpts from the General Penal Code, No. 19/1940, with subsequent amendments, Act on Criminal Responsibility of Legal Persons, No. 144/1998, and Code of Criminal Procedure, No. 19/1991 available at “eng.innanrikisraduneyti.is/laws-and-regulations/english/penal-code-and-punishment/nr/118”, accessed 17 December 2013.

21 Ólafur Jóhannesson, *Stjórnskipun Íslands* (Hlaðbúð, 1960) 96–7; Gunnar G. Schram, *Stjórnskipunarréttur* (2 edn. Háskólaútgáfan, 1999) 40.

If Jóhannesson's view is correct, international law in some instances is part of Icelandic law. Assumedly, these provisions domesticizes international law into the Icelandic legal system. Some even create a path that does not include considerations concerning ratification or any other form of enactment of the relevant international instruments. It must, though, be kept in mind that these statutory provisions do not state that the treaties referred to shall become part of the domestic legal system. Furthermore, the relevant treaties are not attached to these acts, as is usually done when treaties are incorporated into Icelandic law.

Another interesting fact that deserves attention is that these provisions are without regard to whether the international instruments were existing at the time of entering into force of the act or came into existence later. Thus, the developments of international law have a direct impact on the Icelandic legal system.

4 The Icelandic Maritime Zones Act

4.1 Introduction

The Maritime Zones Act from 1979 is the primary act concerning Icelandic maritime zones. It contains provisions concerning baselines from which the breadth of the territorial sea is measured, 12 nautical mile (nm)²² territorial sea, the 200 nm EEZ, the continental shelf, the maritime boundary delimitation with neighbouring states, measures to prevent pollution, and scientific research. It was the first Icelandic statutory act that defined the outer limits of the territorial sea at 12 nm and the outer limits of the EEZ at 200 nm.²³ The *travaux préparatoires* noted that the purpose of the act was to accumulate in one single act all major principles concerning the territorial sea and maritime jurisdiction of Iceland and to incorporate new rights in this field that stemmed from recent developments of international law in the years before the bill was introduced.²⁴ The developments that are being referred to are the negotiation processes that took place at the Third Law of the Sea Conference 1973–1982 and ended with the opening for signature of UNCLOS. It is the first and only treaty that spans almost every aspect of the international law of the sea.

The *travaux préparatoires* of the bill points out that the third conference had not finished yet, at the time it was introduced at the Althing, mainly because of the lack of agreement concerning the international seabed area, beyond the outer limits of national jurisdiction.²⁵ It was noted, though, that

22 1 nautical mile equals 1,852 metres.

23 Schram (n 21) 72.

24 *Parliamentary Record* (Alþingistíðindi), 1978–9, Section A, 1614 at 1617 [PR A 1978–9].

25 *Ibid.* Article 1 § 1 of UNCLOS defines the international seabed area as “the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction”. Part XI is dedicated to the international seabed area as well as the agreement relating to the

almost all major issues had been resolved. When the foreign minister at the time, Benedikt Gröndal, proposed the bill at the Althing, he explained that its main purpose was to incorporate the main principles that had crystallised at the Third Law of the Sea Conference.²⁶ According to Gröndal, the decision was made, after thorough consideration, to have the bill simple, containing only main principles and leaving specific areas of the law to specific acts.²⁷ As an example, he noted that changes to the fisheries legislation could be expected occasionally, for various reasons and with increasing knowledge.²⁸ In such situations, it could be an advantage to have the fundamental issues in one holistic act that would be a sort of a constitution for the territorial sea and maritime jurisdiction. On the other hand, it would be easier to change the specialised acts when the Althing deemed necessary.²⁹

From a formal viewpoint, it is incorrect to describe the Maritime Zones Act as a sort of constitution, as the foreign minister did, because it is a regular act adopted by the legislator and not an amendment to the constitution that would have to follow a certain procedure that the act did not. Nevertheless, it can be argued from a substantive viewpoint that the Maritime Zones Act has a certain supreme standing in the Icelandic legal system. In this context, it must be borne in mind that the territory or maritime zones of Iceland are not defined in the Icelandic Constitution.³⁰ Furthermore, the Maritime Zones Act is the main legislation concerning the outer limits of Icelandic sovereignty and jurisdiction and what rights and duties Iceland enjoys in these zones.

UNCLOS has often been called the constitution for the oceans.³¹ As mentioned above, it contains almost every principle for the international law of the sea. In addition, it contains rules that make the Convention superior toward most other international legal obligations of its state parties³² and difficult to

implementation of part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (adopted 28 July 1994, entered into force provisionally 16 November 1994 and definitively 28 July 1996) 1836 UNTS 3.

26 *Parliamentary Record*, 1978–9, Section B, 3179, 3180 [PR B 1978-9].

27 *Ibid.*

28 *Ibid.*

29 *Ibid.*

30 It should be noted that the Constitutional Bill proposed in 2012 stated in Article 3 that “[t]he Icelandic territorial land forms a single and indivisible whole. The boundaries of the Icelandic territorial sea, airspace and [EEZ] shall be decided by law.” An English translation can be found at the European Commission for Democracy through Law (Venice Commission), “Constitutional Bill for a New Constitution of the Republic of Iceland and Excerpts from the Notes to the Constitutional Bill” (11 January 2013) Opinion no. 702/2012. Available at “[www.venice.coe.int/WebForms/documents/?pdf=CDL-REF\(2013\)001-e](http://www.venice.coe.int/WebForms/documents/?pdf=CDL-REF(2013)001-e)”, accessed 19 December 2013.

31 See Tommy Koh, “A Constitution for the Oceans” available at “www.un.org/depts/los/convention_agreements/texts/koh_english.pdf”, accessed 17 December 2013; Shirley V. Scott, *The LOS Convention as a Constitutional Regime for the Oceans* in Alex G. Oude Elferink (ed.) *Stability and Change in the Law of the Sea: The Role of the LOS Convention* (Martinus Nijhoff, 2005) 9ff.

32 See Article 311 of UNCLOS.

amend.³³ It is possible that the idea of UNCLOS as a constitution had an impact on the main author of the Maritime Zones Act, Hans G. Andersen, the legal adviser of the Ministry for Foreign Affairs. Andersen was Iceland's main negotiator at the Third Law of the Sea Conference³⁴ and, thus, well informed about the background and developments at the conference.

As mentioned above, the Maritime Zones Act was based on the principles that had crystallised at the Third Law of the Sea Conference. This indicates that the Althing desired to have the act in conformity with international law. Two methods were used to reach this goal: by incorporating precisely a translation of the provisions of the ICNT into the Maritime Zones Act and by provisions referring to international law. Four provisions that refer to international law can be found in the act, that is, Articles 2 § 1, 4 § 1 (c), 4 § 2, and 8 § 2. The provisions make references to (1) rules of international law, (2) international law, and (3) international agreements to which Iceland is a party. The reason why this method is used is probably that the provisions that refer to international law are convenient for the legislator and limit the possibility of translation errors. In addition, it should be kept in mind that UNCLOS covers much ground. Transforming UNCLOS fully into domestic law would be a tremendous time-consuming work that would risk translation errors.³⁵ Unfortunately, the *travaux préparatoires* does not explain why the references to international law differ although the three different expressions do not have the same meaning. Another issue that the *travaux préparatoires* does not mention is that UNCLOS has its own dispute settlement mechanism, in Part XV, which includes judicial bodies. Since the Maritime Zones Act is an incorporation of some of the more important provisions of UNCLOS and makes references to international law, it can be argued that the awards and judgements of these bodies should have a special status if they address issues that are of importance for the Maritime Zones Act.

4.2 *Rules of International Law*

Article 2 § 1 of the Maritime Zones Act states that “[t]he sovereignty of Iceland extends to the territorial sea, the bed of the territorial sea and the superjacent air space.” Paragraph 2 provides that “[t]he sovereignty is exercised in accordance with Icelandic law and the *rules of international law*.”³⁶ The *travaux préparatoires* notes that Article 2 does not need any explanation!³⁷

33 Ibid, Articles 312–4.

34 PR B 1978–9 (n 26) 3179.

35 Klabbars (n 7) 295.

36 Interestingly, Article 2 does not address innocent passage, the main exception from coastal states sovereignty in the territorial sea.

37 PR A 1978–9 (n 24) 1618.

Friðrik Sophusson, a parliamentarian at the time, stated in the debates about the bill, in the lower division of the Althing, that he regarded it questionable to oblige Iceland to respect the rules of international law, when it is kept in mind, according to Sophusson, that international law is not always clear, and sometimes, when it is clear, Iceland has refused to abide to it.³⁸ As an example, Sophusson mentioned the refusal of Iceland to accept the jurisdiction of the International Court of Justice (ICJ) in one of the episodes of the Cod Wars, although Iceland had clearly done so in a bilateral treaty more than a decade before the dispute was brought before the Court.³⁹ In other words, Sophusson was worried about the clarity of international law in general as well as that a reference to international law could limit Iceland's option to violate its international obligations when it was in its interest. Neither Sophusson nor anyone else who participated in the debates at the Althing discussed exactly how the expression "rules of international law" should be interpreted.

It is not fully clear how to interpret the expression "rules of international law." International law refers undoubtedly to the sources of international law as expressed in Article 38 of the Statute of the ICJ, that is, treaties, customs, general principles of law, and judicial decisions and the writing of publicists as subsidiary means.⁴⁰ On the other hand, it is unclear how to interpret the term *rules*. Perhaps the expression should be interpreted as treaties because they contain rules. There are, however, arguments against the interpretation. If this was really the intention, why was the term *treaties* not selected instead of mystifying the meaning by using the expression "rules of international law"?

The explanation for the wording is perhaps straightforward. At the time when the bill was written, a consensus had been reached at the Third Law of the Sea Conference regarding the part on the territorial sea. Article 2 § 3 of UNCLOS provides that "[t]he sovereignty over the territorial sea is exercised subject to this Convention and to other *rules of international law*." In line with UNCLOS, Article 2 § 2 of the Maritime Zones Act states that "[t]he sovereignty is exercised in accordance with Icelandic law and the *rules of international law*." In short, the domestic article can be described as an adaptation of an international law provision into a domestic law provision. If the general explanations in the *travaux préparatoires* and the speech of the foreign minister given when he proposed the bill are kept in mind, the outcome must be that Article 2 § 2 of the Maritime Zones Act refers to all sources of international law.

38 PR B 1978–9 (n 26) 4484.

39 Ibid; *Fisheries Jurisdiction Case* (Federal Republic of Germany v. Iceland) (Judgement) [1974] ICJ Rep. 175, 184–7, paras. 25–9; *Fisheries Jurisdiction Case* (United Kingdom v. Iceland) (Judgement) [1974] ICJ Rep. 175, 184–7, paras. 25–9.

40 Statute of the International Court of Justice, (adopted 26 June 1945; entered into force 24 October 1945) 1 UNTS xvi.

4.3 *International Law*

Article 4 of the Maritime Zones Act describes the rights and duties of Iceland in the EEZ, which according to Article 3 extends to 200 nm from the baselines by which the breadth of the territorial sea is measured. As is well-known, coastal states enjoy certain sovereign rights within the EEZ, not sovereignty. The most important rights concern the utilization of natural resources and the preservation of the environment. The *travaux préparatoires* explains that the provision lists the rights that coastal states enjoy in the EEZ in conformity with the consensus at the Third Law of the Sea Conference.⁴¹ Article 4 contains two provisions that refer to international law. The former refers to “international law,” and the latter, to “international agreements to which Iceland is a party”.

Article 4 § 1 (a–b) lists what the sovereign rights and jurisdiction in the EEZ entail.⁴² Subparagraph *c* adds that Iceland has in the EEZ “other rights and duties under international law.” Professor Gunnar G. Schram asked in his book *Hafréttur (The Law of the Sea)* what meaning should be given to the expression *international law* in this context. According to Schram, it is possible to interpret the usage of the concept in three ways: *first*, as the sources of international law in general; *second*, as treaties in general; and *third*, as international agreements that Iceland is party to.⁴³ Schram was of the opinion that the third possibility should be selected because it was likely that the intent of the Althing was to secure maximum influence over the rights within the Icelandic EEZ.⁴⁴ Schram mentioned, though, that Iceland, just as other states, is bound by the customs that may have evolved concerning the rights and duties of coastal states in the EEZ.⁴⁵

Schram’s interpretation must be rejected because it does not conform to a plain and rational textual interpretation. Schram forgets to mention that the Maritime Zones Act refers to international law in three different ways. His book does not ask why Article 4 § 2, which comes straight after Article 4 § 1 (c), refers differently to international law. Article 4 § 2 reads: “The exercise of rights and the performance of duties in the economic zone shall be in

41 PR A1978–9 (n 24) 1618.

42 They read: In the economic zone, Iceland has

(a) sovereign rights for the purpose of exploring, exploiting, conserving, and managing the resources, whether living or non-living, of the seabed and subsoil and the superjacent waters, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents, and winds;

(b) jurisdiction with regard to

(i) the establishment and use of man-made structures,

(ii) scientific research

(iii) the preservation of the marine environment.

43 Gunnar G. Schram, *Hafréttur* (Háskólaútgáfan, 2002) 82.

44 *Ibid.*

45 *Ibid.*

accordance with special legislation and *in conformity with international agreements to which Iceland is a party.*⁴⁶ If Schram's interpretation is correct, the same article uses two different expressions, which do not have the same meaning, about the same object. Logic denies that these different expressions have the same meaning.

The explanation to the question why this expression was used could again be rather simple. Article 56 of UNCLOS is clearly incorporated in Article 4 of the Maritime Zones Act. If the two articles are compared, it is clear that Article 4 § 1 (a–b) is a direct translation of Article 56 § 1 (a–b). On the other hand, the wording in subparagraph (c) of the two provisions is different. The UNCLOS provision provides that, within the EEZ, the coastal state has “other rights and duties provided for *in this Convention.*”⁴⁷ In other words, the rights and duties are linked to the Convention, not to the sources of international law in general. This means that the reference to international law in Article 4 § 1 (c) is broader than in its model provision in UNCLOS. The explanation of the provision in the *travaux préparatoires* does not address this difference. The position taken here is that it is difficult to view Article 4 § 1 (c) in a different manner than as a wide open door into the realm of international law.

4.4 *International Agreements to Which Iceland Is a Party*

As aforementioned, two provisions of the Maritime Zones Act refer to international agreements to which Iceland is a party, that is, Articles 4 § 2 and 8 § 2. Article 4 § 2 provides that “[t]he exercise of rights and the performance of duties in the economic zone shall be in accordance with special legislation and in conformity with international agreements to which Iceland is a party.” The expression “international agreements to which Iceland is a party” is much narrower than “rules of international law” and “international law”. The expression refers to treaties that Iceland is a state party to, such as UNCLOS and the 1995 Fish Stock Agreement,⁴⁸ not customary international law or other sources of international law. The provision seems to be based on Article 56 § 2 of UNCLOS, which reads:

In exercising its rights and performing its duties under this Convention in the [EEZ], the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.

46 Emphasis added.

47 Emphasis added.

48 The United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, adopted 4 August 1995, entered into force 11 December 2001, 2167 UNTS 88.

Because the Maritime Zones Act is obviously not a treaty, it makes references to “international agreements to which Iceland is a party” instead of “the provisions of this Convention”. Interestingly, neither Article 4 nor the *travaux préparatoires* mentions the rights that third states surely enjoy in the Icelandic EEZ under Article 58 § 1 of UNCLOS.⁴⁹

Article 8 of the Maritime Zones Act contains provisions concerning measures to prevent pollution. Its former paragraph states that “[a]ny measures which might pollute or otherwise damage the marine environment shall be avoided.” Its latter paragraph contains the same reference to international law as Article 4 § 2; it read: “The Icelandic authorities concerned shall, by special legislation and in conformity with international agreements to which Iceland is a party, take measures to protect the marine environment against pollution and other harmful effects.”⁵⁰ Because the reference to international agreements is the same as in Article 4 § 2, the same concerns are applicable to Article 8 § 2.

5 References to UNCLOS by the Icelandic Supreme Court

The provisions discussed above in the Maritime Zones Act have not been referred to by the Supreme Court in its judgements; The Court has addressed the provisions of UNCLOS. In the so-called quota case,⁵¹ the Supreme Court made references to UNCLOS as a part of a multilayered argument that public interests justified restrictions on commercial fishing. The Court pointed out that the Icelandic government was obliged under international law to harvest fish stocks in a sensible manner according to Articles 61 and 62 of UNCLOS.⁵² Interestingly, the Supreme Court made references directly to UNCLOS without linking UNCLOS to Article 4 of the Maritime Zones Act. From the text of the judgement, it is not clear whether the Supreme Court was interpreting the relevant Icelandic rules in conformity with UNCLOS or whether it was using UNCLOS as a source of law.

49 The provision reads:

In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.

50 The special legislation referred to in the provision is currently Act No. 33 from 2004 on Marine and Coastal Antipollution Measures. It incorporates various international treaties concerning the environment and makes quite many reference to international agreements to which Iceland is a party. An English translation is available at “www.lhg.is/media/arsskyrslur/Act_33_2004.pdf”, accessed 17 December 2013.

51 *Ákærvaldið v. Björn Kristjánsson, Svavar Rúnar Guðnason, Hyrnó ehf.*, Hrd. 6 December 2000 case no. 12/2000; *See also Vinnslustöðin v. íslenska ríkið*, Hrd. 29 November 2012 case no. 177/2012 and *Hallgrímur Pálmi Stefánsson, H. Skaftason ehf. v. Fiskistofu, íslenska ríkið*, Hrd. 26 March 2013 case no. 652/2012.

52 The provisions address the conservation and utilization of marine resources.

Similarly, no reference was made to the Maritime Zones Act in the part of the so-called Papey Case⁵³ that dealt with the legality of a hot pursuit that the coast guard was engaged in. On the other hand, it made references to provisions of the criminal code that address issues of criminal jurisdiction. Consequently, the Supreme Court connected the Icelandic legal system with UNCLOS through a different channel, which was sensible in the circumstances because the case dealt with a criminal offense. A likely reason why the Supreme Court has not referred to these provisions in its judgement could be that the advocates seem not to have referred to these provisions in the written or oral hearings.

6 Conflicts between International and Domestic Law

Neither the Maritime Zones Act nor the *travaux préparatoires* addresses the possibility that a relevant provision in an Icelandic act and a relevant rule of international law, which the provisions in the act refer to, can conflict. In these circumstances, the question needs to be answered whether the domestic legislation or the rule of international law prevails.

Below, one example will be given of such a conflict. As mentioned above, Article 4 § 2 of the Maritime Zones Act provides that “[t]he exercise of rights and the performance of duties in the economic zone shall be in accordance with special legislation and in conformity with international agreements to which Iceland is a party.” The Fisheries Management Act no. 116 from 2006⁵⁴ definitely falls in the category “special legislation.” On the other hand, the main international agreement that Iceland is a party to in this field is UNCLOS. Article 2 § 2 of the Fisheries Management Act states that

Iceland's exclusive fishing zone includes the ocean area extending from the low-water line to the outer limits of Iceland's exclusive economic zone ... as defined by Act No. 41, of 1 June 1979, concerning the Icelandic territorial sea, exclusive economic zone and continental shelf.

Article 25 § 1 reads:

Violations against the provisions of this Act, rules adopted by virtue of it, or license provisions shall be liable to fines, regardless of whether committed deliberately or through negligence. Cases of serious or repeated deliberate violation shall furthermore be *liable to imprisonment for up to six years*.⁵⁵

Article 73 § 3 of UNCLOS reads:

53 *Ákærvaldið v. Peter Rabe*, Hrd. 3 December 2009 case no. 509/2009.

54 English translation is available at “www.fisheries.is/management/fisheries-management/the-fisheries-management-act/”, accessed 17 December 2013.

55 Emphasis added.

Coastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone *may not include imprisonment*, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment.⁵⁶

It must be noted that Iceland has not made any agreements to the contrary to Article 73 § 3. Consequently, it seems that the penalty provision for serious and repeated deliberate violations of the Fisheries Management Act is not fully in conformity with the ban on imprisonment for foreign fishermen for violations of fisheries law and regulations in UNCLOS.

This inconsistency creates a theoretical problem. If “[t]he exercise of rights and the performance of duties ... shall be in accordance with special legislation and in conformity with international agreements to which Iceland is a party,” what happens if the special legislation and the international agreement conflict? What rule prevails? It should be kept in mind that the wordings “shall be in accordance” and “in conformity” are probably of no significance because the meaning of these expressions is the same. It could be argued that the penal provision is clear and that, in a dualistic legal system, domestic law dominates international law. On the other hand, in these circumstances, the main statutory provision concerning the EEZ states that the exercise of rights and the performance of duties therein shall not only be in accordance with special legislation but also in conformity with international agreements to which Iceland is a party. There is no clear-cut answer to this problem. If this issue would be brought up in a trial, it must be likely that the judge would avoid the above complexity by not sentencing the defendant to imprisonment.

A related subject is the question what happens in case an administrative regulation adopted under a specialised legislation, such as the Fisheries Management Act, conflicts with a rule of international law, which is applicable through one of the provisions that refer to international law in the Maritime Zones Act. The position taken here is that, in such circumstances, international law prevails for the reason that the international rule has been linked to a statutory act, and as is well-known, statutory acts are superior to administrative regulations according to the hierarchy of norms.

7 Developments of International Law

The three provisions of the Maritime Zones Act are without regard to whether the international rights and obligations they refer to were existing at the time when the act entered into force. Thus, the developments of international law impact the provisions. The developments of international law since 1979 and future developments shall therefore be taken into account when the provisions of the act are applied and interpreted.

A distinction must be made between the provisions that make references to international law and those that refer to international agreements to which

⁵⁶ Emphasis added.

Iceland is a party. As aforementioned, the former refers to international law in a much broader sense than the latter. Since the Maritime Zones Act entered into force in 1979, the legal aspects of the marine environment have evolved, in some areas dramatically, which affects the application and interpretation of the act. New concepts of great importance for the legal framework of the marine environment have evolved. The precautionary principle/approach is one of the concepts that did not exist as such in international law in 1979. Principle 15 of the 1992 Rio Declaration of Environment and Development reads:

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.⁵⁷

In its advisory opinion in the case concerning *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area* from 2011, the Seabed Chamber of the International Tribunal for the Law observed

that the precautionary approach has been incorporated into a growing number of international treaties and other instruments, many of which reflect the formulation of Principle 15 of the Rio Declaration. In the view of the Chamber, this has initiated a trend towards making this approach part of customary international law.⁵⁸

Arguably, if the precautionary approach is part of international law, it has an effect on the Icelandic legal system, and in the relevant circumstances, the sovereign rights of Iceland in the territorial sea and one of the duties under international law in the EEZ is to respect the precautionary approach, according to Icelandic law. The other category of provisions that refer to international law in the Maritime Zones Act does so in a much narrower sense, which is to treaties that Iceland is a party to. Such treaties are both bilateral and multilateral, the most important being UNCLOS.

The provisions of the Maritime Zones Act give the international rights and duties mentioned above, which have developed since the act entered into force, certain legal status in the Icelandic legal system. Consequently, it is possible to view the provisions that refer to international law not only as bridges between two legal realities but also as an automatic developer that transforms new international legal rights and obligations into domestic rights and obligations.

57 United Nations Conference on Environment and Development: Rio Declaration on Environment and Development 31 ILM 874 (1992).

58 *Responsibilities and Obligations of States sponsoring persons and entities with respect to activities in the Area* (Advisory Opinion) (The Seabed Disputes Chamber of ITLOS) (2011) 50 ILM 458, 477, para 135.

8 Conclusions

The analysis of the provisions of the Maritime Zones Act, which refer to international law, seems to confirm that the relationship between Icelandic law and international law in this area of the law is far from being dualistic. It can even be argued that it is more in line with monism. It must be kept in mind that the Maritime Zones Act is one of many of the Icelandic legal systems that contain provisions that refer to international law. Consequently, this conclusion is likely applicable to other acts that contain similar provisions.

To sum up, the provisions that have been discussed in this article cannot only be seen as bridges between the realms of international law and domestic law. They can also be seen as a sort of Trojan horse that opens the door for the development of international law within the walls of domestic law without any further input of the legislator. In short, there are indications that the Icelandic legal system, at least in some areas of the law, is not as dualistic as is often argued in the Icelandic legal society and that international law has much more impact on the Icelandic legal system than many realise.

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