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The Relevance of Customary International Law in the Domestic Legal Order of a Federal State

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1 Introduction

Although the relevance of treaty law has grown over time in international law, customary rules remain an important source of law in international relations. An underdeveloped theme when studying customary norms is the use of customary international law (CIL) within domestic legal orders. Especially in federal states, where the composing parts of the polity are sometimes seen as 'remnants' of or reminiscent to sovereign states, rules pertaining to the relationship between states within the field of international law might also prove useful for regulating the behaviour of states that share at least some of the characteristics of sovereign entities but have entered into compacts merging them into greater and tighter-knit polities. For a constitutional court in a federal state, such norms therefore might be a useful tool in solving disputes between the states or between the federation and the states. They might also be useful in regulating treaty practices in federations where there exists a possibility of interstate treaties. Yet, this ambiguity (is the legal order that unites the states and the federation through the federal constitution all-encompassing, or does it leave room for the use of non-domestic norms?) concerning the relationship between partners in a federal makeup can also be shown in the way in which domestic courts make use of these norms. It is seldom completely clear-cut whether a court actually does use a rule of CIL in its original meaning.

In this chapter, I will try to shed some light on the way in which rules of CIL have been used within the domestic legal order for regulating the relations between the states of both federal entities in Germany and Austria. Other federal states might have been used instead of these two countries. The reason for choosing Germany and Austria is that in the

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former an extensive debate has been held on the question whether the German states that entered into the federal compact of 1871 could still be described as states despite the fact that they had lost their independent status under international law.[1] This debate created an intellectual and legal atmosphere in which the statehood of the German regional entities remained relevant, even after the end of the German empire in 1918 – and thus the idea that the rules pertaining to the relationship between states, that is, international law, could still be relevant as well. Austria only became a federal state in 1920, after the demise of the Habsburg empire and thus more or less followed the ideas and conceptions already developed in Germany. Moreover, in both Germany and Austria, domestic interstate law is primarily created through treaties, which also points in the direction of an interesting analogy to international law.

As will be demonstrated, rules of CIL have (arguably) shown to be useful, especially when it comes to disputes between two or more states. As stated above, the use of these norms does raise important questions concerning the nature of federal legal orders, however. Are the component parts of a federal state still 'states' in an international law sense of the word? If so, how much legal manoeuvring space exists to make use of norms of international law to regulate their relations? What is the legal justification, if any, for the 'domestic' use of norms originating under international law? These questions, and the ambiguous unease they provoke in domestic courts, will be dealt with in the following paragraphs.

In the next section, the focus will be laid on the way in which in the Weimar Republic rules of CIL were used to solve disputes between German states. This will be done through an analysis of the case law of the special court constituted under the 1919 German constitution to deal with such legal questions, the Staatsgerichtshof für das deutsche Reich (RStGH). In the third section, the focus will be on the post-war case law of the Federal Constitutional Court, the Bundesverfassungsgericht (BVerfG). The question will be analysed how the case law of the BVerfG has built upon the foundations laid in the 1920s by its Weimar predecessor. The fourth section deals with the situation in Austria: interestingly enough, the Austrian constitution (the Bundes-Verfassungsgesetz, B-VG) contains an article explicitly acknowledging the existence and the relevance of international law within the domestic legal order to regulate interstate and

[1] An illuminating analysis of this German debate can be found in M Duchateau, *Het Europees Parlement als transnationale volksvertegenwoordiging* (Subreeks Grondslagen van de EU ed, Kluwer 2014) 302–27.

federal-state relations, Article 15a B-VG. This article and its practical use under the Austrian constitution will be scrutinised. Finally, some conclusions will be drawn and some light will be shed on the question whether or not courts are using norms of CIL, or are merely using them as a source of inspiration to develop unwritten principles of federal law.

2 The Use of CIL in the Republic of Weimar

After the fall of the monarchy in Germany in November 1918, the new republican government organised elections for a federal constituent assembly, which assembled for the first time on 6 February 1919 in the Thuringian city of Weimar.[2] Over the following months, it elaborated a new constitution for the German Reich that introduced general suffrage for men and women, a catalogue of fundamental rights, a full parliamentary system and a strong, directly elected federal president with far-reaching powers. The constitution was enacted on 11 August 1919. The Reich constitution (often described as the 'Weimar' constitution because it was created there)[3] maintained the existing makeup of the German state as a federation, but it contained many characteristics that strengthened the role of the central authorities. Notable among those were the fact that the new Reich government would be dependent on the confidence of the majority of the directly elected Federal Diet,[4] representing the whole of the German nation and that the new Reich president was also elected by the whole nation,[5] but it was also visible in the division of powers between the federation and the states: compared to Bismarck's 1871 constitution, the legislative and executive powers of the federation were visibly strengthened.

Among the 'federal' innovations of the Weimar constitution we also find the introduction of a new federal court, the so-called Staatsgerichtshof für das deutsche Reich (Federal State Court, RStGH) a specialised court to deal with disputes of a federal nature. Article 19 of the constitution described its legal powers. The RStGH was empowered to settle disputes of a public law

[2] E Zweigert (intr), *Die Verfassung des Deutschen Reichs vom 11. August 1919* (J Bensheimer 1919) 8.

[3] For similar reasons, the 1919 Bavarian constitution is often referred to as the 'Bamberg' constitution.

[4] Verfassung des Deutschen Reichs vom 11 August 1919, RGBl 1919, S 1383, art 54. In this chapter, the standard German abbreviation RV, for Reichsverfassung (Federal Constitution) will be used to refer to articles of this constitution.

[5] ibid art 41.

nature within one of the German states, between two or more states or between the Reich and one or more states, insofar as no other court was created to deal with any of these issues.[6] It was originally envisioned as being an adjacent court to the proposed Federal Administrative Court, the Reichsverwaltungsgericht. This, however, was never actually created, which led to the situation that the court became permanently organised along the lines originally meant as a temporal solution: it was an ad hoc court, annexed to the Reichsgericht. Its president was the president of the Reichsgericht itself, and it consisted of six other members: three judges of the Reichsgericht, one judge from the Oberverwaltungsgericht of the state of Prussia, one judge from the Verwaltungsgerichtshof of the state of Bavaria and one judge from the Oberverwaltungsgericht of the state of Saxony.[7] Thus, the RStGH was a mixture of 'ordinary' and administrative judges.

Although case law concerning constitutional disputes within a state formed the bulk of the activities of the RStGH (the majority of the German states, including the largest and most populous of them all, Prussia, did not create their own constitutional courts), it did decide a number of interesting cases concerning disputes between different states. And it was especially in this field that the court used norms of CIL to settle these disputes, insofar as the domestic legal order did not provide sufficiently clear or relevant norms. The basis of the use of customary norms was found in Article 4 RV. This article stated: '*Die allgemein anerkannten Regeln des Völkerrechts gelten als bindende Bestandteile des deutschen Reichsrechts*.'[8] This article was a novelty in German constitutional law: under the old constitution of 1871, international law was solely seen as the law between states: for the citizens of Germany, it formed *a res inter alios acta*. That changed because of Article 4 of the new 1919 constitution: for the first time, norms of international law became part of the domestic legal order, binding public bodies and citizens alike and gaining relevance before the

[6] Thus, when a German state created its own specialised constitutional court the RStGH could only decide legal cases within that state for which this state court had no competence. Any federal dispute brought under the competence of another federal court by the federal legislator limited the competence of the RStGH as well. The constitutionality of state acts, for instance, was brought under the competence of the Reichsgericht and the Reichsfinanzgericht (for tax and budgetary acts) respectively and could therefore not be decided by the RStGH.

[7] Reichsgesetz vom 9 Juli 1921 (Federal Act of 9 July 1921) RGBl 1921, S 905.

[8] 'The generally acknowledged rules of international law are binding norms of German federal law.'

German courts.[9] It was never entirely clear which norms of international law were covered by Article 4: only norms of CIL, or also treaty norms? Those acknowledging that treaty law could be covered by Article 4 RV mostly accepted that the criterion for 'acknowledgement' by Germany entailed the ratification of the treaty through a federal act, as provided for by Article 45 (3) RV.[10] Those denying it mostly adhered to the idea that Article 45 (3) RV itself regulated the transformation of treaty norms into the German legal order. Since according to both theories Article 4 RV regulated the transformation of customary norms and according to both theories the internal hierarchical status of all international norms was that of a federal act, the question did not have huge practical relevance.[11] Being on a par with federal acts, customary norms of international law took precedence over earlier federal acts on the basis of the *lex posterior* rule and took precedence over all state law (including constitutional state law) on the basis of the *lex superior* rule.[12]

The RStGH never chose sides in the debate on the specific relationship between Article 4 and Article 45 (3) RV. In four of the cases it decided on disputes between two or more of Germany's states it made use of Article 4 RV to settle the case in a legally binding matter. The first of those was a dispute between Prussia and Bremen concerning a 1904 treaty between

[9] *Das ist eine Neuerung, deren Tragweite nicht unterschätzt werden darf. Die deutschen Gerichte werden auf Grund des Artikels 4 nicht nur . . . Akten der deutschen Gerichtsbarkeit gegen fremde Staaten in direkter Anwendung völkerrechtlicher Normen für unzulässig erklären, sie werden etwa auch Klagen von Einzelpersonen . . . die sich auf das Völkerrecht und seine Quellen (etwa auf die Haager Konferenzbeschlüsse), stützen, zulassen müssen.*

That is a new development of which the relevance can hardly be overestimated. The German courts will not only declare acts under German jurisdiction against foreign powers unlawful when directly applying rules of international law, they will also have to allow standing to individual complaints founded in international law and its sources, such as the decisions of the conference of the Hague.

G Anschütz, *Die Verfassung des deutschen Reichs vom 11. August 1919. Ein Kommentar für Wissenschaft und Praxis* (4th ed, Stilke 1924) 47 (unofficial translation by the author).

[10] '*Bündnisse und Verträge mit fremden Staaten, die sich auf Gegenstände der Reichsgesetzgebung bestehen, bedürfen der Zustimmung des Reichstags*' ('Alliances and treaties with foreign powers concerning matters of federal legislation can only be entered upon with the prior assent of the federal diet'). Unofficial translation by the author.

[11] Anschütz (n 9) 49.

[12] ibid 50.

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the two states on the legal and economic status of Bremerhaven. Bremen claimed before the RStGH that this treaty had a very negative impact on the Bremen economy because it was heavily written in favour of Prussia's interests in the region. Under the circumstances of the old Reich this could perhaps be justified, Bremen claimed, because under the old constitution Prussia had been more than a *primus inter pares*.[13] But under the new 1919 constitution this had changed and Prussia had become nothing more than just the largest of the German states. Thus, the 1904 treaty should not be used under the same circumstances as before the war, Bremen argued before the court. The second one decided by the RStGH concerned a dispute between Baden on the one hand and Württemberg and Prussia (for its Hohenzollern territories bordering Baden and Württemberg) on the other concerning the use of water rights from the river Danube. The third one was a case concerning Bremen on the one hand and Prussia, Brunswick and Thuringia on the other hand concerning the pollution of the river Weser by potassium mines in the latter states, forcing Bremen to halt the use of the river as a source of drinking water. The fourth and final case in which the RStGH used Article 4 RV was a dispute between the states of Lübeck and Mecklenburg-Strelitz on fishing rights in the Lübecker Bucht, a part of the (German) Baltic Sea.[14]

The second decision mentioned above is a good example of the way in which the RStGH made use of Article 4 of the 1919 constitution in all four of these cases and is therefore worthwhile looking into in some more detail. The case centred around the fact that water from the Danube leaked away on the territory of Baden, ending up in the small Badener river Aach. This river was an important source of drinking water in parts

[13] The 1871 Reich constitution gave Prussia in many respects a superior status over other states. The king of Prussia was the principal monarch of Germany and *qualitate qua* German Emperor; the ministers in the government of Prussia were *qualitate qua* the ministers of the Reich, although they were in that capacity referred to as *Staatssekretäre*, state secretaries; the Reich chancellor was also the prime minister of Prussia and in the Bundesrat, the Reich assembly representing the interests of the states, Prussia had a blocking veto. All that was no longer the case under the 1919 republican constitution. The governments of the Reich and Prussia became completely separated and within the Reichsrat, the successor to the old Bundesrat, Prussia had only 2/5th of the votes. Moreover, half of those Prussian votes were not cast by the government of the state of Prussia, but by the executives of the Prussian provinces, who voted independently from the state government, RV, arts 61, 63.

[14] See G Hoogers & G Karapetian, 'Federal Disputes in the German Reich under the Weimar Constitution: Lessons in Dispute Settlement for the Kingdom of the Netherlands' (2018) 12(3) Vienna Journal on International Constitutional Law 257.

of Baden, and the Badener authorities had a keen interest in the continuation of this leakage. This, however, led to measurable lower levels in the Danube during periods of lesser rainfall. Both Württemberg and the Hohenzollern province of Prussia used the Danube for drinking water and industrial purposes too. They claimed that Baden strengthened the natural seepage through lack of confining measures on the banks of the river and even through active measures, thereby infringing on the rights of both states. They brought a case before the RStGH in order to compel Baden to desist from any further measure that would strengthen the natural seepage of the Danube waters. The RStGH gave its decision on 18 June 1927.[15] The court concludes in a preliminary remark that the conflict is not of a private law, but of a public law nature, since the conflict deals with the way in which the three states conduct their water policies: and those powers were not conferred to the federation by the Reich constitution, Thus, the conflict was of an interstate, public law nature, making it one of the types of dispute for which the Staatsgerichtshof enjoyed competence under Article 19 RV. The court further concludes that neither federal law nor Badener law can be used as a legal basis for settling the claim, an analysis that leads to one of the key paragraphs of the decision.

When neither federal nor state law is available, the court must make use of other sources of law to settle the dispute, since there can be no gap in the legal order (*Rechtslücke*), the court states.[16] Only international law can play that part. It can be used in the interstate relations within Germany, albeit in a limited way. For although the relationship between the German states is primarily regulated and structured through the federal constitution, the Reich never intended to create an all-encompassing order. Fundamentally, the German states are still (sovereign) states, albeit with a limited sovereignty. Article 5 RV states that the state powers are enacted through state organs on the basis of the state

[15] H Lammers & W Simons (eds), *Die Rechtsprechung des Staatsgerichtshofes für das Deutsche Reich und des Reichsgerichts auf Grund von Artikel 13 Abs 2 der Reichsverfassung* (Berlin 1927) vol 1(37), 178.

[16] The RStGH does not argue that rules of CIL are a prime source of law for German courts in this respect. The fundamental rule is that the relations between the federation and the Ctates, as well as the interstate relations, are regulated by domestic federal law: '*In erster Linie regeln sich die gegenseitigen Rechtsbeziehungen der deutschen Staaten nach der Reichsverfassung und den auf ihrer Grundlage erlassenen Reichsgesetzen*' ('Primarily, the legal relations between the German states are regulated by the federal Constitution and the federal acts promulgated on the basis thereof'), Lammers & Simons (n 15), 185. Unofficial translation by the author.

constitutions. Articles 6 frth. RV regulate the legislative powers of the federation in such a way that the states enjoy all legislative competences unless and insofar the federal legislator has been made competent. Insofar as the states have retained legislative competences, they also have the right to enter into treaties with foreign powers (Article 78 (2) RV). Thus, there is a clear basis, through the whole structure of the federal makeup of the 1919 constitution and through Article 4 RV itself, to make international law applicable on the interstate relations of the German states.[17]

From this, the court draws some important conclusions. It claims that international law, in its more recent developments, has strengthened the idea that states are limited in their sovereignty because they belong to an international order of states. It follows that there exists a general (unwritten)

17 *Kann die Entscheidung demnach weder dem Reichsrecht noch dem Landesrecht entnommen werden, so kommt nur noch zwischenstaatliches, d.h. Völkerrecht in Frage. Seine Anwendbarkeit im Verhältniss der deutschen Länder zueinander ist anzuerkennen, wenngleich in beschränktem Maße. In erster Linie regeln sich die gegenseitigen Rechtsbeziehungen der deutschen Staaten nach der Reichsverfassung und den auf ihrer Grundlage erlassenen Reichsgesetzen. Diese Regelung ist aber unvollständig. . .. Die historische Stellung der Länder als selbständiger Staaten ist . . . bis heute bestehen geblieben. . .. Soweit sich die Länder danach als selbständige Staaten betätigen können, auf den Gebieten also, die ihrer Gesetzgebungsgewalt unterliegen . . . regeln sich ihre Rechtsbeziehungen zueinander nach Völkerrecht, d.h. nach den in Artikel 4 RVerf. genannten allgemein anerkannten Regeln des Völkerrechts, die als bindende Bestandteile des deutschen Reichsrechts gelten.*

(Should both federal law and state law be incapable of providing a decision, then only interstate law, i.e. international law, can be used. Its applicability is to be acknowledged in the relationship of the German states to one another, albeit in a limited manner. Primarily, the legal relations between the German states are regulated by the federal Constitution and the federal acts promulgated on the basis thereof. This is an incomplete legal order, however. Up until the present, the historical position of the German states as autonomous entities has been maintained. Insofar as the states can act in an autonomous manner, in those areas where they enjoy legislative powers, their interstate relations are regulated by international law, i.e. according to the generally acknowledged norms of international law mentioned in art. 4 of the federal constitution, which operate as binding norms of German federal law.)

Lammers & Simons (n 15), unofficial translation by the author; See also H Schneider & W Schaumann, 'Verträge zwischen Gliedstaaten im Bundesstaat' (1961) 19 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 122; H Bauer, *Die Bundestreue: Zugleich ein Beitrag zur Dogmatik des Bundesstaatsrechts und zur Rechtsverhältnislehre* (Mohr Siebeck 1992) 95–6.

principle of mutual respect and good neighbourliness and a duty of non-harm. Within the German legal order, this is even more the case: the preamble of the 1919 constitution states that it originates from the unity of the German nation itself, with the aim to promote the inner peace of Germany. The constitution also creates through Article 110 (2) the right to equal treatment in every German state for all German citizens. From this it follows, the RStGH argues, that every German state has a duty to act in such a manner as not to infringe upon the rights and interests of Germans in other states unless this is absolutely necessary. The sovereignty of the German states on their own territory is therefore even more limited than the limitations that would follow from the aforementioned general principle of international law, because the German states form a legal community that is more close-knit than an ordinary international one.[18]

[18] *Die Sätze des Völkerrechts in seiner neueren Entwicklung beruhen wesentlich auf dem Gedanken einer Einschränkung der Gebietshoheit der einzelnen Staaten durch ihre Zugehörigkeit zur Völkerrechtsgemeinschaft. Aus ihr wird eine Pflicht der Staaten zur gegenseitigen Achtung und Rücksichtnahme hergeleitet, eine Pflicht, einander nicht zu verletzen. Noch enger als diese allgemeine Völkergemeinschaft ist die Gemeinschaft in der die deutschen Länder als Glieder des deutschen Reichs zueinander stehen. Die Verfassung vom 11. August 1919 beruht nach ihrem Vorspruch auf der Einigung des deutschen Volkes in seinen Stämmen und will seinem inneren Frieden dienen. Sie gibt in Artikel 110 Abs. 2 jedem Deutschen in jedem Lande des Reichs die gleichen Rechte und Pflichten wie die Angehörigen des Landes selbst. . .. So gelangt man im Verhältnis der deutschen Länder zueinander zu einer stärkeren Einschränkung des Grundsatzes der Gebietshoheit, als wenn sich zwei völlig fremde Staaten gegenüberstehen. . .. Daraus ergeben sich Verpflichtungen der einzelnen deutschen Staaten zueinander, die sich, wenigstens in gleichem Maße, aus dem für alle Staaten geltenden Völkerrecht nicht herleiten lassen.*

(The recent development of international law is fundamentally based upon the idea that the territorial sovereignty of individual states is limited by the fact that they belong to the international community. From this concept stems the duty of states to respect and acknowledge each other, a duty to refrain from reciprocal harm. Far more closely knit is the community in which the German states are bound as members of the German Reich. The preamble of the Constitution of 11 August 1919 makes clear that it is based upon the unity of the German people in its geographical diversity and the promotion of its inner peace. It grants in article 110 par. 2 every German in every state of the Reich the same rights and duties as the inhabitants of that state itself. From this it follows that the territorial sovereignty of the German states in their interstate relations are more limited than would have been the case if it were two completely independent states. And from that, it follows that they have obligations to each other that cannot be discerned in the same way from international law itself.)

Lammers & Simons (n 15) 186, unofficial translation by the author; Bauer (n 17) 96.

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The use of CIL by the RStGH is therefore of a somewhat ambiguous nature. On the one hand, the court fully recognises that Article 4 of the federal constitution regulates the domestic force of (customary) international norms. It acknowledges that the principle of friendly coexistence and non-harm to other states is a norm that is valid, applicable and enforceable within the domestic legal order of Germany. On the other hand, however, the court clearly accepts the idea that because of the fact that the relationship between the German states is not primarily of an international legal character, it is primarily domestic, federal law that regulates interstate relations. Furthermore, customary international norms have a different, and more material content than they would have in the international legal order. One could perhaps argue (although the Staatsgerichtshof is silent on the matter) that Article 4 RV not only transforms norms of CIL into German law but also – dependent on the norm – adapts their content to make them better suited for domestic use.

3 The Use of CIL in the Federal Republic of Germany

This ambiguity has not been clearly solved in the post-war legal order of the Grundgesetz either. One of the very first decisions the Bundesverfassungsgericht gave after its inception was the so-called Südweststaatentscheidung of 23 October 1951.[19] Although the new federal constitutional court had far more powers than the ones given to the RStGH, public law disputes between the federation and one or more states and between two or more states are enumerated among them.[20] In that sense, the RStGH is a clear legal predecessor of the BVerfG. The Südweststaatentscheidung originated in an agreement between France and the United States of July 1945 to demarcate their respective zones of occupation in the southwest of Germany along the federal highway (*Reichsautobahn*) Karlsruhe-Ulm-Stuttgart. This divided the existing territories of the old states of Württemberg and Baden (and the Prussian province of Hohenzollern-Sigmaringen) between the French and American zones of responsibility. The American military authorities created in their zone of occupation the new state of Württemberg-Baden; the French created two new states, Baden and Württemberg-Hohenzollern.

[19] Bundesverfassungsgericht (Entscheidung vom 23 Oktober 1951) BVerfGE 1, 14.
[20] Grundgesetz für die Bundesrepublik Deutschland vom 23 Mai 1949, BGBl 1949, S 1, Art 93.1(4).

These three states enacted their respective state constitutions on 28 November 1946,[21] 18 May 1947[22] and 22 May 1947.[23] All three states became part of the Federal Republic of Germany; their State Diets enacted the Basic Law on 18 and 21 May 1949 respectively. Almost immediately after the creation of the three states in the southwest it became clear that they were not only artificial creations, which bore no resemblance to the old territorial divisions in the region, but that they were all three too small to function properly in the new makeup of the Federal Republic of Germany. Especially Württemberg-Hohenzollern was a reminder of the Kleinstaaterei that was already partially abolished by the 1919 constitution (which had enabled the federal lawgiver to act on these matters in Article 18 RV, resulting in the creation of the state of Thuringia), but had for the rest completely disappeared under the post-1945 allied occupation.[24] Despite pressure from the allied authorities and negotiations in the summer of 1948, no solution had yet been found when the Basic Law entered into force on 23 May 1949. The Basic Law did, however, contain a special provision for the reshaping of the south-west in Article 118. This article created a more expedient regulation for the possible merger of the three south-western states compared to the

[21] Verfassung des Landes Württemberg-Baden vom 28 November 1946, RegBl 1946, S 277.

[22] Verfassung des Landes Württemberg-Hohenzollern vom 18 Mai 1947, RegBl 1947, S 1.

[23] Verfassung des Landes Baden vom 22 Mai 1947, GVBl 1947, S 129.

[24] Thuringia was created through the Federal Act of 1 May 1920 through the unification of the former states of Saxony-Weimar-Eisenach, Saxony-Meiningen, Saxony-Altenburg, Saxony-Gotha, Schwarzburg-Rudofstadt, Schwarzburg-Sondershausen and the People's State of Reuss, itself a 1919 merger of the old principalities of Reuss-Older Line and Reuss-Younger Line. The Free State of Saxony-Coburg, however, did not join Thuringia but chose to become part of Bavaria in 1920. The post-war cleanup of 1945–49 was far more rigorous: the very small states of Schaumburg-Lippe and Lippe-Detmold disappeared, and so did the slightly bigger states of Oldenburg, Brunswick and Anhalt. Mecklenburg-Strelitz and Mecklenburg-Schwerin had already been merged into Mecklenburg by Federal Act in 1934, Lübeck had been merged with Prussia in 1937. The only small states remaining in the post-war legal order were the old Hanseatic republics of Bremen and Hamburg and the newly created territory of Berlin, which never became fully part of either the Federal Republic of Germany nor the German Democratic Republic because of the special rights of the four allied powers in the city. The most dramatic change was of course the abolition of Prussia by the Allied Control Council in 1947, by far the largest state of Germany. Parts of its former territory are now in Russia and Poland; other parts of Prussia are now the territory of Berlin (a full state since 1990), Brandenburg and Schleswig-Holstein and parts of Mecklenburg-West Pomerania, Saxony-Anhalt, Thuringia, Lower Saxony, North Rhine-Westphalia, Rhineland-Palatinate, Hesse and Baden-Württemberg respectively.

'normal' procedure for the creation or dissolution of a state of Article 29 GG. In all three states a referendum was held (on 24 September 1950) about the question whether or not they should merge into a new Südweststaat. In Württemberg and in the old Hohenzollern lands a vast majority wanted the merger: but in Baden, a clear majority wanted the old state of Baden back, while in the old Badener parts of Württemberg-Baden a significant part of the voters (over 40 per cent) wanted this as well.

Since the three states could not come to an agreement, the federal legislator decided to act unilaterally through Article 118 of the Basic Law. One of the two federal acts published jointly on 4 May 1951 was an act that prolonged the tenure of the existing state diets of Baden and Württemberg-Hohenzollern until the day the state constitutions would be abolished because of the creation of the new state of Baden-Württemberg. This was deemed necessary because their tenure would end before this date and new elections for state diets that would only exist for a couple of weeks were seen as useless and onerous.

Both Baden and Württemberg-Hohenzollern had come to the same conclusion, however. They both started a procedure to amend their state constitutions in order to extend the tenure of their respective diets. Both state constitutions made a plebiscite compulsory for amending the state constitution; both plebiscites were planned for 8 May 1951. Thus, it could be argued, the federal legislator had regulated a matter that fell within the constitutional autonomy of the states. The government of Baden decided to bring the matter before the newly created Bundesverfassungsgericht. Baden not only claimed that this federal act violated the constitutional autonomy of the state, but it also claimed that the other federal act of 4 May 1951 (which regulated the merger of Baden, Württemberg-Hohenzollern and Württemberg-Baden into Baden-Württemberg) was unconstitutional as well, because the Badeners had clearly voted through the referendum in September 1950 that they wanted their old Baden back, not a new Baden-Württemberg. The federal constitutional court sided with the state government of Baden insofar as the federal act prolonging the tenure of the state diets was concerned. It concluded that since the Basic Law was founded upon the principle of democracy, the federal legislator could not interfere unilaterally with the tenure of a state diet in bypassing the constitution that the people of that state have given themselves democratically.[25]

[25] BVerfGE 1, 14, Rn 81–83.

With regard to the second act, the one creating Baden-Württemberg, the situation was different. Article 118 (2) of the Basic Law regulated that the creation of the new Südweststaat was only possible under the guarantee of a mandate of the people. The federal legislator therefore regulated that a referendum was to be held that asked two questions: do you want the new Baden-Württemberg? Or do you want the existing state of Baden? (or in Württemberg-Baden and Württemberg-Hohenzollern: do you want a state of Württemberg, including Württemberg-Hohenzollern?). Baden claimed that this infringed upon the rights to self-determination of the people of Baden because it was not possible for the Badeners to recreate the old pre-1945 state of Baden, although the majority of the Badeners had chosen that option in the 1950 referendum. The Baden state government defended the existence of this right to self-determination partially on the basis of Article 25 of the Basic Law, the successor to the old Article 4 RV. The main difference between the two articles is that Article 25 GG not only states that the general norms of international law are part of the federal legal order, but it also states that these norms create rights and obligations for the inhabitants of the federal republic and that they take precedence over federal acts and state law.[26] Baden claimed that because of Article 25 GG, the general norm of the right to self-determination took precedence over said federal act. The BVerfG denied this claim: it stated, following the reasoning of the RStGH in the Danube decision of 1927, that (customary) rules of international law could only play a part in interstate relations, not in the constitutional relation between the federation and the states.[27]

[26] '*Die allgemeinen Regeln des Völkerrechtes sind Bestandteil des Bundesrechtes. Sie gehen den Gesetzen vor und erzeugen Rechte und Pflichten unmittelbar für die Bewohner des Bundesgebietes*' ('The general norms of international law are part of the federal law. They take precedence over acts of the federal diet and directly create rights and obligations for the inhabitants of the federal territory'). Unofficial translation by the author.

[27] *Ferner soll § 10 unvereinbar sein mit einer durch Artikel 25 GG in Bezug genommenen allgemeinen Regel des Völkerrechts, nach der kein Staat gegen den Willen seines Volkes zur Aufgabe seiner Existenz und zum Eingehen in einen anderen Staat gezwungen werden könne. … Jedenfalls könnte ein das Verhältnis von Staaten zu einander regelnder Völkerrechtssatz innerhalb des Bundesstaates nur im Verhältnis von Land zu Land und im Bereich ihrer rechtlichen Gleichordnung angewendet werden (vgl. Entscheidung des RStGH vom 18. Juni 1927, 7/25, Lammers-Simons I S. 185 ff. u. ö.), nicht dagegen auf das Überordnungsverhältnis von Bund und Land; dieses Verhältnis wird durch die bundesstaatliche Rechtsordnung bestimmt. Bei der Neugliederung – sowohl*

The question which role – if any – CIL as transformed by Article 25 of the Basic Law *did* play in the interstate relations within Germany was decided by the federal constitutional court in a later decision, the *Coburg* decision.[28] The case arose from a dispute between the cities of Coburg and Neustadt bei Coburg and the State of Bavaria. Saxony-Coburg, as has been stated above, was one of the Thuringian states. But while all the others had merged into the state of Thuringia by the Federal Act of 1 May 1920, Coburg (including the smaller city of Neustadt bei Coburg) had been merged with Bavaria through a state treaty (*Staatsvertrag*) between the two states of 24 February 1920.[29] One of the clauses of this treaty between the states of Bavaria and Saxony-Coburg had been that Neustadt bei Coburg would be and remain a separate municipality under its own jurisdiction within Bavaria. Through the state decree on the new territorial division of Bavaria of 27 December 1971,[30] Neustadt bei Coburg had been

> *nach Artikel 29 wie nach Artikel 118 GG – handelt es sich aber nicht nur um das gegenseitige Verhältnis der beteiligten Länder untereinander, sondern zugleich auch um das Verhältnis zwischen Bund und Ländern. Das Bundesrecht, insbesondere das Grundgesetz hat diese Rechtsbeziehungen wie dargelegt, geregelt. Für die Anwendung völkerrechtlicher Normen, die durch Artikel 25 GG Bundesrecht geworden sind, ist damit kein Raum mehr.*
>
> (Further it is claimed that par. 10 is incompatible with the general norm of international law, acknowledged by article 25 of the Basic Law, according to which no state can be forced to give up its own existence and be merged with another state against the will of its own people. In any case, an international norm regulating the interstate relations can only be applicable within a federal state for true state to state relations in the field of their legal equality (see decision of the RStGH of 18 June 1927, 7/25, Lammers-Simons I p. 185 fth.), but not in the hierarchical relationship of federation and state: this is exclusively regulated by the federal legal order. When it comes to the reconstruction of the federal territory – both when applying article 29 or article 118 of the Basic Law – not just the relationship of the relevant states to each other, but also the relationship of the federation to the states is touched upon. Federal law, and especially the Basic Law, has regulated that relationship as is. There is therefore no room for the application of international norms that have become federal law through article 25 of the Basic Law.)

BVerfGE 1, 14, Rn 134, unofficial translation by the author. Interesting, of course, is the fact that the RStGH had said nothing about the question whether or not CIL could play a part in the regulation of federal-state relations; it was simply not part of the 1927 dispute decision.

[28] Bundesverfassungsgericht (Entscheidung vom 30 Januar 1973) BVerfGE 34, 216.

[29] Staatsvertrag zwischen den Freistaaten Bayern und Coburg vom 20 Februar 1920, GVBl 1920, S 335.

[30] Verordnung vom 27 Dezember 1971 zur Neugliederung Bayerns in Landkreise und kreisfreie Städte GVBl 1971, S 495.

made a part of the district (*Kreis*) of Coburg. Both the cities of Coburg and Neustadt bei Coburg claimed that this decree violated the clause of the 1920 treaty that guaranteed Neustadt bei Coburg the right to remain its own district (*kreisfreier Stadt*) and in doing so also violated the 1946 Bavarian constitution, which stated in Article 182 that earlier state treaties to which Bavaria was a party would remain in force. As legal successors of the state of Saxony-Coburg, both municipalities invoked the right before the Bundesverfassungsgericht to represent the interests of the erstwhile state, which could no longer act and speak for itself. Coburg and Neustadt bei Coburg claimed that Bavaria acted in bad faith in invoking the customary rule of *clausula rebus sic stantibus* to terminate the 1920 state treaty: they stated that the circumstances since 1920 had not changed so much that it would entitle Bavaria to unilaterally abolish the guarantee given to Neustadt bei Coburg.

The court rejects the claim of Coburg and Neustadt bei Coburg. The BVerfG acknowledges the right of the two municipalities to speak on behalf of the no longer existing Free State of Saxony-Coburg.[31] It also rules that the state treaty of 1920 was still valid; the federal constitutional court underlines that the 1920 state treaty guarantees the city of Neustadt bei Coburg an autonomous existence without subordination to a district authority.[32] But, the Bundesverfassungsgericht argues, the *clausula rebus sic stantibus* does come into play, because the circumstances in Germany and Bavaria in 1971 differ vastly from those in 1920. It is, the court claims, as a rule regulating the behaviour of German states towards each other, an unwritten part of the German federal constitutional law. It is therefore not a rule of CIL transformed by Article 25 of the Basic Law. The BVerfG acknowledges that under the 1919 constitution the RStGH had ruled that norms of CIL could play a part in interstate relations, but under the Basic Law there is no longer any room for such rules: all norms regulating the federal makeup of Germany are German, domestic rules of constitutional law.[33] Bavaria is therefore entitled to unilaterally change the status of Neustadt bei Coburg, despite the 1920 treaty.

[31] BVerfGE 34, 216, Rn 43.
[32] ibid Rn 46–49.
[33] ibid Rn 53. Unofficial translation by the author.

> *Die* clausula rebus sic stantibus *ist ungeschriebener Bestandteil des Bundesverfassungsrechts. Das innere Verhältnis des Bundesstaats, d. h. sowohl die staatsrechtlichen Beziehungen zwischen Bund und Ländern als auch die staatsrechtlichen Beziehungen zwischen den Gliedern des Bundesstaats, den*

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So far, so good: in the post-war makeup of Germany there is no longer any place for rules of CIL to solve disputes between German states, although materially speaking the unwritten rules of German constitutional law that oblige the state organs to *Bundestreue* towards one another are basically the same as the rules of CIL invoked by the RStGH in the 1920s. Or is there? For the categorical denial of the relevance of rules of customary law in the *Coburg* decision did not hold for long. In its *Grundlagenvertrag* decision of 31 July 1973[34] the BVerfG cast serious doubt on the steadfastness of its

> *Ländern der Bundesrepublik Deutschland, werden nach dem Recht des Grundgesetzes ausschließlich durch das geltende Bundesverfassungsrecht bestimmt. Insoweit ist kein Raum für die Anwendung von Völkerrecht. . . . Artikel 25 GG bestimmt zwar allgemein etwas über das Verhältnis von Völkerrecht zu innerstaatlichem Recht, bietet aber keinen Ansatz, die verfassungsrechtliche Regelung der Beziehungen zwischen den Ländern, die sich aus ihrer gliedstaatlichen Stellung im Bundesstaat ergeben, zu modifizieren oder zu ergänzen. . . . Heute ist das Verhältnis der Länder im Bundesstaat zueinander lückenlos durch das Bundesverfassungsrecht geregelt, teils durch ausdrückliche Regelungen im Grundgesetz, teils durch den vom Bundesverfassungsgericht entwickelten Grundsatz des bundesfreundlichen Verhaltens; dieser Grundsatz verpflichtet im Kern jedes Land, bei der Inanspruchnahme seiner Rechte die gebotene Rücksicht auf die Interessen der anderen Länder und des Bundes zu nehmen und nicht auf Durchsetzung rechtlich eingeräumter Positionen zu dringen, die elementare Interessen eines anderen Landes schwerwiegend beeinträchtigen. In diesem verfassungsrechtlichen Grundsatz wurzelt systematisch der ungeschriebene Satz von der* clausula rebus sic stantibus*, der auf staatsvertragliche Beziehungen zwischen den Gliedern der Bundesrepublik Deutschland einwirkt.*
>
> (The *clausula rebus sic stantibus* is an unwritten part of the federal constitutional order. The inner relation of the federation, i.e. both the legal relations of the federation to the states and the legal relations between the members of the federation, the states of the federal republic of Germany, are governed exclusively by the federal constitutional law as regulated by the Basic Law. There is therefore no room for the application of international law. Article 25 of the Basic Law does generally regulate aspects of the relationship between international and domestic law, but offers no ground for the assumption that it would modify or enhance the constitutional framework regulating the interstate relations originating in their membership of the federation. Presently, the relationship of the states to each other is governed exclusively by the federal constitutional legal order, in part through explicit norms in the Basic Law, and in part through the concept of federal loyalty developed by the Federal Constitutional Court; this latter concept obliges every state not to pursue or force through its own interests to the detriment of other states or seriously harming the fundamental interests of other states. In this fundamental constitutional norm originates the unwritten principle of the *clausula rebus sic stantibus*, which influences the legal relations of the members of the Federal Republic of Germany to each other.)

[34] BVerfGE 36, 1.

recent convictions. The constitutional court had to decide on the constitutionality of the Federal Act ratifying the treaty between the Federal Republic of Germany (FRG) and the German Democratic Republic (GDR) of 21 December 1972. The treaty regulated the relations between the two German states and their respective citizens. The government of Bavaria claimed that this treaty (and therefore the act ratifying it) was unconstitutional because it violated the reunification duty that the Basic Law dictated to all (West-)German authorities.

The BVerfG ruled that it did not, and in its reasoning it developed the famous thesis that the German Reich had not disappeared in 1945, but continued to exist. Because the Reich has no state authorities of its own, the FRG can act on its behalf, at least on its own territory. Because of that, the Federal Republic shared an identity with the German Reich for its own territory and the Germans living there; FRG and German Reich are therefore not identical, but they are partly so (*teilidentisch*).[35] Because of the continued existence of the Reich that was created in 1871, the GDR is not a separate country. Like the Federal Republic, the GDR also belongs to the German Reich and continues to be *teilidentisch* with it, at least until the German question has been definitively solved.[36] This treaty is therefore a treaty under international law, the BVerfG argues, because under international law, both the FRG and the GDR are states; but that does not mean that this treaty creates a situation where both German states are subjects of international law per se. From the perspective of the FRG, the GDR is not a foreign country and the *Grundlagen* treaty does not change that. After laying the groundworks, the court continues in stating that even within a federal constitutional framework like the German one, international law plays a part in regulating the interstate relations; it is therefore perfectly conceivable that the same is true for the *inter se* relations of the two German states.[37] As the quote from the decision

[35] ibid Rn 78–79.

[36] ibid Rn 79. The question was legally solved in 1990 through the two-plus-four treaty between the two German states and the four allied powers, ending their last occupation rights and laying the groundwork for the recreated states on the territory of the GDR to join the Federal Republic, ending the German partition.

[37] ibid Rn 89. Unofficial translation by the author.

> *Der Vertrag hat also einen* Doppel*charakter; er ist seiner Art nach ein völkerrechtlicher Vertrag, seinem spezifischen Inhalt nach ein Vertrag, der vor allem inter-se-Beziehungen regelt. Inter-se-Beziehungen in einem völkerrechtlichen Vertrag zu regeln, kann vor allem dann nötig sein, wenn eine staatsrechtliche Ordnung, wie hier wegen der Desorganisation des Gesamtstaats, fehlt. Selbst im Bundesstaat bemessen sich, falls eine*

shows clearly, the BVerfG explicitly mentions the 1927 *Danube* decision of the RStGH to show that there *is* in fact room for the use of customary international norms within the German legal order, although it had explicitly rejected this only a few months earlier. Since this decision of the summer of 1973, the BVerfG has not ruled on the use of CIL; its most recent decision, therefore, does seem to acknowledge the idea that the case law of the RStGH still has relevance today. And even if one would stick with the *Coburg* decision, materially speaking the same norms are applied: and the RStGH itself had already felt entitled to interpret customary norms in such a way that they would 'fit' within a domestic legal order with its own characteristics. The question if the relations between the German states are regulated by transformed customary norms of international law or by unwritten rules of German constitutional law falling under the scope of *Bundestreue* is therefore mostly academic in nature. Still, the final word – for now – from Germany's highest court seems to be to underline the idea that CIL might have its part to play in regulating the relations between the German states.

4 The Use of CIL in the Republic of Austria

The Austrian federal constitution, the Bundes-Verfassungsgesetz[38] or B-VG of 1920 contains a separate clause on the position of CIL within

> *Regelung in der Bundesverfassung fehlt, die Beziehungen zwischen den Gliedstaaten nach den Regeln des Völkerrechts (vgl. die Entscheidung des Staatsgerichtshofs für das Deutsche Reich, Lammers-Simons, 1, 178 ff., 207 ff.; dazu die Fortentwicklung nach dem Recht des Grundgesetzes (. . .)): Unrichtig ist also die Auffassung, jedes "Zwei-Staaten-Modell" sei mit der grundgesetzlichen Ordnung unvereinbar.*
>
> (The treaty therefore has a dual character: it has the character of an international treaty, more specifically, a treaty regulating inter se relations. Regulating inter se relations in an international treaty may be mostly needed, when a constitutional regulation is lacking, in this case because of the fact that the overarching state is disorganised. Even within a federation the relations between the member states may be regulated by norms of international law, when no domestic rules are available (cf. the decision of the Staatsgerichtshof für das deutsche Reich, Lammers-Simons 1, 178 fth., 207 fth. and the further development of this principle under the Basic Law). The point of view that every 'two state model' is contrary to the federal legal order is therefore wrong.)

[38] One of the peculiarities of the constitutional system of Austria is that its constitutional law is not laid down in one or a few central documents, as is the case in most states with a written constitution. Instead, there is a central document, the aforementioned B-VG, but the B-VG allows the federal legislator in Article 44 to create constitutional law outside

the Austrian domestic legal order. Article 9 (1) B-VG is more or less a copy of Article 4 RV.[39] The Austrian doctrine is not quite clear on the exact hierarchical positions of these customary rules of international law within the Austrian legal order. The majority position seems to be that Article 9 B-VG contributes to these norms a position equivocal to the one explicitly provided for by Article 25 GG: superior to ordinary acts, but inferior to federal constitutional law.[40] It has never played a large part within the domestic legal order of Austria, however.

This has a lot to do with the introduction of another provision into the constitution. This article, Article 15a, was introduced in the B-VG in 1974.[41] It regulates primarily that the federation and the states can enter into treaties with one another on matters of common competence. On the side of the federation, the federal government or a federal minister shall be competent to enter into the treaty; if matters of a legislative nature are regulated by the treaty, it shall need the approval by the federal legislator (1). Interstate treaties are only possible with regard to matters pertaining to the competences of the states themselves; they shall be brought to the attention of the federal government (2). For both treaties between the federation and one or more states and interstate treaties, the fundamentals of international treaty law shall be applicable. For interstate treaties, this applicability can be overruled by corresponding constitutional state acts of the states involved regulating otherwise (3).[42]

of the B-VG itself by enacting legislation through the same procedure as the one prescribed for amending the B-VG. And since this is in most cases a rather easy procedure (a 2/3rd majority of the votes in the federal diet in one reading, half the members present), this has led to a number of federal constitutional acts (Bundesverfassungsgesetze, or BVG) with the same rank as the B-VG itself, and a couple of hundred constitutional articles in ordinary acts (Bundesverfassungsbestimmungen), also of the same rank as the B-VG itself. This has made the Austrian constitution a massive and very complicated structure, since all the BVG and the Verfassungsbestimmungen in ordinary acts cannot just enhance the B-VG itself, but also amend or contravene it. The norms regulating the topic of this article are all regulated in the B-VG, however.

[39] '*Die allgemein anerkannten Regeln des Völkerrechtes gelten als Bestandteile des Bundesrechtes*' ('The generally acknowledged norms of international law form part of the federal legal order'). Unofficial translation by the author.

[40] T Öhlinger & H Eberhard, *Verfassungsrecht* (12th rev ed, Facultas 2019) 80.

[41] *Bundes-Verfassungsgesetznovelle* vom 30 Juli 1974, BGBl nr 444/1974.

[42] Artikel 15a

(1) *Bund und Länder können untereinander Vereinbarungen über Angelegenheiten ihres jeweiligen Wirkungsbereiches schließen. Der Abschluss solcher Vereinbarungen namens des Bundes obliegt je nach dem Gegenstand der Bundesregierung oder den Bundesministern. Vereinbarungen, die auch die Organe der Bundesgesetzgebung binden sollen, dürfen nur von der Bundesregierung mit Genehmigung des*

The new Article 15a was introduced into the federal constitution because of the lack of clarity with regard to the norms applicable on treaties and on interstate and federal-state relations within the Austrian legal order.[43] There was never any doubt as to the nature of these kinds of treaties: they are as such not of an international, but of a domestic nature.[44] Article 15a under 3 B-VG therefore transforms the fundamental principles of international treaty law into Austrian constitutional law and the article prescribes the use of these norms for all treaties between the federation and one or more states and between two or more states – with the exception of a regulation through corresponding constitutional state acts for the latter. Where both the 1919 Federal Constitution and the 1949 Basic Law are silent on the subject and the relevant German courts have never unequivocally stated that, indeed, norms of international law can and must be used *as such* within the domestic legal order, the Austrian constitutional legislator has taken

Nationalrates abgeschlossen werden, wobei Artikel 50 Abs. 3 auf solche Beschlüsse des Nationalrates sinngemäß anzuwenden ist; sie sind im Bundesgesetzblatt kundzumachen.

(2) *Vereinbarungen der Länder untereinander können nur über Angelegenheiten ihres selbständigen Wirkungsbereiches getroffen werden und sind der Bundesregierung unverzüglich zur Kenntnis zu bringen.*

(3) *Die Grundsätze des völkerrechtlichen Vertragsrechtes sind auf Vereinbarungen im Sinne des Abs. 1 anzuwenden. Das Gleiche gilt auch für Vereinbarungen im Sinne des Abs. 2, soweit nicht durch übereinstimmende Verfassungsgesetze der betreffenden Länder anderes bestimmt ist.*

(1) The federation and the Land can conclude agreements between themselves concerning matters of their current scope of competence. The conclusion of such agreements on the part of the federation requires, depending upon the subject matter, the countersignature of the Federal Government or the Federal Minister. Agreements which are also to bind the organs of the Federal legislation, may be concluded by the Federal Government only with the consent of the National Council, in which case Article 50, Paragraph (3) is to be applied correspondingly to such resolutions; they are to be promulgated in the Bundesgesetzblatt.

(2) Agreements between the Länder can only be made concerning matters within their independent field of competence and must be brought to the knowledge of the Federal Government without delay.

(3) The principles of the International Law of Treaties are to be applied to the agreement in the sense of Paragraph (1) of this Article. The same applies to agreements in the sense of Paragraph (2), insofar as it is not determined otherwise through harmonised Constitutional laws of the concerned Länder.) (Unofficial translation by the author.)

[43] T Öhlinger, *Die Anwendung des Völkerrechts auf Verträge im Bundesstaat* (Braumüller 1982) 12.

[44] ibid 12–13.

sides. It has deemed all generally applicable norms of international treaty law such 'fundamental principles'.[45] This means that – generally speaking – the norms laid down in the Vienna Convention on the Law of Treaties (VCLT) are the ones applicable within the domestic legal order of Austria as well for the creation, interpretation and termination of treaties and the settling of disputes arising from them. The norms of the VCLT are for the most part codifications of existing rules of CIL. Both the constitutional legislator itself[46] and the Austrian constitutional court (Verfassungsgerichtshof, VfGH)[47] have ruled that the convention norms should be applied to domestic treaties in the sense of Article 15a under 3 B-VG.

The 1998 decision by the VfGH is the only one in which a clear ruling is given on the application of the VCLT itself on domestic treaties. The case involved a treaty between the federation and the state of Vienna, however. Since Austria is a party to the VCLT, it can be argued that the treaty itself is applicable to the federal authorities, and therefore is applicable to a treaty between the federation and a state. But is the VCLT *itself* applicable to interstate treaties as well? This is somewhat questionable – the Austrian states[48] are not themselves parties to the VCLT, and the fact that the contents of the convention are transformed through Article 15a under 1 B-VG does not necessarily mean that the VCLT as such is transformed as well: the fact that the states are allowed to digress from it through state constitutional acts of their own also suggests that this might not be a straightforward situation. It could therefore perhaps be argued that on an interstate level, the VCLT norms are applicable in their 'older guise' as rules of CIL. The difference is, of course, highly theoretical. Only when a case is decided by the constitutional court about a pure interstate treaty (of which there are not many in Austria) will we perhaps know for sure what the formal status of these rules within the Austrian legal order is. So far, this has not happened. What *is* clear, however, is that Austria unequivocally chooses norms of an international nature, whose origins are undoubtedly customary in nature, to regulate interstate relations, showing the usefulness of these norms for that purpose.

[45] ibid 14–15.
[46] ibid 21.
[47] *Verfassungsgerichtshof* (Entscheidung vom 15 Oktober 1998) VfSlg 15.309/1998.
[48] The Republic of Austria comprises of nine States: Burgenland, Carinthia, Lower Austria, Salzburg, Styria, Tyrol, Upper Austria, Vienna and Vorarlberg.

5 Conclusion

This article has focused on the use of norms of CIL for the regulation of interstate relations in two states with a federal constitutional makeup, the FRG and the Republic of Austria. In Germany, the possibility of the use of CIL became relevant after the Great War, with the introduction of the new republican constitution in August 1919. One of the novelties of this new constitution was its Article 4, which regulated that general rules of international law (and therefore norms of CIL) were a binding part of German federal law. The newly minted Staatsgerichtshof für das deutsche Reich, whose main task it was to solve public law disputes of a federal nature, was quick to acknowledge the possibilities of this new provision in the constitution. In a number of cases on disputes between German states in the 1920s, it argued that when domestic constitutional norms did not provide a reasonable settlement, rules of CIL could be used via the way of Article 4 *RV* to solve the issue. The court did, however, interpret these norms so as to fit into a domestic legal order, which raises the question whether the *RStGH* used 'real' norms of CIL – or merely saw them as a source of inspiration to draw up what are in fact unwritten norms of constitutional law.

This ambiguity concerning the use of customary norms survived the German apocalypse of 1945. The post-war Bundesverfassungsgericht is partly the legal successor to the old Staatsgerichtshof. In three of its cases, it dealt with the question whether rules of CIL could play a part within the domestic legal order of Germany. An analysis of these cases shows that there is no clear-cut answer to the question whether the BVerfG acknowledges an independent role for customary norms in the German federal makeup.

Like Germany, Austria too has a constitutional norm transforming customary international norms into the domestic legal order. This article is no longer relevant for the questions dealt with in this chapter however, since the Austrian constitution also contains a specific norm dealing with the relevance of international law for interstate relations. Article 15a B-VG under 3 states since 1974 that rules of international law are relevant for the creation, interpretation and termination of treaties between the Austrian federation and one or more states and between two or more states. They can also be used to solve federal-state and interstate disputes. In the latter cases, the states party can decide to create differing norms through mutual constitutional state acts. The article was introduced into the Austrian constitution precisely to terminate the debate that is so

topical in Germany: whether there is an actual role for international law in the regulation of interstate and federal-state relations. The Austrian constitution explicitly affirms this concept. The only remaining unclarity is if these norms are simply those of the Vienna convention or if they are of a customary nature. Since the Austrian states are not themselves parties to the Vienna convention, the latter might be the case. The Austrian VfGH has so far not ruled on this question.

The example of these two countries shows that international law norms can play a limited, but useful role within the domestic legal order of a federal state. Whereas in Germany an ambiguity has continued to exist on the question whether such norms, especially if they are of a customary nature, are valid as such within the domestic legal order of Germany or if they merely provide material inspiration for the development of unwritten domestic norms, such as federal loyalty, in Austria the constitutional legislator has been quite clear. Both federal-state and interstate relations in Austria are regulated by international norms, although these legal relations themselves are clearly domestic. Especially the VCLT is a relevant source of law in this respect. The ambiguity in Austria is of a different nature: it is not entirely clear whether the VCLT itself or materially similar norms of a customary nature are applicable in interstate relations, because the nine Austrian states are themselves not party to the convention. Despite this slight ambiguity, the introduction of a new article into the Basic Law along the lines of Article 15a B-VG, but instead focusing on rules of customary law, would seem a good idea to end the continuing vagueness in Germany resulting from the hesitant case law of the relevant German courts since the 1920s.