

Municipal law as a source of international law

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1. Introduction

International law is not a closed system of law. It undergoes very dynamic transformations, and is not free from the significant influence of international politics on its norms. The interest of states plays an important role in the creation of international law. States are the primary creators of norms, they shape them to guarantee their security in international relations on the one hand, while on the other they reflect their needs at a given moment, regardless of which justification they invoke – the needs of the international community, protection of fundamental rights, the right to privacy, or environmental objectives.

The role and the place of municipal law in the international legal order has never been clearly defined. These two systems are distinct from each other in fundamental ways, considering the procedures used in their creation and their spheres of impact. Both orders are, however, legal systems belonging to the same family, and this is why their reciprocal impact cannot be overlooked. In taking up the issue of the impact of municipi-

pal law on international law, we should draw attention to various aspects of their links. Since the formation of international law, scholars have sought analogies for the binding force of norms of that system in the civil law and Roman law, but it was only in the 19th and 20th centuries that those systems were decisively disassociated from each other.

In examining the issue of the ways in which municipal law can potentially impact international law, it is necessary to first consider how the mutual relations between those two systems are presented in present times. The simplest, and most controversial is presentation of the positions of the monists and the dualists. In respect of the former, the theory arguing unity of two systems would seem to dispel all doubts, and we can easily prove the penetration of the international legal order by norms of municipal law, as well as vice versa. However, we in fact are most frequently faced with promotion of the idea of dualism, which would seem to be supported by the practice of the majority of states seeking to protect their interests in relations with other entities. In their view, they are thereby avoiding the direct interference of external entities in municipal law.

A rather large number of works have been written on the subject of the impact of international law on municipal law. Evidence of such practice can be found almost everywhere. It is far more difficult to analyse the issue of the impact of municipal law on the development of norms in the international legal order. In seeking to understand how municipal law impacts international law and *de facto* becomes a source for the creation of norms in international law, it is necessary to review the history of the formation of international law, as well as the opinions of that legal order's founders. The second issue to be analysed should be the interwar period and the activity of the Permanent Court of International Justice. In contemporary times, to understand the sources of impact by municipal law on norms of the international legal order, it is crucial to present issues regarding general principles of law, the work of international judiciary bodies, and acts of municipal law that may have effects similar to those of unilateral acts.

2. The demarcation of international law as an independent branch of law

The potential for municipal law to influence international law can be attested to by opinions dating to the inception of the latter. Reaching back to original sources, such as Alberico Gentili and Hugo Grotius, we are struck by the presentation of the law of nations as a natural legal order, with numerous references to antique tradition, the Bible, and Roman law. While they do observe the distinctness and specificity of the international order, they nevertheless invoke natural law and Roman law when seeking support in interpreting particular norms. What was binding on the individual was also good for na-

tions, of course assuming that the sovereign was free to do far more; this led Gentili to warn against hastily citing the civil law, and that „what applies to the state cannot apply absurdly beyond the state”¹. A. Gentili was in general a supporter of applying Roman law to the law of nations, and made direct reference to it (as well as to the antique tradition). He frequently labelled it the „civil law”, and declared that „all sovereign princes are under a duty to submit to the civil law in disputes between one another”². In his opinion, the Justinian code was not some separate legal order, but in fact the law of nations³. The law of nations is in his view simply the Roman law, as it was the only one suitable for solving disputes between states. Scholars also observe that Gentili, in seeing the specificity of relations between states, essentially attempted to adapt what he understood as a universal legal order, the Roman law, to regulating the activities of states in the international sphere.

Hugo Grotius understood the concept of law differently from Gentili, calling it the „law of man”. In his view, three types of that law can be distinguished: civil law, law of a narrower scope, and law of a broader scope than civil law. Grotius claims that the civil law derives from civil authority, and thus it is enacted by a domestic legislator. The civil law in a narrower scope is subordinate to the civil authority, even though it is not derived from it (in this respect he invokes the relations in families, or in religious orders). Law in a broader scope is the law of nations, that is, one which „attains force as a result of the will of all nations or the great number of them”⁴. As H. Lauterpacht observes, Grotius can be held as the father of legal positivism in respect of the law made by the state, but it cannot be forgotten that he made extensive use of the law of nature, rendering his system diverse and complex⁵. According to Grotius, natural law was that law common to all nations. Law is forged from time and practice⁶. At the same time,

¹ A. Gentili, *Hispanicae advocacionis libri duo*, 1613, in: J. Brown Scott (ed.), *The Classics of International Law*, Oxford University Press 1921, s. 109-110, “The civil law is not to be cited rashly and what applies to a State must not be extended beyond the State absurdly.” source: <https://archive.org/stream/hispanicaadvoca02gentuoft#page/n7/mode/2up>, accessed 10.12.2015.

² A. Gentili, *De iure belli*, 1598, quoted after: H. Lauterpacht, *Private Law Sources and Analogies of International Law*, New Jersey 2002, p. 10-12, see also: A. Wagner, *Lessons of Imperialism and of the Law of Nations: Alberico Gentili's Early Modern Appeal to Roman Law*, “European Journal of International Law” vol. 23 no. 3 (2012), p. 873 – 886.

³ A. Gentili, *De iure belli*, 1958, see also: A. Gentili, *Hispanicae...*, p. 102: “Now as anyone submits to the civil law, especially in these maritime questions, as to a sort of Law of Nations, everyone will be judged according to that law to his entire satisfaction. Then hear the words of a Frenchman, that the greater part of the Law of Nations is Roman Law and is generally accepted in the Occident. Also a Spaniard says “All those principles of the Law of Nations formerly belonged exclusively to the civil law, but the gradually spread, or quietly flew across to other nations”. This we see to be the case with Roman Civil Law and others too take this view.”

⁴ H. Grotius, *Trzy księgi o prawie wojny i pokoju*, (trans. R. Bierzanek), Warszawa 1957, book I, p. 96.

⁵ H. Lauterpacht, *op. cit.*, p. 14-15.

⁶ H. Grotius, *op. cit.*, księga I, p. 97.

in spite of the strong association he demonstrated between natural law and the law of nations, he rejected the conception accepting the Roman civil law as the source of the law of nations:

“I cannot concur with the opinion of some authors that contracts done by kings and nations should be interpreted, to the extent possible, in light of the Roman law, unless it is an obvious thing that some nations have adopted the Roman civil law as the law of nations in respect of cases subjected to the law of nations. This should not, however, be assumed hastily.”⁷

In Grotius' view, human laws demonstrated one point of contact: norms of the law of nature, and in this scope they could be applied by all three branches of law present in his design. Gentili felt that the Roman civil law was the proper one for the law of nations, as it could also be applied by municipal law; Grotius, however, strove to separate the law of nations from internal law. His system, while based on natural law, was presented as an independent creation, which could only in some aspects refer to norms common to both legal orders.

The law of nations slowly but effectively established its place as a particular legal order to be applied between sovereigns. Th. Hobbes pointed out that natural law is divided into the natural law of nations and the natural law of man. In his view, the imperatives of both laws are similar, meaning that the same law is called natural law when it is applied to the obligations of individuals, whereas it becomes the law of nations when it is applied to a state, *id est* a nation as a whole⁸. The law of nations is thus identical to the law of nature⁹. In spite of all else, he emphasized the particular qualities of the state. E. de Vattel returns to the law of nature as the source of international law, citing the opinion of baron de Wolff, who also held that the law of nature is the law of nations, albeit with certain modifications¹⁰. Although he himself subjected that view to certain criticism, he does not depart from indicating the links between the law of nations and

⁷ H. Grotius, *op. cit.*, księga II, p. 567.

⁸ Th. Hobbes, *De cive or the citizen*, New York 1949, original: *Elementa philosophiva de cive*, Paris 1648, “Again, the natural Law may be divided into that of Men, which alone hath obtained the title of the Law of nature, and that of Cities, which may be called that of Nations, but vulgarly it is termed the Right of Nations. The precepts of both are alike, but because Cities once instituted doe put on the personal proprieties of men, that Law, which speaking of the duty of single men, we call natural, being applied to whole Cities, and Nations, is called the Right of Nations. And the same Elements of natural law, and Right, which have hitherto been spoken of, being transferred to whole Cities and Nations, may be taken for the Elements of the laws, and Right of Nations.” ch. XIV para 4, p. 158.

⁹ Th. Hobbes, *Leviathan, Leviathan or the matter forme & power of a common – wealth ecclesiastical and civill*, 1651, source: <http://www.gutenberg.org/files/3207/3207-h/3207-h.htm>, accessed: 10.12.2015, Chapter Commanders: “Concerning the Offices of one Sovereign to another, which are comprehended in that Law, which is commonly called the Law of Nations, I need not say anything in this place; because the Law of Nations, and the Law of Nature, is the same thing.”

¹⁰ For more see: E. de Vattel, *Prawo narodów*, (trans. B. Winiarski) Warszawa 1958, pp. 39-49.

natural law as the appropriate one for all individuals. Among the sources of law he cites there are three groups of norms: peremptory (associated with the law of nature), contractual, and customary¹¹. De Vattel clearly emphasizes the diversity of subjects of natural law; that said, he does not deny that certain norms can be applied unchanged by both individuals and states. In de Vattel's work we may encounter the concept of a positive law of nations. Observation of the changes occurring within the community of nations forced scholars to develop a theory of the law of nations as a particular legal order in effect not only between sovereigns, but also sovereign states.

In writings of the 18th and 19th centuries, we may perceive clear and increasingly stronger tendencies to expanding the distinction between municipal law and the law of nations. A gradual departure from the idea of the law of nature in favour of positive (enacted) law in two different planes was supposed to lead to the formation of clearer borders between the two legal orders. First, scholars largely rejected natural law in favour of positive law. Here we may observe that the terms „Roman law” and „natural law” were replaced by the concept „private law”, at least in continental scholarship. Sovereign states could not, however, be bound by norms they had not consented to nor participated in the creation of. However, similarities were perceived between the behaviour of states and of individuals. E. Kant saw a strong bond between international and municipal law. In his view, within the dimension in which a law of the international community exists, it is created in the mould of existing municipal norms and principles¹². Which does not, of course, make these systems identical.

German scholarship with its leading theoreticians of law took the lead in the drive to apply positivism to the law of nations. H. B. Oppenheim tried directly to reject the invocation of analogy to private law, as this practice served to negate the essence of the law of nations¹³. This opinion was also held by G. Jellinek, nevertheless, he allowed for the possibility of proceeding in a similar manner in the conclusion of agreements under international law and contracts in private law, as he claimed that both fields are concepts of general jurisprudence, and their nature demands that similar rules be applied¹⁴. These ideas were also broadly shared by A. Heffter, who proposed excluding the private law as

¹¹ *Ibidem*, p. 67.

¹² For commentary see: W.F. Conclin, *The Exclusionary Boundary of the Early Modern International Community*, “Nordic Journal of International Law” vol. 81 (2013), p. 157.

¹³ H.B. Oppenheim, *System des Völkerrechts*, Stuttgart – Leipzig 1866, p. 8 and p. 80, source: https://archive.org/stream/bub_gb_B7FJAAAACAAJ#page/n3/mode/2up, accessed 10.10.2015 .

¹⁴ G. Jellinek, *Die rechtlicher Natur der Staatenverträge*, Vienna 1880, p. 51-52: “Jene angebliche Analogie des Privatrechts rührt einfach davon her, das beim Charakter des Vertrages als “universellem Rechtsinstitutes” der Vertrag zwischen Individuen in manchen Punkten denselben objektiven Charakter hat, wie der zwischen Staaten, so dass aus der Natur des Verkehrs zwischen Staaten sich Sätze ergeben müssen welche mit denen aus der Natur des Privatverkehrs fließenden identisch sind.” source: <https://archive.org/stream/dierechtlichena00jellgoog#page/n58/mode/2up>, accessed 15.12.2015 .

a source of international law. He did not propose a complete cutting of the ties with municipal law, but rather cautioned against incautious invocation of the civil law¹⁵. The law enacted by sovereign entities, because of their specificity, could not be identical to internal law. Ultimately, however, it was H. Triepel who finally broke with the private law and Roman law as sources of the law of nations. In his opinion, international law did draw on these sources in the past, but at its present stage of development it had already formulated its own norms. When problems occur in the course of interpretation or uncertainties arise, principles from other legal orders should not be borrowed¹⁶. At most, their reception can be performed, but only in the formal manner appropriate for the law of nations¹⁷. Other German positivists agreed with him, such as Bluntschli¹⁸ and Liszt¹⁹. The systemic division of international law from municipal law was dictated by the desire not only to form a „pure” system of law indicative of the exceptionality and specificity of both its creation and planes of influence, but also to facilitate determining its relation to municipal law in the spirit of legal dualism. The influence of Roman law on international law was also consistently negated, but not as radically by every author. This clear distinction between municipal law and international law is also visible in later international law scholarship. Another of its passionate advocates was L. Oppenheim, who stated unequivocally that „International Law and Municipal Law are in fact two totally and essentially different bodies of law which have nothing in common except that they are both branches – but separate branches – of the tree of law.”²⁰ The Italian lawyer D. Anzilotti was also a supporter of theories rejecting the possibility of the international order drawing on private law, yet closer analysis of his work uncovers a gradual softening of his position²¹.

It may be observed that in contrast to German theoreticians, representatives of Anglo-Saxon scholarship were reluctant to abandon Roman law as a permissible source for the law of nations. Indeed, it was perceived as providing the archetype of legal reason-

¹⁵ A. Heffter, *Das europäische Völkerrecht der Gegenwart: auf den bisherigen Grundlagen*, Berlin 1888, p. 219, source: <https://archive.org/stream/daseuropischev104heffgoog#page/n4/mode/2up>, accessed 15.12.2015.

¹⁶ H. Triepel, *Völkerrecht und Landesrecht*, Leipzig 1899, in particular the issues of the relation of municipal and international law are taken up in the part titled: Die Rezeption vor Landesrecht in das Völkerrecht, pp. 211–225, source: <https://archive.org/stream/vlkerrechtundla00triegoog#page/n227/mode/2up>, accessed 16.12.2015.

¹⁷ *Ibidem*. p. 218.

¹⁸ J. C. Bluntschli, *Das moderne Völkerrecht der civilisirten Staaten*, C.H. Beck 1872 (2nd ed.), p. 178 para. 295.

¹⁹ Quoted after: H. Lauterpacht, *op. cit.*, p. 22.

²⁰ C. M. Piciotto, *The relations of International Law to the Law of England and the Law of United States of America*, Introduction by L. Oppenheim, New York 1915, p. 10.

²¹ J. Crivellaro, *How did Anzilotti's jurisprudential conception influence the jurisprudence of the Permanent Court of International Justice?*, “Jura Gentium, Rivista di filosofia del diritto internazionale e della politica globale” (2011), source: <http://www.juragentium.org/topics/thil/en/crivella.htm>, accessed 6.12.2015.

ing. This can be summed up in one sentence: why reject something tried and tested just to adopt artificial constructs. In the first half of the 19th century, W.O. Manning perceived in the Roman law a source that could be freely drawn on, particularly in the absence of conventional and customary norms. He perceived within it general principles of law to which both the Roman law and the law of nations²². The leading English authors of the 19th century certainly include Lord Phillimore, who considered the Roman law to be a source of international law, and pointed out how that law is invoked quite frequently in international disputes²³. A similar position was taken by J. Westlake, who opined in favour of incorporating the Roman law into the sources of international law as a particular means of legal reasoning. In his view, acceptance of the Roman law as a source of international law would contribute to the spread of the latter²⁴. The idea of acknowledging Roman law as the law which served as the foundation for the evolution of the law of nations was also shared by American scholars. The leading representatives of American doctrine in this period included H. Taylor²⁵ and H.W. Halleck²⁶. They both claimed that proper ascertainment of the law of nations requires knowledge of Roman law. In his book, T.J. Lawrence made multiple references to not only the heritage of Roman law in the international system, but also perceived Roman roots in the existing institutions of the law of nations²⁷.

²² W. Oke Manning, *Commentaries on the Law of Nations*, London 1839, p. vi, “A constant reference to general principle and the deduction from the details of practice from abstract propositions characterize the determination of the Roman Law and of the Law of Nations”. source: <https://archive.org/stream/commentarieson100manngoog#page/n7/mode/2up>, accessed 10.12.2015.

²³ R. Phillimore, *Commentaries upon International Law* (3rd ed.), vol. I, London 1879, pp. 34 – 35, “From this reach treasury of the principles of universal jurisprudence, it will generally be found that the deficiencies of precedent usage, and express of international authority, may be supplied”. source: <https://archive.org/stream/commentariesupon14phil#page/n9/mode/2up>, accessed 10.10.2015.

²⁴ J. Westlake, *International Law*, part I Peace, Cambridge 1904, p. 15, “Further, in applying to international law the methods of reasoning which belong to jurisprudence, it is the reasoning of Roman Law that has been applied, that system being common not only to the continent of Europe but also to the English Court of Admiralty”. Source: <https://archive.org/stream/internationala01west#page/n29/mode/2up/search/Roman>, accessed 10.10.2015.

²⁵ H. Taylor, *A Treatise on International Public Law*, Chicago 1901, pp. 20 – 21. “It is impossible to comprehend what is now known as International Law without some understanding of Roman Jurisprudence for the simple reason that it is the philosophic basis for the entire system.” source: <https://archive.org/stream/atreatiseoninte00taylgoog#page/n100/mode/2up>, accessed 10.12.2015.

²⁶ H.W. Halleck, *International Law, Rules Regulating Intercourse of States during Peace and War*, San Francisco 1861, p. 7, “The origin of the Law of nations in modern Europe has been traced in two principal sources – the cannon law and the Roman civil law”, and p. 55 “It will generally be found that the deficiencies of the precedent, usage, and express international authority may be supplied from the rich treasury of the Roman Civil Law. Indeed in a greater number of controversies between States would find a just solution in this comprehensive system of practical equity, which furnishes principles of universal jurisprudence, applicable alike to individuals and to States”, source: <https://archive.org/stream/internationallaw00hall#page/n0/mode/2up>, accessed 10.12.2015.

²⁷ T.J. Lawrence, *Principles of International Law* (3rd ed.), Boston 1900, p. 357 in regard of war prizes, he said: “This was an ancient Roman theory, and it is the theory of modern law of nations”.

Pure positivism as the dominant doctrine in continental international law was particularly salient in the second half of the 19th century, adopting certain schema specific to municipal law and attempting to fit them to international law. First and foremost, there was a clear limitation on the scope of subjects participating in international legal relations. Sovereign states became the only entities with the authority to create international legal norms. This was a result of their unique properties. Although numerous situations bled over beyond the borders of this closed circle, the fiction was maintained, eyes turned away from reality. Similarities to municipal law or the Roman civil law were primarily identified in the law of treaties; not only were comparisons made of the rules by which they were formed with those applicable to contracts concluded between private entities, but the rules for the interpretation of contracts developed over centuries were also applied to international law. Use was also made of the concept of causes of the invalidity of an obligation, its expiration, and in particular the famous *rebus sic stantibus* clause.

At the beginning of the new century, the scholarship was dominated by representatives of positivism, and it is mostly thanks to that line of inquiry the modern doctrine of international law adopted certain tenants considered to form the foundation of the entire legal order. Ideas were abandoned on scientific grounds that were being applied as late as the 19th century. After World War I, international law assumed a quite coherent form, based on agreements and international custom. Although it had not yet been codified, it was being taught in nearly every state, as well as treated as an independent, fully-formed branch of law. During this period, attempts were also made to strengthen the foundations of the international legal system, which were certainly reinforced by the formation of the League of Nations and the Permanent Court of International Justice. International law, which was heavily influenced by doctrine, was not only a special law forming the framework for the actions of states, but also as a young order, almost primordial. In his international law textbook J. Makowski wrote in 1930 that „international law is the youngest and least-developed branch of law, and resembles the first phase of the development of municipal law”²⁸. Awareness of the system’s incomplete nature is attested to by international practice and the frequent use in arbitration case-law from the 19th and 20th centuries of municipal law or general principles of law in the interpretation of international obligations. As it was put by Liszt, rules of general jurisprudence were applied at the time²⁹. Of course, this way of putting things was not without its detractors. German and Italian scholars took a more radical position concerning the positivist approach to international legal norms. The former, under the influence of Nazism, over time came to reject international law as obligations of states potentially limiting

²⁸ J. Makowski, *Prawo międzynarodowe*, ed. I, Warszawa 1930, p. 11.

²⁹ J. Liszt, quoted after: H. Lauterpacht, *op. cit.*, p. 160.

freedom of action in the international arena; the Italians, represented mainly by D. Anzilotti, were steadfast supporters of the supremacy of international law over the will of states³⁰. A clear conflict was breaking out over the supremacy of international law over municipal, and vice versa, dictated by the broadly-understood necessity for protecting the interests of states.

At the beginning of the 20th century, the majority of international law theorists were thus of the opinion that only international law enacted by sovereign entities could bind states. Practice, however, would show that norms of municipal law play what is in fact a very significant role in shaping the international situation of a state, and can even impact the shape of an international norm.

During the interwar period a complete distinction was made in the doctrine of international law between the international and municipal regimes. It became increasingly difficult to identify opinions in the scholarship declaring the influence of domestic law on international law. A reversal of roles gradually began to take hold. It was international law, supreme over the state, that was supposed to introduce new norms into domestic legal orders. One of the judges of the PCIJ and at the same time one of the most ardent supporters of legal positivism declared that states are the sole sovereign entities, and are subordinate to nothing except international law³¹. The process of segregating international law from the sources of municipal law was a quick one. This is very clearly seen in the discussion of the statute of the Permanent Court of International Justice.

3. Influence of municipal law on the work of international organs during the interwar period

The necessity of establishing a permanent court with the authority to resolve disputes between states was already perceptible in the 19th century, but it was not until work was underway on drafting the statute of the League of Nations that the decision was taken to form a judicial body. The decision to appoint the Preparatory Commission, composed of lawyers, was made during the second session of the Council of the League of Nations in February 1920, held in London. This decision served as the basis for establishing the composition of the Commission, which began its work in The Hague on 16 June 1920³². The Commission was composed of 10 members, and was headed by Baron Descamps.

³⁰ J. Crivellaro, *op. cit.*

³¹ "The State has over it no other authority than that of international law." Customs Regime between Germany and Austria (protocol of March 19th 1931) PCIJ, Series A/B Judgments, Orders and Advisory Opinion, Individual Opinion by D. Anzilotti, p. 57.

³² Procès Verbaux of the Proceeding of the Committee June 16 till July 16 with annexes, text taken from PCIJ official website http://www.icj-cij.org/pcij/serie_D/D_proceedings_of_committee_annexes_16june_24july_1920.pdf, accessed 18. 07. 2014.

The members of the Commission represented various states, but their selection was based on knowledge of the law of nations. Many of them could boast of practical experience in the field, acquired in international arbitration. Reports from the Commission's work highlight the significant differences of opinion among its members in many areas, including issues related to the ground on which the PCIJ was to rule. While there was consensus that the draft under discussion should include international agreements and custom, there were significant differences of opinion when the issue of general principles of international law were discussed. Application of principles of law as grounds for rulings by international organs was nothing new at the time. They were used by international arbitration bodies, and were also invoked in the statutes of two international bodies, the International Prize Court³³ and the Central American Court of Justice³⁴. Neither statute used the phrase „general principles of international law” – in the case of the International Prize Court it was “*rules of international law*” and “*general principles of justice and equity*”, while the Central American Court used the formula “*principles of international law*”. One may conclude that the use of principles of law as such (without indication of their origin) as well as the principles of international law was nothing exceptional at the time. In the doctrine and in practice there was nothing indicating a visible distinction, and it should rather be held that they were universally respected and did not give rise to controversy.

³³ Hague Convention XII (18 October 1907), Convention Relative to the Creation of an International Prize Court Articles 1 – 57, never ratified, Art. 7. If a question of law to be decided is covered by a treaty in force between the belligerent captor and a Power which is itself or whose subject or citizen is a party to the proceedings, the Court is governed by the provisions in the said treaty. In the absence of such provisions, the Court shall apply the rules of international law. If no generally recognized rule exists, the Court shall give judgment in accordance with the general principles of justice and equity. The above provisions apply equally to questions relating to the order and mode of proof. If, in accordance with Article 3, No. 2(c), the ground of appeal is the violation of an enactment issued by the belligerent captor, the Court will enforce the enactment. The Court may disregard failure to comply with the procedure laid down in the enactments of the belligerent captor, when it is of opinion that the of complying therewith are unjust and inequitable. Source: <http://net.lib.byu.edu/~rdh7/wwi/hague/hague11b.html>, accessed 4.12.2015, In spite of the 1909 adoption of the London Declaration, intended to bring clarity to some concepts, these provisions did not enter into force (Declaration concerning the Laws of Naval War. London, 26 February 1909), although the Americans proposed the adoption of an additional protocol, (Convention (XII) relative to the Creation of an International Prize Court. The Hague, 18 October 1907). See: D. Schindler and J. Toman, *The Laws of Armed Conflicts*, Martinus Nihjoff Publisher, 1988, pp. 825-836. Ultimately, only domestic courts functioned, without international oversight.

³⁴ In case of the necessity to ascertain the law, the Court could refer to the general principles of international law. Particularly Art. 21 and 22 of the Statute, “Article XXI. In deciding points of fact that may be raised before it, the Central American Court of Justice [p240] shall be governed by its free judgment, and with respect to points of law, by the principles of international law. The final judgment shall cover each one of the points in litigation. Article XXII. The Court is competent to determine its jurisdiction, interpreting the Treaties and Conventions germane to the matter in dispute, and applying the principles of international law.” Convention for the Establishment of a Central American Court Justice, 20 December 1907, text taken from “*American Journal of International Law*” vol. 2 (1908) supp., pp. 239-240.

Clear differences became apparent during preparatory work on the Statute of the PCIJ. The proposal from Baron Descamps concerning grounds on which the Court would rule on was: “the rules of international law as recognized by the legal conscience of civilized nations”³⁵. They were supposed to be the product of a feeling of objective justice, which clearly located it within theories of the law of nature³⁶. Many years later, Justice K. Tanaka of the ICJ, in referring to the work of the Commission, argued that the proposition formulated in precisely this way provides grounds for the declaration that the sources of general principles were identified in natural law³⁷. In those times, however, it was feared that the introduction of regulation as proposed by the President could lead to numerous misunderstandings. E. Root, representing the United States of America, negated the sense of point 3 concerning general principles of law, as he feared the excessive influence of judges on the deduction of norms from sources unfamiliar to the states interested. In his view, judges were supposed to apply norms, not create them³⁸. He acknowledged the existence of principles of law, but he did not feel that „it [the world] was disposed to accept the compulsory jurisdiction of a Court which would apply different principles, differently understood in different countries”³⁹.

Controversies arose particularly in respect of the genesis of principles. Members of the Commission participating in the discussion indicated not only the existence of general principles of law present in the legal order of every civilized legal order, including international law, but also directly indicated their sources of origin in municipal law. This may be viewed as the legacy of historical theories of natural law or Roman law. Lord Phillimore declared that the general principles cited as the basis for rulings by the Court are „these which were accepted by all nations *in foro domestico*, such as certain principles of procedure, the principle of good faith, and the principle of *res iudicata* (...) ‘general principles of law’ are intended to mean ‘maxims of law’”⁴⁰. He even suggested changing pt. 3 to „rules of international law regardless of the source from which they were derived”⁴¹. In turn, De Lapradelle admitted that those principles which form the basis for the existence of municipal law are also a source of international law. Nevertheless, the sole general principles that exist are those which attain unanimous (or nearly unanimous) support. A similar view was expressed by M. Fernandez, who generally con-

³⁵ “1. the rules of international law as recognized by the legal conscience of civilized nations;” Annex no 3, Proposal by Baron Descamps, Procès verbaux..., p. 306.

³⁶ M. Biddulph, D. Newman, *A Contextualized Account of General Principles of International Law*, “Pace International Law Review” vol. 26 (2014), p. 292.

³⁷ South West Africa, Second Phase, Judgment, I.C.J. Reports 1966, Dissenting opinion of Judge K. Tanaka, p. 299.

³⁸ Procès Verbaux..., p. 293.

³⁹ *Ibidem*, p. 308.

⁴⁰ *Ibidem*, p. 335.

⁴¹ *Ibidem*, p. 294.

curred with the introduction of general principles of law, and viewed their source in municipal law „What is true and legitimate in national affairs, for reasons founded in logic and not in the arbitrary exercise of sovereignty, cannot be false and illegal in international affairs, where, moreover, legislation is lacking and customary law is being formed very slowly...”⁴². Nevertheless, he perceived the necessity of applying a test; specifically, whether a given principle is not rejected by the legal tradition of one of the states-parties to a dispute.

The discussion held within the Commission at the time is an example demonstrating the collision of two perspectives regarding the relation of municipal law to international law, specifically, of legal dualism and legal monism⁴³. This is why, in the course of the Commission’s work, a desire emerged for the diversification of norms into those arising out of municipal law and of international law. Ultimately, the wording of Article 38 (3) of the Statute of the PCIJ was „General principles of law recognized by civilized nations.” In spite of the intense debate, the opinion of the president carried the day, and the other members of the Commission were thus convinced to adopt that wording. However, it had been clear from the beginning that the very wording of that sentence would give rise to controversy in the scholarship, and may impact the work of the Court, which, in extreme cases, could become a creator of norms rather than just their interpreter. A particularly important element is, of course, that which referred to the essence of general principles of law and issues surrounding their indication. In this scope justices were provided with a measure of freedom, quite rationally indicating the necessity of their drawing on general knowledge as well as principles taken from municipal law, to the extent such would be possible. It was feared that if the discretion of justices were to be significantly curtailed, in the event of an absence of a contractual or customary norm, disputes involving even an evident violation of the law could not be heard⁴⁴. Thus, on the one hand it was acknowledged that para. 3 should be included in the Statute, whilst on the other there were fears that the Court could thereby acquire law-making competences⁴⁵.

The discussion conducted during preparatory work, among the most learned scholars of international law of their day, demonstrated that international law aspired to achieve the status of an independent legal system under which states-entities governed by it would have to submit to its norms, while potential gaps would be filled in by reference to general principles. In this manner, judges were permitted to employ knowledge regarding

⁴² Statement of M. Fernandez, *Procès Verbaux...*, p. 346.

⁴³ M. Bos, *The Methodology of International Law*, Amsterdam-New York Oxford 1984, p. 259.

⁴⁴ H. Thirlway, *The sources of International Law*, Oxford 2014, p. 93.

⁴⁵ A. Pellet, *Article 38*, in: A. Zimmermann, Ch. Tomuschat, K. Oellers-Frahm, Ch. J. Tams (eds), *The Statute of International Court of Justice*, A Commentary, Second edition, Oxford 2012, p. 832.

not only the law of nations, but also for comparison of municipal law norms to determine if a general principle did, in fact, exist.

The doctrine of the interwar period took various perspectives on Art. 38(3) of the Statute. The most significant doubts naturally concerned the source of general principles. In his Hague lectures, A. Verdross divided principles of law into three groups: the first of them being those arising out of international law itself, the second: norms developed by the adjudicating institution; the third: norms derived from the principles of law recognized by civilized nations⁴⁶. In his view, it was not necessary for those principles to be present in every legal order, but they should be given their general expression in the legal orders of states⁴⁷. At the same time, he warned against the application of municipal law by way of analogy. He felt that this could not be done in an unreflexive and literal manner owing to the different natures of municipal and international law. Municipal law is never binding on states in respect of international obligations. But the general principles of law derived from municipal law can also be applied in the field of international law. This is possible due to the fact that the basis of every law is to be found in principles and ideas. And while the principles of law should be identical in municipal and international law⁴⁸, the two legal orders should always be distinguished. A slightly different understanding of the genesis of general principles of law was presented by G. Ripert. In his opinion, these principles come from municipal law, but only positive law, *id est* legislative acts. No principle can be taken from a source other than enacted law⁴⁹.

In the Polish scholarship of the interwar period it was rare for the links between municipal and international law to be taken up. It is also difficult to locate such analyses in the publication of J. Makowski⁵⁰ and Z. Cybichowski⁵¹. Only L. Ehrlich, in 1927, and most likely under the influence of the regulation adopted in the PCIJ Statute along with the earlier treaty establishing the International Prize Court, made mention of the certain eventuality of municipal law exerting influence on international law. In his work, he described the issue thusly: „*Vice versa*, the internal law of a state is not binding in international relations. Even if the same norm were to exist in the law of several states, it would

⁴⁶ A. Verdross, *Les Principes Généraux du droit dans la Jurisprudence Internationale*, “Recueil de cours” 1935 – II, vol. 52, p. 204.

⁴⁷ A. Verdross, *op. cit.*, “Il doit suffire qu’il ait pénétré dans le système positif des Etats en general”. p. 205.

⁴⁸ F. T. Freeman Jalet, *The Quest for the General Principles of Law Recognized by Civilized Nations – a Study*, “UCLA Law Review” vol. 10 (1962-1963), p. 1076.

⁴⁹ G. Ripert, *Les Règles du droit civil applicable aux rapports internationaux*, “Recueil de cours” 1933 – II, vol. 44, p. 579: “L’article 38 vise les principes généraux reconnus par les nations civilisées. Cette reconnaissance pourrait s’entendre de un adhésion de l’opinion publique mais comme le droit des nations civilisées est Presque toujours codifié et, en tout cas, écrit, il est certain que ces principes généraux ont été consacrés par la législation positive.”

⁵⁰ J. Makowski, *Prawo międzynarodowe*, Warszawa – Lublin 1918.

⁵¹ Z. Cybichowski, *System prawa międzynarodowego*, Warszawa 1923, ed. II.

not on such grounds become a norm of the law of nations, although under certain conditions it could be a ‘general principle of law applied by civilized nations’⁵².

Formally, the position of the PCIJ regarding municipal law was expressed in a quite direct manner in the case concerning *Chorzów Factory* in 1926. The PCIJ clearly stated that „From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures”⁵³. Indeed, to this day some authors hold that such is the place of municipal law. It should be observed that the PCIJ did not maintain this position with absolute consistency, and on multiple occasions took up analysis of municipal law if doing so would assist in determining the scope of obligations of states in the international arena. Formally, the Court gave its strong support to the dualistic conception, but did make note of certain shared features when the norms of the two systems were coherent and reflected “true law”; this was grounds for ascertaining mutual relations⁵⁴. The Court was at pains not to explore municipal law, clearly favouring international law. It emphasized this in cases where it was forced to address municipal law invoked by states as justification for their actions. In an advisory opinion from 1930 concerning mixed Greco-Bulgarian communities, the court clearly stated that “... it is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty”⁵⁵. This was accented with similar force in another dispute involving France as a party: „France cannot rely on her own legislation to limit the scope of her international obligations”⁵⁶. Thus, even if two identical rules appear in the two legal orders, this is the result of replication⁵⁷, and not reference by the law of nations to municipal sources.

Although municipal law did not constitute grounds for the PCIJ to rule, it turned out to be necessary to indicate norms of the internal law of states and seek in them potential reflections of the practice of states regarding recognition of certain obligations as

⁵² L. Ehrlich, *Prawo narodów*, Lwów 1927, p. 15, L. Ehrlich here directly invoked Art. 38 of the Statute of the PCIJ, but in his work he referenced the same Article in different wording, as page 87 contains the word „recognized” rather than “applied”.

⁵³ Case concerning certain German interests in Polish Upper Silesia (Merrits), Judgment 25th of May 1926, PCIJ Series A, No 7, p. 19: “It might be asked whether a difficulty does not arise from the fact that the Court would have to deal with the Polish law of July 14th, 1920. This, however, does not appear to be the case. From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures.”

⁵⁴ H. A. Steiner, *Fundamental Conceptions of International Law in the Jurisprudence of the Permanent Court of International Justice*, “American Journal of International Law” vol. 30 (1936), p. 433.

⁵⁵ Greco – Bulgarian mixed communities, Advisory Opinion, July 21, 1930, Series B, No. 17, p. 32.

⁵⁶ Zones Order, 1930, Series A, No. 24, p. 12.

⁵⁷ H. A. Steiner, *op. cit.*, p. 437.

binding. The PCIJ also allowed for this practice in several cases, but did so reluctantly and usually when it concerned protection of the interests of natural persons. International practice of that period confirmed that in many cases international courts were forced to invoke municipal law. The concept of general principles recognized by civilized nations, *id est* derived from internal legal orders, was present in international documents. International bodies were essentially forced to examine the national legislation of states-parties to a dispute, which was a product of the system's incomplete nature; this is why we may identify such a line of interpretation in verdicts and advisory opinions of the PCIJ.

According to the opinions presented by the PCIJ, international law was to be assigned priority over municipal law; save for the exceptions cited above, the Court did its best to avoid assessing municipal law. An expression of the changes occurring in the international legal order was a ruling emphasizing the capacity of natural persons to acquire rights under the provisions of international agreements. In a verdict regarding the Free City of Danzig, the Court rejected Poland's appeal in the *Beamtenabkommen* case, arguing that „It may be readily admitted that, according to a well-established principle of international law, the *Beamteabkommen*, being an international agreement, cannot, as such, create direct rights and obligations for private individuals. But it cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts”⁵⁸. Such a decisive emphasis on the separateness of international law from municipal law provides confirmation of the hypothesis that in the majority of cases the Court based its considerations on the dualistic conception. However, the nature of cases referred to the PCIJ required reference by the PCIJ to municipal law. Such actions were frequently characterized by the desire to maintain the cohesion of international law, and to limit the freedom of states to invoke their internal law. Because of the nature of the cases, the PCIJ did not always maintain a consistent position. It decisively rejected the possibility of interpreting municipal law in the case of the Serbian loans, arguing that such activity was neither within the cognition of the Court, nor was it requested by the parties⁵⁹. In the case of Upper Silesia, in spite of previous reservations and a clear rejection of municipal law, the Court declared that municipal law could not constitute grounds for a state to invoke the non-performance of international obligations. However, if such

⁵⁸ Jurisdiction of the Courts of Danzig, Advisory Opinion, 3 of March 1928, PCIJ Series B.-No 15, p. 17-18, commentary in: J.A. Winter, *Direct Applicability and Direct Effect. Two Distinct and Different Concepts in Community Law*, “Common Market Law Review” vol. 9 (1972), p. 429.

⁵⁹ Case Concerning the Payment of Various Serbian Loans Issued in France, Judgment 12th of July 1929, No 20, PCIJ Series A, No. 20, p. 46.

were the case, municipal law could become an object of analysis⁶⁰. It did not maintain such objections in the *Lighthouses* case, as it engaged in analysis of provisions of the constitution and the civil law of Turkey, with reference to eventual effects in the international sphere⁶¹.

However, the ruling which served to most strongly highlight the significant impact of municipal law on international obligations of states came in the *Chorzów Factory* case. In the published verdict the Court emphasized that municipal law does not constitute grounds for effects to arise within international law. In the face of such an unequivocal position, particularly worthy of attention is the fact that the Court based its entire conception of international responsibility of states and the necessity of remedying injury on principles present in municipal law. When the Court invokes „well known principles” without direct reference to contractual norms, it is essentially applying rules of Roman law, or even European continental law. In the 1927 judgement it put the matter quite succinctly: „It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form”⁶². The Court used the knowledge and experiences of judges that they had acquired as individuals versed in municipal law, with Roman and civil law.

The activity of the PCIJ broadly contributes to changes in the way international law is perceived. In the period during which it began its work, international law was still at the beginning of its codification phase. International agreements did not regulate the majority of activity engaged in by states, while international custom not only did not encompass all spheres of cooperation, but there was frequently disagreement among states as to the peremptory character of some norms. The Court thus strove to effect a clear demarcation of two legal orders: international and municipal. Out of the necessity to emphasize the peremptory nature of norms from the international legal order, as well as desiring to avoid situations that could prevent it from issuing a verdict, it invoked rules drawn from domestic law without admitting to such. The official position of the justices was limited to the general declaration that municipal law cannot constitute a source of international law. This does not, however, change the reality of those times, and in the work of the PCIJ we may perceive the influence of municipal law on the shape of international law norms. This is visible not so much as concerns the similarity of the

⁶⁰ Case concerning certain German interests in Polish Upper Silesia (Merrits), Judgment 25th of May 1926, PCIJ Series A, No 7, p. 19, “The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court’s giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention.”

⁶¹ *Lighthouses*, Case between France and Greece, Judgment March 17th, 1934, No 62, PCIJ Series A/B, No. 62, pp. 20-24.

⁶² Case Concerning the Factory at Chorzow (claim for indemnity), Jurisdiction 26th of July 1927, PCIJ Series A No. 9, p. 21.

two orders, but rather the practice of the Court consisting in a more or less official usage of municipal norms in the process of adjudication.

The work of the Court was carried out contemporaneously with the development of international law scholarship, which also rejected direct analogy between the two legal orders and took a negative view of transporting municipal norms into international law. The mere emergence of a norm, or the transposition of one from a municipal legal order to international law could take place in one of two ways: either by reference to general principles of law recognized by civilized nations, or through the proceedings of permanent international courts and courts of arbitration, which could invoke municipal norms when appropriate for a given case. This sort of transfer of norms was, however, of an exceptional nature, and was frequently criticised by both supporters of dualism and positivists. The rejection of municipal law as a potential source of a norm in international law was supposed to reinforce the position of the latter, underlining its exceptional character as an order created among sovereigns, and also to emphasize the special character of its regulations. In spite of all this, the transfer of norms went on uninterrupted. The only – and only necessary – condition for this to occur was the need of society and the interest of states pushing through some solutions grounded in municipal norms.

Although this process was not visible in Nazi Germany and the Soviet Union owing to a tendency to reject any and all international norms that may limit the freedom of states to shape their situation under international law, radical changes occurred after the end of World War II, which had been initiated while the fighting was still going on. States perceptibly changed the manner in which international legal norms were formed, with a focus on the necessity of keeping the peace and changes in the status of the individual. From that moment on, we may observe that they more or less willingly gravitated towards the primacy of international obligations over municipal law. Both groups of these legal orders exerted mutual influence on the shape of norms. Many types of international activity that previously were considered private international law matters found themselves the object of interest of public international law owing to the participation of public entities (states and international organizations) in legal relations, and also because of the shift of particular activity, such as international loans, from the domain of private transactions to loans granted at the international level⁶³.

⁶³ W. Friedman, *The Uses of "General Principles" in the Development of International Law*, "American Journal of International Law" vol. 57 (1963), p. 281.

4. Municipal law in the case-law of contemporary judicial bodies

a. International Court of Justice

In adopting the Charter of the United Nations along with the Statute of the ICJ, the Commission concerned with the Court decided on what was a nearly full incorporation of Article 38 of the Statute of the PCIJ into the new document. Although it was stated that „the wording of this provision is open to certain criticisms it has worked well in practice and its retention is recommended”⁶⁴. A detailed discussion on the sources of international law was not conducted, and it was concluded that the practice of the PCIJ had contributed to a clear definition of their essence and place in the international legal order. The French delegate drew attention to the fact that while Article 38 had not been particularly well-drafted, it would be difficult to do better in the time given to the Washington Committee of Jurists. He also emphasizes that the Court had functioned well based on that Article, and in his view no time should be wasted on improving it⁶⁵. The influence of municipal law on the creation of an international norm was again outside the mainstream of scholarship. This tendency can be understandable when we consider the changes occurring within the international legal order at the time, the multiplicity of regulations reaching deeply into areas which were previously reserved for the state. The overriding goal was to demonstrate the necessity of states fulfilling international obligations based on the principle of the primacy of international norms. At the same time, the influence of municipal courts on the shape of international obligations was becoming increasingly visible. There were opinions stated that it was only after the interpretation of a given norm by municipal courts could we then examine the real scope of that norm, particularly in respect of the rights of natural persons⁶⁶. Scholars also drew attention to the fact that, similarly to before World War I, it was attempted to avoid situations in which the Court would be unable to function, and a given case would have to remain unresolved in spite of an infringement of the law or the general international order as such.

In the initial phase of its operation, the ICJ functioned in a similar legal situation to that of the PCIJ. Many areas of law had not been codified, and this left fairly broad room to manoeuvre in the application of the concept of general principles of law. Judges today also readily make use of this concept. What it means, its scope, and whether it allows for supplementing the system of international norms with rules drawn from mu-

⁶⁴ UNCIO, vol. XIV, p. 435.

⁶⁵ UNCIO, vol. XIV, p. 170.

⁶⁶ See: A. Tzanakopoulos, CH. J. Tams, *Introduction: Domestic Courts as Agents of Development of International Law*, “Leiden Journal of International Law” vol. 26, (2013), pp. 531–540 and J. D’Aspremont, *The Systemic Integration of International Law by Domestic Courts: Domestic Judges as Architects of the Consistency of the International Legal Order*, pp. 142-165, source: <http://ssrn.com/abstract=1401019>, accessed 10.05.2014.

nicipal law, would all seem to be questions that remain unresolved; this is all the more true when considering that the sources of some principles can be identified in documents of international organizations adopted by way of resolution. However, it would seem that there are two elements which seem vital for it to exist: a principle must be general in nature, and it must be recognized by civilized nations⁶⁷. In addressing this issue, M. Virally most likely expressed the consensus among Western commentators by saying that Article 38 equipped the ICJ with the right to invoke municipal legal orders when both sources, *id est* contractual and customary, are insufficient. In his view, Article 38 allowed for the use of analogy with municipal law in order to fill gaps appearing in a case brought before the Court⁶⁸.

In analysing the practice of the ICJ, it can be observed that the Court invoked general principles of law, but like its predecessor it did so with exceptional caution, and it is quite difficult to grasp from the Court's rulings its real significance and scope. The ICJ also did not give into the temptation of providing a definition of general principles of law, in spite of suggestions by justices of how we may understand the concept. It was indicated that one of their sources could be municipal law. According to justice Ammoun, as set out in a dissenting opinion concerning a dispute over the continental shelf in the North Sea, the source of principles is defined in the following way: "the general principles of law (...) are nothing other than the norms common to the different legislations of the world, united by the identity of the legal reason therefor, or the *ratio legis*, transposed from the internal legal system to the international legal system"⁶⁹. However, this definition cannot be treated as universally accepted by the ICJ, as it was included in a separate opinion, which means that the remaining justices did not concur with it. It is difficult to take from what is a quite rich case-law one technique or method aiming at delineating and identifying a general principle of law. Essentially, there is no case in which a ruling would be based solely on Art. 38(1c).

During the initial phase of its activity, the Court twice employed the phrase "principles of law". In the Court's opinion regarding the *Corfu Channel case*, its determinations were based *inter alia* on the idea that Albania, by not informing other states of the mining, had violated „certain general and well-recognized principles, namely: elementary considerations (...) the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for

⁶⁷ M. Cherif Bassiouni, *A Functional Approach to "General Principles" of International Law*, "Michigan Journal of International Law" vol. 11 (1989-1990), p. 768.

⁶⁸ G. Hanessian, „*General Principles of Law*” in the *Iran-U.S. Claims Tribunal*, "Columbia Journal of Transnational Law" vol. 27 (1988-1989), p. 325.

⁶⁹ North Sea Continental Shelf, Judgment I.C.J. Reports 1969, p. 3, (Separate Opinion of Judge Fouad Ammoun, p. 134.

acts contrary to the rights of other States”⁷⁰. The adoption of such a formula could have been a signal of the recognition of general principles as grounds for judgement, but further on in its considerations the ICJ did not take up this issue further, preferring the safe grounds of Art. 38 a and b, *id est* customary law and The Hague Convention of 1907⁷¹. In an advisory opinion on the possibility of entering objections to the convention in respect of prosecuting and punishing the crime of genocide, although the concept of „general principles of law” did make an appearance, it was without direct reference to Art. 38(1)(c). Then, the ICJ declared: „the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation”, and that the objective of the convention is “to confirm and endorse the most elementary principles of morality”⁷². This was not, however, of greater significance for any potential new lines of interpretation.

In very few cases has the ICJ taken up the issue of municipal law or invoked it as a source of law. The sole case in which it engaged in a thorough analysis of the internal law of a state was in the *Barcelona Traction* case⁷³. This was out of necessity, considering the absence of the relevant norms in international law; the ICJ had to invoke the internal law of a state, as it was dealing with an enterprise whose activity extended beyond the borders of one state, and thus it must be observed that norms of municipal law in such a case extend beyond the borders of the state and influence international relations⁷⁴. Of course, the Court was at pains to point out that it may not be expected that interna-

⁷⁰ Corfu Channel case, Judgment of April 9th, 1949: I.C. J. Reports 1949, p. 4, “Such obligations are based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war ; the principle of the freedom of maritime communication ; and every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.”, p. 22.

⁷¹ H. Thirlway, *op. cit.*, p. 102.

⁷² Reservations to the Convention on Genocide, Advisory Opinion: I.C.J. Reports 1951, p. 15, p. 23.

⁷³ *Barcelona Traction, Light and Power Company, Limited*, Judgment, I.C.J. Reports 1970, p. 3.

⁷⁴ *Barcelona Traction* p. 33, “(...)From its origins closely linked with international commerce, diplomatic protection has sustained a particular impact from the growth of international economic relations, and at the same time from the profound transformations which have taken place in the economic life of nations. These latter changes have given birth to municipal institutions, which have transcended frontiers and have begun to exercise considerable influence on international relations. One of these phenomena which has a particular bearing on the present case is the corporate entity. 38. In this field international law is called upon to recognize institutions of municipal law that have an important and extensive role in the international field. This does not necessarily imply drawing any analogy between its own institutions and those of municipal law, nor does it amount to making rules of international law dependent upon categories of municipal law. All it means is that international law has had to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction. This in turn requires that, whenever legal issues arise concerning the rights of States with regard to the treatment of companies and shareholders, as to which rights international law has not established its own rules, it has to refer to the relevant rules of municipal law. Consequently, in view of the relevance to the present case of the rights of the corporate entity and its shareholders under municipal law, the Court must devote attention to the nature and interrelation of those rights.”

tional law would automatically acknowledge the supremacy of national regulations in issues of trade. A supplemental argument to this approach was the concern that glossing over municipal law could lead to an incorrect decision, as international law does not provide any norms to regulate such issues. The object of evaluation was not, however, to be only the municipal law of one state, but rather a comparison of the law on commercial companies⁷⁵. In spite of the absence of relevant regulation in international law, the Court at the time ascertained positive norms in effect at both the municipal and international level with a view to the proper protection of individual entities against the activity of a state.

In its case-law the ICJ continued the line adopted by the PCIJ defending the distinctness of the two legal systems. This is why municipal law generally was not the object of its analysis, although there were cases of the Court referring to it as a means of highlighting the differences between those two orders. In accordance with the established case-law, it is not permissible to invoke municipal law in the event of a violation of international obligations. However, when internal solutions have been referenced, the ICJ has attempted to do so in a quite specific manner. This has either been done with a view to comparing the activity of a state in the domestic and the international spheres, or a clear line was drawn, and documents or acts of municipal law were treated as something imperfect and useable only for purposes of comparison.

The conclusion that emerges after review of verdicts handed down by the ICJ from the beginning of its operation is that references to municipal law are sporadic. They can be classified into several groups. The first of them addresses the broadly-understood category of acts of municipal law. This was first done in a 1951 dispute between the United Kingdom and Norway, in which the court declared that delimitation of maritime areas inevitably includes an international aspect, and therefore cannot be based solely on the will of the coastal state. The contents of acts of municipal law must be communicated properly to interested parties⁷⁶. It adopted a similar interpretation in a dispute between the United Kingdom and Iran. When Iran wished to negate the legal effects brought

⁷⁵ *Barcelona Traction*, p. 50 “If the Court were to decide the case in disregard of the relevant institutions of municipal law it would, without justification, invite serious legal difficulties. It would lose touch with reality, for there are no corresponding institutions of international law to which the Court could resort. Thus the Court has, as indicated, not only to take cognizance of municipal law but also to refer to it. It is to rules generally accepted by municipal legal systems which recognize the limited company whose capital is represented by shares, and not to the municipal law of a particular State, that international law refers. In referring to such rules, the Court cannot modify, still less deform them.”

⁷⁶ Fisheries case, Judgment of December 18th, 1951: I.C.J. Reports 1951, p. 116, p. 132: “The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law.”

about by its own municipal law in relations with other states, the ICJ clearly rejected this position as the document had been published properly, the parties had had the opportunity to familiarize themselves with it, and it also impacted the position of the Iranian government at the moment the agreement was concluded⁷⁷. In the *Peru v. Chile case* concerning demarcation of the continental shelf and other maritime areas, the approach taken by the ICJ to domestic legislation was, however, different. In its reasoning it rejected acts of municipal law entered by the sides as evidence; those parties justified their claims on grounds of the statements which were too chaotic, uncoordinated, and only selectively addressed the given activity of states⁷⁸. In this case one may get the impression that the ICJ does not apply uniform criteria, and makes use of those sources of law it feels are most appropriate for the case at hand. In the first period of its activity, the court invoked the *Mavromatis* case in which the PCIJ had made the following statement: “The Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law”⁷⁹. This quite clearly depicts the certain measure of freedom available to the Court in respect of analysing whether to make use of the internal law of states.

In cases concerning potential interference in the internal matters of a state through assessment of the legality of domestic acts, the ICJ has also refused to undertake a deeper analysis of documents drafted on the basis of municipal law regulations as grounds for its ruling – this was the case regarding documents presented by Bosnia and Herzegovina⁸⁰, as well as in a dispute between Congo and Uganda⁸¹, in which it argued that information from intelligence services, diplomatic correspondence, and other internal documents may not constitute evidence, as they do not meet the burden of evidence imposed by the ICJ⁸². In an earlier ruling in the case of *Nicaragua v. USA*, the Court adopted

⁷⁷ *Anglo-Iranian Oil Co. case (jurisdiction)*, Judgment of July 22nd, 1952: I.C. J. Reports 1952, p. 93, p. 107: “It is contended that this evidence as to the intention of the Government of Iran should be rejected as inadmissible and that this Iranian law is a purely domestic instrument, unknown to other governments. The law is described as „a private document written only in the Persian language which was not communicated to the League or to any of the other States which had made declarations”. The Court is unable to see why it should be prevented from taking this piece of evidence into consideration. The law was published in the *Corpus of Iranian laws* voted and ratified during the period from January 15th, 1931, to January 15th, 1933. It has thus been available for the examination of other governments during a period of about twenty years. The law is not, and could not be, relied on as affording a basis for the jurisdiction of the Court. It was filed for the sole purpose of throwing light on a disputed question of fact, namely, the intention of the Government of Iran at the time when it signed the Declaration.”

⁷⁸ *Maritime Dispute (Peru v. Chile)*, Judgment, I.C.J. Reports 2014, p. 3, p. 57.

⁷⁹ *The Mavromatis Palestine Concessions*, Judgment of August 30th, 1924, PCIJ Series A-No 2, p. 34.

⁸⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43.

⁸¹ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 168.

⁸² *Ibidem*, p. 130.

a similar position concerning recognition of evidence from press reports and declarations of witnesses presented by the parties⁸³. This approach to documents which are binding on grounds of municipal law was also confirmed in an earlier judgement concerning nuclear tests⁸⁴.

A separate issue for the ICJ arose from cases concerning assessment of decisions by national judiciary bodies. In the *Diallo* case the Court clearly emphasized that it is the state's role to interpret its own municipal law. As a rule, it is not within the remit of the ICJ to substitute for national courts in the performance of that function, and the ICJ may not replace domestic interpretation with its own. This is particularly the case when such interpretation has been adopted by the supreme court of the state. Such interference is permissible only in exceptional circumstances, when an authority of the state adopts an interpretation grossly violating municipal law "particularly for the purpose of gaining an advantage in a pending case, it is for the Court to adopt what it finds to be the proper interpretation"⁸⁵. This particular case involved a national court adopting a decision in a manner that clearly contradicted municipal law. The ruling in the dispute between Congo and Belgium was in a similar vein, where the ICJ confirmed that it was forbidden from passing judgement on the decisions of national courts, "This does not mean, however, that the Court may not deal with certain aspects of that question in the reasoning of its Judgment, should it deem this necessary or desirable"⁸⁶. In other words, although somewhat cautiously, it did reserve for itself the right to assess judgements of national courts in the event of an infringement of international norms. Following this logic, in a dispute between Croatia and Serbia, the ICJ, while not directly addressing the activity of national courts, did clearly indicate that states are under an obligation to punish individuals guilty of international crimes before a national court. This position was justi-

⁸³ Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*). Merits, Judgment. I.C.J. Reports 1986, p. 14. p. 39 „The Court holds that general principles as to the judicial process require that the facts on which its Judgment is based should be those occurring up to the close of the oral proceedings on the merits of the case. While the Court is of course very well aware, from reports in the international press, of the developments in Central America since that date, it cannot, as explained below (paragraphs 62 and 63), treat such reports as evidence, nor has it had the benefit of the comments or argument of either of the Parties on such reports. As the Court recalled in the Nuclear Tests cases, where facts, apparently of such a nature as materially to affect its decision, came to its attention after the close of the hearings: „It would no doubt have been possible for the Court, had it considered that the interests of justice so required, to have afforded the Parties the opportunity, e.g., by reopening the oral proceedings, of addressing to the Court comments on the statements made since the close of those proceedings.”(I.C.J. Reports 1974, p. 264, para. 33; p. 468, para. 34.

⁸⁴ Nuclear Tests (*Australia v. France*), Judgment, I.C.J. Reports 1974, p. 253 I.C.J. Reports 1974, p. 264, p. 468.

⁸⁵ Ahmadou Sadio Diallo (*Republic of Guinea v. Democratic Republic of the Congo*), Merits, Judgment, I.C.J. Reports 2010, p. 639, p. 665.

⁸⁶ Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*), Judgment, I.C.J. Reports 2002, p. 3, p. 19.

fied based on the argument that the necessity of prosecuting natural persons for acts contrary to international law resulted from both the municipal law of the state and from international obligations⁸⁷.

In its verdict concerning the quite sensitive issue of the nature of the immunity afforded to individuals performing public functions, this time the ICJ referred to the obligation to hand over a natural person. It observed that in some cases municipal law can have a decisive influence on the application of international legal norms:

It follows from the terms of the two provisions cited above that the expulsion of an alien lawfully in the territory of a State which is a party to these instruments can only be compatible with the international obligations of that State if it is decided in accordance with “the law”, in other words the domestic law applicable in that respect. Compliance with international law is to some extent dependent here on compliance with internal law. However, it is clear that while “accordance with law” as thus defined is a necessary condition for compliance with the above-mentioned provisions, it is not the sufficient condition. First, the applicable domestic law must itself be compatible with the other requirements of the Covenant and the African Charter; second, an expulsion must not be arbitrary in nature, since protection against arbitrary treatment lies at the heart of the rights guaranteed by the international norms protecting human rights, in particular those set out in the two treaties applicable in this case.⁸⁸

The ICJ considered as valid the decision of a national court which was issued pursuant to municipal law, insofar as it did not contradict the international obligations of the state.

Norms referring to regulation of the issue of international responsibility of states clearly forbid them from invoking municipal law to avoid fulfilling international obligations. In accordance with this theory, the ICJ has emphasized on multiple occasions the ineffectiveness of invoking norms of municipal law as a way of avoiding responsibility on the international plane. This was the case in the dispute *Costa Rica v. Nicaragua*, confirming that regulations comprising municipal law are not grounds for excluding responsibility of the state in the international sphere⁸⁹. This was consistent with the reasoning adopted in the *Avena case*, in which the Court examined the municipal law of the USA and the practice of that country’s authorities in respect of informing a detained individual of the right to receive support from their country’s consular services, and similarly defined the USA’s liability on grounds of international law⁹⁰.

⁸⁷ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Serbia*) 3 February 2015, Judgment, Merritts, p. 55.

⁸⁸ Ahmadou Sadio Diallo, *op. cit.*, p. 663.

⁸⁹ Certain Activities Carried out by Nicaragua in the Border Area (*Costa Rica v. Nicaragua*), Construction of a Road in Costa Rica Along the San Juan River (*Nicaragua v. Costa Rica*), 16th December 2015, Judgment, Merritts, p. 59.

⁹⁰ Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning *Avena and Other Mexican Nationals (Mexico v. United States of America)* (*Mexico v. United States of America*), Judgment, I.C.J. Reports 2009, p. 3, p. 34.

The Court also drew attention to the necessity of limiting the effects of a state's activities in municipal and international law. In a dispute between Congo and Rwanda, the issue was reservation raised by Rwanda to the Convention on the Prevention and Punishment of the Crime of Genocide. In the eyes of the government of Congo, because of changes in municipal law and the verbal declarations of individuals performing public functions Rwanda withdrew its reservations consisting in the permissibility of holding only natural persons responsible for the crime of genocide, by extending responsibility to the state *per se*. The ICJ considered these internal reforms and informal, if public, declarations to be insufficient. In the Court's view, the law of treaties clearly sets out the proper form for withdrawal of a reservation, which in this case Rwanda had not invoked; it could also not be confirmed based on the intent of a real effect consisting in the extension of responsibility for crimes of genocide to the state⁹¹.

The International Court of Justice, in spite of being comprised of justices educated in various legal orders, rarely invokes the general principles or municipal law of states. Doubtlessly they are a certain point of reference, but it would be difficult to identify one uniform interpretation. Municipal law is certainly not ignored, and it is analysed, but rather as a fact, and in only a very small percentage of cases may we claim that it has penetrated the international level. The Court does this by invoking universally recognized rules or principles, without indicating their source of origin. In numerous separate and individual opinions, particular justices do indicate that it is possible and proper to apply Art. 38 (1)(c) as autonomous grounds for a decision. Nevertheless, this position does not enjoy broader support among the majority of justices. Perhaps justices issuing verdicts of the ICJ continue to prefer seeking norms of a contractual or customary nature, rather than risk the charge levelled during preparatory work on the Statute of the PCIJ that they are ruling on grounds of a principle that is not acknowledged by one of the states-parties to the dispute.

b. International Criminal Tribunals

b.1. Ad hoc courts

International criminal law in the form familiar to us today began to develop following World War II. Many authors point out that in the case-law of international criminal courts, since the International Military Tribunal at Nuremberg⁹² a very important role has been played by the internal law of states. The International Military Tribunal, as the first

⁹¹ Armed Activities on the Territory of the Congo (New Application : 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, p. 6.

⁹² Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom and of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal London, 8 August

body with jurisdiction in criminal cases, made use of it in the process of preparing charges, during trials themselves, and in respect of procedural matters. Somewhat controversial was the violation of the principle *nullum crimen nulla poena sine lege*, as many observers pointed out that at the moment the accused performed many of the acts they were on trial for, those acts were not universally regarded as forbidden. Ultimately, however, this argument was rejected⁹³. It was held that the Tribunal had the authority to refer to facts of common knowledge, that the accused should be present during the trial, that no appeal could be submitted unless explicitly permitted by the law, and that the burden of proof rests on the accuser. Defendants were primarily ensured the right to a defence (personally or with the assistance of an attorney), evidentiary proceedings grounded in techniques and practices familiar in the states (including Germany) participating in the proceedings⁹⁴. The Tribunal was guaranteed freedom in its decisions, while the deliberations of the justices were confidential. In the case of the International Military Tribunal this was particularly significant considering that it was the first international body to take up the issue of punishment for the commission of international crimes. Its competencies are, however, always defined as special powers, with consideration to the fact that the situation in which it was appointed led to it being granted exceptional authority⁹⁵.

The experiences of the IMT served as inspiration for both the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. Appointed in a special mode, pursuant to a decision by the UN Security Council, they were not only pioneers in the development of rules for criminal responsibility of individuals for international crimes, but they also contributed significantly to the creation of an international criminal law, itself a hybrid of municipal and international norms⁹⁶. These Tribunals invoked municipal law either directly or through the deduction of general principles of law. As some claim, out of simple respect for substantive criminal law they had to base their judgements on certain assumptions fundamental to the criminal process as such. The principles considered of greatest importance and most universal among nearly all municipal legal orders which were transplanted into the international legal order included the presumption of innocence (individual criminal respon-

1945 r., source: <http://avalon.law.yale.edu/imt/jack60.asp>, accessed 8.09.2014, Polish text in: Dz. U. z 1947 r. nr 63, poz. 367.

⁹³ M. Biddulph, D. Newman, *op. cit.*, p. 324.

⁹⁴ For commentary see: D. Tilley, *The Non-Rules of Evidence in the ad hoc Tribunals*, "The International Lawyer" vol. 45 (2011), p. 697.

⁹⁵ P. Wismer, *Bring Down The Walls!-On the Ever-increasing Dynamic between the National and International Domains*, "Chinese Journal of International Law" vol. 5 (2006), p. 550.

⁹⁶ M. Fan, *Custom, General Principles and the Great Architect Cassese*, "Journal of International Criminal Justice" vol. 10 (2012), p. 1076.

sibility), duress as a mitigating factor, and proportionality in verdicts⁹⁷. This approach was not acceptable for some, which can be deduced even from the content of some rulings which clearly emphasize the distinctness and specificity of international criminal law. A. Cassese generally rejects the possibility of directly importing rules from municipal law. In his opinion, international and municipal law are two distinct systems, and we may not say that they function identically: “The International Tribunal, being an international body based on the law of nations, must first of all look to the object and purpose of the relevant provisions of its Statute and Rules”⁹⁸. A. Cassese goes on to unequivocally emphasize that analogy to rules taken from municipal law can only be employed exceptionally. Such a position on the relation between international and municipal law clearly delineates the border between those two legal orders, but does not entirely exclude their reciprocal impact. The distinct goals and tasks of the two systems in the area of criminal law determine to an extent the necessity of performing diverse tasks in both spheres. In the opinion of some authors, municipal law and general principles have become grounds for the issuing of verdicts by international criminal tribunals, but it cannot be forgotten that in that system they perform a complementary function, supplemental in respect of norms set out on the basis of the acts establishing it⁹⁹.

The special material on whose grounds international criminal courts were supposed to function contributed to their exceptionally strong link with internal law. For the founders of international criminal courts, it was obvious that those bodies would be unable to work effectively without applying norms and procedures universally recognized in the criminal law. An additional difficulty concerning the application of municipal norms consists in their substantial differences. It is emphasized that in this particular area of law the exclusive jurisdiction of a state formed within a shared tradition and culture of a given social group was retained. This leads to significant difficulties for states in ceding their exclusive rights in favour of international bodies. Nevertheless, in observing the development of criminal law in various states, it may be noted that they make use of certain institutions which, to varying degrees, can be considered shared. This is very visible in their case-law, in which they refer directly to one another’s case-law. This objective would seem a simple one as it concerns the indication of some principles emphasizing the impartiality of the case-law¹⁰⁰.

⁹⁷ F. Mantovani, *The General Principles of International Criminal Law: The Viewpoint of a National Criminal Lawyer*, “Journal of International Criminal Justice” vol. 1 (2003), p. 399.

⁹⁸ Prosecutor v. Erdemovic, Prosecutor v. Erdemovic, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Cassese, (Int’l. Crim. Trib. for the Former Yugoslavia Oct. 7, 1997, para. 2.

⁹⁹ F. O. Raimondo, *General Principles of Law as Applied by International Criminal Courts and Tribunals*, “The Law and Practice of International Courts and Tribunals”, vol. 6 (2007), p. 394.

¹⁰⁰ F. Mantovani, *op. cit.*, p. 396.

The impact of municipal norms in cases before international judicial bodies is clear in two planes: vertical and horizontal. According to some scholars, the former refers to the process of abstracting legal norms from domestic legal orders. Courts to date have examined municipal criminal codes, not only in respect of their literal wording, but also with reference to ethics, or even morality. In proceedings before the tribunals for both the former Yugoslavia and Rwanda, analysis of municipal law usually provided a starting point for considerations on the interpretation of the act committed by the accused¹⁰¹. Their work was affected by many different acts of law, and thus not only at the national level, but also the regional. This direction of influence would seem to be appropriate, as apart from shared characteristics, it also allows for the indication of differences in domestic orders resulting from tradition, Acts, and the rulings of municipal courts. Although the significance of custom in criminal matters has decreased in recent times, particularly among the leading legal orders of the world, it is reflected to a degree in constitutions, Acts of law, and the decisions of courts. It is important to derive shared principles for legal orders from current sources, particularly when one of the fundamental principles of criminal law is held to be *lex retro non agit* when it may have a detrimental effect on the situation of the accused. This is why the accused should answer for acts that were crimes at the moment of their commission.

The horizontal plane encompasses the activity of organs regarding comparison of national legal systems in order to determine whether the majority of states recognizes a principle of law invoked as the effect of vertical operations. A separate issue is that of how international criminal courts verify whether a given principle is generally recognized within a municipal system¹⁰². In the *Kunarac* case, the Chamber referred to the technique of searching for sources of principles in a municipal order, but it did not hold it necessary to compare all of them. In the Chamber's opinion, of greater importance was indicating whether a general comparison of legal systems would facilitate the identification of a general rule¹⁰³. Justices were not, however, always unanimous in their views on the existence of a principle deduced from national legal orders. One example is that of the *Erdemovic* case, where the Tribunal for the former Yugoslavia took up analysis

¹⁰¹ H. van der Wilt, *National Law: A Small but Neat Utensil in the Toolbox of International Criminal Tribunals*, "International Criminal Law Review" vol. 10 (2010), p. 218.

¹⁰² F. Mantovani, *op. cit.*, p. 400.

¹⁰³ Prosecutor v. Kunarac et al. Case Nos. IT-96-23-T and IT-96-23/1-T, Judgment, 439 (Int'l. Crim. Trib. for the Former Yugoslavia Feb. 22, 2001). "[t]he value of these sources is that they may disclose 'general concepts and legal institutions' which, if common to a broad spectrum of national legal systems, disclose an international approach to a legal question which may be considered as an appropriate indicator of the international law on the subject. In considering these national legal systems the Trial Chamber does not conduct a survey of the major legal systems of the world in order to identify a specific legal provision which is adopted by a majority of legal systems but to consider, from an examination of national systems generally, whether it is possible to identify certain basic principles".

of the impact of acting under duress on the exclusion or relaxation of criminal responsibility of a perpetrator. The justices analysed the legal orders of many states, and arrived at the opinion that they found no definite answer to the question of whether such a principle exists or not.¹⁰⁴ Rwandan law was invoked on multiple occasions before the Tribunal for Rwanda, as were other systems of municipal law. In the case of *Akayesu* the First Chamber of the Tribunal initially analysed the legal systems of several states, ultimately acknowledging Rwandan law as the most appropriate for application¹⁰⁵.

In the course of issuing verdicts, international *ad hoc* courts have a tendency to consider the national legal systems of the countries where crimes were committed. This is why the International Criminal Tribunal for the former Yugoslavia frequently referred to the law of the Socialist Federal Republic of Yugoslavia, of Bosnia and Herzegovina, and of Croatia, while the ICTR invoked the law of Rwanda¹⁰⁶. This would seem to be

¹⁰⁴ Prosecutor v. Erdemovic, Case No. IT-96-22-A, Joint Opinion of Judges McDonald and Vohrah, (Int'l. Crim. Trib. for the Former Yugoslavia Oct. 7, 1997, p. 56-58 (presenting several of the key considerations on questions of how to use general principles, and engaging with some of the leading decisions to have done so). See also: Prosecutor v. Erdemovic, para. 3. Separate and Dissenting Opinion of Judge Li).

¹⁰⁵ Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, 2 September 1998, par: 535. "The ingredients of complicity under Common Law do not appear to be different from those under Civil Law. To a large extent, the forms of accomplice participation, namely „aid and abet, counsel and procure", mirror those conducts characterized under Civil Law as *l'aide et l'assistance, la fourniture des moyens*". Para. 536. Complicity by aiding or abetting implies a positive action which excludes, in principle, complicity by failure to act or omission. Procuring means is a very common form of complicity. It covers those persons who procured weapons, instruments or any other means to be used in the commission of an offence, with the full knowledge that they would be used for such purposes. Para. 537. For the purposes of interpreting Article 2(3)e) of the Statute, which does not define concept of complicity, the Chamber is of the opinion that it is necessary to define complicity as per the Rwandan Penal Code, and to consider the first three forms of criminal participation referred to in Article 91 of the Rwandan Penal Code as being the elements of complicity in genocide, thus: complicity by procuring means, such as weapons, instruments or any other means, used to commit genocide, with the accomplice knowing that such means would be used for such a purpose; complicity by knowingly aiding or abetting a perpetrator of a genocide in the planning or enabling acts thereof; complicity by instigation, for which a person is liable who, though not directly participating in the crime of genocide crime, gave instructions to commit genocide, through gifts, promises, threats, abuse of authority or power, machinations or culpable artifice, or who directly incited to commit genocide."

¹⁰⁶ Tribunals themselves have done so on multiple occasions, but in a general manner. The opinion of Judge Cassese indicates the work performed individually by justices in identifying grounds in national law for holding criminals to account: Prosecutor v. Erdemovic, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Cassese, (Int'l. Crim. Trib. for the Former Yugoslavia Oct. 7, 1997, footnote to para. 63: "As examples of national criminal provisions contemplating duress for all offences, including murder, see Art. 10 of the 1975 Criminal Code of Austria; Art. 71 of the 1867 Criminal Code of Belgium; Art. 25 of the 1969 Criminal Code of Brazil; Art. 25 and Art. 32 of the 1950 Criminal Code of Greece; Art. 54 of the 1930 Criminal Code of Italy; Art. 40 of the 1881 Criminal Code of the Netherlands; Art. 122-2 of the French Penal Code; Section 34 and Art. 35 of the 1975 Criminal Code of Germany; Art. 85 of the 1924 Criminal Code of Peru; Art. 8 of the 1944 Criminal Code Spain; Art. 34 of the 1937 Criminal Code of Switzerland; Art. 4, Chapter XXIV of the Criminal Code of Sweden; Art. 10 of the Penal Code of the Socialist Federal Republic of [the former] Yugoslavia provided for the defence of "extreme necessity" to any crime. This article has been incorporated unchanged into the Penal Code of the Federal Republic of Yugoslavia (Serbia and Montenegro), the Penal Code of the Republic of Croatia and the Penal Code of Bosnia".

justified by the desire to observe the principle of *nullum crimen nulla poena sine lege*, as this is an issue of primary importance in substantive criminal law. Nevertheless, it should be observed that the legal systems of Germany, Australia, France, England and Wales, the United States of America, Italy, and Canada were the most frequently invoked legal orders in the course of comparative studies conducted by international courts. Taken together, they were cited in over half of the cases where municipal systems were referred to as sources of general principles of law. Reference to these seven national legal systems is of an almost systemic nature¹⁰⁷. Mention must also be made of international courts and tribunals invoking general principles that refer to both substantive and procedural criminal law. There is a noticeable tendency towards limiting the use of general principles of law and national law as well as the opinions of scholars in conjunction with the growing output of the judicial bodies themselves¹⁰⁸. Of course, this cannot be viewed as a total abandonment of those sources. It has simply been acknowledged that it is not necessary to continue the practice of drawing on other legal orders to determine the existence of norms, with a view to the fact that another international court has already done so. An example of this is a ruling issued by the Special Court for Sierra Leone, in which it directly references a verdict of the Rwanda Tribunal¹⁰⁹.

In summarizing the activity of *ad hoc* international criminal courts as concerns the application of general principles of law derived from the legal orders of states, or directly from municipal law, it can be observed that techniques revolve around the simple reference that the acknowledgement of a majority of states is clear, or that other, simpler formulas are applied presenting a comparative analysis of law. It may also be noticed that in proceedings before *ad hoc* Tribunals a particular position was occupied by the internal law of the state on whose territory a crime was committed. This system was granted what amounts to a privileged position¹¹⁰. To be precise, international criminal tribunals invoke general principles of law recognized by all nations, general principles recognized by the community of nations, general principles of law acknowledged by the community of nations, and general principles recognized by the majority of the world's legal systems. Here an additional problem arises with defining precisely the meanings of phrases like "all nations", "community of nations", "nations of the world", "majority of the world's legal systems"¹¹¹. That said, we may not ignore the fact that it is not entirely clear whether an applied norm comes from national law, as the activities of both

¹⁰⁷ F. Mantovani, *op. cit.*, p. 402.

¹⁰⁸ F. O. Raimondo, *op. cit.*, p. 396.

¹⁰⁹ Prosecutor v. Sesay et al., Ruling on the Issue of the Refusal of the Third Accused Augustine Gbao, to Attend Hearing of the Special Court for Sierra Leone on 7 July 2004 and Succeeding Days, Case No. SCSL – 04-15-T, T. Ch., 12 July 2004, para. 10.

¹¹⁰ H. van der Wilt, *op. cit.*, p. 236.

¹¹¹ F. Mantovani, *op. cit.*, p. 400.

tribunals are clearly directed at highlighting the distinctions and differences between the systems. Even in the *Furundžija* case, where direct reference to municipal law was found, the Tribunal clearly stated that while different legal orders address the issue of rape in different manners, the protection of human dignity is a concept shared by all of them¹¹². This does not, however, change the fact that general principles of law, at least on the grounds of criminal law, are not capable of filling all of the existing gaps; thus, national law has been, and for some time will continue to be assigned a special role¹¹³.

b.2. International Criminal Court

The International Criminal Court is an international body whose rulings may be directly based on general principles and the municipal law of various legal systems around the world. Article 21 indicates the law applicable in the work of the ICC¹¹⁴:

The Court shall apply:

- (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
- (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
- (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards (...).

Such quite broad powers are most certainly intended to boost the effectiveness of ICC rulings. During preparatory work it was pointed out that the wording of that article requires engaging in comparison of legal systems, but not all of them, only the leading ones. This meant demonstrating the existence of similar norms in the most important legal orders, *id est* continental law, *common law* and Islamic law¹¹⁵. However, the possibility of directly invoking the national law of one state was rejected. The majority felt that such direct application of internal law would disrupt the cohesion of international criminal law, and could lead to clear miscarriages of justice in the case of a subject being judged with different standards being applied to the same act¹¹⁶. Additional discussion was provoked by the issue of which term was to be used: applicable or particular legal orders, and there was even a proposal to refer simply to general principles. Ultimately,

¹¹² Prosecutor v. Furundžija, Case No. IT-95-7/1-T, Judgment, 177 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998), para. 183-186.

¹¹³ H. van der Wilt, *op. cit.*, p. 237.

¹¹⁴ The Rome Statute of the International Criminal Court, A/CONF.183/9 of 17 July 1998 and corrected by process-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002. source: [http://legal.un.org/icc/statute/english/rome_statute\(e\).pdf](http://legal.un.org/icc/statute/english/rome_statute(e).pdf), accessed: 16.12.2016

¹¹⁵ A. Pellet, *Applicable Law*, in: A. Cassese, P. Gaeta and J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford 2002, p. 1073.

¹¹⁶ H. van der Wilt, *op. cit.*, p. 216.

the draft prepared by the working group was incorporated in that form into the Statute¹¹⁷. The provisions in Article 21 (1) (c) thus theoretically go further than in the case of the statutes of other tribunals when we take into account the possibility of applying general principles of law delineated by the ICC from national legal orders of the world. The adoption of this position seemed to be a necessity, as classic international law had not developed and could not provide appropriate criminal law rules. Municipal law became not only a means of filling in the existing gaps, but also allowed for taking account of psychological reasons¹¹⁸ for the existence of a prohibition on or permission for the commission of some acts.

The fact may not be ignored, however, that in the rulings of the Court municipal law does not perform an independent function. What is more, to date the justices have treated municipal law with a certain reserve. In the *Bemba* case, Pre-Trial Chamber III explained that “national case law can only constitute a subsidiary source of law before this Court, insofar as it shows the existence of a general principle of law that can be derived from “national laws of legal systems of the world” and is not inconsistent with the Statute and with international law and internationally recognized norms and standards”¹¹⁹. In two decisions confirming issued charges, an aversion on the part of the Court to national law could be observed, as their texts allow for the conclusion that the Court does not feel itself bound by municipal law¹²⁰. Based on previous work, national law is supposed to assist in strengthening the charges pressed against accused persons. For example, the Court has held that the accused should have been aware of the unlawful nature of his actions when such unlawfulness resulted from municipal and/or international law¹²¹. Similarly, in the *Katanga* case, the Court referred to certain solutions present in both municipal systems and the international legal order, which demand a clear distinction of the perpetrator from accessories to the crime¹²². However, the Prosecutor’s motion to prepare witnesses as is the custom in Anglo-Saxon law was rejected, as it is not

¹¹⁷ A. Cassese, P. Gaeta and J.R.W.D. Jones (eds), *op. cit.*, p. 394.

¹¹⁸ H.-H. Jescheck, *The General Principles of International Criminal Law Set Out in Nuremberg, as Mirrored in the ICC Statute*, “Journal of International Criminal Justice” vol. 2 (2004), p. 40.

¹¹⁹ No ICC-01/04-01/07, Decision revoking the prohibition of contact and communication between Germain Katanga and Mathieu Ngudjolo Chui, 13 March 2008, p.12 (*Bemba*)

¹²⁰ No ICC-01/04-01/06 Decision on the Confirmation of the Charges, 29 January 2007 para. 69 and ICC – 01/04-01/07, Decision on the Confirmation of the Charges, 30 November 2008, para. 91

¹²¹ No.: ICC-01/04-01/06, Date: 14 March 2012, Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo, p. 415 “Therefore, it is argued that the expression “should have known” requires the finding that the accused was legally obliged, either under domestic or international law, to establish the age of the recruits and that a lesser, loosely-formulated obligation simply based on his involvement in recruitment is insufficient”.

¹²² No.: ICC-01/04-01/07 Date: 7 March 2014, Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Germain Katanga, p. 526: “In criminal law, they recalled, the distinction between perpetrators of and accessories to a crime is necessary and constitutes “[TRANSLATION] one of most widely accepted pillars of criminal law throughout all legal systems and national and international legislation”.

present in the Roman/Germanic law tradition¹²³. Because only two verdicts to date have been handed down by the ICC, the Court's output is, so far, modest. Nevertheless, for future practice the decisions of the Pre-Trial Chamber will be of great importance, as they ultimately determine whether a case is to be heard by the Court, as well as formal submissions prepared by particular organs of the Court. The work of the Prosecutor also demonstrates multiple attempts at reinforcing argumentation through reference to municipal law. An example is the case against citizens of Kenya. In response to doubts expressed by the government of Kenya, the Prosecutor stated clearly that a state may not invoke internal law in reference to fulfilling obligations that arise out of the Statute. In this case, even the provisions of a constitution may not be applied¹²⁴. In previous cases heard before the ICC, the Prosecutor referred to the law of states not only in substantive decisions, but also in procedural matters. The Prosecutor provided an interesting presentation of the issue of the right to submit an appeal. Municipal law was provided as the source of this institution. It was identified in the majority of the legal systems of 24 states; appeal is an institution to be found in continental law, common law, and legal systems strongly influenced by Islamic law¹²⁵.

They were further in agreement with the Pre – Trial Chamber's endorsement of the principle of control over the crime to distinguish between perpetrators of and accessories to a crime."

¹²³ No.: ICC-01/04-01/06, Decision regarding the Practice Used to Prepare and Familiarise Witness for Giving Testimony at Trial, 30 November 2007, para. 41

¹²⁴ No.: ICC-01/09-01/11 Date: 30 June 2014, Situation in the Republic of Kenya in the Case of the Prosecutor v. William Samoei Ruto and Joshua Arap Sang, Public with a Public Annex, Prosecution response to the Government of the Republic of Kenya's observations on the Appeals against the "Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation", p. 7, "11. Although the GoK asserts that the 'Kenyan Constitution is superior at all times to [...] international treaties ratified by Kenya' for the purpose of international law, it is well established in the international law of treaties (and State responsibility) that a State may not rely on domestic law to relieve it of an obligation assumed under international law; [...]. 29. this is complemented in the Statute by the requirement under Article 86 that State Parties 'shall [...] cooperate fully with the Court'; 30 While the Constitution of Kenya may control the means by which Kenya's international obligation under the Statute is implemented within Kenya, this is without prejudice to the existence of the obligation itself. Article 93(3) of the Statute makes clear that even the existence of "an existing fundamental legal principle of general application" does not invalidate a request for assistance as such, but only triggers good faith negotiations between the Court and the State to resolve the request by another means. For these reasons, the Constitution of Kenya is simply irrelevant to an analysis of Kenya's international obligations as a State Party to the Statute."

¹²⁵ No.: ICC-01/04 Date: 24 April 2006, The Appeals Chamber, Situation in the Democratic Republic of the Congo, Public Document Prosecutor's Application for Extraordinary Review of Pré-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 21. p. 10: "Therefore the next inquiry is whether there is any identifiable general principle of law, relevant to the issue of the availability of review of the denial of leave to appeal by a lower court, in the legal systems of the world. Research into the law of 24 national jurisdictions representing both the Civil and the Common Law traditions, and the law of a further three jurisdictions with a strong Islamic law component, shows the existence of two major groups: (a) those where an appeal is always lodged before the appellate court or, if filed with the lower or first court, it is immediately forwarded to the former (certain civil law jurisdictions and the Islamic law systems reviewed); (b) systems where, at least in certain instances, an appeal is filed with the lower or first court and that court is empowered to make certain determinations as to the legal requirements pertaining to the appeal (both civil and common

Summarising the work of international criminal institutions, it may be observed that during proceedings the judges frequently do take national law into account; what is more, it presently performs a significant role in that system. However, it should be kept in mind that international criminal law is a quite young field, which is why it eagerly supplements itself with additional sources of law. In the past, such a practice could be limited through the development of a set of concepts for the express needs of international criminal procedure. An opinion of A. Cassese describes the essence of this process while at the same time indicating significant differences in respect of the interpretation of municipal and international law. In his opinion, a norm incorporated from municipal law is transformed, and from that moment serves the entire international community. The norm thus sheds its initial nature, and at the level of international law, subjected to its specific influence, begins to live its own life in another dimension, previously unknown at the national level.

General principles of criminal law, whose existence, content, and scope were indicated through reference to the decisions of courts and writings of scholars, are taken particularly from national law (constitution, legislation, case-law). Ultimately, general principles of law must be deduced from presently existing and obligatory sources of municipal law. This requirement will prove particularly important owing to the prohibition on the application of retroactive norms which could lead to a worse situation for the accused. And for this reason, there can be no doubt that the law which is to serve as the object of analysis for deducing a general principle of law should be the law in force at the moment the act is committed¹²⁶.

c. Selected international courts of a regional or specialized nature

In analysing the activity of international bodies of a specialised or regional nature, we may observe that they also make reference to the internal law of states. This does not, however, change the fact that their approach to many issues of international law takes a somewhat different shape, as their statute and the grounds for ruling as submitted by the parties facilitate these differences. The entirety of the case law, however, paints a picture in which the rules for applying municipal law are not uniform, and thus the potential for comparative analysis, which would allow for ascertaining the real impact of national law on an international norm, is limited. The common element of municipal law present in verdicts is proof that such law does indeed play a quite significant role in the activity

law; the scope of these determinations vary from jurisdiction to jurisdiction). In the first group there is no need for a remedy vis-à-vis the first court's determination, as the appellate court is involved in the potential appeal from the outset. In the second group, as explained below, there is always a remedy against flawed determinations pertaining to the filing of the appeal entered by the lower or first court."

¹²⁶ K. Ambos, *General Principles of Criminal Law in the Rome Statute*, "Criminal Law Forum" vol. 10 (1999), p. 1.

of those bodies. Only exceptionally does it constitute autonomous grounds for ruling, as courts more frequently refer to general principles of municipal and/or international law. Such application of municipal law while simultaneously emphasizing its dissimilarity is vital for issuing the correct ruling. Frequently, an international organ that does not want to directly invoke municipal law hides behind the necessity of applying general principles of law. The examples given below do not encompass all existing judicial organs. Their selection has been done based on the criterion of their real impact on states and the international community.

The use of municipal law in order to ascertain facts or the proper understanding of certain concepts functioning in the international sphere has a very long tradition. It is not so much about presenting the activities of general international courts, but also of *ad hoc* institutions. One example is that of the decisions of the conciliation commissions established after World War II, such as the French-Italian and the American-Italian commission¹²⁷. In their activity, owing to the specificity of the disputes that had arisen, municipal law was frequently subjected to analysis, but the differences between the systems were always indicated. Here it is sufficient to recall the considerations regarding the right to “residence”¹²⁸, and also the unusually interesting analysis of positions taken by the joint committees concerning recognition of citizenship on the basis of municipal law¹²⁹. Ultimately, decisions were taken after reviewing both the law of the states-parties and the arguments they presented before other bodies of an international character. However, there is no clear evidence of the formation of a uniform practice on these grounds, nor the emergence of specific norms of a customary nature. What is important is that analysis was undertaken of many different aspects of those disputes with account being taken of municipal law. In this way it could have become grounds for the incorporation of certain

¹²⁷ Clauses concerning the appointment of the relevant organs were contained in Article 83 of the Treaty of Peace with Italy, 10th February 1947, source: <https://www.loc.gov/law/help/us-treaties/bevans/m-ust000004-0311.pdf>, accessed 10.02.2016.

¹²⁸ Decision of 25 June 1952, by the French-Italian Conciliation Commission. The Commission was tasked with interpreting the concept of „right to residency” contained in Article 79, par. 1c of the Treaty of Peace of 10 February 1947 between the Allies and associated powers and Italy. The word „residence” is a term that appears in the majority of legal orders, and it could be expected that the Commission would use a definition taken from municipal law, particularly as this was suggested by France. The Commission rejected this argument, holding that “As the Peace Treaty does not define expressly what is meant by residence, the interpreter must infer this definition from the purpose the Allied and Associated Powers intended to pursue by Art. 79 para. 6 lit. c. 4”.

¹²⁹ Such an analysis was presented in detail in the *Flegenhaimer* case, when the Conciliation Commission examined the multiple spheres of state practice in respect of awarding citizenship and the effects thereof in the international sphere. Reports of International Arbitral Awards, Recueil des Sentences Arbitrales, Flegenhaimer Case–Decision No. 182 20 September 1958 vol. XIV pp. 327-390, http://legal.un.org/riaa/cases/vol_XIV/327-390.pdf, accessed 10.02.2016 for commentary see: H. Goldschmidt, *Recent Applications of Domestic Nationality Laws by International Tribunals*, “Fordham Law Review” vol. 28, Issue 4, 1959, pp. 689-736.

norms into the international legal order. With all certainty these were some of the rules concerning the conducting of evidentiary proceedings, as well as the treatment of municipal law as an element capable of producing effects in the international plane.

In the case of disputes concerning investment and trade, the issue of applying municipal law does not give rise to controversy. Quite the opposite, in the scholarship and in practice there are abundant voices stating that this is precisely the law which should be applied first in the event of interpretative differences arising after bilateral investment treaties (BIT) and other agreements between parties. BITs, as special agreements between parties of an international character, can also indicate the legal grounds on which a potential future dispute is to be resolved. One example of the indication of municipal law of a state-party is the agreement between Argentina and The Netherlands, and the provisions of Article 10(7)¹³⁰: “The Arbitration Tribunal addressed in accordance with paragraph (5) of this Article shall decide on the basis of the law of the Contracting Party which is a party to the dispute (including its rules on the conflict of law), the provisions of the present Agreement, special Agreements concluded in relation to the investment concerned as well as such rules of international law as may be applicable”. In this situation international law holds a far less privileged position, although the disputes themselves in the area of commercial law are a part of the international legal order. The role and the place of municipal law in respect of commercial disputes was already at the centre of scholarly interest during the interwar period.

Presently, the practice of invoking municipal law in investment disputes conducted under various procedures before international organs is rather widespread. The options accepted by these organs include the possibility to accept a municipal norm deduced from legal orders in the form of general principles of law, and also direct invocation of national law, usually the law of the states engaged in a dispute. Nevertheless, these organs clearly distinguish municipal norms from international ones, and the application of the former is permitted only when such bodies are unable to find an international norm suitable as grounds for resolving the dispute.

The most common models for arbitration proceedings in commercial disputes are the rules of UNICITRAL¹³¹ and ICSID¹³². They both refer to grounds for ruling by arbitration bodies, leaving the parties and arbitrators with a relatively large amount of freedom

¹³⁰ Argentina/Netherlands BIT, 20 October 1992, Investment Promotion and Protection Treaties, loose-leaf, ICSID.

¹³¹ UNICITRAL – United Nations Commission on International Trade Law, appointed under Resolution 2205 (XXI) of the General Assembly of 177 December 1966.

¹³² International Centre for Settlement of International Disputes, established under the Convention of 18 March 1965 on the basis of a decision of the World Bank. The Centre operates under its auspices. *History of the ICSID Convention*, vol. I, <https://icsid.worldbank.org/apps/ICSIDWEB/resources/Pages/The-History-of-the-ICSID-Convention.aspx>, accessed 16.12.2015.

in selecting the norms on which its verdict is to be based. The UNICITRAL rules place heavy emphasis on the particular role of the parties in the freedom to indicate the legal grounds for decisions. At the same time, they grant the tribunals appointed in that procedure a range of freedom in the independent selection of the sources they feel are appropriate in the event the parties are unable to do so themselves¹³³. Proceedings conducted under UNICITRAL primarily serve the harmonization of arbitration proceedings, allowing for the resolution of trade disputes both in the event of proceedings between foreign entities (state – foreign entity) and domestic ones. A necessary requirement for the application of the rules is their ratification by a state-party. The possibility to invoke municipal law would seem to be beneficial for the parties, but the practice of adjudicating authorities demonstrates that they take a very cautious approach to the issue. In 2001, the International Chamber of Commerce (ICC) refused to apply either French or Japanese law as the applicable law in a dispute, as it acknowledged the best resolution could be reached by the application of *lex mercatoria*¹³⁴. In turn, the most interesting aspect was the subsequent confirmation that national legal systems constitute one of the sources of that system. Desiring to avoid accusations of bias, some authors recommend simply ignoring the domestic law of one of the parties, as this may lead to one of the participants in the proceedings being in a privileged position concerning application of and familiarity with the law¹³⁵.

The Iran-US Claims Tribunal, ruling on the basis of UNICTRAL provisions, invoked the general wording of the developed rules, indicating the possibility to resolve disputes based on broadly-understood law. International law and municipal law thus constitute a point of departure for verdicts, and there is no indication of the precedence of one system over another. In practice, however, the Tribunal avoids directly invoking municipal law¹³⁶, rather making use of reference to general principles, even when the

¹³³ UNICITRAL Rules: Article 35 1. The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate. <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf>, accessed 16.12.2015.

¹³⁴ ICC International Court of Arbitration Case No 9875, “The arbitral tribunal considers that the difficulties to find decisive factors qualifying either Japanese or French law as applicable to the contract reveal the inadequacy of the choice of a domestic legal system to govern a case like this. (...) The most appropriate “rules of law” to be applied to the merits of this case are those of the *lex mercatoria*, that is the rules of law and usage’s of international trade which have been gradually elaborated by different sources such as the operators of international trade themselves, their associations, the decisions of international arbitral tribunals and some institutions like *Unidroit* and its recently published Principles of International Commercial Contracts. Nevertheless the tribunal will take into account any relevant national laws concerning intellectual property rights issues raised during this procedure.” source: <http://www.unilex.info/case.cfm?pid=2&do=case&id=675&step=FullText>, accessed 16.12.2015.

¹³⁵ D. Jones, *Choosing law or the rules of law to govern the substantive rights of the parties*, “Singapore Academy of Law Journal”, vol. 26 (2014), p. 927.

¹³⁶ One such case was the dispute: *Dic of Delaware, Inc. v. Tehran Redevelopment Corp.*, 8 IRAN-U.S. C.T.R. 144 (1985 I).

national law is identical¹³⁷. This law is thus taken into consideration only exceptionally, and even when such a necessity arises the Tribunal does so reluctantly¹³⁸. This most certainly results from the unfavourable attitudes of the national judges of the Tribunal. Reference to general principles is therefore a comfortable formula for the Tribunal, as it seeks to avoid suspicions of favouring one particular legal system. Although the practice of confidentiality makes it difficult to engage in thorough investigation of that organ's case-law, we may observe the use of those "indeterminate" sources of law. In the *Sea-Land Service Inc. v Iran* case, the Tribunal referred to „unjust enrichment”, stating that the institution is known to the majority of municipal systems of law in the world, and thus may be treated as incorporated into the catalogue of general principles of law applied by international tribunals¹³⁹.

ICSID rules expressly permit the use of national law. Article 42 (1) clearly states that the arbitration tribunal shall apply the law agreed on by the parties; however, in the event no such agreement is reached, “(...) the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable”¹⁴⁰. In a report prepared by the Executive Directors, which refers to the application of the convention, the competences of arbitration bodies are confirmed to engage in precisely this selection of grounds for ruling, but with clarification of how the concept of “international law” should be understood. Article 38(1) of the ICJ Statute is directly invoked as the source for defining norms of international law, at the same time emphasizing that it was designed to be used in disputes between states¹⁴¹.

¹³⁷ J. R. Crook, *Applicable Law In International Commercial Arbitration: The Iran-US-Claims Tribunal Experience*, “American Journal of International Law” vol. 83 (1989), p. 310.

¹³⁸ J. R. Crook, *op. cit.*, p. 280.

¹³⁹ Iran-US Claims Tribunal, *Sea-Land Services, Inc. v. Iran*, 6 IRAN-U.S. C.T.R., at 149, p. 168: “The concept of unjust enrichment had its origins in Roman Law, where it emerged as an equitable device „to cover those cases in which a general action for damages was not available”. It is codified or judicially recognised in the great majority of the municipal legal systems of the world, and is widely accepted as having been assimilated into the catalogue of general principles of law available to be applied by international tribunals.”

¹⁴⁰ Convention on the Settlement of Investment Disputes between States and Nationals of other States, ICSID, Article 42 (1). https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf, accessed 16.12.2015

¹⁴¹ Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States: 40. Under the Convention an Arbitral Tribunal is required to apply the law agreed by the parties. Failing such agreement, the Tribunal must apply the law of the State party to the dispute (unless that law calls for the application of some other law), as well as such rules of international law as may be applicable. The term “international law” as used in this context should be understood in the sense given to it by Article 38(1) of the Statute of the International Court of Justice, allowance being made for the fact that Article 38 was designed to apply to inter-State disputes. p. 47. https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf, accessed 16.12.2015.

Reference to the internal law of a given state on whose territory another entity is conducting commercial activity comes up rather in respect of situations not encompassed by an agreement or contract¹⁴². The application of municipal law, while very common, is not without limitation. In interpretation of the rules of ICSID it is emphasised that basing a specific contract exclusively on the internal law of a state-party, or even a portion of legislation (e.g. Act of parliament) is inappropriate in respect of choice of law. As in the case of other international judiciary bodies, in some instances general principles concerning the international obligations of states will be of decisive importance. For example, this was the case in the *Autopistas v. Venezuela* dispute, where the Tribunal did not acknowledge the Venezuelan government's invocation of domestic law as grounds for voiding a contract¹⁴³. However, it did analyse the issue of whether and in what scope municipal law may be applied, retaining the right to a final decision as to which grounds it would indicate. This special role of national law has been emphasized on many occasions, and even judiciary bodies have declared that municipal law has precedence over international law in the selection of sources, while the role of international law is to fill in gaps in municipal law¹⁴⁴. In analysing international practice, one may arrive at the conclusion that municipal law is the dominant law for many disputes resolved within the framework of that procedure. However, it should be emphasized that courts of arbitration retain significant freedom in indicating the grounds for verdicts, and much depends on bilateral investment treaties and agreements between the parties regarding the law applicable to the dispute. Thus, as indicated above, in many cases national law will play a leading role, while in others it may only be applied as a subsidiary

¹⁴² Y. Banifatemi, *The Law Applicable in Investment Treaty Arbitration*, Chapter 9, p. 196, source: http://www.shearman.com/~media/Files/NewsInsights/Publications/2010/06/The-Law-Applicable-in-Investment-Treaty-Arbitrat_/Files/View-full-article-The-Law-Applicable-in-Investme_/FileAttachment/IA061010TheLawApplicableinInvestmentTreatyArbitr_.pdf, accessed 10.01.2016.

¹⁴³ International Centre for Settlement of Investment Disputes *Autopista Concesionada de Venezuela, C.A. ("Aucoven") Claimant v. Bolivarian Republic of Venezuela ("Venezuela") Respondent*, ICSID Case No. ARB/00/5 AWARD 207. Further, it is a well settled principle of international law that a state cannot rely on a provision of its domestic law to defeat its consent to arbitration (Schreuer, referred to above, Nr 95 ad Article 42 and ref.). It is further a well accepted practice that the national law governing by virtue of a choice of law agreement (pursuant to Article 42(1) first sentence of the ICSID Convention) is subject to correction by international law in the same manner as the application of the host state law failing an agreement (under the second sentence of the same treaty provision) (Schreuer, referred to above, Nrs. 62-70, ad Article 42 and ref., in particular Nr. 70). As a result, Venezuela's defense based on national law is no bar to Aucoven's claim of a breach of Clause 64. https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC610_En&caselId=C192, accessed 10.12.2016.

¹⁴⁴ *Amco Asia Corporation and others v. Republic of Indonesia*, Decision on the Application for Annulment, May 16, 1986, 1 ICSID Reports 509, 515 (1993), para. 20 : "Article 42(1) of the Convention authorizes an ICSID tribunal to apply rules of international law only to fill up lacunae in the applicable domestic law and to ensure precedence to international law norms where the rules of the applicable domestic law are in collision with such norms."

instrument¹⁴⁵. The location and the effect of municipal law, although significant in some disputes, can be marginalized based on the will of the parties or a decision of the adjudicating body. An example is the *EL v. Argentina* case, in which the Tribunal declared the order of sources of law that were to be applied. Pride of place was given to BIT, then international law, and lastly municipal law¹⁴⁶.

The application of municipal law by international bodies ruling in commercial disputes gives an advantage to the state participating in the dispute, as it allows for the invocation of norms that it itself determines. In commercial disputes, the majority view is that municipal law should be the first one applied, given priority over even international law, which should perform a subsidiary role in such disputes. Taking into consideration the Executive Directors' Report and the assessment that the two systems are equiponderant, we may not ignore the clear objection of some state delegations participating in the drafting of ICDIS strongly accenting the primacy of municipal law in the case of investment disputes¹⁴⁷.

¹⁴⁵ Centre for Settlement of Investment Disputes Washington, D.C. in the Proceedings between AZURIX Corp. (Claimant) and the Argentine Republic (Respondent) ICSID Case No. ARB/01/12 AWARD, 14 June 2006, Para 66.: Article 42(1) has been the subject of controversy on the respective roles of municipal law and international law. It is clear from the second sentence of Article 42(1) that both legal orders have a role to play, which role will depend on the nature of the dispute and may vary depending on which element of the dispute is considered. The Annulment Committee in *Wena v. Egypt* considered that "The law of the host State can indeed be applied in conjunction with international law if this is justified. So too international law can be applied by itself if the appropriate rule is found in this other ambit." 67. Azurix's claim has been advanced under the BIT and, as stated by the Annulment Committee in *Vivendi II*, the Tribunal's inquiry is governed by the ICSID Convention, by the BIT and by applicable international law. While the Tribunal's inquiry will be guided by this statement, this does not mean that the law of Argentina should be disregarded. On the contrary, the law of Argentina should be helpful in the carrying out of the Tribunal's inquiry into the alleged breaches of the Concession Agreement to which Argentina's law applies, but it is only an element of the inquiry because of the treaty nature of the claims under consideration. <http://www.italaw.com/sites/default/files/case-documents/ita0061.pdf>, accessed 10.12.2015.

¹⁴⁶ International Centre for Settlement of Investment Disputes Washington, D.C. in the Proceedings between LG&E Energy Corp. LG&E Capital Corp. LG&E International Inc. (Claimants) and the Argentine Republic (Respondent) ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, "99. In order to settle this controversy, the present Tribunal shall apply first the Bilateral Treaty; second and in the absence of explicit provisions therein, general international law, and, third, the Argentine domestic law, particularly the Gas Law that governs the natural gas sector. The latter is applicable in view of its relevance for determining the Argentine Republic's liability and the defenses to which it may resort vis-à-vis the allegations made by Claimants." http://www.italaw.com/documents/ARB021_LGE-Decision-on-Liability-en.pdf, accessed 10.12.2015.

¹⁴⁷ E. Gaillard, Y. Banifatemi, *The Meaning of „and” in Article 42(1), Second Sentence of the Washington Convention*, "ICSID Journal – Foreign Investment Law Journal" vol. 18(2) (2003), p. 383: "Some delegations first pleaded for the exclusive applicability of domestic law, see, e.g., the position of the representative of Ceylon, in Summary Record of Proceedings, Bangkok Consultative Meetings of Legal Experts, Apr. 27-May 1, 1964, Document No. 31, in History of the ICSID Convention, supra note 4, at 501; the position of the representative of India, id. at 506 and 514; the position of the representative of China, id. at 513-14; the position of the representative of Iran, id. at 516.": source: http://www.arbitration-icca.org/media/4/58005448293215/media012178520651780the_meaning_of_and__article_42_1_eg.pdf, accessed 10.12.2015.

Although the influence of municipal law on the development of international commercial law would seem to be obvious, the issue must of necessity be examined considering the specificity of the field in which international organs operate. Firstly, they are not institutionally linked to one another. They can reference case-law from other cases, but there is no requirement that they do so. What one of them considers of importance can be rejected without any explanation by another organ. Most often, municipal law will be incorporated into international commercial law through adoption of some of the norms identified within internal systems as general principles of law. In this manner, accusations of bias, inaccurate interpretation, or acting to the detriment of one of the parties can be avoided. Some principles are incorporated from the national level to the international level following their prior transformation in order to develop common standards for the treatment of natural persons in a third-party state, which corresponds with standard of treatment they encounter in their state of origin. This may be considered an example of a municipal approach to general principles¹⁴⁸. That said, it should be strongly emphasized that, in most cases, the conflict between international and municipal law is settled in favour of international law, which may also contribute over time to the unification of some procedures.

d. Regional courts operating under international organizations.

Regional systems of law are created by states as a means of ensuring better and closer cooperation. In contemporary times we may observe the quite dynamic growth of regional systems, which are exceptionally distinct when considering the spheres of cooperation set out by the states that create them. It is difficult to say exactly how many such systems of regional cooperation exist at present, and to characterise all of the fields they cover. They possess certain common characteristics consisting in cooperation in the pursuit of shared objectives, and very frequently shared values as well. In regional systems, municipal law plays a very significant role. Already at the foundations of the creation of a given legal regime we may observe the emergence of similarities as concerns understanding of certain concepts, as well as institutional and procedural similarities. Courts operating under international organizations and special courts engaged in the protection of human rights are faced with different challenges than other international organs. First and foremost, they usually function within a limited group of states that are seeking to develop cooperation in a particular area. Law enacted for the purposes of such an organization must thus be given priority, in order for the unity of its application to be maintained, as well as for it to contribute to a greater feeling of legal security. Human rights protection at the regional level is, in turn, an obvious example of the building of shared

¹⁴⁸ M. Biddulph, D. Newman, *op. cit.*, p. 318.

standards in respect of fundamental rights. In both cases, both international norms and acts adopted by an organization, or even verdicts themselves, acquire particular significance. It is subject to the overarching goal of constructing a single legal space within a given field. It would thus seem that broadly-understood international law is the most important, as it provides foundations for cooperation. Municipal law, and particularly that part of it which would conflict with the objectives of a given legal order, should be eliminated in order to avoid posing a threat to integration. In light of the preceding, should municipal law, as that which is in effect only within the borders of a given territory, not be limited on grounds of being a threat to unity? Posing the matter in this way may lead to very discomfoting conclusions; nevertheless, when we consider the number of international documents that are intended first and foremost to serve natural persons and commercial entities, it becomes clear that we are witnessing the acceleration of the process of international law seeping into national legal orders, and domestic law into the international legal order.

The majority of specialized systems have been based in the principle of superiority. Municipal law is the object of considerations by international organs, as conflicts of norms arise, in which broadly-understood international law is given priority. However, municipal law is an area which has a multifaceted influence on the development of norms. State law and norms grown out of tradition and custom shape our understanding of juridical acts, particular institutions established within the international sphere, and undoubtedly contribute to their application as well. Regional and specialized courts are populated by individuals with the authority to issue verdicts in their states of origin; they must also possess a legal education, which doubtlessly results in the incorporation of their knowledge and experience into the international sphere.

We may observe two main groups of norms influencing the international law of specialized systems. Both of them belong to the category of broadly-understood principles of law. The first consists of principles concerning the course of proceedings – here we may cite the right to a hearing, the right to a fair trial, the right to be represented by an attorney, and the right to defence. In European systems we also encounter the principle of two-tiered court systems and right of appeal. The second group consists of norms of fundamental significance for the functioning of a given legal order in the municipal context. When they are important for the functioning of an entire special system, they may be incorporated on grounds of international law. In this case, we may again indicate two norms of such character: the first are norms shared by regional legal orders, developed within the states of a given region, and the product of shared experiences. The second group consists of norms adopted by municipal orders by way of ratification of international agreements. These norms, taking into consideration the specificity of interna-

tional law and the issue of responsibility for non-fulfilment of obligations, can impact the shape of regional systems.

The Court of Justice of the European Union was set up under the Treaty establishing the European Coal and Steel Community. Almost from the very beginning it was a special international court with very broad authority. Its position as a factor fuelling integration is the effect not so much of its founding document, but rather its case-law and the widespread acceptance of its interpretations among Member States' courts. Two cases are considered fundamental in defining the relation between a municipal order, community law and international law, as well as for characterising the place of community law itself¹⁴⁹. The Court has always defended the unity, autonomy, and superiority of community (today: EU) law over municipal law. Municipal law has not formally constituted legal grounds for the Court's case-law, and has not been taken into account by the Court.

The competences of the Court of Justice of the European Union are presently set out in several documents. Article 19 of the Treaty on European Union does not indicate the grounds on which rulings are to be issued nor the law to be applied by the Court. There is only an indication that the Court „shall rule in accordance with the Treaties”. Neither municipal law nor any other sources are mentioned here. In the verdicts of the Court of Justice of the European Union we may, however, observe that municipal law has had and continue to have an impact on the formation of that legal system. In practice, the Court makes quite broad use of its rather general powers in respect of the application and interpretation of the dimension of treaty obligations. Additionally, municipal law is subjected to detailed analysis in terms of compliance with EU law.

A particular role in the Court's case-law is played by the concept of a shared constitutional tradition among the Member States. This has been most precisely studied on the basis of the application of the European Convention on human rights and fundamental freedoms. However, the Court has applied this notion to other international agreements, albeit selectively¹⁵⁰. In three cases, after a long period of silence on matters of human rights, the Court decided to invoke the shared constitutional tradition of Member States¹⁵¹. This application of municipal law was consistent with the convictions of the

¹⁴⁹ Case C-6/64 Flaminio Costa v E.N.E.L., source: http://curia.europa.eu/arrets/TRA-DOC-PL-ARRET-C-0006-1964-200406979-05_00.html, Case 26/62 NV Algemene Transport – en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration, source: http://curia.europa.eu/arrets/TRA-DOC-PL-ARRET-C-0026-1962-200406974-05_00.html, accessed: 10.11.2015.

¹⁵⁰ J.L. Murray, *The Influence of the European Convention on Fundamental Rights on Community Law*, “Fordham International Law Journal” vol. 33 (2011), p. 1394.

¹⁵¹ Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel, Case 11/70, [1970] E.C.R. 1125, p. 1134 “In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community. It must therefore be ascertained, in the light of the doubts expressed by the

majority regarding the grounds on which the Court could rule, particularly in cases which were not encompassed by community law, and could thus be decided with reference to the law of Member States¹⁵². Agreements done by the Community constitute an integral element of the law of the organization, which also explains how general principles of law could penetrate the community legal order¹⁵³. On multiple occasions the Court also referred to general international law¹⁵⁴, as during their early period the Communities attempted to operate in accordance with the norms of that law; after the Lisbon treaty¹⁵⁵ this practice became more coordinated. This favourable approach to international law does not, of course, mean acceptance of all norms. As de Burca points out, this approach changed as a result of the *Kadi* case, as the Court began giving priority to European Union values, particularly protection of natural persons, making it more sceptical of international law¹⁵⁶.

Verwaltungsgericht, whether the system of deposits has infringed rights of a fundamental nature, respect for which must be ensured in the Community legal system.” *Nold v. Commission*, Case 4/73, [1974] E.C.R. 491, p. 507 “In this way, the Decision is said to violate, in respect of the applicant, a right akin to a proprietary right, as well as its right to the free pursuit of business activity, as protected by the Grundgesetz of the Federal Republic of Germany and by the Constitutions of other Member States and various international treaties, including in particular the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and the Protocol to that Convention of 20 March 1952. 13 As the Court has already stated, fundamental rights form an integral part of the general principles of law, the observance of which it ensures. In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those States. Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law.”

¹⁵² G. De Burca, *The Road Not Taken: The EU as a Global Human Rights Actor*, p. 23, source: <http://www.eui.eu/Documents/MWP/ProgramActivities/MRW2014-2015/deburcaTheRoadnottaken.pdf>, accessed 10.03.2016, “in *Stauder*, the President of the Commission had been arguing openly for an understanding of fundamental human rights as part of the ‘general principles’ of EC law, which although autonomous in source from national constitutions, nevertheless took into account the common legal conceptions of the Member States.”

¹⁵³ Case 181/73, *Haegeman v. Belgian State*, 1974 E.C.R. 449, 459.

¹⁵⁴ See e.g. case C-144/04, Judgment of the Court (Grand Chamber) of 22 November 2005. *Werner Mangold v Rüdiger Helm*. „The right of all persons to equality before the law and protection against discrimination constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of All Forms of Discrimination against Women, United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories. Convention No 111 of the International Labour Organisation (ILO) prohibits discrimination in the field of employment and occupation.” p. I-10018.

¹⁵⁵ Article 3 (5): In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

¹⁵⁶ G. de Burca, *International Law Before the Courts: the EU and the US Compared*, “Virginia Journal of International Law” vol. 55, No 3 (2014), p. 721.

The Court of Justice of the European Union indicated that sources of general principles could be the law of Member States, the founding treaties, and international agreements to which Member States are parties. This specific transfer of norms from the international legal order to municipal, and then at the level of the European Union, was applied in order to emphasize that the activities of states and the organization are grounded in shared values. Direct invocation of the internal law of states and analysis of all legal acts is thus unnecessary, as the Court makes use of one ratified international document which is essentially an element of the domestic legal orders. The Court, likely seeking to avoid accusations of bias in favour of some legal orders, applied this particular line of interpretation, which also enables it to eliminate certain imperfections in the EU system. This practice developed gradually, from positions presented by Advocates General, to the incorporation of this interpretation into the standard practice of the Court.

The origins of the present-day practice can be seen in the 1960s, when problems arose with identifying the proper instruments for protection of the rights of the individual. In the opinion of Advocate General M. Dutheillet de Lamothe, the fundamental principles of law contribute to the development of shared philosophical, political and legal grounds common to Member States¹⁵⁷. The Court concurred with this opinion, but was more laconic in its case-law, only confirming that human rights constitute general principles of Community law¹⁵⁸. The position taken by the Court in cases concerning protection of fundamental rights would suggest that it proceeds in an exceptionally analytical manner in comparing national legal orders. However, many authors point out that, essentially, the discernment of a particular principle is of a purposive nature, and is not always supported by the legal systems of all or even the majority of Member States' legal systems¹⁵⁹. Some point out not only its absence or presence in national legal orders, but

¹⁵⁷ *Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel*, Case 11/70, [1970] E.C.R. 1125, Opinion of Mr. Advocate-General Dutheillet de Lamothe delivered on 2 December 1970, p. 1146 “Does that mean that the fundamental principles of national legal systems have no function in Community law? No. They contribute to forming that philosophical, political and legal substratum common to the Member States from which through the case-law an unwritten Community law emerges, one of the essential aims of which is precisely to ensure the respect for the fundamental rights of the individual. In that sense, the fundamental principles of the national legal systems contribute to enabling Community law to find in itself the resources necessary for ensuring, where needed, respect for the fundamental rights which form the common heritage of the Member States.”

¹⁵⁸ *Erich Stauder v City of Ulm, Sozialamt*, Case 29/69 [1969] ECR 419: “Interpreted in this way the provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the Court.”, p. 425.

¹⁵⁹ R. Nelson, *The applicable law in the Caribbean Single Market*, “Amicus Curiae Issue” vol. 87, (Autum 2011), p. 8., <http://sas-space.sas.ac.uk/3551/1/1527-1842-1-SM.pdf> : Hartley summarizes the position as follows: “When the European Court creates new rules of Community law, it purports to do so on the basis of ‘general principles of law.’ In theory, these are principles found in all or most legal systems. ... The principles thus ‘discovered’ by the court are not always found in a majority or even any of the legal systems of the Member States. When it wants to create a new legal rule, the European Court certainly looks at the

also in general international law¹⁶⁰. The application of the internal law of Member States frequently leads to the adoption of a broader interpretation of fundamental rights than would result from international agreements alone¹⁶¹. These critical remarks apply primarily to the interpretation of norms addressing human rights and set out by national and international law. The authors, however, are inclined to agree with the statement that the Court may also seek sources of inspiration for their decisions in the constitutional orders of Member States¹⁶².

Another of the more fully-developed regional courts under international organizations is the Andean Court of Justice (ACJ), modelled on the Court of Justice of the European Union. It was established under a treaty concluded in May 1979, subsequently modified in May 1996¹⁶³. In spite of the fact that it is considered to be one of the most active international organs, it did not occupy the type of position that its EU counterpart had. The grounds for ACJ rulings are legal acts in force within the Andean Community. The Pact of 1979, supplemented by the Cochabamba Protocol, clearly define what documents comprise the legal order of the Andean Community. Article 1 of the Pact declares that these include: a. The Cartagena Agreement, its Protocols and additional instruments; b. This Treaty and its Amending Protocols; c. The Decisions of the Andean Council of Foreign Ministers and of the Commission of the Andean Community; d. The Resolutions of the General Secretariat of the Andean Community; and e. The Industrial Complementarity Agreements and any such other agreements as the Member Countries may adopt among themselves within the context of the Andean subregional integration process, agreements addressing industrial cooperation, and documents adopted by Member States during the existence of the Community in service of Andean integration. According to one of the judges, the legal order set out in Article 1 means that the system lays down norm which have integrative effect, their character and scope, as well as the powers and competence of the organs under its review and also the law making organs. The very treaty establishing the Tribunal defines in its Article I the hierarchy of that legal

legal systems of the Member States. However, it does not regard itself as bound to adopt the majority view. Once it has informed itself of possible solutions, it considers itself free to fashion the rule it regards as most appropriate to the needs of the Community.”

¹⁶⁰ This is also the source of the criticized verdict in case C – 144/04 – Mangold – for more see: B. Mikołajczyk, *Wiek emerytalny w sprawach przed Trybunałem Sprawiedliwości UE*, „Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego”, vol. X, A.D. MMXII, p. 17.

¹⁶¹ E. F. Defeis, *Human Rights and the European Court of Justice: An Appraisal*, “Fordham International Law Journal” vol. 31 issue 5 (2007), p. 1111.

¹⁶² D. Kornobis – Romanowska, *Europejska Konwencja Praw Człowieka w systemie prawa Wspólnot Europejskich*, Dom Wydawniczy ABC, 2001, p. 141.

¹⁶³ Tratado de Creación del Tribunal de Justicia de la Comunidad Andina, Modificado por el Protocolo de Cochabamba 28 de Mayo de 1996, uniform text: www.comunidadandina.org, accessed: 10.10.2014, English version: <https://wits.worldbank.org/GPTAD/PDF/annexes/Cartagena%20justicetreaty.pdf>, accessed 15.12.2015.

system where secondary legislation is subordinated to its primary law¹⁶⁴. From grounds for ruling by the Court presented and understood in this way, it results that the Court rules on grounds of international agreements, significant primary and superior acts, as well as other legally bonding documents issued in conformity with the procedure established in the agreements setting up the Andean Community¹⁶⁵. In light of this, the Court's rulings are to be based on sources of law referred to as primary, derivative, and broadly-understood general principles and judicature. In this case as well, municipal law does not constitute grounds for the Court to rule, which does not change the fact that it also has an impact on the Court's work.

Another organization established by Latin American states is the Caribbean Community and Common Market (CARICOM). Under an agreement concluded between the states-parties, the Caribbean Court of Justice was established¹⁶⁶. The Court rules on grounds of "applicable rules of international law". Such broadly-defined legal grounds indicate the permissibility of that body applying general principles of law, which it has done in its practice. The CARICOM Court, much like the CJEU, defines the community's system of law as a separate and particular legal order, one outside both municipal and international law¹⁶⁷. With a view to unification of that system, the Court enjoys broad competencies allowing it to indicate the legal grounds for issued judgements; it may even do so based on general principles of international law "derived from a comparative study of all or most of the legal systems of Member States"¹⁶⁸. The CARICOM Court has taken advantage of this prerogative given to it by the Statute. It is felt that the Court has yet to take full advantage of its powers¹⁶⁹, which most likely results from its limited number of rulings.

¹⁶⁴ G. Chahin Lizcano, *Comercio Exterior, Parte General e importaciones, Teoría y Práctica*, Segunda Edición, Santa Fe de Bogota 1998, p. 7, cited in: W. Kaune Arteaga (collaborative work of judges of the Court, edited by its then-Chief Justice), *Tribunal de Justicia de la Comunidad Andina, Testimonio Comunitario, Doctrina – Legislación-Jurisprudencia*, 2004, source – official web page of Court publications www.tribunalandino.org.ec . accessed 6.06.2014, Part 1: La necesidad de la integración y el orden y ordenamiento jurídico comunitario, author: W. Kaune Arteaga, para. 2.1

¹⁶⁵ W. Kaune Arteaga, *La necesidad de la ...*, para. 2.2.1.

¹⁶⁶ Agreement Establishing the Caribbean Court of Justice, the document establishing the Court presently in force was adopted on 14 February 2001 in St. Michael, Barbados, http://www.caricom.org/jsp/secretariat/legal_instruments/agreement_ccj.pdf, accessed 6.06.2014

¹⁶⁷ *TCL v Caribbean Community* [2009] 2 C CJ 2 (OJ) the Court ruled: "By signing and ratifying the Revised Treaty and thereby conferring on this Court ipso facto a compulsory and exclusive jurisdiction to hear and determine disputes concerning the interpretation and application of the Revised Treaty, the Member States transformed the erstwhile voluntary arrangements in CARICOM into a rule-based system, thus creating and accepting a regional system under the rule of law. A challenge by a private party to decisions of the Community is therefore not only not precluded, but is a manifestation of such a system... The rule of law brings with it legal certainty and protection of rights of states and individuals alike, but at the same time of necessity it creates legal accountability."

¹⁶⁸ For more see: R. Nelson, *op. cit.*, p. 4.

¹⁶⁹ *Ibidem*, p. 9.

As has been indicated above, regional courts designed to ensure integration make use of municipal law norms. They can do so indirectly, employing general principles of law and international agreements in effect between the states of a given region. Direct reference to national law is rather the exception than the rule, as the suspicion can always arise of bias towards one legal order over another. Diverse methods have been developed; the fields of activity and scope of powers are also different. This results from their specificity, as well as the particular tasks they are designed to perform. Their use of international documents ratified by states, particularly ones concerning human rights and protection of intellectual property, is certainly a beneficial solution from the perspective of individuals. Nevertheless, it may contribute to the emergence of a legal subsystem within the framework of another, more broadly-based international agreement. It cannot be denied that the frequent close similarity of regional norms and those of national legal orders constitutes a significant facilitation for judicial organs when introducing notions from general principles or national law. In seeking to remain as close as possible to citizens and national courts, they also implement solutions that enjoy the broadest acceptance, and which are favourable to national orders. Their task is made easier owing to the acceptance of the principle of precedence and uniformity.

5. Municipal law as a source of general principles of law

From the above considerations it results that reference in proceedings before international courts and other bodies to general principles of law recognized by civilized nations is nothing exceptional. The concept itself of general principles is understood nearly identically as it was during preparatory work on the Statute of the PCIJ. Their sources continue to be identified primarily within municipal law¹⁷⁰. The very notion of “general” should not, in judge Tanaka’s view, mean that Article 38(1)(c) is limited in its essence to just a few primary principles, such as limiting the right to self-defence, *pacta sunt servanda*, or good faith. In this justice’s opinion, it should be understood as something common to all branches of law, and should constitute a portion of the general theory of law. Taking his analysis further, K. Tanaka emphasized that it should also encompass all areas of municipal law, including fundamental legal concepts on which norms are build, such as person, right, duty, property, legal act, contract, etc.¹⁷¹. Of course, these views are entirely consistent with the majority of the legal scholarship; nevertheless, when reviewing the case-law it may be noticed that international bodies have frequently invoked various areas of municipal law without going deeply into theoretical issues.

¹⁷⁰ M. Bos, *op. cit.*, p. 261.

¹⁷¹ Dissenting opinion of Judge Tanaka, South West Africa case, p. 295.

However, the question of the very process of confirming the existence of a general principle remains something of a mystery, particularly when we derive such a principle from municipal legal orders. According to M. Bos, this process can be divided into three stages. In the first of them, we must select a method for seeking the general principle (comparison of law, deduction); then, we must establish the content of the norm (this can be done on the basis of practice, but not only); the final stage is taking the decision about incorporating the principle into the international order¹⁷². In the scholarship, the greatest amount of consideration is given to the first stage of norm creation; the remaining two are essentially a product of the analysis itself and comparison of legal systems, as well as of a certain consensus adopted by judges in the course of arriving at a decision.

It is clear that general principles of international law are overwhelmingly derived from the legal systems of states. If a principle exists in the majority of internal legal orders, this would suggest that the national lawmaker considers it appropriate and practical¹⁷³. Thus, insofar as such is justifiable, it should be applied on the grounds of international law. The task of delineating the principle rests on the shoulders of international courts and scholars.

Invocations of general principles of law can mainly be encountered in the rulings of international courts and in resolutions of international organizations. However, as Verdross states, principles derived from municipal orders may not be applied automatically. This approach to the use of legal principles elaborated on grounds of national law has also been criticized by J. L. Brierly and Judge McNair. Brierly pointed out that international law does not borrow norms from internal law by way of wholesale import of institutions and norms of private law together with ready-made sets of particular norms. Rather, they are to be reviewed in search of examples of those norms in legal policy and principles¹⁷⁴. Judge McNair argued in the *South West Africa case* that international law frequently borrows norms from municipal law, but this is not done in an automatic¹⁷⁵. General principles of law can be verified through scholarly study of the law of various states.

¹⁷² M. Bos, *op. cit.*, p. 266.

¹⁷³ M. Akehurst, *Equity and General Principles of Law*, "International Comparative Law Quarterly" vol. 25 (1976), p. 813.

¹⁷⁴ M. Cherif Bassiouni, *op. cit.*, p. 774.

¹⁷⁵ *South West Africa Case (Advisory Opinion)*, separate opinion of Judge McNair, (1950) ICJ Reports 28, p. 148. „To what extent is it useful or even necessary to examine what may at first sight appear to be relevant analogies in private law systems and draw help and inspiration from them? International law has recruited and continues to recruit many of its rules and institutions from private systems of law...The way in which international law borrows from this source is not by means of importing private law institutions ‘lock stock and barrel’, ready-made and fully equipped with a set of rules. It would be difficult to reconcile such a process with the application of the ‘general principles of law’. In my opinion, the true view of the duty of international tribunals in this matter is to regard any features or terminology which are reminiscent

This transfer of norms got underway long ago. While it was earlier explained by reference to common features and similarity between the law of nations and Roman or continental law, and later on the necessity of filling gaps in positive law through natural law¹⁷⁶, or the identity of some juridical acts¹⁷⁷, today such activity is justified by the development of international law and reference to private law as a result of similarities between juridical acts done in the international and domestic spheres. In W. Friedman's opinion, many types of international activity were, owing to their object, located within the sphere of private international relations; now they have become the object of interest of public international law, owing in part to participation by non-state entities in public relations¹⁷⁸. Yet while general principles of law¹⁷⁹ are frequently produced at a very high level of abstraction, there is no reason to avoid applying as general principles of international law other norms which would seem to be shared by diverse internal legal systems. National law as a whole should, in many cases, be examined, as it facilitates identification of a principle of international law¹⁸⁰.

Nevertheless, a distinction should be made between principles and rules present in national legal orders, although the latter category may also prove helpful. According to M. Akehurst, the difference between principles and rules results from their different levels of development. In this manner, general principles of law can be used to resolve many technical issues of law, while considerations regarding e.g. justice may not be entirely balanced¹⁸¹. In turn, G. Fitzmaurice identified – in a somewhat complicated manner – the mutual influence of principles and rules. He perceived differences between them in both domestic and international legal orders. In his view, a principle of law emphasizes a rule, and either explains or indicates the reason for its existence¹⁸². Principles of law can serve the achievement of technical objectives, or procedural ones in proceedings before an international body, an example of which may be international criminal proceedings. This does not mean, however, that they are fixed and inflexible. A properly-

of rules and institutions of private law as an indication of policy and principles rather than as directly importing these rules and institutions”.

¹⁷⁶ V. D. Degan, *Sources of International Law*, The Hague 1997, p. 15.

¹⁷⁷ Case of the Free Zones of Upper Savoy and the District of Gex (Second Phase) Order of December 6th, 1930, Series A, No. 24 Observations by Mr. Kellogg, p. 38: “In other words, the Court is competent to construe and apply treaties between the nations and decide questions susceptible of solution by the application of well recognized rules and principles of international law or domestic law where such law is applicable to the question in hand. These are the same principles as those which, within the domain of domestic law, form the basis of the jurisdiction of Courts generally throughout the civilized world and are recognized by the jurisprudence of all civilized countries.”

¹⁷⁸ W. Friedman, *op. cit.*, p. 281.

¹⁷⁹ M. Akehurst, *op. cit.*, p. 814.

¹⁸⁰ H. van der Wilt, *op. cit.*, p. 213.

¹⁸¹ M. Akehurst, *op. cit.*, p. 814.

¹⁸² G. Fitzmaurice, quoted after: H. Thirlway, *op. cit.*, p. 94.

conducted analysis renders them fit for undergoing a process of systematic transformations, entirely like the internal systems on which they are based and continually extended. This gives them the non-fixed character often assigned to natural law¹⁸³.

In taking all this into account, the majority of authors concur that there is only one reliable manner to demonstrate the existence of a general principle of law: studying the legal systems of various states. Such examination may uncover the existence of a general principle of law, or in another case may indicate such far-reaching differences that neither the existence nor the application of any general principle may be considered. This is also why the use of a certain fiction of existence or non-existence of a principle cannot be accepted unreflexively by judges; it must be proven. Of course, it will be impossible for a court to examine the law of all states in the world, but this is frequently unnecessary¹⁸⁴. Legal systems are categorized into families; the laws of English-language states are similar to one another, while the same may be said of the majority of South American states, as of the law of Islamic states based partially on the Koran. If someone demonstrates the existence of a principle in English law, there is a strong possibility that we will find it in the law of New Zealand, and of Australia. It is not permissible to give preference to any one group of legal systems¹⁸⁵ in relation to others. This makes it impossible for principles derived from the civil law of states to ignore laws formulated within the framework of common law, as well as to give preference to rules derived from Western systems over those present in other systems. In this process, emphasis should be given to the particular role of the international body and judges themselves, as prior to deriving a principle from the private law there they must be certain that it is recognized in its essence by all of the world's leading legal orders, and that its application will not violate the fundamental concepts of any one of those systems¹⁸⁶. A principle of law may be considered general if it is applied by the most representative systems of municipal law¹⁸⁷. In accordance with general knowledge, a principle that is accepted by a minority of states in the world may not constitute a general principle of law.

Additionally, B. Conforti emphasizes the significance of *opinio iuris* for the confirmation of existence of a general principle¹⁸⁸. Proof of the existence of a principle in international law will thus be its continual application within the framework of internal systems of law, as they are a reflection of the timeless principles of legal logic and jus-

¹⁸³ M. Akehurst, *op. cit.*, p. 814.

¹⁸⁴ W. Friedman, *op. cit.*, p. 284.

¹⁸⁵ M. Akehurst, *op. cit.*, p. 818.

¹⁸⁶ W. Friedman, *op. cit.*, p. 285.

¹⁸⁷ F. A. Mann, *Reflections on a Commercial Law of Nations*, "British Yearbook of International Law" vol. 33 (1957), p. 22.

¹⁸⁸ B. Conforti, *International Law and the Role of Domestic Legal System*, The Hague 1993, pp. 64 – 65.

tice. These are the principles regarded by the state and its bodies as universal, and for this reason they should, in their opinion, be applied in every system of law. Delineating the existence of *opinio iuris* is to ensure that the international legal order does not adopt every principle of law that may be identified in the law of a state engaged in a dispute, but rather only those recognized by the majority of states.

Another important element in establishing and applying principles of international law is the absence of the necessity of prior existence of international practice¹⁸⁹. Universal principles of law thus occur in a very similar manner on both the international and the domestic planes. Although their interpretations may be somewhat different, they should reflect the spirit of the law, and should be proof of logical thinking.

The legal scholarship requires that a general principle be recognized by civilized nations, which in present times encompasses practically the entire international community. Meanwhile, in analysing the work of international bodies one may arrive at the conclusion that it is not entirely clear whether a general principle of law must be common to all states, or at least the majority of them. It is rightly pointed out that studies should be done of all systems, or of the most representative ones; however, if this rule were to be treated literally, in the opinion of some authors, judges would do nothing more than compare the municipal law of states¹⁹⁰. A review of cases before the PCIJ indicates that in the majority of cases, according to the Court, a supposed general principle of law has existed in all states, or at times nearly all or a majority of them; in some cases, the law of several states has been cited as an example, but no direct reference was made to the other states in which a given principle was to function. Such statements are not decisive, as in several cases it has been argued that a given principle may not be ascertained as a general principle of law, for it has been rejected by the majority of states. Adopting such a general interpretation of general principles may have led to situations in which an international court indicated a state was bound by a general principle, while at the same time that principle was not recognized in its municipal law¹⁹¹. This interpretation of norms led to a quite clear difference of opinion within the ICJ in the *South-West Africa* case, between Judges van Wyk and Tanaka. Justice *ad hoc* van Wyk cast doubt on the literal understanding of Article 38(c), that general principles of law recognized by civilized nations in favour of the general principles of law of those nations. This did not, in his opinion, mean that a state could be forced to submit to a norm that is not to be

¹⁸⁹ M. Bos, *op. cit.*, p. 263.

¹⁹⁰ Ch. T. Kotuby Jr., *General Principles of Law, International Due Process, and the Modern Role of Private International Law*, "Duke Journal of Comparative and International Law" vol. 23 (2012-2013), p. 442.

¹⁹¹ M. Akehurst, *op. cit.*, p. 820.

found within the legislation of that state¹⁹². Judge Tanaka presented the view that the provisions of Article 38(c) concerning general principles do not require the consent of states as a necessary condition for the recognition of general principles. Even states which do not recognize or even negate their existence are bound by those norms¹⁹³. In that judge's opinion, the source of general principles is to be found in natural law.

According to B. Cheng, general principles of law are not specific to any particular system of law, but are located within them, common to all. They create a shared foundation for every system of law¹⁹⁴. It may only be added that they should be regarded as vital for the proper functioning of international law *per se*¹⁹⁵. This facilitates distinguishing a situation in which a given regulation refers to one particular legal relation from the application of it as a principle in an entire system of law of one or several states. The process of thought that accompanies the delineation and recognition of a general principle is not, however, entirely clear, as essentially in no ruling does the adjudicating body present clear and uniform criteria for distinguishing them¹⁹⁶. Emphasis should, however, be placed on the general recognition that a state is certainly not bound by a customary norm which it has protested against from the beginning, and it would be illogical to hold that it is bound by a general principle of law which it also rejects in its own municipal system of law¹⁹⁷. That said, here as well we may dispute such an interpretation, invoking the views of judge Tanaka. Another potential barrier to the application of general principles is to be found in the supposed difficulties of proving the existence of general principles of law *per se*.

It is sometimes suggested that general principles of law are inextricably bound up with the nature of law itself. If this is to mean that general principles of law have been

¹⁹² South West Africa, Second Phase, Judgment, I.C.J. Reports 1966, Separate opinion of Judge van Wyk, s. 170, "The Applicants next invoked the provisions of Article 38 (1) (c) to justify their alleged norm, which they contended should be distilled from the general principles of law recognized by civilized nations. The first fallacy in this contention is that this subsection does not authorize the application of the laws of civilized nations, it limits the Court to „the general principles of law” of these nations. It certainly does not mean that by legislating on particular domestic matters a majority of civilized nations could compel a minority to introduce similar legislation. If, for example, every State but one were to enact a law prohibiting the manufacture of atomic weapons, or enforcing the enfranchisement of women, the remaining State would not be obliged to bring its laws into conformity with the rest. In any event, the evidence of Professor Possony, Professor van den Haag and Professor Manning proves that such a rule is not universally observed, and that laws and official practices to the contrary exist in a large number of States, including the Applicants'. The fact that neither of the Applicant States observes this alleged norm or standards in their respective countries indeed reveals the artificiality of their cases”.

¹⁹³ Dissenting Opinion of Judge Tanaka: "But this viewpoint, we believe, was clearly overruled by Article 38, paragraph 1 (c), by the fact that this provision does not require the consent of States as a condition of the recognition of the general principles. States which do not recognize this principle or even deny its validity are nevertheless subject to its rule", p. 298.

¹⁹⁴ Quoted after: M. Cherif Bassiouni, *op. cit.*, p. 779.

¹⁹⁵ B. Conforti, *op. cit.*, p. 64.

¹⁹⁶ Ch. T. Kotuby Jr., *op. cit.*, p. 442.

¹⁹⁷ M. Akehurst, *op. cit.*, p. 821.

formed through *a priori* logic, without study of the internal legal orders of various states, such an idea should probably be rejected. A principle cannot be considered an inseparable part of the law unless it is present in all or the majority of legal systems. In other words, they must encompass values and influence the behaviour perceived by states as required by municipal law and international law¹⁹⁸. Furthermore, mistaken identification of general principles of law with principles constituting an inseparable portion of law is indicated by the fact that courts frequently apply¹⁹⁹ general principles that are shared by a group of states, but which do not occur in many states outside of that group; for example, the Court of Justice of the European Union applies principles shared by the laws of EU Member States²⁰⁰.

The application of general principles of law usually engages an element of analogy. For this reason as well, their application requires in the majority of cases a sort of adaptation through logical reasoning. In determining the content of principles of law, it is necessary to apply deduction, which means that confirmation of their existence requires objectivism. According to theoreticians of law, establishing the content and nature of a norm is done through the selection of a method, determining the properties of the existence and the content of the principle, and at the end a more or less conscious absorption of it into international law²⁰¹. Applying analogy, we must not forget about the particular nature of international law. However, it is vital to examine the types of cases such principles have referred to in municipal law²⁰². This is why it should be kept in mind that analogies based in municipal law are not always appropriate for international law. This results from differences among systems, something pointed out after the adoption of Article 38 by the PCIJ. The environment in which international law operates is very different from the municipal law environment, and analogies taken from internal law are not always appropriate for the international environment²⁰³. This limits in a natural manner the usefulness of general principles derived by way of analogy. Nevertheless, this would not seem to be a flaw which entirely excludes their application. According to M. Akehurst, in the work of adjudicating bodies general principles did not play a dominant role, but constitute only a subsidiary source after agreements and custom. M. Bos somewhat disagrees with this opinion, as in his view they may in some cases serve as an independent basis for resolving a dispute, although practice indicates that they perform a primarily interpretative task²⁰⁴. For this reason as well, applying principles to international

¹⁹⁸ B. Conforti, *op. cit.*, pp. 64-65.

¹⁹⁹ M. Akehurst, *op. cit.*, p. 817.

²⁰⁰ *Ibidem*, p. 817.

²⁰¹ M. Bos, *op. cit.*, p. 263.

²⁰² *Ibidem*, p. 261.

²⁰³ M. Akehurst, *op. cit.*, p.815.

²⁰⁴ M. Bos, *op. cit.*, p. 261.

relations may only be done when a treaty or international custom creates a sort of gap. Only then may municipal law be invoked, and analogy can be applied to a specific international situation. As M. Akehurst rightly points out, the adoption of another, rigid interpretation of the notion of general principles would be highly desirable, as it could lead to situations in which principles derived from national law would constitute a portion of international law in complete conflict with the specific nature of that legal order.

However, we may not fail to present views contradicting the notion that municipal law may serve as a source of general principles. J. Ellis took a critical approach to this issue. She indicated three main strands of thought delineating general principles from municipal law. In her opinion, general principles have been identified in the natural law school of thought, according to which the presence of any norm or rule in many legal systems is proof of its objective belonging to the category of law understood as such. Another school of thought has identified the roots of general principles in the voluntarist approach to positivism, *id est* the presence of a norm in many legal systems constitutes proof of the agreement of states to being bound by it. The third has its genesis in apprehension over the democratization of the fundamentality of international law, particularly in the post-colonial context, and treats national acceptance of a rule as a sort of legitimacy for its creation via democratic process²⁰⁵. Although she generally rejects these three concepts, she does not reject principles of law. In her view, they should more be an effect of legal reasoning and argumentation, based on accuracy and conviction rather than some objective nature of law, or ascertainment of the consent of a state²⁰⁶.

Against this backdrop, one interesting idea would seem to be that of identifying general principles of law not only within municipal law, but also from a feeling of morality or justice²⁰⁷. This is not entirely outlandish if we take into consideration the advisory opinion of the ICJ in respect of reservations to conventions concerning the apprehension and punishment of those responsible for the crime of genocide, coupled with the opinions of some judges. In a dispute between Argentina and Uruguay, the ICJ addressed legal protection of the environment. Judge Trinidadé did not concur with its conclusions, and he attached a separate opinion in which he argued that, in his view, general principles of law result “from human conscience, from the universal juridical conscience, which I regard as the ultimate material “source” of all law”²⁰⁸. This invocation of meta-norms present in nearly every legal order demands that we again address the question

²⁰⁵ J. Ellis, *General Principles and Comparative Law*, “European Journal of International Law” vol. 22 (2011), p. 970.

²⁰⁶ *Ibidem*, p. 270.

²⁰⁷ Quoted after: V. D. Degan, *op. cit.*, p. 15.

²⁰⁸ Pulp Mills on the River Uruguay (Argentina v. Uruguay) Judgment, ICJ Reports 2010, p.14, Separate Opinion of Judge Cancado Trinidadé

of natural law. A similar position was taken by the founding fathers of international law. In modern times, however, it would be difficult to expect states to address them with the same attention they did in the past.

6. Unilateral acts of states

Unilateral acts of states in international law constitute an expression of the will of the state, and by way of which that subject wishes to express its position. There are many definitions of these acts²⁰⁹, yet they all essentially refer to situations in which a new norm is created concerning the formation of international obligations of states. An important issue in this context would seem to be considerations on the scope in which the internal law of a state, adopted for the performance of tasks specific to that state, may serve as a source of changes in the powers of other states. In this respect we may, at least at a very rudimentary level, examine that type of municipal legislation that impacts other states. The most prominent areas are those which directly concern areas which naturally impact the rights of third-party states and impose additional duties on them. The spheres of international cooperation where this is most clearly visible are the law of the sea, and broadly-understood environmental protection. Legal regulation adopted by states under their municipal law can produce effects similar to those of unilateral acts, and in an obvious manner influence the rights of other states and entities operating within the sphere of international law. When in such situations we consider principles of international law, such as the principle of reciprocity or certainty of law, this can contribute to changes in the scope of obligations in mutual relationships; as a consequence, a new norm can be created. As said by the Special Rapporteur of the International Law Commission (while personally opposing this interpretation), some scholars are of the opinion that states may perform unilateral acts even when they have no intention of doing so²¹⁰.

It must be emphasized that in such situations the state invokes prerogatives assigned to it on grounds of internal law. There are many areas that remain outside the scope of international law regulations, allowing certain norms to be clarified by municipal legal orders. Such broad discretion permits states in various cases to introduce ele-

²⁰⁹ In essence, all definitions directly refer to the effects they create in international law. The broadest definition is that presented by the Special Rapporteur of the International Law Commission: "For the purposes of the present articles, "unilateral act of a State" means an unequivocal expression of will which is formulated by a State with the intention of producing legal effects in relation to one or more other States or international organizations, and which is known to that State or international organization." Third report on unilateral acts of States, by Mr. Victor Rodríguez Cedeño, Special Rapporteur, Document A/CN.4/505, p. 256.

²¹⁰ *Ibidem*. "(...) It might be affirmed, as did a representative in the Sixth Committee, that all acts of States are in principle political, and that some of them may be legal if that is the intention of the author State, although it has been recognized that intent is always difficult to prove, and even that States might perform unilateral acts without realizing their intention; (...)", p. 252.

ments of municipal law into relations with other states. In this case, the source of such actions is with all certainty the desire to protect one's own interests, and it is precisely here that we should identify the source of a norm of international law. We may also not exclude situations in which states regulate areas which were not previously addressed by international legislation, and thus occupy so-called „free fields”, nor those cases in which states use their dominant position to force other subjects to submit to certain solutions. Of course, this may lead to considerations of the emergence of an international law norm out of so-called “unlawful situations”, sanctioned by way of practice.

The declaration of the President of the United States, Harry Truman, concerning the continental shelf²¹¹, comprises one of the glaring examples of the emergence of an international law norm on grounds of an act of municipal law. At the moment of its adoption, it was a legal act defined by municipal law as one of the prerogatives of the President of the USA. Proclamations can be divided into two groups: those of a ceremonial nature, addressing general issues of an individual nature, and those which are of substantive significance as a source of law, and which are then confirmed by the Congress of the United States, which renders them a source of rights and duties. Establishment of the continental shelf as an area governed by the sovereign law of a coastal state, while at the same time referring to international law in the event of disputes indicates that, in certain situations, states can influence the rights of other states with their own regulations. By virtue of that proclamation, the President of the United States of America not only defined the right of the USA to establish the shelf, but at the same time acknowledged the rights of other states to engage in analogical activity. This initial unilateral activity by the USA contributed to the development of international law in that direction, as states began to define their competences in respect of exerting control over adjacent maritime areas in other manners as well²¹². Not all of these actions met with approval.

Contemporary international courts must address unilateral acts in respect of delimitation of maritime areas by states, and, what follows, of defining the scope of sovereign authority over those areas. One of the first such disputes took place between the United Kingdom and Norway. The Norwegian representatives invoked their municipal law, which limited access to the country's shores for the fishing boats of other states. This law was adopted in the form of a Royal Decree in 1937²¹³, and other states with ac-

²¹¹ 1945 US Presidential Proclamation No. 2667, Policy of the United States with Respect to the Natural Resources of the Sunsoil of the Sea Bed and the Continental Shelf, Adopted in Washington, USA on 28 September 1945, source: http://oceancommission.gov/documents/gov_oceans/truman.pdf, accessed 15.02.2014.

²¹² S. G. Borgerson, *The National Interest and the Law of the Sea*, Council Special Report No. 46 May 2009, p. 7.

²¹³ Royal Decree of July 12th, 1935, as amended by a Decree of December 10th, 1937, for that part of Norway which is situated northward of 66° 28.8' (or 66° 28' 48") N. latitude. Cited by: Fisheries case, Judgment of December 18th, 1951: I.C.J. Reports 1951, p. 116, p. 118.

cess to the North Sea were informed of its effects. It was emphasized that the new regulation did not introduce radical changes to norms adopted in a similar manner in the 19th century. The Decree expanded authority over some areas. Norway addressed a question to the ICJ concerning whether the delimitation performed on grounds of municipal law and then disputed by the United Kingdom could have effects in international law, and if it is compliant with that law in general. The Court held that in this respect Norway had not violated international law, and her legal acts are binding. Of course, in analysing the ruling of the ICJ, G. Fitzmaurice argued that the competence of states to determine the reach of their territorial waters is not absolute, and that it must always be exercised in a manner consistent with international law²¹⁴.

However, is municipal law sufficient for a norm to be acknowledged as grounds for the existence of a norm of international law? The answer to this question is by no means a simple one. Many efforts aimed at coercing other states were a failure, such as the famous wars over tuna and shrimp fishing. Here we may recall the approach taken by the ICJ in the dispute between Chile and Peru concerning delimitation of maritime areas, where the ICJ essentially treated all acts of domestic law as documents incapable of having effects in international law. The basis for an internal norm to be transformed into a norm of international law would seem to consist of several factors, among the most important of which are the international position of the state, the scope of the regulation adopted, and the needs of the community in whose opinion the solution proposed by the state is supposed to be beneficial. This benefit, that is, the interest of states, may result from the fact that a given situation was not previously regulated by international law, and may also enhance the rights of other states. As a result, the reaction of the international community may also seem the most important element for recognizing internal law as a source of regional or universal law.

In recent times, the significance of domestic regulations addressing maritime environmental protection has grown. States restrict not only fishing, but are also introducing norms designed to protect coastal areas from pollution, directly prohibiting some entities from approaching their coastlines. These initiatives also impact other states, which are not only forced at times to adapt municipal law to the requirements of other states, but also to introduce similar solutions in their own national law. Primary examples of this are *inter alia* the law of the United States concerning the protection of dolphins, as well as of sea turtles. National documents referring to fishing of tuna and protection of dolphins were adopted by Congress in 1972, and then elaborated in 1984 and 1988²¹⁵. The official

²¹⁴ G. Fitzmaurice, *The Law and Procedure of the International Court of Justice*, 1951-54: General Principles and Sources of Law, "British Yearbook of International Law" vol. 40 (1953), p. 13.

²¹⁵ Marine Mammal Protection Act Amendments of 1988, Pub. L. No. 100-711, § 4, 102 Stat. 4755 (1988)

name of the legislation is the Marine Mammal Protection Act. It subjected techniques for tuna fishing to the oversight of the United States government. Certain regulations were adopted setting out the permissible number of dolphins killed in relation to tonnes of tuna caught. These regulations directly impacted domestic producers, but also required foreign producers to follow the same rules. In the event they failed to do so, the government of the United States could impose special tariffs on them²¹⁶. Mexico fell victim to these restrictions, and brought a claim against the USA to GATT, initiating the dispute resolution mechanisms foreseen in that agreement²¹⁷. The panel ruled that the USA was in violation of GATT regulations. A similar issue arose in respect of protection of sea turtles while engaged in fishing for shrimp. Here as well it was held that municipal law may not impose restrictions on foreign entities, which may result in violating the foundations of GATT and WTO.

These examples clearly demonstrate that states do make attempts at impacting the shape of international obligations through the use of internal instruments, but this is not always effective. In the GATT/WTO system, this type of activity is clearly restricted²¹⁸. A negative decision was also issued in the case of the shrimp, but here it was clearly stated that states have the right to adopt regulations aimed at enhancing environmental protection; however, their impact may not run contrary to the foundations of the GATT/WTO system²¹⁹. The USA succeeded only in forcing foreign producers to label their products with information concerning the manner in which tuna and shrimp were caught, but they did not restrict import. In this case, the interests of the USA and desire to protect domestic producers were at the foundation of these acts, and the decisions adopted

²¹⁶ D. A. Wirth, *The Uneasy Interface Between Domestic and International Environmental Law*, "American University International Law Review" vol. 9, Issue 1 Article 8 (1993), p. 175.

²¹⁷ GATT, United States-Restrictions on Imports of Tuna, *reprinted in* 30 I.L.M. 1594 (1991).

²¹⁸ K. C. Kennedy, *The Illegality of Unilateral Trade Measures to Resolve Trade-Environment Disputes*, "Michigan State University College of Law, Digital Commons at Michigan State University College of Law Faculty Publications" (1-1-1998), p. 379, source: <http://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1382&context=facpubs>, accessed: 10.05.2015.

²¹⁹ Quoted after official webpage of WTO: https://www.wto.org/english/tratop_e/envir_e/edis08_e.htm "186, accessed 10.05.2015. What we have decided in this appeal is simply this: although the measure of the United States in dispute in this appeal serves an environmental objective that is recognized as legitimate under paragraph (g) of Article XX of the GATT 1994, this measure has been applied by the United States in a manner which constitutes arbitrary and unjustifiable discrimination between Members of the WTO, contrary to the requirements of the chapeau of Article XX. For all of the specific reasons outlined in this Report, this measure does not qualify for the exemption that Article XX of the GATT 1994 affords to measures which serve certain recognized, legitimate environmental purposes but which, at the same time, are not applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade. As we emphasized in United States — Gasoline [adopted 20 May 1996, WT/DS2/AB/R, p. 30], WTO Members are free to adopt their own policies aimed at protecting the environment as long as, in so doing, they fulfill their obligations and respect the rights of other Members under the WTO Agreement."

in those cases were of an international nature, which provoked a number of comments addressing the rights of states to enact similar solutions.

Protection of the natural environment is usually treated in a very traditional manner, practically Westphalian, limited to treating the environment as a good only within a state's own borders²²⁰. For this reason, norms addressing water and air pollution are based in municipal law. An outstanding example of this is the application of the law by the United States in the Trail Smelter dispute²²¹. This conflict concerned the emission of gases from Canada into the territory of the United States. The arbitration panel convened to resolve the dispute emphasized the necessity of applying municipal law alongside international law, owing to the absence of relevant norms in the international law system²²². It considered as most appropriate those which American courts had applied, including the Supreme Court of the United States²²³, as they addressed cases involving pollution between US states. In spite of the passage of time, this decision remains relevant, and some authors point out that the USA and Canada continue to deal with similar issues of environmental protection invoking old sources²²⁴. As it is, an exceptional example is the United States, which forces some other states to submit to its internal regulations in the event of causing environmental pollution. The situation in the USA is made more complex by the ruling of the Supreme Court that Congress has the power to enact laws with effect outside the territory of the USA²²⁵. This effect is not, however, peremptory, and is not always taken into consideration. American courts are of the view that

²²⁰ D.A. Kysar, Ya-Wei Li, *Regulating from Nowhere: Domestic Environmental Law and the Nation-State Subject*, "Cornell Law School", research paper No. 07-011, p. 2, source: <http://poseidon01.ssrn.com/delivery.php?ID=996103073088117019117083086068094068004022029078044001090110003011097096014090072124043107058100031035112109067113098115115054013063012063028112120097082088123026000031105084008065079103124093122076102004121001087118111126107104006068080126127074&EXT=pdf>, accessed 10.07.2014.

²²¹ Trail Smelter Case (United States, Canada) 16 April 1938 and 11 March 1941 Volume III pp. 1905-1982, Reports of International Arbitral Awards, UN 2006.

²²² Trail Smelter: "In deciding in conformity with international law an international tribunal may, and, in fact, frequently does apply national law; but an international tribunal will not depart from the rules of international law in favor of divergent rules of national law unless, in refusing to do so, it would undoubtedly go counter to the expressed intention of the treaties whereupon its powers are based.", p. 1950.

²²³ Trail Smelter: "There are, however, as regards both air pollution and water pollution, certain decisions of the Supreme Court of the United States which may legitimately be taken as a guide in this field of international law. for it is reasonable to follow by analogy, in international cases, precedents established by that court in dealing with controversies between States of the Union or with other controversies concerning the quasi-sovereign rights of such States, where no contrary rule prevails in international law and no reason for rejecting such precedents can be adduced from the limitations of sovereignty inherent in the Constitution of the United States.", p. 1964.

²²⁴ A. L. Parrish, Austen L., *Trail Smelter Déjà Vu: Extraterritoriality, International Environmental Law and the Search for Solutions to Canadian-U.S. Transboundary Water Pollution Disputes*, (2005). Articles by Maurer Faculty. Paper 891. <http://www.repository.law.indiana.edu/facpub/891>, p. 387, accessed 10.05.2015.

²²⁵ EEOC v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 248 (1991) ("Congress has the authority to enforce its laws beyond the territorial boundaries of the United States.")

when an effect directly impacts the territory of the USA or other important areas, domestic law may be applied. Such practice can contribute in a gradual manner to the formation of certain standards at the international level through absorption of norms from a municipal legal order.

The application of municipal law taking the shape of unilateral acts in respect of shaping environmental protection norms is nothing exceptional²²⁶, nor is it a new practice²²⁷. However, the danger lies in the fact that states, in going outside international dispute resolution forums, will make use of internal institutions. This is most certainly intended to protect states' own interests²²⁸. However, it can lead to violations of a state's international obligations, primarily of the principle of equality of parties in a dispute between sovereign subjects, which will result in more favourable treatment for the subject of municipal law²²⁹. Environmental protection law shaped in this manner contributes to refusal to participate in multilateral agreements establishing objective oversight mechanisms²³⁰.

The law of outer space is also an area of international law which is doubtlessly influenced by municipal law. Scholars point out that from the moment the first satellite was sent into space, the states participating in the „space race” have exercised significant influence on international regulation subsequently adopted. This concerns many aspects, such as individual responsibility and issues of safety. In this case, municipal law overtook international law²³¹, as the limited number of states active in space imposed national regulations on those joining them later, and these regulations then took the form of international conventions.

Treating the internal law of states as a unilateral act would seem disproportionate, from the perspective of international law. This does not, however, change the fact that municipal law cannot be treated in every case as a mere fact existing alongside the international law system proper. There are no uniform criteria for indicating in which specific case those norms may become a source of obligations of states; this does not, however, exclude special cases in which they are taken into account by other subjects participating in international relations. Certainly, such practice can contribute to the emergence of a new customary norm.

²²⁶ D. Bodansky, *What's So Bad about Unilateral Action to Protect the Environment?*, “European Journal of International Law” vol. 11, issue 2 (2000), p. 339.

²²⁷ R. Bilder, *The Role of Unilateral Action in Preventing International Environmental Injury*, “Vanderbilt Journal of Transnational Law” vol. 14 (1981), p. 51.

²²⁸ *Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction*, “Harvard Law Review” vol. 98 (1985), p. 1319.

²²⁹ See: J. Ellis, *Extraterritorial Exercise of Jurisdiction for Environmental Protection: Addressing Fairness Concerns*, “Leiden Journal of International Law” vol. 25 (2012), pp. 397–414, p. 414.

²³⁰ J. Brunneć, *The United States and International Environmental Law: Living with an Elephant*, “European Journal of International Law” vol. 15 (2004), p. 631.

²³¹ S. Gorove, *The Growth of Domestic Space Law: a US Example*, “Journal of Space Law” vol. 18, No 2 (1990), p. 107.

7. Summary

International law and municipal law are two distinct legal systems. Their distinctness is attested to by the distinct goals, means of enactment, and the subjects governed by them. However, they cannot be treated as entirely sealed off, for norms from one order are penetrating the other with increasing frequency, and the borders between them are becoming less and less clear. Yet even now we continue to battle with the problem of not only indicating the proper relations between international law and municipal law, but also the spheres of their mutual (reciprocal) impact. The place of national law in the international law system as formed, accompanied by various issues of completeness and effectiveness, remains to be firmly established. States oblige themselves to adhere to international obligations both on grounds of international law – attested to *inter alia* by the Convention on the Law of Treaties – and in municipal law acts, particularly in constitutions, where considerations as to the hierarchy of norms are found. The question that was of fundamental significance to us was how, against this backdrop, the position of municipal law is to be understood, as well as the potential impact of norms established within municipal law on international law. And ultimately, whether municipal law can constitute a source of international law.

In the modern world, the mutual relations between international and municipal law constitute an object of separate analysis. Municipal law, in spite of what is a well-formed international system, is an element capable of impacting the development of a new norm. This results from a number of factors, such as the interests of states seeking a dominant position in a given region. The multiplicity of subjects of the international system, the creation of separate branches of international law and the fragmentation of that law demonstrate the impact of municipal law across various planes on international norms, the practice of states, and the rulings of international bodies. Surely many more words will be written on the nature of the impact of international law on municipal law. Customary norms, norms from conventions, and acts of international organizations have been examined, leading to the conclusion that evidence of such practice can be found nearly everywhere. It is far more difficult to analyse the issue of the effect of municipal law on the creation of norms in the international legal order. Not because such a phenomenon does not exist. The cause would seem to be more prosaic, and results frequently from the far-reaching specialisation of international law.

Summarizing the issue of the potential for municipal law to affect international law, it is necessary to first consider how the mutual relations between those two systems are perceived in the present time. The simplest – and still highly controversial – means of doing so is to present the positions of monists and dualists. In the case of the former, arguments concerning the unity of the two systems would seem to dispel all doubts, and we

can easily demonstrate the penetration of international law by norms of municipal law, as well as vice versa. However, in practice we are frequently faced with the promotion of the idea of dualism, which would seem to be reinforced by the majority of legal orders, as states desire to protect their interests in relations with other subjects and to avoid situations in which external subjects could interfere in their municipal law. Aware of the essence of international law, which arose as a means of regulating relations between sovereigns, we may observe that even if we give priority to international law, the two legal orders cannot be entirely separated from each other. As W. Friedman correctly points out, the change in the scope of the distinction between international law from private law resulted from evolution of the nature of the state and its new role in both internal and international relations. This particularly concerns the function of improving the welfare of ordinary people²³². Presently, international law is entering such a great number of areas once reserved for municipal law, that the penetration of norms by one system into the other is a natural consequence. Proof of this is to be found in the rulings of international bodies citing international agreements done by other subjects, and through emphasising a shared constitutional tradition of states discerning rights for individuals from them.

In the development of international law, we may observe that all purely theoretical considerations regarding real relations between municipal law and international law are ultimately incomplete. This results from failure to consider the most unstable and most difficult to characterize element. This is nothing more and nothing less than the interest of various subjects active in the sphere of international law. They bring their knowledge, experience, and even norms into the international sphere, to benefit from them, and, in consequence, for the entire society to benefit. The unceasing drive to separate norms of international law from other types of norms arising out of municipal law has been justified from the beginning of the system by the necessity of creating a complementary system, which may, however, lead to the application of artificial legal constructions.

For participants in international relations, it has become impossible to act within a system created solely for the needs of sovereign subjects without at least indirectly invoking municipal norms, which in a certain manner has confirmed the legitimacy of the state to take certain decisions. In considering these dependencies, we perceive that contemporary authors have referred to this issue by indicating the many possibilities for transfer of municipal law to the international order. These strongest bonds initially appeared in three planes: general principles of law and the rulings of courts, the work of international tribunals, and later unilateral acts of states. These acts, however, do not concern a general category indicated in the contemporary international law doctrine, but rather are typical acts of municipal law which directly influence relations with other states.

²³² W. Friedman, *op. cit.*, p. 282.

According to M. Bos, international law may draw on municipal law to form its principles in the following areas²³³: general conceptions of law (the most frequently invoked are the principle of good faith, *pacta sunt servanda*, interpretive methods, and balancing the parties' faults); in the law of obligations (regardless of their source – law as a system or international agreements) – the duty to remedy injury, transfer of rights, force majeure, exceptional change of circumstances, unjustified enrichment etc. (the Vienna Convention on the Law of Treaties is an excellent example of the effect of the law of obligations on international law); in property law (prescriptive acquisition, possession, servitude); in procedural law (concerning grievances, proceedings, the court functions of the rights of parties); and ultimately in international criminal law (primarily in reference to persons). These possibilities are used at present, and there is no shortage of evidence thereof. This results from the specific transposition of municipal norms to the international level, which is frequently the product of rational thinking and the use of those legal constructions known to a significant portion of legal orders.

In respect of international courts and tribunals, comparison of various legal systems of states has achieved universal acceptance. Engaging in this type of verification, a court is less exposed to the charge of bias or of subjective and arbitrary action, it incurs a smaller risk of having its competencies restricted in the future. Differences in the details among various national legal systems should not halt the application of general principles of law. In the case-law of international courts the general interest takes precedence, and if it serves a specific decision it can be accepted as an argument in favour of a positive decision. Also of great importance is the reason why a given principle has been accepted, and what end it is supposed to serve. Merely indicating a legal provision without reference to the broader context can be misleading. For this reason, principles of law should not be sought in a legal order, but in a legal system²³⁴. In many situations, such an approach ensures general acceptance when invoking institutions present in municipal law. For example, this may concern expiration of a claim, when a grievance is submitted a long time after the occurrence of the injury. This period differs depending on the state, but the fundamental principle is the same. This principle is also applied by international courts in analogical situations concerning the submission of grievances in disputes between states.

Municipal law present in proceedings before international bodies is not only general principles of law, but also international agreements ratified by states together with the entire national case-law based on it. This category also includes norms which have become emancipated and whose importance has led to their entry into the international order. The simplest thing is to demonstrate the phenomenon of the penetration of mu-

²³³ M. Bos, *op. cit.*, pp. 275-282.

²³⁴ *Ibidem*, p. 263.

nicipal norms into the international order by acquainting oneself with the practice of international courts. The use of municipal law by international courts is a continual process, and in some areas of international law the deduction of a common principle from national legal orders is more visible than in others. The process of comparing norms of municipal law is carried out by all international courts. The ICJ is no exception, even if it does so in a not entirely well-specified manner; nevertheless, the positions presented by particular judges quite clearly indicate how the entire process of deduction operates. Other bodies are under an obligation to familiarize themselves with municipal law, and in the event of the absence of an international law norm they may apply municipal law. International commercial disputes and international criminal law are the areas where judicial organs simply must take municipal law into account in the judicial process.

General principles of procedural law also invoke general principles of international law; these may include issue associated with transparency, the right to a defence, fair trials, the right to an appeal, etc.²³⁵. However, there is no reason to suspect that a state would be in violation of international law if it did not have such provisions in its internal law. It may again be repeated that the adoption of a provision in national law by all of the states on the planet save for a few does not oblige those few to follow in the majority's footsteps. Even if all states in the world have some norm in their own internal orders, each state has the freedom to remove it from its own law without violating international law, even if the others wish to retain such a provision²³⁶. The question remains of what about norms serving the interest of the entire international community.

Some authors point out that in the relation of international law-municipal law, general principles of law work in two directions: on the one hand, they are the sum of norms deduced from municipal systems, while on the other they may facilitate rejection of a municipal law inconsistent with a norm thus ascertained²³⁷. Such far-reaching interference can only be permitted in exceptional circumstances, to the extent the adjudicating authority is empowered to do so. In other cases, we are left with the accepted general formula that municipal law may not influence the shape of international obligations of states. What, then, when a principle not recognized by a state becomes the grounds for a decision adopted in a given case? There is no clear answer to this question, as we would have to face not only the issue of the scope of a state's responsibility, but also with norms of a *ius cogens* nature.

Municipal law and international law must co-exist. Each of those systems contains conflict of laws rules which determine priority of application. On the basis of the pro-

²³⁵ Ch. T. Kotuby Jr., *op. cit.*, p. 428.

²³⁶ M. Akehurst, *op. cit.*, p. 815.

²³⁷ Ch. T. Kotuby Jr., *op. cit.*, p. 416.

vided examples, we may observe the rule that the development of international law and the increasing entry by subjects of international law into new spheres of activity have created a situation in which internal law may not be excluded from the scope of interest of international law. However, that relation is evolving from one of declared dependence to a partnership. In enacting municipal law, states engage in the fullest expression of protection of their own interests. Transferring them to international law, they contribute to increasing their impact on other subjects.

International law has, in a sense, come full circle in returning to its sources in which bonds between municipal law and international law are indicated. Common elements have facilitated the rapid development of the international law system, and the invocation of shared traditions. Presently, however, such direct references to municipal law are not only unjustified, but in fact needless, as in many areas the norms of international law are coherent and complete. Additionally, municipal law is divided into many groups, such as common law, continental law, and the previously-mentioned Islamic law. Indicating that which is shared by all these types of orders and deducing on those grounds the existence of a norm in international law may be a tremendous challenge. The scope in which municipal law norms penetrate international law will thus be determined again by the interest of states, and the needs of the international community. The greatest responsibility rests on the shoulders of entities engaged in the application of law and its correct interpretation. In many cases, municipal law can be helpful, or even supply a ready answer, but its transfer to the international law plane without reflection may have a negative impact on the system as such.