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Jan Kolasa (ed.)

THE NATURE OF SOURCE IN INTERNATIONAL LEGAL ORDER

Wrocław 2017

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Preface

Fairly uniform in its mainstream, the position of science regarding sources of international law has been undergoing erosion for decades. This is largely due to the rapidly expanding scope of international relations governed by completely new branches of contemporary international law. This expansion is not limited to subject matter – such as the cosmos or the bottom of the seas and oceans. Contemporary international law is also enriching itself in its subjective sphere, creating new entities such as international organizations or empowering in many respects in its legal order the human being. Only the most general and obvious examples of transformations that inevitably lead to major change in today's international law are discussed.

Therefore, it is not surprising that from the observation of modern international law practice, a whole series of more or less convincingly argued new sources of law, not even mentioned in Art. 38 of the Statute of the ICJ, is emerging. The manifestations of such new sources of contemporary international law seem to largely distance the law itself from direct activity of the states in that regard, namely treaty and custom. The very essence of the traditional source of international law, the consent of states, is being questioned more and more boldly. Thus, a very complicated and entangled view of the philosophical-legal problem concerning the essence of the source of modern international law has emerged. However, my young research team has managed to convince me to focus attention to this complex and sensitive problem.

The title given to our research in this matter may rightly seem to many internationalists too serious and too brave. Especially when the proper nature of the subject matter and the nature of the research team of internationalist lawyers themselves is taken into consideration. And the issue presented in the title of this publication has aspects of a philosophical and legal nature. Well aware of this, we did not delude ourselves when taking up research on this multifaceted issue, or even more as we concluded it that we would be able to fully explain and convincingly justify the proper nature of the source of contemporary international law. It was rather about paying close attention to this serious problem, penetrating it from a few different grass-roots points selected from contemporary international practice.

On a few selected examples we have tried to investigate and show when, where, under what circumstances and, above all, under what conditions the actions or behaviour of the subjects, courts or opinions of scholars, and in particular their respective bodies, can and should be reflected in the sources of law in a certain binding form. It should be remembered that all this must be done within the established binding framework of the legal system, which on the one hand diminishes the permissible limits of action, but on the other hand results in new legislative possibilities.

Jan Kolasa

The legal character of a unilateral state act

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- II. Conditions of validity of the act
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 - 2. The lawful subject and purpose of the act
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I. Introduction

Among the various more or less informal, or implied sources of international law, the unilateral state act is a peculiar one. It has appeared in international practice for many years, for instance in the form of recognition of a state or government; however the science of international law was not very keen on exploring this phenomenon. Indeed, it was noticed by Grotius or Pufendorf, however the one who examined the matter in more detail was D. Anzilotti in the 1920s.¹

It was only with the 1974 ICJ judgment on nuclear experiments conducted by France in the South Pacific that the unilateral state act was introduced into the system of international law. The court in that ruling stated with the full force of its authority that a unilateral declaration of a state may exert legal effects in the field of international law. From that moment, international law, with very few exceptions, has shared the dictum of the Court. This judgment as well as the position of the International Law Commission (ILC) on the codification of unilateral states is a central point of reference in the following considerations.

Despite widespread acceptance of unilateral state acts as a source of international obligations for the performer of such an act, doubts remain about the very substance of its legal nature. The lack of a widely accepted definition, and worse yet, many of the known and cited state acts recognized by some internationalists as unilateral acts in the strict sense, by others are treated as established in the negotiating process. An example commonly referred to in the scholarly literature is the so-called Ihlen declaration; this is considered by the Court to be the standard unilateral state act, while the ILC presents it as the result of negotiations between the governments of Norway and Denmark. The rationality of the very basis of the division of unilateral state acts into acts related to international agreements and autonomous acts having legal effects alone, without any connection with other international instruments, is ruled out. And the variety of unilateral state acts seems almost unmanageable, as can be attested to by certain failed attempts at codification undertaken in this matter by ILC.

Lastly, the basic finding of the Court that the unilateral state act can be a source of binding commitments only for its author is becoming increasingly questionable. There are serious arguments that a unilateral state act can, in certain circumstances, become a source of international law and not just a source of international obligations for its creator. V.-D. Degan in his work on sources of international law came to the conclusion that it was difficult to find another branch of international law in which doctrinal con-

¹ See. e.g. V.-D. Degan, *Unilateral Act as a Source of Particular International Law*, "The Finish Yearbook of International Law", Vol. 5 (1994), pp. 150-152 and 156-159, or J.-D. Sicault, *Du caractère obligatoire des engagements unilatéraux en droit international public*, "Revue Générale du Droit International Public" (RGDIP), Tome 83/1979/3, pp. 636-637.

cepts would remain for so long a period in such sharp contradiction with international relations and practice as in the case of unilateral state acts².

In this concise overview of various opinions expressed in relation to the aforementioned issue, the author seeks to bring out and illustrate the distinctive, peculiar characteristics of the binding unilateral state act itself, to indicate the basis for its binding force and to draw attention to the possibility of an autonomous – and in some cases even non-autonomous – unilateral act taking on the character of a source of international law, and not just the source of international obligations. Our undertaking certainly does not fully elaborate these issues, but it can bring us closer to a possible solution. While in the general literature as well as in this study various kinds of manifestations of the will of the state are evoked in the form of a unilateral act, the more general findings presented refer, in fact, to only a few of them, such as promise, renouncement, notification and recognition. This narrowing of the findings refers in particular to the considerations contained in *Part IV* and in *General Conclusions*.

II. Conditions of validity of the act

The question of the validity of a unilateral state act is essential for establishing a credible basis for defining such an act of law. Naturally, in the definition it is the most general, basic criterion separating the unilateral state act from other acts and giving it its own distinctive features.

Both jurisdiction and doctrine quite consistently indicate that for the legal validity of a unilateral state the following conditions must be met:

- it must come from a state, more specifically from its competent authorities,
- its content and purpose cannot be contrary to international law,
- state intent must be expressed in a clear and unambiguous manner,
- in the form accessible to addressees³.

Krzysztof Skubiszewski captures the basic question of validity of a unilateral act in one general statement: „Every autonomous act of the state, in order to be valid, must conform to the fundamental (substantial) norms of international law⁴. In other words, it must be recognized by the system of international law as binding, as being part of this system.”

² V.-D. Degan, *Sources of International Law*, The Hague 1997, p. 253.

³ See. e.g., ICJ, Reports 1974, Judgment (*Australia v. France*), p. 18, par. 43. Further quoted without indicating the parties to the dispute. C. Goodman, *Acta sunt servanda? A Regime for the Unilateral Acts of States at International Law* A paper presented at the 2005 ANSZIL Conference, p. 6, or J.-D. Sicault, *op. cit.*, p. 656-661. P. Saganek presents the case somewhat differently, *Akty jednostronne państw w prawie międzynarodowym*, Warszawa 2010, pp. 62-63.

⁴ K. Skubiszewski, *Unilateral Acts of States*, [in:] M. Bedjaoui, (ed.), *International Law: Achievements and Prospects*, Paris 1991, p. 230.

1. Derivation from the competent authorities of the state

Like other unilateral acts, both doctrine and ILC seek inspiration in this regard in the Convention on the Law of Treaties. Art. 6 of said convention holds that each state has the capacity to enter into treaties, that is, to incur international obligations. It is considered that this provision could therefore also be applied directly to the unilateral act of a state⁵.

Inspired by Article 6 of the Convention on the Law of Treaties is the draft of Art. 3 on unilateral acts, which in the second report prepared by the ILC's Special Rapporteur reads as follows: „Each State has the capacity to perform unilateral acts.” The fundamental condition for the validity of such an act is the possibility of attributing it to a particular state. One should also consider the two-level legal basis of a unilateral state act. On the one hand, the procedure for adopting a unilateral state act is governed by national law, while, on the other hand, the validity of the legal effects of such an act is subject to the rigors of international law⁶.

The next ILC report upheld the previous findings. However, a detailed analysis has been made of the issue of statements made by heads of state delegations at international conferences. Attention was paid to the great variety of such statements and the accompanying very different intentions and contents. It was agreed in the conclusion that an international conference declaration can only be binding if it is the intention of the state on whose behalf it is submitted. At the same time, it has been observed that the scope of the persons making such unilateral statements on behalf of their country is in practice broadened in comparison with the findings of the Convention on the Law of Treaties. This was reflected in the new draft of Art. 3 entitled „Persons authorized to formulate acts on behalf of the state.” In paragraph 1, only head of state, head of government and minister of foreign affairs were mentioned. Paragraph 2 added that, in addition to persons deemed to be authorized to act on behalf of the state, in the practice of states the authorization may also be derived from „other circumstances in which their intention was to recognize a person as authorized to act on behalf of that State for a particular purpose”⁷. Finally, the results of the Commission's deliberations and the findings have been included in point 4 of the *Guiding Principles*:

A unilateral declaration binds the state at an international level only if it is made by an *authority* with competence in that regard. The heads of state, heads of government and ministers of foreign affairs are competent to formulate such declarations. Other persons representing the

⁵ See. e.g. V.R. Cedeño and M.I.T. Cazorla, *Unilateral Acts in International Law*, in: *Max Planck Encyclopedia of Public International Law, Heidelberg 2011*, p. 3, ILC, 2nd Report 1999, pp. 11-13, par. 60-70, ILC, 3rd Report 2000, pp. 12-13, par. 15-27, or ILC, *Guiding Principles applicable to unilateral declaration of states, with commentaries thereto*, 2006 (cited further as *Guiding Principles*) Text in: Yearbook of the International Law Commission, 2006, vol. II, part II, p. 372.

⁶ ILC, 2nd Report 1999, pp. 12-13, par. 66-70.

⁷ ILC, 3rd Report 2000, pp. 14-17, par. 93-115.

state in specific areas may be authorized to commit it by means of their declarations in areas within their competence⁸.

In the commentary on the draft of this article, it was stated that its content was based on „consistent practice” of both the PCIJ and the current ICJ, on unilateral acts, and the competence of state bodies to represent and commit the state at international level⁹. It has also been added that the practice of states shows that unilateral declarations creating legal obligations are quite often formulated by the authorities of such states or the government or foreign minister, without the need to invoke their powers to bind the state in the field of international law¹⁰. In the judgment on the French nuclear tests, the Court included, among others, a declaration by the French Minister of Defense as a statement on behalf of the Government¹¹.

The Court spoke in its 2006 judgment in *Congo v. Rwanda* (§ 46) on those „other persons” making declarations on behalf of the state. It stated that in the increasing intensity of modern international relations, people representing the state in specific areas may be authorized to commit it if their statements are made „concerning matters within their function (*purview*)”. This may be the case with *holders of technical ministerial portfolios* and even *certain officials*¹².

The practice in this regard is somewhat complicated¹³. K. Skubiszewski believes, not without reason, that the situation is clear when a representative of the state receives a clear mandate to take a specific legal act on behalf of the state. However, as he observes, in practice it happens rarely. Then we must look for support in general international law¹⁴.

The issue of lack of or exceeding authority by the author of the unilateral act was considered by the International Law Commission. It was believed that due to the special nature of a unilateral act, a state could express recognition of the act affected by such a defect. This, however, must be done in an explicit manner. In the third report, there was even a draft of the relevant article thus formulated: „A unilateral act formulated by an unauthorized person (...) is deprived of legal power unless it is expressly confirmed by the state.” This article was included in the draft of the *Guidelines*¹⁵, but was not included in the final version.

⁸ *Guiding Principles*, Principle 4.

⁹ *Ibidem*, p. 372-374.

¹⁰ *Ibidem*, p. 373.

¹¹ ICJ, Reports 1974, Judgment, p. 17, par. 38, 40.

¹² ICJ, Reports 2006, Judgement, p. 347, par. 46.

¹³ See for example, K. Zemanek, *Unilateral Legal Acts Revisited*, [in:] K. Wellens (ed.), *International Law: Theory and Practice, Essays in Honor of Eric Suy*, The Hague, 1998, pp. 213-217.

¹⁴ K. Skubiszewski, *op. cit.*, p. 230.

¹⁵ ILC, 9th Report 2006, as Rule 4, p. 2.

Both the Commission and doctrine were well-aware of two important cases of transgression of competence (in the light of national law) of state representatives to make commitments through unilateral action. The declaration of the King of Jordan in the *West Bank* case was considered to have been taken *ultra vires* in light of the Constitution of that Kingdom. Next, however, the validity of this act was confirmed by an appropriate act of domestic law. The second case was the declaration by the Colombian Foreign Minister on Venezuelan sovereignty over the Los Monjes archipelago. Although the Minister clearly exceeded his powers in this matter, the Colombian authorities did not question the validity of his statement in the international arena¹⁶. This may demonstrate that neither in theory nor in the practice of states is the question of the validity of a unilateral act at the level of international law bound up with its conformity with the law of the country in question. The two referenced cases of unilateral acts incompatible with national law had their impact at the international level before they were validated by national law. In the literature, however, it is arguable that the ICJ showed too much flexibility in recognizing the French Minister of Defense's statement as binding on France. Such recognition can be rated as premature, *rapid*.¹⁷

In the context of the issue of unilateral acts there is also mention of the law of armed conflict, which empowers military commanders to take certain acts in their dealings with their opponents. One can also raise the issue of the so-called *temporary international persons*, combatants (*belligerents*) and *insurgents* fighting for statehood or power in the state. It is known that the so-called temporary or transitional authorities do not have full powers, which are reserved only for sovereign states. Their international subjectivity is therefore dependent on recognition by other states. This kind of recognition is constitutive. The state granting recognition to the liberation movement or the fighting side may, according to their own will, recognize their unilateral acts if they are within the scope of their authority¹⁸.

It can therefore generally be stated that both theory and practice in this matter, with respect to unilateral acts of states, do not differ from the practice or theory of international agreements. In both cases, the same principle applies to the validity of a legal act.

2. The lawful subject and purpose of the act

Internationalists' opinion on the requirement of compliance of a unilateral state act with international law is maintained rather in the sphere of general statements and indications. C. Goodman, for example, argues that a given unilateral act must be lawful in *nature*.

¹⁶ See *Guiding Principles*, pp. 373-374.

¹⁷ See e.g. J.D. Sicault, *op. cit.*, p. 660.

¹⁸ V.-D. Degan, *Unilateral Act...*, p. 174.

It must have a proper purpose, that is, be possible to fulfil and not be forbidden by law. She underlines that the fundamental principle of the nullity of an unlawful legal act (*ius cogens*) also applies to unilateral acts¹⁹. V.-D. Degan also briefly states that the general requirements for the validity of unilateral acts are essentially the same as the validity of the treaties, and so: „their content cannot be unlawful by law.” This means that it must be “*materially possible* and not forbidden by peremptory norms of general international law”²⁰. Therefore, these authors limit the nullity of the unilateral state act to a situation when it violates norms of international law which are absolutely binding. This is essentially the prevailing view in the doctrine.

The ILC followed the general thought of doctrine in formulating point 8 of its *Guidelines*. It states: „A unilateral declaration which is in conflict with a peremptory norm of general international law is void”²¹. The difference between this and the views of doctrine in principle boils down to the association of unilateral validity of an act to the declaration of a state. As in the doctrine, such a requirement of validity was inspired by the Commission in Art. 53 of the Convention on the Law of Treaties²². This position of the doctrine and the Commission also complies with international practice and ICJ jurisprudence. The Court’s ruling on armed conflict in Congolese territory (*Congo v. Rwanda*) provided for the possibility of recognizing Rwanda’s unilateral declaration as invalid in case of its possible non-compliance with a *ius cogens* norm of international law²³.

Igor I. Lukashuk did not concur with this position of the majority of the Commission’s members. He tried to convince the Commission that a state could not employ a unilateral act to not only work around universally binding norms of international law, but could also not violate relatively binding norms in that way. According to this member of the Commission, a departure from the latter is possible, but only in relations with other countries and with mutual consent. Therefore, a unilateral act incompatible „with any norm of universal international law must be declared invalid”. That is, the state in its unilateral act cannot depart in its relations with other states from any general norm of the applicable international law. To considerable surprise, he adds that unilateral acts „aiming at making changes to existing international law – such as the Truman proclamation – *represent a separate problem*”, which should be further considered²⁴. Thus, the incompatibility of a unilateral state act with the applicable international law can be interpreted in various ways.

¹⁹ C. Goodman, *op. cit.*, p. 13 and 26.

²⁰ V.-D. Degan, *Unilateral Act...*, pp. 187-188.

²¹ *Guiding Principles*, p. 378, Principle 8.

²² *Ibidem*, p. 378.

²³ ICJ Reports, 2002, par. 69, *Guiding Principles*, p. 379.

²⁴ Yearbook of the International Law Commission, 1999, vol. I, p. 189, par. 52, (hereinafter referred to as YILC), P. Saganek, *op. cit.*, p. 128.

Interesting in this matter is the moderate opinion of K. Skubiszewski formulated in his article about the requirements of the validity of a unilateral act. He states that any, and therefore also unilateral, act of a state must be in conformity with the fundamental (*substantial*) principles of international law under pain of invalidity. Such a view on the validity of unilateral acts stemmed from the existing difference between a negotiated treaty and a unilateral autonomous act of the state. This difference lies in the fact that two or more states may *deviate* in their mutual relations even from the „general international law”, agreeing to depart in respect of specific legal norms, with the exception of *ius cogens*. No similar departure from the substantive norms of international law can be performed by a state or even a group of states in a unilateral legal act, under pain of nullity of such an act. The same also applies to the relationship between treaties and unilateral acts of states. The latter must comply with their treaty obligations²⁵. There seems to be a clear tendency towards developing a hierarchy of norms of international law.

From the logic presented by K. Skubiszewski it follows that there is an essential criterion of narrowing the content and purpose of the unilateral state act, as compared to the generally shared position of scholars and the ILC expressed in the proposed Art. 8 of the *Guiding principles* and the previously mentioned ICJ position. This limitation is undoubtedly the result of a significant difference in the legal nature and role of the treaty in international law as compared to the role of the unilateral state act. It is the result of the legal logical interpretation of unilateral acts in the context of the entire contemporary system of international law. This interpretation is also in line with the emerging hierarchy of norms of this law, while maintaining its consistency and compatibility with the direction of its development.

On the other hand, the extreme view of I.I. Lukashuk that any departure of a unilateral act from any norm of international law makes it *ab initio* invalid, is too rigorous. P. Saganek is right in stating that any departure from *ius dispositivum* – whether *in plus* or *in minus* – requires the consent of a third country not to be taken into account. He believes that a unilateral act of departing from *iuris dispositivi* is binding. It is, however, ineffective to the extent that it tries to impose obligations on another country. It is effective in giving rights²⁶.

It should be added that the ILC's investigation into the ultimately agreed position on the nullity of a unilateral state act contradicting peremptory norms of international law did not go off without a hitch. This particularly applies the unilateral act of a state

²⁵ K. Skubiszewski, *op. cit.*, p. 230.

²⁶ P. Saganek, *op. cit.*, p. 130. This position was taken by the chairman of the ILC – see YILC, 1999, vol. I, p. 54.

which, despite its obvious incompatibility with the general norms of international law in force, is tolerated in the process of the formation of customary law.

As early as during the second and third sessions of the Commission devoted to unilateral acts, it was proposed that the principle of the law of treaties relating to their invalidity, when contrary to the principles of *iuris cogentis*, “should be applied with greater flexibility in the case of unilateral state acts”. One of the members of the Commission even stated that he “would not agree that a unilateral act cannot depart from customary law”, so from the general principles of international law. He acknowledges, however, that such an act incompatible with universal international law could not have legal effects unless it was accepted by its addressees. He explained that states can derogate from the norms of universal international law by mutual agreement²⁷. However, as it is known, such an act unilaterally accepted by other states would lose its unilateral character. It would become an international agreement subject to the regime of the law of treaties.

The Commission’s Special Rapporteur, V. Cedeño, referred in the context of the nullity of a unilateral act contrary to international law to the 1945 proclamation by President Truman mentioned earlier by Lukashuk. This proclamation broadly extended the scope of US jurisdiction to its continental shelf. The Rapporteur pointed out to the Commission that it is worth considering this crucial example of practice. In his view, this act “is an important milestone in the development of the international law of the sea”. And although it was not in line with the earlier norms of the law of the sea, it played a decisive role in formulating a legal norm when it was accepted by states and then codified in the new Convention of the Law of the Sea. Hence, the Rapporteur draws the following conclusion: it does not seem appropriate to include a norm indicating the nullity of a unilateral act, because of its non-compliance with the universal norm of international law. Indeed, such an act, contrary to the norm of universal international law, is not invalid if other interested or affected States *agree* that although it is not compatible with existing international law, it is “part of the process of originating a new customary standard, and it was neither rejected nor protested by other states”²⁸.

In this interesting but somewhat brief report by the Commission’s Rapporteur on the subject of a unilateral act that is contrary to a universal norm of international law, the following statement is particularly significant.

A unilateral act of a state incompatible with a universal norm of international law is invalid and will not have legal effects unless the states *agree* to it in some way or other. However, such recognition may result simply from a lack of protest or rejection. This could mean that silent tolerance is enough for it to become meaningful. The presentation

²⁷ ILC, 3rd Report 2000, p. 20, par. 152 and p. 22, par. 163.

²⁸ *Ibidem*, p. 22, par. 164-166.

of the role of a unilateral act of a state incompatible with universal international law in the process of establishing a new norm of international law should not constitute at present a particular novelty (*novum*). As V.-D. Degan admits, “customary international law has developed in certain important areas, mainly through unilateral practice and state acts. This applies in particular to areas of the law of the sea such as fishing, neutrality, or customs zones on the waters adjoining the land”²⁹. Contemporary confirmation of the importance of such unilateral acts of government can be found in the dispute over the Norwegian Decrees of 1812 and 1869 or in the UK-Icelandic fisheries dispute³⁰.

It is difficult not to agree with the Rapporteur of the Commission, V.R. Cedeño, who tried to convince its members that even a unilateral act incompatible with the universal norm of international law could prove *valid* unless it was opposed or rejected by other states. This position finds obvious confirmation in international practice and does not seem to contradict the spirit of international law. This system is derived and based on the sovereign will of states. By not protesting, they voluntarily agree to a new legal regulation. Such a regulation, however, must emerge not from an unlawful act, but rather from a period of tolerated practice initiated by such act and must take the form of a customary norm.

3. Autonomy and unilateralism

A. Autonomy

The issue of autonomy has already appeared in the first report of the ILC rapporteur debating the special features of a unilateral state act. It was acknowledged that the autonomy of a unilateral act is an essential criterion for this type of act, and it was emphasized that such a view is shared by most authors³¹. Additionally, it was noted that a stand-alone unilateral state act should be examined from two different points of view. Firstly, it should be understood in terms of its relation to other legal acts or other statements of will, whether prior, simultaneous or subsequent. Secondly, the autonomy of the will must be interpreted in the context of the commitment it creates³².

Despite the recognition of such an important role of autonomy in formulating the definition of a unilateral state act, the third report of the Special Rapporteur already expressed doubts as to whether this determinant should be included in the definition of a unilateral act. The problem was explored further. It was emphasized that the criterion of the autonomy of a unilateral act should not be understood too broadly. Although

²⁹ V.-D. Degan, *Unilateral Act...*, p. 149-150.

³⁰ See, e.g., *Ibidem*, p. 149, K. Wolfke, *Custom in Present International Law*, 2nd ed., Dordrecht 1993, p. 149, or P. Saganek, *op. cit.*, p. 35.

³¹ ILC, 1st Report, 1998, p. 26, paragraph 137.

³² *Ibidem*, par. 136-139.

a piece of legislation may indeed be somehow related to prior norms, in particular the norms of universal international law, an overly broad view of such a relationship cannot be a determinant in establishing the autonomy of a unilateral act. This is rather related to the use of this criterion in the exclusion of acts associated with other legal regimes, with acts related to the law of treaties³³.

The second report referred to the discussion that took place in the Sixth Committee of the UN General Assembly, where autonomy was presented in the sense that a unilateral, autonomous act could have legal effects in the field of international law without the need for acceptance by other states or some other way of reacting to them. This observation was considered very important in arriving at the definition of a unilateral act³⁴. The opinions varied on the issue of the inclusion of autonomy in the definition of a unilateral act³⁵.

A different view was shared by the working group set up in 1999 within the Commission. Some of its members were of the opinion that the notion of autonomy of a unilateral act is not important enough to be included in the text of the definition of a unilateral state act. It has a rather secondary meaning, so it should be omitted in formulating the definition. It was argued that if a piece of legislation is unilateral, then there is a presumption that its legitimacy is already there, and that is sufficient³⁶. However, the problem was further studied.

Finally, the term “autonomy” was not included in the definition of a unilateral act, assuming that these acts were independent in the sense in which the ICJ stated in its ruling on French nuclear tests. They are independent of other regimes and “can have legal consequences regardless of whether they are accepted by their addressees, which reflects one form of autonomy...”³⁷. Autonomy is therefore the criterion of a unilateral act that produces legal consequences for itself without linking it with other acts or other entities.

Naturally, the Commission debated the issue of the autonomy of a unilateral act based on relevant literature, in which there is a quite consistent view that the autonomy of a unilateral act signifies its ability to achieve its intended effect without needing to be associated with any other manifestation of will³⁸.

This issue is introduced exceedingly well by E. Suy, who summarises matters in three points. Firstly, the autonomy of a unilateral act means that it produces legal consequences by itself and not as an element of a negotiated process. Secondly, the auton-

³³ ILC, 3rd report, 2000, p.11, par. 60 and 61.

³⁴ ILC, 2nd Report, 1999, pp. 9-10, par. 47.

³⁵ ILC, 3rd Report, 2000, p. 11, par. 63 and 64.

³⁶ *Ibidem*.

³⁷ *Ibidem*, 5th Report, p.13, par. 53-54 and p. 12, par. 52

³⁸ See. e.g. G. Venturini, *La porte et les effets juridiques des attitudes et des actes unilatéraux des états*, RCADI, 1964, II, t. 112, pp. 367, 400, C. Goodman, *op. cit.*, p. 17, or E. Suy, *Les actes juridiques unilatéraux en droit international public*, Paris, 1962, p. 11

my of a unilateral act means that it produces legal effects without the need for a similar act by another state or states. Thirdly, a unilateral act which is part of a negotiating process cannot be considered autonomous if the legal effects are the result of treaty provisions arising either from or without interoperability with other unilateral acts. As an example, E. Suy indicates ratification, accession, reservation, or denunciation of the treaty. These are not unilateral acts in the strict sense. They are defined in the scholarly literature as *adjunctive unilateral acts*³⁹.

Karl Zemanek presents the problem as follows: “Adjunctive acts are part of the process of contracting or creating custom and should be assessed in the context of these processes.” On the other hand, unilateral autonomous acts are “*communications under, not about, rules* of the existing legal order and are intended to confirm or to change the legal position of the state being authored by applying the relevant norms of international law”⁴⁰. The strong autonomy of the unilateral act is emphasized by J. Charpentier. It is precisely because of its failure to fulfill these conditions that it excludes from any involvement acts aimed at the creation or revision of the conventions of states such as ratification, accession or reservation. For example, simple accession to a treaty that is formally a unilateral act is intended to involve its author in a conventional way. This author emphasizes that the characteristic feature of unilateral autonomous act is *un engagement sans contrepartie*⁴¹.

In short, it can be said that the autonomy of a unilateral act lies in the fact that the act itself produces legal effects and thus is therefore an autonomous source.

B. Unilateralism

In connection with the definition of a unilateral act, the issue of its unilateral nature was also considered within the Commission. Reference was made in this regard to the literature in which there was no significant difference between the authors presenting unilateralism as the “expression of will formulated by the subject matter of the international legal order with a view to producing legal effects at international level.” It was found that for some authors ‘unilateral acts are an expression of the will of a single legal entity, and for others unilateral act derives from a *single expression* of will and creates standards applicable to other subjects not taking part in the formulation of such act⁴².

³⁹ E. Suy, *The Unilateral Acts of the United States of America, as a Source of International Law: Some New Thoughts and Frustrations*, [in:] *Droit du pouvoir, pouvoir du droit, Mélanges offerts à Jean Salmon*, Bruxelles 2007, pp. 632-633.

⁴⁰ K. Zemanek, *The Legal Foundations of the International System*, RCADI, vol. 266 (1997), pp. 193-195, E. Suy, *Unilateral Acts ...*, pp. 633-634.

⁴¹ J. Charpentier, *Engagements unilatéraux et engagements conventionnels: Différences et convergences*, [in:] J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski*, The Hague 1996, pp. 371-373. E. Suy, *Les actes ...*, p. 126.

⁴² ILC, 5th Report, 2002, pp. 12-13, par. 57.

Eric Suy's version of the definition of the nature of an unilateral act is as follows:

Unilateral legal acts are declarations of will derived from one subject of international law aiming at producing legal effects. The characteristic feature of a legal unilateral act is that it contains a declaration of will of only one subject of international law and this declaration produces effects without the participation of other subjects of international law⁴³.

Camille Goodman clarifies this issue in the sense that the unilaterality of a legislative act is above all not the number of its authors, but their position in relation to the legal norms established in that act. This shows that while in bi – or multilateral treaties their creators are on par with all their subjects, in the unilateral commitment its creators become *promissors* of commitments made in favour of the beneficiaries of this standard. As an example, a joint declaration issued by the presidents of Venezuela and Mexico on August 3, 1980, which establishes a program of energy cooperation for the countries of Central America and the Caribbean, includes the acceptance of legal obligations by the two declaring states in favor of non-participating third countries in formulating this declaration⁴⁴. The benefits of this act are derived only by its recipients. There is no reciprocity.

Jean-Didier Sicault confirms that in the text of the treaty there will always be an idea of mutual benefit sought by its parties. The opposite is the case when considering a unilateral obligation. There is no reciprocal benefit. The objective, however, is essential. It is necessary to go beyond the strict text of the act in which the author's obligation is based in order to understand its true objective. Then, it will turn out that the unilateral commitment contains only an obligation for its author or authors. There will be no indication of mutual benefit to the author of the commitment, which would be obvious if the text were negotiated⁴⁵.

It may be, however, that such a suggestion of looking beyond the text of a unilateral act or of the circumstances in which it was undertaken may not necessarily lead to the same result. Based on the example of the Ihlen's declaration, Goodman claims that if we take such a broad perspective on the formal text of the very declaration, it will often be possible to find other texts that can be linked to the one at hand. Then *the concept of external reciprocity* can be applied so that we may be able to perceive an agreement or bilateral character in almost every unilateral commitment⁴⁶. Similar extremism would be seen in the multilateral treaties of a series of unilateral acts expressing consent to com-

⁴³ E. Suy, *Unilateral Acts ...*, p. 634. In his earlier work, he presented this in three points. The unilateralism of an international legal act depends on three conditions: 1) origin from one legal entity; 2) cannot be dependent on another legal act in their consequences and 3) cannot create obligations for other states; *id.*, *Les actes ...*, p. 44. There is no mention of commitments in the new definition.

⁴⁴ C. Goodman, *op. cit.*, p. 7; E. Suy, *Les actes ...*, p. 126.

⁴⁵ J.-D. Sicault, *op. cit.*, p. 643.

⁴⁶ C. Goodman, *op. cit.*, pp. 7-8. The author invokes the publication of M. Virally, *Le principe de réciprocité dans le droit international contemporain*, 122 RCADI 46 (1967 III) and J.-D. Sicault, *op. cit.*, pp. 29 and 643.

mitments, such as signature, ratification or accession⁴⁷. The author rightly recommends preserving sensible moderation in the evaluation of a unilateral act in connection with its too-broadly defined context. If a given legal measure can itself produce legal effects, it should not be excluded from the category of autonomous, unilateral acts⁴⁸.

It is true that an international agreement cannot be understood as a coincidence of various unilateral acts. But can a one-sided act, authored by two or more states, not raise doubts about its unilateral nature? Is it actually not too similar to agreements to the benefit of third countries? After all, these states must negotiate their obligations with the addressees of their agreement. On the other hand, it may be assumed that although the content of the act was negotiated, it was without its beneficiaries and was issued as a unilateral act.

4. Intention (will) of the state

The question of the legal nature and role of the state's intentions in its unilateral act was laid out by the ICJ in a rather decisive tone in the ruling on French nuclear tests. However, the ICJ did not derive its general findings directly from statements by representatives of the French government. The authorities did quite the opposite. The declarations made by the French sought to clarify and justify their legal character in the context of contemporary legal knowledge in this area. It was stated explicitly: "Before considering whether the declarations made by the French authorities correspond to the subject matter of the [Australian – J.K.] complaint ... first, it is necessary to establish the status and content of these declarations at international level"⁴⁹. And then it was added: "There is a well-established view that declarations made through unilateral acts concerning legal or factual situations may create legal obligations as a result"⁵⁰. In such a categorical and unequivocal statement of the Court one can sense a certain hint of exaggeration. Before the judgment was handed down in 1974 it was difficult to find in the science and practice of international law a "well-defined view" of the subject. Earlier, scholars were not much interested in this issue and had rather divergent views. On the other hand, there was quite a consistent view indicating that after the 1974 ruling of the Court on that subject, the science was revived⁵¹.

The Court declares under what conditions a unilateral intention and state declaration may become binding:

⁴⁷ *Ibidem*, p.8. The author cites the publication quoted above: K. Zemanek, *Unilateral...*, pp. 210-211 and A.P. Rubin, *The International Legal Effects of Unilateral Declarations*, 71 AJIL, I, 1977, p. 8.

⁴⁸ C. Goodman, *op. cit.*, p. 8, similarly J.-D. Sicault, *op. cit.*, p. 645, or G. Venturini, *op. cit.*, p. 400.

⁴⁹ ICJ, Reports 1974, Judgement, p. 18, par. 42.

⁵⁰ *Ibidem*, p.18, par. 43.

⁵¹ See. P. P. Rubin, *op. cit.*, p. 7, 22, and especially 24, H. Thirlway, *The Sources of International Law*, Oxford 2014, pp. 44-48.

When the intention of the state making the declaration is binding in accordance with its terms, such **intent shall give that declaration the character of a legal obligation** [emphasis J.K.] in the sense that the state becomes henceforth obliged to act legally from the declaration made⁵².

The Court decided to make this rather categorical opinion even more precise. Namely, as noted by P. Saganek, in its ruling on the case of *Burkin v. Mali* the Court quoted the above-mentioned *passus* of its 1974 judgment, adding at the outset the important word “only”⁵³. Thus, according to the Court, “only” the relevant intent of the state can give its unilateral declaration the power of a binding obligation.

Not all unilateral acts, however, contain a clear and unambiguous intent on this issue. Hence, the legal nature of the state’s intention expressed in its declaration “must be determined by the interpretation of the act”⁵⁴. According to the Court, such an interpretation of intention should be restrictive, that is to say, primarily to assess the subjective intention itself, taken by the state without a negotiating context. Nevertheless, the Court considers it necessary to include in this restrictive interpretation of the state’s intentions the circumstances that accompanied its taking, and the effects it may have on international relations. In the case of the French Government’s declarations, the Court stated that they were not *in vacuo*. They concerned a specific important issue and were publicly announced, even *erga omnes*. Thus, the nature and legal effects of these declarations “must be assessed in the general framework of security of international relations, taking into account the sphere of trust and credibility of such crucial factors in relations between states”⁵⁵.

It was not until the assessment of the legal validity of the French Government’s subjective intentions, taking into account the circumstances in which this intention was manifested, that allowed the Court to recognize the declarations made by the French Government as credible, as binding that government in the sphere of international law. The critical role attributed by the Court to the circumstances accompanying intentions seems to indicate their importance in determining the legal character of the unilateral act. This happens, however, only when the intention expressed by the state is not sufficiently clear and raises doubts as to its purpose and legal nature.

The doctrine of international law, of course, also raises the intention of the state as a constitutive criterion of a binding unilateral act. Some authors simply end up repeating the Court’s findings on this matter, while others seek to apply certain conditions with respect to the state’s intentions without altering the substance of the Court’s findings. It is therefore emphasized that the intention of the state to commit itself must be stated

⁵² ICJ, Reports 1974, Judgement, p. 18, par. 43.

⁵³ ICJ, Reports 1986, p. 573, par. 39, P. Saganek, *op. cit.*, p. 365-366.

⁵⁴ ICJ, Reports 1974, Judgement, p. 18, par. 44.

⁵⁵ *Ibidem*, p. 20, par. 50 and 51.

in a pronounced way and be “specific in its content”, devoid of defects and of an unconditional and definitive nature. The last prerequisite is generally understood in a sense that if the right is reserved by a country to withdraw their declaration after some time, then it can be concluded that it has not committed a legally binding obligation at all⁵⁶.

As mentioned before, there seems to be a common view claiming that since the power of a unilateral state act arises independently of the will of the addressee, then the origin of such an act derives from the voluntary attitude of its founder. It is voluntarism that results in detachment from the will of the possible recipient. On the other hand, it is stressed that the conduct of such a state is, nevertheless, subject to assessment by other entities, or at least observable by them. Hence, the question arises whether the element of will suffices to fully determine the legal effect of a unilateral state act. It may seem difficult at times to know whether the legal effect of a declaration of a unilateral state is a direct consequence of a manifested intention of the act’s formulator, or whether the expectation of the other states concerned is fulfilled⁵⁷.

By sharing the essential findings of the Court on the role of state intentions in a unilateral act, however, various doubts arise as to the proper understanding of the manifested intention. There is a certain dose of anxiety in this regard, especially when it comes to the need to interpret the declared intent of the state, which is almost in every case individual. The question arises on what grounds one should consider it – as rather a declared or true, viable, intention. J.-D. Sicault refers in this regard to the Convention on the Law of Treaties. He notes that the Convention speaks quite extensively in favour of the system of declared will, albeit with clear reference to the context, purpose of the treaty and practice. He argues that such a view also exists in international jurisdiction, where a decisive preference is given to the will as declared. It is not, however, ruled out that, if necessary, the true intention of the parties to the treaty should be examined⁵⁸.

The author aptly notes that the difference is significant in the interpretation of the intentions of the state expressed in a unilateral act and in a bilateral or multilateral treaty. The intention expressed in the treaty is the result, very pendulous at times, of a negotiation process. This can facilitate determination of the negotiators’ intentions. In contrast, the difficulty in pursuing the proper intention expressed in a unilateral act lies in the fact that the actual will can only be known to the author of the act in question. If they do not express their will clearly and unequivocally in a written or oral statement, neither the

⁵⁶ See. e.g. V.-D. Degan, *Unilateral Act*, op. cit., pp. 171-172, W. Fiedler, *Unilateral Acts in International Law*, [in:] R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. 4, North-Holland, 2000, vol. 4, p. 1021, J. Charpentier, op. cit., p. 373-375.

⁵⁷ See. e.g. A. Kozłowski, *Estoppel jako ogólna zasada prawa międzynarodowego*, Wrocław 2009, pp. 71-72.

⁵⁸ J.-D. Sicault, op. cit., pp. 647-648.

addressee nor the interpreter can have any means to fully understand it. In this situation, the addressees of the unilateral act have to perforce rely on the will to be declared⁵⁹.

Given this, the fundamental difference in the interpretation of treaties and unilateral acts is emphasized, considering the particular role played by the acts ascribed to the circumstances accompanying the manifestation of the will of the state. It has already been accepted in the literature that, in relation to the interpretation of a unilateral act, the role of the context and the circumstances in which the State's intent has been declared must be considered to a large extent⁶⁰.

Christian Eckart's position on the will or manifestation of the will is to be drawn directly from the paragraph on the French Declaration, which reads: "The legal consequences of a unilateral act must be deduced *from the actual substance* of these declarations and the circumstances surrounding them." (ICJ, Reports 1974, p. 20-21, par. 51). In his view, this statement from the Court indicates that the only sensible approach to the validity (*value*) of a statement is to rely on the "declared intention", that is the "manifested will of the state." It would be very difficult to come up with a possible, hidden, current will that the state had at the time of making its declaration. No one can know what a person is, and even more so as a state as an abstract and complex legal entity *really and actually intended when making a statement*⁶¹.

In addition, according to Eckart, internal motives cannot play a greater role in the international law situation of stability and confidence in the declarations of a state. Such statements should therefore be judged according to their content and *at face value*. In the end, however, he believes, as well as others, that there may be special circumstances in which not only one can, but even the real intentions of the state must be sought by appropriate interpretation⁶².

Proponents of the will of the real author of the unilateral act, however, argue that since intent is a constitutive element of the obligation of a unilateral state, the text itself, that is, the declared will, cannot be taken as the expression of a real intention. In some cases, one cannot count only on the tone of the will expressed in a written or oral statement, that is the will as declared. On the other hand, they also agree that with a view to elementary legal security we should, or even must, rely on the declared will⁶³.

Krzysztof Skubiszewski states that for the validity of a unilateral act, the will of the state expressed in it must "be" a *true* will. He does not, however, indicate how to reach

⁵⁹ *Ibidem*, pp. 647-648.

⁶⁰ V. R. Cedano and M.I.T. Cazorla, *op. cit.*, p. 5.

⁶¹ Ch. Eckart, *Promises of States under International Law*, Oxford 2012, pp. 209-210.

⁶² *Ibidem*, P. 210-211. This author devotes much attention to the interpretation of the state declaration, *ibidem*, pp. 211-218.

⁶³ J.-D. Sicault, *op. cit.*, pp. 647-648.

it, how to determine it. He merely states that it cannot point to any possible future behaviour of a given state without stressing a binding obligation to act. He nevertheless draws attention to the fact that the intention of the state to undertake such a commitment may come not only from the content of the oral or written statement. It is equally possible to derive it from the aims, character, particularities or circumstances surrounding the creation of the statement. Also, the subsequent conduct of the state may indicate that it intended to commit itself in a certain way. State intentions can therefore be sought in various manifestations of its behavior. In any case, however, the intention must be clear and there can be no doubt in this matter. Otherwise it could not be considered binding⁶⁴. It is stressed that an impediment to the true and proper intent of the state also results in the absence, even in the general indication, of a particular form of unilateral act⁶⁵. J. Charpentier says that the only requirement specified by international law in this matter is to communicate that intention to its intended recipient⁶⁶.

The Commission also took into account that the intention expressed by the state was subjective. It is of a psychological nature. The law in this case is created by subjective positivism. However, they were of the opinion that the state's intention to be legally effective must be a real, consciously and fully understood will. Hence, it does not agree with the view expressed in the Sixth Committee of the United Nations General Assembly that a State may form a unilaterally binding legal act without understanding its intention (A/CN. 4/505, item 119). The Commission is of the opinion that the intention of the creator of the unilateral act is the foundation of this act and explains that, since we recognize the act "manifests and reflects the intent of the state", it must be undertaken with a full understanding of its lawmaking endeavour. Therefore, there is no visible hint of a unilateral act if the state does not understand that it takes on responsibility in the form of certain international obligations. A unilateral act formulated by the state without full awareness of its substance and its legal effects is, in the Commission's view, rather a behaviour or "attitude" which, although it may have legal effects, cannot be regarded as legally binding. An important element in the legal act is the "determination of the will" of the state⁶⁷.

Taking into account the position of the Court and of the scholarship, the Commission stated its findings in this regard as follows: "Declarations made publicly and manifesting the will to commit can ultimately create legal obligations"⁶⁸. So that cannot be the will itself as such, but it must be expressed publicly. Then it can only bind the legally

⁶⁴ K. Skubiszewski, *op. cit.*, p. 232.

⁶⁵ J. Charpentier, *op. cit.*, pp. 371-372, or V.-D. Degan, *Unilateral Act...*, p. 190.

⁶⁶ J. Charpentier, *op. cit.*, pp. 371-372.

⁶⁷ ILC, 3rd Report 2000, p. 7, par. 34.

⁶⁸ *Guiding Principles*, Principle 1.

concerned country. It must be determined and aware of legal consequences. It was confirmed in the 7th principle in its first sentence, which reads: “A unilateral declaration creates obligations for the state which formulates it only when it is expressed *in clear and specific terms*”. Therefore, the will of the state must be expressed in a convincing way, or at least in a way that can be interpreted by the act or state.

Sometimes it is not just the difficulty of reaching the real intentions of the state manifested in its broad and varied context. More or less categorically, the constitutiveness of the will of the state itself is questioned. This subjective intention of the state is attempted to be complemented by some additional elements that interact with it in creating a binding legal norm. This is to be shown in some way the trust of the addressee of the unilateral act, the display of some “reciprocity”, or, finally, the particular role attributed to the circumstances in which the act was taken. It is characteristic here to derive a new insight into the role of intent in a unilateral act of the very substance of the Court’s ruling on the French declarations. It gives rise to a legal notion that is not entirely or completely incompatible with the Court’s fundamental statement that the unilateral intention of the state binds the state at the time of its manifestation⁶⁹. So that it has a stand-alone, autonomous constitutive character.

The delicate relativisation of this *dictum* of the Court is already seen in C. Goodman’s view. It binds the various parts that make up the concept of unilateral act which the Court has invoked in its ruling. And on this basis, it proves that in a unilateral act the Court combines the subjective will of the state with the “objective standard”. This occurs when the Court itself states that “the decisive intent” is not the intention expressed in the French declarations, but the intention “derived from the good faith, the trust of other States concerned and the circumstances in which that declaration was made” (ICJ, Reports 1974, s. 253, paragraph 43). According to C. Goodman, in these words the Court introduced an “objective standard”, which made “the decisive intent not to directly derive from the French authorities, but derived precisely from the good faith, trust and circumstances of the French declarations”(ICJ, Reports 1974, Judgment, p. 14, paragraph 43)⁷⁰. The Court’s conclusions also claim that the intent of the State is only a condition of the validity of a unilateral act and is subject to the fundamental principle of good faith (ICJ, Reports 1974, Judgment, p. 19, paragraph 46).

Sergio Carbone is also of the opinion that, in fact, the Court’s ruling on the French Declaration (ICJ, Reports 1974, Judgment, p. 474, paragraph 1) shows that a unilateral obligation will not become binding only on the sole intention of the state. This can only happen on the basis of a set of circumstances accompanying such intentions. It is these

⁶⁹ ICJ, Reports 1974, Judgement, p. 18, par. 43.

⁷⁰ C. Goodman, *op. cit.*, pp. 14-15.

circumstances, together with the intent of the state that create legitimate expectations that the state making a promise will act in accordance with the conditions contained therein. As a consequence, thanks to them the legitimate expectation of the addressee of the unilateral act can arise that will cause its author to act accordingly⁷¹. R. Quadri states that, to support the binding force of a promise, many authors emphasize the need to protect the expectations of the recipient of the promise. Hence, it was concluded that even the authors who recognized the promise's binding force believed that, in order for the ruling to have that effect, it must be formulated with the addressee's participation⁷². In this way, however, they render promises similar to agreements.

Thomas M. Franck expressly disagrees with the position of the Court that a unilateral act binds its author already at the time of its formation. In his view, this would mean that law may be derived directly from intention itself, whether or not it was subsequently adopted by the addressee or addressees. The author pointed out to the Court a very radical departure from "earlier concepts of binding commitments", and in any case from what is understood by Anglo-Saxon lawyers. He remarks that in the Anglo-Saxon law, where the institution of unilateral act originated, "reliance ... may seal a promise as much as acceptance seals an offer"⁷³.

The author adds that the law-making intent of a unilateral state act cannot be determined solely by "reference to the speaker's state of mind". The "state of mind of the audience" must also be taken into account. Where a country clearly and unequivocally expresses its will in a unilateral undertaking, there is no need at all for interpretation of that intention. However, one should investigate whether other states interested in the manifested intention "can confidently assume that this declaration has made a commitment". He concludes: "We can rightly assume that a unilateral statement cannot be regarded as binding (*as law*) until there is an element of trust or reciprocity" from the addressee of the statement⁷⁴.

In this concept, a unilateral act not only does not bind from its announcement, but the recipient's trust in the unilateral act addressed to him grows to complicity with the intent of assigning the act with binding force. It only binds when the intent of the commitment is to find some sign of trust in it on the part of the addressee. In support of his view Franck refers to the common law, in which the trust of the addressee of a unilateral act constitutes a "necessary element" of its binding force. He also invokes Corbin's authority, who says in this regard: "It is now clear that informal promises can be challenged

⁷¹ S. Carbone, *Promise in International Law: A Confirmation of its Binding Force*, "Italian Yearbook of International Law", Vol. 1 (1975), pp. 168-169.

⁷² R. Quadri, *Cours général de droit international public*, RCADI, 1964 / III, t. 113, p. 370.

⁷³ T.M. Franck, *The Decision of the ICJ in the Nuclear Tests Cases*, 69 AJIL, 1975, p. 619.

⁷⁴ *Ibidem*, pp. 616-617.

based on the action taken in trusting”⁷⁵. This quote, however, indicates that the beneficiary can only claim their rights when they intend to use them or have already benefited from them. It is not a question of the binding force of the promise itself as such, but the protection of the effects it could cause after being used by the addressee.

Finally, Franck raises the question of whether the element of trust in the Anglo-Saxon sense is to be found in general in the ICJ decision taken on the French declaration. His response: “It seems not”. It would be easier to find such confidence on the part of Australia and New Zealand if they withdrew their complaint from the Court following its ruling in this case. In fact, both countries have done the opposite, maintaining the view that the French government’s declarations do not contain any legal obligation binding on that government. They still manifested “non-reliance on the French statements”. To break the stalemate the Court decided to formulate its own views on the meaning and legal value of the French declaration, and thereby recognized their legal validity. Franck therefore claims that as a result trust was given to French declarations not from their addressees, Australia and New Zealand, but “by most of the International Court.” Moreover, the author continues that it was precisely the Court, and not the states complaining against France, that is, the addressees, acted on the basis of confidence in these declarations, and departing from the jurisdiction in that matter, announced that the dispute has been completed⁷⁶. It seems that to some extent the Court’s activity grounded in trust in the French declarations could have been made easier by the fact that they were directed not to the states in dispute with France, but to the general collection of states, to the whole international community, *erga omnes*. The Court seemed to act on its behalf and not on behalf of the states complaining against France. One may have doubts whether it was competent to do so.

It seems that the role of trust in a unilateral act on the part of its addressee derived from the Court’s judgment is misleading. The legal power of the creator’s intentions are conflated with its effects. It is precisely the effects of a unilateral act that can only arise and acquire binding power when the act itself enters into force, and it enters into force when its recipient benefits in some real way. Only then will the legal consequences of this act become legally enforceable. The UN GA Sixth Committee expressed the view that autonomous acts cannot be effective in the legal sense unless they meet some form of reaction from the state concerned. An example of a unilateral declaration on continuity in the sphere of state succession was cited⁷⁷.

⁷⁵ *Ibidem*, p. 618.

⁷⁶ *Ibidem*, p. 618.

⁷⁷ *Topical summary of the debate in the Sixth Committee on the 2000 ILC Report*, ILC Report, 2000, A/CN.4/513, p. 45, par. 243. A. Kozłowski, *op. cit.*, p. 72.

Jean d'Aspremont proves that nothing can be more *loggerheads* in formal law-making than a criterion based on intentionality. This does not require the materialization of the intention in words or some material designation. Indeed, such a criterion ultimately lays down the identification of international legal acts as “a fickle and indiscernible psychological element”. In his view, it is necessary to distinguish between the two kinds of intentions contained in a legal act, both conventionally and unilaterally: the intention relating to the nature of the norm must be distinguished from the intention relating to the content and scope of that norm. For the sake of law, only *the intent to make law* is counted. The intent relating to content is irrelevant when determining the nature of the international legal act in which the norm is embodied. Intention as a criterion in lawmaking should be replaced, both in practice and in the science of law, by “a systematic use of written linguistic indicators” in the process of concluding treaties and other international instruments. This would facilitate a clearer distinction between what is and what is not the law. This is, however, a quite isolated view and beyond the scope of these general considerations. In any case, this author is right in that setting the legal nature of a unilateral act is a “profoundly speculative operation intended to reconstruct the will of the author” of the act⁷⁸.

5. Form of unilateral act

In the 1974 *French nuclear tests* case, the Court took a very clear position on the form of a unilateral state act. It stated that international law does not deal with the form of a legal act, and does not lay down “any special or strict requirements”. It explained that it is not important whether a unilateral declaration of will is manifested by the state orally or in writing⁷⁹. On that occasion the Court recalled its earlier ruling, in which it stressed that international law did not provide for any formal rigor to the form that the intention of the state was taken⁸⁰.

The mere principle of freedom of choice of form for a unilateral state act does not raise doubts in the scholarship or practice. A few years before announcing the 1974 judgment cited above, E. Suy wrote that freedom of form with respect to a unilateral state act was recognized by all authors and confirmed by all the known examples taken from practice⁸¹. This freedom does not have to be limited to the choice between oral and written unilateral declarations. The will of a state can also be manifested by its proper behaviour in certain circumstances. Such behaviour of the state can take different forms again,

⁷⁸ J. d'Aspremont, *Formalism and the Sources of International Law. A Theory of Ascertainment of Legal Rules*, Oxford 2011, pp. 150 and 181.

⁷⁹ ICJ, Reports 1974, Judgement, p. 18, par. 45.

⁸⁰ *Ibidem*.

⁸¹ E. Suy, *Les actes...*, p. 157.

and in some situations, even the failure of the state to act can have effects on the international level. He drew the attention of the ILC, claiming that certain forms of behaviour by the state could produce legal effects similar to those from unilateral acts, expressed in oral or written form⁸².

Krzysztof Skubiszewski clarifies this issue by explaining that the representatives of states can, however, manifest without saying or writing anything their position in a given case through various types of activities. This may be i.e. by initiating an action, responding appropriately to actions taken by other states, and even by keeping silent⁸³. It was the issue of expressing the will of a state, through its silence in a matter demanding the response of the state, that the ILC paid much attention too⁸⁴. The Court confirmed this principle in its judgment in the dispute between Great Britain and Norway, accusing Britain of neglecting to take appropriate action at the right time⁸⁵.

This full freedom of choice of the form of unilateral state act, however, is bound by some rigor. First of all, such a manifestation of will must take a form in which it will be able to reach its addressee or addressees. It must be known and understood by them. Such a requirement was formulated both in the 1974 Court ruling and in the work of the ILC and is widely shared in the field of international law. It is admitted that the only lawful requirement in this matter is that the intention reaches the addressee⁸⁶. In this case, “reaching” means the addressee somehow is familiarized with it.

A unilateral act does not, however, have to be addressed either personally or even to a specific addressee. It can be addressed to some group of states, to all states, or even to the entire community of states. As an example, the French declarations on the cessation of nuclear testing were delivered verbally, taken in very different places and circumstances by the various representatives of France and directed (aside from one) to the whole of the states, *erga omnes*. The Court assembled these various statements into one piece and ruled that they are credible and, when publicly disclosed, have acquired legally binding force⁸⁷. Obviously, the will exercised by the State can also be communicated privately⁸⁸ without giving it a public character.

The addressees must, however, have the capacity to know the will contained in a unilateral act, to evaluate it and possibly to trust it in the sense that its author will act in accordance with it. Hence, it is concluded that a commitment undertaken, but not shared with the addressees, which they have not been seen, cannot have legally binding

⁸² ILC, 7th report 2004, pp. 70-72, par. 170-186.

⁸³ K. Skubiszewski, *op. cit.*, p. 223.

⁸⁴ See. ILC, 4th Report 2001, pp. 5-10, par. 25-43.

⁸⁵ ICJ, Reports 1951, pp. 116, 138-139.

⁸⁶ J. Charpentier, *op. cit.*, pp. 371-372.

⁸⁷ ICJ, Reports 1974, Judgement, p. 20, par. 50-51.

⁸⁸ J.-D. Sicault, *op. cit.*, p. 671.

effects. A secret commitment cannot have binding power at all, because its author “cannot be bound by his thoughts”⁸⁹.

As regards the manner and means of informing the addressees of unilateral acts intended for them, there is also complete freedom in practice. In the literature, as S. Carbone states, there is no unanimity in this matter. Some believe that the state interested in a unilateral act should be officially informed about it by an *ad hoc* formal act, or rather in writing. Others believe that any means of communication can be used in this case. S. Carbone is of the opinion that the Court in 1974 resolved that problem decisively. It made the statement that the unilateral declaration became binding on the states concerned “in its fulfillment by the sole fact of its being made public”⁹⁰. A similar interpretation of the Court’s position on this subject was made by J.-D. Sicault and C. Goodman. They embrace this position in the sense that the proper communication of a unilateral act is about its effectiveness and its applicability. This is to be used with common sense. Unless the unilateral act is made public, it has no legal value and can be freely changed by its author. It is only after becoming acquainted with by its addressee that it acquires ultimate form and legal effectiveness. Then it can only be placed in opposition to the state being its author⁹¹. Therefore, these authors link the binding force of the act taken against its author with legal protection of its effects.

There is one more condition associated with the freedom of selection of form for a unilateral state act. The Court in the case *Temple of Preah Vihear* confirmed that states are free to do so, under the condition that any given declaration reveals a clear intention and goes on to say that in the case of a lawful act “the sole relevant question is whether the language employed in any given declaration does reveal a clear intention”⁹². According to K. Skubiszewski, regardless of freedom of form, intention cannot raise any doubts. If this is not the case, it is not possible to recognize a given manner of expressing will as legally binding⁹³.

The broad freedom in manner of expressing the intentions of a state and manner of communicating it to the addressee is thus subject to two conditions. The recipient must have the opportunity to familiarize themselves with it, and it must be understood without doubt.

6. Summary

The four basic requirements that are to be fulfilled for the legal validity of a unilateral state act seem to be sufficient grounds for constructing its notion as an act which itself

⁸⁹ See. e.g. V.-D. Degan, *Unilateral Act...*, pp. 189-190, or J.-D. Sicault, *op. cit.*, p. 671.

⁹⁰ S. Carbone, *op. cit.*, p. 170. This does not mean, however, that the declaration cannot be communicated to the interested State with the same effect in a non-public manner.

⁹¹ C. Goodman, *op. cit.*, pp. 16-17, J.-D. Sicault, *op. cit.*, p. 671. See. W. Fiedler, *op. cit.*, p. 1022, or E. Suy, *Les actes...*, s. 150-151.

⁹² ICJ, Reports 1961, pp. 31-32.

⁹³ K. Skubiszewski, *op. cit.*, p. 232.

produces binding legal effects. These generally accepted criteria, however, both in the literature and in practice, differ in terms of interpretation and renditions. There are various doubts about the theoretical and practical nature of this subject matter.

The first requirement for the state as the author of a binding unilateral act does not display serious discrepancies, neither in the scholarship nor in practice. The basis of the determinations was taken from Art. 26 of the Vienna Convention of the Law of Treaties. However, the scope of officers who may appear on behalf of a state in particular areas of their competence has been broadened.

The issue of the proper form of a unilateral state act remains as such in principle outside of legal regulation. Thus, it can take any shape. States must, however, be free to take into account the intended legal effectiveness of their undertaking. So, *nolens volens*, a one-sided act should take a form that will allow it to reach its addressee, and the addressee can understand the meaning of the message it contains. It must be therefore possible to know the intention of the creator of the adopted act. This can be a written or oral communication, or a result of a particular state behaviour.

The issue of unilateralism and autonomy of a unilateral state act causes more serious problems. It is simply difficult for specific unilateral acts to state precisely which are of an autonomous nature and which function in conjunction with other legal acts. Even the same, important and well-known unilateral state acts are judged by some as unilateral acts of an autonomous nature, while others as acts linked in their background with other legal acts. Even the Court's findings on this subject are questioned. What is more, views arise that the same unilateral state act exhibits a dual legal nature. Depending on the specific circumstances, it may function as a unilateral act in conjunction with other legal acts, while in other circumstances as an act of its own which produces the legal effects envisaged therein⁹⁴. This seems to undermine the accepted rigid general criterion for the division of unilateral acts of a state into autonomous ones in their effects and those related to other acts, thus losing its statutory independence.

Divergent views are also presented regarding the will of the state as a constitutive factor in the formulation of a unilateral act. First of all, the question is whether it is a declared will, or a true, actual will. The question of the moment from which a unilateral state act is binding is also discussed in conjunction with the will of the state. A position in this matter was clearly occupied by both the Court and the ILC. The unilateral state act binds its creator from the moment it is made and communicated to its addressees. However, there is no need for any response from those recipients. Various doubts arise against this background. There are voices that the mere intent of the state cannot give effect to such an act. It may become fully binding only in conjunction with a clear dis-

⁹⁴ See above in part IV views on this issue by J. Charpentier, E. Suy, or K. Zemanek.

play of trust in it by the addressee. Assigning such a serious share of the addressee's trust in the creation of a unilateral state act could undermine its unilateral character.

In order to avoid such a charge, there seems to be a need of interpretation of the Court's standpoint in the sense that the addressee does not have to demonstrate confidence, since its implicit trust is accompanied by the unilateral act addressed to him at the time of arrival, and even from its inception. The originator of such an act could not withdraw it at any time. Such unilateral acts would lose this characteristic only if rejected by their addressee⁹⁵.

It seems that, regardless of other doubts, the binding of the presumed trust of the addressee to the unilateral act addressed to it at the moment of the act's inception is too abstract. Besides, it puts the creator of a unilateral act in too difficult of a legal situation compared with that of the beneficiary of the act. One would rather assume that the unilateral act binds its creator from the moment it is taken up and made public, for such was the sovereign will of its creator, and in such a capacity reaches its recipient. Then it can no longer be arbitrarily withdrawn or altered by its creator, because there is a legitimate presumption that the addressee is acquainted with its content and has placed trust in it, because he did not reject it. At this point, the change in the legal relationship between the creator and the addressee of the unilateral act foreseen in this act has taken place. Arbitrary withdrawal would already qualify for a complaint in such a situation. The principle of good faith could be invoked here in order to protect the confidence or interest of the addressee and to confer rights granted on a bilateral basis.

III. Grounds for binding power of a unilateral state act

1. *Dictum of the Court*

The issue presented in the title of this chapter is not entirely new. It has appeared in the doctrine of international law since the days of Grotius and Pufendorf. A broader and more in-depth discussion of it developed only after the publication of the 1974 ICJ ruling on the French declaration on the cessation of nuclear testing. In this judgment the Court formulated its position in this regard as follows:

One of the basic principles governing the creation and performance of legal obligations, regardless of their source, is the principle of good faith⁹⁶.

In this regard, the principle of good faith is therefore applicable to both the creation and performance of obligations, regardless of the source from which they originate. Therefore, it is appropriate to refer also to the creation and performance of obligations

⁹⁵ See, e.g. Ch. Eckart, *op. cit.*, pp. 205-207.

⁹⁶ *Nuclear tests (Australia v. France)*, ICJ Reports 1974, Judgement, p.19, par. 46.

arising from unilateral state acts. In this respect, unilateral commitments are no different from other commitments entered into at international level. The Court added, in connection with the principle of good faith, that faith and trust must be intrinsic (*inherent*) in international cooperation and in increasingly closer relations⁹⁷.

Directly after the afore-mentioned *dictum*, the Court went a step further and clarified its position, stating that just as this (very rule), *pacta sunt servanda* in the law of treaties is based on good faith, the same is true of the binding nature of an international obligation adopted in a unilateral declaration⁹⁸. Further clarification was given that the interested states may acquaint themselves with the unilateral binding declaration, trust it, and acquire the right to demand that the obligation thus created be respected in good faith by its creator.

The above-cited statement of the Court allows for the conclusion that the principle of good faith not only “governs” the creation and implementation of international obligations adopted in unilateral acts, but also that it is the basis of the binding force of such obligations. This is to say that both the source and the basis of the binding force of the unilateral act is the principle of good faith. This was particularly emphasized by P. de Visscher, who wrote that the Court based the binding force of the French declarations *sur base du seul principe général de la bonne foi*⁹⁹.

There is no doubt that the Court sought to strongly link the legal character of the unilateral act of the French government with the principle of good faith. Emphasis was put on the special role of this principle in international relations that are developing with increasing speed. The Court believed that it was the basis of those relations in which trust constitutes an essential element¹⁰⁰. The exact role of this rule in relation to unilateral acts, however, was expressed by the Court in a very general way, causing various controversies in the literature.

2. Doctrine

Various attempts are made in the scholarship to explain the basis of the binding force of a unilateral state act. They are essentially based on the position of the Court quoted above. It is difficult, however, to strictly separate them, because they overlap in a narrower or wider range. This especially applies to followers of the rule of good faith, *pacta sunt servanda*, or other equivalent ones. This is basically about establishing a general

⁹⁷ *Ibidem*.

⁹⁸ *Ibidem*.

⁹⁹ P. de Visscher, *Remarques de l'évolution de la jurisprudence de la Cour Internationale de Justice, au de l'affaires au fondement de certains actes unilatéraux*, in: J. Makarczyk (ed.), *Essays in International Law in Honour of Judge Manfred Lachs*, The Hague 1984, pp. 462-463.

¹⁰⁰ ICJ, Reports, 1974, Judgement, p. 19, par. 46.

legal principle of customary origin as the basis for the binding force of unilateral state acts. These are to be presented in a common perspective. A separate group will be joined by authors who, in determining the basis of the binding force of a unilateral act, attribute the recipient's trust to the act addressed to them. The third group would be supporters of the sovereign will of states as the source and basis for the binding force of their unilateral acts¹⁰¹.

However, one can also find in the doctrine of international law authors who negate in general any legal power of unilateral acts of states. Thus, it is necessary to begin to reflect on these specific views prevailing in the scholarship regarding the basis of binding force of a unilateral state act or its absence thereof.

A. Denying the binding force of the unilateral state act

The fiercest opponents of recognition of unilateral state acts' binding force are A.-Ch. Kiss, R. Quadri, A.P. Rubin and M. Bos¹⁰².

The most prominent of them is the well-known French internationalist A.-Ch. Kiss. He categorically denies that a unilateral act can be binding on the state from which it originates. He further notes that the basic principle of unilateral acts is that such acts cannot legally bind either the issuing state or any other states. He believes that it might have been the reason why doctrine has not shown any interest in the subject. Even more so, as he explains, no state can unilaterally create a rule of law which determines an international legal situation (*une règle de droit, qui détermine une situation juridique internationale*), as this requires the acceptance of such an act by another state or states¹⁰³.

Kiss advocates this standpoint in his research on the international practice of the French government. He cites quite convincing examples to counter France's recognition of the legal force of unilateral acts of states. At the same time, however, to the reader's surprise, he admits at the end of his reflections that there may or may not be some unilateral acts that produce certain, sometimes even very significant, effects. He does not specify, however, what kind of acts and effects these would be. They are recognised, but not dealt with¹⁰⁴.

On that same note, R. Quadri, the Italian internationalist, states that classical doctrine representatives were completely uninterested in unilateral acts at the level of inter-

¹⁰¹ Ch. Eckart, following the doctrine and discussion at the ILC, lists three broadly shared answers to the question of why the state is bound by its promises. They referred to: a) the sovereignty and self-limitation of the state, b) its sovereign will, and c) the general principle of good will. Ch. Eckart, *op. cit.*, pp. 195-196.

¹⁰² There are also other authors. See. eg P. Saganek, *op. cit.*, p. 311. W. Fiedler also criticized the legal nature of the promise. W. Fiedler, *Zur Verbindlichkeit einseitiger Versprechen in Völkerrecht*, in: German Yearbook of International Law, 1976, vol. 19.

¹⁰³ A.-Ch. Kiss, *Les actes unilatéraux dans la pratique française du droit international*, RGDIP, 1961, vol. 65, pp. 317-318.

¹⁰⁴ *Ibidem*, pp. 318 and 331.

national law. It is only recently that their interest has begun growing. The first observation he makes in reading the doctrine is that the character of the unilateral act has always been negated. He observed that in international jurisprudence there always been a “unanimous negation” in this matter. Moreover, he states that no one dared even to quote a single precedent until the founding of the League of Nations in 1920. This applies to the so-called Minority Treaties. The author observes that again, the declarations submitted for the protection of national minorities were recognized by many internationalists as being of a negotiating nature, as contracts. Considering this matter, Quadri remarks that the representatives of the states to whom the obligations arising from such declarations referred declared as follows: I have the honor to accept (*j’ai honneur d’accepter...*). The well-known Norwegian-Danish case regarding Greenland is also explained as an agreed settlement of the case by way of a query posed by a representative of the Danish government to the Norwegian Minister for Foreign Affairs and his reply to the Danish inquiry. The author himself judges this *casus* in the same way¹⁰⁵.

Investigating the new doctrine of international law, Quadri does not find convincing arguments in support of the conviction that there is a new source of international law in the form of a unilateral act. In his view, the authors representing the opposing side are not able to convincingly prove that unilateral promises on their own can create a new source of international law. They seek notification, sometimes referring to the behaviour of the addressee of a unilateral act, which should show a positive attitude towards the unilateral act addressed to that addressee. The addressee should simply indicate that they trust the state who is the author of the promise¹⁰⁶.

Referring to analysis of both the practice and the doctrine of international law, Quadri concludes that *les promesses* themselves are not capable of producing the intended legal effect. They must always be made in the context of a treaty in order to achieve their objective, that is to achieve the intended legal effect. There is therefore no reason to engage in an effort to replace *la vénérable règle pacta sunt servanda* by *une règle de loin plus sévère et de portée très large*, that is *promissio est servanda*¹⁰⁷.

The third of the above-mentioned scholars opposed to assigning binding force to unilateral state acts is the American internationalist A. P. Rubin. Unlike the two others, this scholar has taken into account the ICJ ruling on French nuclear testing. The verdict shocked him deeply.

His reflections, similar to Quadri, began with an examination of both the doctrine and international practice in the matter prior to the above-mentioned judgment in 1974.

¹⁰⁵ League of Nations, Journal Officiel, 1923, p. 1311, R. Quadri, *op. cit.*, pp. 364-365.

¹⁰⁶ R. Quadri, *op. cit.*, p. 364.

¹⁰⁷ *Ibidem*, p. 364.

He argues that he found no basis for the Court's judgment, neither in the doctrine nor in court practice. Rubin claims that prior to the judgement issued on the French nuclear test, only one similar situation was known. He refers to the unilateral declaration of the Egyptian government of April 24, 1957. The Egyptian government promised to restore freedom of navigation through the Suez Canal. Nonetheless, he states that even in that case the opinions of internationalists were divided as to the legal nature of the declaration. In his view, this unilateral act of the Egyptian government, and other declarations analyzed by the researcher, arose in a more or less explicit negotiating context¹⁰⁸.

By way of conclusion, Rubin reiterates that until the ruling on above-ground French nuclear experiments carried out in 1974, neither the scholarship nor the practice of states showed "any consensus" indicating the binding force of unilateral declarations submitted by states. Like Quadri, he proves that the very intention expressed in such a declaration cannot create a binding obligation of international law. There must be additional factors such as negotiating context, confirmation of reaction from other states, or official declaration before the Court along with acceptance by the Court of Justice. As an example, Rubin recalls, again following Quadri, the case of East Greenland, in which "there was a response to the question of a diplomatic representative of a foreign state." Then – as he says – it was additionally recorded and initialed by the then-minister of foreign affairs of Norway¹⁰⁹.

In Rubin's view, the issue of French nuclear tests was devoid of any negotiating context. France has consciously and consistently tried to keep its statement far from the said circumstances, even away from the parties to the dispute and the Court itself. The lack of this factor – Rubin maintains – deprived the French government's declaration of the character of a legally binding agreement resulting from the agreement of states. Even if we were to accept – as stated in the ICJ judgment – that unilateral declarations may be binding on the sole intent of their author, this would not apply to the French declarations anyway. According to Rubin, it is not possible to see in them any element indicating their legally binding character. There is no credible intention to create a legal relationship. Rubin finds confirmation of his observation that France did not intend to be bound by its unilateral statements in *inter alia* French international law practice¹¹⁰. As did Quadri, he links the binding force of a unilateral act directly to the issue of its legal consequences.

This particular group of views should be accompanied by a theoretician M. Bos. By presenting his concept of sources of international law he also devoted a bit of attention to unilateral acts and stated that in a community of *homines liberi* no law of unilateral origin can exist at all. The source of international law must be at least bilateral. This does

¹⁰⁸ A.P. Rubin, *op. cit.*, pp. 3-6.

¹⁰⁹ *Ibidem*, pp. 4, 7-9.

¹¹⁰ *Ibidem*, p. 28.

not, however, refer to the decisions of international organizations. Their decisions are, of course, also unilateral acts, but not in the same sense as unilateral state acts, not in the world of *homines liberi*¹¹¹. In other respects, the juxtaposition of the international community of sovereign states with the community of “free people” seems quite surprising in this context. The problem of sources of law is quite different in a state-organized community than in an international community of sovereign states¹¹².

In this sharp criticism of the binding force of unilateral state acts, it is striking that all these authors allow for the possibility of existence, or even the existence in practice, of such acts in one form or the other. In any case, voices opposing the binding unilateral state acts are few and the denial is neither complete nor convincing. It is difficult to completely disregard the prevailing practice of states and the strongly emphasized position of the ICV and doctrine on this matter.

B. Seeking the basis of the binding force of a unilateral state act in the general principle of the law of customary origin

The development of the customary principle of good faith as the basis for the binding force of a unilateral state act was known in the scholarship before the judgment in 1974 on French nuclear testing. The influence of the E. Suy treatise, published in 1962, is emphasized as having a strong impact on the Court’s judgment in this case¹¹³. Already at the beginning of this dissertation, E. Suy concludes emphatically: “in contrast to a few authors’ opinions, we maintain the thesis that the purely unilateral promise exists in the law of nations and it is binding”¹¹⁴. He opposes artificially contrasting treaties with unilateral acts of states. He considers the recognition of treaties as binding based on the *l’unique raison* that they are grounded in the agreed will of certain subjects of international law, while at the same time refusing to recognize all the legal values of unilateral obligations of states (since that will not derive from the agreement of two or more states), as something that testifies to a very rigid formalism. Such an outlook loses sight of the proper meaning of the whole international legal *réglamentation*, which is to ensure the security and harmony of international relations¹¹⁵. Ch. Rousseau, having shared this view, stated that, by demonstrating that the binding force of the act does not necessarily have to be based on the existence of two consistent wills, it restores the unilateral *une finalité sociale*, which is very often lost from view even nowadays¹¹⁶.

¹¹¹ M. Bos, *A Methodology of International Law*, Amsterdam 1984, p. 88.

¹¹² M. Virally, *The Sources of International Law*, in: M. Sørensen, ed., *Manuel of Public International Law*, New York, 1968, p. 120.

¹¹³ See, e.g. P. Saganek, *op. cit.*, pp. 375-376

¹¹⁴ E. Suy, *Les actes ...*, p. X.

¹¹⁵ *Ibidem*, p. 271.

¹¹⁶ Ch. Rousseau, *Review in: RGDIP*, 1962, t. LXVI, p. 876, quoted after J.-D. Sicault, *op. cit.*, p. 682.

Unlike an offer – writes Suy – which should be accepted by the addressee to acquire binding force, a unilateral promise is given trust from the moment it reaches the addressee. And it is at this moment that trust in the word given finds its foundation of validity. A higher interest in the security of international relations requires a promise to become binding once it is recognized by the state concerned. And this higher interest translates into the principle of good faith, which should govern (*regir*) all international relations¹¹⁷.

According to E. Suy, international law is derived from the conventionally or unilaterally manifested will of subjects of international law, with which the norms of this legal order bring about legal effects corresponding to that will. The legal system thus determines the legal consequences of the adequately manifested will of the state¹¹⁸. It can be said that this system, on the one hand, ensures its subjects' sovereignty and free will, but on the other hand it delineates the area of their legal effectiveness.

Despite the continued emphasis on the essential similarity between the treaties and unilateral state acts, Suy denies that the binding power of a promise can be inferred directly from the principle of *pacta sunt servanda*. In his opinion, this principle explains only the binding force of treaties. He believes, however, that this principle could be broadened in the sense that *pactum* meant not only the contract, but also the *tous les engagements internationales*¹¹⁹ and so the same with regards to the unilateral acts of states. By such an extension of the concept of *pactum* to unilateral acts, *la norme fondamentale, la source de la promesse* would take the character of a customary norm requiring respect for unilateral international obligations¹²⁰. Accordingly, the legal basis for the binding force of a unilateral state act is to be a customary norm in the broader concept of the principle of *pacta sunt servanda* on the principle of *acta sunt servanda*.

Significant influence on the position of the ICJ on the unilateral state act is also attributed to the Italian scholar, G. Venturini. This author assumes that the competence of the state to incur an international obligation is precisely an attribute of its sovereignty. Accepting a commitment undoubtedly limits the scope of this sovereignty. But even such self-limitation is also an attribute of its sovereignty¹²¹. He supposes that the opposition to recognizing the binding force of unilateral obligations is derived from the concept of voluntary, conventional law, which is the foundation of *pacta sunt servanda*. Its followers seem not to notice the existence, alongside the law of treaties, of the law of customary origin, which contains universally binding norms. Therefore, the principle

¹¹⁷ E. Suy, *Les actes...*, p. 151.

¹¹⁸ *Ibidem*, pp. 43-44.

¹¹⁹ *Ibidem*, pp. 44-45.

¹²⁰ *Ibidem*, p.151.

¹²¹ G. Venturini, *op. cit.*, p. 401.

of *pacta sunt servanda* cannot be the only source of binding force in the whole system of international law¹²².

Like E. Suy, Venturini emphasizes that an international agreement is nothing more than “the expression of the will of international entities with their rights able to undertake commitments to other entities. This will is presented as a legal act. A unilateral act is derived from the same source and is also intended to create a commitment”. Invoking the views of E. Suy, he states that a unilateral declaration itself in a particular case “produces the effects of the principle of good faith and security of international relations constituting one of the sources of the binding nature of international obligations¹²³. Thus, the author sees no logical reason not to recognize the binding legal character of unilateral state acts. The difference between a contract and a unilateral act is simply that the treaty obligation is subject to the principle of reciprocity which justifies its immutability, while at first glance unilateral commitments seem to be lacking¹²⁴. Thus, it is necessary to examine practice in order to make a promise more concrete in a *de volonté effective* declaration without reciprocity. It should also be properly served and clearly addressed, so that the addressee is clear. Addressees should be able to be confident in the act of the promising state¹²⁵.

With regards to the issue of a unilateral act’s binding force, Venturini attempts to present a clear position. He considers that it is precisely these important considerations – good faith and security of international relations – that justify the nature of binding unilateral promises, as well as the binding nature of the treaties. Both are an expression of the general competence of a state based on the same constitutional norm of international public order *relative à la production juridique volontaire*¹²⁶. J.-D. Sicault believes that in his Hague lecture Venturini gave the fullest possible theoretical expression explaining the binding force of unilateral acts¹²⁷.

¹²² *Ibidem*, p. 400-401. See also J.-D. Sicault, *op. cit.*, p. 684

¹²³ *Ibidem*, p. 403.

¹²⁴ *Ibidem*, p. 402 and 367, see J. Charpentier, *op. cit.*, p. 376

¹²⁵ G. Venturini, *op. cit.*, pp. 400-401.

¹²⁶ *Ibidem*, p. 403.

¹²⁷ There seems to be no doubt, Sicault writes, that these views could serve the Court in its justification for the binding force of unilateral acts. The distinctive features of the binding force of a unilateral act in the Venturini concept are:

- 1) Strong emphasis on the sovereign will of the state to embrace international obligations both in the conventional and unilateral contexts. And in one case, the sovereign will of the state creates an international commitment.
- 2) The obligation incurred in a unilateral act must relate to and be limited to a particular case. It cannot have the character of a general obligation, not exhaustive in one particular case.
- 3) Venturini says that the feature of a unilateral act is not to establish an advantage for its author, who can always keep what he promises. The purpose of the unilateral act is to create benefits for the recipient of the promise. This is done „in the name of the principle of elementary justice, of objective justification for such protection.”

The views of later authors regarding the binding force of unilateral acts are more or less closely related to the judgment of the Court of 1974, and revolve around it. Many of these authors affirm, and in a way justify, the correctness of the interpreted ICJ position on this matter, such as P. de Visscher and C. Goodman.

Paul de Visscher is enthusiastic about the 1974 judgments of the Court. Among other things, he states: “In the doctrinal plane, the *l'intérêt majeur* of the judgments of December 1974 contains their contribution to the general theory of sources, and especially to the general principle of good faith as a binding foundation”¹²⁸. The researcher explains that the Court ascertained “purely unilateral acts” (*actes juridiques unilatéraux purs*) in the French declarations of cessation of nuclear testing, and justified their binding force on the basis of “the only principle of general good faith”¹²⁹. In these judgments he notices the proclamation of the “autonomy of the general principle of good faith as a source of positive law”. The Court was to express it in the words already cited:

One of the basic principles governing the creation and application of legal obligations, regardless of their source, is the principle of good faith Just as the principle of *pacta sunt servanda* in treaty law is based on good faith, so is [based on it – J.K.] the binding nature of the international obligation adopted by way of unilateral declaration...¹³⁰.

In the opinion of that author, the judgments of the Court concerning these declarations are of exceptional importance for the science and the practice of international law. These are the “fundamental tendencies of the progressive development of international law”, and the autonomous principle of good faith assumes the character of a source of international obligations, a source of positive law¹³¹. The principle of good faith, which was formerly recognized as the principle of international morality, as the right idea of sovereignty, now tends to be more explicit and more positive. Thus, the 1974 judgments opened, according to de Visscher, a new stage in the development of international law, affirming without any reservations *la fonction autonome du principe de la bonne foi dans la création des obligations juridiques*¹³². Thus, the binding force of the unilateral act is the “autonomous principle of good faith” as a general rule of binding nature.

The Court’s conclusions also serve as the direct source of the particularly interesting arguments made by C. Goodman. In her extensive review of international literature dealing with unilateral acts she proclaims the concept of moving the basis of the binding

4) Finally, the view that the basis for binding unilateral declarations is the principle of good faith in close connection with the security of international relations. J.-D. Sicault, *op. cit.*, p. 684.

¹²⁸ P. de Visscher, *op. cit.*, p. 461.

¹²⁹ *Ibidem*, pp. 462-463.

¹³⁰ ICJ, Reports, 1974, Judgement, p. 19, par. 46, P. de Visscher, *op. cit.*, p. 463.

¹³¹ P. de Visscher, *op. cit.*, pp. 463-464.

¹³² *Ibidem*, pp. 463-464.

force of international obligations “from the subjective expressions of the will to the objective foundation of good faith”. Goodman observes that although the ICJ clearly and explicitly stated in its judgment on French nuclear tests that “just as the principle of *pacta sunt servanda* in the law of treaties is based on good faith, the same is true of the binding nature of unilateral acts. There are divergent opinions in this issue.” Views representing a subjective perspective on the subject matter are confronted with those presenting objective perspectives based on good faith¹³³. The subjective explanation of good faith in the context of the judgment of the ICJ in 1974 leads, in her opinion, to an extreme view. The unilateral act does not have any independent status in international law, nor does it give rise to legal effects at the level of international law, and moreover, it is argued that the possible basis for the binding force of such an act would be the presumed consent of the addressee of the unilateral act, estoppel or finally autonomy of expressing the will of the state¹³⁴.

Camille Goodman seeks to undermine the notion that the binding force of both treaties and unilateral state acts is derived from the autonomy of sovereign states. She proves that the binding force of a treaty or unilateral act is derived from the principle of good faith, the accompaniment of which is based on presumption. She disagrees with the belief that the principle of good faith or *pacta sunt servanda* applies only to the fulfillment of the commitments made, and thus they are unable to justify the binding power of the undertaking *at its conception*. She believes that, in fact, it is precisely in the execution of the commitments that makes them binding. She agrees that the manifestation of the creative will of the sovereign state is a very important condition of *validity* of a commitment, but “nothing more.” Its binding nature comes from the “objective principle of good faith”¹³⁵. Thus, the subjective will of the sovereign state is contrasted by Goodman with “the objective basis of good faith”¹³⁶.

The author also dealt in her work with the relationship between the principle of *pacta sunt servanda* and the principle of good faith. She observed that it is rarely possible

¹³³ C. Goodman, *op. cit.*, p. 18.

¹³⁴ *Ibidem*.

¹³⁵ *Ibidem*, pp. 22-23.

¹³⁶ Drawing on the views of scholars and the practice of states, Goodman tries to explain her position in a historical perspective. As it is well known, since the earliest times, the sovereign will have expressed sovereign will in concluding treaties accompanied by grand ceremonies, such as the oath. They emphasized the importance and sanctity of the undertakings and were testimony of good faith. It was realized that adherence to the principle of good faith was inevitable to ensure minimum cooperation and the necessary tolerance for „the emergence of the human community.” As the number of treaties concluded increased, the principle of good morals began to manifest itself as a binding principle. Understood in the sense that the parties to the treaty include it in good faith and that they will act in good faith in its execution. Hence, the author concludes that the expression of will confirmed by signature, notification or ratification serves only to mark the intention of the party committing to it. Although this is an essential condition for the validity of a given contract, the presumed good faith that accompanies it from the beginning, gives it binding force.

to find a clear link between two such important principles of international law. She notes that the principle of *pacta sunt servanda* is generally conceived as mandating the performance of binding treaties. However, it does not actually determine the content of the commitment. This is in line with the positivist view that created norms should be respected, but only until a *norm-abolishing act* appears. In fact, good faith plays, in Goodman's view, a broader but more remote role. It serves to delineate the content of a given commitment, to correct any defects of will or formality, where this requires honesty. It can also serve to broaden the scope of binding legislation. In this view, good faith is presented as an *over-reaching and reconciling principle of law, which founds and legitimizes other rules including pacta sunt servanda, rebus sic stantibus, or estoppel*. One can even imagine the possibility of interfering with the principle of good faith in solving conflicts of law¹³⁷. However, she acknowledges that the nature of a unilateral international obligation can also be seen as deriving its legal force from the principle of *pacta sunt servanda*, but *conceptualized* as a "special emanation" of the application of the principle of good faith¹³⁸.

She raises another two arguments to justify her opinion. She claims that states acquire rights and contract by expressing their will contained in a certain *instrumentum*, which provides evidence of this undertaking, both when they are done in the form of a treaty (through a *pactum*) or in a unilateral declaration. The similarity in terms of validity applies both to the existence of a legally valid *instrumentum* establishing a treaty and to the existence of legal validity of a unilateral commitment. She therefore considers that the term *pactum* can fairly directly cover both conventional and unilateral acts without prejudice to the substantive change of their criteria¹³⁹. It seems that here Goodman has fallen into the formalism that she had accused other authors of. The introduction of the term *instrumentum* is of course a purely formalist approach, which cannot erase differences between unilateral and bilateral acts. Agreements and settlements cannot quite be considered equivalent to a promise.

Secondly, Goodman notes that the scholarly literature suggests that the new notion of *promissio est servanda*, reflecting the autonomous nature of a unilateral act, should be transformed so that the principle of *pacta sunt servanda* can also be applied to unilateral acts. There are also proposed constructs such as *acta sunt servanda*, or the ILC's *declara-*

¹³⁷ *Ibidem*, pp. 23-24.

¹³⁸ Goodman sees the lack of logic in the fact that despite the recognition of good faith as the *ultimate basis* not only of conventional but unilateral acts, it is a question of whether its specific application in the *acta sunt servanda* has a similar reference to both types of these acts, it raises objections. Both states and commentators maintain that this principle applies strictly to the commitments made by the pact, so it cannot be applied to unilateral acts. Goodman believes that this is a misleading, unilateral, even narrow and formalist view. *Ibidem*, p. 24.

¹³⁹ *Ibidem*, pp. 24-25.

tio est servanda (ILC, 1st report 1999, p. 29, paragraph 157). That is true – agrees Goodman – that none of the proposed maximum could cover all unilateral acts (e.g. protest), but the Vienna Convention (1969) does not refer to any kind of treaty¹⁴⁰.

Finally, these considerations lead Goodman to conclude that the *acta sunt servanda* proposed by the ILC seems to be the most flexible formula and consistent with the concept of a unilateral act as state behaviour. She believes that such a rule is essential to ensure stability and security in international relations, which the ICJ was seeking in respect of the nuclear tests. If such a principle were to be *synthesized* in a pragmatic program, then it would be possible to develop an inclusive *overall regime* that would allow the regulation of unilateral acts in a manner that would be useful to states and the international legal system¹⁴¹.

The concept of good faith as the basis of the binding force of unilateral acts is also explicitly touted by J.-D. Sicault. He rejects accusations that good faith is too entangled in morality or loyalty and is not a legal principle. He argues that good faith is the foundation of the legal power of unilateral obligations in states. However, he insists that it should not be taken as a duty of loyalty, but as a protection of the legitimate trust necessary for the security of international relations.¹⁴² In this view, good faith clearly represents not only the basis for the binding force of a unilateral state act, but also protection of the recipient's trust and security of international relations.

Przemysław Saganek criticizes the efforts of scholars and the ILC seeking to establish a common basis for the binding force of all kinds of unilateral state acts in the form of *acta sunt servanda* or *declaratio est servanda*. He firmly advocates the position that nothing in this case can be said with complete certainty until we draw up a comprehensive list of these very diverse legal acts. Regardless of whether such a postulate is real, Saganek is right to point out that these searches, due to the state of our knowledge in this complex matter, should be directed towards individual categories of unilateral states, such as promise, renunciation or recognition¹⁴³.

Both scholars and the ILC seem to be moving in this narrow direction, mainly following the ruling of the 1974 Court, which formally confined itself only to establishing a legal basis for a unilateral declaration (promise). It is often difficult, however, to stick strictly to promises and suggestions or arrangements, formulated alternatively, referring to a certain group are made, some even to all unilateral state acts.

According to Saganek, the question of the legal basis of the binding force of a promise has intrigued and interested the doctrine much more than the legal effects of a uni-

¹⁴⁰ *Ibidem*, p. 22.

¹⁴¹ *Ibidem*, p. 24.

¹⁴² J.-D. Sicault, *op. cit.*, pp. 684-686.

¹⁴³ P. Saganek, *op. cit.*, pp. 87-88.

lateral promise. Observing the perspectives of scholars, he notes that it is possible to distinguish “several levels of discourse”. He limits the spectrum to only two. The first deals with the question “of the very nature of international law,” while the other, more practical, is seeking a specific standard that gives the legal force of a unilateral declaration¹⁴⁴.

Saganek places in this first plane the views of E. Suy, who argues that the theory of autolimitation of the state cannot be sufficient to establish the binding force of a promise. This power must come from international law itself. On the other hand, the second level is seeking a specific rule or principle which underlies the binding force of a one-sided promise. Here again, Saganek quotes Suy’s views, who considers that such a principle may be that of *pacta sunt servanda*. He states, however, that besides this principle, there is a customary norm on which the binding force of the promise is based. Of course, as long as the promise fulfills the conditions required for its validity. Behind such a customary principle is the principle of good faith¹⁴⁵. Saganek believes that Suy in a “brilliant way had predicted the future development of ICJ case law”, and perhaps even “showed it the way”. As proof of these observations, the following sentence from the Court’s ruling is shown: “One of the basic principles governing the creation and exercise of legal obligations is the principle of good faith”¹⁴⁶.

In the end, however, the author concludes that the principle of “having the duty to keep a promise unilaterally, respecting a unilaterally made renunciation, recognition, etc.” means the prohibition of any unilaterally performed act of this kind. In his view, such a norm must be of a customary standard, as is the unquestioned customary origin of the *pacta sunt servanda* rule. The problem, however, lies in the fact that the author of these statements is questioning the existence of the principle he suggests. It does not bother him, however, to say that the “principle of *acta sunt servanda*”, possibly with some refinement or restriction, applies, but only as a general principle of law recognized by civilized nations. Again, however, this is also troublesome, because these civilized nations interpret and apply this general principle in a system of national law¹⁴⁷. Eventually, it seems that nothing is certain in here. We find ourselves in a circle of assumptions with a tendency to seek the basis of the binding force of certain unilateral acts in customary law, from which the principle of *pacta sunt servanda* is derived. These considerations are reminiscent of the earlier findings of W. Czapliński, who stated that the princi-

¹⁴⁴ *Ibidem*, pp. 375-376.

¹⁴⁵ *Ibidem*, pp. 375-376.

¹⁴⁶ *Ibidem*, p. 376.

¹⁴⁷ *Ibidem*, pp. 377-378.

ple of good faith is based on the unilateral acts of states. It has a customary character and widens the traditional understanding of the principle of *pacta sunt servanda*¹⁴⁸.

Lastly, at the end of his deliberations, Saganek again states that the admission of the principle of good faith as a legal basis for binding unilateral declarations in the jurisprudence and doctrine also raises his doubts. He doubts whether the principle of good faith in the light of the Court's case law on French above-ground nuclear tests would be opposed to the principle of simply the will of the state. But again, he adds that the reference to general principles of law should not be opposed to the existence of a customary norm which underlies the binding force of a unilateral declaration¹⁴⁹.

From the meandering conduct of Saganek's reflections on the basis of the binding power of a unilateral declaration, it appears, however, that he is in favour of the existence of a customary principle that he has not finally identified.

In the search for a legal principle of customary character as the basis of the binding force of a unilateral act, V.-D. Degan reaches to the work of Grotius. Like others, he begins his deliberations on the basis of the binding force of unilateral acts by stating that there is no peremptory norm of universal international law which forbids a sovereign state to accept a binding legal obligation, even in a unilateral act. He binds, like many other internationalists, unilateral acts to the free will of a sovereign state. The unilateral act finds its place in the system of international law. It derives from the will of the sovereign state and is binding. Degan says to the Court that a promise must be recognized as a genuine kind of acceptance of legal duties of the author of such a promise in respect of the addressee, and may even be associated with *erga omnes*¹⁵⁰.

Unlike the previously cited authors, Degan does not bind the legal basis for unilateral acts only with the general principle of good faith. In his opinion, the legal basis of this issue lies in the principle already pointed out by Grotius, namely in the praxis *promissorum implemendorum obligatio* – that is, the obligation to fulfill promises. This principle is no less important (*inferior*) than the general principle of *pacta sunt servanda*. These two legal bases of binding international obligations are equally important, yet not identical¹⁵¹. The difference between these is derived by Degan from the difference between the acts to which these principles apply. He states that although the differentiation between unilateral acts and treaties is not always quite clear in practice, a treaty does not at all consist of the unilateral actions of negotiating parties, as some authors suggest. The

¹⁴⁸ W. Czapliński, *Akty jednostronne w prawie międzynarodowym*. International Affairs 1988, No. 6, pp. 107-109. This position was confirmed in a later publication: W. Czapliński, A. Wyrozumska, *Prawo międzynarodowe publiczne*, 2nd ed., Warszawa 2004, p. 121.

¹⁴⁹ P. Saganek, *op. cit.*, pp 378-379

¹⁵⁰ V.-D. Degan, *Unilateral Act...*, pp. 151, 178, 186.

¹⁵¹ *Ibidem*, p. 178.

treaty contains the will of all its parties seeking to bring effect to international law. Without such an agreement the will of all its parties will not arise. In a unilateral act no agreement is made, no other party is present. There is only one state's will to bring about results in international law for the purpose of the unilateral act. According to Degan, exactly for this reason these two general principles of law – *promissorum implemendorum obligatio* and *pacta sunt servanda* – cannot be fully identical. This does not mean, however, that a unilateral promise can be considered as a source of less important, lesser legal status than a treaty. The deeper analysis of these two different types of international law sometimes shows the relative nature of their disparities in practice. He states that in many acts perceived by most writers in the context of the negotiation “one is not able to find even a fiction of agreement”. This is the case, for instance, in the case of a treaty validation that would otherwise be invalid or expire¹⁵².

Grotius's principle of “promises to keep” is known in literature. It was also referred to by the ILC, but no attempt was made to make it a binding customary rule. In addition, it refers only to promises, and it was difficult to turn it into a principle of general significance.

This urgent search for a general standard of international customary law as the basis for the binding force of unilateral action brings to mind the views of H. Kelsen on the basis of the binding force of treaties. It is well known that his basis for the binding force of treaties is “the customary principle of international law, usually expressed in the form of *pacta sunt servanda*”. This formula justifies (“is the reason for”) the binding force of the treaties and is the “source” of all the law created by the treaties¹⁵³. A similar customary rule of law seeks to base its binding force on a unilateral act. Many authors seem to believe in the existence of such a principle. The differences are related to closer characterizations. Searching for the right name for this rule seems to be a purely formal and irrelevant endeavour. For example: should it be *pacta sunt servanda* or *acta sunt servanda*? Each refers to the same thing. The essence of the matter is that the principle of good faith can be contrasted with the sovereign will of the state as the basis for the binding force of their unilateral act at the level of international law.

C. A closely aligned principle of good faith with the presumed trust of the addressee

Many supporters of the Court's position find it difficult to accept that the binding power of unilateral promises is based on the principle of good faith and that it binds and produces legal effects upon reaching the addressee without the need for any reaction on its

¹⁵² *Ibidem*, pp. 180-181.

¹⁵³ H. Kelsen, *Principles of International Law*, New York, 1956, p. 314.

part, without showing any sign of trust in the received promise. They are trying to discern such trust in some way, to link it with the promise and the principle of good faith.

This problem existed in the scholarship before the appearance of the Court's ruling on French declarations. As an example, G. Venturini proclaimed that a unilateral promise by itself can create an international commitment. He added, however, that the binding nature of such a promise lies in the protection of the recipient's trust in the promise addressed to him. Hence, for Venturini it was obvious that "trust is essential to the binding nature of unilateral promises". Moreover, he believes that "the nature of a promise is to assume (presuppose) that the addressees trust it, that they feel connected to it, and that it is in the position of presuming the recipient's trust in the promise they have received and that such confidence is necessary to obtain binding power"¹⁵⁴. Similarly, in the 1950s, L. Brierly stated, "The possible explanation of the binding force of the so-called unilateral declaration of *rights, against the declarant*, can be found in the theory of the presumed consent of the beneficiary"¹⁵⁵.

Thomas M. Franck, recognizing the binding force of the unilateral act, criticizes the Court's view that a unilateral declaration could have come into force as soon as it was adopted. In his opinion, this would mean that law may arise from a unilateral statement without linking it with the recipient's trust. He considers that "a unilateral statement cannot be regarded as *law* until there is some element of reciprocity or trust from its addressee"¹⁵⁶.

These and other similar views appear not only in doctrine. During discussions of the ILC, it was also possible to hear that "the autonomy of a unilateral act is *totally conditional*, because the obligations it creates are not derived from the unilateral expression of the will of the state which issued such an act, but rather from the compatibility of such will with the interests of other states"¹⁵⁷.

Recently, Ch. Eckart has endeavored to link the position of the Court with the recipient's trust in the promise received. Like others, he criticized the Court's view that a unilateral promise could be binding upon reaching the addressee without the need for him to show the trust of the recipient. He states: "Without trust there is no reason for the author of a given promise to feel compelled to respect his or her words on the basis of good faith"¹⁵⁸. His interpretation of the Court's position on this issue has also been derived from the quoted paragraph on the French declarations:

¹⁵⁴ G. Venturini, *op. cit.*, pp. 403-404.

¹⁵⁵ J. L. Brierly, YILC, 1950, vol. II, p. 227.

¹⁵⁶ T. M. Franck, *op. cit.*, pp. 616-617.

¹⁵⁷ ILC, 3rd Report 2000, p. 11, par. 65.

¹⁵⁸ Ch. Eckart, *op. cit.*, p. 206.

One of the basic principles governing the creation and exercise of legal obligations, regardless of their source, is the principle of good faith. *Trust and confidence* are closely linked to international cooperation, especially at a time when this cooperation is becoming more and more important in many areas¹⁵⁹.

Trust and confidence, as Ch. Eckart explains, is a *legitimate interest* of recipient of a given promise. It proves that the promising state is obliged to fulfill its promise even when it changes its opinion in this matter, or because it has stated so, or even because it so wished, but because of the protection of the legitimate interest of the addressee of his promise. He argues that only by referring to this “external factor” can one explain the binding force of the declaration¹⁶⁰. Thus, the reliance of the addressee is contrasted with the freedom of form here. The pledge eventually acquires the binding force on the basis of the trust of the addressee.

As is known, according to the position of the Court and many of its commentators, the promise of a state is binding from the moment it reaches the addressee, without the need for any response from them. To reconcile the Court’s position with its interpretation, Eckart assumes that, from the legal order itself, there must be a presumption of such confidence at the moment of the pledge reaching its addressees. He says: “... the legal order actually *presumes* that the addressee *will be present and will be reliant upon the very minute it has been received*. It actually binds *the minute it is made* and cannot be changed or withdrawn by its author *at will*”¹⁶¹. Eckart believes that the Court’s ruling on the French declarations is just about to go in the right direction. Only accepting that “the addressee’s actual reliance on a statement which is beneficial and not rejected is presumed to exist” allows the binding force of a binding promise in good faith without the need for any reaction on the part of the addressee¹⁶².

Irrespective of the rightness of accepting the presumption that the trustee (or interest) of a recipient of a promise can be linked to the moment it reaches the addressee, and even at the very moment of taking the pledge, the role of the principle of good faith is reduced here rather to protect the recipient’s trust in the promise that had been made. The protection of trust in practice is intended to guard the consequences of the promise associated with the recipient’s trust. The will embodied in the promise and trust in that promise is to be the basis of its binding force, not interpreted from the judgment of the Court, and the principle of good faith widely shared.

The more prominent views expressed by internationalists clearly demonstrate that the principle of good faith, as indicated by the Court itself, cannot, as such, be the basis

¹⁵⁹ ICJ, Reports 1974, Judgement, p. 19, par. 46.

¹⁶⁰ Ch. Eckart, *op. cit.*, p. 203.

¹⁶¹ *Ibidem*, pp. 203 and 206.

¹⁶² *Ibidem*, pp. 206-207.

for the binding force of the unilateral state act. A more specific customary principle similar to the principle of *pacta sunt servanda* is sought. Alternatively, its role depends on merging with some or all of the presumed trusting beneficiaries of the unilateral act addressed to it. He raised the issue of G. Venturini even before the Court's 1974 judgment. C. Goodman, arguing that the binding nature of a unilateral act provides the "objective principle of good faith", essentially reduces its role to ensuring proper fulfillment of obligations. In Goodman's view, it is precisely in the execution of the commitments that they are binding.

What is particularly important in this case is that the Court itself doubts that the principle of good faith can be considered a source of unilateral commitments. Confirmation of this can be found in the Court's subsequent judgments detailing the general statements in the 1974 judgment. In a 1988 judgment, the Court, citing its general view on the role of the good faith principle from 1974, explained that this principle "does not constitute a source of commitment, where it somehow already had existed". In a literal sense: "it is not in itself a source of obligation where none would otherwise exist"¹⁶³. Not without significance is the fact that this explanation of the Court was literally repeated 10 years later in the *Cameroon v. Nigeria* case¹⁶⁴.

D. Sovereign will of the state

In the doctrine there is a view shared equally broadly which maintains that the basis of the binding force of a unilateral state act is not good faith, but the sovereign will of its creator. And what is characteristic, this position, unlike the previous, is convincing and quite clearly presented, as can be easily seen in the examples cited.

In the Polish scholarship, K. Skubiszewski gives his opinion directly and convincingly on the matter of unilateral state acts' binding force. In his deliberations on this very issue, he puts strong emphasis on the role of the author of the unilateral act. He says that the state can, according to its will, give binding force to its unilateral acts. The decisive factor in this case is the intent of the state. The state is bound by its unilateral act, because it is its intention. The confirmation of this principle is found in the practice of the international judiciary system. However, he states that it was only in nuclear test cases that the Court explicitly emphasized the role of intention in the unilateral act¹⁶⁵.

Skubiszewski tries to somehow synchronize the will of the state with the principle of good faith. He says: "The state's intent is binding, and it ties in with the principle of good faith." Further he explains that this principle is affected by the effect of the act since its publication or communication to the concerned State or States. He then adds that

¹⁶³ ICJ, Reports 1988, p. 105, par. 94.

¹⁶⁴ ICJ, Reports 1998, p. 297, par. 39.

¹⁶⁵ K. Skubiszewski, *op. cit.*, pp. 231-232.

it is the principle of good faith that obliges a state to act in accordance with its intentions and to commit itself to its unilateral act. At the same time, however, it stipulates that *the act remains its own creation*. So the unilateral state act remains the *creation* of the will or the intent of the state, not the principle of good faith. Skubiszewski does not elaborate this topic, however. In any case, such a basis does not constitute an agreement with the state to which the unilateral act is addressed. Such an act is not an offer that requires approval. But the *reliance* on a unilateral act by the interested state can affect its application, for example on its revocation in special circumstances. However, it does not affect its binding power¹⁶⁶. In this regard, the scholar fully shares the Court's position.

Skubiszewski's arguments show a convincing combination of the basis of the force binding a unilateral state act with the principle of good faith. He combines the principle of good faith with a unilateral act only from the moment of this act reaching the addressee. Thus, he does not bind it to the very basis of the binding force of a unilateral act, but rather to the effects it has caused. It is supposed to ensure respect and performance in good faith¹⁶⁷.

Such an opinion is also quoted by A. Kozłowski. He believes that "the decisive factor, constitutive" of the binding force of a unilateral state act is its sovereign will. It comes from a voluntaristic basis. On the other hand, the principle of good faith is understood as the basis for the "normative effectiveness" of a unilateral act which "materializes in the form of the *acta sunt servanda* principle"¹⁶⁸. The principle of good faith can thus "materialize" in various forms under international law. In this case it can take the form of *pacta sunt servanda* as well as *acta sunt servanda*. Both are a special expression of the general principle of good faith that underpins and permeates the whole system of international law.

Equally firmly in the direction of the sovereign will of the state as the basis for the binding force of a unilateral act are the views of J. Charpentier. He comments on the issue of the basis for the binding force of a unilateral act in the context of the judgment of the Court of 1974. He wonders if, according to the Court's ruling, *pacta sunt servanda* does not refer to unilateral state acts, then the good faith referred to by the Court may be the cornerstone of the binding force of such an act. This doubt arises from his own interpretation that, in the view of the Court, the principle of good faith applies properly to the performance of bilateral obligations and not to the basis of the binding force of a unilateral act. He contradicts, like K. Skubiszewski, the generally widespread belief that the Court has set the principle of good faith as the basis for the binding force of promises. In this situation, Charpentier identifies the answer to this question directly in the autonomy of the will of the state. He asserted that "*le propre d'une personne juridique est de*

¹⁶⁶ *Ibidem*, p. 232.

¹⁶⁷ *Ibidem*.

¹⁶⁸ A. Kozłowski, *op. cit.*, pp. 71-73.

pouvoir s'engager valablement par une manifestation libre de la volonté"¹⁶⁹. W. Fiedler also states that the decisive factor for the binding force of a unilateral act is *the intention of the declaring state to be bound*. He adds, however, that such an intention must be deduced from the circumstances that accompany each individual case¹⁷⁰.

Jean Charpentier notices in the doctrine of international law tendencies for relationships of autonomy of the state with its sovereignty based on the introduction to the judgment of the ICJ in *Wimbledon: contracter de la Faculté des engagements internationaux est un précisément attribut de la souveraineté de l'Etat* (PCIJ, Series A, N ° 1, p. 25). According to this author the principle of *pacta sunt servanda* cannot have any significance, if, for instance, the signatories to the pact have no ability at all to commit by the free manifestation of their will. To reinforce this position, Charpentier invokes the idea of Venturini, who claims that the binding nature of unilateral promises should be justified in the same way as a binding treaty. In fact, both acts are an expression of the general will of obligation based on the same constitutional norm of the international legal order *relative à la production juridique volontaire*¹⁷¹.

These views, as well as many other authors', are determined to return to a free and sovereign will of the state as the basis of any legally binding commitments undertaken by a sovereign state. So the formal side of the source of law, treaty, custom or unilateral act is of no significance here. One is the source of the binding force of such state acts in the international law.

Good faith is intertwined with the free will of the state. Reuter, however, favours the latter concept. In his view, for a unilateral commitment to achieve validity, it had to contain an expression such as *a non viciée, de la volonté normatrice* from its author. The element of intention or will becomes very significant here, even creative¹⁷². P. Reuter writes: "In principle, international law is not formalistic, so it attaches importance to the will as the core of the theory of the law"¹⁷³. J. Pauwelyn explicitly states that the criterion of intent is generally accepted in order to distinguish what is and is not the law¹⁷⁴.

For a fuller justification of this position one can refer to the opinion of A. E. Zoller, the author of a work on good faith in international law. She refuses to distinguish between general principles such as *pacta sunt servanda* and *promissio est servanda*. In both cases the same issue is presented – *une parole qui a été donnée*. Hence, the

¹⁶⁹ Charpentier, *op. cit.*, p. 374.

¹⁷⁰ W. Fiedler, *op. cit.*, p. 1021.

¹⁷¹ *Ibidem*, pp. 375-376.

¹⁷² P. R. Reuter, *Droit international public*, Paris 1963, pp. 84-85, *Principles ...*, p. 581, J.-D. Sicault, *op. cit.*, p. 668.

¹⁷³ P. R. Reuter, *Principes...*, p. 581, J.-D. Sicault, *op. cit.*, p. 668.

¹⁷⁴ J. Pauwelyn, *Is it International Law or Not, and Does it Even Matter?*, [in:] J. Pauwelyn, R. A. Vessel, J. Wouters (eds.), *Informal International Lawmaking*, Oxford 2012, p. 134.

basis of the legal character of a state's obligations is the autonomy of its will, regardless of whether the international commitment undertaken has a negotiated or unilateral context. Ergo, it is not good faith, but "the will to commit determines the legal nature of the unilateral obligation". According to Zoller, good faith is not an autonomous concept from the legal point of view, capable of producing legal consequences by itself. So it cannot be a source of law¹⁷⁵.

Recently, Ch. Eckart protested sharply against the notion that the basis for the binding power of a state is solely its sovereign power in this area (will). Even the position of the PCIJ does not convince him, that "the right to incur international obligations is an attribute of state sovereignty (PCIJ, Judgment of 17 August 1923, Series A1, p. 25). He is not pleased with the absence of a clear explanation for why a sovereign pledge taken *at will* cannot be withdrawn *at will*, when a given sovereign changes its mind in that regard. He believes that since sovereign competence allows it to contract *at will*, the same competence should also give it the right to withdraw *at will*¹⁷⁶.

It seems that this author has simplified the underlying elements of his deliberations too much. It is as if he did not notice that the declaration of a sovereign state does not appear *in vacuo*. It is submitted to other sovereign states and, of course, within the framework of all sovereign states of law. And that even a sovereign state cannot simply act at any time and in any way *at its will*. In the ruling on the French declarations, the ICJ, with all its authority, ruled that public declarations cannot be withdrawn or altered arbitrarily by the French government¹⁷⁷. The current legal order, permeated by the principle of good faith, does not allow this.

3. Grounds for the binding force of a unilateral state act in ILC guiding principles

In seeking the basis for the binding force of unilateral acts, the Commission, following the Court, refers to the law of the treaties. Art. 26 of the Vienna Convention on the Law of Treaties is invoked, which reads as follows: "Each treaty in force binds its parties and should be exercised in good faith." On the basis of that provision adopted by the Convention, the Commission stated: "... in like manner, unilateral declaration binds the state that formulated it by the same principle"¹⁷⁸. Therefore, the Commission, on the basis of the binding force of both treaties and unilateral acts, has applied the same principle of good faith on the basis of Article 26 of the Vienna Convention on the Law of Treaties.

¹⁷⁵ A.E. Zoller, *La bonne foi en droit international public*, Paris 1977, pp. 51, 342-343.

¹⁷⁶ Ch. Eckart, *op. cit.*, pp. 198-200.

¹⁷⁷ ICJ, Reports 1974, Judgement, pp. 20-21, par. 51.

¹⁷⁸ ILC 1st Report 1998, p. 28, par. 153.

It seems, however, that the meaning of the quoted article from the law of the is somewhat different. In essence, it reads as follows: “Every treaty **in force** [highlighted – J.K.] is obligatory, and must be performed in good faith”¹⁷⁹. This article does not refer to the basis of the binding force of treaties concluded. However, it is applicable to the performance of treaties already in force. It demands they be performed in good faith. This is the spirit in which it is understood and interpreted in the scholarship¹⁸⁰.

In the continuing appeal of the Commission to the principles of good faith and the principles of *pacta sunt servanda*, it was suggested that they could serve as a basis for the development of a more detailed norm in the form of *declaratio est servanda*. This would be a new and more specific norm, but one which seems to be of a fairly general nature. According to the Commission, although it would not cover all kinds of unilateral state acts, it could refer to such unilateral acts as pledge, rejection and recognition. Recognizing that the development of such a norm or general rule could raise doubts about unilateral acts other than the three mentioned above, such as protest, such fears should not prevent the development of the proposed *declaratio est servanda* rule. According to the Commission, it would not necessarily apply to all kinds of unilateral acts¹⁸¹.

In these searches for a counterpart to the *pacta sunt servanda* rule in respect of unilateral acts, the Commission refers to the classical literature, to Grotius and Pufendorf, who attributed binding force to the promise, and Grotius was aware of the general principle *promissorum implemendorum obligatio*¹⁸². Eventually, however, this line of inquiry was abandoned, and the Commission remained with a principle already known much earlier in the scholarship. For instance, E. Suy and G. Venturini proclaimed that the binding force of obligations stemming from a unilateral declaration comes from “the very principle of good faith and security of international relations”¹⁸³. It was precisely on the basis of the views of these authors, which the Commission was familiar with, and the Court’s position expressed in the 1974 judgment, that the first Guiding Principle was formulated, which reads as follows:

Declarations done publicly and manifesting the will of commitment result in the creation of legal obligations. When conditions are fulfilled, the binding nature of such declarations is based on good faith. States concerned can take them into account and rely on them; such countries are entitled to insist that these obligations be respected¹⁸⁴.

¹⁷⁹ Vienna Convention of the Law of Treaties .

¹⁸⁰ See e.g. S. Nahlik, *Kodeks prawa traktatów*, Warszawa 1976, pp. 178-184, or A. Wyrozumska, *Umowy międzynarodowe, teoria i praktyka*, Warszawa, 2006, p. 273 et seq.

¹⁸¹ ILC, 1st Report 1998, p. 29, par. 157. See, also A. Kozłowski, *op. cit.*, p. 68, or P. Saganek, *op. cit.*, pp. 87-88.

¹⁸² See. V.-D. Degan, *Unilateral...*, *op. cit.*, p. 151, or J.-D. Sicault, *op. cit.*, p. 636.

¹⁸³ G. Venturini, *op. cit.*, p. 403, E. Suy, *Les actes...*, p. 151.

¹⁸⁴ *Guiding Principles*, Principle 1.

Thus, the Commission did not take into account the clarification of the 1974 Court's position in its 1988 and 1998 verdicts cited above. It did not benefit from the diverse views of scholars in this regard. As a result, the principle formulated by the Commission does not reflect either the mainstream doctrine or a proper interpretation of the Court's position.

4. Summary

While the principle of good faith has been invoked in the doctrine of international law as the basis for the binding force of the unilateral state act, it was not until 1974 that the ICJ, discussing the French declarations, gave rise to broader interest in this issue. In fact, the Court has referred to this important legal issue, but in a manner too general and, in addition, not entirely clear. Hence, those commenting on this ruling try to complement and interpret the Court's view of the principle of good faith as a legal basis, the source of binding force of a unilateral act (in the French version).

Paul de Visscher is rather an exception, stating that the Court in its ruling clearly pointed to the "autonomous function of the principle of good faith in the creation of legal obligations"¹⁸⁵. Other commentators raise even more serious doubts about good faith as the basis for the binding force of a unilateral act. Among such doubts, it is difficult to agree with C. Goodman's view that the Court has succeeded in shifting international obligations "from the subjective expression of the will to the objective of good faith"¹⁸⁶. The more so, that it itself in principle focuses on good faith as rather securing the fulfillment of international obligations.

In fact, the commentators of the Court's ruling are rather seeking the existence of a specific legal norm of customary character, expressing the essence of the principle of good faith as the basis of binding force of a unilateral state act (or promise). And these searches conclude rather with various suggestions than justified and firm beliefs.

No less trouble is made for the commentators by the matter of specifying from what moment the pledge acquires a binding force that no longer allows the author of that promise to withdraw it arbitrarily. The main source of these doubts is again the Court's view that the promise has legal effect upon reaching the addressee, without need for any reaction showing confidence on the part of that addressee. The Court and ILC were concerned that the requirement of any reaction, even if only showing confidence in the promise received, would have violated the unilateral nature of such a state act. In reality, however, it is difficult to imagine, at least in most situations, that the promise itself of some rights, even beneficial, to its addressee may have legal effect in and of itself without giving rise to real trust and the exercise of that right by the addressee. Actually,

¹⁸⁵ P. de Visscher, *op. cit.*, pp. 463-464.

¹⁸⁶ C. Goodman, *op. cit.*, p. 18.

it is only the exercise of the promised rights that makes it possible to appeal against a one-sided act in the event of its violation. M. Virally tries to clear up these misunderstandings. He emphasizes that legal consequences do not come from a unilateral act alone, only because the author pursues such a purpose. The rights it intends to pass on to the third state will become definitively opposed only when they are “accepted” or used by the addressee¹⁸⁷.

In the scholarship some attempt is made to render more realistic the Court’s position on this issue through the presumption of trust in a promise or identifying the roots of such a presumption in the existing legal order. Ch. Eckart was one who drew special attention to this matter. He seeks to prove, not so much from the actual content of the Court’s ruling, but rather from its intentions, that the recipient’s trust in the promise is to be presumed precisely from the moment it reaches them, and even from the moment of the promise is served. In this version, the protection of trust from good faith comes from the appearance of a promise. Moreover, thanks to this construction, the promise cannot be either altered or withdrawn arbitrarily from its arrival to the addressee or addressees, or even from its receipt.

This is a design not without logic. It is difficult to assume, however, that implied trust in a given promise lies within itself from the beginning or manifests itself when it reaches the addressee, or if it can be identified in the existing legal order. Besides, attributing trust as such a significant effect of the nature of a binding promise can deprive it of its unilateral character. Trust may have an impact on legal effects, on legality, but not on the proper legal nature of the promise itself¹⁸⁸. One thing is the binding power of promises, and another thing is its effects and related issues of possible complaint or revocation.

It is much simpler to say that a unilateral act “reaching” its addressee means that they have become familiar with its content. The lack of opposition or rejection, though, can create the presumption that this act has led to their trust and will create legal effects. These effects derive from a single unilateral act, and this act sets out and delineates the nature and magnitude of the effects, but they are based on the recipient’s confidence in the act addressed to them.

The position of supporters of the binding force of the unilateral act on the sovereign will of its creator is clearly formulated and justified convincingly in connection with the general character of the whole international legal order and the place of sovereign states in it. Not by accident do J. Charpentier, K. Skubiszewski, and E. Zoller interpret the Court’s position in this spirit. It is difficult to resist such an interpretation of the judgment of when we read: “When it is the intention of the State to formulate its declaration (*dec-*

¹⁸⁷ M. Virally, *The Sources...*, pp. 153-156

¹⁸⁸ See. e.g. K. Skubiszewski, *op. cit.*

laratio) that it is bound to be binding, because such **intention gives the statement the character of a binding commitment** [emphasis JK]¹⁸⁹. It is not without significance for such an interpretation to clarify this view by adding in another, later judgment, the words “only” at the beginning¹⁹⁰. Only then does the will of the unilateral creator give it the power of a legally binding obligation. This *passus* in the Court’s case law is similarly interpreted by Zoller. On the basis of the above-quoted statement of the Court of Justice in its 1974 judgment, he states: “The will of the commitment determines the legal nature of the unilateral obligation. This commitment is essential because it draws on the distinction between declarations of a nature of legal obligations and declarations deprived of such character”¹⁹¹.

Thus, in the attempt to find grounds for the binding force of a promise in good faith, there are too many serious doubts for it to be credibly opposed to the sovereign will of the state. At the same time, it cannot be doubted that the principle of good faith plays a very important role in respect of unilateral acts by states.

IV. Source of law or international obligations

The considerations contained in this subsection are not limited to merely seeking direct answers to the question in the title. Efforts have also been made to highlight and clarify the specific legal character and specific characteristics, objectives and tasks that the legal norms created by unilateral states in the international community apply. Obviously, this is only fragmentary, hence it does not pretend to cover all the material or to show the full or final image of the basic legal problem. It is difficult to capture it in its complexity, giving a clear, confident and complete answer to whether the unilateral state acts are merely a source of obligation, or whether they can also be an independent source of international law. Considerations have been limited to portraying the various concepts elaborated in the literature, and in this context a more middle-of-the-road look has been put forward on this difficult legal issue.

1. ICJ findings

As to whether the unilateral act is a source of law or merely a source of unilateral international obligations, the Court has spoken in very broad terms. The Court stated, basing its position in this matter on “well-established” views of scholarship: “The declarations in a unilateral act, in relation to legal or political situations, may ultimately create legal

¹⁸⁹ ICJ, Reports, 1974, Judgement, p. 18, par. 43.

¹⁹⁰ ICJ, Reports, 1986, p. 573, par. 39. P. Saganek drew attention here, *op. cit.*, pp. 365-366,

¹⁹¹ E. Zoller, *op. cit.*, p. 342.

obligations.” It was added that such commitments come from the will of the originator of the unilateral act and only oblige that entity. On the other hand, with regard to the specific French declarations that were provided for the cessation of nuclear testing, it ruled with all its authority that “they create obligations with legal effects.” This is identified in not only their clearly-expressed content, but also their submission to the entire international community of states, making them obligations *erga omnes*¹⁹². He also emphasized that those interested in these declarations could familiarize themselves with them and, by trusting them, feel empowered to request that the undertakings made in these declarations be fully respected by the French government¹⁹³. So the French declarations became binding and actionable.

Although the Court speaks of declarations in principle as the only source of commitments for their author, the natural rights of the addressees of such declarations arise naturally, including the Court’s right to enforce a commitment. More specifically, the unilateral act can be, in the light of the Court’s judgment, not only a source of obligations, but also of rights resulting from those obligations. However, they do not entail a duty to exercise such rights.

In general, however, it must be stated that examination of international case-law shows that international courts have not taken a position on whether unilateral acts of states are a source of international law. They only confine themselves to saying that they are a source of international obligations. It is noted that judicial practice is neither uniform nor fixed in the legal assessment of unilateral state acts¹⁹⁴. It seems rather difficult to speak at all about the existence of such practice except in sporadic cases.

2. The Doctrine

The scholarship of international law almost unanimously claims that a unilateral act of a state is not a source of international law. In general, it is claimed that it can only be a source of obligations for the author of the unilateral act. It is only rarely added that it can be a source not only of such obligations, but also of rights resulting therefrom. As the basis of such a position, the principle of international law is put forth, ensuring equality of sovereign states. Equal, independent, sovereigns, incapable of imposing obligations on one another. This can only happen with mutual consent, generally on the basis of reciprocity. From then on, it ceases to be a one-sided act.

Maarten Bos’s theoretical perspective was particularly firm. His opinion on the sources of international law in relation to the unilateral state act derives from the con-

¹⁹² ICJ, Reports, Judgement, 1974, p. 18, par. 42, 43 and p. 20, par. 51.

¹⁹³ *Ibidem*, p. 19, par. 46.

¹⁹⁴ ILC, 1st Report 1998, p.15, par. 82.

ception of a community of free people. He stated that “in the *homines liberi* community no law can exist in its unilateral conception”. With regard to international law, he adds: “... if an act entails the emergence of international law, it must have at least a bilateral character.” Some of the unilateral decisions made by international organizations may demonstrate features of a source of international law. They function in an “organized community”¹⁹⁵.

An equally adamant author on this subject is K. Skubiszewski. Referring to the views of M. Bos, he categorically states: “... a unilateral state act cannot be the source of this [international] law.” To make his point clear, he adds: “Neither the binding nature of certain unilateral acts nor their irrevocable character gives them the status of a source of law”. In his view, unilateral state acts can only affect the functioning of sources of international law, may give rise to customary norms, and many treaties are concluded by exchanging unilateral state acts, for example by exchange of notes. Certain unilateral acts may even lead to *legal rights*, obligations or relationships. All this is something other than the creation of sources of international law by the unilateral state act¹⁹⁶.

Skubiszewski admits that although no state can impose obligations on another state, it may unilaterally through its own act activate the obligations of another state resulting from general international law or treaties. Both customary and treaty law leave many different issues to the unilateral decisions of the states concerned. By making such decisions, the state can initiate the operation of some rights or duties. But in such circumstances, stresses Skubiszewski, the unilateral state act does not become a source of rights or obligations. These rights or obligations come either from custom or treaty, and via these unilateral acts¹⁹⁷.

Thanks to unilateral acts that activate international rights or obligations, they become *applicable*, and in this sense can be referred to a unilateral act, sought by other interested states. In this sense, unilateral acts opposing previous acts may also be applicable. To illustrate such a situation, Skubiszewski cites an example of the law of the sea. Each coastal state has the right to delimit the breadth of its territorial sea via a unilateral act. However, this can only be done to the extent permitted by general international law. The link between a unilateral decision of a state and general international law was emphasized by the ICJ in *fisheries* cases:

While the delimitation act is necessarily a unilateral act, only the coastal state has the power to take it, but the validity of the delimitation itself is dependent on international law (ICJ, Reports, 1951, p. 139)¹⁹⁸.

¹⁹⁵ M. Bos, *op. cit.*, pp. 88-89.

¹⁹⁶ K. Skubiszewski, *op. cit.*, pp. 221-223.

¹⁹⁷ *Ibidem*, p. 233.

¹⁹⁸ *Ibidem*, p. 233.

This quotation seems to indicate that the preceding quotations of K. Skubiszewski refer to unilateral acts closely related to the law of the sea at that time, i.e. non-autonomous acts. Such unilateral acts actually only “activate” the rights guaranteed by the law of the sea. They are, therefore, not autonomous unilateral acts *sensu stricto*. Their anchorage lies in international treaty law or customary law.

Skubiszewski’s reasoning, however, draws attention to unilateral acts which may activate the rights or obligations of other states under general law or treaties and become the basis for pursuing claims on the activated rights or obligations. They seem to acquire some degree of independence and come closer to unilateral acts *sensu stricto*. Unfortunately, these arguments are not illustrated by examples from practice. He also emphasizes that the unilateral state act, imposing an obligation upon its author, simultaneously creates an appropriate right for the addressees of such a unilateral act. These states, by putting their trust in such an act, may demand that their rights be exercised and respected by their creator. Such an act can also be challenged in the event that it deprives them of their freedom of action¹⁹⁹. So such a unilateral act can become the authentic source of these rights, and one can say that in this respect it is also a law-making phenomenon. In the light of Skubiszewski’s arguments, however, it does not acquire the character of a source of international law in the strict sense, even when both obligations and corresponding rights arise from it.

Venturini has already emphasized that in a unilateral act, the state can only incur an obligation. He also reinforced the legal nature of such a commitment. This can be a commitment only in one particular case. Such an obligation must be precisely defined and, therefore, cannot constitute a general obligation, not limited and not exhaustive in one case²⁰⁰. Such an act cannot be regarded as a source of general law. He did not, however, take a stand regarding a general obligation not limited to one case.

The views expressed are a good reflection of the general position of authors refusing to assign unilateral acts the character of sources of international law. However, there is an increasing tendency in the international law scholarship aimed at providing a certain measure of elasticity to such a firm standpoint, while at the same time to some extent undermine the division adopted by the scholarship into unilateral acts with a conventional base and unilateral autonomous acts, that is unilateral state acts *sensu stricto*. Some unilateral acts of states may have a dual nature. In certain situations, they remain dependent on treaties for exercising their legal effect, while in other circumstances they may produce legal effects on their own.

¹⁹⁹ *Ibidem*, p. 233.

²⁰⁰ Such a unilateral act cannot therefore be a source of general law. G. Venturini, *op. cit.*, p. 403.

Jean-Paul Jacqué, in his reflections on international law, draws attention to the difference between norms of conventions and norms of unilateral acts. He adopts a binary classification – formal and substantive. By applying a substantive criterion, the author submits unilateral acts as creating legal norms applicable to other legal entities other than the author of the unilateral act, while treaties create legal norms that refer only to their creators²⁰¹. Of course, there may be exceptions, such as a third country contract. As a general rule, unlike treaties, unilateral acts could be regarded as the source of legal norms directed at entities other than their creators. As a result of this arrangement, Jacqué criticizes the supporters of the voluntary approach to international law. From their point of view, a legal act cannot create both obligations and rights, as for the entities involved in the creation of such acts. In this perception, such an act may be a source of legal norms that apply only to the authors of this source. It comes from their will, and can only refer to them²⁰².

Such a view, of course, does not fit very well with the reality created by legal norms contained in many unilateral acts, especially promises. Closer to the legal reality is a perspective based on the substantive criterion distinguishing norms of convention from norms created unilaterally. This view emphasizes precisely that legal obligations stemming from unilateral state acts are borne by the author of such an act, and at the same time the effects of these obligations are directed to the benefit of other states, the addressees of those acts. For this reason, Jacqué compares such unilateral acts to agreements made with third countries and states that they could be called unilateral acts for third countries²⁰³. W. Czapliński believes that *pactum in favorem tertii* is in fact a one-sided act²⁰⁴.

Jacqué's views above live up to the arguments put forward earlier by G. Venturini. He also points out that a binding unilateral act is not geared to the benefit of the state bound to it for a specific conduct or omission. There is also no element of contractual reciprocity. The author of a unilateral act can always keep what they promise to give to others, irrespective of any legal ties. Because they can promise only what they already have. And they promise to create benefits for the addressee of their unilateral act. Venturini explains that he perceives that such unilateral acts are taken and performed "in the name of elementary justice"²⁰⁵. Such a character of unilateral acts is strongly emphasized by A. Kozłowski, stressing that unilateral acts of the strictest sense, i.e. autonomous, are

²⁰¹ J.-P. Jacqué, *Eléments pour une théorie de l'act juridique en droit international public*, Paris 1972, p. 320.

²⁰² *Ibidem*, p. 320.

²⁰³ *Ibidem*, p. 320. Jacqué also included in international unilateral acts the decisions of international courts. He calls them one-sided authoritative acts. Among them the most important is the act of jurisdiction. It is authoritative because its creator can impose liability on the addressee of the sentence. This view is rather isolated (*ibidem*, pp. 345-346).

²⁰⁴ W. Czapliński, *op. cit.*, p. 106.

²⁰⁵ G. Venturini, *op. cit.*, p. 403.

regarded in the international legal order as not only a source of commitment for their creators, but also positive rights for their addressees²⁰⁶. Brierly explicitly states that such unilateral acts generate “rights against the declarant”²⁰⁷.

To support such a view, it is worth mentioning the opinion quoted and included in the 7th ICJ report. It was pointed out that the current international practice abounds with numerous examples of unilateral promises of states, humanitarian aid, granting permission to use special territories, withdrawing from territories occupied militarily or being used for strategic purposes, debt cancellation, economic assistance, etc. Especially providing assistance in the present day, granting loans based on unilateral pledges has become a *familiar phenomenon*²⁰⁸. A notable example here is the Joint Declaration of the Venezuelan and Mexican Presidents issued on July 3, 1980, in which they announced a program of energy cooperation for the countries of Central America and the Caribbean. In this act they assumed obligations that can be considered legally binding, and which are to the benefit of third countries not participating in the formulation of this declaration. The legal nature of these commitments can also be attributed to the fact that they have been consistently performed by both countries and confirmed in time by declarations of the same content²⁰⁹. It is therefore possible for Venturini to say that these acts make the system of international law more fair, while giving it greater flexibility and perhaps greater efficiency.

In addition, the quoted views and examples clearly appear to indicate a complex, even legal nature, of some unilateral state acts, and in particular of a promise. Although undoubtedly these acts derive their legal force from the subjective will of their creator and their creator sets the purpose and scope of its act, the obligation and the rights resulting therefrom, the foreseen effects of that obligation or the fulfillment of purpose cannot normally take place without any participation. In the subject to which the act was addressed. M. Virally explicitly states that the rights the author of a unilateral act intends to transfer to a third country become definitive only when they are accepted or practiced by the state concerned²¹⁰. One can say that such unilateral legislation is unilateral only in the aspect of its origin and its source of binding force. In contrast, in its legal-practical fulfillment, in its implementation, it is of a bilateral character²¹¹. It may even have a quasi-multilateral character in some sense, such as the French declarations, where the com-

²⁰⁶ A. Kozłowski, *op. cit.*, pp. 71-72.

²⁰⁷ J. L. Brierly, YILC, 1950, vol. II, p. 227.

²⁰⁸ ILC, 2004, 7th report, pp. 10-13, par. 23.

²⁰⁹ Libero, *Amarillo de la Republica de Venezuela*, Caracas 1983, pp. 872-873, after: ILC, 1st report 1998, p. 16, par. 83.

²¹⁰ M. Virally, *op. cit.*, pp. 154-156. Similarly, E. Suy, *Les actes...*, p. 151.

²¹¹ Such a kind of bilateralism does not change the character of a unilateral act. In addition, the unilateral act of the State may be rejected, and even in certain cases challenged by its beneficiary.

mitment was made *erga omnes*. So it is an act changing the legal relationship between two or more states. However, it must be remembered that such bi- or multilateralism has its own specificity, distinct from bi- or multilateralism based on the consent of parties and the related reciprocity.

Camille Goodman, as do others, believes that since no state can impose obligations on another without its consent, a unilateral state act cannot be of a source of international law in the strict sense. She adds, however, that the legal effect of a unilateral state act may be to accept the author's obligation, to confirm previously existing rights, and even to acquire important new rights, such as territory²¹². However, she does not give an example nor explain how a unilateral act can lead directly to the right to acquire territory. Is this, for example, a cession, or a customary one-way act?

More about the possible various legal effects of unilateral state acts is expressed by the V.-D. Degan. It seems odd to him that, until now, most of the works and textbooks devoted to international law and dealing with unilateral acts do not at all mention the possibility of acquiring new rights for themselves into new territories, such as not belonging to any other countries. But, moreover, the state can acquire new rights through such act, even if it is contrary to the principles of general international law or the subjective rights of another state. The condition for acquiring such rights may be a peaceful extension of its authority to some territory or part of the sea for a longer period of time and without any protests from other states²¹³. In support of this view he quotes Max Huber's statement on Palmas Island of April 4, 1928:

... practice and doctrine recognize, though under various legal formulas and with some variation in the required conditions, that the continuous and peaceful exercise of territorial sovereignty (peaceful against other states) is as good as (historical) title ...²¹⁴.

Max Huber's remarks refer to overland territory, but they can equally be used to extend state power to international sea waters. Degan points to the many unilateral acts or conduct of various states that initially had no legal basis or were incompatible with existing international law norms, and over time gained legal force on the basis of "subsequent practices of most other states generating new customary rules". It rightly emphasizes that the so-called unilateral acts of states, or even practices, in particular the major

²¹² C. Goodmann, *op. cit.*, pp. 2-7.

²¹³ V.-D. Degan, *Unilateral Act...*, p. 237. M. Virally has different view on the topic. He believes that unilateral acts on the territorial waters or the continental shelf can have effects in international law only if they are not contrary to this law. As long as such an act does not find support in customary law, it cannot be counterproductive in relation to other states, unless it is explicitly recognized by the situation, or if such a situation would gain historical title or universal tolerance (*Fisheries case*, ICJ, Rep. 1951, p. 138 et seq.). M. Virally, *op. cit.*, p. 156.

²¹⁴ II Reports of International Arbitral Awards, 839, quoted after V.-D. Degan, *Unilateral Act...*, p. 234.

maritime powers of the largest commercial, fishing or war fleets, have always been the foundation of the development of international law of the sea²¹⁵.

It should also be stressed that it is justified to emphasize that such acts have become merely the root of the practice, which can then lead to a new customary norm. Thus, such state acts aiming at acquiring jurisdiction over some land or sea areas do not fall within the category of unilateral acts of an autonomous nature. They only initiate a practice that can lead to recognition in the form of the so-called *opinio iuris* as evidence of the emergence of a new customary standard. The resulting customary norm consists of two elements – practice as a material element, objectively determined, and subjective element, i.e. *opinio iuris*.

Degan's claim, however, is that unilateral state acts, which at the beginning are incompatible with the international law in force, acquire legal force based on practice recognized as evidence of a customary norm. Such an act is only a beginning and an integral part of the developed practice, and thus accomplishes its goals. It is neither a source of a customary norm, nor can it be given the power of law. It was created on the basis of the practice initiated by the unilateral act, simply as act of absorption. This as such ceases to have any further lawmaking significance. It may, however, affect the process of forming the customary norm. K. Zemanek puts forward a different concept. He believes that while in the law-making process initiated by a unilateral act the custom of the state is considered to be the proper source of law, yet such a unilateral act can be regarded as the source of this custom, and then they can hardly be separated²¹⁶. It does not appear, however, that the unilateral act itself, understood in the sense of action, of the practice of states, could be regarded as a source of customary law. Such a rule of law must consist of two elements – practice and *opinio iuris*. Indeed, practice itself can lead to the formation of a habit, but not legally binding.

In the doctrine of international law, since the middle of the last century views have emerged that a unilateral state act may, at the time of its inception, bring about the legal effects which it assumes as the norm of international customary law. It is quoted by L. Brierly, who argued at the ILC forum in 1950 that in the formation of custom there is no need for "continuation or repetition of the practice over a considerable period of time". Of significance is, however, *opinio iuris*, which may appear "at moment's notice". He argued that the principle of state sovereignty over the air on its territory was "settled at once" at the "outbreak of war in 1914". Previously, it was only a "matter

²¹⁵ *Ibidem*, pp. 241-242

²¹⁶ K. Zemanek, *op. cit.*, p. 218.

of opinion”²¹⁷. Many authors state that nowadays customary norms can emerge *instantly* through unilateral acts of states.

Igor I. Lukashuk writes, for example, that not only doctrine, but even international bodies are inclined to recognize the possibility of creating a customary norm without preceding it, or even without prior practice. According to this orientation, the essence of the matter in the creation of norms of customary international law is simply to shift the focus from the requirement of *evidence of practice* to *opinio iuris*. So what was formerly recognized as evidence of practice now is the growing *evidence of opinio iuris*²¹⁸. Lukashuk states that lawyers have pointed out for several decades that the length of the practice was not a decisive factor in shaping custom. The time required for custom depends in each case on individual circumstances and may vary from case to case. In situations of rapid change and emergence of new problems requiring immediate decisions, customary norms can even appear without preceding practice. This recalls the view of Bin Cheng, who has long argued that international customary law has only one constitutive element. It is *opinio iuris*²¹⁹. Even if one accepts this view that a unilateral state act may, without the protests of other states, immediately create a legally binding norm, then it would be difficult to regard it as a source of customary norms. It would deny the whole essence of customary norms stemming from practice rather than consent in the form of *opinio iuris*.

The main impetus for the emergence of the concept of *instant customs* has been given particularly thanks to two essential and widely known events of major importance for international law. These were the announcement made on September 28, 1945, by US President H. Truman regarding the continental shelf proclamation, and the launch of space missions by the then Soviet Union of the first Sputnik in 1957, without prior notice to any country. The lack of protest against these two unilateral acts violating the international law in force then began to be explained and justified as a reconciliation of their binding force as a source of new norms of customary law. They were meant to be the source of customary norms of an *instant custom* based solely on the *instantly* created “*opinio iuris*”²²⁰. However, as it is known, what is and what is not the law is not to be decided by the opinions of lawyers, but by the bodies set up to determine and apply the

²¹⁷ YILC, 1950, vol. I, p. 5.

²¹⁸ I.I. Lukashuk, *Customary Norms in Contemporary international Law*, [in:] J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century, Essays in honour of Krzysztof Skubiszewski*. The Hague 1996, pp. 503-505.

²¹⁹ B. Cheng, *United Nations Resolutions on Outer Space: Instant International Customary Law?* “*Indian Yearbook of International Law*”, Vol. 5 (1965), p. 36, I.I. Lukashuk, *op. cit.*, p. 506.

²²⁰ Some authors, while recognizing their features, tried to construct something similar to the supposed practice. see. e.g. K. Wolfke, *op. cit.*, 2nd ed. pp. 56-58.

law, i.e. courts, in this case ICJ. Noteworthy here is the opinion of the body set up for the development and codification of international law, namely the ILC.

The Commission, as its member J. Brierly points out, was reluctant to recognize the authority of a legal norm from a practice based solely on the will of the countries concerned. Brierly did not consider that even a fairly extensive practice of states could create sufficient grounds for a customary norm. Considering, however, that since the unilateral act of the United States was widely endorsed by its general utility, such support provided a sufficient basis, but merely to recommend the exclusive rights of coastal states to the adjoining continental shelf²²¹. It was considered that Truman's proclamation constitutes only a "part" of the unfinished process of the creation of a new customary norm in the law of the sea relating to the continental shelf²²².

A similar position was taken by the ICJ. In the North Sea continental shelf judgment, Truman proclaimed the "special status" of both the theory and the practice of international law governing the legal regime of the continental shelf. Ultimately, he stated that this was only a "starting point of a positive law", the law codified in 1958 in the Convention on the Continental Shelf²²³. A good example can be mentioned in the matter of Lord Asquith of Bishopstone seized in arbitration concerning the *Abu Dhabi case*. He stated explicitly that even a "continental shelf doctrine was not known in international law" until World War II. He added that until 1951 it did not become part of the corpus of international law, nor was it finally established as a norm of international law²²⁴.

Thus, K. Skubiszewski is rather right to say that "*instant custom* is an invention of literature, not a phenomenon of the legal realm"²²⁵. In the process of creating international customary law, unilateral acts of states can only initiate and participate in its continuation leading to its possible recognition (*opinio iuris*) as proof of the formation of a new customary norm. As such, they do not constitute an independent source of these legal norms.

Both in the jurisdiction and in the doctrine, the position that a customary norm is practiced is widely shared. K. Wolfke, after thoroughly examining both ICJ practice and doctrine, stated: "in present, international law there are no binding precise, pre-established conditions for custom creating practice, except the basic one that such practice

²²¹ J.L. Brierly, *The Law of Nations*, 6th ed., Oxford 1963, pp. 213-215.

²²² ILC, 3rd Report, 2000, p.22, par.164-166

²²³ ICJ Reports, 1969, par. 47 and 100.

²²⁴ *The Arbitrations between Petroleum Development (Trucial Coast) Ltd., and the Sheikh of Abu Dhabi (1951)*, 1, ICLQ (1952), pp. 247, 253-255. For G. Schwarzenberger, *International Law*, 3rd ed., 1957, vol. 1, p. 350. See also J. L. Kunz, *Continental Shelf and International Law: Confusion and Abuse*, 50 AJIL, 1956, pp. 228-235.

²²⁵ K. Skubiszewski, *Rezolucje Zgromadzenia Ogólnego ONZ a powstawanie prawa zwyczajowego*, in: *Acta Universitatis Wratislaviensis*, N° 948, Prawo CLIX, Wrocław 1987, p.138

must be sufficient foundation for at least a presumption that the states concerned have accepted it as legally binding”²²⁶. Following M. Virally it can be added on the basis of ICJ practice that proving a custom depends on procedures. On the “legal interpretation of facts objectively established”²²⁷.

Degan, as quoted above, rightly states that unilateral acts on the seas, or even practice, in particular that of the major sea powers, have always been a *factor* in the evolution of international norms. They were so even when they had no legal basis. It is therefore clear that such unilateral state acts can be regarded as a new source of international law. He states first and foremost, as do almost all other authors, that there is such a great diversity of acts of this kind that it is impossible to find one common denominator. Some of them, like *acquiescence*, produce only *opposable situations*. Others, such as protest, preclude them. These types of unilateral acts in his opinion are not *genuine sources* of international law. They are rather reactions to acts of other states²²⁸.

In general, the answer to the question of whether unilateral acts of states are a *genuine* source of international law depends on how we interpret the notion of such sources. If under this concept we understand the source of law as merely *impersonal* legal norms, then the answer is definitely negative. On the other hand, in conjunction with treaties, certain Declarations of the UN General Assembly, the final acts of diplomatic conferences, judicial practice and states’ unilateral acts are “an important element in the creation, modification and expiry of customary norms of international law.” In this context, they see their “normative character”²²⁹.

Finally, the author acknowledges that in the sense “of a particular agencies creating legal rights and obligations for some states only” certain types of unilateral acts “constitute a source of international law”. He adds that in their nature and their legal implications they are closest to treaties. And in this narrower sense they are “a genuine law creating process”, as are other sources of international law. And all unilateral acts of the nature “of being law creating agencies” can be incorporated into three groups:

1. a pledge, by which a given subject of international law, the author of a unilateral act, assumes a new obligation in respect of another state, group of states or even *erga omnes*.
2. waiver of certain binding rights.
3. unilateral acts that have for centuries created new rights for their originators in relation to certain land territories or parts of the sea. These rights arise through the peaceful use of these acquisitions for a long time, even without any legal title²³⁰.

²²⁶ K. Wolfke, *op. cit.*, pp.44 and 169.

²²⁷ M. Virally, *op. cit.*, pp.121-122 and 134-135.

²²⁸ V.-D. Degan, *Unilateral Act...*, p. 185.

²²⁹ *Ibidem*, pp. 185-186.

²³⁰ *Ibidem*, pp. 186-187.

This division points to the very unilateral state acts in their content and character. From accepting new obligations towards other countries, renouncing certain rights over other states, and finally acquiring certain special rights that may create obligations for other states, or at least restricting the rights of other states to certain land or sea areas. Except for the above-mentioned reasons, the acts referred to in paragraph 3, Degan's unilateral acts change the relationship between the various parties of that right. They are, as Degan points out, "*law-creating agencies*". Their creators change their legal relationships in a wide range of subjects, with one or a group of subjects, and even in the *erga omnes* scale. With this disproportion, however, the source of this change of relations, even *erga omnes*, is, on the other hand, one legal entity, although it may be composed of several states. And in that sense, such an act of law does not correspond to a non-personal, impersonal act. And according to Degan, these are precisely the sources of international law in a strict sense. Perhaps, however, one can doubt the opinion of Degan that the source of international law must always and everywhere be completely depersonalized. As an example, such a personalized act as the French declaration changed the legal relationship between all states. They applied *erga omnes*. The decisions of an organization recognized as a source of international law also come from one subject of that law. And they are widely recognized as a source of international law. This also seems to point to the lack of a logical and coherent notion of the source of contemporary international law.

Like Degan, J. Dehaussy also seeks in unilateral state acts a new source of international law. He believes that the source of law is the process of creating general legal rules (*caractère général*) designed to regulate existing relations or create a new legal order between states. However, it shares unilateral acts on account of their law-making significance in two groups: unilateral acts of international bodies and unilateral acts of national authorities of states. The acts of international organizations attribute *un caractère plus ou moins nettement supérétatique*. He considers that the autonomous acts of state organs issued for the purpose of regulating international relations are also a source of law, since they fulfill *un rôle normatif générale en droits des gens*. Given the individual relations between the different states, the nature of international relations, and the unilateral acts of states may regulate such relations, they should be incorporated into the sources of international law. All the unilateral acts of states in international law, however, consider lower rank of international law. They are also made up of the law, but such law is dependent on acts of higher rank. So it is derived law, secondary (*secondaire*) law. This means that the law derived from this source cannot be contrary to the law of the

higher category, that is neither treaty law nor the customary law, which constitute the “main source” of international law²³¹.

This concept met with harsh criticism from Bos. Only in respect of the first group, that is the acts of unilateral international bodies, he agrees with Dehaussy’s view. Nonetheless, only to a certain extent. In his opinion, a “more or less transnational character” can be granted to only “some decisions” and not “resolutions” of international bodies. He cannot agree with the notion of a “derived source” of international law in respect of unilateral acts of states on two grounds.

First of all, there is no place in the system of international law for a second category source, that is, sources of law dependent on another, higher category of sources or main sources. There simply cannot be any source of this kind in international law.

Secondly, the fundamental reason for rejecting such views is seen by Bos in the fact that in the “*homines liberi* community” there can be no law of unilateral nature at its origin. According to Bos, the international act must have at least a bilateral character. The decisions of international organizations, although they are one-sided, are not in the *homines liberi* world. They function in an “organized community”. That is why they are “a class of their own”. They are a source of international law, and in the terminology used by Bos they are a “Recognized Manifestation of International Law” (RMIL)²³².

This concept of Bos can lead to the conclusion that all treaties concluded by international organizations are not a source of international law, as they cannot conflict with the basic principles of their statutes. And international law cannot be in conflict with the basic provisions of the UN Charter. Bos seems not to notice the emerging hierarchy of norms of contemporary international law. And besides, as Virally rightly writes, the issue of the source of law is different *in a state of community*, and in what we call the *international community*, which is still *imperfectly organized*²³³.

Michel Virally refers critically to the adoption in international law of the general theory of the traditional notion of law “sources” from which legal norms are created in the sense of “general and fixed norms” having repeated application without restriction. He believes that such a capturing of sources does not match the so-called “particular rules”. This causes difficulties in international law, which is characterized by the fact that it includes relatively few general norms binding all states. Very often the term “international law” is used in the sense that it only covers “general international law”. In fact, it also contains other standards binding only a certain group of states, or even some states. It points to the situation of norms contained in multilateral treaties as well

²³¹ J. Dehaussy, *Sources du droit international: Introduction général*, w: *Juris-classeur de Droit International*, vol. I, Fasc. 10, pp. 4-12. M. Bos, *op. cit.*, p. 88.

²³² M. Bos, *op. cit.*, pp. 88-89.

²³³ M. Virally, *op. cit.*, p. 120.

as customary norms that create regional customs. Finally, general and permanent norms may arise in relations between only two states. In this way, unilateral state acts can lead to the emergence of *international rules of law*. They may be the source of regional international law²³⁴. This is a concept reminiscent of Degan's above-mentioned opinion.

The same line of reasoning towards unilateral acts is followed by Ch. Eckart. He, above all, took a very strong position on the nature of the legal promise. Eckart believes that the Court has formulated its view of the pledge as a source of commitments rather than a law based on G. Fitzmaurice's theory of treaties. According to this theory, treaties are not a source of law, because they do not apply to all states, but only refer to states that are parties to such a treaty. And yet – as the author rightly noted – according to Art. 38 of the ICJ statute, both “general” and “particular” treaties are considered sources of international law. He believes that the same character should be assigned to promises, and that they should be included among the sources covered in this article as a new source of developing international law²³⁵. There is now a clearer stance in the scholarship that seeks to recognize autonomous unilateral state acts as “derivative”, “particular”, and even international law. Even P. Saganek, who is very critical of the authors who perceive sources of international law in unilateral state acts, summarises with the following conclusion: “In the present state of this doctrine, it is impossible to refuse the status of source of law to any unilateral acts. Acts which are at least similar to agreements deserve the same treatment as regards belonging to sources of international law”²³⁶. Probably, however, he exaggerated or erred by pointing to “any and all” unilateral acts of states. It is rather only some of them that he wished to mention.

As has already been said, there is a broadly shared and accepted division of unilateral legal acts into acts related to the process of treaties and customary law, and acts that are independent of these processes, that is unilateral autonomous acts. The fundamental difference between the two groups of acts is that the unilateral acts of states linked to treaties and customary law cannot independently produce the legal effects they envisage. This may only be in connection with a given treaty or customary law. Autonomous acts, on the other hand, produce legal consequences autonomously, on their own. On this basis, ILC excluded from the scope of its deliberations all of the first group of unilateral state acts. In the scholarship they are also omitted when considering the legitimate character of unilateral acts.

There are, however, some authors who disagree with such an arbitrary division. It is arguable that certain unilateral acts of states, linked to treaties or customary law,

²³⁴ *Ibidem*, pp. 120 and 154.

²³⁵ Ch. Eckart, *op. cit.*, pp. 179-188.

²³⁶ P. Saganek, *Akty jednostronne państw a problematyka źródeł prawa międzynarodowego*, [in:] B. Mielnik (ed.), *Z problematyki źródeł prawa międzynarodowego*, Wrocław 2017, p. 87.

in certain situations may have legal effects independent of a given treaty or custom. Not every unilateral commitment resulting in the legal consequences of a convention has to lose its legitimate autonomy. Unilateral commitments can be combined with conventions without losing their autonomous character. This is an example of the recognition adopted by *Les Douze en application de la Déclaration sur les lignes directrices de la reconnaissance de nouveaux Etats en Europe orientale et en Union Soviétique du 16 décembre 1991*²³⁷. It is about taking into account the five conditions set out in the Declaration of European Political Cooperation of 16 December 1991, in giving these new states collective recognition. This trend of academic inquiry was initiated by J. Charpentier and further developed by other authors, especially K. Zemanek and E. Suy.

Jean Charpentier basically agrees that the search for an independent source of law excludes the unilateral acts of states aimed at creating or modifying their conventions. This applies to acts such as ratification or objection to a treaty. This may also be related to accession to a treaty, when the state notifying of the act of accession becomes a party to it, although it did not participate in its preparation. Accession to a treaty may also have a different legal character. This can happen when, by unilateral act, a state accepts the provisions of a given multilateral treaty, but does not want or cannot become a party to it. In such a situation, it becomes unilaterally bound by the provisions of the treaty, and the source of the change of legal relationships between the parties to the treaty and the state accepting its provisions is unilateral. Such known cases are, for example, the acceptance by France of the Treaty of Non-Proliferation of Nuclear Weapons in 1968 before its formal accession to it,²³⁸ or the Declaration of December 12, 1978 of the European Space Agency accepting the rights and obligations of the 1974 Convention on the Registration of Objects Sent to Space²³⁹. One can also include an example by M. Virally, who points out that there are states which, by unilateral declaration, have “accepted” the provisions of the UN Charter. Nevertheless, the declarations made by them do not make them members of the UN, the parties to the multilateral treaty with which they are bound. In such a situation, however, Virally considers that states are bound by the Charter, or by customary law, which “attaches binding effects to unilateral declarations, or that these principles have been universally recognized as customary”²⁴⁰.

Jean Charpentier is of the opinion that, as a result of such a unilateral act, its creator enters all treaty obligations with respect to all states-parties to the treaty, but also enjoys the rights conferred by that treaty in the same way as all its parties. Conversely, all states as parties to a treaty extend their treaty obligations and rights to one new entity/non-party

²³⁷ J. Charpentier, *op. cit.*, p. 371.

²³⁸ In 1992, however, France joined TNP.

²³⁹ J. Charpentier, *op. cit.*, p. 71; see. E. Suy, *Unilateral Act...*, pp. 636-637.

²⁴⁰ M. Virally, *op. cit.*, p. 129.

to their treaty. This entire operation does not change the legal character of a unilateral act, even though legal effects are the result of its interaction with the treaty. The appropriate source for the change of the legal situation of the state – author of a unilateral act towards states that are parties to a given treaty is a unilateral act of an autonomous nature.

The important feature of Charpentier's deliberations over the unilateral state acts is to oppose a categorical separation of these acts from the agreements as well as the categorical division of unilateral state acts into autonomous acts and acts related to treaties and customary law. His research leads to the following conclusion: "One can be surprised to find that the difference between the two acts is less than we think". And the stability of unilateral commitments is comparable to conventional obligations²⁴¹.

Karl Zemanek has already presented direct criticism of the prevailing scholarship, and the rigid division of unilateral state acts by the ILC into legal and treaty-dependent acts and autonomous acts in this regard. He has certain objections about the fairness of such a categorization of unilateral state acts and draws conclusions on their definitively different law-making nature. First of all, he argues that not all forms of participation of unilateral acts of states in the process of concluding treaties can be fully subordinated to the Convention on the Law of Treaties. Some go beyond just supplementary roles and can produce legal consequences of themselves without a treaty, and are not mentioned in the Convention even though they are linked to a treaty. Current examples include the notification of new states on their accession to multilateral conventions or the continued application of bilateral treaties. States that are not parties to the Vienna Convention on the Succession of States to the Treaties of 1978 nevertheless accepted such notifications without protest. From their silent acceptance in this case Zemanek proposes that either they recognize the relevant rules of this Convention as evidence of existing custom, or they themselves have transformed them into the customary law through their acquiescence. In any case, either way, it was precisely because of the notification, a unilateral act of a country not covered by the Vienna Convention on the Law of Treaties. According to Zemanek, unilateral acts in such situations play an autonomous role, so they can be grouped into unilateral acts²⁴².

It is obvious to Zemanek that, as in the process of concluding treaties, so in the process of the formation of international customary law, the unilateral state acts constitute the "main instrument". The "definitive nature" of such acts indicates that they do not go in the process of creating or confirming the existence of customary law to establish individual rights and / or obligations for the states that are their authors, but contribute to the creation of norms of a general character, or confirm these norms by applying them. In addition, the

²⁴¹ J. Charpentier, *op. cit.*, pp. 175-176 and 380.

²⁴² K. Zemanek, *op. cit.*, pp. 210-211.

author believes that the difference in this case between the creation and application of customary law is sometimes blurred in practice. It would be possible to distinguish between unilateral acts influencing the formation of custom and then exerting a “constitutive effect”, and acts that only apply customary norms and consequently have a declaratory character; however, according to Zemanek this distinction would be purely academic. The law of custom is not a static set of rules, but it is a continuous process where continuous use leads to small changes, at times causing radical changes²⁴³.

Unlike the previous category of unilateral acts, those belonging to the group of autonomous acts go directly to the establishment of rights and / or obligations for the author of the autonomous act. If such an act lays down obligations only for its author, then there is no formal acceptance to achieve the intended legal effects. On the other hand, when it concerns other states, it must be “accepted by them to give them the opportunity to respond”²⁴⁴.

Based on his quoted *revisited* findings, Zemanek raises the question of whether unilateral acts of states can be regarded as a separate source of international law. First of all, however, again as other authors referred to above, he considers the prevailing practice of distinguishing between sources of rights and/or obligations and sources of international law as questionable and useless. This view can only reflect the situation of unilateral acts connected with the process of concluding treaties. In this respect, exceptions are provisions which do not exclude the provisions of the treaty, but merely alter the content of one of them and thus create a new law binding between the state making such an objection and those of the parties to the treaty which have such an objection. The division of sources here does not incorporate into the role of unilateral acts in the process of creating customary law. Although custom is considered in such a situation to be the proper source of law, unilateral acts, however, can be regarded as the source of this custom, and then they can hardly be separated²⁴⁵.

Lastly, such division is not appropriate for unilateral acts of an autonomous nature that are not carried out in a single application, but have lasting effects requiring constant adaptation. As an example, Zemanek quotes an ICJ judgment on French nuclear tests. France pledged not to continue such trials in airspace. This behaviour is continuous. It is not consumed in one act of behaviour or written act. In that case Zemanek does not see the difference between a unilateral act and a treaty as a source of international law²⁴⁶.

It could possibly be argued that the unilateral acts of states, as deriving their legal force from the international custom, are a derivative source, having no separate status.

²⁴³ *Ibidem*, p. 211.

²⁴⁴ *Ibidem*, p. 212.

²⁴⁵ *Ibidem*, p. 218. The acts that influence the rise of customary law attribute „constitutional effect”, p. 211.

²⁴⁶ *Ibidem*, p. 218.

According to Zemanek, such an argument, even if it is correct in its first part, is confusing in its conclusions. Similarly, as Dehaussy quoted above, and contrary to Bos, Zemanek considers that “delegated law-making is still law-making”²⁴⁷.

In conclusion, this author states that while most unilateral state acts will only create rights and / or obligations for their authors, some of them may “create a new law”. In Zemanek’s terms, this essentially refers to acts unilaterally recognized in the scholarship and in the work of the ILC for non-autonomous acts²⁴⁸.

Summing up, Zemanek’s revisited look at unilateral state acts can be concluded as follows:

- 1) he contests the consensus of scholarship and the ILC as a criterion for the classification of unilateral acts of states into dependent acts in their legal effects, either on treaties or customary law, and the autonomous acts of states;
- 2) he believes that the division into the source of rights and / or obligations of states and the proper source of international law is at best questionable and at worst useless;
- 3) he shows in the examples cited above that, in principle, not unilateral acts of autonomous nature as held by the scholarship, but unilateral acts of a state regarded as having legal effects dependent on treaty or customary law, may be – and in practice are – a source of international law.

Similar to Zemanek, Eric Suy in his recent publication and in his “new” view of international law states that, in the light of the progressive development of international law and the codification of treaties, constitutive elements of the autonomy of unilateral acts of states should be revisited or at least weakened (“shaded”)²⁴⁹. Among other things, it turns out, as Zemanek noted earlier, that the codified law of treaties does not include the regulation of certain forms of lawful participation of unilateral acts related to treaties.

Eric Suy illustrates this situation with the example of objections to treaties in the form of unilateral acts. If a multilateral convention permits the lodging of a reservation, then such a reservation is a unilateral state act which falls within the process of concluding treaties. It is not an act independent of the treaty in its legal effects. It happens in practice, though, that a multilateral treaty contains a provision excluding objections to it – as do most treaties on disarmament or human rights. However, if, despite such a prohibition, a reservation is made in the form of a unilateral act, such act will not give rise to any legal effect. It is observable that in the current practice of states there are “prohibited reservations” under the cover of “interpretative declarations”. If they have clear charac-

²⁴⁷ *Ibidem*.

²⁴⁸ *Ibidem*, p. 218.

²⁴⁹ E. Suy, *Unilateral Acts...*, pp. 634-635.

teristics of objections, they will have no legal effect. The treaty, as it is known, prohibits objections. An authentic interpretative declaration may be regarded as actually an autonomous unilateral act “generating the legal effects intended by its author”²⁵⁰. That may be a source of international law, as pointed out by Charpentier and Zemanek. There may be, nonetheless, some doubts as to whether such interpretative declarations should be considered part of a given treaty.

In conjunction with the institution of reservations to multilateral treaties, another lawmaking situation may arise. That is, in the current practice of states, numerous multilateral treaties do not contain a provision at all, nor are they subject to any objection or ban on their submission. If a party to such a treaty lodges a reservation, it will have the effect of restricting the application of the treaty to that state, provided that such a reservation does not contradict the substance and purpose of the treaty. This is due to the rule of customary law incorporated in Art. 19 of the Vienna Convention on the Law of Treaties²⁵¹. A tacit agreement on objections to it does not interfere in such a situation with the determination of the effect of the objection. Hence, Suy draws the conclusion that such a reservation should not be regarded as “a truly autonomous unilateral act”. Its legal effects are determined only by the state that is its author. The same applies *mutatis mutandis* to the termination of a treaty or treaty obligation²⁵².

To the example taken from Charpentier on accepting the rights and obligations of a multilateral treaty without joining as a party, Suy adds a few more. On this basis, he proposes that unilateral declarations containing promises or promises of acceptance of treaty provisions without formal accession thereto be included in the Convention on the Law of Treaties. This means that Art. 11 of this Convention should be extended to “autonomous unilateral commitments”, because these acts “may create legally binding obligations and expectations”²⁵³. C. Goodman considers it even an anomaly that “while the bilateral and multilateral action” of states has been regulated, and unlawful acts have been recognized and codified within the responsibility of states, lawful unilat-

²⁵⁰ *Ibidem*, p. 635.

²⁵¹ Article 19, Formulation of reservations:

“A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

- (a) The reservation is prohibited by the treaty;
- (b) The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- (c) In cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty“

Article 11, Ways of giving consent to be bound by a contract; „The consent of the State to be bound by the Agreement may be expressed by the signature, exchange of contractual documents, ratification, acceptance, approval, accession, or in any other agreed manner.”

²⁵² E. Suy, *Unilateral Acts...*, pp. 630-635.

²⁵³ *Ibidem*, pp. 136-138.

eral legal acts remain unconfirmed and non-codified. The author believes that such codification is not only quite possible, but would bring recognition of unilateral acts “as a source of international law.” Such an opinion is strongly favoured by this author²⁵⁴.

3. ILC standpoint

At the very beginning of its work, the Commission, when considering the scope of its tasks, spoke quite clearly about the legal nature of unilateral acts of states. It expressed this in determining the difference in this regard between a binding unilateral act of an international organization and a unilateral state act. The members of Commission indicated that it is important here to delimit the border between unilateral acts “in the context of co-ordination relations” and unilateral acts “in the context of *relationships of association*”. Notably, coordination relations are based on respect for sovereignty and legal equality of states. Consequently, unilateral acts in this context “cannot generate obligations for third countries”, while an international body may take legal acts to the extent permitted by the legal competence of its member states²⁵⁵. They may therefore be equipped with the competence to create obligations for third parties²⁵⁶.

Continuing to reflect on this problem, the Commission stated that, at the outset of its codification activities, it must first determine whether, formally, a declaration as a formal unilateral act may or may not be an autonomous source of international law²⁵⁷. In solving this problem, the Commission relied on the doctrines of international law. It was said that most authors believe that the unilateral state act is not a source of international law. It can only be a source of commitment for its author. However, the Commission used mainly the views of the two most authoritative authors, K. Skubiszewski and M. Bos²⁵⁸. It also examined practice of international courts. The members of the Commission found that international Courts did not say whether unilateral acts of states could be a source of law. They limit themselves in this regard to the statement that they may be the source of international obligations²⁵⁹. It was acknowledged, however, that there was no doubt about the serious contributions made by unilateral state acts to the rise of custom. In this context, the Commission mentioned unilateral state acts related to the law of the sea. They have been applied since the 18th century and subsequently contributed to the codification of this area of international law²⁶⁰. However, the Commission has come to the conclusion that such acts of habitual states can be excluded from the

²⁵⁴ C. Goodman, *op. cit.*, p. 31.

²⁵⁵ ILC, 1st Report 1998, p. 8, par. 31-32.

²⁵⁶ *Ibidem*, p. 9, par. 35.

²⁵⁷ *Ibidem*, p. 15, par. 80.

²⁵⁸ *Ibidem*, p. 15, par. 80-81.

²⁵⁹ *Ibidem*, p. 15, par. 82.

²⁶⁰ *Ibidem*, p. 19, par. 101.

category of strictly unilateral acts, since their effects boil down to some sort of silent international agreement. Formally unilateral acts may seem autonomous, but generally they are effective when they meet other similar acts and therefore contribute to the customary norm²⁶¹.

Thus, in the Commission's view, unilateral acts of the states-parties in respect of the law of the sea may have legal effects, leading to silent agreement or, together with other similar acts, contribute to the norm. In this context, they do not behave as strictly autonomous acts, i.e. producing effects on their own, without the involvement of other entities or similar acts. Exceptions to this general rule may, however, occur. The Commission notes that the act which forms part of the process of creating an international custom does not necessarily have to be excluded from the category of strictly unilateral acts. This can happen when an act, regardless of its function as a source of custom, "reflects an autonomous substantive unilateral act creating a new juridical relationship"²⁶². Unfortunately, no example of practice has been quoted.

It is clear from the Commission's consideration that unilateral state acts can play a dual role. Contributing, along with other similar acts, to the formation of a customary norm, they do not need to simultaneously lose their independence and may create new legal international relations. Unfortunately, the Commission did not elaborate on this issue. Finally, in the Guiding Principles, the Commission merely confined itself to the Court, stating that a state declaration made publicly and manifestly willing to commit itself may give rise to legal obligations (rule 1). These may be commitments made to one, several, or other entities (Rule 6). It was difficult to grasp this matter more rigorously. And it would have to leave some flexibility, if only interpretative. In this form, it lags far behind the reality of international law and beyond the rather widespread new views of science²⁶³.

4. Summary

Among the wide array of various autonomous unilateral state acts, three of them draw specific attention to their particular character, creating favourable privileges for their addressees. Both in the literature and in the source of ILC the broader scope is indicated along with a growing role they play in international relations. G. Venturini wrote in the 1960s that such unilateral acts are being made and performed "in the name of elementary justice"²⁶⁴.

²⁶¹ *Ibidem*, p. 20, par. 104.

²⁶² *Ibidem*, p. 20, par. 104.

²⁶³ Ch. Eckart harshly criticized the Guiding Principles of the Commission, *op. cit.*, e.g. pp. 247-250.

²⁶⁴ G. Venturini, *op. cit.*, p. 403.

The scale of views on the position of the unilateral state act in the modern system of international law ranges from denying it binding force, restricting it only to the source of its author's obligations, to giving it the role of "secondary source", a source of "particular" law as a source of international law in the full sense of the word. In the background of these diverse views there is also a varied notion of the source of international law. However, there is no closer, more complete display of these new concepts of sources. This is especially true of the lack of development of the basic issue, whether they can be a source of commitments not only for their creators, but possibly also for their recipients. Only historical examples of unilateral acts broadening the sovereignty of states in the waters of the high seas, which may have the effect of imposing duties, and at least restriction of the rights of other states to a given maritime area, are cited. They are created in violation of maritime law and their legal character is differently understood. Actually, however, not a unilateral act, but the new customary norm created by it becomes a source of new international rights and obligations. On the other hand, the example of a more modern unilateral act in the form of the United States' proclamation on the continental shelf, which was supposed to lead to the creation of an *instant custom*, is a creation of doctrine rather than a legal reality.

It can be stated that generally autonomous unilateral state acts are granted only the feature of an obligation, or the nature of international law of derivative or particular law. These are just emerging concepts, but strongly pointing to the need to reflect on the new concept of the source of contemporary international law. This is indicated by a more detailed analysis of Art. 38 of the ICJ Statute or the Vienna Convention on the Law of Treaties.

A clearly different view on this issue is provided by research that runs counter the generally accepted basis for the division of unilateral acts into autonomous acts and dependent acts resulting in legal effects out of treaties or other acts. The authors of this study argue that unilateral acts in connection with treaties can constitute a full source of rights and obligations. One such example is an act of accession of a state to a multilateral treaty without becoming one of its parties. By such an act, a state not being a party to a treaty extends the resulting rights and obligations of it to its relations with all other states-parties to a treaty. At this point it is not a treaty, but a unilateral act that becomes the proper source of rights and obligations in this respect. However, there may be doubts as to whether a unilateral act of a state so interconnected in such a meaningful way to exercise its legal effect with a particular treaty can be regarded as an intrinsic source of law. K. Skubiszewski, for example, absolutely denied this possibility. He demonstrates that the state can unilaterally act by itself, trigger the actions of rights or obliga-

tions resulting from a specific treaty. But such an act does not at all become a source of rights or obligations. The relevant source remains the treaty²⁶⁵.

It seems unquestionable, however, that the proper source of legal relationships of the author of a unilateral act is, in the above-mentioned case, their unilateral act, and not a multilateral treaty, because the state does not become a party to it. Skubiszewski does not explain what in legal sense he means “launching” or “inducing” legal effects by a unilateral state act. It is only possible to start what has already existed and bound in some way with the state. And linking a unilateral act with the whole regime of international relations of the multilateral treaty, without becoming a party to it, is hardly regarded as merely “activating” it against the author of the unilateral act. If even such a concept of “activation” were to be adopted, the constitutive nature of the act of the parties to the treaty must be admissible to the act in question.

Krzysztof Skubiszewski is undoubtedly stuck in rigid traditional rules defining the source of international law. Other authors, following the development of law and international relations, capture new emerging aspects of the issue, which undoubtedly deserve to be taken into account. It is right to point out the inapplicability of the concept of the source of law transposed into international law from the general theory of law. Article 38 of the ICJ Statute expressly states that the term “international law” also includes standards deriving from particular treaties or particular customary law. They do not have to be the general norms binding all countries of the world today. Reality shows that the sources of international law must be dealt with according to the nature of that law and the direction of its development in a community of sovereign states, taking also into account the consolidating international community. The continuation of the notion of a source of law derived from national law does not allow the inclusion of the specificity of international law in this matter.

V. General conclusions

Today, it is quite clear that unilateral acts of states have appeared for centuries in various forms in international law practice. And at least since the days of Grotius, they have been seen in scholarship, while some of them have been legally binding. It is now widely acknowledged that have had real influence on the formation of customary and indirect law, and even direct involvement in the development of the whole of international law. More and more attention has been devoted to this problem since the well-known ICJ judgment of 1974. Our knowledge in this field has expanded and deepened, revealing its legal complexities. They concern especially important matters such as the notion of a unilat-

²⁶⁵ K. Skubiszewski, *op. cit.*, p. 233.

eral state act, the basis of its binding force and its proper legal nature, that is to say if it is just a source of commitment for its creator or, in some cases, a source of international law. And while most of the observations and findings refer to just a few such acts, and especially to the promise, they broaden and deepen our insight into the whole system of sources and the functioning of contemporary international law.

Admittedly, there is widespread agreement that the validity of a unilateral state act depends on the fulfillment of four basic conditions: the origin of a competent state body, its content and purpose cannot be contrary to current international law, the intention of the state must be expressed clearly, and its form should be accessible to addressees. In practice, using the same four requirements can lead to quite divergent findings. The same well-known and commonly cited acts by some are termed dependent on the creation of legal norms from treaties or customary law, and by others as autonomous acts, meaning resulting in binding legal consequences by itself. What is more, the very meaning of the division of unilateral state acts into dependent and independent in its law-making sphere is ever more serious. Recently, the proper meaning of this division is increasingly being questioned. It is arguable that unilateral acts considered to be non-autonomous in connection with treaties may take the form of a source of law that is independent of the treaty in question. It would then be necessary to re-evaluate the importance of these two kinds of unilateral acts in the development of international law and possibly find a new criterion for their differentiation.

With regard to the basis of the binding force of the unilateral act, there are also different positions – proponents of the principle of good faith and advocates of the sovereign will of the state. The former did not quite convincingly develop their view on this issue from the decision of the ICJ, which in this case is not quite so unequivocal. Their opponents, on the other hand, convincingly argue that, like treaties, unilateral acts of state draw their legal force from the sovereign will of the state. And their position also underpins the judgment of the Court as adherents of the principle of good faith. However, their interpretation of the Court's position on this point is also more convincing. The source of binding force of the unilateral state act is its will.

Among some supporters of both positions, however, doubts arise whether the very principle of good faith or the will of the state may give rise to binding effects of a unilateral state act. They show that it is only in conjunction with the presumed or even implied trust of the addressee of such an act that it is legally valid. Only then can binding legal consequences arise and only then will this act be secured against its arbitrary change or withdrawal.

It seems that this is due to a misunderstanding of the proper moment the effects come into existence. In fact, the legal effectiveness of a unilateral act, e.g. in the form

of a promise, is realized at the moment of the message reaching the addressee and not being rejected by it. Then the addressee becomes the holder of the rights or other benefits resulting from this act. Non-rejection of the received act creates the presumption that the addressee trusts it and shares some of the benefits with it. It does not, however, need to run those rights or accept the resulting benefits. This does not necessarily have to take place for the legal effectiveness of a given unilateral act. As an example, after the nationalization of the Suez Canal, all states were granted the right to sail on it when publicly manifested in 1957 by the Egyptian government. They did not have to take advantage of these laws in order to legally acquire them. From that point on, they could claim the right if reasons for doing so arose. It is only right that in the implementation of rights, the effects envisaged in a given act can arise in bilateral, negotiating or judicial terms.

The most controversial issue seems to be whether unilateral state acts can only be a source of commitments, or whether they can be regarded as a source of international law. It is generally accepted that they can only be a source of obligation for their author. But it is also noted that such obligations may result in rights for their addressees. As a rule, these are beneficial and not subject to reciprocity. That is the legal nature of the autonomous unilateral act of a state, in any case in the form of a promise.

In more recent scholarship, however, we cannot conclude with such a vague statement. Efforts are being made to find in the unilateral state acts a particular source, whether in the form of a source of origin, source of particular law, and even source of general law.

The concept of the autonomous unilateral act of a state as a source of particular law is derived from Article 38 of the ICJ Statute, according to which the source of international law is not only general treaties, but also particular treaties, that is the treaties referring to certain countries, even to just a few. This shows that international law consists not only of general norms, but also of norms of a particular nature. Accordingly, the above-mentioned autonomous unilateral state acts and, in any case, promises, could be regarded as a source of particular international law, and in the light of Art. 38 of the ICJ statutes, even directly as international law.

With regard to unilateral autonomous acts, the concept of a derivative source, a source of lower legal norms, is also emerging. This points to the emerging hierarchy of norms in the modern system of international law. The derivative is to be characterized by the fact that it is dependent on sources of higher rank, that is, treaty and customary law. And norms from a derivative source must not conflict with norms derived from primary sources.

The specificity of both the derivative and the particular source concept lies in their considerable limitation. There can be no obligation arising from them for other countries. These may be commitments only for the authors of the act, while rights arise from

those obligations to the addressee of the autonomous act of the state, which may even be the entire international community of states. They would, however, be sources significantly limited in their law-making function, of a completely different nature. They would be distinct from particular treaties, as sources based on consensus and creating both reciprocal rights and duties for the states-parties to them.

Finally, there are views that perceive the potential of unilateral acts of a non-autonomous state to come in some form of a source of international law, not only international obligations. It can take such a form, for instance, in contact with a multilateral treaty. This may happen if the state, by way of its unilateral act, accepts all the rights and obligations of a given multilateral treaty while not becoming a party to it. By such a one-sided act, an entire network of new legal ties binding the state that is the author of this unilateral act is established, with all other states-parties to the treaty. The source of these new bonds is not a treaty at that time, because the state that created the act of accession did not become a party to it. The source of these legal relationships becomes the unilateral state act in a specific form of the accession act. Thus, such a unilateral act assumes the form of an intrinsic source of general international law.

The findings of this study, which are related to the legal nature of the unilateral state act, although they are still rather preliminary, constituting rather a discussion, and come in rather simple form, referring in principle to only a few acts, unquestionably demonstrate that the issue of the sources of the modern system of international law requires a new approach. Contemporary international law is a more complex and varied system of legal norms, with a much broader and more diverse set of sources than is apparent from the general study of this law and Art. 38 of the ICJ Statute or the Vienna Convention on the Law of Treaties. Thus, the binding force of contemporary international law derives from a growing and more diversified plane of international relations, as well as an ever-expanding, yet increasingly consolidated international law system. It is an open system for the development and acceptance of the progressive development of modern international law, and it is necessary to capture its origins from this very perspective. Finally, one should go beyond the concept of a source formulated for another legal system and seek the notion of a source expressing the specificity of international law created directly, with various nuances, indirectly, but always from the will of sovereign states. The diversified source leads to the diverse legal character of the norms arising out of them and their increasingly clear hierarchical layout.

Unilateral acts of international organizations as a source of international law

1. Introductory remarks
2. The international organization and its acts
3. Law-making acts of organizations and sources of international law
4. Binding character of an act
5. Soft law
6. The abstract and general character of an act
7. Legality – the absence of defect
8. Summary

1. Introductory remarks

It is unquestionable that the development of international organizations has made and continues to make its mark on the means by which international law is created. In this respect, the statement opening the ground-breaking study by K. Skubiszewski on law-making resolutions of international organizations retains its timeless relevance¹.

The influence of international organizations on the development of international law has been analysed by many other eminent internationalists², who have examined the multifaceted role played by international organizations in respect of treaty law. In the first place, we should recall the initiating influence of organizations on the development of contractual law – understood as the involvement of an organization in the course of creating and concluding international agreements by states, as well as changes in existing norms³.

¹ K. Skubiszewski, *Uchwały prawotwórcze organizacji międzynarodowych. Przegląd zagadnień i analiza wstępna*, Poznań 1965, p. 11.

² The following works can be given as examples: M. Lachs, *Le rôle des organisations internationales dans la formation du droit international*, [in:] *Mélanges offerts à Henri Rolin: Problèmes de droit des gens*, Paris 1964, p. 156 et seq.; D. Vignes, *The Impact of International Organizations on the Development and Application of Public International Law*, [in:] R.St.J. Mac Donald, D.M. Johnston (eds.), *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory*, The Hague et al. 1983, p. 809 et seq. and earlier studies such as C.W. Jenks, *The Impact of International Organizations on Public and Private International Law*, "Transactions of the Grotius Society", Vol. 37 (1951), pp. 23-50.

³ N. Buchowska, *Współdział organizacji międzynarodowych w procesie tworzenia prawa międzynarodowego*, „Prawo i Administracja”, vol. VI, Piła 2007, p. 226.

First and foremost, an organization can initiate the conclusion of a given international agreement, that is to propose that it be made, or even present its own draft of one. An organization can also convene a diplomatic conference in order to agree the text of such an agreement. That same organization can also perform the role of such a conference by consolidating the text of the agreement and adopting it in a resolution of one of its organs⁴. Let us ignore in this context issues associated with the role of a depositary or rights concerning interpretation and revision of a treaty concluded with the participation of an international organization. We should also recall one creative manner of elaborating the norms of treaty law in situations where an organization itself (alongside states) becomes a party to an international agreement⁵.

Nevertheless, participation of an organization in the creation of international law cannot be reduced to joining into traditional law-making processes⁶. In this context, it is useful to make a distinction between law-making *sensu largo*, i.e. any influence at all (independent or in cooperation) on the creation or shaping of norms of international law, and law-making *sensu stricto*, i.e. direct and unilateral creation of norms⁷. And it is these very acts of international organizations, their meaning, and the direct impact exerted by inter-governmental organizations on the shape of the contemporary law of nations which will be the primary subject matter analysed. We are thus interested in the effect of the unilateral, law-making activity of inter-governmental organizations in the form of sources of international law.

Of particular significance in the considerations conducted in this chapter are the necessary references to enhanced regional economic integration (visible in the law of the European Union⁸), but the primary field of analysis will be the perspective of general international law, which – without limiting itself to the law of a particular international organization – aims at more general determinations as to the status of acts of international organizations from the perspective of sources of international law.

2. The international organization and its acts

Our considerations should begin with a definition of international organizations themselves. This is a difficult task when considering the tremendous diversity among such

⁴ W. Morawiecki, *Funkcje organizacji międzynarodowej*, Warszawa 1971, p. 125.

⁵ N. Buchowska, *op. cit.*, p. 226.

⁶ See e.g. H. Bokor-Szegő, *The role of the United Nations in international legislation*, Budapest 1978.

⁷ C. Denis, *Le pouvoir normatif du Conseil de sécurité des Nations Unies: portée et limites*, Bruxelles 2004, p. 9.

⁸ See e.g. A. Doliwa-Klepacka, *Stanowienie aktów ustawodawczych w Unii Europejskiej*, Warszawa-Białystok 2014.

entities⁹. As opposed to states, international organizations do not apply the principle of equality, nor do they enjoy the general competence of states. Instead, their activity is the product of the principle of specialisation¹⁰. The distinguishing of a non-state subjectivity means, firstly, autonomy vis a vis member states¹¹. Here, emphasis is necessary on the element of distinct will – *volonté distincte* treated as a main, fundamental component of international legal personality¹².

This element of the definition is expressed very succinctly under the approach proposed by Ph. Gautier, which treats an international organization as “an autonomous entity, set up by a constituent instrument, which expresses its independent will through common organs and has a capacity to act on an international plane”¹³. It has also been reflected in the definition adopted by the authors of a Polish textbook devoted to institutional law. J. Menkes and A. Wasilkowski hold that “an international organization is an association of members (organism) appointed by a certain number of members to exist on the basis of an agreement, whose object is to achieve a distinct, common interest or objective. It has the capacity to act in its own name (...)”¹⁴. And it is this effect of such activity that we will take the most interest in.

⁹ In the course of work on the law of treaties, in 1950 J. Brierly suggested defining an organization as “an association of States with common organs which is established by treaty” (“Yearbook of the International Law Commission” 1950, Vol. II, p. 223). In turn, H. Lauterpacht in commentary on his draft, treated organizations of states as “entities which are created by treaty between States, whose membership is composed primarily of States, which have permanent organs of their own, and whose international personality is recognized either by the terms of their constituent instrument or in virtue of express recognition by a treaty concluded by them with a State” (Yearbook of the International Law Commission” 1953, Vol. II, p. 99). See also J. Kolasa, *La notion d’organisation internationale contemporaine*, “Polish Yearbook of International Law”, Vol. XII (1983), p. 95 et seq.

¹⁰ See Ch. M. Chaumont, *La signification du principe de spécialité des organisations internationales*, [in:] *Problèmes de droit des gens. Mélanges offerts à Henri Rolin*, Paris 1964, p. 55 et seq.

¹¹ Which was excellently captured by Sir Gerald Fitzmaurice in his definition of an organization as part of his work for the International Law Commission on codification of the law of treaties; in 1956 he suggested understanding an organization as “a collectivity of States established by treaty, with a constitution and common organs, having a personality distinct from that of its member-States, and being a subject of international law with treaty-making capacity” – *Law of Treaties*, Doc. A/CN.4/101, Report by G.G. Fitzmaurice, Special Rapporteur, “Yearbook of the International Law Commission”, 1956, Volume II, p. 108.

¹² See H.G. Schermers, N. Blokker, *International institutional law: unity within diversity*, 5. rev. ed., Leiden-Boston 2011, p. 44 et seq.; P. Sands, P. Klein (eds.), *Bowett’s Law of International Institutions*, Sixth ed., London 2009, p. 15 and very clearly I. Seidl-Hohenveldern, *The Legal Personality of International and Supranational Organizations*, “Revue Egyptienne de Droit International”, vol. 21 (1965), p. 66; I. Seidl-Hohenveldern, G. Loibl, *Das Recht der internationalen Organisationen einschließlich der supranationalen Gemeinschaften*, 7., überarbeitete Aufl., Köln 2000, p. 5. Compare: J. Sandorski, *RWPG – forma prawna integracji gospodarczej państw socjalistycznych*, Poznań 1977, p. 47 et seq. N.D. White, *The law of international organizations*, Second edition, Manchester 2005, p. 30.

¹³ Ph. Gautier, *The Reparation for Injuries Case Revisited: The Personality of the European Union*, “Max Planck Yearbook of United Nations Law”, vol. 4 (2000), p. 333.

¹⁴ J. Menkes, A. Wasilkowski, *Organizacje międzynarodowe. Wprowadzenie do systemu*, Warszawa 2004, p. 55. See also the newer textbook of those authors, *Organizacje międzynarodowe. Prawo instytucjonalne*, 2nd edition, Warszawa 2010, pp. 91-2.

A unilateral act is an act made by one subject of international law, action undertaken by that one subject¹⁵. One characteristic is thus independence, *i.e.* the absence of a partner whose declaration of will complementing a given act would determine an agreement has been made¹⁶. Recognising the autonomy of organizations in respect of member states is sufficient grounds. The view of V.-D. Degan should be considered an isolated one, that from the perspective of member states, the acts of an international organization are not comparable, particularly when they express a position identical to that of members towards the unilateral acts of other states. And thus, in the cited author's view, a unilateral act of an organization is only an act which is directed at a state which is not a member state, on condition that it did not participate in its adoption¹⁷. But this view does not enjoy widespread support. The opposite view is the majority one, concerning the separate personality of the organization and autonomy of will, which is not identical with the will of member states (either all of them or each of them individually). But, as Skubiszewski argues, it is inappropriate to assign to states the behaviours of an international organization to which they belong¹⁸. By the same token, it will be difficult to recognise an organization as the collective proxy of the states that comprise it.

Fundamentally, in the unilateral character of an act we are stating that a given act should be attributed exclusively to the international organization. This is consistent with an understanding typical for international responsibility. Through attribution, a given act or omission is linked with a state and/or international organization¹⁹. A fundamental rule concerning attribution of the act of an international organization was captured in Art. 6 of the draft Articles on responsibility of international organizations²⁰, which states: "the conduct of an organ or agent of an international organization in the performance of func-

¹⁵ W. Czapliński, *Akty jednostronne w prawie międzynarodowym*, „Sprawy Międzynarodowe”, no. 6/1988, p. 98. P. Saganek, *Akty jednostronne państw w prawie międzynarodowym*, Warszawa 2010, p. 33. Similarly, rejecting exclusively one will, the matter is put by F. Rigaldies – see F. Rigaldies, *Contribution à l'étude de l'acte juridique unilateral en droit international international public*, "Revue juridique Thémis", 1980-81, p. 419.

¹⁶ J.D. Aston, *Sekundärgesetzgebung internationaler Organisationen zwischen mitgliedstaatlicher Souveränität und Gemeinschaftsdisziplin*, Berlin 2005, p. 52; W. Czapliński, *op. cit.*, p. 98.

¹⁷ V.-D. Degan, *The Sources of International Law*, The Hague 1996, pp. 176-7; previously given in part as: *Unilateral Act as a Source of Particular International Law*, "Finnish Yearbook of International Law", Vol. V (1994), p. 175 et seq.

¹⁸ K. Skubiszewski, *Enactment of Law by International Organizations*, "British YearBook of International Law", Vol. 41 (1965-66), p. 222.

¹⁹ P. Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens*, Bruxelles 1998, p. 375.

²⁰ Responsibility of international organizations, Text of the draft articles with commentaries thereto, International Law Commission, Report on the work of its sixty-third session (26 April to 3 June and 4 July to 12 August 2011), GAOR Sixty-sixth Session Supplement No. 10 (UN Doc. A/66/10 and Add. 1).

tions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization”²¹.

In spite of the significant growth in the number of organs and concomitant qualitative changes, of no significance will be the various classifications employed by representatives of international law doctrine²². In the context of relations of an international organization with its member states, attention should be focused on the dualistic nature of the activity undertaken. Organs of an international organization are composed of representatives of states, which are operating in a dual character. Retaining their internal (domestic) mandate, they are undertaking functions at the level of the international organization. George Scelle describes such a situation with the term *dédoublement fonctionnel*.²³ Reference to this can also be found in an advisory opinion of the PCIJ in a case concerning interpretation of Art. 3 paragraph 3 of the Treaty of Lausanne. In the ruling, the Hague Court claimed, in referring to the Council, that “It is, therefore, composed of representatives of Members, that is to say, of persons delegated by their respective Governments, from whom they receive instructions and whose responsibility they engage”²⁴.

It should be emphasised that the resolutions of international organizations are not a direct expression of the will of member states. This will is expressed in the treaty appointing a given organization and assigning it the competency to issue resolutions, but in the process itself of drafting resolutions, their participation is not always necessary²⁵. It is difficult to view an international organization as merely the sum of its member states.

However, if we do apply the classic approach, it can be demonstrated that, ultimately, the source of the norms of behaviour created by an international organization will be the shared will of states²⁶. R. Higgins notes what she considers an obsessive interest in the resolutions of organizations as a separate issue. As this consummate internationalist observes, resolutions are only one of the many manifestations of the practice

²¹ Art. 6(2) specifies that „The rules of the organization apply in the determination of the functions of its organs and agents”. Definitions of both notions are supplied in Art. 2 of the draft. Under Art. 2(c), “organ of an international organization” means any person or entity which has that status in accordance with the rules of the organization”. However, „agent of an international organization” under Art. 2 (d) “means an official or other person or entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts”.

²² See e.g. Z.M. Klepacki, *Organy organizacji międzynarodowych. Studium porównawcze*, Warszawa 1973, p. 12 et seq.

²³ G. Scelle, *Le phénomène juridique de dédoublement fonctionnel*, [in:] W. Schätzel, H.-J. Schlochauer (Hrsg.), *Rechtsfragen der internationalen Organization: Festschrift für Hans Wehberg zu seinem 70. Geburtstag*, Frankfurt am Main 1956, p. 324 et seq.

²⁴ Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne, Advisory Opinion of 21 November 1925 Permanent Court of International Justice, Series B, No.12, p. 29.

²⁵ R. Sonnenfeld, *Podstawy prawne kompetencji uchwałodawczej Rady Bezpieczeństwa ONZ*, „Przegląd stosunków międzynarodowych”, no. 1(73), Opole 1978, p. 17.

²⁶ W. Morawiecki, *Funkcje...*, p. 121.

of states²⁷. Adopting this perspective, we should understand the consequences of the applied simplification – here we are employing the mediation of a non-state subject of international law. However, it is not always a simple task to draw a distinction between an organization and its member states.

A quite interesting situation is in respect of legal protection of the environment, where the significance of conferences of states-parties is growing²⁸. They participate in the enactment of law in a dual manner: through drafting and amending primary law, and through the enactment of secondary law. As regards structure, it can be equated with international organizations, which lack only distinct legal personality²⁹. A more cautious position, however, is expressed in treating conferences of parties as merely a formula of a diplomatic conference ensuring a continuous – or at least regular – grounds for taking decisions³⁰. In this context, we may observe a natural tendency, by no means limited only to the sphere of environmental protection, that states are not eager to equip new subjects (international organizations) with the appropriate competences, particularly the right to enact law³¹.

An assessment of the criterion of unilaterality cannot be conducted in an abstract manner, but only through interpretation of the provisions granting law-making competence to particular international organizations³².

There is no doubt that the framework of analysis for unilateral acts of international organizations is negatively impacted by significant definitional discrepancies³³, thus it is necessary to begin with bringing order to the terminology. The potential for building

²⁷ R. Higgins, *The Role of Resolutions of International Organizations in the Process of Creating Norms in the International System*, [in:] W.E. Butler (ed.), *International Law and the International System*, Dordrecht et al. 1987, p. 22.

²⁸ V. Röben, *Institutional Developments under Modern International Environmental Agreements*, “Max Planck Yearbook of United Nations Law” Vol. 4 (2000), p. 363 et seq.

²⁹ See R.R. Churchill, G. Ulfstein, *Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law*, “American Journal of International Law”, Vol. 94 (2000), *passim* esp. p. 625; Cf. J. Brunnée, *COPing with Consent: Law-Making Under Multilateral Environmental Agreements*, “Leiden Journal of International Law”, Vol. 15 (2002), p. 16, G. Ulfstein, *International framework for environmental decision-making*, [in:] M. Fitzmaurice et al. (eds.), *Research handbook on international environmental law*, Cheltenham 2010, p. 40.

³⁰ M. Fitzmaurice, *Law-making and International Environmental Law: The legal character of decisions of conferences of the parties*, [in:] R. Liivoja, J. Petman (eds.), *International Law-making: Essays in Honour of Jan Klabbers*, London 2014, p. 195 and 207.

³¹ C.F. Germelmann, *Moderne Rechtssetzungsformen im Umweltvölkerrecht – Entwicklung und Perspektiven sekundärrechtlicher Regelungsmechanismen*, “Archiv des Völkerrechts”, Bd. 52 (2014), p. 335.

³² M. Frenzel, *Sekundärrechtsetzungsakte internationaler Organisationen: völkerrechtliche Konzeption und verfassungsrechtliche Voraussetzungen*, Tübingen 2011, p. 17.

³³ J. Kolasa, *Some Remarks on the Concept of a Resolution and Decision of International Organizations*, [in:] J. Makarczyk (ed.), *Essays in International Law in Honour of Judge Manfred Lachs*, The Hague 1984, p. 494.

a general theory in this scope is, at times, brought into question³⁴. Diversity in nomenclature leads to a blurring or even dispersion of the fields of the present analysis.

From a general perspective, K. Kocot defines acts of an international organization as „all official declarations of will of the organs of international institutions, i.e. all verbal declarations of will originating from international organizations, which, on the basis of the will of states, are intended to have specific effects in the area of functions and competences of the organization”³⁵. After implementing such a collective definition, he adds that they do not always lead to the creation of a new norm, or changes to an existing one, or any modifications at all of an obligational relationship³⁶.

As a generic notion, Z. Doliwa-Klepacki uses the term „decision”, understood as all acts constituting the formal expression of will of the organs of an organization³⁷. We may consider whether such a broad definition is justified. It would seem more appropriate to limit the meaning to this term to binding acts, and thus a decision can be defined as any form (announced in writing or derived from established practice) of will expressed by every organ of an international organization that is binding on its addressee³⁸. It thus encompasses both resolutions of collective organs³⁹ and regulations of one-person organs.

The suggestion offered by N. Buchowska also does not seem entirely justified; she proposes capturing the notion of “resolution” as a general, “collective” term for delineating all unilateral acts⁴⁰. She is, of course, right to state categorically that “regardless of the number of members comprising an organ undertaking a resolution, and the manner in which that resolution is adopted, it always constitutes an expression of the international organization itself, and not its constituent members”⁴¹. But it is difficult to agree with her observation that “fundamentally, every act of will of an organization is, from a formal perspective, a resolution, as it is almost always adopted by a collegial organ”⁴². This quite obviously glosses over the acts adopted by the UN General Secretary, the so-called *Presidential Statements*, expressed by the president of the Security Council, as well as acts of the President of the European Council.

³⁴ See J. Castañeda, *Legal Effects of United Nations Resolutions*, New York and London 1969, p. 1 et seq.

³⁵ K. Kocot, *Organizacje międzynarodowe. Systematyczny zarys zagadnień prawa międzynarodowego*, Wrocław et al. 1971, p. 216.

³⁶ *Ibidem*.

³⁷ Z.M. Doliwa-Klepacki, *Proces podejmowania decyzji w organizacjach międzynarodowych*, Warszawa 1979, p. 11 and *idem*, *Encyklopedia organizacji międzynarodowych*, Warszawa 1997, p. 165.

³⁸ J. Kolasa, *Some Remarks ...*, p. 499.

³⁹ See A. Wasilkowski, *Zalecenia Rady Wzajemnej Pomocy Gospodarczej*, Warszawa 1969, p. 35, who defines a resolution as “every act constituting the formal expression of the will of an organ of an international organization operating under the principle of collegiality”.

⁴⁰ N. Buchowska, *Uchwały organizacji międzynarodowych w polskim porządku prawnym – zarys problematyki*, [in:] P. Wiliński (ed.) *Prawo wobec wyzwań współczesności*, Vol. 2, Poznań 2005, p. 246.

⁴¹ *Ibidem*, p. 245.

⁴² *Ibidem*, p. 246.

Various classifications of acts of international organizations can be applied. M. Virally suggest first a distinction based on his own classification, which distinguishes between the acts of intergovernmental organs and acts of other organs (administrative, judicial, parliamentary)⁴³. Objective criteria can also be applied, differentiating “personal” decisions, *i.e.* those which award particular legal status or functions to defined subjects, and “essential”, in turn divided according to the character of the competence exercise or of the act⁴⁴. Yet another classification assumes a distinction based on criteria of form, content, and conditions⁴⁵. In respect of the first category, a distinction is made between an international agreement, organizational decision, resolution, recommendation, and consensus. However, from the perspective of content, mention is made of constitutive, administrative, technical and management decisions, as well as legal and technical support.

From the perspective of the manner by which a given act is adopted, we may distinguish those adopted unanimously and ones passed by a majority of votes. This distinction needs to be viewed in conjunction with the composition of the organ of an international organization, which can be divided into organs comprised of representatives of all member states of a given organization and organs with membership limited to just some representatives. A distinction should also be drawn of organs populated not by representatives, but rather international functionaries.

Another distinction refers to the sphere of regulation. In its classic definition, the performance of regulatory functions can be treated as “a political process by which states and members of an international organ reach an understanding concerning norms which are intended to provide relatively durable regulation of the relations among the participants (subjects) of international relations”⁴⁶. If we analyse the creation of regulations governing the behaviour of member states outside an organization, and thus external regulation, which we can define as „the issuing of legal regulations by organs of international organizations serving to achieve its external tasks and of obligatory application towards member states”⁴⁷. It is important here to distinguish external regulation from internal, *i.e.* the enactment of the internal law of an organization.

The internal law of an organization includes norms enacted by the organization, referring to its structures, elaborating general statutory principles concerning the func-

⁴³ M. Virally, *Unilateral Acts of International Organizations*, [in:] M. Bedjaoui (ed.), *International Law: Achievements and Prospects*, The Hague 1991, p. 243

⁴⁴ *Ibidem*, p. 244.

⁴⁵ G.F. FitzGerald, *The International Civil Aviation Organization – A Case Study in the Implementation of Decisions of a Functional International Organization*, [in:] S.M. Schwebel, *The Effectiveness of International Decisions, Papers of a conference of The American Society of International Law, and the Proceedings of the conference*, Leyden 1971, p. 157.

⁴⁶ W. Morawiecki, *Funkcje...*, p. 121.

⁴⁷ *Ibidem*, p. 177.

tioning of its organs and the performance of tasks assigned to the organization, as well as determining the procedure in effect within the organization⁴⁸. They can thus be described as norms affecting the internal life of an international organization⁴⁹. However, we should proceed with care considering the multiplicity of views⁵⁰, also taking into account reference to the established practice of an organization⁵¹.

There are disputes within the doctrine of international law concerning the qualification of those internal rules, and specifically about the answer to the question of whether the internal rules of a given organization can be considered international law⁵².

If we consider the creation by an international organization of norms which are directly binding on member states, it would be necessary to first distinguish the introduction of changes in the statutes of those organizations themselves. Of course, some organizations, like the European Union, assume an extremely conservative, traditional model of statutory changes, requiring a new agreement be made between all of the states⁵³. However, with increasing frequency revision procedures are becoming far simpler, and they are often composed of two stages: adopting a resolution to make changes, and then their acceptance by a defined number of member states, with the effect of their applying to all members of the organization. By the same token, we are dealing with a mixed mechanism that combines the traditional consensual method with the imposition of obligations against the will of states in the minority. In the literature we may encounter such extreme diagnoses that this type of mechanism constitutes a general rule, whereas exceptions to it should be set out *expressis verbis* in the statute of a given organization⁵⁴.

⁴⁸ K. Skubiszewski, *op. cit.*, p. 25.

⁴⁹ W. Morawiecki, *Prawo wewnętrzne organizacji międzynarodowej*, „Państwo i Prawo” 1969, vol. 1, p. 37.

⁵⁰ See J. Kolasa, *Z zagadnień tzw. prawa wewnętrznego organizacji międzynarodowych*, „Prawo XXXII”, Wrocław 1970, p. 95.

⁵¹ See definition of internal rules of an organization, adopted by the International Law Commission during codification of responsibility of international organizations (art 2(b)): “rules of the organization” means, in particular, the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization.

⁵² Affirmatively G. Balladore Pallieri, *Le Droit Interne des Organisations Internationales*, “Recueil des Cours de l’Académie de Droit International”, Vol. 127 (1969-II), p. 1. The international character of norms of internal law of an international organization is negated by: L. Focsaneanu, *Le droit Interne de l’Organisation des Nations Unies*, “Annuaire Français de Droit International”, Tome 3 (1957), p. 315; P. Cahier, *Le Droit Interne des Organisations Internationales*, “Revue Général de Droit International Public”, Vol. 67 (1963), p. 563; J.A. Barberis, *Nouvelles Questions concernant la Personnalité Juridique Internationale*, “Recueil des Cours de l’Académie de Droit International”, vol. 179 (1983-I), p. 225. In the Polish literature see J. Kolasa, *La notion..., passim*. Compare pt. 5 of commentary to Art. 10 Articles on responsibility of international organizations, § 5 p. 32.

⁵³ See Art. 48 Treaty on European Union.

⁵⁴ E. Schwelb, *The Amending Procedure of Constitutions of International Organizations*, “British Year-Book of International Law”, Vol. 31 (1954), p. 58.

Finally, a distinction should be made of acts according to their real binding scope⁵⁵. Acts of an organization can be binding *in toto*, but they can also merely set out a binding objective, while leaving addressees freedom in the choice of means by which particular effects are brought about. An ideal example of this is the construction of the Directive in the European Union⁵⁶. In turn, among non-binding acts we may distinguish recommendations *sensu stricto*, recommendations with legal effects, and recommendations creating formal/procedural obligations.

3. Law-making acts of organizations and sources of international law

Considerations of acts of international organizations are undertaken in this work from the perspective of sources of international law, thus attention should be focused primarily on law-making acts.

In a study on law-making acts of the UN and specialised organizations, P. Rösigen sets out three characteristics of such acts: unilateral acts (and thus without the necessity of acceptance by member states), which are legally binding and addressed to all member states of an international organization⁵⁷. It is precisely these three elements: unilateral, binding, and of a general character, which establish a legal act.

Edward Yemin, the author of a seminal monograph on law-making competencies within the UN system, gives a similar account of three conditions of law-making acts: their unilateral character, the creation or modification of elements of a legal norm, and their general character, *i.e.* they are directed to an unspecified group of addressees, and are suitable for repeat application⁵⁸. A. Marschik gives as characteristics of a law-making act generality, abstractness, sustainability, and the binding nature of the decision⁵⁹.

As regards the Polish literature, it would seem necessary to refer to the works of K. Skubiszewski. In his comprehensive study, he lists the following requirements for

⁵⁵ See H. Miehsler, *Zur Autorität von Beschlüssen internationaler Institutionen*, [in:] Ch. Schreuer (Hrsg.), *Autorität und international Ordnung: Aufsätze zum Völkerrecht*, Berlin 1979. R.L. Bindschedler, *Rechtsakte der internationalen Organisationen*, [in:] E. Bucher, P. Saladin (Hrsg.), *Berner Festschrift zum Schweizerischen Juristentag 1979 dargebracht von der juristischen Abteilung der Rechts- und wirtschaftswissenschaftlichen Fakultät der Universität Bern*, Bern und Stuttgart 1979, p. 361 et seq.

⁵⁶ See Art. 288 Treaty on the Functioning of the European Union.

⁵⁷ P. Rösigen, *Rechtssetzungsakte der Vereinten Nationen und ihrer Sonderorganisationen: Bestandaufnahme und Vollzug in der Bundesrepublik Deutschland*, Bonn 1985, p. 7.

⁵⁸ E. Yemin, *Legislative Powers in the United Nations and Specialized Agencies*, Sijthoff, Leyden: 1969, p. 6: "legislative acts have three essential characteristics: they are unilateral in form, they create or modify some element of a legal norm, and the legal norm in question is general in nature, that is, directed to indeterminate addressees and capable of repeated application in time".

⁵⁹ A. Marschik, *Legislative Powers of the Security Council*, [in:] R. St.J. Macdonald, D.M. Johnston (eds.), *Towards world constitutionalism: issues in the legal ordering of the world community*, Leiden et al. 2005, p. 462.

considering a given act by an organization to be a law-making act: such an act “must be a binding act, and must formulate general (abstract) norms regulating the behaviour of an unlimited number of cases”⁶⁰. Skubiszewski’s definition is adopted by N. Buchowska, who considers as a law-making resolution a resolution binding on member states, addressed *pro foro externo*, and containing norms of a general and abstract character⁶¹.

The issue of sources of international law is at the heart of fundamental discussions in the doctrine. It also frequently evokes a sort of helplessness – for example, we may invoke the statement of C. Parry, who points out the impossibility of saying what sources are, and only allows for the possibility of discussing them⁶².

The classic point of departure for sources of international law is Art. 38 of the Statute of the International Court of Justice. It strongly repeats the disposition of the analogous provision in the Statute of the Permanent Court of International Justice. The work of the PCIJ Statute led to acknowledgement of general principles as a source of law, which some scholars consider a revolution in the classic theory of sources of international law⁶³. Recognition of the acts of an organization can be treated as yet another revolution in the development of the theory of sources⁶⁴.

It is also difficult to consider Art. 38 of the Statute an exhaustive enumeration of all sources of international law. From a formal perspective, it expresses (merely) the grounds for rulings by the primary judicial authority of the United Nations. First and foremost, the disposition contains no mention of unilateral acts. In the classic definition, authors have captured unilateral acts only from the perspective of states⁶⁵. As is generally known, Art. 38 ICJ Statute does not make any direct reference to acts undertaken by international organizations.

The absence of unilateral acts of states and international organizations in the disposition of Art. 38 ICJ Statute does not mean that they shall not have the status of sources of law. This has been written about *inter alia* in the first report of the International Law Commission’s Special Rapporteur, V. Rodríguez Cedeño⁶⁶. However, some studies by

⁶⁰ K. Skubiszewski, *Uchwały...*, p. 178.

⁶¹ N. Buchowska, *Wykonywanie kompetencji prawotwórczych przez organizacje międzynarodowe w ramach systemu contracting out*, „Ruch Prawniczy Ekonomiczny i Socjologiczny” 2008, no. 4, p. 29.

⁶² C. Parry, *The Sources and Evidences of International Law*, Manchester 1965, p. 27.

⁶³ A. Verdross, *Die Quellen des universellen Völkerrechts: eine Einführung*, Freiburg 1973, p. 11.

⁶⁴ See e.g. R. Geiger, *Die zweite Krise der völkerrechtlichen Rechtsquellenlehre*, “Österreichische Zeitschrift für öffentliches Recht und Völkerrecht”, Bd. 30 (1979), p. 234.

⁶⁵ P. Guggenheim, *Traité de droit international public: avec mention de la pratique internationale et Suisse*, Genève 1953, pp. 147-8.

⁶⁶ First Report of the Special Rapporteur, Mr. Víctor Rodríguez Cedeño, UN Doc. A/CN.4/519, § 67: “However, there are or can be other sources. The fact that they are not mentioned in Article 38 cannot in itself preclude their treatment as such. Two other sources are frequently utilized: unilateral acts and the resolutions of international organizations”. However, it should be noted that this statement is contained in a provi-

outstanding internationalists devoted to the issue of sources of international law entirely avoid the question of resolutions of organizations⁶⁷.

The absence of such references can be explained by repetition of PCIJ regulations developed in times when the phenomenon of organizations was not so widespread⁶⁸. But already at the beginning of the previous century W. Kaufmann included the law of organizations as part of the law of nations⁶⁹. Interestingly, he also did this in reference to other, non-intergovernmental organizations. His position, however, did not gain other advocates.

Traditionally, states are both the creators and the addressees of norms of international law. Meanwhile, in respect of law-making acts of international organizations, states will only be addressees, *i.e.* the performers of norms enacted by an entity external in relation to them⁷⁰.

Following C. Parry, it may be observed that when discussing sources of international law, the transition from states to new collective institutions of the international community would seem a natural one⁷¹. Other internationalists go even further and demonstrate the necessity of the existence of at least a limited law-making power, derived from the need to ensure the effective functioning of the international community⁷². In this manner we may translate the overwhelming consensus among states into ordinal rules and legal norms, regardless of the objection of one or more sovereign states⁷³. An exceptionally accurate remark is that of J. Brunnée, who holds that the creation of international law is expressed in the constant conflict between state sovereignty and the effective implementation of the objectives of the international community⁷⁴.

Granting an organization the capacity to impose external regulations implies an indisputably serious risk on the part of member states, which results from their *a priori* consent to undertake obligations arising out of the later activity of that very international organization. Thus, the practice of states protecting themselves against the uncomfortable (for them) imposition of obligations (or activity against their will) by the inter-

sion that addresses sources of law and sources of obligations jointly: A. *Sources of international law and sources of international obligations*.

⁶⁷ See e.g. G.G. Fitzmaurice, *Some Problems Regarding the Formal Sources of International Law*, [in:] *Symbolae Verzijl*, The Hague 1958, p. 153 et seq.

⁶⁸ See N. Buchowska, *Uchwały organizacji międzynarodowych jako źródło prawa międzynarodowego*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny”, LXII, 3, 2001, p. 53.

⁶⁹ W. Kaufmann, *Die modernen nichtstaatlichen internationalen Verbände und Kongresse und das internationale Recht*, „Zeitschrift für Völkerrecht”, 1908, p. 436 et seq.

⁷⁰ See e.g. W. Meng, *Das Recht der internationalen Organisationen: eine Entwicklungsstufe des Völkerrechts; zugleich eine Untersuchung zur Rechtsnatur des Rechtes der Europäischen Gemeinschaften*, Baden-Baden 1971 p. 71 et seq. (esp. p. 76).

⁷¹ C. Parry, *op. cit.*, p. 19.

⁷² R. Falk, *On the Quasi-Legislative Competence of the General Assembly*, “American Journal of International Law”, Vol. 60 (1966), p. 785.

⁷³ *Ibidem*.

⁷⁴ J. Brunnée, *op. cit.*, p. 5.

national organization comes as no surprise, particularly through limiting the scope of the performed regulations „only to matters which do not engage the more serious interests of states, and thus of a more technical than political nature”⁷⁵.

In the context of the creation of international law, it is necessary to confront the potential of this conception with not only the elastic reaction of an international organization to fluid situations and needs, but it should also be categorically stressed that the use of the traditional inter-state method in this scope is excessively arduous and slow. In other words, international agreements are too static to allow for a swift and effective adaptation to evolving needs⁷⁶. In addition, objective considerations, specifically, the highly-specialised nature of the material regulated, primarily technical content, is frequently left to regulation by international organizations⁷⁷.

The fundamental question concerns the autonomous nature of an act, and thus whether it can be held to be an independent source of international law, *i.e.* one giving rise to rights and duties for particular subjects when it is not linked with a declaration of will from another entity⁷⁸. Disregarding previous perspectives rejecting the legal character of resolutions⁷⁹ or treating such acts as new law, distinct from both the internal law of states and from international law (which would to a large extent reflect the present autonomous understanding of EU law)⁸⁰, the primary axis of the dispute can be reduced to the question of whether they constitute an independent source of international law.

Dionisio Anzilotti treated the decisions of international organizations (*reglements der Kollektivorgane*) as a particular form of treaty, which was concluded through the mediation of organs rather than in a direct manner⁸¹. In the course of his Hague lecture, A.J.P. Tammes drew attention to the grounds for the adoption of resolutions in a treaty and emphasized that the International Court of Justice did not need an additional, direct reference to apply decisions of an organization⁸². In this context we may cite an earlier opinion of Basdevant, expressed during work on the ICJ Statute. This long-serving judge

⁷⁵ W. Morawiecki, *Funkcje...*, p. 177-8. As this internationalist adds, this is also the source of the term „regulation”, suggesting rather a detailed elaboration of the content of more general norms previously adopted under another mode.

⁷⁶ M. Benzing, *International Organizations or Institutions, Secondary Law*, “Max Planck Encyclopedia of Public International Law”, § 5.

⁷⁷ K. Skubiszewski, *Uchwały...*, p. 175.

⁷⁸ W. Czapliński, *op. cit.*, p. 103.

⁷⁹ As Count G. Ballardore Pallieri in his Hague Academy lecture: *Le droit interne des organisations internationales*, “Recueil des Cours de l’Académie de Droit International”, Vol. 127 (1969), p. 36 [quoted after:] R. Sonnenfeld, *Podstawy prawne kompetencji...*, p. 19.

⁸⁰ See R. Sonnenfeld, *Podstawy prawne kompetencji ...*, pp. 19-20.

⁸¹ D. Anzilotti, *Lehrbuch des Völkerrechts*, Band 1: *Einführung – Allgemeine Lehren*, Berlin –Leipzig 1929, p. 223.

⁸² A.J.P. Tammes, *Decisions of International Organs as a Source of International Law*, “Recueil des Cours de l’Académie de Droit International”, Vol. 94 (1958-II), p. 269.

of the Permanent Court of International Justice stated that, while Art. 38 is not composed well, based on its disposition the predecessor to the International Court of Justice had functioned very well, and thus no change to it is necessary⁸³. In a similar vein the problem is treated by the editors of the newest Oppenheim's treatise⁸⁴. Sir Robert Jennings and Sir Arthur Watts, addressing the rapid development by members of the international community of a new procedure for collective action, arrive at the conclusion that this can at present be considered nothing more than another form of the emergence of rules, whose legal force is derived from traditional sources of international law⁸⁵. That said, they do allow for future acquisition by those collective activities of the nature of a separate source of law⁸⁶.

In the Polish literature, M. Muszkat, in "An outline of public international law" categorically rejects recognition of the resolutions of international organs as a source of international law, because "in each case they are binding upon states [...], this binding force is always the product of the prior consent of states formulated in an agreement"⁸⁷. H. Thirlway similarly captures this reduction to the agreement constituting an international organization⁸⁸. Interestingly, we are *nolens volens* referring to the approach represented by the Soviet doctrine of international law⁸⁹. But it would be wrong to engage in over-simplification. Firstly, we may also find among Soviet scholars a position more favourable to treating resolutions as sources of international law⁹⁰. Furthermore, in this manner the quoted English author elaborates his deliberations formulated several decades ago, maintaining that a new source of international law cannot arise in another manner than through an existing source of law recognised by the international community⁹¹. He emphasised that considerations of stability and certainty, which are those served by the theory of sources of law, should be the lens thorough which the category of sources of law is viewed as a closed catalogue⁹².

⁸³ UNCIO, Vol. XIV, p. 170.

⁸⁴ See R. Jennings, A. Watts, *Oppenheim's International Law*, 9th ed., vol. 1, part 1, Longman, London-New York 1996, p. 46.

⁸⁵ *Ibidem*.

⁸⁶ *Ibidem*, p. 47.

⁸⁷ M. Muszkat, *Część pierwsza: Wiadomości podstawowe*, Rozdział IV: Źródła prawa międzynarodowego [in:] M. Muszkat (ed.), *Zarys prawa międzynarodowego publicznego*. Vol I, Warszawa 1956, p. 26

⁸⁸ H. Thirlway, *The Sources of International Law*, Oxford 2014, p. 33.

⁸⁹ See G.I. Tunkin, *Zagadnienia teorii prawa międzynarodowego*, Warszawa 1964, p. 155.

⁹⁰ W.N. Durdieniewski, S.B. Kryłow (*Podręcznik prawa międzynarodowego*, Warszawa 1950, p. 31) treat acts of international organs as „a third source of international law” and regret that they are not treated with sufficient attention „in spite of the tremendous role and significance of that source”.

⁹¹ H. Thirlway, *International Customary Law and Codification: an examination of the continuing role of custom in the present period of codification of international law*, Leyden 1972, p. 39.

⁹² *Ibidem*, p. 42: “the purpose of a theory of sources is to ensure stability and certainty; and for that reason, it appears axiomatic that the class of sources should be a closed class, not in the sense of being in-

Another group of authors treats resolutions as executive acts in relation to the statute of the organization, comprising part of the category of treaty law. This is the approach taken by A. Verdross. Alongside the three primary formal sources, he also distinguished secondary formal sources (*formelle Völkerrechtsquellen zweiten Ranges*), the most important of which are norms created by international organizations on the basis of founding treaties⁹³. In this category he distinguished between regulations and norms applicable to member states – either of a technical nature, secured by the possibility of opting out of being bound, as in the case of the World Health Organization and the International Civil Aviation Organization, or by concrete directives issued under the statute of the organization. Verdross clearly emphasises here that they cannot issue any general norms⁹⁴. In addition, they will essentially be able to issue only recommendations.

In a similar vein in his Hague lecture, G. Arangio-Ruiz derives the binding force of treaty law from customary law, and thus gives the label of tertiary law to the secondary law of international organizations⁹⁵.

In the Polish scholarship, R. Bierzanek was a supporter of treating resolutions as „*sui generis* contractual law”⁹⁶. A similar view was also taken by R. Sonnenfeld, who treated law-making resolutions as executive acts in respect of the primary treaty, *i.e.* belonging *sensu largo* to treaty law⁹⁷. Echoes of this approach can be found in the textbook by J. Menkes and A. Wasilkowski. They point out that decisions will frequently be of an exclusively executive or incidental nature⁹⁸. These authors admit the potential recognition of law-making resolutions as a new source of international law as “a logical solution, and perhaps belonging to the future, but presently of a rather academic nature”. They classify law-making resolutions as a „type of sub-culture (derivative form) within the framework of treaty law”⁹⁹. They base this conclusion on the absence of references to resolutions as a separate source of law in any act of international law, and the lack of distinction of that category in the constitutions of contemporary states¹⁰⁰. Such

variable, but in the sense we have indicated, namely, of being variable only through a change brought about by the operation of one of the recognized sources, one of the members of the class”.

⁹³ A. Verdross, *Die Quellen des universellen Völkerrechts: eine Einführung*, Freiburg 1973, p. 137.

⁹⁴ *Ibidem*, p. 138.

⁹⁵ G. Arangio-Ruiz, *The normative role of the General Assembly of the United Nations and the declaration of principles of friendly relations*, “Recueil des Cours de l’Académie de Droit International”, Vol. 137 (1972-III), p. 728. Similarly: G. Schulz, *Entwicklungsformen internationaler Gesetzgebung*, Göttingen 1960, p. 113.

⁹⁶ R. Bierzanek, *Metody rozwoju i formułowania prawa międzynarodowego a ONZ (Odczyt wygłoszony na Kongresie International Law Association w dniu 2 września 1947 r. w Pradze)*, „Państwo i Prawo”, 1948, no. 2, p. 9.

⁹⁷ R. Sonnenfeld, *Podstawy prawne kompetencji...*, p. 22.

⁹⁸ J. Menkes, A. Wasilkowski, *Organizacje międzynarodowe. Prawo instytucjonalne*, 2nd edition, Warszawa 2010, p. 322.

⁹⁹ *Ibidem*, p. 324.

¹⁰⁰ *Ibidem*.

a justification can leave one wanting, as it expresses a potentially excessive degree of caution. In turn, P. Guggenheim and K. Marek pointed out the difficulties of separating treaty law and international legislation, and out of caution they locate the activity of an international organization within the “border one” between those two fields of consideration¹⁰¹.

But it should be kept in mind that authorisation does not imply they achieve the same rank. Municipal legislation, adopted on the basis of a constitution, does not achieve the rank of a constitution itself¹⁰². This issue is excellently portrayed in a joint dissenting opinion in the *South West Africa* case by Sir Percy Spender and Sir Gerald Fitzmaurice:

the fact that an act is done under an authority contained in an instrument which is itself a treaty (in this case the League Covenant) does not per se give the resulting act a treaty character. To take a familiar recent instance—under Article 17 of the United Nations Charter the General Assembly is authorized to approve the budget of the Organization, and the budget as approved is binding on the Member States. It could not be contended that it is on this account a “treaty” any more than could a resolution of the General Assembly apportioning the expenses of the United Nations amongst its Members under Article 17 (2) of the Charter¹⁰³.

As emphasised by K. Skubiszewski, in spite of law-making activity being based on treaty authorisation, we are dealing with a new and separate source¹⁰⁴. In this scope, we may invoke the fundamental difference between the distinction of formal sources of law and their dependence¹⁰⁵. Attempts at squeezing the acts of international organizations into the framework of sources set out in Art. 38 of the ICJ Statute seem unsatisfactory¹⁰⁶. Indeed, such an operation of „extending” classic sources would do more harm than good¹⁰⁷. Thus, the decisions of international organizations should be treated as an independent but secondary source of law¹⁰⁸. Independence is expressed in the absence

¹⁰¹ P. Guggenheim, K. Marek, *Völkerrechtliche Verträge*, [in:] H.-J. Schlochauer (Hrsg.), *Wörterbuch des Völkerrechts* begründet von Professor Dr. Karl Strupp in völlig neu bearbeiteter zweiter Auflage, Berlin 1962, p. 535.

¹⁰² K. Skubiszewski, *A New Source of the Law of Nations: Resolutions of International Organizations*, [in:] *Recueil d'études de droit international en hommage à Paul Guggenheim*, Genève 1968, p. 519.

¹⁰³ *South West Africa (Ethiopia v. South Africa)*, Proceedings joined with *South West Africa (Liberia v. South Africa)* on 20 May 1961, Judgment of 21 December 1962, Preliminary Objections, Joint Dissenting Opinion of Sir Percy Spender and Sir Gerald Fitzmaurice, ICJ Rep. 1962, p. 491.

¹⁰⁴ K. Skubiszewski, *Uchwały prawotwórcze...*, p. 144.

¹⁰⁵ *Ibidem* oraz P. Reuter, *Organizations internationales et evolution du droit*, [in:] *L'évolution du droit public: études offertes à Achille Mestre*, Paris 1956, p. 452 et seq.

¹⁰⁶ G. Schulz, *Entwicklungsformen internationaler Gesetzgebung*, Göttingen 1960, p. 112; J. Kolasa, *Ku koncepcji międzynarodowego prawa uchwalanego*, [in:] K. Wolfke (red.), *Aktualne zagadnienia źródeł prawa międzynarodowego*, Wrocław 1984, p. 12. Cf. R. Monaco, *Sources of international law*, [in:] R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. IV, Amsterdam 2000, p. 476.

¹⁰⁷ G.J.H. van Hoof, *Rethinking the sources of international law*, Deventer 1983, p. 190.

¹⁰⁸ G. Jaenicke, *Völkerrechtsquellen*, [in:] H.-J. Schlochauer (Hrsg.), *Wörterbuch des Völkerrechts* begründet von Professor Dr. Karl Strupp in völlig neu bearbeiteter zweiter Auflage, Berlin 1962, p. 772.

of the possibility to directly invoke will expressed by member states (mediation in the organization), while the secondary character refers to the basis for binding force resulting from a treaty.

Similarly, S.E. Nahlik, in spite of emphasizing the derivative nature of resolutions in respect of treaties, did not exclude the possibility of taking into account the role of resolutions passed by organizations in the event of a future revision of ICJ Statute within the scope of Art. 38¹⁰⁹. Interestingly, he did not foresee a growth in the significance of resolutions, as, in his words, “the subjective and objective scope of enacting norms binding on states in this manner is minor, and encompasses a narrow and tightly defined sphere”¹¹⁰. In comparison with the creation of treaty law and ascertaining customary law, the scope of law-making competences of international organizations seemed limited in G. Jaenicke’s view, thus he felt it premature to treat this activity as international law-making¹¹¹.

On the other hand, O.Y. Asamoah, in a study devoted to the legal meaning of declarations made by the UN General Assembly, states that, in appropriate conditions, resolutions of the Assembly can constitute not only a substantive, but also a formal source of international law¹¹². In the latter meaning, resolutions constitute (or may constitute) – in Asamoah’s opinion – the practice of states¹¹³. In the sense, more prevalent and more frequent, resolutions lead to (generate) practice which can achieve the status of law. Then, a resolution becomes evidence of the existence of a law whose formal effect is the product of subsequent practice of states¹¹⁴. In this manner, we are referring – consistently with the most popular justification – to customary law.

In this context, it is worth citing the weighty confrontation of resolutions of organizations with customary law, as performed by M. Bedjaoui. He treats resolutions of international organizations as a modern source, accenting the drawbacks of custom and the treaty method, while stressing their significance for developing states¹¹⁵. Of course, we may wonder about the legitimacy and perspectives for domination of the international community of states by the numerically larger group of developing states, which attempt in this mechanical manner to advance their own interests¹¹⁶.

¹⁰⁹ S. E. Nahlik, *Wstęp do nauki prawa międzynarodowego*, Warszawa 1967, p. 417 et seq.

¹¹⁰ *Ibidem*, p. 413-4.

¹¹¹ G. Jaenicke, *Völkerrechtsquellen*, [in:] H.-J. Schlochauer (Hrsg.), *Wörterbuch des Völkerrechts begründet von Professor Dr. Karl Strupp in völlig neu bearbeiteter zweiter Auflage*, Berlin 1962, p. 772.

¹¹² O.Y. Asamoah, *The Legal Significance of the Declarations of the General Assembly of the United Nations*, The Hague 1966, p. 46.

¹¹³ *Ibidem*.

¹¹⁴ *Ibidem*.

¹¹⁵ M. Bedjaoui, *Towards a new international economic order*, Paris 1979, pp. 140-2.

¹¹⁶ See A. Bleckmann, *Völkerrecht*, Baden-Baden 2001, p. 85 (§ 225).

Paul Reuter perceives in the development of the law of international organizations a shift from the law of coordination to the law of subordination¹¹⁷. D. Sijdjanski goes even further, seeing in them the initial phase of a federal international law¹¹⁸.

Irrespective of the extent to which we are prepared to accept such radical approaches, we should take notice of the conclusion that flows from these ideas, allowing us to treat resolutions as a separate source of law within the framework of international law. The Polish literature has seen calls for the adoption of a separate category of sources of international law in the form of “adopted law”¹¹⁹. K. Skubiszewski wrote similarly of a „fourth source of international law”, as acts by international organizations establishing law cannot be assigned to any of the three traditional sources¹²⁰. A more optimistic position in this scope is taken by K. Wolfke, who clearly states that „resolutions of international organizations as a primary instrument for achieving the goals and statutory objectives of such organizations are presently considered among the sources of international law”¹²¹. J. Gilas states directly that „presently, resolutions of international organizations are considered the new main source of international law”¹²².

Indeed, as early as in 1963, during his Hague lecture, H. Waldock suggested treating the acts of international organizations as primary sources of international law within the meaning of Art. 38 of the Statute of the International Court of Justice¹²³, and not as derivative of treaties on the formation of international organizations. He accepted the fact that while a treaty is the origin of the legal force of an organization’s acts, the moment of its conclusion is also the inception of an independent organization which becomes a new decision maker within the international community.

The International Court of Justice, in the context of a decision by the Security Council, gave an excellent account of this dependency in an advisory opinion in the matter of Kosovo:

Security Council resolutions are issued by a single, collective body and are drafted through a very different process than that used for the conclusion of a treaty. Security Council resolutions are the product of a voting process as provided for in Article 27 of the Charter, and the final text of such resolutions represents the view of the Security Council as a body. Moreover,

¹¹⁷ P. Reuter, *Organizations internationales et evolution du droit*, [in:] *L’évolution du droit public: études offertes à Achille Mestre*, Paris 1956, p. 449

¹¹⁸ D. Sijdjanski, *Du Fédéralisme national au Fédéralisme international*, Lausanne 1954, p. 14.

¹¹⁹ J. Kolasa, *Ku koncepcji...., passim*.

¹²⁰ K. Skubiszewski, *Uchwały prawotwórcze....*, p. 144.

¹²¹ K. Wolfke, *Uchwały organizacji międzynarodowych*, [in:] B. Hołyst, E. Smoktunowicz (ed.), *Wielka encyklopedia prawa*, second edition, Warszawa 2005, p. 1083.

¹²² J. Gilas, *Prawo międzynarodowe*, Second edition, Toruń 1999, p. 74.

¹²³ H. Waldock, *General Course on Public International Law*, “Recueil des Cours de l’Académie de Droit International”, Vol. 106 (1963-II), p. 103.

Security Council resolutions can be binding on all Member States [...], irrespective of whether they played any part in their formulation¹²⁴.

It is without doubt that the creation of law by international organizations is the most similar to the manner in which municipal law is enacted¹²⁵. Comparisons with national legislation created by parliament seem natural¹²⁶. However, we recall that in traditional terms, “international legislation” has been understood as the making of international agreements¹²⁷, and according to an even more traditional definition, as exclusively international custom¹²⁸. At present, we may speak in this context of international organs adopting norms which are directly binding on states¹²⁹. We should be aware, however, that the absence of a uniform understanding of this term is the result of the untranslatability of domestic legislative mechanisms onto international law¹³⁰.

As the International Criminal Tribunal for the Former Yugoslavia so excellently put it,

It is clear that the legislative, executive and judicial division of powers which is largely followed in most municipal systems does not apply to the international setting nor, more specifically, to the setting of an international organization such as the United Nations. Among the principal organs of the United Nations the divisions between judicial, executive and legislative functions are not clear cut. [...] There is, however, no legislature, in the technical sense of the term, in the United Nations system and, more generally, no Parliament in the world community. That is to say, there exists no corporate organ formally empowered to enact laws directly binding on international legal subjects¹³¹.

For international legislation, creating something along the lines of a parliament, regardless of practicability, could have a disintegrating influence¹³². Sir Hersch Lauterpacht addressed international law-making in the sense of “enactment of laws overriding

¹²⁴ See Accordance with international law of the unilateral declaration of independence in respect of Kosovo, Advisory Opinion of 22 July 2010, ICJ Rep. 2010, p. 442, § 94.

¹²⁵ N. Buchowska, *Kompetencja prawotwórcza organizacji międzynarodowych*, [in:] P. Wiliński (red.), *Prawo wobec wyzwań współczesności*, Poznań 2004, p. 327.

¹²⁶ G. Dahm, *Völkerrecht*, Band I, Stuttgart 1958, p. 26, Band III, Stuttgart 1961, p. 174.

¹²⁷ J.I. Knudson, *Methods of International Legislation with Special Reference to the League of Nations*, Genève 1928, p. 16. See also M.O. Hudson (ed.), *International Legislation: A collection of the texts of multipartite international instruments of general interest beginning with the Covenant of the League of Nations*, Volume I 1919-1921, Washington 1931 p. xiii et seq.

¹²⁸ See T. Gihl, *International legislation: an Essay on changes in international law and international legal situation*, London et al. 1937, p. 151.

¹²⁹ “[A]doption by international bodies of norms that are directly binding upon States” – See J. Brunée, *International Legislation*, “Max Planck Encyclopedia of Public International Law”, § 1.

¹³⁰ See M.L. Fremuth, J. Griebel, *On the Security Council as a Legislator: A Blessing or a Curse for the International Community?*, “Nordic Journal of International Law”, Vol. 76 (2007), p. 342.

¹³¹ *The Prosecutor v. Dusko Tadić*, Case No. IT-94-1, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2.10.1995, § 43.

¹³² H. Huber, *Die Internationale Quasilegislativ*, “Schweizerisches Jahrbuch für internationales Recht”, Band XXVII (1971), p. 24.

the will of a dissenting minority”¹³³. Similarly, P.B. Potter accents the nature of “international legislation as the enactment of international law by formal action of less-than-unanimous consent”¹³⁴.

As it is, support for the rule of the majority can be found in the writings of Grotius. In his seminal work on the law of war and peace, the father of the contemporary law of nations refers to the right of the majority in the following manner:

(...) all (societies) have this in common to them, that in matters for which each Association was instituted, the whole body, or the major part in the name of the whole body, oblige all and every the particular members of the society. For it is certainly to be presumed, that those who enter into a society are willing that there should be some method fixed of deciding affairs; but it is altogether unreasonable, that a greater number should be governed by a less; and therefore, tho’ there were no contracts or laws that regulate the manner of determining affairs, the majority would naturally have the right and authority of the whole¹³⁵.

Such an approach can be considered innovative – indeed, traditionally there has been reliance on unanimity resulting from the fundamental sovereignty of members of the international community, customary law, or the principle of equality of states¹³⁶. However, the exclusion of a sovereign decision about submission to the will of the majority would also be in direct conflict with the argumentation presented above¹³⁷. We recall the classic *dictum* of the Permanent Court of International Justice, as expressed in the *Lotus* case, that limitations on the sovereignty of states may not be presumed¹³⁸. That said, voluntary submission to the will of the majority cannot be ruled out *a priori*¹³⁹. The defence of unanimity has also been based on the premise that the requirement of unanimity promotes consultations and international cooperation¹⁴⁰.

Reliance on the principle of unanimity leads in almost every case to paralysis¹⁴¹. However, views expressed immediately after the end of World War II on the death of the principle of unanimity were premature¹⁴².

¹³³ H. Lauterpacht, *International law: a treatise by L. Oppenheim, Vol. 1: Peace*, 7th edition, London 1947, p. 26, footnote 3.

¹³⁴ P.B. Potter, *An Introduction to the Study of International Organization*, Fifth edition completely revised and extended, New York –London 1949, p. 209.

¹³⁵ H. Grotius, *The Rights of War and Peace* (2005 ed.), Vol. 2, <http://oll.libertyfund.org/titles/grotius-the-rights-of-war-and-peace-2005-ed-vol-2-book-ii>.

¹³⁶ Critically on the issue see: C.A. Riches, *Majority rule in international organization: a study of the trend from unanimity to majority decision*, Baltimore 1940, p. 8 et seq.

¹³⁷ See F.S. Dunn, *The Practice and Procedure of International Conferences*, Baltimore 1929, p. 126.

¹³⁸ PCIJ, Series A, No. 10, „*Lotus*” Judgment of 7 September 1927, p. 19-20.

¹³⁹ C.A. Riches, *op. cit.*, p. 291 et seq.

¹⁴⁰ *Ibidem*, p. 12.

¹⁴¹ Ch. Tomuschat, *Obligations Arising for States Without or Against Their Will*, “Recueil des Cours de l’Académie de Droit International”, 1993, vol. 241, p. 326.

¹⁴² See C. W. Jenks, *Some Constitutional Problems of International Organizations*, “British YearBook of International Law”, Vol. 22 (1945), p. 34.

In practice, the principle of consensus has achieved a great deal of significance, as it links respect for state sovereignty with consideration of the interest of the majority of states. Growth in the number of members of organizations, a product of decolonisation, is given among the causes of the growth in the importance of consensus¹⁴³. It may also be argued that a decentralised international community is not prepared to express *volonté générale*¹⁴⁴. We are aware of the multiplicity of meanings ascribable to the term *consensus*: from total unanimity, through a situation of nearly complete unanimity with a few states abstaining or opposed, to the opinion of the majority with a strongly emphasized minority opinion¹⁴⁵. Here a strong similarity to majority voting can be observed.

From the procedural perspective, we may speak of *consensus* as a means of adopting a resolution which is already the product of general agreement¹⁴⁶. At times, it is treated as the bastard child of unanimity¹⁴⁷. In turn, from the substantive perspective this term expresses a certain content agreed upon and adopted without voting¹⁴⁸. In this context, some speak of “une quasi-résolution plus «floue» dans son texte, moins précisément adoptée, donc plus vague dans sa portée, et à laquelle il paraît d’avoir recours lorsqu’on juge trop difficile ou trop long de faire adopter une résolution classique”¹⁴⁹. Of course, this framing undermines the postulate of legal certainty. From this perspective, it could be held that the formal adoption of a resolution reinforces the position of an international organization expressed therein as a source of law.

Consensus is treated as a (pre-)source of law, and not exclusively as an expression of the manifestation of sources¹⁵⁰, which requires separate analysis undertaken in the course of considerations on non-binding acts (see *infra*, point 5).

¹⁴³ H.G. Schermers, N. Blokker, *International institutional law: unity within diversity*, 5. rev. ed., Leiden-Boston 2011, § 784, p. 546.

¹⁴⁴ See H. Rolin, *De la volonté générale dans les organisations internationales*, [in:] *La technique et les principes du droit public. Études en l'honneur de Georges Scelle*, Paris 1950, tome II, p. 553 et seq. Cf. K. Zemanek, *Majority rule and consensus technique in law-making diplomacy*, [in:] R.St.J. Mac Donald, D.M. Johnston (eds.), *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory*, The Hague et al. 1983, pp. 871 and 879.

¹⁴⁵ See A. D'Amato, *On Consensus*, “Canadian Yearbook of International Law”, vol. 8 (1970), p. 106; Cf. R. Wolfrum, *Konsens im Völkerrecht*, [in:] H. Hattenauer, W. Kaltefleiter (Hrsg.), *Mehrheitsprinzip, Konsens und Verfassung: Kieler Symposium vom 14.-16. Juni 1984*, Heidelberg 1986, p. 79 et seq.

¹⁴⁶ K. Skubiszewski, *Uchwały prawotwórcze...*, p. 24-25.

¹⁴⁷ See L. Condorelli, *Voluntarism versus Majority Rule*, [in:], A. Cassese, J.H.H. Weiler, *Change and Stability in International Law-Making*, Berlin – New York 1988, p. 117.

¹⁴⁸ K. Skubiszewski, *Uchwały prawotwórcze...*, p. 25.

¹⁴⁹ G. de Lacharrière, *Consensus et Nations Unies*, “Annuaire Français de Droit International”, Tome 14 (1968), p. 14.

¹⁵⁰ The main representative of such a stance is B. Simma, *Methodik und Bedeutung der Arbeit der Vereinten Nationen für die Fortentwicklung des Völkerrechts*, [in:] W.A. Kewenig (Hrsg.), *Die Vereinten Nationen im Wandel: Referate und Diskussionen eines Symposiums „Entwicklungslinien der Praxis der Vereinten Nationen in völkerrechtlicher Sicht“, veranstaltet aus Anlaß des 60jährigen Bestehens des Instituts für Internationales Recht an der Universität Kiel*, 20. – 23. 11. 1974, Berlin 1975, pp. 98-99. See also O.J. Lissitzyn,

4. Binding character of an act

The capacity of international organizations to issue binding acts remains the exception rather than the rule. In numerical terms, formally non-binding acts are predominant and quite diverse. In this context, therefore, it comes as no surprise that R. Baxter referred to international law in its “infinite variety”¹⁵¹.

We may also invoke consequences: a resolution will be legally binding if violation of it would constitute a violation of international law¹⁵². This definition, however, constitutes a tautology, it refers to the affiliation of a given rule with international law. From a broader perspective, we may refer to binding character as an immanent feature of law in general¹⁵³. Thus, if we are to construe criteria for binding character, we should include the authority to issue binding resolutions after requirements are fulfilled with regards to voting and procedures; and ultimately, this act must be promulgated with the intent of effecting a binding resolution¹⁵⁴.

Substantiation of the binding character of acts issued by international organizations can take diverse forms¹⁵⁵. From a historical perspective, it is simplest to draw an analogy to treaties, but presently this analogy is rejected. A fantastic illustration of this assumption is supplied by the dispute between Poland and Lithuania concerning railways, and which was the subject matter of an advisory opinion of the Permanent Court of International Justice. Owing to a difference of opinion over the resumption of rail connections along the Landwarów-Kaisiadorys route following World War I, a case was heard by the Council of the League of Nations, which recommended the initiation of negotiations in its resolution of 10 December 1927¹⁵⁶. Referring to this resolution, in its 1931 opinion the Permanent Court held that both states had participated in the adoption of the resolution, and that they were bound by it through the expression of consent¹⁵⁷. The Polish side claimed that the parties to the dispute, through the adoption of the recommendation, had undertaken an obligation not only to enter into negotiations, but also to conclude a final agreement facilitating the initiation of rail traffic along the aforementioned route. The

Discussion [in reference to] O. Schachter, *Legal Problems*, [in:] R.N. Swift (ed.), *Annual Review of United Nations Affairs 1963-1964*, New York 1965, p. 128.

¹⁵¹ R.R. Baxter, *International Law in 'Her Infinite Variety'*, “International and Comparative Law Quarterly”, vol. 29 (1980), p. 549.

¹⁵² R. Lagoni, *Resolution, declaration, decision*, [in:] R. Wolfrum (ed.), *United Nations: Law, Policies and Practice*, New, Revised English Edition, Volume 2, München 1995, p. 1084.

¹⁵³ J.-P. Jacqué, *Eléments pour une théorie de l'act juridique en droit international public*, Paris 1972, p. 231.

¹⁵⁴ R. Lagoni, *op. cit.*, p. 1084-5.

¹⁵⁵ See J. Klabbers, *An Introduction to International Institutional Law*, Second ed., Cambridge 2009, p. 184 et seq.

¹⁵⁶ Text of the resolution cited on p. 115 of the ruling.

¹⁵⁷ *Railway Traffic between Lithuania and Poland*, Advisory Opinion of 15 October 1931, PICJ, Series A/B, no. 42, p. 116.

Court concurred with this interpretation, but only within the scope of commencing and continuing negotiations to the extent possible with a view to concluding an agreement. This conclusion was justified by invoking the practice of the Council itself. It observed, however, that the obligation to engage in negotiations does not entail an obligation to reach an understanding.¹⁵⁸

We may consider the wording of the position expressed by the Court. It doubtlessly makes a distinction between the obligation of effort and of result. It expresses the significance and the role of *pactum de negotiando*, and is treated in this way¹⁵⁹. From the perspective of the creation of international law by international organizations, this argumentation is less than convincing. However, it should be observed that the aftermath of this theory can be found in the Luxemburg case law. In case no. C-311/94, the Court of Justice of the European Union held that by virtue of its participation in the adoption of “Recommendations”, The Netherlands was bound by that document¹⁶⁰.

It is difficult to concur with a conception which treats the resolution of an international organization as an agreement (even in simplified form¹⁶¹) concluded between states whose representatives had voted for a resolution¹⁶². It should be kept in mind that accreditation before an organization does not automatically imply automatic authority to conclude this type of “treaty”.

Depending on the position adopted in the course of voting, various justifications of binding force can be observed. The simplest scenario concerns a resolution adopted unanimously. In the absence of unanimity, a resolution passed by a majority via the required procedure will be binding upon the states voting for it on grounds of their expressed consent, and under the *estoppel* principle. The possibility of referring to the latter principle comes in for harsh criticism as leading to greater legal uncertainty¹⁶³. T.O. Elias presents a justification for this binding force applying to the remaining states as well¹⁶⁴. Member states which abstained from voting would be bound on grounds of ac-

¹⁵⁸ *Ibidem*.

¹⁵⁹ H.G. Hahn, *Das pactum de negotiando als völkerrechtliche Entscheidungsnorm*, “Außenwirtschaftsdienst des Betriebs-Beraters”; Bd. 18 (1978), p. 489 et seq.; U. Beyerlin, *Pactum de contrahendo und pactum de negotiando im Völkerrecht?*, “Zeitschrift für ausländisches öffentliches Recht und Völkerrecht”, Bd. 36 (1976), p. 427; see also L. Marion, *La notion de pactum de contrahendo dans la jurisprudence internationale*, “Revue Générale de Droit International Public”, tome 78 (1974), p. 351 et seq.

¹⁶⁰ See Judgment of the Court of 15 October 1996. – IJssel-Vliet Combinatie BV v Minister van Economische Zaken. – Reference for a preliminary ruling: Raad van State – Netherlands. – State aid for the construction of a fishing vessel. – Case C-311/94, European Court reports 1996 Page I-05023

¹⁶¹ See M. Frankowska, *Umowy międzynarodowe w formie uproszczonej*, Wrocław et al. 1981, p. 54 et seq.

¹⁶² C. Parry, *The sources and evidences of international law*, Manchester 1965, p. 22.

¹⁶³ I. Detter, *The Effect of Resolutions of International Organizations*, [in:] J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century – Essays in Honour of Krzysztof Skubiszewski*, The Hague 1996, p. 392.

¹⁶⁴ T.O. Elias, *Modern Sources of International Law*, [in:] W. Friedmann et al. (eds.), *Transnational Law in A Changing Society: Essays in Honor of Philip C. Jessup*, New York and London 1972, p. 51.

quiescence, as abstention is not a vote against. In turn, members whose position was overruled in the vote should be considered as bound under the principle of the democratic majority.

Another justification can be based on abstract authorisation, consent, expressed in the course of accession to (creation of) an international organization. This mechanism is clearly presented by I. Detter, who indicates that accession to a treaty, the „constitution” of an international organization by states, means consent to undertaking certain legal obligations in the future, without consent expressed in each individual case¹⁶⁵. Such a principle, in Detter’s opinion, would seem to be a particular element of the *pacta sunt servanda* principle, which applies in respect of that constitution. The argumentation presented above is, of course, more convincing than that of the binding force of unilateral acts by states¹⁶⁶, although its abstractness and the absence of reference to reality may grate¹⁶⁷. However, we may consider the direct application of consent as a consequence – albeit far from those initially intended – of membership in an international organization¹⁶⁸.

However, in his treatise on the law of international organizations, I. Seidl-Hohenveldern points out that the parties to a treaty appointing an international organization have undertaken an obligation to implement the founding treaty, referring in this manner to the theory of implied powers¹⁶⁹. This concept consists in recognising that an international organization possesses certain additional competences beyond those given to it directly in the act constituting a given organization. Such additional competences are necessary and important in the fulfilment of the tasks and objectives of the organization, as well as the performance of its functions, but also for the exercise of those competences granted explicitly¹⁷⁰. As we may read in the advisory opinion of the International Court of Justice in the *Reparation for Injuries Suffered in the Service of the United Nations* case, “Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as

¹⁶⁵ I. Detter, *Law making by international organizations*, Stockholm 1965, p. 322.

¹⁶⁶ E. Suy, *Les actes juridiques unilatéraux en droit international public*, Paris 1962, p. 30 et seq.

¹⁶⁷ A. Pellet, *Article 38*, [in:] A. Zimmermann et al. (eds.), *The Statute of the International Court of Justice: A Commentary*, Oxford 2012, p. 768.

¹⁶⁸ See e.g. E. Lauterpacht, *The Waning of the Requirement of Consent*, “Proceedings of the American Society of International Law”, Vol. 85 (1991), p. 39.

¹⁶⁹ I. Seidl-Hohenveldern, *Das Recht der internationalen Organisationen einschließlich der supranationalen Gemeinschaften*, Köln 1967, p. 204. Reference tot hat formula may be found in the subsequent editions of this treatise – see I. Seidl-Hohenveldern, G. Loibl, *Das Recht der internationalen Organisationen einschließlich der supranationalen Gemeinschaften*, 7., überarbeitete Aufl., Köln 2000, p. 227.

¹⁷⁰ K. Skubiszewski, *Implied Powers of International Organizations*, [in:] Y. Dinstein, M. Tabory (eds.), *International Law at a Time of Perplexity*, Dordrecht et al. 1989, p. 856.

being essential to the performance of its duties”¹⁷¹. The primary judicial organ of the United Nations applied implied powers to the performance of the functions and securing the object and purpose of the Organization. However, in a dissenting opinion, judge Hackworth linked them with powers granted explicitly¹⁷².

The ICJ also offered a narrow interpretation of implied powers in its advisory opinion in *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*¹⁷³. It was pointed out that:

(...) international organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations are governed by the „principle of speciality”, that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them. (...) The powers conferred on international organizations are normally the subject of an express statement in their constituent instruments. Nevertheless, the necessities of international life may point to the need for organizations, in order to achieve their objectives, to possess subsidiary powers which are not expressly provided for in the basic instruments which govern their activities. It is generally accepted that international organizations can exercise such powers, known as “implied” powers¹⁷⁴.

And thus, the grounds of the implication can be purposes, functions, and powers granted directly, although this should always be done cautiously¹⁷⁵.

The possibility of deducing law-making powers as implied powers is categorically excluded by K. Skubiszewski¹⁷⁶. In turn, W. Morawiecki states that powers to enact norms can be expressed directly in the statute of an organization, but also in an implied manner; he specifies by explaining this can be done when they concern the internal functioning of the organization, or when they only constitute recommendations. This position thus has much in common with the approach of K. Skubiszewski detailed above. F. Er-

¹⁷¹ *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Rep (1949), p. 182. The Permanent Court of International Justice had also made similar declarations in an advisory opinion concerning the International Labour Organization, PCIJ, Series B. No. 13, 23.07.1926, *Competence of the International Labour Organization to Regulate, Incidentally, the Personal Work of the Employer*, p. 18.

¹⁷² ICJ Rep. 1949, p. 198: “Powers not expressed cannot freely be implied. Implied powers flow from a grant of expressed powers, and are limited to those that are ‘necessary’ to the exercise of powers expressly granted”. Similarly, in a dissenting opinion attached to an ICJ advisory opinion of 1954, “The doctrine of implied powers is designed to implement, within reasonable limitations, and not to supplant or vary, expressed powers” – see *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion of 13 July 1954, Dissenting Opinion by Judge Hackworth, ICJ Rep. 1954, p. 80.

¹⁷³ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, ICJ Rep. (1996). See J. Klabbers, *An Introduction to International Institutional Law*, Cambridge 2004, p. 80.

¹⁷⁴ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, ICJ Rep. (1996), point 25, pp. 78-79.

¹⁷⁵ K. Skubiszewski, *Implied Powers...*, p. 868.

¹⁷⁶ K. Skubiszewski, *Uchwały prawotwórcze...*, p. 31.

macora, on the other hand, feels that reference to the conception of implied powers is unnecessary on grounds of logic¹⁷⁷.

In turn, the most conservative approach assumes the necessity of acquiring consent in every case. This is derived from the demand for equal treatment of states¹⁷⁸. Such an approach would, however, seem to equate the organs of an international organization to a conference of states. Nevertheless, the example of the reactions by some Member States of the European Union to the decision of the Council concerning relocation of refugees¹⁷⁹ demonstrates that this is not an entirely fictional scenario.

Another concept assumes allowances for opting out of the binding force of a resolution following its adoption through the submission of a reservation within a stipulated deadline. This mechanism is excellently depicted in solutions adopted under the Chicago Convention on International Civil Aviation¹⁸⁰. Article 37 of the Chicago Convention contains a general provision concerning the adoption of international norms and principles of conduct¹⁸¹. At the same time, however, it was permitted to take advantage of *contracting out*, consisting in the acceptance that resolutions passed by an organization are assumed to be binding, and only the performance of a given action can release a state from its obligation. Indeed, the Convention in Art. 38 introduces “departures from international standards and procedures”¹⁸². By the same token, insofar as no reservation to a res-

¹⁷⁷ F. Ermacora, *Das Problem der Rechtsetzung durch internationale Organisationen (insbesondere im Rahmen der UN)*, [in:] “Berichte der Deutschen Gesellschaft für Völkerrecht”, Heft 10, Karlsruhe 1971, p. 93.

¹⁷⁸ A. Verdross, *Kann die Generalversammlung der Vereinten Nationen das Völkerrecht weiterbilden?*, “Zeitschrift für ausländisches öffentliches Recht und Völkerrecht”, Bd. 26 (1966), p. 692.

¹⁷⁹ See Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece (OJ L 239, 15.9.2015, pp. 146–156) and 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece (OJ L 248, 24.9.2015, pp. 80–94).

¹⁸⁰ The Convention on International Civil Aviation made at Chicago on 7 December 1944 and entered into force on 4 April 1947. For the (original) text of the Convention see 15 UNTS., pp. 295 et seq.

¹⁸¹ “Each contracting State undertakes to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures, and organization in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation. To this end the International Civil Aviation Organization shall adopt and amend from time to time, as may be necessary, international standards and recommended practices and procedures dealing with: a) communications systems and air navigation aids, including ground marking; b) characteristics of airports and landing areas; c) rules of the air and air traffic control practices; d) licensing of operating and mechanical personnel; e) airworthiness of aircraft; f) registration and identification of aircraft; g) collection and exchange of meteorological information; h) log books; i) aeronautical maps and charts; j) customs and immigration procedures; k) aircraft in distress and investigation of accidents; and other such matters concerned with the safety, regularity, and efficiency of air navigation as may from time to time appear appropriate.”

¹⁸² “Any State which finds it impracticable to comply in all respects with any such international standard or procedure, or to bring its own regulations or practices into full accord with any international standard or procedure after amendment of the latter, or which deems it necessary to adopt regulations or practices differing in any particular respect from those established by an international standard, shall give immediate notification to the International Civil Aviation Organization of the differences between its own practice and that established by the international standard. In the case of amendments to international standards, any State

olution of the International Civil Aviation Organization is submitted within the appointed time, it enters into force without the necessity of any actions being taken.

A similar mechanism was used within the framework of exercising of the law-making power given to the World Health Organization (WHO)¹⁸³. Under Art. 21 of the WHO Constitution, the Health Assembly adopts two regulations: Nomenclature Regulations and International Sanitary Regulations, which, since a thorough revision in 1969, have been called International Health Regulations. For many years, merely cosmetic changes were performed on the latter document; a breakthrough occurred in 2005, in the form of new health regulations adopted to assist effective reaction to the H1N1 virus epidemic¹⁸⁴. In accordance with Art. 22, the Assembly should notify all member states of regulations adopted under Art. 21, and appoint a period for exercising the right to submit a reservation or rejection of the act in its entirety to the Director-General. And thus, in the event there are no reservations/rejections, an act will be binding without the necessity of any other actions being performed by member states.

More examples of the application of the mechanism can, of course, be given¹⁸⁵. From the perspective of our analysis, of importance is the sort of reversal of the mechanism for the adoption of obligations. States will be automatically bound by the act of an international organization, and if they desire to avoid being bound, they should submit a clear declaration to that effect. Taking into account the possibility of a state or states expressing such a position would at the same time seem to exclude a strictly unilateral character of an act adopted by an international organization. What is of greater importance, the binding character of acts of international organizations could be eroded, but only in relation to states submitting a declaration. It should be noted, however, that contracting out by one or more member states does not negate the validity of the resolution in respect of other (the remaining) states. From the perspective of an international organization, this will be only an exception from the law-making activity it engages in.

which does not make the appropriate amendments to its own regulations or practices shall give notice to the Council within sixty days of the adoption of the amendment to the international standard, or indicate the action which it proposes to take. In any such case, the Council shall make immediate notification to all other states of the difference which exists between one or more features of an international standard and the corresponding national practice of that State.”

¹⁸³ Constitution of the World Health Organization, Art. 59, July 22, 1946, 14 UNTS 185.

¹⁸⁴ See W. Burek, *Zmiana sposobu realizacji kompetencji prawotwórczych przez Światową Organizację Zdrowia*, „Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego”, vol. XII, A.D. MXIV, pp. 78 et seq.

¹⁸⁵ A similar mechanism enabling to lay down technical regulations may also be found in World Meteorological Organization – see N. Buchowska, *Wykonywanie kompetencji prawotwórczych...*, p. 40 et seq. Cf. K. Skubiszewski, *Uchwały...*, p. 63.

5. Soft law

Above we have observed that only a small portion of the acts created by international organizations are binding acts. The question arises of the possibility to introduce gradation of binding force. As convincingly observed by J. Klabbers, gradation can be taken into consideration in respect of concreteness, detail, specificity, scope, etc., but not in respect of validity¹⁸⁶. In this definition, employment of the concept of *soft law* is not at all necessary¹⁸⁷. P. Weil also regrets the blurring of levels of normativity¹⁸⁸. On the other hand, A. Pellet considers this perspective on the matter to be simplified, and argues that the “soft” character of law can be derived from both its insertion into a non-binding instrument but also from the content itself, and thus can be expressed both formally and substantively¹⁸⁹.

Some terms can produce consternation. In his Hague lecture, G. Tunkin employs the formula of “semi-legal norms”¹⁹⁰. Going beyond the framework of bivalent logic, in an expansive study published in a British yearbook of international law, F.B. Sloan addresses the binding force of recommendations¹⁹¹. He writes about „nascent legal force”, which, in the absence of the relevant intention of the authors of a declaration, provoked the strong objection of H. Lauterpacht¹⁹². Other authors also warn against distorting the rules of international law through blurring with categories that are not entirely binding, which will lead in consequence only to creating legal instability and confusion, as well as contribute to depreciation of the discipline of international law¹⁹³.

It may not be forgotten, however, that bivalent logic does not always operate here. Attachment to it is treated as „exaggerated juridical formalism”, and the application of traditional criteria and methods of municipal law for assessing the binding character

¹⁸⁶ J. Klabbers, *The Redundancy of Soft Law*, “Nordic Journal of International Law”, Vol. 65 (1996), p. 181: “Our binary law is well capable of handling all kinds of subtleties and sensitivities, within the binary mode, law can be more or less specific, more or less exact, more or less determinate, more or less wide in scope, more or less pressing, more or less serious, more or less far-reaching; the only thing it cannot be is more or less binding”.

¹⁸⁷ *Ibidem*, p. 168.

¹⁸⁸ P. Weil, *Towards Relative Normativity in International Law*, “American Journal of International Law”, Vol. 77 (1983), pp. 415 et seq. and in the course of discussions on the report by M. Virally for the Institute of International Law – see *Annuaire de l’Institut de droit international*, Session de Cambridge, p. 369.

¹⁸⁹ A. Pellet, *The Normative Dilemma – Will and Consent in International Law*, “Australian Yearbook of International Law”, vol. 12 (1992), p. 46 and 27, respectively

¹⁹⁰ G. Tunkin, *International law in the international system*, “Recueil des Cours de l’Académie de Droit International”, Vol. 147 (1975-IV), pp. 61 and 70.

¹⁹¹ F.B. Sloan, *The Binding Force of a Recommendation of the General Assembly of the UN*, “British Yearbook of International Law”, Vol. 25, 1948, pp. 1 et seq.

¹⁹² See H. Lauterpacht, *International Law and Human Rights*, London 1950, p. 413-4 (and footnote 61).

¹⁹³ I. Detter, *The Effect of Resolutions...*, p. 392.

and force of international rules would seem affected¹⁹⁴. And thus, as A. Pellet argues, it seems necessary to reject this rigour and to accept the possibility for the existence of diversity in the forms by which international law manifests itself¹⁹⁵.

Limited significance in a legal sense, but based on the absence of a formal connexion, it gives rise to certain consequences. As judge Klaestad remarks in a dissenting opinion to the advisory opinion of 1955 on voting procedures:

Its effects [of a resolution adopted by the General Assembly] are, in my view, not of a legal nature in the usual sense, but rather of a moral or political character. This does not, however, mean that such a recommendation is without real significance and importance, and that the Union Government can simply disregard it. As a Member of the United Nations, the Union of South Africa is in duty bound to consider in good faith a recommendation adopted by the General Assembly under Article 10 of the Charter and to inform the General Assembly with regard to the attitude which it has decided to take in respect of the matter referred to in the recommendation¹⁹⁶.

They are thus worthy of consideration. B. Conforti goes a step further, observing in this scope the necessity to justify the failure of realisation in respect of the organ that issued them. It can even be deduced on the basis of the presumption of legal action¹⁹⁷.

The greatest attention has been devoted to the quasi-law-making powers of the General Assembly¹⁹⁸. It should be recalled that proposals to grant the General Assembly with such powers during a conference in San Francisco were submitted by the Philippines¹⁹⁹. They were ultimately rejected.

Formally non-binding resolutions of the Assembly may be treated as a modern complement to the law of treaties, as well as an authoritative interpretation or indications as to the proper interpretation of treaties²⁰⁰. They are even held as an elaboration of the provisions of the United Nations Charter²⁰¹. In the subject literature, these resolutions

¹⁹⁴ J. Castañeda, *Legal Effects of United Nations Resolutions*, New York and London 1969, p. 176. The author's argument is worth citing *in extenso*: "Obviously, the legal value of declaratory resolutions allows for a wide range of shadings. There are no tangible, clear, juridical criteria that demarcate with precision the zones of binding force. Hazy, intermediate, transitional, embryonic, inchoate situations are not infrequent. [...] to determine the legal value of this type of resolution by means of *a priori*, schematic, and strict criteria, implies failure to take into account the multifarious variety and complexity of the underlying international reality, which must necessarily be reflected in the juridical superstructure".

¹⁹⁵ A. Pellet, *The Normative Dilemma – Will and Consent in International Law*, "Australian Yearbook of International Law", vol. 12 (1992), pp. 52-3.

¹⁹⁶ Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa, Advisory Opinion of 7 June 1955, Separate Opinion of Judge Klaestad, ICJ Rep. 1955, p. 88.

¹⁹⁷ B. Conforti, *Le rôle de l'accord dans le système des Nations Unies* "Recueil des Cours de l'Académie de Droit International" 142(1974), pp. 262ff. (to 265).

¹⁹⁸ R. Falk, *op. cit.*, pp. 782 et seq.

¹⁹⁹ UNCIO, Vol. 9 p. 316

²⁰⁰ See U. Scheuner, *Recommendations and Traditional Sources of International Law*, "German Yearbook of International Law", Vol. 20 (1977), p. 107.

²⁰¹ O.Y. Asamoah, *The legal Significance of the declarations of the General Assembly of the United Nations*, The Hague 1966, p. 35 et seq.

(or at least some of them) are associated with general principles of law²⁰². They can also simply be treated as a means of ascertaining legal rules²⁰³.

During the conference in San Francisco, consideration was given to the possibility of broadening interpretation of the Charter by organs of the United Nations²⁰⁴. It was agreed that all organs of the UN are appointed to interpret its statute as a component of the performance of its functions²⁰⁵. In practice, it is associated with the unanimous position of the members, or at least the absence of overt opposition²⁰⁶.

For example, L.B. Sohn states that there has never been any doubt certain resolutions of the General Assembly and Security Council have a binding effect²⁰⁷. If such a statement in respect of the Security Council does not provoke any objections, it is worth examining the justification given for the binding force of some resolutions by the General Assembly. In this respect, the position submitted by the representative of Peru in the course of examining the Hungarian question is cited, which boils down to the following logic: a decision by the General Assembly which applies the principles of the Charter in respect of a specific situation will be binding, as the Charter is binding, and the resolution of the General Assembly merely gives effect to and interprets the Charter in a specific case, thereby creating a legal obligation²⁰⁸.

As regards the possibility of performing binding interpretation, diverse opinions have been expressed in the case law and the scholarship. First and foremost, we may refer to the advisory opinion of the Permanent Court of International Justice in the *Jaworzyna* case²⁰⁹, or to the even more strongly emphasized position taken by A. Verdross, in accordance with which authentic interpretation can be performed only by the authority creating a given norm or authority superior to it, or through a procedure established by those authorities²¹⁰.

²⁰² See e.g. R. Cassin, *La déclaration universelle et la mise en oeuvre des droits de l'homme*, "Recueil des Cours de l'Académie de Droit International", Vol. 79 (1951-II), p. 294. See also A. Verdross, *Kann die Generalversammlung der Vereinten Nationen das Völkerrecht weiterbilden?*, "Zeitschrift für ausländisches öffentliches Recht und Völkerrecht", Bd. 26 (1966), p. 694 et seq. and O.Y. Asamoah, *op. cit.*, pp. 61-62

²⁰³ U. Scheuner, *op. cit.*, p. 110.

²⁰⁴ Committee IV/2 captured the issue thusly: "if an interpretation made by any organ of the Organization or by a committee of jurists is not generally acceptable it will be without binding force" – see UNCIO Doc. 993/IV/2/42(2), UNCIO, Vol. 13, 1945, p. 709 et seq.

²⁰⁵ UNCIO, Vol. 13, p. 709.

²⁰⁶ L.B. Sohn, *The Development of the Charter of the United Nations: the Present State*, [in:] M. Bos (ed.), *The Present State of International Law and Other Essays written in honour of the Centenary Celebration of the International Law Association 1873-1973*, Deventer 1973, p. 50.

²⁰⁷ *Ibidem*, p. 55-6.

²⁰⁸ See Statement by Mr. Belaunde (Peru) in the Hungarian Question, 9th January 1957, GAOR, Eleventh Session, Plenary, pp. 836 Et seq. [cited in:] Sohn, *op. cit.*, p. 56

²⁰⁹ "It is an established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it" – see *The Question Jaworzina (Polish-Czechoslovakian Frontier)*, Advisory Opinion of 6 December 1923, PCIJ Series B, No. 8, p. 37.

²¹⁰ See A. Verdross, *Kann die Generalversammlung der Vereinten Nationen das Völkerrecht weiterbilden?*, "Zeitschrift für ausländisches öffentliches Recht und Völkerrecht", Bd. 26 (1966), p. 695.

Such an approach can be treated as an expression of formalism, and a threat to the effective performance of the functions of a given organization. In this context, it would be appropriate to cite the advisory opinion of the International Court of Justice in the case concerning the interpretation of peace treaties with Bulgaria, Hungary, and Romania, in which it was emphasized that the Court's task is to interpret, not revise, the treaties²¹¹.

Salo Engel took a position in direct opposition to that expressed above in the course of a debate conducted by the American Society of International Law. The mentioned author considered unanimous practice of Members as an interpretation with binding force²¹². In this manner, resolutions of the General Assembly are equated with the later practice of states as a means of treaty interpretation (Art. 31(3)(b) Vienna Convention on the Law of Treaties)²¹³. It should, however, be kept in mind that the Vienna Convention (1969) refers to the practice of states-parties to a treaty, and thus members of an organization. In light of the autonomy of an international organization, it would be difficult to maintain the identity of the practice of member states with the practice of organs of a given organization, even if the composition of the latter includes representatives of states²¹⁴.

Within this scope, it is worth making reference to the concept of formless consent (*formloser Konsens*), which precedes an international agreement and customary law. In the opinion of B. Simma, it is a logical necessity as attempts at couching an authentic interpretation of the UN Charter arrived at in such a manner or of a new general international law in the classic categories resulting from the disposition of Art. 38 ICJ Statute are futile and objectless (*müßig*)²¹⁵. On the one hand, the internationalist cited here, opposed to equating the practice of an organ with the practice of states, takes a critical approach to the consequences that emerge within the scope of customary law, while on the other he treats the General Assembly as a centre for communication owing to which

²¹¹ *It is the duty of the Court to interpret the Treaties, not to revise them.* The next part of the Court's reasoning should also be presented: *The principle of interpretation expressed in the maxim: Ut res magis valeat quam pereat, often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement of disputes in the Peace Treaties a meaning which, as stated above, would be contrary to their letter and spirit.* – See Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion of 18 July 1950 (second phase), ICJ Rep. 229.

²¹² S. Engel, *Procedure for the de facto Revision of the Charter*, "American Society of International Law Proceedings" 1965, pp. 108–116.

²¹³ Cf. E. Klein, *Vertragsauslegung und „spätere Praxis“ Internationaler Organisationen*, [in:] R. Bieber, G. Ress (Hrsg.), *Die Dynamik des Europäischen Gemeinschaftsrechts/The dynamics of EC-law: Die Auslegung des des Europäischen Gemeinschaftsrechts im Lichte nachfolgender Praxis der Mitgliedstaaten und der EG-Organe*, Baden-Baden 1987, p. 101 et seq.

²¹⁴ See K. Skubiszewski, *Enactment...*, p. 222.

²¹⁵ B. Simma, *Methodik und Bedeutung der Arbeit der Vereinten Nationen für die Fortentwicklung des Völkerrechts*, [in:] W.A. Kewenig (Hrsg.), *Die Vereinten Nationen im Wandel: Referate und Diskussionen eines Symposiums „Entwicklungslinien der Praxis der Vereinten Nationen in völkerrechtlicher Sicht“, veranstaltet aus Anlaß des 60jährigen Bestehens des Instituts für Internationales Recht an der Universität Kiel, 20. – 23. 11. 1974*, Berlin 1975, pp. 98–99.

pure, primary consent as a formal source of international law can be materialised, along with but also first and foremost before the manifestation of the emergence of a treaty or customary norm²¹⁶. Earlier, in the face of a disorganised international community, this operation was, in the opinion of B. Simma, too abstract²¹⁷.

By the same token, consensus is set up in opposition to the consent of a state. If the latter expresses the will of a sovereign state, law-making *consensus* therefore expresses the will of the international community²¹⁸. Yet the literature also contains views that equate consensus with the consent of a state²¹⁹. Such a position would seem to ultimately be taken (or at least it is perceived) by R. Falk, who writes that “the myth of consent is frequently supplanted by the reality of an inferred consensus”²²⁰. It cannot, however, be forgotten that the impressions of agreement and unanimity which arise will frequently be illusory – states do not consider a document adopted in this manner as binding, which is why they do not express any objections²²¹. It cannot be excluded that they would have voted differently had they been aware of the risk associated with the given resolution²²². These considerations (and in accordance with the *prima facie* wording of the Charter) make it troublesome to acknowledge consensus as a source of law. An additional form of acceptance by states via some more traditional means would be necessary, or manifestation by an international organization through a binding unilateral act.

However, the dominant view places the significance of resolutions by the General Assembly in the context of customary law. Under this view, such resolutions provide evidence of the existence of an *opinio iuris*. The International Court of Justice also favours this conception, as it stated in the *Nicaragua* case:

This *opinio iuris* [– as to the binding character of the obligation to refrain in international relations from the threat or use of force –] may, though with all due caution, be deduced from, inter alia, the attitude of [...] states towards certain General Assembly resolutions, and particularly resolution 2625 (XXV) entitled “Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations”. The effect of consent to the text of such resolutions cannot be understood as merely that of a “reiteration or elucidation” of the treaty commitment undertaken in the Charter.

²¹⁶ *Ibidem*, p. 98.

²¹⁷ *Ibidem*.

²¹⁸ R. Falk, *op. cit.*, p. 784 invoking C.W. Jenks *Law, Welfare, and Freedom*, pp. 83 et seq., K. Skubiszewski, *Czy uchwały Zgromadzenia Ogólnego ONZ są źródłem prawa?*, „Państwo i Prawo” no. 2, 1981, p. 25.

²¹⁹ See O.J. Lissitzyn, *Discussion* [in reference to] O. Schachter, *Legal Problems*, [in:]: R.N. Swift (ed.), *Annual Review of United Nations Affairs 1963-1964*, New York 1965, p. 128.

²²⁰ R. Falk, *op. cit.*, p. 790.

²²¹ See remarks by K. Subiszewski during discussion of paper by B. Simma [in:] W.A. Kewenig (Hrsg.), *Die Vereinten Nationen im Wandel: Referate und Diskussionen eines Symposiums „Entwicklungslinien der Praxis der Vereinten Nationen in völkerrechtlicher Sicht”, veranstaltet aus Anlaß des 60jährigen Bestehens des Instituts für Internationales Recht an der Universität Kiel*, 20. – 23. 11. 1974, Berlin 1975, p. 112.

²²² I. Detter, *The Effect...*, p. 391.

On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves²²³.

The Hague judges still more precisely expressed this influence in an advisory opinion of 8 July 1996 on the *legality of the threat or use of nuclear weapons*:

The Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule²²⁴.

It should generally be stated that the soft law created by international organizations gives greater freedom and flexibility than customary law. But it can also impact the formation of customary law²²⁵. This mechanism is described well by Sir Kenneth Bailey:

A resolution on the record may today, in point of law, look like only a recommendation, or even a mere “*voeu*”. But it is to be remembered that propaganda can create pressure; that pressure can create practice; and that practice can create law. The process is valuable in proportion as it is understood²²⁶.

By the same token, we are referring to observance of the law as a process²²⁷.

²²³ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment of 27 June 1986, §188, ICJ Rep. 1986, pp. 99-100.

²²⁴ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, ICJ Rep. 1996, § 70, p. 254-255. It should, however, be observed that the Court next adopted a quite limited position (*ibidem*, § 71): “Examined in their totality, the General Assembly resolutions put before the Court declare that the use of nuclear weapons would be „a direct violation of the Charter of the United Nations7”; and in certain formulations that such use „should be prohibited”. The focus of these resolutions has sometimes shifted to diverse related matters; however, several of the resolutions under consideration in the present case have been adopted with substantial numbers of negative votes and abstentions; thus, although those resolutions are a clear sign of deep concern regarding the problem of nuclear weapons, they still fall short of establishing the existence of an *opinio juris* on the illegality of the use of such weapons”.

²²⁵ See in particular a seminal study in French – G. Cahin, *La coutume internationale et les organisations internationales: l'incidence de la dimension institutionnelle sur le processus coutumier*, Paris 2001.

²²⁶ K. Bailey, *Making International Law in the United Nations*, “Proceedings of the American Society of International Law”, Vol. 61 (1967), p. 239.

²²⁷ See e.g. R. Higgins, *Policy Considerations and the International Judicial Process*, who defines international law in the following manner: “international law is a continuing process of authoritative decisions. This view rejects the notion of law merely as the impartial application of rules. International law is the entire decision-making process, and not just the reference to the trend of past decisions which are termed “rules”. There inevitably flows from this definition a concern, especially where the trend of past decisions is not overwhelmingly clear, with policy alternatives for the future” (“International and Comparative Law Quarterly”, Vol. 17, 1968, p. 59). Similarly, E. Mc Whinney, *The World Court and the contemporary international law-making process*, Alphen aan den Rijn 1979 p. 1, and also G.J.H. van Hoof, *Rethinking the sources of international law*, Deventer 1983, p. 206 et seq.

An interesting example of this approach would seem to be the increasingly common procedure concerning follow-up activities, applied by organs engaged in human rights protection²²⁸. They aim at the (gradual) convincing of member states to observe recommendations which are not formally binding on them. By the same token, this procedure can be treated as an element of the dialogue between an organ monitoring observance of human rights and a member state²²⁹.

Undoubtedly, the legal value of a recommendation is additionally expressed in the establishment of the presumption of legality of actions consistent with its content²³⁰. In this context we may even speak of a legitimising effect²³¹. In issuing a recommendation, the organization takes on the function of expressing approval or disapproval of claims, policies, and actions of states, and thus expresses a “collective legitimisation”²³².

Let us recall the discretionary recognition enjoyed by the addressees of recommendations, but we may also not forget that continual infringement of recommended standards can ultimately lead to consequences for states choosing to ignore them. This dependency has been expressed quite succinctly by judge H. Lauterpacht in his dissenting opinion attached to the advisory opinion in the matter of voting procedure concerning South West Africa²³³. It is worth quoting directly the later portion of this carefully-worded separate opinion to the advisory opinion:

²²⁸ See especially N. Ando, *The follow-up procedure of the Human Rights Committee's views* [in:] N. Ando et al. (eds.), *Liber amicorum judge Shigeru Oda*, The Hague 2002, p. 1437 et seq. and M.G. Schmidt, *Follow-up procedures to individual complaints and periodic state reporting mechanisms*, [in:] G. Alfredsson et al. (eds.), *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Möller*, Leiden 2001, p. 201 et seq.

²²⁹ See szerzej F. Coomans, *Follow-up action to state reporting on human rights: procedure and practice of the Committee on the Rights of the Child and the Committee on Economic, Social and Cultural Rights*, [in:] F. Coomans et al. (eds.), *Rendering justice to the vulnerable: liber amicorum in honour of Theo van Boven*, The Hague 2000, p. 83.

²³⁰ U. Scheuner, *op. cit.*, p. 118.

²³¹ H.G. Schermers, N. Blokker, *op. cit.*, § 1238, p. 778. See I.L. Claude, *Collective Legitimization as a Political Function of the United Nations*, “International Organization”, Vol. 20 (1966), p. 367.

²³² W. Morawiecki, *Funkcje...*, p. 119.

²³³ *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa*, Advisory Opinion of 7 June 1955, Separate Opinion of Judge Lauterpacht, ICJ Rep. 1955, p. 120: “Both principle and practice would thus appear to suggest that the discretion which, in the sphere of the administration of Trust Territories or territories assimilated thereto is vested in the Members of the United Nations in respect of the Resolutions of the General Assembly, is not a discretion tantamount to unrestricted freedom of action. It is a discretion to be exercised in good faith. Undoubtedly, the degree of application of good faith in the exercise of full discretion does not lend itself to rigid legal appreciation. This fact does not destroy altogether the legal relevance of the discretion thus to be exercised. This is particularly so in relation to a succession of recommendations, on the same subject and with regard to the same State, solemnly reaffirmed by the General Assembly. Whatever may be the content of the recommendation and whatever may be the nature and the circumstances of the majority by which it has been reached, it is nevertheless a legal act of the principal organ of the United Nations which Members of the United Nations are under a duty to treat with a degree of respect appropriate to a Resolution of the General Assembly. The same considerations apply to Resolutions in the sphere of territories administrated by virtue of the principles

it is not admissible to give currency to an interpretation, without qualifying it in all requisite detail, which gratuitously weakens the effectiveness of the Charter. It would be wholly inconsistent with sound principles of interpretation as well as with highest international interest, which can never be legally irrelevant, to reduce the value of the Resolutions of the General Assembly—one of the principal instrumentalities of the formation of the collective will and judgment of the community of nations represented by the United Nations—and to treat them, for the purpose of this Opinion and otherwise, as nominal, insignificant and having no claim to influence the conduct of the Members. International interest demands that no judicial support, however indirect, be given to any such conception of the Resolutions of the General Assembly as being of no consequence²³⁴.

Wolfgang Friedmann points out in a similar manner that resolutions of the General Assembly, formally of no significance in the process of enacting international law, come from the most representative organ of the most expansive organization in human history, and they “clearly” have a significant impact on the development of that law²³⁵. In conclusion, he points out the multiplicity of channels of the growth and creation of international law, and emphasises that, just as it is absurd to equate resolutions with formal international agreements, it would also be absurd to refuse to recognise their meaning in the ongoing process of articulation and evolution of international law²³⁶. Similarly, M. Lachs emphasizes the clear tendency towards treating the issue of the form of international law with greater tolerance and flexibility²³⁷.

This can be served by the creation of law through reference, which can be found in a number of shapes and forms. In this very manner a given act (primarily one of *soft law*) acquires its binding character²³⁸. The application of this mechanism can be seen in all clarity in reference to the UN Convention on the Law of the Sea²³⁹. A number of its

of the System of Trusteeship. Although there is no automatic obligation to accept fully a particular recommendation or series of recommendations, there is a legal obligation to act in good faith in accordance with the principles of the Charter and of the System of Trusteeship. An administering State may not be acting illegally by declining to act upon a recommendation or series of recommendations on the same subject. But in doing so it acts at its peril when a point is reached when the cumulative effect of the persistent disregard of the articulate opinion of the Organization is such as to foster the conviction that the State in question has become guilty of disloyalty to the Principles and Purposes of the Charter. Thus an Administering State which consistently sets itself above the solemnly and repeatedly expressed judgment of the Organization, in particular in proportion as that judgment approximates to unanimity, may find that it has overstepped the imperceptible line between impropriety and illegality, between discretion and arbitrariness, between the exercise of the legal right to disregard the recommendation and the abuse of that right, and that it has exposed itself to consequences legitimately following as a legal sanction”.

²³⁴ *Ibidem*, p. 122.

²³⁵ W. Friedmann, *The Changing Structure of International Law*, London 1964, p. 138.

²³⁶ *Ibidem*, p. 140.

²³⁷ M. Lachs, *Some Reflections on Substance and Form in International Law*, [in:] W. Friedmann et al. (eds.), *Transnational Law in a Changing Society, Essays in Honor of Philip C. Jessup*, New York and London 1972, p. 112.

²³⁸ See Ch. Tomuschat, *op. cit.*, p. 348 et seq. and J.D. Aston, *op. cit.*, p. 175-177.

²³⁹ OJ L 2002, no. 59, item 543.

provisions incorporate references to standards and other rules that are to be binding upon states. For example, we may point to Art. 211(2) of this Convention, pursuant to which:

States shall adopt laws and regulations for the prevention, reduction and control of pollution of the marine environment from vessels flying their flag or of their registry. Such laws and regulations shall at least have the same effect as that of generally accepted international rules and standards established through the competent international organization or general diplomatic conference²⁴⁰.

By the same token, the possibility again arises of enhancing the status of rules which were initially non-binding in international law. An institutional act acquires binding force because of a treaty formally external to it.

As K. Zemanek rightly observes, states – being not only addressees but also creators of international law – can create new law-making processes within such scope as those processes are accepted by systemic partners²⁴¹. We again arrive at the conclusion that it is difficult to restrict considerations about the sources of international law to elements in the disposition of Art. 38 ICJ Statute.

6. The abstract and general character of an act

In considering sources of international law, it should be observed that the doctrine of sources naturally must find a way of reconciling the demand for specificity of rules with their normativity²⁴². The distinction between abstract and general norms *versus* individual and specific norms does not perform as meaningful a role at the inter-state level, or within the community of states in general, as it does in municipal law²⁴³. Particularly in respect of international organizations, separating executive from law-making activity is far more difficult than in the case of a state²⁴⁴. Indeed, this is visible in the once-traditional name of organizations as “administrative unions”²⁴⁵.

²⁴⁰ See also para. 5 of that article. Other examples of the application of this mechanism are to be found in Art. 21(2) & (4), 39(2), 41(3), 42(1)(b), 53(8), 60(3) & (5), 94(5), 207(1), 208(3), 209(2), 214, 216(1), 217(1)-(4), 218 (1), 219, 220 (1)-(3), 222, 226(1) & (4) of the Convention.

²⁴¹ K. Zemanek, *Is the Term ‘Soft Law’ Convenient?*, [in:] G. Hafner et al. (eds.), *Liber amicorum Professor Ignaz Seidl-Hohenveldern in Honour of his 80th Birthday*, The Hague 1998, p. 844.

²⁴² M. Koskeniemi, *From Apology to Utopia. The Structure of International Legal Argument (with a new epilogue)*, Cambridge 2005, p. 303.

²⁴³ R.L. Bindschedler, *Rechtsakte der internationalen Organisationen*, [in:] E. Bucher, P. Saladin (Hrsg.), *Berner Festschrift zum Schweizerischen Juristentag 1979 dargebracht von der juristischen Abteilung der Rechts- und wirtschaftswissenschaftlichen Fakultät der Universität Bern*, Bern und Stuttgart 1979, p. 361.

²⁴⁴ I. Seidl-Hohenveldern, G. Loibl, *Das Recht der internationalen Organisationen einschließlich der supranationalen Gemeinschaften*, 7., überarbeitete Aufl., Köln 2000, p. 218-9.

²⁴⁵ See A. Ross, *A Textbook on International Law. General Part*, London 1947, p. 224 et seq.

International law-making fundamentally excludes individual and specific norms, *i.e.* acts of application, rather than enactment, of international law²⁴⁶. For example, K. Skubiszewski categorically states that „the contents of a law-making act of an international organization are general (*i.e.* formulated abstractly) norms regulating the behaviour of an unlimited number of addressees in an unlimited number of cases”²⁴⁷. But the correctness of this position (widely held, it should be noted) is questioned with a view to the fact that this requirement is derived from the conception of the Act, and this idea is difficult to transpose onto relations between members of international organizations²⁴⁸. A distinction can also be based on the criterion of the norm created: between general norms, *i.e.* of general and abstract applicability, and detailed norms, which include decisions about the application of general norms in concrete situations²⁴⁹.

Wojciech Morawiecki, as opposed to K. Skubiszewski, in the context of the law-making competence of an organization rejects the requirement that a law-making act refer to an unlimited quantity of addressees²⁵⁰. He does, however, add the general stipulation that in international law the number of entities is generally limited, and gives the example of a bilateral agreement which will be binding on only two subjects. He does, however, require such an act be of a repeatable character²⁵¹. In this context it should be noted that the division into abstract and general norms, suitable for repeat application and derived from multilateral treaties on the one hand, and obligations of a primarily one-off character and derived from bilateral treaties on the other hand, has lost significance²⁵². In both cases a uniform treaty regime is applied, as expressed in the Vienna Convention on the Law of Treaties.

Let us return, however, to the general character of regulation. As Ch. Tomuschat correctly observes in his Hague lecture, recognition of a general regulatory competence of the Security Council is neither revolutionary nor an ivory tower dream²⁵³. Using the example of an economic embargo imposed on a given state, he convincingly argues that the group of addressees is significantly broader, as the sanctions set out in the Council's resolution will impose difficulties on not only the direct addressee, but also on other

²⁴⁶ N. Buchowska, *Kompetencja prawotwórcza*..., p. 327. J. Dehaussy (*Sources du droit international – Introduction générale*, “Jurisclasseur de droit international”, fasc. 10, no. 7) treats sources as all processes in the creation of general norms intended to regulate international relations (*tout processus juridique de créateur de norms générales destinées à régir des rapports internationaux*).

²⁴⁷ K. Skubiszewski, *Uchwały prawotwórcze*..., p. 34.

²⁴⁸ M. Bos, *A methodology of international law*, Amsterdam *et al.* 1984, p. 61.

²⁴⁹ C. Denis, *op. cit.*, p. 2-5.

²⁵⁰ W. Morawiecki, *Funkcje*..., p. 429 (footnote 1)

²⁵¹ *Ibidem*, p. 121.

²⁵² See A. Wyzomska, *Źródła prawa międzynarodowego*, [in:] J. Symonides, D. Pyć (ed.), *Wielka encyklopedia prawa*, Tom 4: *Międzynarodowe prawo publiczne*, Warszawa 2014, p. 614.

²⁵³ Ch. Tomuschat, *op. cit.*, p. 345-6.

states by necessitating modification of their position (such as the suspension of trade relations). Thus, we may also speak in this context of the general application of a given measure, which is a characteristic that qualifies the action of the Council as a normative act, and not a revolutionary breakthrough²⁵⁴.

In this context, it comes as no surprise that the Security Council is treated at times as an *Ersatzlegislator* of the community of states²⁵⁵. Some authors go even further and speak directly of legislative or law-making activity²⁵⁶. They can be justified by broad discretion in assessment and strong acceptance by states²⁵⁷. As M. Akram and S. Haid-er Shah observe, the conceptual vagueness of peace and security render it difficult to state that the Security Council has exceeded its remit²⁵⁸. Important, however, is the exhortation by O. Corten to not confuse the strength of a fact with a legal competence²⁵⁹. It cannot be forgotten that the interpretative possibilities of the Security Council are not boundless, and it may not interpret that notion in a manner that would amount to amending the UN Charter²⁶⁰. Narrowing the law-making character to binding force in respect of decisions by the Security Council equates the creation of law with its application²⁶¹.

The biggest controversies were provoked by two resolutions of the Security Council, number 1373 and number 1540. The first of those resolutions was adopted as an element²⁶² of the reaction to the attack of 11 September 2001 on the World Trade Center. The Security Council set out obligations imposed on **all** [emphasis mine, BK] states: to prevent and suppress financing of terrorist acts, and the penalisation and freezing of the use of financial resources for terrorism-related purposes²⁶³. Attention should also be paid to the wording used in the preamble of the resolution, in which the Security Council ac-

²⁵⁴ *Ibidem*, p. 346.

²⁵⁵ J.D. Aston, *op. cit.*, p. 64.

²⁵⁶ See K. Dicke, *Weltgesetzgeber Sicherheitsrat*, "Vereinte Nationen", Bd. 49 (2001), p. 163; S. Talmon, *The Security Council as World Legislature*, "American Journal of International Law", Vol. 99 (2005), p. 175; E. Rosand, *The Security Council as "Global Legislator" Ultra Vires or Ultra Innovative*, "Fordham International Law Journal", Vol. 28 (2005), p. 542.

²⁵⁷ Interestingly, Aston applies that justification also to the Security Council's appointment of the ICTY in Resolution 827.

²⁵⁸ M. Akram, S.H. Shah, *The legislative powers of the United Nations Security Council*, [in:] R. St.J. Macdonald, D.M. Johnston (eds.), *Towards world constitutionalism: issues in the legal ordering of the world community*, Leiden et al. 2005, p. 440.

²⁵⁹ In the introduction to the work, C. Denis, *op. cit.*, p. xii.

²⁶⁰ N. Angelet, *Protest against Security Council decisions*, [in:] K. Wellens (ed.), *International Law: Theory and Practice: Essays in Honour of Eric Suy*, The Hague 1998, p. 281.

²⁶¹ A. Marschik, *Legislative Powers of the Security Council*, [in:] R. St.J. Macdonald, D.M. Johnston (eds.), *Towards world constitutionalism: issues in the legal ordering of the world community*, Leiden et al. 2005, p. 462.

²⁶² Prior to that the Security Council adopted Resolution 1368 on 12 September 2001.

²⁶³ UN Doc. S/Res/1373 (2001).

knowledge that every act of international terror constitutes a threat to international peace and security²⁶⁴.

Such an approach contradicts the views of many commentators, who have interpreted the notion „threat to peace” narrowly, coupling it tightly with the threat of force, which is prohibited under Art. 2 (4) of the UN Charter²⁶⁵. However, with the passage of time a gradual broadening of the meaning of that notion took place. For example, it has been expanded to include a serious violation of human rights and international humanitarian law²⁶⁶, violations of the right of nations to self-determination²⁶⁷, and support for international terrorism²⁶⁸. Another example may be given in the form of Resolution 2177 (2014), in which the eruption of an epidemic of the Ebola virus is treated as a threat to international peace and security²⁶⁹. Since the end of the Cold War it has been possible to observe a clear growth in the activity of the Council in respect of applying chapter VII of the Charter²⁷⁰. Before, if the Security Council decided to employ repeatable measures, they were a concrete response to a given threat in a defined situation. This practice was broken with for the first time with the adoption of Resolution 1373 (2001).

Resolution 1540 (2004) takes things a step further, and without reference to a specific situation recognizes the spread of weapons of mass destruction as a threat to international peace and security, and obliges states to a range of activities to prevent access by private entities to this type of weapon. These are general and abstract obligations. Resolution 1540 even contains definitions (means of delivery, related materials, non-state actor)²⁷¹.

Thus, we may observe an attempt at departing from the traditional manner of setting up international obligations. Resolutions adopted by the Security Council make it possible to avoid the painstaking process of expressing consent, but is done at the expense of states which are deprived of the possibility of expressing their dissent owing to the limited number of states comprising the Security Council. Both resolutions were

²⁶⁴ It is worth citing the exact wording (UN Doc. S/Res/1373 (2001) of para. 3 of the Preamble: Reaffirming further that such acts [the terrorist attacks which took place in New York, Washington, D.C. and Pennsylvania on 11 September 2001], like any act of international terrorism, constitute a threat to international peace and security.

²⁶⁵ See J. Arntz, *Der Begriff der Friedensbedrohung in Satzung und Praxis der Vereinten Nationen*, Berlin 1975, p. 64, 110-111.

²⁶⁶ See e.g. UN Doc. S/RES/1264 (1999).

²⁶⁷ E.g. Resolution 217 (1965).

²⁶⁸ See e.g. UN Doc. S/RES/1269 (1999), UN Doc. S/RES/1368 (2001).

²⁶⁹ See UN Doc. S/RES/2177(2014), para. 5 of the Preamble.

²⁷⁰ Attention is drawn to this *inter alia* by W. Czapliński, *Ewolucja kompetencji Rady Bezpieczeństwa ONZ*, [in:] K. Lankosz (ed.), *Aktualne problemy prawa międzynarodowego we współczesnym świecie. Księga pamiątkowa poświęcona pamięci Profesora Mariana Iwanejko*, Kraków 1995, p. 28. A detailed analysis, including from a statistical perspective, See P. Wallensteen, P. Johansson, *Security Council Decisions in Perspective*, [in:] D.M. Malone (ed.), *The UN Security Council: from the Cold War to the 21st Century*, Boulder 2004, p. 18 et seq.

²⁷¹ See UN Doc. S/RES. 1540(2004), §§ 1, 8 and 9 Preamble.

undertaken unanimously and, furthermore, it would seem that they reflected the general conviction of states that it is necessary to react swiftly to new threats. The acceptance of states can here have a convalidating effect, but the exceptional character of such legislation has been emphasized on many occasions²⁷². We are dealing with great possibilities, which are nevertheless associated with great danger.

In particular the discussion accompanying the passage of Resolution 1540 demonstrates clearly the objections of states to the Security Council adopting resolutions of a law-making character. The Switzerland representative articulated the exceptional nature of the situation which led the Security Council to undertake a resolution on weapons of mass destruction²⁷³. However, the representative of Nepal highlighted the necessity of the Security Council acting within the mandate given to it under the UN Charter, exhorting it to reject the temptation to act as the world's law-maker, government, and court rolled into one²⁷⁴. The requirement of consent was pointed out by the representative of Indonesia, which also expressed the position of the Non-Aligned Movement²⁷⁵. A similar position was presented by the Indian representative, first during a debate²⁷⁶, and then after the first debate in an official letter²⁷⁷ addressed to the President of the Security Council.

²⁷² For example, Ambassador Stählin, representing Switzerland, emphasized: "In principle, legislative obligations (...) should be established through multilateral treaties, in whose elaboration all States can participate. It is acceptable for the Security Council to assume such a legislative role only in exceptional circumstances and in response to an urgent need". (UN Doc. S/PV. 4950, p. 28).

²⁷³ *Ibidem*; compare Egypt's position: "We note a growing trend towards granting the Security Council additional legislative powers. Here, we wish to make it very clear that membership of the United Nations and the common desire to strengthen its role places a number of responsibilities on our shoulders in conformity with the provisions of the Charter as drafted by the founding Members. Thus, in defining the role of the Security Council in terms of the maintenance of international peace and security and of guaranteeing compliance by Member States with international law, the Charter does not give the Council legislative authority; it gives it the authority to safeguard the Charter and to monitor compliance with its provisions. If in the present case that is what is required, it should be emphasized in the text" (UN Doc. S/PV. 4950, (Resumption 1), p. 3).

²⁷⁴ S/PV.4950 (Resumption 1), p. 14: "The Council needs the willing support of the broader membership to maintain international peace and security. To ensure such support, the Council should work within its mandate and be seen to be doing so. Therefore, it should resist the temptation of acting as a world legislature, a world administration and a world court rolled into one".

²⁷⁵ "Indeed, we are of the opinion that legal obligations can only be created and assumed on a voluntary basis. Any far-reaching assumption of authority by the Security Council to enact global legislation is not consistent with the provisions of the United Nations Charter. It is therefore imperative to involve all States in the negotiating process towards the establishment of international norms on the issue" – See UN Doc. S/PV. 4950, p. 31.

²⁷⁶ "International treaties or agreements in this field should be multilaterally negotiated, not imposed. They should be based on a balance of obligations to ensure universal adherence, which is the true test of legitimacy and credibility". UN Doc. S/PV. 4950, p. 24.

²⁷⁷ Letter dated 27 April 2004 from the Permanent Representative of India to the United Nations addressed to the President of the Security Council, UN Doc. S/2004/329: "India cannot accept any obligations arising from treaties that India has not signed or ratified. This position is consistent with the fundamental principles of international law and the law of treaties. India will not accept externally prescribed norms or standards, whatever their source, on matters within the jurisdiction of its Parliament, including national

The remarks as submitted weaken the force of the unilateral vote on Resolution 1540. It should, however, be noted that the Security Council (for now) rarely chooses to make use of this new instrument for enacting international law norms. It should also be observed that it is first and foremost objectives which are set out in this manner. The manner in which an effect set out in resolutions of the Security Council is achieved remains left up to the decision of individual states, which renders this method similar to harmonisation by way of directive, which has been so thoroughly analysed within the context of European Union law.

7. Legality – the absence of defect

Recognition of the law-making effect of an organization's acts leads to the natural question of the limits of such activity by international organizations. Thus, it is necessary to explore still one more characteristic of law-making resolutions, *i.e.* the absence of defect. This is naturally associated with the issue of oversight of the legality of activities by international organizations as, after all, secondary subjects of international law, equipped with limited competences in comparison with the omnipotent nature of states as primary subjects.

This aspect was clearly emphasized by the ICJ in its advisory opinion concerning the legality of the use by states of nuclear weapons in armed conflict²⁷⁸. The Court pointed out that "(...) international organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations are governed by the „principle of speciality“, that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them.”

In respect of international organizations, as opposed to states, we may distinguish two types of *ultra vires* activity. The key criterion here will be the question of whether the activity of an organ exceeds the competences granted to the organization. In the first case, we may distinguish a situation in which an organ exceeds the scope of its competences, yet its actions remain within the scope of competence of the organization as a whole. This version is treated as an internal transgression of competences. This is similar to an analogical situation in reference to states.

In an advisory opinion regarding certain expenses, the International Court of Justice referred to precisely such a case, emphasising that if there is a general convic-

legislation, regulations or arrangements, which are not consistent with India's constitutional provisions and procedures or are contrary to India's national interests or infringe on its sovereignty”.

²⁷⁸ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, ICJ Rep. (1996). See also J. Klabbers, *An Introduction to International Institutional Law*, Cambridge 2004, p. 80.

tion a given activity is within the scope of the functions of an organization, but activity was undertaken by an improper organ, it was irregular from the perspective of the internal structure, but costs incurred in this manner could be treated as UN expenses.²⁷⁹ This was accompanied by a clear note that “both national or international law contemplate cases in which the body corporate or politic may be bound, as to third parties, by an *ultra vires* act of an agent”²⁸⁰.

The second version concerns a situation where an organ violates not only the scope of its own competences, but in fact exceeds the mandate of the entire organization. For this reason, the scholarly literature employs the expression “external transgression of competences”²⁸¹. In this we may observe the specificity of international organizations. Considering the plenitude of competences of the state, it would be difficult to identify an equivalent in respect of states.

Even an extension of the scope of the rights of an organization to include implied competences (which have been addressed above), it should still be recalled that this is not an operation that renders such organizations boundlessly similar to states²⁸². For this reason as well, the assumption by an organ of new (implied) competences must be done in a manner consistent with the law of a given international organization, while the legality of the procedure may be reviewed. The organ may not, therefore, abuse its competences²⁸³. Let us keep in mind that a significant portion of authors in general exclude the possibility of implied law-making competences.

The observation by W. Morawiecki seems correct that states expressing consent to granting law-making competences to an organization “always resort to particular measures providing themselves with protection against the resulting risk”²⁸⁴.

The validity of a law-making act will in the first place be decided about by the regulations granting that organization law-making competence. They establish formal conditions, but substantive ones as well. It is, however, difficult to generalize. It is thus

²⁷⁹ *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, ICJ Rep. 1962, p. 168: “If it is agreed that the action in question is within the scope of the functions of the Organization but it is alleged that it has been initiated or carried out in a manner not in conformity with the division of functions among the several organs which the Charter prescribes, one moves to the internal plane, to the internal structure of the Organization. If the action was taken by the wrong organ, it was irregular as a matter of that internal structure, but this would not necessarily mean that the expense incurred was not an expense of the Organization”.

²⁸⁰ *Ibidem*.

²⁸¹ See e.g. B. Dold, *Vertragliche und ausservertragliche Verantwortlichkeit im Recht der internationalen Organisationen*, Zürich et al. 2006, p. 90.

²⁸² This is clearly pointed out by K. Skubiszewski, listing among the limitations primarily those resulting from the legal character of an organization – in the form of the absence of general jurisdiction over its members.

²⁸³ K. Skubiszewski, *Implied Powers...*, p. 862: “if implication of powers amounts to a *détournement de pouvoir* the organ’s activity is unlawful”.

²⁸⁴ W. Morawiecki, *Funkcje...*, p. 178.

necessary to undertake a casuistic interpretation. The fundamental issue is to seek an answer to the question of who may declare that the activity of an organization is *ultra* or *intra vires*. The following versions may be envisioned: the organ itself will decide, other organs of a given organization are entitled to pass judgement, a tribunal will rule on the matter, or states will be given the possibility to bypass the decisions of an organization which they consider to have been taken *ultra vires*²⁸⁵. The first of these possibilities would seem to be extremely uncomfortable for states.

The second of those situations will also rarely apply, because of the practical absence of precise rules regulating the relations among the organs of particular organizations. Generally, this type of association may be assumed (and the resulting possibility of an *ultra vires* ascertainment) between the primary (parent) organs and the auxiliary organs appointed by it. This scenario will, however, be a rare one, as the statutes of organizations only sporadically address the relevant procedures directly. In this context, the action presently envisioned under Art. 263 Treaty on the Functioning of the European Union for declaring the invalidity of EU legal acts presents itself as utterly exceptional. It can be treated as an element characteristic of regional integration organizations, unheard of in respect of coordination organizations, and that not only universal ones. The principle that one may not be a judge in one's own case would seem to argue against the implied granting of such a competence. However, account should also be taken of the effects of the gap in the law thus created, leading to the absence of the possibility for the organization to act effectively. For these reasons, accent in the scholarship (not without reservations) is placed on the necessity of taking a pragmatic approach, allowing the organization itself to take a position on the issue of the legality of resolutions it has issued²⁸⁶.

A determinant of the traditional, classic approach will be the solution to the issue of interest to us within the United Nations. In the case on certain expenses, the International Court of Justice emphasized that at the international level (*i.e.* within the UN), there is no procedure comparable to that of declaring the validity of law-making or government acts²⁸⁷. Emphasis was placed on the impossibility of the UN Charter being sub-

²⁸⁵ R. Bernhardt, *Ultra Vires Activities of International Organizations*, [in:] J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski*, The Hague 1996, p. 604.

²⁸⁶ E. Osieke, *The Legal Validity of Ultra Vires Decisions of International Organizations*, "American Journal of International Law", Vol. 77 (1983), p. 242 et seq. and N. Buchowska, *Problematyka nieważności uchwał prawotwórczych organizacji międzynarodowych*, [in:] *Prawo wobec wyzwań współczesności*, Vol. III, Poznań 2006, p. 211.

²⁸⁷ Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962, ICJ Rep. 1962, p. 168: „In the legal systems of States, there is often some procedure for determining the validity of even a legislative or governmental act, but no analogous procedure is to be found in the structure of the United Nations”.

mitted to ultimate interpretation by the ICJ, from which the necessity of determining competencies (as a rule at least) by each of the organs was derived²⁸⁸.

In turn, in the *Namibia* case, the presumption of validity of adoption of a resolution was expressed²⁸⁹. At the same time and in the same advisory opinion, the primary judicial organ of the United Nations held that it did not possess the competencies to review or abolish the resolutions of political organs of the UN²⁹⁰. Attention should, however, be paid to the important exhortation by M.N. Shaw that the mere existence of the presumption of validity carries within it the germ of at least a potential declaration of invalidity²⁹¹. The issue of judicial review of acts of international organizations exceeds the scope of this work²⁹².

In turn, the last possibility, *i.e.* of overturning a decision of an organization by states, should be excluded at least in respect of states that voted in favour of its adoption. It would seem that this is a classic example of application of the principle of *estoppel*. If, in turn, we were to invoke the principle of loyalty, the potential to question the decisions of organizations turns out to be even narrower, as such an option will be unavailable to essentially all member states²⁹³. The argumentation cited here contradicts the position according to which states always retain the competence to question the resolutions of an organization to which they belong, with consideration of the consensual nature of the statute and the rights resulting thereof to examine whether, within the framework of performance of such an international agreement, it is not being violat-

²⁸⁸ *Ibidem*: "Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted; the opinion which the Court is in the course of rendering is an advisory opinion. As anticipated in 1945, therefore, each organ must, in the first place at least, determine its own jurisdiction".

²⁸⁹ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of 21 June 1971, ICJ Rep. 1971, § 20, p. 22: "[a] resolution of a properly constituted organ of the United Nations which is passed in accordance with that organ's rules of procedure, and is declared by its President to have been so passed, must be presumed to have been validly adopted".

²⁹⁰ ICJ Rep. 1971, § 89, p. 44: "undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned".

²⁹¹ See M.N. Shaw, *The Security Council and the International Court of Justice: Judicial Drift and Judicial Function*, [in:] A.S. Muller, D. Raič, J.M. Thuránzsky (eds.), *The International Court of Justice. Its Future Role after Fifty Years*, The Hague et al. 1997, p. 257. Cf. similar remarks by J. Klabbers: "any request to spell out the legal consequences of the acts of the Council or, for that matter, any other organ of the UN, presupposes some power of review. The question then is not so much whether the Court has the power of judicial review, but how it should exercise this power, over which acts, and on whose request" – See J. Klabbers, *International Law*, Cambridge 2013, p. 163.

²⁹² See e.g. E. Lauterpacht, *Judicial review of the acts of international organizations*, [in:] L. Boisson de Chazournes, Ph. Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons*, Cambridge 1999, p. 92 et seq. and B. Krzan, *Judicial review of the acts of international organizations*, [in:] J. Crawford et al., *Professor, Minister, Judge – Krzysztof Skubiszewski 1926-2010*, Warsaw 2015, pp. 68 et seq.

²⁹³ J.P. Mueller, *Vertrauensschutz im Völkerrecht*, Köln 1971.

ed²⁹⁴. Adopting such a view, in turn, leads to the threat of an organization's autonomy being undermined. Thus, in each case we are again treading the delicate ground of the relations between an organization and its members.

It is difficult to find a universal response to the effects of acts undertaken in violation of law-making competency. If an organization does not possess competence (or exceeds it) in a given area, its act would be adopted without a basis in law, and thus would be invalid. The scope and effects of this invalidity again escape universal, abstract considerations. Theoretically, it would seem that we are dealing here with invalidity *ex tunc*, but at times it would be necessary to temper such arguments with consideration for justice and certainty of law²⁹⁵.

We are thus dealing with contradictory, opposing tendencies, and in spite of the passage of time, the remarks made by W. Wengler expressed in his report prepared for the Institute of International Law on judicial review of decisions by international organizations remain relevant; he emphasized that “la domaine de la nullité des actes internationaux est trop vaste, trop inexploré et trop subtil et son examen prolongerait inutilement les débats”²⁹⁶. We can thus imagine that (at least potentially) the effects of acts adopted in violation of competences will be distinguished in relation to particular states, which was mentioned two paragraphs above. By the same token, it is difficult to deduce the general consequences of unlawful acts of international organizations, which in and of itself would seem to reflect the expediency of establishing overly rigid rules in this scope²⁹⁷. However, we should recall the contrary tendencies leading to the most precise establishment of rules of accountability of international organizations²⁹⁸.

8. Summary

The considerations presented above facilitate the formulation of several conclusions of a general nature. We should begin with the obvious conclusion concerning the continuing importance of acts issued by international organizations for the development

²⁹⁴ E. Osieke, *op. cit.*, p. 240, affirmatively N. Buchowska, *Problematyka nieważności...*, p. 211.

²⁹⁵ R. Bernhardt, *op. cit.*, p. 608.

²⁹⁶ Recours judiciaire à instituer contre les décisions d'organes internationaux, Rapport par M. Wilhelm Wengler, “Annuaire de l'Institut de droit international”, Vol. 47-II, Session d'Amsterdam 1957, p. 277.

²⁹⁷ E. Lauterpacht, *The Legal Effects of Illegal Acts of International Organizations* [in:] *Cambridge Essays in International Law: Essays in Honour of Lord McNair*, London 1965, p. 121.

²⁹⁸ Work was undertaken by the International Law Association, which in May 1996 appointed a Committee tasked with considering which measures (legal, administrative, other) should be adopted in order to protect the accountability of public international organizations vis a vis member states, third parties, and vice-versa: of members and third parties vis a vis international organizations. The final report was presented in 2004 during the ILA conference in Berlin – See International Law Association, Berlin Conference (2004), Accountability of International Organizations. Final Report, Report of the Seventieth-first ILA Conference held at Berlin, p. 164 et seq.

of international law. This observation may seem trivial, but it is vital from the perspective of analysis of the essence of a source of international law. Indeed, it allows us not only to apply the meaning of unilateral acts of international organizations to classic sources, but primarily to derive further determinations concerning their independent and autonomous role as sources of international law.

In adopting law-making resolutions, international organizations naturally base them on the authorization granted by states in the treaties appointing those organizations, but quite frequently exceeding the authorization designed by those responsible for drafting the statute of a given organization. By the same token, it is difficult to treat such “liberated” institutional acts merely as executive acts in respect of treaties. The role of acts of international organizations can also not be reduced exclusively to confirming or shaping customary norms of international law. Law-making resolutions can function as an independent source of public international law, constituting an expression of the will of international law subjects autonomous in relation to member states. We are thus dealing with a sort of emancipation of resolutions, which by no means excludes their significance in regard to classic sources of international law. The connexions between particular categories (such as between agreement and custom²⁹⁹) are quite natural, and in no way do they undermine their autonomous character vis-à-vis each other.

As an independent source, law-making acts of international organizations allow the international community to react quicker and more effectively to needs as they arise. In the main, they will regulate specific and individual situations, but with increasing frequency they are taking on the form of abstract and general acts, by the same token fulfilling the criteria traditionally reserved for the creation of law as acts of an abstract and general character. However, it should be stressed that this postulate will also not be fulfilled by other classic sources of international law, which in turn justifies a broader treatment of the category of acts of international organizations analysed here.

An ideal exemplification of this phenomenon could be the law-making practice of the Security Council, or the normative activity of organs operating within regional trade organizations. However, the price of this innovation and emancipation is limited oversight by states and other addressees of institutional activity. Resistance by states not only exhibits the additional dimension of complicated relations with the organization, but primarily can lead to undermining the effectiveness of norms enacted by international organizations, further adding to the complexity of international law-making.

²⁹⁹ E.g. K. Wolfke, *Treaties and custom: aspects of interrelation*, [in:] J. Klabbers, R. Leferber (eds.), *Essays on the law of treaties: a collection of essays in honour of Bert Vierdag*, The Hague 1998, pp. 31 et seq.

The essence of general principles of international law and international court judgments as sources of international law

1. Introductory remarks
2. Justification of the applicability of international law
3. Methods of understanding general principles of law
4. A general principle of international law as an expression of norms and values
5. General principles of international law versus the “new *ius gentium*”
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8. Binding judgment versus precedent
9. The extent of effectiveness of a judicial precedent
10. Logic as a component of judicial reasoning
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12. The scope of freedom in judicial reasoning
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1. Introductory remarks

Present-day international practice provides a basis for deriving international law from an array of sources not covered by Article 38 of the ICJ Statute. In line with the assumption adopted for this project, contesting the voluntary consent of a state as the sole and exclusive basis for international legislation today opens the way for reflections on the essence of present-day sources of international law as well as allows thereby for a discussion of the very nature of the international order and of the character of the international community as a whole together with its respective constituent components.

Therefore, the scope of research covers “special”, untypical sources of international law in which simple consent-based justification is not obvious and may be extended to include additional themes. For the present argument, it is essential then to set out

a model of reasoning in a manner which draws on the system of international law, and by which it would be possible to prove the applicability of international legal norms through their link with the category of special sources of international law. It is key from that point of view to refer to the notion of consent of subjects and its effectiveness, as well as considerations of international law's systemic conditions and their impact on the sphere of rights and obligations. This part of the work will address itself to general principles of (international) law and international court case-law, in particular as seen from the perspective of the institution of judicial precedent.

2. Justification of the applicability of international law

The significance of general principles of law (including general principles of international law) and international court judgments as sources of international law depends on the answer given to the question of whether the international legal order allows for deriving legal norms from other factors than the consent of the subjects of international law. This forms the core issue in the present text. To the extent that it were possible to confirm that we can prove the applicability of norms to the international legal order based on other than consent-based justification, the role of general principles and case-law as a separate category of that legal order's sources would grow accordingly, if perhaps indirectly. The link between reflections on general principles and those on case-law may be found in the search for a justification traceable to elsewhere than the coordinated intent of the subjects. The legal order is the sum total of norms arranged into specific contingencies, relations and hierarchies. Once they meet specific (eligibility) criteria for inclusion in a given legal order, these norms comprise the legal system.

Owing to the character of the international law system, it remains an open question whether it is at all effective and desirable to seek justification of the applicability of norms elsewhere than in positive law. In order to settle the matter conclusively, it is necessary first to determine which general theory of international law will provide the framework for the following discussion. This is a key condition from the point of view of the role of general principles and case-law, as discussed in this part of the paper, to the extent that these relate to the sources of international law. This is also a basis which allows either for verification of the proposed approach to the problem within a specific theory of sources of international law, or for reconsidering the matter in a conceptually different framework. Embedding the considerations within the framework of positive law is strongly related to a sense of legal security. This means that a comprehensive model approach provides the subject of international law with the fullest extent of knowledge of both the possible bases for settling a dispute within the limits of the international legal order to-

gether with methods of safeguarding rights and obligations, as well as the associated paths of legal reasoning. However, in considering phenomena occurring within the international legal order, it is sometimes difficult to accept that their essence proceeds solely from the positive-law justification of the validity of international law. The following questions force themselves: how to establish the source of special values, directions organizing thoughts or directives of conduct, which permeate the system of international law but do not stem from positive-law justifications? how do these factors contribute to the creation, interpretation and application of legal norms? are the general principles of (international) law together with judicial case-law the vehicle for special values and contents and, if that is indeed the case, how do they express these?

Answering such questions demands reference to a number of key issues. First of all, it would be appropriate to explain terminological issues prior to elaborating upon the topic of searching for the origins of the need to refer to general principles and international court case-law; these considerations may then serve to derive the necessary generalizations related to the theory of sources of international law and the meaning accorded to the general principles of (international) law and rulings of international judicial bodies.

3. Methods of understanding general principles of law

In the case of general principles of law, it should be emphasized that the possibility of utilizing diverse terminology does not facilitate the task of correctly interpreting the role that these principles play in the international legal order¹. Article 38 of the ICJ Statute mentions “general principles recognized by civilized nations”, while there are also in use such expressions as “general principles of law” and “general (basic, fundamental) principles of international law”². It would be necessary to consider whether these terms denote the same concept, whether the concept expresses any normative value and whether the source of these principles is identical.

Without going too far into the already identified nature of Article 38 of the ICJ Statute³, it is useful just to indicate what appear to be the key points of reference. The assumption is that general principles recognized by civilized nations are an emanation

¹ See S. Besson, *General Principles in International Law – Whose Principles?*, (in:) Collection dirigée par Samantha Besson et Nicolas Levrat, *Les principes en droit européen/Principles in European Law*, Ouvrage édité par Samantha Besson et Pascal Pichonnaz avec la collaboration de Marie-Luise Gächter-Alge, *Fondements du droit européen*, Genève, Zurich, Bâle 2011, p. 33.

² See G. Gaja, *General Principles of Law*, Max Planck Encyclopedia of Public International Law, 2013, points A-D (www.opil.oupilaw.com), 10 June 2016. Also J. A. Vos, *The Function of Public International Law*, Springer 2013, pp. 109-134.

³ More on the subject in: G.J.H. Van Hoof, *Rethinking the Sources of International Law*, Kluwer Law and Taxation Publishers 1983, pp. 131-151.

of norms generalized by comparative means and found in specific orders (or types) of domestic law as well as having a form, substance, role and meaning which are sufficiently consistent with the determinants of the essence of the international legal order to be applied therein as general principles and in so doing, to testify to the shared normative values and serving as one of many possible instruments of legal reasoning. The phrase “civilized nations” may not result today in any discriminatory consequences. Approaching the matter systemically, this should be assumed to refer to the legal systems of the countries forming the international community. Owing to the legal nature of Article 38 of the ICJ Statute, general principles recognized by civilized nations should, on one hand, express something that would be formally common to all currently existing domestic legal orders; on the other hand, owing to its importance for litigation law, it allows for accepting the proposition that the lowest level of “generality” admissible under Article 38 is when a given principle figures in the legal orders of two contestant countries engaged in a dispute before the International Court of Justice. It seems that in the case of doubts pertaining to the generality or acceptability of a specific principle, its applicability in a proceeding pending before the ICJ would be decisively determined by that principle’s conformity with the general determinants of the essence of international law as envisioned by positive law, or – in other words – conformity with those of its constitutive features compliant with the “constitution” of the international legal order, which improve its coherence, sense of legal security as well as opportunities for harmonious development within the boundaries delimited by a systemic understanding of the international order of law. It is only by understanding the general principles of law in such a way that systemically recognizable and acceptable judgments are guaranteed.

Therefore, deriving a general principle of law from domestic legal orders is, first of all, burdened with the need for examining the principle for compliance with the essence of the international law system as well as safeguards protecting the identity of “codes” and values. An attempt to recognize as a source of law, i.e. a source of rights and obligations, a principle which aspires to the status of general principle but which fails in its form or substance to improve systemic consistency and legal security would be an ineffective measure. In judicial reasoning, such a principle would in the long term invariably lead to numerous paradoxes, a mismatch between proffered resolutions and the international legal order’s systemic requirements as well as intellectual overkill outgrowing the realistic, or systemically appropriate, limits of international law. Thereby, applying general principles of law as one of the bases upon which to resolve a contentious issue, rather than contribute to the growth of international law by supplying successive pieces to form its grand normative scheme, would instead each time necessitate a specific conceptual reduction, resulting in another dispute on the necessity of removing

the consequences of applying an erroneous general principle or an incorrect interpretation of its meaning.

It appears to be a safe linguistic convention to label general principles recognized by civilized nations as general principles of law⁴. The conceptual scopes of these terms are identical. Things are different in the case of general principles of international law *sensu stricto*. It is accepted that a general principle of international law is a norm which in its substance refers to elements which thanks to their attributes constitute international law as a separate legal order⁵. These elements are constituent parts containing directives which allow international law to be organized in a systemic fashion. As such, they accentuate the features which may be considered to be characteristic of or specific to the international legal order. For that reason, the concepts of general principle of law and general principle of international law are sometimes sharply distinguished⁶. In addition to recognizing a general principle of international law as a normative generalization stemming from the sum total of particular norms present in the international legal order, some opinions can be found which trace the origin of general principles of international law directly to international custom. In such an approach, however, it would have to be accepted that customary law takes precedence over other formal sources of international law such as, for example, international agreements, and that it is immutable in respect of general principles, unless the notion of general principle of international law were to be fully equated with *ius cogens*. In such a case, it would be the sole prerogative of peremptory norms to be labelled as general principles of international law⁷.

Despite the emphasis on the differences of origin between general principles of law and general principles of international law, they are also tied together by certain relations. For example, these principles may be identical as to content. Also, some of them may arise from others. Therefore, a general principle of law may be identical as to its

⁴ See S. Besson, *op. cit.*, p. 33.

⁵ *Ibidem*: "General principles of international law, by contrast, are principles that are fundamental to the international legal order itself. They stem from regular sources of international law, such as general treaties and customary international law. They include structural and founding principles of the international legal order such as the principles of territorial integrity, sovereign equality, primacy of international law or *pacta sunt servanda*".

⁶ For example, Ian Brownlie in his analysis treats these two notions as formally separate objects (*Principles of Public International Law*, 6th ed., Oxford 2003, pp. 15-19). At the same time, he observes certain connections.

⁷ G. Guillaume, *Can Arbitral Awards Constitute a Source of International Law under Article 38 of the Statute of the International Court of Justice*, (in:) *The Precedent in International Arbitration*, E. Gaillard, Y. Banifatemi (eds), „International Arbitration Institute”, Series on international arbitration, no 5, p. 106: "While general principles of Public International Law are enshrined in international custom, and for advocates of *jus cogens*, may even be considered as "peremptory norms of international law", general principles of law are common to national legal systems and transposable to Public International Law".

object with a general principle of international law⁸. Theoretically, there may be an evolution from a general principle of law towards a general principle of international law⁹. The *pacta sunt servanda* principle's substance refers to justifications which illustrate the foundations of both international law and a developed order of national law. The link between these two concepts is their normative character. Each of these principles expresses a legal norm. The differences spring from the different sources, from which the norms arise. As stressed before, general principles of law have their origin in the domestic legal systems analysed from a comparative perspective, whereas general principles of international law are predominantly considered to take root directly from international law.

4. A general principle of international law as an expression of norms and values

General principles of international law express norms¹⁰. These are the normative constituents of the international legal order. They were not explicitly spelled out in Article 38 of the ICJ Statute. Their relationship with the elements listed therein may therefore be analysed from the perspective of indirect links only. It is easy to imagine a situation in which a conventional or customary norm expresses values and a degree of normativity consistent with the characteristics specific to a particular general principle of international law. However, this type of inference is not very productive. It does not say too much about the essence of normativity of general principles of international law.

The mechanism that led to the formation of general principles of international law may be illustrated in two ways. The first way is through international practice and custom to generalization, a kind of abstraction within international law, where it is not necessary to constantly prove the relationship with practice as a prerequisite of upholding

⁸ Thus in I. Brownlie, *op. cit.*, p. 18: "The rubric may refer to rules of customary law, to general principles of law as in Article 38 (1) (c), or to logical propositions resulting from judicial reasoning on the basis of existing international law and municipal analogies)".

⁹ Cf. S. Besson, *op. cit.*, p. 35: "Thus, in what follows, I will distinguish between general principles as a source of general principles of international law, on the one hand, and as a type of legal norms that stem from other sources of international law, on the other. [...] First of all, Article 38 par. 1 lit. c ICJ Statute turned or imported a type of domestic legal norms into one of the formal sources of general principles of international law, thus clearly indicating that the reference community for the kind of general, fundamental, abstract and indeterminate norms that are general principles of international law remains the domestic one".

¹⁰ *Ibidem*, p. 32: "General principles of international law are a kind of international legal standards and more particularly of international legal norms. They share the main characteristics of general principles of domestic law presented above: they are general and abstract, but also fundamental and indeterminate legal norms. Thus they are general not particular legal norms in the sense that they apply to all situations covered by the legal order".

the normative value of the principle¹¹ (dominant view on the problem); the second way is through the use of an axiological source, formally separate from the international legal order but effective within that order's limits for reasons determined by the essence of international law¹². Therefore, the domain of international law is a source supplying either the substance from which to develop specific principles or the substance and abstractions attracting external ideas and associated principles¹³.

It appears that the mechanism of development of general principles of international law should be directly associated with their normativity. This normativity may be shown in two ways. First: general principles of international law form a common element which features in each of the most essential norms belonging to the system of international law. Therefore, their derivation would require analysing the respective norms of international law in such a way as to establish, in line with the general characteristic of international law, the existence of an objectifiable common element, feature or rule of conduct for the entire system. General principles of international law would emerge from the sum total of all norms together comprising the international legal order. This would be their common denominator. It follows that general principles as herein understood would be an indirect consequence of coordinated actions of subjects of international law. Legal norms sharing a common element would arise from their consensual arrangements. The common elements would form a source of a series of general principles of international law. However, adopting such a model necessitates accepting a number of related legal consequences. The above seems to suggest that any change in particular legal norms automatically puts general principles at risk of change and transformation. The change would be consequent to the coordinated intent of the subjects of international law. Thus, action taken by the subjects under positive law would culminate in a series of norms sharing a normative code susceptible to change as a result of successive actions under positive law. Were a general principle of international law to be the end-result of generalization within the sum total composed of all norms present in the system of international law, then each change in a partial norm would transfigure the general principle. In that sense, the source of general principles would lie in the system of international law itself envisaged as a functional entity. General principles would have an intra-systemic nature, for

¹¹ I. Brownlie, *op. cit.*, pp. 18-19: "In many cases these principles are to be traced to state practice. However, they are primarily abstractions from a mass of rules and have been so long and so generally accepted as to be no longer directly connected with state practice".

¹² More on the subject in point 5 below.

¹³ Cf. J. A. Vos, *op. cit.*, p. 134: "At the same time, the concept of general principles of law and the concept of (general) principles of international law may be seen as forming and informing the constituting of international society by the members of international society, on the basis of considerations taken from the structure of international society or inferred from principles or rules of conventional international law or customary international law".

they would always follow from, adhere to and be identical with that system. Consequently, such an understanding of general principles of international law as related to the international legal order would exclude the *contra legem* formula. The legal order could transform and expand in line with its essence only under the influence of *infra legem* or *praetor legem* inference. Such transformations of general principles of international law would change their substantive scope, with each principle remaining at the same time in concord with the system of international law. This view on the problem would eliminate, if only in theory, any potential conflicts and contradictions between particular norms and the resulting general principles of international law. Once accepted, this approach would reduce the need for seeking justification for the applicability of international law outside the positive-law conception.

Another view on the origin of general principles of international law and their source of normativity presumes that general principles of international law are external to the system of international law, with their origins lying beyond the international legal order. Their justification would relate to values desirable for one reason or other in international law¹⁴. The rights and obligations of subjects of international law would be established with respect to general principles so conceived in such areas as are not covered by their coordinated intent or as have been modified by pre-existing particular norms whose applicability is justified under international law. Following the need for specific norms to be applied, the rights and obligations of the parties would be modelled in line with directives arising from general principles of international law so conceived. As a result of such reasoning, the scope of rights and obligations would be set out in line with the need for respecting values protected by means of the form of a general principle. In the extreme variant, it could be pondered whether a particular norm following from the consent of the parties concerned should, in the case of conflict, yield in precedence of application to a general principle of international law. It seems that the primary concern in scores of international disputes is ultimately to settle the question of priority of norms which express higher-order values but which have a somewhat shaky foothold in positive law.

¹⁴ S. Besson, *op. cit.*, p. 32: "As to their fundamental nature, general principles of international law are fundamental legal norms in the sense that they capture one or many moral and political values, on the one hand, and contribute to the axiological foundations and justifications of the legal order and/or of other legal norms within the legal order, on the other. They are therefore 'fundamental' both in their content and, this is connected, in their prior nature to other legal norms". *Ibidem*, p. 45: "The material source of general principles of international law are moral values and principles as in the domestic context". This is not to say that values have no role to play in the first view on the source of general principles of international law. The role is, however, limited. Value is a characteristic protected by means of normative generalization arising from the sum total of all norms or a designated parts thereof which form the international legal order or – in the words of S. Besson – a material source of general principles of international law (*ibidem*, p. 41-45).

5. General principles of international law and the “*new ius gentium*”

Tying general principles of international law to the sphere of values may produce far-reaching consequences. The principles come to express and formally guarantee these values. A focus on their essence, including also the source from which they arise, may lead to radical changes in the perception of international law. The view presented by ICJ judge Antonio Augusto Cançado Trindade especially deserves to be highlighted as an example¹⁵. General principles are not an end in themselves here. Rather, they are treated as a useful instrument to realize universal justice which cannot ignore the sphere of public international law. They specifically guarantee that the goal is achieved in the process. It is also to be stressed that general principles of public international law seen in this way serve to protect the international community as a whole rather than individual states¹⁶. They consolidate the entire system of international law. They also ensure that it is consistent to a necessary extent. They intertwine with the basic assumptions for an international legal order, thereby lending it a trait of universality, which in turn is a source of benefits for a broadly conceived human community (humankind)¹⁷. It should be pointed out that Cançado Trindade considers these principles to originate from human conscience which co-forms the universal legal consciousness attaining the rank of ultimate substantive source of all laws, including also the international legal order¹⁸. Therefore, the essence of a source would be the ability to select one from a se-

¹⁵ For the basic elements of that concept, see (in:) A. Kozłowski, *The normative dimension of the conception of the individual presented in opinions of judge Antonio Augusto Cançado Trindade of the ICJ – fundamental elements*, WRLAE, vol. 6 (2016), issue 1, p. 1 and following

¹⁶ Separate opinion in the matter of *Questions relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal), ICJ Reports 2012, p.556, par. 177: “Furthermore, it transcends the inter-State dimension, as it purports to safeguard not the interests of individual States, but rather the fundamental values shared by the international community as a whole”.

¹⁷ Separate opinion in the matter of *Pulp Mills* (Argentina v. Uruguay) ICJ Reports 2010, p. 214, par. 217: “It is not surprising to find that voluntarist-positivists, who have always attempted to minimize the role of general principles of law, have always met the opposition of those who sustain the relevance of those principles, as ensuing from the idea of an objective justice, and guiding the interpretation and application of legal norms and rules. This is the position that I sustain. It is the principles of the international legal system that can best ensure the cohesion and integrity of the international legal system as a whole. Those principles are inter-twined with the very foundations of international law, pointing the way to the universality of this latter, to the benefit of humankind”.

¹⁸ *Ibidem*: “Those principles emanate from human conscience, the universal juridical conscience, the ultimate material “source” of all law”. Also *ibidem*, par. 201: “Every legal system has fundamental principles, which inspire, inform and conform to their norms. It is the principles (derived etymologically from the Latin *principium*) that, evoking the first causes, sources or origins of the norms and rules, confer cohesion, coherence and legitimacy upon the legal norms and the legal system as a whole. It is the general principles of law (*prima principia*) which confer to the legal order (both national and international) its ineluctable axiological dimension; it is they that reveal the values which inspire the whole legal order and which, ultimately, provide its foundations themselves. This is how I conceive the presence and the position of general

ries of values, which in the form of a general principle of international law could supply the formal basis for adjudication, leading to the fullest realization of justice and equitability for the individual and being its source and measure¹⁹. It is difficult to decide from that perspective whether general principles as understood by Cançado Trindade have source within the system or whether they come from a sphere external to the international legal order. The present concept seems to suggest that they form a common and immanent trait of all legal orders and as such, they permeate the law as a uniform phenomenon. They are a unique attribute without which no legal order is able to exist²⁰. Such an approach to the essence of general principles of law would deliver another proof that the essence of a source of law lies in the law's systemic organization. One could venture to say these connections would not be merely ones of formal logic. The legal system is constituted by a specific order to the extent that the former is organized through the instrumentality of general principles by the universal awareness of seeking for equitable and just resolutions.

In the presented approach, general principles act as a counterweight to legal positivism²¹ in that they are not statutory, but rather arise from subject's general awareness of a given legal order. On the other hand, such an approach does not directly exclude a normative meaning of general principles, because Cançado Trindade allows for the possibility utilizing them under Article 38 of the ICJ Statute for interpreting and validat-

principles in any legal order, and their role in the conceptual universe of law". Consistently in: Dissenting opinion in the matter of *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v. Russian Federation), ICJ Reports 2011, p. 322, par. 213: "These are some of the true prima principia, which confer to the international legal order its ineluctable axiological dimension. These are some of the true prima principia, which reveal the values which inspire the corpus juris of the international legal order, and which, ultimately, provide its foundations themselves. Prima principia conforms the substratum of the international legal order, conveying the idea of an objective justice (proper of natural law)".

¹⁹ Cf. S. Besson, *op. cit.*, p. 33: "As a result, the formally foundational or original nature of general principles in the international legal order has been more contested than their materially fundamental nature or priority. Arguably, of course, with the development of direct international rights and obligations for individuals, individuals become subjects of legitimation and this in turn confirms the importance of the moral foundations of international law". On the impact of the individual on legal transformation, see also G. Hafner, *Some Thoughts on the State-Oriented and Individual-Oriented Approaches in International Law*, Austrian Review of International and European Law, vol. 14 (2009), p. 27 and following

²⁰ Separate opinion in the matter of *Interpretation of Judgment in the case of the Temple of Preah Vihear* (Cambodia v. Thailand), ICJ Reports 2013, p. 345, par. 66: "Without them, there is ultimately no legal system at all".

²¹ Separate opinion in the matter of *Obligation to Negotiate Access to the Pacific Ocean* (Bolivia v. Chile) (Preliminary Objection), p. 13, par. 40 in connection with separate opinions in (par. 20, par. 25-27) appeals to the ICJ in the matter of *Certain Activities Carried out by Nicaragua in the Border Area* (Costa Rica v. Nicaragua) and *Construction of a Road in Costa Rica along the San Juan River* (Nicaragua v. Costa Rica): "Despite the characteristic attitude of legal positivism to attempt, in vain, to minimize their role, the truth remains that, without principles, there is no legal system at all, at either national or international level". <<http://www.icj-cij.org/doctet/files/153/18750.pdf>>, 7 January 2015.

ing the applicability of specific norms²². It is characteristic of the present conception that general principles of law are identified with necessary law – an indispensable, lasting and necessary component of the legal order (*ius necessarium*) extending beyond the voluntarist justification of the applicability of legal norms²³. The essence of a source therefore would lie in the legal consciousness, a lasting element taking centre stage in the form of general principles of law. The aim of these principles is to model the legal system in order to obtain just decisions. Justice is determined by the needs of an individual who affirms in this way its own significance as a measure of all things. According to Cançado Trindade, a study of general principles operates reciprocally by allowing for the identification of those values which by supporting the sense of equitability and justice show their full worth in connection with the need for protecting the individual²⁴. This is a state of objective justice which flows out of general, fundamental principles (*prima principia*). It seems that the currently discussed approach to the problem of the essence of a source, the notion of objective justice is identical in objective terms with necessary law. With this assumption, it should come as no surprise that the intent of states is incapable of overcoming objective justice, must therefore submit to it, recognize the primacy of higher, humanist values forming an integral element of, among others, international law. In this way, the justification of the applicability of general principles of law to the international legal order would come decidedly closer to a model, in which general principles of law are tied with the sphere of values proper to and characteristic of each legal order rather than being just a generalization or common denominator for all particular statutory norms present in international law.

Judge Cançado Trindade formulates a catalogue of general principles intended as instruments for exercising objective justice which reaches its fullest extent when it protects and is compatible with human conscience. His catalogue includes, *inter alia*, the principles of *pacta sunt servanda*, no discrimination, equality of arms and humanity, which is a generalization of the law on human rights or international humanitarian law,

²² Separate opinion in the matter of *Interpretation of Judgment in the case of the Temple of Preah Vihear* (Cambodia v. Thailand), *op. cit.*, p. 337, par. 42: “It is, ultimately, those principles that inform and conform the applicable norms”.

²³ Separate opinion in the matter of *Obligation to Negotiate Access to the Pacific Ocean* (Bolivia v. Chile) (Preliminary Objection), *op. cit.*, p. 13, par. 40: “General principles of law inform and conform the norms and rules of legal systems. In my understanding, sedimented along the years, general principles of law form the substratum of the national and international legal orders, they are indispensable (forming the ‘*jus necessarium*’, going well beyond the mere *jus voluntarium*), and they give expression to the idea of an objective justice (proper of *jus naturalis* thinking), of universal scope”.

²⁴ Separate opinion in the matter of *Interpretation of Judgment in the case of the Temple of Preah Vihear* (Cambodia v. Thailand), *op. cit.*, p. 337, par. 42: “The necessary attention to those principles brings us closer to the domain of higher human values, shared by the international community as a whole”.

dignity of the human person and a series of general principles of international law set out in Article 2 of the United Nations Charter²⁵.

In this light, it comes as no surprise that Cançado Trindade does not include the principle of state consent as a general principle²⁶. This is a simple consequence of the previously adopted assumption that the consent formula only presumes the articulation of fundamental values organizing the international legal order in a way that allows justice to be served, without pronouncing any special immanent relationship between consent and a sense of equitability. The expression of fundamental values is tantamount to a meta-norm which gives rise to a general systemic need for realizing justice. Of course, the principle of state consent may enhance this effect, although in this particular case it does not meet the criteria of a *sine qua non* condition. In this way, Cançado Trindade seems to try to keep within the limits of statutory law, if perhaps indirectly, especially when he refers to the need for judicial review in international disputes, i.e. a situation where an international court is appointed to deliver a judgment based on a law acceptable to the contesting parties. However, this leaves open the question of finding an acceptable normative basis for dispute settlement in the event of a divergence of consent and basic values serving to realize justice as understood from the perspective of protecting fundamental individual rights. In such a case, nothing can be done except to adopt a solution applying general principles of international law but disregarding the consequences arising from the consent principle.

It is worth noticing in what other ways Cançado Trindade utilizes established notions and uses them to create a picture of a system combining the requirements of a formal-positive legal order with references to a source whose essence is out of line with that assumption. As the present conception is characteristic in linking the legal status of an individual with the need for realizing justice by means of general principles of law, the notion of mandatory law comes to be its natural extension (*ius cogens*). To sum up, the basic aim of international law as understood herein is to realize justice in a way as to guarantee the highest degree of individual protection by means of the formal instrument of general principles of law embodying values crucial to that aim. The journey to-

²⁵ Dissenting opinion in the matter of *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v. Russian Federation), *op. cit.*, p. 322, par. 212: "Fundamental principles are those of *pacta sunt servanda*, of equality and non-discrimination (at substantive law level), of equality of arms (*égalité des armes* — at procedural law level). Fundamental principle is, furthermore, that of humanity (permeating the whole corpus juris of international human rights law, international humanitarian law, and international refugee law). Fundamental principle is, moreover, that of the dignity of the human person (laying a foundation of international human rights law). Fundamental principles of international law are, in addition, those laid down in Article 2 in the Charter of the United Nations".

²⁶ *Ibidem*, par. 213: "In turn, State consent does not belong to the realm of the *prima principia*; recourse to it is a concession of the *jus gentium* to States, is a rule to be observed (no one would deny it) so as to render judicial settlement of international disputes viable".

wards that aim is naturally facilitated by imperativity, especially of the fundamental principle determining any legal order. The imperativity strengthens the process of “constitutionalization” of international law, while also serving in the first place its fundamental purpose²⁷. It is no wonder then that Cançado Trindade claims that the property of *iuris cogentis* should be combined with the need for realizing justice²⁸. It remains an open question whether that characteristic should be extended over all consequences arising from this meta-principle²⁹. All things considered, one may conclude that the status of mandatory law should be definitely attributed to those general principles of law which express common and supreme values for the international community as a whole. Such a vision of *ius cogens*, says Cançado Trindade, acts to strengthen the ethical aspect of international law interpreted as the “new *ius gentium*”, or the international legal order in service of the human person and, by extension, of humankind at large³⁰. Also, according to Judge Cançado Trindade, classifying a given general principle (e.g. principle of no torture) into the category of mandatory law is related to acknowledging obligations necessarily of result rather than merely obligations of means and conduct³¹. Adopting such a perspective obviously reinforces the effectiveness of the concept of the “new *ius gentium*” and heightens the importance of general principles of international law.

It might be useful to illustrate by way of example the potential normative impact of the general principles of international law on certain key spheres of the international legal order in line with the present conception. Construed as strengthening the normative effect of general principles in cases of gross human rights violations or infractions of the

²⁷ G.J.H. van Hoof, *op. cit.*, p. 151: “International *jus cogens*, of course, belongs to the „material constitutional provisions” of international law”.

²⁸ Separate opinion in the matter of *Ahmadou Sadio Diallo* [Compensation] (Republic of Guinea v. Democratic Republic of the Congo), ICJ Reports 2012, p. 382-383, par. 95: “The realization of justice is of key importance to the victims, and belongs, in my understanding, to the domain of *jus cogens*. Without it, the right of access to justice ‘*lato sensu*’, there is no legal system at all”.

²⁹ Cf. *ibidem*, p. 378, par. 81: “The ‘*reparatio*’ for damages comprises distinct forms of compensation to the victims for the harm they suffered, at the same time that it re-establishes the legal order broken by wrongful acts (or omissions) — a legal order erected on the basis of the full respect for the rights inherent to the human person. The observance of human rights is the ‘substratum’ of the legal order itself. The legal order, thus re-established, requires the guarantee of non-repetition of the harmful acts. The ‘realization of justice’ thereby achieved (an imperative of ‘*jus cogens*’) is in itself a form of reparation (satisfaction) to the victims”.

³⁰ Separate opinion in the matter of *Questions relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal), *op. cit.*, p.557-558, par. 182: “Identified with general principles of law enshrining common and superior values shared by the international community as a whole, *jus cogens* ascribes an ethical content to the new *jus gentium*, the international law for humankind. In prohibiting torture in any circumstances whatsoever, *jus cogens* exists indeed to the benefit of human beings, and ultimately of humankind”.

³¹ *Ibidem*, p. 555-556, par. 175: “[T]he obligations under a “core human rights Convention” of the United Nations such as the Convention against Torture are not simple obligations of means or conduct: they are, in my understanding, obligations necessarily of result, as we are here in the domain of peremptory norms of international law, of *jus cogens*, generating obligations *erga omnes partes* under the Convention against Torture”.

international humanitarian order, *ius cogens* enables Judge Cançado Trindade to elucidate themes related to state responsibility to an individual and to the need for restricting state immunity as long as that immunity impedes the realization of a permanent ingredient of every legal order, which this conception refers to as rectitude³². Cançado Trindade's views on the legal nature of state immunity are unambiguous. In his dissenting vote on the advisory opinion concerning Kosovo's declaration of independence, this ICJ judge left no doubt as to the scope of impact of mandatory legal standards on the efficacy of a legal defence applied by a state invoking state immunity. Cançado Trindade is of the view that a peremptory norm intended to protect the individual from suffering severe lawlessness overrides any privileges and prerogatives inherent in the institution of state immunity, including above all state impunity and denial of justice³³. Two elements in this line of reasoning require close scrutiny. Firstly, the protection provided by state immunity is not meant to safeguard state interests where the state in question has perpetrated crimes against its own or a third state's people³⁴. Secondly, international crimes perpetrated by states are not covered by *iure gestionis* nor *iure imperii*. These are a separate category of *delictae imperii*, which are not covered by any form of immunity³⁵. From this presumption follows a clear conclusion that the right of recourse to international justice must be available to an individual against whom grave human rights violations have been committed or where standards of international humanitarian law have been disobeyed, whereby this right is effective against the country of origin in that it leaves the offending state no option to avail itself of remedies preventing justice from being realized in its simple form³⁶. Such an approach illustrates the normative primacy of general principles of international law, in particular *iuris cogentis*, over the legal consequences arising from the principle of consent. It is worth noting that this line of argu-

³² Dissenting opinion in the matter of *Jurisdictional Immunities of the State* (Germany v. Italy: Greece intervening), ICJ Reports 2012, p. 290, par. 313: "Grave breaches of human rights and of international humanitarian law amount to breaches of *jus cogens*, entailing State responsibility and the right to reparation to the victims. This is in line with the idea of rectitude (in conformity with the *recta ratio* of natural law)".

³³ *Ibidem*, p. 286, par. 299: "[State immunity] is not to stand in the way of the realization of justice. The pursuit of justice is to be preserved as the ultimate goal; securing justice to victims encompasses, inter alia, enabling them to seek and obtain redress for the crimes they suffered. *Jus cogens* stands above the prerogative or privilege of State immunity, with all the consequences that ensue therefrom, thus avoiding denial of justice and impunity".

³⁴ *Ibidem*, p. 288, par. 305: "When a State pursues a criminal policy of murdering segments of its own population, and of the population of other States, it cannot, later on, place itself behind the shield of sovereign immunities, as these latter were never conceived for that purpose".

³⁵ *Ibidem*, par. 306: "International crimes perpetrated by States are not acts *jure gestionis*, nor acts *jure imperii*; they are crimes, *delicta imperii*, for which there is no immunity".

³⁶ *Ibidem*, par. 307: "In case of grave violations of human rights and of international humanitarian law, the direct access of the individuals concerned to the international jurisdiction is thus fully justified, to vindicate those rights, even against their own State".

mentation is supported by the institution of customary law invoked as a secondary source of law in order to affirm that primacy³⁷.

General principles of international law have therefore an essential role to play in Cançado Trindade's conception. For they would embody a special manner, in which the essence of a source of international law is understood. The substance of general principles of law and, by extension, of international law would be determined by a sense of equitability, a need for realizing justice on behalf of the individual. These principles would also leave room for circumstances which are not fully identical to the consequences of a positive view on international law. As to their rank, they would have the form of a primary source of law in that they would have the power under specific circumstances to overrule or suspend the consequences of the intent of subjects of international law. On the other hand, the general principle form guarantees that these "non-positive" values will be incorporated among the generally applicable norms, for example, for the purpose of invoking Article 38 of the ICJ Statute. Therefore, the essence of a normative source would also in this case lie outside the positive-law international order. However, it is only within the limits of the positive-law construal of the international legal order that the source in question would be able to produce consequences. An international judge would still rule based on a construal of law which accords with the essence of the legal order. This essence would be identical with that of a primary source of international law, that essence being in this particular theory the need for the realization of justice interpreted as appropriate. The need stems in turn from a sense of rectitude (*ratio recta*), whose origins are traceable to natural law. However, such an approach may diminish the positive-law value of legal consequences implied by that assumption. This is because the approach implies the need to follow imperatives (*ius necessarium*) which do not necessarily correspond to model positive law (*ius voluntarium*). This narrative may be salvaged, however, by the conventional usage of general principles of international law. For these principles are the vehicle for systemic values; they represent an effort to transpose the values into the system. They may act as a buffer against head-on criticism levelled at the essence of international law as conceived by Cançado Trindade, while providing a way of framing the essence of a source of international law in terms of their intrinsic value as a form of expressing norms³⁸. Another way to shore up this conception embedded within expressly or tacitly created international law is to refer to the customary confirmation of this vision of international law. Then, even if values

³⁷ *Ibidem*, p. 289, par. 311: "The State's duty to provide reparation to individual victims of grave violations of human rights and of international humanitarian law is a duty under customary international law and pursuant to a fundamental general principle of law".

³⁸ At this point, it would be appropriate to draw attention to the comparative manner of presenting the essence of a source of general principles set out in Article 38 paragraph 1 letter c of the ICJ Statute.

intended to realize justice had their source outside the limits of positive international law, their acceptance within that order would proceed in a form consistent with its human made nature.

The above approach to the essence of the international legal order is burdened with a number of risks and uncertainties related to its systemic adaptation. Meanwhile, the fundamental value lies in the organizing directive *pro persone humane* and related hierarchization of international law to provide a greater degree of protection for the individual to the detriment of a conflicting state interest.

6. Normative bases for adjudication

A normative sense accompanying general principles of law demonstrates itself the most clearly in connection with settling disputes under judicial review. The connection of general principles of law with the essence of the international court's decision allows, among others, for elaborating on the role of a court judgment as a source of international law. It is to be assumed at the outset that an international court, which operates within the law, must in passing judgment indicate the substantive grounds for settling the matter pending before it. In that sense, the court is driven by the need to establish the applicable law. It is bound by that law for the purpose of settling a dispute. In striving to settle a dispute placed before it, the court establishes a normative basis for adjudication. The decision of an international court, as a result of the need to establish its normative value, gains a special significance especially where the parties disagree as to the normative bases for dispute settlement. A situation where the court in accordance with the principle of opposability delivers a judgment by reference to norms uncontested and accepted by the parties is more comfortable for the judge and fits in well with the systemic conditions of international law. Such a situation does not lead to tensions or any particular problems. The consent is bilateral, thereby lending the norm unquestionable systemic support.

The situation is far more complicated when it comes to searching for the essence of a judgment as a source of international law when the burden of applying the law rests on the court, but the required norms are questioned by the parties or the court itself is in doubt as to their applicability or relevance. Then, the need arises to settle the dispute by reference to norms derived from a system of international law in connection with the case at hand³⁹. For a court judgment to be effective, it must be embedded in the law. The search for the appropriate legal basis for dispute settlement also determines the signifi-

³⁹ Of course, this takes place within the limits of competence of the relevant court. For the ICJ, these limits are set by the Statute (Article 38). That is why reflections on the topic of sources of law and jurisdiction of international courts are inextricably connected but do not form equivalent notions. See O. Yasuaki, *The ICJ: An Emperor Without Clothes? International Conflict Resolution, Article 38 of the ICJ Statute and*

cance of the judgment as one of the elements specifying the essence of a source of international law and, by extension, also the nature of the international legal order. To go further, the search for a legal basis for dispute settlement forces the court to favour one of the concepts of a source from which the norms of the international legal order flow. An investigation of the subject-matter forming a potential source of norms should be sufficiently lucid to clearly confirm the existence or non-existence of a specific norm. Striving for unambiguity is one of the elements determining a correct reading of the normative significance of a judgment and by extension also its essence as a source of international law.

7. *Non liquet* situation

Striving for an unambiguous legal basis for adjudication opens the door to reflections on the role played in the present context by a judicial ascertainment of the impossibility of indicating such a basis. The *non liquet* situation⁴⁰, where a real normative basis for dispute settlement is lacking, is at the least a formal alternative to adjudication on normative bases. As to the need for specifying the essence of a source of international law, the question which requires highlighting is guidance directives, which should be called on when needed in order to conduct the judge's reasoning in such a way as to, firstly, decide whether it is at all possible to adjudicate the matter and, secondly, to ensure that the resulting judgment is compatible with the systemic character of the international legal order.

In a theoretical view, the admissibility of *non liquet* should be analysed in the context of the systemic completeness of international law⁴¹. It seems that the completeness of the international system of law is one of the concept which when analysed allows grasping at the essence of a source of international law. It should be emphasised that if the nature of the international legal order lies only in the consent of the subjects of international law, then it is all the easier to invoke a *non liquet* situation as a way to mark the normative limit of the system. A *non liquet* situation means that a specific circumstance examined during a judicial hearing is not covered by any of the applicable norms, because it is not supported by the consent of subjects of international law. In that sense, the

the Sources of International Law, (in:) N. Ando, E. McWhinney, R. Wolfrum (eds), *Liber Amicorum Judge Shigeru Oda*, vol. 1, 2002, p. 201.

⁴⁰ D. Bodansky, *Non liquet and the incompleteness of international law*, (in:) L. Boisson de Chazournes, Ph. Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons*, CUP 1999, p. 154: "Today, *non liquet* refers to insufficiency in law: specifically, a finding by a court that the law does not permit a conclusion one way or the other concerning the issue in question".

⁴¹ See C. Focarelli, *International Law as Social Construct: The Struggle for Global Justice*, Oxford University Press, Oxford 2012, p. 327: "Legal theorists tend to deny *non liquet* on the ground that it undermines the systemic unity of law and ultimately law in its very essence".

limits of the system of international law are predictable and tangible. Every legal order has outer limits, for it is impossible to draw an infinite number of derivatives from a given norm *x*. Theoretically speaking, this set is always limited. Of course, a judge or legal theorist may use his expertise to stretch out a chain of reasoning and thereby to enlarge the normative field. But the limit is an immanent concept related to the system of law. Where the limit is drawn depends on the question of where the essence of international law lies. The unambiguity and tangibility of international law is brought about through emphasis on its consensuality. It is then at arm's length. However, it is sometimes true that by the addition of successive assumptions to the reflections on the essence of international law and its sources, that essence – though logically reaffirmed and necessary – fades beyond the horizon.

In the light of the above, it seems that analysing the essence of a *non liquet* situation can provide a large amount of key information on the essence of a source of international law. As it is necessary for the court to resolve the dispute pending before it, there exists a relationship between the sought-after truth about the essence of a source and a declaration that no settlement can be reached for lack of adequate legal basis. The invocation of *non liquet* must determine a specific conception of a source of international law. When the court ascertains that no normative bases exist upon which to settle the dispute at issue⁴², this certainly implies that the adopted conception of a source theoretically allows using the concept of a limit of the international legal order without stating with any degree of clarity, however, how the essence of such a source demonstrates itself. This means certain systemic barriers exist which cannot be transcended without violating that essence⁴³. In that sense, the portfolio of legal norms would be limited with the limitation emerging as a consequence of the assumed essence of a source of international law. Judges by the power of reasoning would be capable of developing international law, in accordance with the system's principles, through deriving, from the existing norms, new norms of the international legal order as approved by the consent of subjects of international law interpreted jointly with its systemic consequences. The court's recourse to *non liquet* would mean that, in their reasoning, the judges have reached a conclusion which cannot be derived from the consent of subjects of interna-

⁴² *Ibidem*, p. 327: "In international practice *non liquet* is quite unpopular".

⁴³ *Ibidem*: "First, it is argued that *non liquet* is inconsistent with the judicial function since it allows the court not to do what is expected to do, namely, deliver justice to the parties in the proceedings. Secondly, it is assumed that international law is a complete legal system and thus the court can always find the rule to decide the case. Advocates of *non liquet* retort that international courts (unlike domestic courts) lack legitimacy and should avoid the quasi-legislative task of filling the gaps. Moreover, international law (unlike, once again, domestic courts) is far from envisaging mechanisms entrusted to correct unsatisfactory rulings. They also claim that international courts should avoid intruding in political questions and the *non liquet* is a helpful tool to this end".

tional law⁴⁴. In a sense, this is the prelude to reflections on language and linguistic ability as used by judges to persuade, mainly the parties to a dispute, but also indirectly other members of the international community, about the validity of their normative conclusions.

Deliberations on a *non liquet* are a natural extension of the question of properly defining the normative bases for settling a legal dispute; therefore, they share a subject-matter affinity with the problem of general principles of international law examined in what is here the obvious context of sources of international law. That affinity admits of questions about the limits of the international legal order and about the truthfulness of the dictum that what is not expressly forbidden is allowed in international law⁴⁵. In the present considerations of the essence of a source of international law and in relation to general principles of international law, it should be reminded that a solid legal basis for settling a dispute exists only where a general principle of international law expresses a legal norm and the norm is shown to be systemically acceptable (systemically recognizable). It should be said therefore that, in theory, a *non liquet* would apply only where it were proved that, in a specific case, no general principle of international law exists upon which to deliver a normative judgment. However, pursuant to Hans

⁴⁴ Of course, adopting an assumption other than the voluntary theory of international law would modify the concept itself to a certain extent. Ascertaining a *non liquet* situation where international law is assumed to stem from natural law would lead to the conclusion that the judges lack competence or adequate intellectual prowess to effect a normative reading of Nature, from which the source every order, including that of the international legal order, springs forth. Cf. W. Czapliński A. Wyrozumska, *Prawo międzynarodowe publiczne. Zagadnienia systemowe*, edition 3, C.H. Beck, Warszawa 2014. p. 810: "It is impossible in principle for an international court to declare *non liquet*, that is a lack of norm applicable to the dispute as a cause of inability to solve the matter unless the referral of the matter to the Tribunal expressly restricts the possibility of selecting applicable legal norms. In practice, no international court has been known to deny jurisdiction over a dispute even when doubts existed as to the basis for settlement. The rules of interpretation have so far allowed finding a solution". Such an understanding of the issue offered by the authors begs the question about the systemic limits of judicial interpretation. It cannot be assumed that interpretation delivers only systemically acceptable outcomes. It should be stressed, however, that ascertaining a *non liquet* should come as a result of applying elaborate reasoning utilizing all appropriate methods, rules, directives and interpretations. See *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (Nicaragua v. Honduras), Judgment, ICJ Reports 2007, p. 704, par. 145: "A claim was also made during the oral proceedings by each Party to an island in an entirely different location, namely, the island in the mouth of the River Coco. For the last century the unstable nature of the river mouth has meant that larger islands are liable to join their nearer bank and the future of smaller islands is uncertain. Because of the changing conditions of the area, the Court makes no finding as to sovereign title over islands in the mouth of the River Coco". The tribunal decided that there is no norm of international law (legal title) which could be related to the facts of this part of the case. Similar evaluations are related to the purport of the ICJ's advisory opinion on the legality of threat or use of nuclear weapons (see K. Oellers-Frahm, *Lawmaking Through Advisory Opinions*, (in:) A. von Bogdandy, I. Venzke (eds.), *International Judicial Lawmaking*, Springer 2012, p. 82.

⁴⁵ See S. C. Neff, *In Search of Clarity: Non Liqueur and International Law*, (in:) K. H. Kackobad, M. Bohlander (eds), *International Law and Power Perspectives on Legal Order and Justice. Essays in honour of Colin Warbrick*, Martinus Nijhoff Publishers, Leiden, Boston 2009, p. 66-67.

Kelsen's formalized analysis, the existence of at least one, hypothetical principle determining the existence and development of an entire legal order could be confirmed in line with the rules of inference⁴⁶. It seems that the principles of trust and confidence or good faith have the potential of becoming fundamental, founding principles. Based on that potential, it can be said that any bilateral or multilateral relation is ultimately subject to the principles of trust and confidence or good faith and, as such, gives the green light to normative evaluations of all phenomena occurring within the international legal order and, by extension, to utilizing these evaluations in the formulation of legally binding resolutions.

In that context, the question may arise of whether the general principle of international law prohibiting an international judge from invoking a *non liquet*⁴⁷ belongs to the system of international law. If the need for protecting trust and confidence, legitimate expectations and good faith and its consequences is the overarching value within international law, then these values should in each position and at every level be protected by the system, making a *non liquet* difficult if not impossible. Adopting the view in which each bilateral or multilateral relation or unilateral attitude resulting in the presumption of good faith in the international community must lead to the conclusion that protection of good faith is necessary in every case where such a relation or attitude occurs. This would mean that a *non liquet* situation does not occur at all in the international legal order, for the primary concern of every legal dispute is with issues arising from relations or attitudes matching the above description, necessitating therefore the protection of good faith. This approach would limit *non liquet* to cases in which the mutual bilateral or multilateral relations of subjects are not characterized by good faith. Then, the court could declare a *non liquet* situation only where it has been ascertained that the consequences of the subjects' relations do not stem from good faith.

⁴⁶ H. Kelsen, *Principles of International Law*, The Lawbook Exchange, Ltd., 2003, p. 303: "The norm which regulates the creation of other norms is "superior" to the norms which are created according to the former. The norms created according to the provisions of another norm are "inferior" to the latter. In this sense, any superior legal norm is the source of the inferior legal norm". These statements mark the trail leading to the "Grundprinzip" theory. This being said, the "what is not forbidden is allowed" principle is said by Kelsen to have a vital organizing function in the international system of law" ("That there is no rule referring to the case can only mean that there is no rule imposing upon a state (or another subject of international law) the obligation to behave in this case in a certain way. He who assumes that in such a case the existing law cannot be applied ignores the fundamental principle that what it is not legally forbidden to the subjects of the law is legally permitted to them").

⁴⁷ Cf. S.C. Neff, *op. cit.*, p. 83: "[T]here remains doubt about the validity of Lauterpacht's strongest contention: the existence of an overriding general principle of law actually prohibiting judges from ever pronouncing a *non liquet*, that is, requiring judges to exercise whatever degree of creativity is necessary to fill any provisional gap that arises.

8. Binding judgment versus precedent

The ICJ Statute makes the rulings of the court binding upon the parties only in a specific case. It seems that Article 59 of the ICJ Statute leaves no doubt in this matter. An analysis of it leads to largely clear-cut conclusions⁴⁸. However, the binding power is formally effective for the resolution of the dispute alone. It appears unlikely that from the literal wording of the above provision it might be inferred that the parties to a dispute are bound by such a reading of the law as has been applied by the judges. The parties to a dispute are bound by international law because they expressed their consent to be bound by it. It is far easier to accept that it is judges who are bound to some extent in subsequent proceedings by a reading of law they have applied themselves to the matter which has been resolved previously. In that sense, it would be detrimental to the legal system to infract the principle of certainty of law. This would in turn foreshadow a kind of estoppel, i.e. an impediment preventing the judge from availing himself of legal reasoning contrary to a previously applied inference in cases of an identical legal nature⁴⁹. This approach to the question of an international court being bound by its judgment would not derail the systemic essence of a source of international law. On the contrary, it would draw strength from being interpreted in the context of the principles of confidence and certainty of law. In addition, the judgment would become normatively significant without conflicting with the formal limitations under Article 59 of the ICJ Statute, on the nature of a legal ruling⁵⁰. An international court judgment would not restrict the parties to a proceeding in their original ability to define what international law is. The court itself would be bound by a previously adopted interpretation of international law, as any departure from that interpretation would be legally detrimental and contrary to the principle mandating such a manner of legislation, interpretation and legal practice as to increase the sense of certainty and confidence in the legal order in those for whom the norms are intended. Without trust and certainty, any legal order, including also interna-

⁴⁸ M. Jacob notes the possibility of exceptions to the prevailing view on this point by distinguishing the procedural and jurisdictional aspects of the norm referred to in Article 59 of the ICJ Statute (*Precedents and case-based reasoning in the European Court of Justice*). *Unfinished Business*, CUP 2014, p. 238-243).

⁴⁹ "In a nutshell, my view on this question is that the Court itself, and not the Respondent, is precluded now from taking a different position at this stage which would be diametrically opposed to the one that the Court itself is deemed in law to have so definitively determined in the present case. The principle of consistency as an essential prerequisite for the stability of legal relations should support such an approach" (Judge Owada, Separate opinion in the matter of *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, ICJ Reports 2007, p. 297, par. 37).

⁵⁰ If we assume that the international judiciary is voluntary in principle and its effectiveness is conditional upon the consent of the concerned parties, the unconditional acceptance of the significance of the judgment as a source of international law would be contrary to this fundamental assumption, in particular where no systemic contraindications prevent both contesting parties from unanimously rejecting the judgment.

tional law, loses its systemic character, becoming a formless entity without any organizing principle whatsoever. If a judge deems it pointless to be bound by a previously applied reasoning, by doing so, he creates a situation in which the very essence of law is defeated. Requiring judges to be bound by a previously applied judicial reasoning is another consequence of the systemic character of international law and an effect of a systemic understanding of the essence of a source of international law. In this case, the judgment forms a legal basis for the court to rule in subsequent proceedings without necessarily confining the contesting parties in the future within any abstract legal framework transcending the context of the original matter. At this point, it would be useful to touch upon the notion of precedent. It remains to be explained to what extent the usage of the notion of precedent allows for a detailed definition of the essence of a source of international law.

An examination of Article 38 paragraph 1 letter d) provides clear-cut conclusions. G. Guillaume emphasizes that international law does not confer binding force upon precedent, in disregard of *stare decisis*. The conclusion therefrom is that no ruling of an international court, not even one of the International Court of Justice, may be seen as a formal source of international law⁵¹.

Although a court judgment is not a formal source of international law, it frequently provides a normative model to which other international courts may refer⁵². The justifi-

⁵¹ G. Guillaume, *Can Arbitral Awards Constitute a Source of International Law under Article 38 of the Statute of the International Court of Justice*, (in:) Y. Bonifetami (ed.), *Precedent in International Arbitration*, New York, Juris Publishing, Inc., 2008, p. 107; further quoted as G. Guillaume, *Can Arbitral Awards...*. To be sure, this does not invalidate considerations of the impact of case-law on trends in the respective branches of international public law, even when such trends are unconnected with the notion of precedent as such (see Ch. J. Tams, *The ICJ as a 'Law-Formative Agency: Summary and Synthesis*, (in:) Ch. J. Tams, J. Sloan, *The Development of International Law by the International Court of Justice*, OUP 2013, p. 377-396).

⁵² For example, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (Nicaragua v. Colombia), ICJ, Preliminary Objections, Judgment, p. 18, par. 35: "That question has to be answered by the application to the relevant provisions of the Pact of Bogotá of the rules on treaty interpretation enshrined in Articles 31 to 33 of the Vienna Convention. Although that Convention is not in force between the Parties and is not, in any event, applicable to treaties concluded before it entered into force, such as the Pact of Bogotá, it is well established that Articles 31 to 33 of the Convention reflect rules of customary international law (Avena and other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004 (I), p. 48, para. 83; LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001, p. 502, para. 101; Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II), p. 812, para. 23; Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994, p. 21, para. 41; Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal), Judgment, I.C.J. Reports 1991, p. 70, para. 48). The Parties agree that these rules are applicable. Article 31, which states the general rule of interpretation, requires that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose", <http://www.icj-cij.org/docket/files/155/18948.pdf>, 20 June 2016. In this case, a series of judgments acts to support the conclusion that a legal basis for judicial settlement arises from a formal source of international law, with the judges presumed to identify that source correctly.

cation of this process must bypass the formal conditions of a precedent⁵³. This is obvious for the ICJ in view of its Statute. It seems that the essence of international law may be partially revealed by tracing the origins of re-enacting previous judgments together with the accompanying legal inferences. One of the possible justifications is the legal certainty which accompanies the application of a specific rule of law. This is therefore a sort of appeal for a stable approach to specific legal institutions⁵⁴. The recurring dilemma, which appears also in this case, is whether legal certainty demonstrates any intra-systemic phenomenon reducible to a normative dimension or whether it is an external idea applicable within the scope of the international legal order in line with a specific model of reasoning. Understanding this model is facilitated by an explanation of the very essence of a source of international law. Such an approach envisages an international court judgment as a source of international law, as this mode of treatment of earlier judgments imposed on other courts would arise from the need to guarantee legal certainty. With that said, the certainty of law should be regarded as an immanent value of the law as such. So, where there is law, there is also a systemic need for its certainty. Legal certainty is a systemic property which does not necessarily come as a consequence of the orientated intent of states. Legal certainty as a systemic directive involves a series of consequences, including the instruction to consider prior judgments of international courts⁵⁵.

⁵³ The preceding footnote discusses the situation referred to by the ICJ in a series of its own rulings, in which the ICJ persuasively confirmed, for example, the customary nature of the rules of interpretation set out in articles 31 to 33 of the 1969 Vienna Convention on the Law of Treaties. However, this situation differs from a case in which judicial reasoning and results therefrom are not rooted in a formal source of law, but affirmatively in their earlier decisions. Cf. *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (Nicaragua v. Colombia), ICJ, Preliminary Objections, Judgment, *op. cit.*, p. 19, par. 37: “An *a contrario* reading of a treaty provision – by which the fact that the provision expressly provides for one category of situations is said to justify the inference that other comparable categories are excluded – has been employed by both the present Court (see, e.g., Territorial and Maritime Dispute (Nicaragua v. Colombia), Application by Honduras for Permission to Intervene, Judgment, I.C.J. Reports 2011 (II), p. 432, para. 29) and the Permanent Court of International Justice (S.S. “Wimbledon”, Judgment, 1923, P.C.I.J., Series A, No. 1, pp. 23-24). Such an interpretation is only warranted, however, when it is appropriate in light of the text of all the provisions concerned, their context and the object and purpose of the treaty. Moreover, even where an *a contrario* interpretation is justified, it is important to determine precisely what inference its application requires in any given case”. Marc Jacob draws attention to argumentative burdens that disregard the formal ramifications of precedential burdens (*Precedents: Lawmaking Through International Adjudication*, (in:) A. von Bogdandy, I. Venzke, *op. cit.*, p. 58: “Precedents in international law are best thought of not as normative obligations but as argumentative burdens on the party seeking a different result from that reached in a pertinent previous decision. Arguments from precedent are independent from the status of precedent as a formal source of law or any express denial of bindingness”).

⁵⁴ G. Guillaume, *Can Arbitral Awards...*, p.107: “Still, as provided by Article 38(d), judicial decisions are a ‘subsidiary means for the determination of rules of law’. Recognizing this role means in reality that, while settling disputes, a judge applies and interprets a rule of law. He is not compelled to follow the same solution that justified the decision he had previously made, but he will be inclined to do so in order to ensure legal certainty through ‘consistency with its own past case law’”.

⁵⁵ A considerable dose of skepticism is expressed on this point by Marc Jacob (*op. cit.*, p. 59): “A parting thought on precedents and the coherence and integrity of the international legal system: a precedent is only

From this perspective, the essence of a source would again be found in a systemic organization of norms (in this case, of international law), which would lead, as far as the notion of judicial precedent is concerned, to a systemic presumption in favour of reference by international courts to prior rulings. Exceptions to this presumption would be possible only where it has been clearly ascertained that failure to apply a previous ruling to a specific case will provide a better guarantee of enhancing legal certainty⁵⁶.

9. The extent of effectiveness of a judicial precedent

It should be remarked that the precedent in the sense established herein exhibits a normative value irrespective of the court which has set it⁵⁷. In that sense, ICJ judges, in order to comply with the systemic requirements of the international legal order, should have no hesitation in applying, for example, a judgment of an arbitration court in respect of the reasoning expounded therein or as an independent normative source in so far as such application is a necessary condition to remain true to the systemic essence of international law⁵⁸. Specialization of international courts does not act to the detriment of this principle in relation to the system of international law as a whole, although practice may suggest that courts are more likely to draw upon their own previous judgments. Previous judgments may be called on in matters which are similar, identical as to subject-matter or compatible with the essence of the legal order. From that perspective, there should be no doubts regarding ICJ judges' practice of limiting their references to judgments of arbitration courts in international cases and omitting arbitration court judgments delivered in settlement of investment or commercial disputes or of litigation involving not only states but also natural or legal persons⁵⁹. The identity of contesting parties as to their essence determines the adequacy of the norm sought for. This is a strong presumption⁶⁰.

one small stone in a larger mosaic, which in the end does not necessarily have to amount to a coherent picture, let alone one that is pleasing to behold. An acknowledgement of precedents as constraining and thereby system-building devices does not commit one to a particular view of the legal system as a whole".

⁵⁶ Cf. G. Guillaume, *Can Arbitral Awards...*, p.107: "From this perspective, the Court has expressly pointed out that if '[t]here can be no question of holding [a State party to the dispute] to decisions reached by the Court in previous cases', [t]he real question is whether, in this case, there is cause not to follow the reasoning and conclusions of earlier cases".

⁵⁷ *Ibidem*, p. 109: "The ICJ, as well as the Permanent Court of International Justice, nevertheless made general reference to their previous decisions on several occasions, as well as to decisions of arbitral tribunals, to international arbitrators or to international jurisprudence" [footnotes omitted].

⁵⁸ See M. Sourang, *Jurisprudence and Teachings*, (in:) M. Bedjaoui (ed.), *International Law: Achievements and Prospects*, Martinus Nijhoff Publishers 1991, p. 286.

⁵⁹ G. Guillaume, *Can Arbitral Awards...*, p. 111: "In the first place, arbitral awards that have been mentioned by the Court have always been rendered in intergovernmental disputes. The Court has never made reference to arbitral awards issued in other domains, such as commercial arbitration or investment arbitration".

⁶⁰ However, this is not a condition of considering a judgment of an international court as a precedent as such. It seems that this effect may also hold for a third state as long as the systemic adequacy conditions

Adopting a different approach, provided that no definitive systemic grounds can be found for exemption from a general rule, would have to give rise to subsequent judgments being frequently paradoxical. Of course, this does not exclude mutual normative effectiveness of judgments delivered by different arbitration courts under international investment law or international commercial law. Moreover, G. Guillaume underlines that the effectiveness of court judgments, including those of an arbitration court, as precedents is conditional upon their publicity and jurisprudential consistency⁶¹.

On the question of judicial decisions setting precedents, it is useful to consider whether reference to an earlier judgment exemplifies the application of a norm or an inference which leads to articulating a specific contractual or customary norm. If it is assumed that a prior judgment forms in its own right a source of dispute resolution in another matter, this would be justified by articulating a legal gap, a lack of relevant, appropriate norm upon which to resolve the dispute, with the simultaneous systemic necessity of handing down a decision⁶². The use of the sole term “solution” to refer to a sought-after legal basis for dispute resolution is not very intelligible in this case⁶³.

The award of an international court regarded as a precedent-setting source of international law may also be considered against the backdrop of the relationship of the judgment and a separate or dissenting opinion. In relating the problem to the ICJ, Hugh Thirlway says that judicial activism is a luxury in which individual judges may indulge, but which the court as a whole cannot afford⁶⁴. In connection with analyses of adjudication by international courts in the light of the essence of a source of international law, it has been underlined earlier in this work that the impact of a decision as a source depends on the interplay of the judgment with the systemic requirements of the international legal

of a judicial decision in relation to that state are met. See M. Sourang, *op. cit.*, p. 287. On one hand, the author relates an ICJ judgment in the matter of Aegean Sea continental shelf, in which the judges declared that their deliberations concerning the nature of the agreement of 1928 may be applicable not only to Greece and Turkey (*Aegean Sea Continental Shelf* (Greece v. Turkey), ICJ Reports 1978, p. 17). On the other hand, he claims that although judicial decisions may be regarded as sources of international law, their opposability is limited to the states which are parties to the proceeding.

⁶¹ G. Guillaume, *Can Arbitral Awards...*, p. 112: “The situation might be the same for arbitral jurisprudence, both in commercial and investment domains, if or when it attains a sufficient degree of publicity and consistency”. Cf. Th. Walde, *Confidential Awards as Precedent in Arbitration. Dynamics and Implication of Award Publication*, (in:) Y. Bonifetami (ed.), *op. cit.*, p. 113 and following.

⁶² G. Guillaume, *Can Arbitral Awards...*, p. 111: “Thus, for the Court, there is no doubt. There are some arbitral awards which merits mention as establishing rules of law”.

⁶³ G. Guillaume (*Can Arbitral Awards...*, p. 112) quotes the Louis Renault’s opinion (A. de Lapradelle and N. Politis, *Recueil des arbitrages internationaux*, tome premier 1798-1855, (A. Pedone, 1905), p. VII: “When a controversial question has been decided in the same way by a number of arbitral tribunals, one realizes what authority will be attached to a solution given several times in total independence by highly qualified judges of various nations... The solution will enter then into the body of international law...”.

⁶⁴ H. Thirlway, *Judicial Activism and International Court of Justice*, (in:) N. Ando, E. MacWhinney, R. Wolfrum (eds), *Liber Amicorum. Judge Shigeru Oda*, vol. 1 (2002), p. 104: “Judicial activism is the luxury of the individual Member of the Court”.

order. If the question is looked upon from that angle, it is of no essential consequence whether the supporting or complementing element of the system is consequent to the operative part of the judgment or the view expressed in the dissenting opinion. Admittedly, from a formal point of view, in a proceeding pending here and now, the judgment will have the effect of binding the parties (Article 59 of the ICJ Statute). If it clearly articulates the legal basis, it has the power, or at least the systemic potential, to produce a substantive precedent in the future, i.e. to form a source of resolution to the extent of the defined norm or utilized method of reasoning, in a subsequent proceeding, without the need for the parties to that proceeding to be the same as to identity⁶⁵. A separate or dissenting opinion should in no way whatsoever be construed as binding on the parties to a specific dispute. The same applies in terms of normative value to an advisory opinion of the ICJ⁶⁶. On the other hand, there is nothing to prevent the content of the dissenting opinion from producing a precedent in the future by direct reference or approximation⁶⁷. As long as the reasoning it offers complements the picture of the international legal order, it becomes virtually compulsory for the system to make use of it. Compulsory in relation to the international community⁶⁸. Rejecting such a basis may only have the effect of aggravating legal disagreement and give rise to more paradoxes undermining the community's confidence in the permanence, recognisability and predictability of a given legal order⁶⁹. The acceptance thereof will as a matter of course help to improve the rule of law.

⁶⁵ C. Parry, *The Sources and Evidences of International Law*, Manchester University Press 1965, p. 94: "Firstly, it should be noted that the circumstance that such a decision as the Anglo-Norwegian Fisheries case cannot practically be ignored in relation either to other irregular coasts inhabited by fishermen besides the Norwegian, or by other States than the United Kingdom, involves that such decisions, to whatever extent they are held to be sources of international law, are sources of which not only courts but other organs of international community must take note". The character of the judgment does not prevent the norm identified in the precedent as understood herein from being construed under certain conditions as being effective *erga omnes*.

⁶⁶ See K. Oellers-Frahm, *op. cit.*, p. 88-90.

⁶⁷ Cf. F. Berman, *The International Court of Justice as an 'Agent' of Legal Development*, (in:) Ch. J. Tams, J. Sloan, *op. cit.*, p. 13: "On the other hand, there is the fact – once again I try to put it delicately – that the individual opinions tend to generate more excitement among the professoriate than they do in the hard, cold world. [...] All that said, it can also be said with confidence that an ICJ bench tried to be too adventurous would find its judgment encircled by an array of trenchant separate or dissenting opinions that would weigh in as a useful corrective in the process of absorbing the judgment into the international bloodstream".

⁶⁸ Cf. K. Oellers-Frahm, *op. cit.*, p. 90: "All these statements underline the fact that the advisory function is conceived, or at least presented, by the courts themselves as a means of merely giving guidance to the requesting organ in the particular circumstance on the basis of the existing law, and that the impact of the opinions depends on the reception and acceptance by the international community". K. Oellers-Frahm also speaks in this context of the international community expectations (*ibidem*, p. 98). Of course, this is understandable where the community is aware of its own expectations. It seems that this formula should also be used for persuading the international community to adopt a specific normative attitude.

⁶⁹ Cf. *ibidem*, p. 94: "Only in the presence of compelling reasons would the court depart from its earlier ruling, because advisory opinions, as judgements, are authoritative statements of law in equal degree. From

10. Logic as an element of judicial reasoning

If systemicity is of such crucial importance, another issue remaining to reflect upon in the light of the above conclusions is the role of legal logic applied to determine the essence of a source through judicial reasoning. To what extent is legal logic binding upon the subjects who in respect of the capacity conferred to them may voluntarily impact on the shape of international law? So, is logic one of the elements defining the essence of a source of international law and, if this is answered in the affirmative, to what extent are judges at liberty to accept logical inferences as a necessary element in defining the essence of a source of international law?

The principles of legal logic are one of the modes of communication in general, including in particular for legal entities. The existence or meaning of a legal norm cannot be confirmed other than with the accompaniment of a set of legal inferences. There remains to be established the degree of the binding force, firstly, on the subjects responsible for the existence of a norm, and secondly, on the judges appointed to reproduce a legal norm in connection with a need to resolve a contentious issue. Operating within the framework of a voluntarist concept of international law, one might venture to claim that it is possible to reject the rules of logic and adopt a legal norm whose substance rejects logical constraints. However, following Ludwik Ehrlich, who allowed for rejecting the principle of good faith but interpreted this as indicative of a withering away of international law in its accepted form so far⁷⁰, it should be said that rejecting the rules of logic as a natural background for the operation of law, though formally conceivable, would lead to rejection of the law itself through negating its systemic character. The discussion of the above problems can be reduced to establishing to what extent legal logic is necessary for communication between the legislator and the intended recipient of the law. It seems that there is a strong systemic presumption in that respect. This means that for reasons of communication the normatively effective intent of a subject only gains its systemic sense when reference is made to the rules of logic. The law, in order to produce the intended effect, should be comprehensible as to its subject-matter and purpose. That comprehensibility is guaranteed by relating law to the notion of a system. The notion of a system entails in turn the necessary degree of order⁷¹. The order is a consequence

this perspective, advisory opinions constitute precedents. They do not legally bind the court, however, for the sake of consistency and predictability of jurisprudence, the law stated to exist in an advisory opinion will be upheld unless compelling reasons require the court to decide otherwise”.

⁷⁰ L. Ehrlich, *Prawo międzynarodowe publiczne*, 4th ed., Warszawa 1958, p. 15.

⁷¹ Por. *Brierly's Law of Nations*, A. Clapham, OUP 2012, s. 53: “The ultimate explanation of the binding force of all law is that individuals, whether as single human beings, or whether associated with others in a state, are constrained, in so far as they are reasonable beings, to believe that order and not chaos is the governing principle of the world in which they have to live”.

of logical reasoning being implemented. Logical reasoning may be identified for the purpose of the presented model with adopting a rational approach to the legal norm construed as an instrument for regulating social relations.

In international law, consent constitutes a norm but does not condition its binding force comprehensively. The norm becomes binding by its membership in a system, which in this case is the international legal order. An international judge in resolving a dispute must refer only to the law, i.e. a set of norms consolidated into a system, as the norm becomes binding only through membership in the system. The existence of a norm is conditional upon consent from the subjects; the system is a field, in which the norm's binding force applies⁷². As the judge seeks a legal basis upon which to resolve the dispute before him, he interprets the law. For that reason, the first thing he must do is to determine whether a norm exists, i.e. whether it is backed up by the consent, expressed in one way or another, of the parties concerned. Next, he relates the norm to the system and thereby he confers to it a meaning comprised by its applicability and substance, or in other words, the resulting scope of rights and obligations. The judge subjects the normative matter to specific measures. As emphasized earlier, he is bound by earlier judgments in respect of the reasoning applied therein as a source of comprehension of the law, to the extent that reproducing in time and space a prior reasoning under the specific conditions of the dispute at hand conforms to the systemic requirement that legal certainty should be ensured. One of the ways in which the sense of legal certainty can be strengthened is by referring to the rules of legal logic, including also the presumption of rational conduct which should accompany the judge in affirming the existence of a specific norm as well as when attributing binding force and proper meaning to it. In that sense, legal logic is a component of the essence of a source of international law. The judge must make reference to legal logic by presumption, as only then can he start, in accordance with the adopted assumptions, to fulfil the fundamental goal of settling disputes on the basis of the applicable system of norms realizing the requirement of certainty of law and confidence in the legal order that comes with it. In this way, legal reasoning which

⁷² Cf. G. Fitzmaurice, *The Foundations of the Authority of International Law and the Problem of Enforcement*, *The Modern Law Review*, vol. 19 (1956), p. 11: "The principle involved can be stated as follows: a juridical answer to the question why any rule of law is binding, presupposes the existence of a fully-fledged juridical system in terms of which that answer can be given. Thus, to ask this question, not as regards a particular rule of law, but with reference to the concept of law itself, is necessarily fruitless, for unless law already exists and is valid, no juridical answer to the question can be given; while if law does already exist and is valid, no answer is necessary. In order to give legal reasons why law is valid and binding, it is necessary to assume the validity and obligatory character of law, or the legal reasons will themselves have no juridical force". Fitzmaurice appreciates the system's role as an essential factor in determining the nature of a legal norm. However, she does not treat it as a definitive source of applicability. In this category, she includes extra-systemic facts (p. 12): "And the ultimate source of the validity of this law is and must be extra-legal. Of the various possible ultimate but non-legal sources of the validity of the law, the most satisfactory may well lie in a concept very close to that of law, though not itself specifically juridical-namely that of justice".

at a critical juncture in dispute resolution assumes its fundamental meaning in terms of existence, applicability and understanding of a norm, may be placed on a par with the elements which combine to form a source of international law. The judge is obliged to acknowledge legal inferences as components consistent with the essence of a source of international law, because the systemic dimension of existence, applicability and understanding of the law as such cannot be erected and realized without applying the rules of legal reasoning as a necessary condition.

11. Judicial reasoning in the light of mutual relations between legal (argumentative) logic and rhetoric (persuasion)

In practice, the rules of legal logic do not provide the complete apparatus for determining the essence of a source of international law. For a judge to resolve a particularly elaborate and complex matter as to the facts, he may have to make recourse to the principle of legal rhetoric as well. At this point, it remains to be decided in what way legal rhetoric can be identified with the essence of a source of international law. While logic is usually thought to operate on a binary true / false basis, seeking to determine whether a norm exists or not, whether a norm is valid or not, whether a norm means x or not, rhetoric is embedded and develops within the domain of probability⁷³. As a result, the judge faces the task of convincing the parties that the award is lawful with a probability close to certainty and is not just manipulation and illegal action taken to influence the litigants. Resolving a legal dispute with complex factual circumstances forces the judge to transition through successive levels of inference in order to make a final decision. The respective contentious issues are resolved in the course of that process with the use of instruments for logical reasoning and persuasion. Persuasion should draw upon the store of knowledge, skills and competence (including linguistic⁷⁴) forming the judge's entire expertise. It is to be hoped the risk of a miscarriage of justice decreases as the size of that expertise grows. From the perspective of the systemic operation of international law, there are certain safeguards in place to eliminate the consequences of erroneous deci-

⁷³ M. Korolko, *Retoryka i erystyka dla prawników*, Wydawnictwo Prawnicze PWN, Warszawa, 2001, p. 12: „The realm of rhetoric is verisimilitude (Gr. *doxa*, Lat. *verisimilium*). The Greek notion of *doxa* encompasses presumption, opinion, judgment, etc. The opposite of verisimilitude is other verisimilitude, just as logical truth has its opposite in falsity (logic knows no “half-“ or “quarter-truths”)”.

⁷⁴ The power of precedent in the light of the language in which it is expressed has been highlighted by M. Jacob (*op. cit.*, p. 63): “Public international law is thus not only shaped by the will of the states, but can also be manipulated decisively by the creative use of the French and English language. [...] Thirdly, if language can impose its own constraints, then multilingualism and looser social and cultural ties weaken these constraints on account of diluting linguistic precision and reducing the common conceptual repository. This perhaps offers an explanation why precedent thrives in the fertile soil of highly homogenous legal system (e.g. Victorian England) and habitually has a looser hold on heterogeneous orders (e.g. public international law)”.

sions. All in all, the parties to a proceeding can together effectively dismiss the court's judgment and resolve the dispute by other means even though they may have initially agreed to institute the proceeding. Such an approach is compatible with the fundamentals of the international legal order⁷⁵. The basic organizing and corrective directive is furnished by the principle of effectiveness accompanied by the principle of consent. Due to the specific nature of the system of international law, no judicial decision may override this basic feature of the international legal order. Therefore, in settling a dispute on the basis of international law, the judge by means of reasoning intended to reach a final decision resolves successive alternatives by reference to the legal basis for the judgment, by means of logical inferences, with the aid of the rules of construal as well as through rhetorical persuasion. By doing so, he is finally able to grasp the norm, its validity and significance. At the same time, he keeps in mind the need for balance between his actions and the fundamental principles of international law. This is condition for successfully navigating through the system of international law, all the while remaining within its limits, with the ultimate aim of comprehending that system's essence. Adopting an erroneous assumption always produces the wrong conclusion despite appearances to the contrary, especially when the adopted assumption and the final conclusion which follows therefrom are accompanied by elaborate, multifaceted reasoning⁷⁶. The wrong approach opens the way for the system to produce more or less noticeable paradoxes and contradictions, preventing the law from being applied correctly; it is to be doubted whether it makes any sense for the law to exist in such a faulty form. The situation is aggravated when the conclusions following from erroneous assumption provide assumptions for further judicial reasoning, from which to draw conclusions.

In practice, it is sometimes difficult to draw a line between the scopes of logic and rhetorical persuasion⁷⁷. The line between these scopes becomes more blurred in proportion as the facts of the case are more complex and the legal issues more troublesome. In such a case, it is worth calling upon a few organizing directives. For example, the recipient's lack of preparation cannot be used to persuade him to accept a conclusion. Also, the proportions in which legal logic and rhetoric are to be used should be carefully weighed. At this point, the question forces itself whether it is possible for a judgment

⁷⁵ Of course, taking into account both the role played by the peremptory norms (*ius cogens*) and the competences of the Security Council under the Chapter VII of the UN Charter.

⁷⁶ A classic example of an erroneous assumption being adopted together with the associated problems is the contention that the European Union law, thanks to its autonomy, no longer has the nature of international law and is immune to the influence of certain organizing and corrective general principles of the international legal order. In that sense, norms arising from a regulation still have the traits of international law if for the purpose of resolving a specific legal dispute, the autonomous EU regulation is used as a source of law.

⁷⁷ M. Korolko, *op. cit.*, p. 12: "It is known that the realm of truth is logic whose predecessor was dialectics. For these reasons, any knowledge of rhetoric should be strictly correlated with logic, that is – obviously – with binary logic described by Aristotle in *Prior and Posterior Analytics*".

to rely solely on persuasion? It seems that we are dealing with a borderline value here. The *non liquet* does not provide an opening for rhetorical or persuasive appeals. If the ascertainment of a *non liquet* does not throw us back on pure rhetoric, what can be a source of added value which is the mainstay of the international legal order? It has been stated that its sources lie in the norms themselves, which naturally, that is systemically, organize themselves, paving the way in the process for formulating new norms. As we will attempt to prove here, judges play an essential role in this process. However, the act of organizing must originate from the sphere of argumentation. A model consideration suggests that embedding the entire process only in the sphere of judicial persuasion will by definition engender numerous paradoxes or situations out of line with the very essence of the legal system, unless such an attitude from the judges furnishes conclusions accepted by the original subjects and thereby the capacity for automatic, natural (systemic) self-organization. The *non liquet* situation is a borderline condition for applying judicial persuasion. It marks out an area in which logical inferences intertwine with rhetorical interactions⁷⁸.

Having considered the questions of logic, rhetoric and the basic relationship they share, it is advisable to examine the adequacy of Ch. Perelman's view on legal logic in relation to the search for the essence of a source of international law. The contention that legal logic, especially in its judicial version, is "argumentation contingent upon the manner, in which legislators and judges comprehend their own pronouncements and on the views they entertain with respect to the law and its functioning in society"⁷⁹ forecasts a series of conclusions. One of the admissible conclusions seems to be that an international judge's impact on the sphere of sources of international law by reading normative added value, which remains in a direct and simple relationship with the essence of a source of international law, is exercised through *ad hoc* generalization rather than a static conceptualization of international law⁸⁰. A judge's opinion depends on his personal preferences and the stability of his view may also be tested. The adoption by a judge of a specific role opens the way, in that sense, for applying a reasoning which corresponds to the functions accepted by him of international law within the limits of the international community. The degree of certainty as to the manner in which the essence

⁷⁸ J. L. Goldsmith and E. A. Posner (*The Limits of International Law*, Oxford University Press 2005, p. 184) seem to suggest that this effort is each time directed towards establishing the meaning of words and exercising control over the consequences following from declarations made. In that sense, linguistic (logical and rhetorical) prowess would be a source of mandatory (prevailing) meanings, including also a source of understanding of norms. So, when a judge is ill-equipped to display such prowess, this spells an erroneous judgment.

⁷⁹ Ch. Perelman, *Logika prawnicza. Nowa retoryka*, Warszawa 1984, p. 232.

⁸⁰ This would forestall the near-sacrilegious contention that there are as many pictures of international law as there are situations, in which the appropriate basis for resolving a specific legal dispute is defined.

of a source of international law, at least with respect to judge-made law, is in proportion with the degree of consistency in the approach to understanding the role and function of international law. However, in the case of the international legal order, the chances that such a degree of uniformity in the approach understanding the essence of the sources of international law will be achieved are systemically limited owing to a lack of a hierarchically organized international judiciary. There is a risk that international courts may interpret the essence of a source of international law within a certain range without indicating a specific level. The value of such case-law for the interpretation of the essence of a source of international law is relative and should be confronted with the original “instinct” of the original subject of international law. If a judge in his reasoning on the essence of a source of international law makes a statement in much the same way as a state does, the practice stands a chance of being preserved and actually equated with the essence. In that respect, the logical and rhetorical impact of the judge will resonate more widely and produce broader legal effects to the extent that the judge through his reasoning and process of thought is successful in finding a solution to the dispute, which best fits each particular case under the same circumstances⁸¹. Striving to obtain each time the fairest judgment possible is one of the ways to arrive at an enduring reading of the essence of a source of international law in a way that serves to realize justice as envisioned by international law. Such a reading of the essence would very well reflect the role of legal logic as an instrument provoking to “reflect upon what should be done when one reasonably wants – as far as possible – to obtain (...) legal judgments” which are fair, equitable and reasonable⁸². Therefore, having regard to this factor, it should be underscored that striving for justice and equity through logic is the simplest way to read the essence of international law by correctly understanding the essence of its source.

There is one hurdle on this road, however. The selection of reasoning techniques is driven by the adopted conception of the law. So, striving for justice and equity through logic requires adopting a preliminary assumption. It seems that this may act to weaken the unambiguity of considerations on the essence of the source, for each adoption of a fundamental assumption would determine the result of inference. For example, assuming a natural-law concept of the law would have a clear-cut impact on the understanding of the essence of a source of international law. The solution of this paradox expressed in the statement that legal logic is the simplest way to realize justice through an unambiguous reading of the legal essence of a given system by means of a proper understanding of the essence of the source within the limits of a preferable concept, lies in the fact that in the case of international law, a fair and equitable resolution within the meaning

⁸¹ Cf. Ch. Perelman, *op. cit.*, p. 36.

⁸² See *ibidem*, p. 34.

of international law is possible subject to adopting such an appropriate assumption on the essence of the source of international law which envisions the acceptance of that essence by the original subjects of international law. Only then can a judge, by applying legal reasoning, that is by reference to legal logic, obtain a result consistent with the intra-systemic conceptualization of equity and justice. Then, the most equitable solution for each particular case would mark a specific precedent for successive decisions, because equal treatment of cases similar as to subject-matter is equally felt as more fair.

Consequently, judicial analyses and considerations leading to a fair resolution cannot avoid a correct rendering of the essence of a source of international law. Intra-systemic justice is guaranteed when the essence is grasped properly. Again, this creates in turn a specific need for reference to the institution of precedent, as fair resolution within that meaning entails a further resolution referring to the essence of the source. In this manner, a precedent becomes an intra-systemic direction arising from the need for fair resolution of disputes, while a correct reading of that direction is a vested privilege and obligation of the judge. A precedent is, then, systemic consistency. The judge is directed to strive for a fair solution. The use of a precedent follows from this direction. This principle does not arise from a specific norm but follows from the fact that the judge moves within the limits of the system of international law. The system holds within itself fundamental information on the essence of a source of international law. As long as the judge reads the essence correctly, his analyses and reasoning will lead to a fair judgment. Issuing a single fair judgment brings with it a further systemic consequence in the form of the need for issuing another fair judgment drawing its specific systemic justification from a prior award. As emphasized earlier, this means that if the role of precedent in international law in the sphere of resolution of international disputes has been reduced by the ICJ Statute dating back in its origins to 1922, the effectiveness in terms of substantive law of falling back on earlier judicial awards has a very good systemic and logical justification which stands firm even in the face of Article 38 paragraph 1 in connection with Article 59 of the Statute.

There are certain doubts in this regard; these, however, relate to the process of international law fragmentation and multiplication of the international judicature.

Again, there emerges the question of whether courts hearing matters within their specialty are bound by the inferences of judges whose jurisdiction arises from a different set of regulations.⁸³ It seems that the above-mentioned reasoning is fully applicable here as well. Regardless of the area of specialization within which a given international court

⁸³ See G. Guillaume, *The Use of Precedent by International Judges and Arbitrators*, *Journal of International Dispute Settlement*, vol. 2 (2011), p. 5 and following; further quoted as G. Guillaume, *The Use of Precedent* ...

operates, it should draw upon the arguments contained in the award of a different court due to the fact that the entire system of international law has a body of shared features. Even if the judgment is passed within a subsystem of international law, then still – owing to this system belonging to the common international legal order – there appear certain fixed points of reference. In that sense, judgments should definitely draw upon the arrangements made in other areas of reasoning, whose subject-matter is composed of precisely these points of reference, leading in the process to the formation of a consistent grand scheme of international law. The consistency is meant as the possibility of reproducing the reasoning contained therein in subsequent situations, factual circumstances and related disputes due to their compatibility with the essence of the international legal order. Judge Guillaume has found that precedent in international litigation law should be neither too much admired nor too hastily bypassed in the literature⁸⁴. Considering the factors discussed above, it would seem that the point is not to treat each judgment necessarily as a formal precedent. In that sense, the award of international court does not require any extraordinary treatment. However, the omission of a reasoning contained in an award, which correctly renders the essence of a source of international law and thereby also relates to the nature of international law as a legal system, would be contrary to the requirement of developing the legal order in a consistent manner in such a way as to realize justice. Dropping that requirement as well as the associated reasoning would generate a number of paradoxes, leading eventually to a weakened sense of equitability for the subjects of international law and – in extreme cases – making judicial resolution and the inferences contained therein powerless to fulfil this requirement.

12. The scope of freedom in judicial reasoning

Relating Ch. Perelman's view on the essence of legal logic to the deliberation on the impact of the application of law by judges on the definition of the essence of a source of international law, it should be conceded that it is, firstly, dependent on the manner, in which the judge understands his tasks and, secondly, on the adopted view on the law and its functioning within the international community.⁸⁵ These are borderline conditions. The choice of argumentation is governed therefore by various factors; the model is not static and may be subject to transformations. The array of tracks along which reasoning may proceed is wide. However, it is key from that point of view to know what international law is for the international community. Information on this subject is furnished by the observation of behaviours and attitudes. The essence of a source of inter-

⁸⁴ *Ibidem*, p. 5.

⁸⁵ See Ch. Perelman, *op. cit.*, p. 232.

national law in that sense would boil down to a reading of the essence of the legal order itself. In an effort not to cross the limits of the international legal order and simultaneously not to distort its legal nature, the judge chooses the appropriate directives on interpretation and argumentative chains to settle the matter laid before him. In ruling on the basis of the law, he expounds an understanding of the law compatible with the essence of the legal order. Where the essence of the international legal order lies depends on the expectations of the international community which accepts the applicability of specific principles governing the mutual relations between the members of that community. Therefore, the understanding of the essence of international law, which has an impact on the essence of a source of international law and, as a result, on determining a number of specific attitudes and behaviours in judges may change in time and space. The points of emphasis might be distributed differently here. It is important for the essence to be identified in a specific proceeding in such a shape and form as would be acceptable in a given time and space. Hence, the understanding of sovereignty as a building block of international law, though crucial and indispensable, may in specific court proceedings be read in a slightly different manner to ensure a more nuanced understanding and significance in order to cater for the requirements of a specific legal dispute to be settled⁸⁶.

The diversity and apparent contradiction of certain decisions awarded by international court poses no impediment in itself to the correct functioning of the system of international law in so far as it is ensured each time that each individual reasoning retains a relationship with the properly understood essence of the international order considered for the purpose of a specific dispute. From that perspective, it would be worth considering the sense and significance of judgments in which the courts made reference to the question of premises of state responsibility (exercise of control in the Nicaragua (ICJ) or Tadić (the Yugoslav tribunal) cases)⁸⁷. The issues related to the jurisdictional immunity of a state and its representative may be considered in a similar spirit⁸⁸. In the light of this relativization, the systemic requirement of certainty as to the law would be identical with the need for preserving correct references to the essence of international law, in practical terms meaning that the adoption of correct assumptions and applying appropriate systemic interpretations of terms. The sense of equity and justice will be preserved

⁸⁶ See ICJ judgment in the matter of *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (Malaysia v. Singapore), ICJ Reports 2008, pp. 31-40, par. 46-80.

⁸⁷ See the argumentation on this subject in the judgment in the matter of *Prosecutor v. Duko Tadić*, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, The Appeals Chamber, 15 July 1999, p. 40-62, par. 99-145; <http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf>, 15 January 2016.

⁸⁸ For example, ICJ judgments in the matters of *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), Judgment, ICJ Reports 2002, p. 3 and following as well as *Jurisdictional Immunities of the State* (Germany v. Italy : Greece intervening), Judgment, ICJ Reports 2012, p. 99 and following.

if individual proceedings apply references to the essence of international law understood in the context of a specific case. As a result, the understanding of the essence may change depending the nature of the case, whereas certainty of law will remain intact to the extent that it can be shown that in that proceeding the essence formed a point of reference for elaborating the relevant argumentation to allow the judge to infer the sought normative basis for the resolution of the case before him from the essence of international law. The potential multiplicity of the ways in which the meaning of the essence of international law can be determined is by no means at odds with the sense of justice and certainty of law nor does it rule out the possibility that the judge in a case similar or identical as to subject-matter will be bound by the argumentation used, if not formally by the judgment itself, and the normative conclusion following from it as long as the case being heard is of a particular nature.

Therefore, in connection with the above statement, it should be said that the use of the potential of the essence of international law is a standing direction and a necessary component of each inference, intended to resolve the matter on the basis of the law. The essence of the international legal order consists of a set of systemic determinants. These have specific meanings which may be subject to the process of abstraction. However, owing to the need for their systemic use and the overlapping of disputes under international law, it is frequently, if not always, true that the need for their *ad-hoc* use in a form relativized to the specific circumstances of contentious issues and other legal principles applicable to a given case. The following question may arise: does such a view of the problem allow at all for certain argumentative chains to develop with the use of notional elements comprising the essence of the international legal order, whose full range could be applied in a simple manner in later proceedings. Thanks to the assumed character and multi-level form of international disputes and the underlying legal issues, this is impossible in practice. That is why it is far more frequently the case that only certain fragments of conclusions are later exploited and juxtaposed to complement each other, provided that the particular case reproduces the essence of the source of international law. The requirement for the judge to correctly reproduce the essence of the source of international law is a fixed component of inference. The substance of the essence, however, is susceptible of transformation. Still, it is important that each emerging solution can be inscribed into the systemic nature of international law.

The concern for ensuring legal certainty and a degree of flexibility at the same time is in no way at odds with the significance of lasting reference to those components of reasoning which reflect the essence of international law. The essence of a source of international law is defined in the “here and now” formula; therefore, it can evolve, but whether such evolution is effective depends on whether international law evolves in line with

its systemic characteristics. In other words, it is impossible for the international legal order to evolve in violation of its systemic characteristics. Consequently, the judge is free to take account of the aspect of evolution and change without undermining equitability and justice, as within the meaning of international law, the evolution and change, which conform to the acceptability criterion and thereby that of equitability and justice, are only that change and that evolution which take place in compliance with the systemic nature of international law. It may be claimed again with Ludwik Ehrlich that one of the characteristics is respect for the principle of good faith. Its rejection would mean the emergence of a new phenomenon which would not deserve to be labelled as international public law⁸⁹. In that sense, evolution may also affect the essence of the source of international law.

Similarly, the above-mentioned multiplication of international judicature or the process of fragmentation of law does not pose a threat to the significance of a judicial precedent interpreted in that manner. For regardless of the jurisdictional bases of individual international court or their specialization, the link between their activities with the requirement of realizing equitability by means of reproducing the essence of a source of international law in the judgment is provided by the concept of general principles of international law. These are the common denominator for the entire legal order regardless of the nature of the international court, including its subject-matter jurisdiction reserved for a specific subsystem of international law. In this way, the concept of general principles of international law would cumulate within itself all those components of reasoning which are capable of ensuring – in the quickest and complete manner – that judicial reasoning reproduces the essence of a source of international law. This has the effect of consolidating case-law with the understanding of general principles of international law. At the same time, an international judge through reference to general principles of law gives a guarantee for a consistent understanding of international law through a correct reading of the essence of a source of international law, thereby providing a wider scope for the application of a specific precedent formula within the meaning as set out hereinabove.

In the light of the above, the judge's freedom to evaluate applicable law forming the basis upon which to render a judgment may not overstep the limit marked by the systemic characteristics of the international legal order. In that sense, Judge Guillaume is right in claiming that an award may not be arbitrary⁹⁰. Guillaume says that each system needs a minimum of certainty, that in similar cases the court will rule in a manner similar or identical as to the essence (source) but not necessarily as to the letter. This need may

⁸⁹ L. Ehrlich, *op. cit.*, p. 15.

⁹⁰ G. Guillaume, *The Use of Precedent ...*, p. 6.

be identified with a systemic requirement. The requirement is not a phenomenon external to international law but its immanent feature. It will not be going too far to recognize this need as being expressive one of the general principles of international law. Its practical application means that the rule of precedent binding upon the judge within the established meaning follows from a general principle of international law and its fundamental systemic role compels references to a number of further general principles of international law. This chain of reasoning brings the judge closer to reproducing the essence of a source of international law.

13. Conclusions. A model of reasoning deriving international law from international court judgments and general principles of international law

A. The judgment (award) of a court (tribunal) as a source of international law

To sum up the previous thoughts on the significance (essence) of general principles of (international) law and awards of international courts and tribunals in the context of determining the essence of a source of international law, related directly to the nature of international law, it is necessary to propose the appropriate components allowing for the construction of a model of reasoning. The emerging doubts as to the existence and understanding of a norm, including a general principle of law, eventually give rise to the need for advocating a specific vision of the nature of the legal order. In this case, the key role is to be played by the judge. He is charged with the task of reading the essence of international law, yielding a specific understanding of the essence of a source of international law. Apart from the considerations of the formal role of precedent in international law, it seems that the judge's core mission is fundamentally to strive in the course of his judicial duties to perform his tasks and functions to establish a systemically acceptable normative value which is a component of further general principles. Judicial reasoning is the source from which follow the contentions that shape these principles. They can be systemically verified by the subjects of international law. However, logical agility and rhetorical persuasion in a judicial pronouncement may play a decisive role. The award of an international court may form a source of international law and so it is law-forming in nature in so far as it defines in a systemically pertinent way the substances and forms characterizing general principles of law as a vehicle for values which underlie the norms or their further development derived inferentially in accordance with the essence of the international legal order.

The essence of international law lies in the sum total of its constituent norms, taking into account the factor thanks to which human pronouncements have a *per se* tendency

to put themselves in a system-like order, which gives rise to further normative consequences. In consideration of the above meaning, the source of international law lies in the mentioned factor. That factor determines the existence, applicability and meaning of a norm of international law. The practical significance of the essence of a source is reduced at a critical moment to the adoption by a judge of such a combination of reasoning and interactions as not lead to paradoxes undermining the consistency of the system or disrupting the sense of certainty of law. It seems that within the boundaries delimited by that expectation lies the acceptance of the potential multiplicity, diversity and somewhat surprising mutability of judicial attitudes, methods of interpretation or final conclusions. What joins all potential solutions that could be proposed under a particular set of circumstances is their capacity for systemic adaptation. Relating the surveyed judicial attitude to the efforts to determine the essence of a source of international law, it should be said that the added value being discussed is determined to a large degree by the judge's labour. Admittedly, the value is conditioned in an objectified way by the characteristics of the system itself, as its essence gives rise to the consequences which combine to create the value⁹¹. However, in practice, thanks to the human dimension of the application of law, the role of the judge is inestimable. In the event of a dispute, especially in the so-called hard case condition, or borderline situations involving the need for reference to prime elements forming the essence of a given legal order, the judge makes a construal of the legal order and its individual constituent ingredients. All these efforts combine to outline a system consisting of norms affirmed by the intent of subjects, norms which exist but which are, for the purposes of a particular case, read in the context of other norms, added norms derived from the essence of a systemic organization. It is up to the judge's discretion to indicate the legal bases for dispute resolution in a manner that is acceptable under international law in order to further organize and develop it in line with its essence. If these systemically determined limits are not crossed, the subsequent judgments should embody a lasting or objectively verifiable in the long term and confirming the understanding of a given norm. When the limit is overstepped, the resolution must be systemically rejected, sooner or later, due to its inadequacy in relation to the basic determinants of the international legal order. The essence of a source of international law lies in its systemic

⁹¹ B. Cheng, *On the Nature and Sources of International Law*, (in:) B. Cheng (ed.), *International Law: Teaching and Practice*, London, Stevens and Sons 1982, p. 218: "Secondly, to say that international law depends on the consent of States does not mean that every rule of international law has to have the active consent of every State, and that before a rule can be applied to a State, it must be established first that the latter has previously consented to it". J. I. Charney, *International Lawmaking – Article 38 of the ICJ Statute Reconsidered*, (in:) J. Delbruck (ed.), *New Trends in International Lawmaking – International „Legislation“ in the Public Interest*, Berlin 1997, p. 177: "A review of the traditional doctrine of sources demonstrates, however, that, even historically, sovereign state consent was not as salient for all sources of international law as many assume".

organization. The existence, applicability and meaning of a specific norm is confirmed by the appropriate judicial activity. It is of no importance whether judges' attitudes are expressed through *judicial activism* or *judicial restraint*. Neither judicial activism and judicial abstention from adopting an active attitude do not by themselves determine their role in the reading of the essence of the international legal order. Both active and passive attitudes may be interpreted as compatible with the scope of judicial freedom or violating that freedom by positing the existence, applicability or meaning of a norm despite the essence of the legal order, of which that order is composed.

Even if the source of applicability of a norm is state consent, then a reading of its meaning within the limits of the system is the responsibility of the judge. In extreme cases, this may mean deriving further norms from the absence of other, confirmed norms from the system. However, the system is not created by judges, who merely navigate within or mark its limits, with the decisive vote being cast by the original sovereign subjects. The norm as a component of the system emerges in connection with subjects of international law expressing their will. Its application under amicable conditions clears any doubts as to its applicability or meaning and shortens the entire course of reasoning related to the essence of a source. The existence of a norm depends on the intent of the subjects, but its normative sense is the result of belonging to the system. Intent is a necessary, causative component but it is insufficient from the perspective of complete normativity. The norm applies through the system. That is why in an extreme case the norm may exist but its normative sense may be insignificant or none (*desuetudo*), which is tantamount to a fading of the norm.

Because the legal system is a set of norms with systemic organizing value, then the key task is to determine the essence of that value, as it gives an idea of the essence of the source and nature of international law. The role of the judge who reads norms in relation to the essence of their source and the nature of the system which they form is fundamental in that regard. The reading of the essence is a consequence of judicial reasoning, while the reasoning itself is delimited by the acceptability of the judgment under international law. What is acceptable is decided eventually by states, i.e. the only subjects of international law endowed with sovereignty. The decision makes an impact in turn on the contents of individual norms. The content of the norms determines the way in which they are organized. The way in which norms are organized within the system is consequent to the essence of a source of international law. Its proper reading is a task for the judge. In this way, the entire process is reciprocal.

The above systemic role is fulfilled by the judge through the **institution of legal (substantial) precedent**. Understanding precedent within the meaning as hereinabove established should in no way be associated with the legislative function. Both judicial

activism and judicial restraint from extensive action must have regard to the systemic limitations. The boundaries of the international legal order determine the role of the judge and scope of his actions. The judge's reference of an earlier award made in his own court or a court with a specific jurisdiction will produce lasting legal effects in terms of the international legal order only in so far as this correctly renders the systemic characteristics of international law, including mainly the essence of a source of international law. In that sense, judicial reference to an earlier award in the form of a quasi-precedent does not fulfil the legislative function. The judge does not create a norm for a specific case but reads its contents out of elements provided to him by the system of international law. A correct reading of the norm determines its strength and allows for re-use in subsequent proceedings. The notion of consistency of jurisprudence⁹² should not be understood as a call to respect a separate principle expressing a distinctive substance in isolation from the meanings here discussed. This is a judicial formulation whose normative sense is gained only in connection with the above meaning attributed to general principles and case-law in relation to determining the essence of a source of international law. Consistency of jurisprudence does not express an autonomous general principle of consistency *per se*. The consistency of jurisprudence has a deeper meaning only when it reflects the nature of its source in a way consistent with the systemic characteristics of international law. References to earlier awards may not effectively safeguard international law when separated from these characteristics. The consistency and uniformity of jurisprudence are a systemically acceptable value, a value which expands and organizes the system of international law only provided that the essence of a source of international law is correctly rendered in the court judgments. Otherwise, the consistency of jurisprudence whose value would be expressed only in constancy seen in isolation from the essence of the international legal order would be a source of lasting inconsistency, i.e. a state which in the long term would have to reject such jurisprudence as an element unable to organize the international legal order in a proper (acceptable) way.

It should be underlined that the role of precedent within the meaning as established hereinabove does not have to be limited by the jurisdictional basis of the operation of a specific court⁹³. This means that ICJ judges are not particularly entitled nor systemically obliged to stick firmly to their earlier decisions. It should be noted that the value of judicial rulings depends solely on the subject-matter and personal pertinence of reference to elements of legal reasoning applied in any of the earlier judgments of an international court. Pertinence is defined in line with the nature of the international

⁹² See a joint declaration by seven judges of the ICJ in the matter of Kosovo – *Legality of Use of Force* (Serbia and Montenegro v. Portugal), Preliminary Objections, Judgment, ICJ Reports 2004, p. 1208.

⁹³ See G. Guillaume, *The Use of Precedent ...*, p. 7 and following.

legal order, in particular the essence of a source of international law. So, due to jurisdictional limitations, the desired value is gained by those legal pronouncements which remain in concord with the essence. The jurisdictional basis for a specific court to take action determines only its competence to issue a binding decision in the matter it is seized of. If the matter pertains to international law, the reasoning that leads to its resolution pursuant to international law must be informed by such a circumstance. That is why it seems that an ICJ judge is obliged to take advantage in an on-going proceeding of certain elements of reasoning applied, for example, in a proceeding before the competent organs of WTO if only the reasoning concerns the personal or subject-matter aspects considered by the ICJ, whose application requires a higher degree of consistency. In that sense, the ICJ and any other international court are bound by this reasoning stemming from successive courts, as their rejection (by applying different inference and conclusions following therefrom) or omission logically forestall a growing inconsistency. An example may be provided by the understanding of state liability related to overall or effective control over individuals whose actions or omissions give rise to liability⁹⁴. When allowances are made for divergent or mutually exclusive conclusions, this situation is contrary to the systemic organization of the norms of international law discussed earlier. A natural state of the system is an intra-systemic effort to bring the constituent elements under control rather than break apart and atomize them. The judge in expounding his reasoning contributes to a lasting resolution of the dispute provided that consistency with the natural state of the legal system is maintained. This is the only solution to guarantee the systemic acceptability of the award.

The consequences of waiving a precedent should be outlined against this backdrop, within the meaning as established hereinabove, following from an award of a specific international court⁹⁵. The systemic justification of this is quite simple. The court wishes to bring its reasoning into line with the essence of the international legal order, including mainly the essence of a source regardless of whether this constitutes a precedent or waiver thereof in a particular dispute. Both solutions are equally valid in systemic terms. Consistency and predictability related to rendering the essence of international law rather than just reproducing it half-automatically for each subsequent case. That is why, as far as a fixed jurisprudential strategy of an international court is concerned, this may consist of both judgments supporting a prior precedent and those which negate earlier decisions, i.e. new precedents. The common denominator is represented by a search for a systemically acceptable solution, for only an outcome of that sort is capable of making

⁹⁴ See A. Cassese, *The Nicaragua and Tadic Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, "European Journal of International Law", vol. 18 (2007), p. 649 and following.

⁹⁵ See G. Guillaume, *The Use of Precedent ...*, p. 10.

an impact on the attitudes of the contesting parties, or subjects of international law. The jurisprudential strategy of the court is perpetuated in its tendency and effect of rendering the essence of international law, including that of its source⁹⁶. Therefore, waiving a previous award or jurisprudential strategy is merely a way of finding a fair resolution of a legal matter in line with the essence construed for a specific dispute, having regard to those systemic ramifications of international law which determine that essence. The court on announcing its decision may declare its wish to follow its previous rulings in the cases that may happen to come within its purview⁹⁷. This does not constitute a precedent within the meaning considered herein. It may give rise to an obligation binding the court internally, effective also with respect to the parties in subsequent proceedings, particularly where the parties may happen to be the same persons. However, the value of such decisions in terms of a substantial precedent relies on the judges correctly rendering the essence of a source of international law rather than their assurances that they will be guided by their previous pronouncements in the future. The situation in question should not be construed as a possibility of a judicial organ ruling at first instance with the awards issued at second instance⁹⁸. The systemic purpose is to resolve the matter in conformity with all systemic ramifications, including a systemically acceptable rendering of the essence of a source of international law. A court appointed by subjects of international law does not become autonomous in respect of the fundamental goals it is intended to aim

⁹⁶ G. Guillaume (*The Use of Precedent ...*, p. 11) lists ICJ awards to exemplify a change in its jurisprudential strategy in international law, here illustrated by the principles of delimitation of maritime areas: *North Sea Continental Shelf* (Judgment) [1969] ICJ Report 3, 53, p. 101; *Continental Shelf* (Tunisia v. Libyan Arab Jamahiriya) (Judgment) [1982] ICJ Report 18; *Maritime Delimitation in the Area between Greenland and Jan Mayen* (Judgment) [1993] ICJ Report 38; *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Judgment) [1984] ICJ Report 299-300, p. 112; *Continental Shelf* (Libyan Arab Jamahiriya v. Malta) (Judgment) [1985] ICJ Report 13.

⁹⁷ Cf. Article 21, par. 2 of the Roman Statue of the International Criminal Court: "The Court may apply principles and rules of law as interpreted in its previous decisions". Likewise, the appellate body of WTO: "Thus, the legal interpretation embodied in adopted panel and Appellate Body reports becomes part and parcel of the acquis of the WTO dispute settlement system. Ensuring „security and predictability“ in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case" (United States – Final Anti-Dumping Measures on Stainless Steel from Mexico), par. 156-158, 160-162, WT/DS344/AB/R). See also G. J. Spak, G. Kapterian, *The World Trade Organization*, (in:) Ch. Giorgetti (ed.), *The Rules, Practice, and Jurisprudence of International Courts and Tribunals*, Martinus Nijhoff Publishers 2012, p. 143-147.

⁹⁸ G. Guillaume (*The Use of Precedent...*, p. 12) quotes Article 30 of the European Convention for the Protection of Human Rights and Fundamental Freedoms which stipulates that where one of the chambers wishes to depart from the Court's jurisprudential strategy, or where this is necessitated by important points of interpretation, the matter should be referred to the Grand Chamber ("Where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects").

for. This is the reason for numerous problems related to evaluating the role of the EU Court of Justice which acting as an international court and despite having a broad range of competence which prevent a factual assessment of its work as an international court, should strive to constantly reflect the essence of a source of international law, while also working to maintain a correctly defined relationship between a source of international law and a source of EU law. So, any tasks outside its fundamental function are secondary and subordinate. The role of a quasi-constitutional court, if seen as essential, would by definition prevent a correct reading of the essence of a source of international law which also contributes to the essence of EU law.

The argument concerned principally the relationship between judgments delivered by permanent international courts with the attempt to address the questions of establishing the essence of a source of international law. It should be considered whether the present conclusions could be safely related to the awards of arbitration courts. With regard to the adopted assumptions and the nature of conclusions following therefrom, the answer seems obvious. Despite differences of opinion relating to the construction of permanent international courts and international arbitration, in particular in forms other than state arbitration⁹⁹, a uniform approach to the essence of a source of international law seems fully justified. This is because separate bases for operation, methods of appointing the bench or determination of legal bases for delivering judgments are of no importance to the connection between the award of an arbitration tribunal and the essence of a source of international law through the institution of substantial precedent. To the extent that a judgment of an arbitration court operates in the public domain, it may produce effects proper to a precedent within the meaning as herein established, once specific conditions are met. If the arbitral award correctly reflects the respective constituent elements of the essence of a source of international law, then the jurisdiction of individual arbitration tribunals or the legal bases defined for them are of no importance to the essence. Such an award should produce the effect of a substantial precedent provided the essence is reflected in it. The point is to contribute to the erection of a consistent picture of the system of international law through reasoning contained in the arbitral awards referring in parts to the essence of a source of international law, rather than simply ensure consistency between the awards of individual arbitration courts. This kind of consistency is not a value in itself. It emerges as a secondary consequence of consistency in the international legal order. A practical conclusion follows from this. The arbitrator is systemically obliged to construe the rules of law established in a compromise agreement in accordance with the determinants of a correct construal of the essence of a source of international law, following from earlier judicial decisions by arbitration courts, to the extent that they are adequate

⁹⁹ See *ibidem*, p. 14 and following

as to subject-matter in that respect. In that sense, substantial precedent as discussed here is present even though its constituent elements in the case of international arbitration are strongly decentralized and scattered between individual benches.

It should be stressed that construing a precedent through its consistency with the essence of a source of international law may to some extent resemble a hermeneutic spiral. The bonding of reasoning with the essence of a source and thereby the formation of true precedents in substantive law may only take place by successive approximations. In other words, a great number of decisions delivered by international or arbitration courts and tribunals may precede precedent-like resolutions. In the meantime, a great number of decisions may emerge which only seemingly follow the essence. Only time will tell which of them are ineffective as substantial precedents and contribute no lasting value to the system.

It should be specified that an international court decision in terms of its impact on the sources of international law may be evaluated in two ways. Firstly, a decision may provide indirect information on the formal sources of international law evaluated from the standpoint of research on the essence of a source of international law. Secondly and most importantly, a judgment delivered by an international court may be regarded as providing information on the essence of a source of international law itself but not necessarily useful as an argument focusing on aspects of international law norms being expressed formally. Of course, it could be useful in that respect. At that point, judicial reasoning becomes rounded off and places itself within a string of inferences ensuring the systemic consistency of international law, including those identical to the essence of a source of international law. The second approach is decisive for an assessment of a given judgment's precedential importance. It is inadequate to base the process of determining the essence of a source of international law based solely on the first approach.

B. The systemic role of general principles of international law

A tool which helps an international court to reflect the essence of a source of international law in its case-law, thereby also to produce the consequences of a substantial (normative) precedent, is provided by general principles of international law. Seen in this light, they constitute a systemic value. Also, some of them are vehicles for values which compel an explanation of the relation between the sphere of values and the consent-based nature of the international legal order. A certain paradox emerges as a result of an evaluative understanding of the essence of general principles of international law. It is seen on one hand in the need for salvaging higher-order values and on the other, in the atomization of the international legal order and weakening of its unambiguity, intelligibility and acceptability by facing subjects of international law with having to respond to questions about the point of taking their consent as the ultimate criterion of nor-

mativity and confronting them with the contention that their objectively expressed intent is not the sole source of rights and obligations.

However, there does seem to be a way out of this predicament. It is to read the essence of international law in such a way as to frame the legal order in a manner which reconciles apparently divergent justifications and to establish the meaning of a source of international law that is compatible with the so conceived essence of the international legal order. According to Hersch Lauterpacht, international law is comprised of both norms recognized and accepted in various ways by subjects of international law as well as legal norms arising from its very essence or nature¹⁰⁰. Thus, the system of international law would be constructed partially from norms arising from a justification under positive law and partially by norms which are systemically necessary but not always describable by simple organizational rules¹⁰¹. This is how the question arises about the point of the essence of international law which is a source in itself from which norms forming the system of international law arise. One of the possible explanations is by acknowledging that organizing norms into a legal system gives rise to a series of systemic criteria for the operation of a given legal order, which determine the existence of a series of norms and without which no legal system would exist. In such a case, the nature of international law would be reduced to its special systemic form. Norms in every legal order tend to organize themselves internally in a way compatible with an imperative reflecting the essence of that order. Legal norms are incapable of operating outside the system. The natural cost of the norms functioning within the limits of the system is the acceptance of a series of systemic consequences of the existence of law in such a form. Of course, the manner in which norms are organized within the limits of the legal system does contain certain constants and variables that reflect its normative nature. Therefore, in such a view on the problem, international law would consist of norms consequent to the consent of subjects of law and norms resulting from a systemic organization of international law, without which, firstly, the system itself would not be able to exist, operate or develop and, secondly, without which the normative effect of the concerned

¹⁰⁰ H. Lauterpacht, *Private Law Sources and Analogies of International Law: With Special Reference to International Arbitration*, The Lawbook Exchange, Ltd., New Jersey 2002, p. 203.

¹⁰¹ Cf. M. N. S. Sellers, *Republican Principles in International Law. The Fundamental Requirements of a Just World Order*, Palgrave Macmillan 2006, p. 44: "The primary source of international law has always been the law of nature, applied to nations. Conventions, custom, legal principles, and the opinions of publicists all seek to articulate preexisting realities, or new elaborations of what justice requires, made salient by historical circumstances. [...] To justify international law its proponents have always assumed an underlying community of humanity. Grotius and Vattel supposed that the world's peoples would act through states. But states are means towards the realization of a just society, not ends in themselves". Also J. A. Vos, *op. cit.*, p. 134: "Correspondingly, the members of international society are situated as having a power to act, but not an unlimited freedom to act, by virtue of which they act so as to constitute (the common good of) international society pursuant to practical reasoning".

parties' consent would be cancelled out. The law is a system. When we talk about a system we relate this concept to norms existing and organized in accordance with the system's nature. On the other hand, the nature of international law cannot be analysed without reference to consent as the basic, necessary but incomplete source of normativity. The key aspect is that each normativity is determined by its dependence on the system. The normativity of international law, which arises from the consent of subjects, depends on the system; for without any systemic frames or references, the consent of subjects would be powerless to produce effects, consequences; it would be an empty set. That is why, at the level where successive norms are shown to be applicable, the systemic consequences are unavoidable. The law as such is unable to operate outside the limits of the system. The remaining open question is that of determining the value which arises from the recognition that the essence of law, including that of international law, lies in its systemic nature. The essence is comprised of certain constants, which are characteristic of each legal system, and variables which reflect the nature of a given legal system. In the case of international law, the constant is represented, for example, by normative consequences arising from the need to apply the rules of interpretation in general or rules of inference as such. The variables would include contents, entitlements and directions arising from the application of specific directives on interpreting or rules of inference.

This systemic organization of norms is guaranteed, among others, by principles of international law. They are a systemic necessity, which is formal aspect. On the other hand, in the substantive sphere, they express a series of systemically crucial values. For the system to be operational, it has to be evaluated. This valuation may theoretically be two-fold. If a general principle is derived directly from and within the limits of a given legal system, it reflects values interpreted intra-systemically. This is called justice or equity within the meaning of and for the purposes of international law, coordinated or systemically relativized with all shortages which may appear when this understanding of equity is juxtaposed against an abstract notion which does not relate directly to international law. Such an understanding of the systemic role of the international legal order would be a source of all directives organizing the international legal order, including issues related to interpreting the essence of a source of international law, the form and meaning of general principles. It would act as the beginning and end of all normativity within the limits of international law. General principles of international law would be a derivative of the values construed from the level of the system of international law by fulfilling all the typical roles and functions which are associated with the application of general principles of law. However, if we accept that international law forms part of a larger order, then – at the level of application of specific norms underlain by the consent of subjects of international law, then it might turn out that from the perspective

of a general sense of justice or equity, not every norm that has been agreed upon by the subjects of international law corresponds to this model. Then, the need would arise for a joint construal of such norms with desirable values which could be represented within the limits of international law by means of general principles. In that sense, it would be possible that not all norms of international law seen from that perspective are fair or equitable. Hence, the need for “equitable” adjustment by means of general principles that bring with it a store of values situated beyond the limits of international law. Normative added value would be embodied in the sum total of borrowed general principles operating as a safety mechanism and derivative of these values. The related danger would lie in the ways of interpreting desirable values and thereby in the ways of including within the limits of international law of successive general principles. The resource would have to be verified, systemically indispensable and acceptable.

Each legal system's essence generates a need for realizing good and equitable things¹⁰². The point of reference is the proper context comprised of the community within which the law is to operate. These values can be found either inside or outside the system's limits. These needs are realized at the level of legislating, interpreting and applying of the law by the subjects concerned. Erroneous approaches are verified by means of the effectiveness principle. So, in a long-term perspective, the ability to survive is only found in a normative situation which is supported by a dose of effectiveness necessary within the meaning of international law. To the extent that in the first, intra-systemic case, the form and substance of general rules would follow from the sum total of constituent norms comprising the international legal order, the second understanding going beyond the limits of the system reduces the search for values extending beyond consensual justification to individual decisions and resolutions agreed upon by the subjects and judges aiming to strengthen the norms of international law by lending them support in the sphere of values necessary from the point of view of decision-makers to create or maintain a sense of equitability of justice. The risk inherent in this approach is mainly related to the fact that sometimes an objective, systemically adequate approach is replaced by subjective emotions felt by the individual subjects or judges, which are initially out of step with the assumptions of the international legal order. This approach would result in a temporary dissonance seen in the existence of normative situations not supported by a dose of systemic acceptability. A lasting lack of acceptability means a misreading of the essence of the international legal order. At times, the adjustment may be time-consuming although it is firm as long as it conforms to the nature of international law and its source.

¹⁰² *Ius est ars boni et aequi* (D. 1,1,1).

The essence of international law is embodied in its systemic nature. The systemic nature entails the use of the notion of general principles of law. The general principles of international law organize international law by means of values inherent in them. The award of an international court becomes a component of the international legal order if it is its necessary complement resulting from the need for realizing systemic justice interpreted in accord with the nature of international law.³ In that sense, a judgment of an international court can operate as a precedent.

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 advocationis 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/hispanicaeadvoca02gentuoft#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*, 1598, 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. Picciotto, *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/commentariesonl00manngoog#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 Nijhoff 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 Danzing, 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 form 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 of humanity (...) 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*, "Colombia 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, Merits, 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, Merits, 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 Nuremburg⁹² 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 UNICITRAL 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 CCJ 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. Kellog, 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 analogous 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 Seabed 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. Brunneé, *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.

Doctrine as a source of international law

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1. Introduction

The issue of sources of law in a given legal system is usually determined by a legal act ordering the essential legal issues, such as a constitution. Such a solution is typical of a national legal order. In the international space, due to the uniqueness of international law – both in the subjective and objective sphere, and particularly due to the specificity of the law-making process – the issue of sources of law may give rise to some doubts and uncertainties. Broad understanding has only been achieved with regard to international agreements and custom. However, regarding other forms, including general principles, as referenced by the doctrine of international law and by judicature, and sometimes directly by the interested entities, the determination of their legal nature, binding force, and basis of obligation, is not clear or obvious. A certain important indicator is, obviously, the generally accepted enumeration of sources included in the Statute of the International Court of Justice; therefore, it is rather commonly accepted to make reference to this catalogue¹.

The contents of Article 38 par. 1 item d of the ICJ Statute, determining the grounds for its adjudication in accordance with international law, imply that doctrine, along with judicial rulings, in the form of “teachings of the most qualified publicists of the various

¹ R. Wolfrum, *Sources of International Law*, [in:] *Max Planck Encyclopedia of Public International Law*, May 2011, accessed on 25 May 2016.

nations in the area of international law,” is only a “subsidiary means for the determination of rules of law”². From such wording, one may initially derive an essential conclusion that scholarship plays a subsidiary role in respect of the so-called classical sources of international law, as included in items a, b, and c of Article 38(1) of the ICJ Statute (convention, custom, general principles of law recognized by civilized nations), helping in interpretation, explanation, clarification, and sometimes even *sui generis* extraction of existing legal norms the content or form of which is not absolutely certain. Therefore, the main task of representatives of doctrine is to clarify legal norms through proving their existence, deriving them from formal sources of law or from any other law-making behaviour of subjects of international law.

Simultaneously, it should be strongly stressed that the significance of doctrine for the evolution and functioning of the law of nations is of key importance. There can be no doubt that the teachings of the so-called fathers of international law – Hugo Grotius or Emmerik de Vattel, as well as by experts on the subject, including Byrkenshoek, Hersch Lauterpacht, Oppenheim or, in the Polish scholarship, Ludwik Ehrlich or Manfred Lachs, have significantly affected the process of formation of principles and norms of international law as well as the form thereof as a legal system. At the same time, however, it is impossible not to notice that the doctrine has a heterogenous character and contains opinions of writers of various categories, e.g. persons authorized by states, academics appointed ad hoc to give an opinion on a legal problem, people clustered in expert groups. The forms and places of publication are also different: monographies, articles, and, even internet blogs. Hence the power and significance of individual opinions can be evaluated and differentiated³.

The preparatory work for the Statute of the International Court of Justice (ICJ), or actually the Permanent Court of International Justice (PCIJ), as quoted in the commentary to this document, implies that the intent of the authors was to attribute a role explaining the principles applied by the Court, rather than shaping these principles, to both case-law and doctrine⁴. The Supreme Court of the United States expressed itself in a similar vein in the *Paquete Habana* case (often referenced in the context of the issue of scholarship as a source of international law), clearly stressing that the works by international law specialists are not supposed to be construed as the authors’ speculation

² The Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 933.

³ S. Sivakumaran, *The Influence of Teachings of Publicists on the Development of International Law*, “International and Comparative Law Quarterly”, vol. 66, January 2017, p. 37, available at: https://www.cambridge.org/core/services/aop-cambridge-core/content/view/DFE12D4CB4E4A94377A02E3439C1523C/S0020589316000531a.pdf/influence_of_teachings_of_publicists_on_the_development_of_international_law.pdf, accessed on 4 January 2018.

⁴ A. Pellet, *Commentary to the art. 38 of the Statute of ICJ* [in:] A. Zimmermann, C. Tomuschat, K. Oellers-Frahm (eds.), *The Statute of the International Court of Justice*, Oxford 2006, pp. 783-792.

concerning what the law should be like, but rather as proving what the law is like. In a separate opinion to this ruling, Judge *Fuller* expressed this issue in a short but unequivocal statement: “Their elucubrations [of experts in international law] may be persuasive but not authoritative”⁵. The British court (King’s Bench Division), contemporaneously with *Habana* case, expressed directly that: “any doctrine so invoked must be one really accepted as binding between nations, and the international law sought to be applied must, like anything else, be proved by satisfactory evidence (...). The mere opinions of jurists, however eminent or learned, that it ought to be so recognized, are not in themselves sufficient”⁶. That clearly means – every binding international law should be based on the will of states.

The representatives of doctrine themselves do not aspire to the role of lawmakers, only of law interpreters or *sui generis* catalysts of the law-making process. For instance, Professor Manfred Lachs, referencing the contents of Article 38 of IJC Statute, claims that: “It is obviously not a question of ‘doctors’ dictating the law, but of their influence on its understanding”⁷. The 9th edition of the textbook by *Oppenheim* states that “It is as evidence of the law and not as a law-creating factor that the usefulness of the teachings of writers has been occasionally admitted in judicial pronouncements”⁸.

In connection with the treatment of doctrine as a subsidiary means of determination of legal norms and confirmation of this subsidiary formula in commentaries by international law scholars themselves, as well as in judicial practice, assumed as presented above in the Statute of the PCIJ and subsequently of the IJC, it is hard to argue that its function is not to create norms, but rather to postulate, explain, prove, or criticize them, as well as to encourage the law-making process through proper interpretation of its systemic conditions. However, bearing this in mind, one should not underestimate the role of doctrine, particularly in the form of works by international collectives and bodies established to inquire or codify the international law, such as the International Law Commission, the Institute of International Law, and the International Law Association, which contribute to a substantial and significant extent to the final shape of norms adopted by subjects of international law in the formula of consensus, traditional and typical of international law. Therefore, the basis of being bound by a norm of international law is the will and consent of states (or other subjects of international law), and the basis of their application is a formal source of law in the form of an agreement, custom, general prin-

⁵ *Ibidem*, “Their elucubrations may be persuasive, but not authoritative.”

⁶ *West Rand Central Gold Mining Company, Ltd. v. The King* [1905] 2 K.B. 391. K.J. Hynning, *Sources of International Law*, 34 Chi.-Kent. L. Rev. 116 (1956), available at: <http://scholarship.kentlaw.iit.edu/cklawreview/vol34/iss2/2>.

⁷ M. Lachs, *Teachings and Teaching of International Law*, (1976) 151 RdC, pp. 161-252.

⁸ *Oppenheim’s International Law* (9th edition), edited by Sir Robert Jennings QC, Sir Arthur Watts KCMG QC, Oxford 2008.

ciple, unilateral act, or a law-making resolution by an international organization. An important law-making factor is a substantive source, namely, the will of states, based, for instance, on certain common values, regulatory needs, political treaties, or ultimately derived from the views of international law scholars, especially when these views remain unanimous and uniform. Therefore, doctrine is unquestionably a significant law-making factor and a weighty element of the systemic understanding of international law, remaining an inspiring, indicating, documenting, evidential, persuasive, commenting, and interpreting element, but not directly a law-making one.

2. The place and significance of doctrine in light of Article 38 of the ICJ Statute

Article 38 of the ICJ Statute is traditionally and unanimously interpreted as a tool defining the function of the Court and an enumeration of sources of international law. In reference to the latter meaning, the imperfectness and incompleteness of the formula of Article 38 is obvious due to the lack of literally enumerated applicable sources of international law, other than the ones contained therein, such as resolutions by international organizations or unilateral acts. As for the issue of the functions of the court, the wording included in the quoted provision is rather clear (although it is subject to doctrinal analysis), meaning that the task of this court is to resolve disputes on the basis of international law. Hence the conclusion that Article 38, although discussed and criticized, nevertheless serves as a point of departure for a discussion on interpretation and application of international law with regard to the judicial functions of the International Court of Justice.

In the context of the wording of Article 38(1)(d), it is worth pointing out that it mentions judicature and doctrine in the same breath⁹. This peculiar alignment of the power (authority) of case-law and scholarship prompts commentators to pose questions about the reason why scholarship has been elevated to such a high level, and about the extent of awareness in this formation of role of both subsidiary means of determination of legal norms. It seems that certain explanations are provided by the preparatory work for the Statute.

The draft presented by the Advisory Committee of Jurists established by the League of Nations, as reported by chairman Baron Descamps, the original wording of Article 38 (numbered as Article 35) stated that, firstly, a judge would apply the rules mentioned therein in an established order (based on a sequence), and, secondly, he would rely on in-

⁹ A. Z. Borda, *A Formal Approach to Article 38(1) (d) of the ICJ Statute from the Perspective of the International Criminal Courts and Tribunals*, EJIL (2013), vol. 24 No. 2, pp. 649-661 and the study quoted therein: R. Jenninigs, *The Judiciary, International and National, and the Development of International Law*, ICLQ (1996), vol. 45, No. 1.

ternational case-law as a means of application and development of law¹⁰. Scholarship was not mentioned at all. However, the need to take account “simultaneously of the teachings by writers whose views have the authority (gravity)” was emphasized during further works¹¹. Yet determination of whose views would have such a nature is general enough that it paves the way for considerations on who can be deemed to be a proper authority and why. Neither the Statute nor the preparatory work elaborates on the meaning of the phrase “most qualified”¹². However, taking account of the internal orientation, typical of professional environments or occupational groups, concerning the qualifications of colleagues working in the same field, indicating who is bestowed with respect, esteem and authority based on their knowledge and skills, does not seem to be a difficult task. Therefore, it seems rather redundant to specify the meaning of the phrase “most qualified jurist” at the level of a legal act.

On the other hand, an important issue is to determine what the actual intent was of authors of the Statute as regards qualification of doctrine as a source of law. Interesting research materials are provided by the preparatory work, reflecting the dispute concerning the role of scholarship. It implies there were several versions of item d of Article 38(1). The final version was adopted as a sign of compromise between the views of Descamps, Root, Lord Philimore, Ricci-Bussati, and de Lapradell. As a point of departure, Descamps saw doctrine as a *sui generis* factor enabling avoidance of a *non liquet* situation in case of lack of general principles, or if such principles were unrelated to the dispute being heard. However, this version was too “loose” to be accepted. Therefore, there were attempts to define the meaning of doctrine as a tool useful in the application and development of law. Such formulae, however, were not precise enough. Discussions were thus held concerning treatment of scholarship as a subsidiary source, simultaneously limiting its extent to “widely recognized authors.” However, it seems that the breakthrough and most significant part of the discussion was the argument raised by Ricci-Busatti, of whether states are able to accept rules derived from doctrine rather than resulting from their own will. In the context of the voluntarist theory of international law and the principle of sovereignty of states, this issue is indeed justified and understandable. Following suit, it was stressed that “doctrine and jurisprudence no doubt do not create law; but they assist in determining rules that exist”¹³. This was not far from adopting the final version, according to which the ICJ should take account of “teachings of the

¹⁰ M. Fitzmaurice, *History of Article 38 of the Statute of the International Court of Justice*, Queen Mary University of London, School of Law Legal Studies Research Paper No. 232/2016, pp. 1-31.

¹¹ M. Peil, *Scholarly Writings as a Source of Law: A Survey of the Use of Doctrine by the International Court of Justice*, “Cambridge Journal of International and Comparative Law” (2012), vol. 1(3), p. 138.

¹² *Ibidem*.

¹³ *Ibidem*, pp. 138-140.

most qualified publicists of the various nations in the area of international law, as subsidiary means for the determination of rules of law.”

The literature referencing Article 38 of the ICJ Statute also features a thread concerning a peculiar intent of the authors of the draft of this document. Namely, it is a kind of tribute to the role of scholarly opinions in the process of formation of the law of nations in the past, especially that for centuries it had been based on customary law, intrinsically quite difficult to clearly identify and interpret. This is why the function of determination, classification, explanation and systematization of international law, including extraction of its essence through ordering of the corpus of judicial decisions, is hard to overestimate¹⁴.

Although Article 38 is indeed subject to a lively and still relevant discussion in the doctrine¹⁵, no one can deny that it can and should be interpreted as a peculiar centre, middle, main point, midpoint between mechanical application of rules of law and the threat of “judiciary legislation”¹⁶. Following such a statement, one should point out its significant advantage, *i. e.* openness to the process of thinking, deduction, interpretation made by judges, without neglecting the aspect of overzealous, unordered, or haphazard interpretation of international law, performed by a human mind which is imperfect by definition. However, it should be simultaneously pointed out that the latter mechanism is secured, at least to a certain extent, by the structure of the ICJ as a collegial body making decisions by a majority vote, which should guarantee preservation of rules of law, objectivity, reason, reliability, a high level of knowledge of international law, as well as orderly thinking and decision-making.

As a result of adoption of a solution foreseeing a judge including both case-law and doctrine during settlement of a dispute – both forms serving as subsidiary means for determination of a norm of international law – account was taken, at least to a certain extent, of the significance of these two inspiring substantive sources of international law, without making a serious distinction between them, especially that international judges and international law scholars are often, in practice, the same people.

It is also worth emphasizing the significance of Article 38 for the practice of international law, since the authority of this provision translates directly to the position of the sources of law it mentions. In its beginnings, the article was not designed nor perceived as an authoritative enumeration of sources. However, over time and, above all, through

¹⁴ M. Sourang, *Jurisprudence and Teachings*, [in:] M. Bedjaoui (ed.) *International Law: Achievements and Prospects*, Dordrecht/Boston/London 1991, pp. 286-287.

¹⁵ See e.g. H. C. Gutteridge, *The Meaning and Scope of Article 38 (1) (c) of the Statute of the International Court of Justice*, Transactions of the Grotius Society, vol. 38, Problems of Public and Private International Law, Transactions for the Year 1952 (1952), pp. 125-134; M. Fitzmaurice, *op. cit.*, pp. 1-31.

¹⁶ A. Pellet, *op. cit.*, p. 680.

inclusion of the ICJ Statute to the United Nations Charter, it gained greater significance than just a 'practical catalogue'. Certainly, Article 38 should be interpreted as a point of reference with the essential authority in the process of identifying sources of international law. Therefore, in spite of all deficiencies, shortcomings or uncertainties of Article 38, as an incomplete and imperfect catalogue of sources, especially in the context of evolution of international law, it is important to conclude that since its very beginning it has been intended to introduce order into the system of international law¹⁷.

3. Opinions of scholars and their impact on the shaping of law in the views of international law scholarship

a. The subsidiarity of doctrine

Despite reaching a compromise, or maybe precisely because of it, the wording of item d of Article 38(1) of the ICJ Statute is subject to deliberations in the doctrine and of judges themselves. A remark formulated by Manley Hudson, a judge of the Permanent Court of International Justice, seems to be interesting. He points out that the meaning of the word 'subsidiary' (*auxiliary* in the French version, which is authentic on par with the English one) is not clear, since it may lead to a deduction according to which subsidiarity means inferiority towards other sources mentioned in items a-c, *i. e.* a possibility to only reference doctrine or case-law when it is not possible to identify sufficient guidance in conventions, customs and general principles of law. This may also give rise to deduction implying (in reference to the French-language version) that subsidiarity should be construed as indication that the confirmation of rules whose existence has been stated may result from reference to case-law or doctrine¹⁸. However, the final conclusion in Hudson's deliberations conforms with the direction assumed during the preparatory works, *i.e.* with the concept of doctrine and case-law as materials facilitating the search for the rules to be applied, rather than as the rules themselves.

The subsidiary role of doctrine has been emphasized very clearly by Judge Professor Manfred Lachs in The Hague Lectures, stating that even if he invoked his heroes among scholars, he could not conclude that these people create the law. Scholars are not legislators, they do not create the law in international relations. The importance of their opinions is limited to a subsidiary role in determination of the rules of law, which is the formula adopted in Article 38¹⁹. Another well-known judge of the ICJ and simultaneously an au-

¹⁷ M. Fitzmaurice, *op. cit.*

¹⁸ M. Hudson, *The Permanent Court of International Justice 1920-1942, 1943*, p. 612. Quotation from: M. Peil, *op. cit.*, p. 141.

¹⁹ M. Lachs, (1976/III) 151 Hague Recueil 161, p. 169. Quotation from: M. Peil, *op. cit.*, p. 141.

thor of studies on the international judiciary, Professor Shabtai Rosenne, made a similar statement. He stressed that neither doctrine nor case-law is positive international law, as it is neither a product (effect) of direct nor indirect action of states. Therefore, doctrine may only serve determination of legal norms, rather than creation thereof²⁰.

A contemporary scholar of international law, Professor Jan Klabbers, only points out a certain kind of hierarchy among them, emphasizing the subsidiary nature of judicature and doctrine without discussing the significance of legal scholarship as a source of law at all²¹.

The issue of subsidiarity of doctrine and judicature is perceived by authors from different perspectives. Some simply claim that both sources are of a subsidiary nature, without going into any possible details. Some scholars, however, pay attention to certain intricacies. For instance, Prof. Julian Makowski speaks of both sources as ancillary ones, but simultaneously notices how strict the relation between case-law and international custom is, indicating that judicature is a part of the formation and a form of expression of custom, and the activity of the PCIJ is most significant in this regard, since, in view of the permanent nature and breadth of rules on which the Statute based its competence, it was particularly predisposed to play the role of an ancillary norm-making body. To substantiate such a view, the cited author explains that “even in the internal practice, at highly developed legal systems, a judge cannot evade creative activity in many cases. The application of law itself, beside decisions on applicability of a general norm to a specific case, always implies a certain creative moment”²². Similarly, referencing national law as a background for his deliberations, he emphasizes the role of scholarship, although not as strongly as in the strict relation between judicature and custom as referenced above. Excluding even the obvious example of Roman law, he also invokes the gravity of invoking of scholarly views in England or, in the international perspective, before arbitration tribunals or the PCIJ. The summary he draws in the form of a conclusion is based on an *a fortiori* inference: “If taking account of doctrine is acceptable in such a perfect legal system as internal law, it is *a fortiori* not just advisable but outright necessary in such an imperfect legal system of nations”²³. It is hard to deny that the assumed concept is logical, but such automatic referencing of the output of national law is not justified in itself. Admittedly, international law takes account, *inter alia*, of the arrangements of internal legal solutions of states regarding, for instance, human rights, but its dissimilarity is so distinct that a simple analogy may not be entirely accurate. Therefore, one

²⁰ S. Rosenne, *Practice and Methods of International Law*, Oceana 1984, p. 119. Quotation from: M. Peil, *op. cit.*, p. 141.

²¹ J. Klabbers, *International Law*, Cambridge 2013, p. 25.

²² J. Makowski, *Podręcznik prawa międzynarodowego*, Warszawa 1948, pp. 12-13.

²³ *Ibidem*.

should rather confine oneself to the statement that references to doctrine are a natural part of the process of creation and interpretation of law, in the sense of focusing of any and all factors which may affect the shape of a norm, but do not have a decisive or law-making nature in the strict sense of the word. The attribute and competence of creation of a binding norm of international law is reserved for states, either acting individually or associated in international organizations.

The issue of importance of the opinion of legal scholars has also been raised in the popular English-language publication for students, *Public International Law. Revision Workbook*²⁴. According to the views presented therein, the role of jurists in international law is clearer than in national law, and this fact is reflected in Article 38, where views of respected international law experts constitute a subsidiary source of law. In the context of the aforementioned views regarding the weight of the authority of scholars in shaping national law, the shift of the point of gravity towards international law seems quite surprising. However, the authors of the quoted study reference leading international law theorists, including Grotius, de Vattel, Oppenheim, and Lauterpacht, pointing out their significant and profound influence on the development of international law, and even describing them with the label “institutional writers”, which is explained by the adoption of a view that scholarly opinions actually enjoy a recognized position in international law. In this spirit, they even conclude that, in view of their authority, the invoked persons evade simple classification indicating their scholarly output as a subsidiary source of law. Simultaneously, however, taking account of contemporary practice, the subjective nature of opinions of recognized international law scholars, and judges’ reluctance to reference the doctrine’s views as a source of law resulting from this characteristic were clearly emphasized. In the modern understanding, scholarship is therefore regarded more as evidence of practice of states, e.g. in the custom-shaping process, rather than a self-contained source of law.

In the Oxford Encyclopedia of International Law, beside an indication that doctrine is a subsidiary source of law, the explanations for the entry *Subsidiary sources of law* are supported by a meaningful quote from a study on sources of law by d’Aspremont. It implies that scholars, despite not practicing law, unquestionably participate in the final shaping of the formal criteria which are further applied by international community members creating and applying the law. Thus, the function of scholars is to play a role consisting in organizing, systematizing, and indicating the distinction between what is law and what is not²⁵. The entry *Opinions of respected jurists* shows this function of doctrine even more

²⁴ K. Vickneswaren (ed.), *Public International Law. Revision Workbook*, 2nd ed., London 2002, p. 20.

²⁵ H. Thirlway, *The Subsidiary Sources, The Sources of International Law*, Oxford Public International Law, Oxford 2014, accessed on 18 January 2016.

distinctly and emphatically: “International law owes its structure and explanation of its rules precisely to writers, and not only to the past ones. In this meaning, the opinions of respected jurists are essential for the system of international law”²⁶.

In the context of the statement above, it is interesting to note that the first ordered enumeration of sources of international law was, in fact, proposed by the scholarship. In 1863, *Wheaton* enumerated the following as such sources: views of writers enjoying authority, agreements, norms issued by individual states, decisions of international courts, written official and law opinions, the history of wars, negotiations, and peace treaties²⁷. This enumeration largely overlaps with a listing of sources included in Article 38 of the ICJ Statute. Admittedly, norms issued by individual states as well as historical aspects of the law of war and peace were left outside the original catalogue, but this solution logically results from the evolution and the essence of international law as a system created by will of states and on a common international forum, rather than within the framework of national solutions, and based on the consent of states for observation of specific norms, rather than on a precedent or on views expressed at the stage of negotiations. The latter may only support and supplement the process of interpretation of norms accepted by subjects of international law, being repeatedly of key importance for determination of the actual intent of parties and the extent of respect for the principle of good faith or *pacta sunt servanda*. States have indeed given it a distinct form in the provisions of the 1969 Vienna Convention on the Law of Treaties, indicating the described elements as one of the significant aspects of the process of interpretation of commitments assumed by way of agreements.

With all openness to the profound importance of doctrine as a source of law, and even in the face of the argument about its gravity for shaping not just individual norms but the system of international law as a whole, it would seem honest and accurate to recognize the subsidiary nature of scholarship, emphasizing that, depending on the strength of the authority of a scholar or an entire scientific body, the influence of their opinions may be either stronger or less distinct. Additionally, in a situation when the opinions of doctrine overlap with judicial reasoning and decisions, the significance of doctrine is on the rise. However, it does not transcend the subsidiary importance attributed to it in Article 38 of the ICJ Statute. If this were the case, it would be necessary to deny the voluntarist theory of international law, predominant in scholarship, and to violate the resulting consequence according to which the basis of obligation of international law is the will of states.

²⁶ M. Wood, *Teachings of the Most Highly Qualified Publicists (Art. 38 (1) ICJ Statute)*, Oxford Public International Law, Oxford 2014, accessed on 18 January 2016.

²⁷ Quotation from: L. Ehrlich, *Prawo międzynarodowe*, 4th edition, Warszawa 1958, p. 64.

Therefore, one can imply from the referenced stances that there is agreement concerning the subsidiary nature of doctrine as a source of international law in such a perspective that it can be drawn upon in order to determine the existence of a norm of international law and the meaning thereof. On the other hand, one may discuss the problem of potential subordination of doctrine to other sources in the hierarchical sense. On the other hand, it should be simultaneously assumed that doubts are raised concerning the meaning of the phrase “most qualified publicists.” The essence of this uncertainty is well reflected, for instance, by Rosenne who points out that granting of such an attribute is based on the individual potential of a given author, verified on the basis of skills, knowledge, and recognition²⁸.

b. Test of applicability of a norm

In the context of the subject matter of sources of law, it is worth referencing an important remark by Prof. Ehrlich, according to which international law is a positive law, which means that it consists of norms that can be ascertained using objective criteria; namely, the existence of these norms may be proven through study of sources of international law²⁹. Although literature may also exhibit different opinions, or at least a discussion on the functioning of two theories in international law: positive law and simultaneously natural law, the adoption, after the quoted author, of the positivist concept with regard to the subject matter of sources surely facilitates their identification and organization.

It would be good to determine the nature of a given norm using clear criteria. Therefore, Ehrlich rightly states that “in order to determine whether a given norm is a legal norm, one should determine a test that would allow practical distinction between legal and other norms”³⁰. He is not isolated in this view, invoking a similar stance of both doctrine (A.V. Dicey, G. Jellinek) and judicature (a 1929 judgment of the PCIJ concerning Brazilian loans). A proper test to determine whether a given norm is a norm of international law is to verify whether it is used as a norm of international law by international courts³¹. Yet in further discussions, Ehrlich allows invocations of doctrine, albeit only in the subsidiary approach. Namely, in the absence of such bases of reasoning as, for instance, an international agreement, determination whether a given norm is a norm of international law may consist in asking the question of whether in a given case an international court would probably deem it to be a norm of international law, and the basis of reasoning in this direction may often be found, *inter alia*, in studies by outstanding scholars³².

²⁸ S. Rosenne, *op. cit.*, pp. 119-142

²⁹ L. Ehrlich, *op. cit.*, p. 10.

³⁰ *Ibidem*, p. 9.

³¹ *Ibidem*, pp. 9-10.

³² *Ibidem*.

In the catalogue of norms of international law, Ehrlich distinguishes norms derived from the basic principles of international law through precedents and through doctrine. In the latter case, he explains that he means views of “scholars enjoying such respect that their deductions may be practically assumed as a sufficient base of legal resolution of an issue unable to be resolved on the basis of the hitherto recognized norms”³³. Although he only mentions several authors in the category of sufficiently respected scholars, such as Grotius, Vattel, Hall, Oppenheim, and only provided that the given view is relevant and has remained in practice³⁴.

A significant conclusion for the key considerations of this study is one formulated in the textbook by Prof. Ehrlich, according to which no principles of taking account of views of authors have been established in the international practice so far³⁵. Hence the reflection that, as a rule, Ehrlich accepts the systematics of sources as adopted in the ICJ Statute, with the reservation that it requires clarification, such as through indication of clear criteria to evaluate which and whose views may be counted among the sources set out in par. 1 item d. There is no such formal classification, and it seems that one can hardly be expected. As has already been emphasized, the authority of scholars is based on general acceptance of their competencies, and gives rise to quite few serious doubts.

An interesting conclusion in the context of legal positivism and doctrine as a source of law is that the scholars’ findings promote formation of positive law, in the sense of support to this process through preparatory analyses, elaborations, and systematizing works. The influence of doctrine is very clear in such fields or issues of international law as military law, territorial sovereignty, freedom of navigation, freedom of seas, diplomatic and consular immunity, theory of polar zones, and theory of the contiguous zone³⁶.

In the discussions by Professor Manfred Lachs in his meaningfully-titled study “On the Science of International Law”, we may observe far-reaching acceptance of the importance of the science of law in legal practice. Admittedly, Lachs perfidiously quotes the words of a judge investigating a disputed case before the Admiralty Court, stating that “Some pedant locked in his study dictates the law of nations; everyone quotes him but no one cares about it (...) so if doctors argue, who is to decide?”³⁷; however, he simultaneously appends to this thought a comment that challenging the importance of doctrine results from the original sin consisting in assigning an excessive role to it. Through such a reflection he builds a view that seems to be natural and close to the truth. Namely, he ascertains that, in fact, this is not about dictating the law by teachers, but rather about

³³ *Ibidem*, p. 14.

³⁴ *Ibidem*, p. 29.

³⁵ *Ibidem*, p. 30.

³⁶ M. Sourang, *op. cit.*, p. 284.

³⁷ Quotation from: M. Lachs, *Rzecz o nauce prawa międzynarodowego*, Wrocław 1986, p. 205.

their influence on their students who, holding responsible and honourable functions or offices in their professional life, such as judges, members of government, and officials of international organizations, follow the knowledge, skills, and ideas conveyed to them by teachers/scholars. Thus, the indirect influence of the views of scholars on the practice of creating and applying of law is put into practice³⁸. Therefore, it is important to pay attention to the authority of doctrine.

c. The authority of doctrine in a legal system

The issue of the authority of doctrine in the process of shaping international law, including sources thereof, may be examined from at least two viewpoints. Above all, as a certain entirety of views formed by leading authors, but also as individual scholarly opinions initiating the development of so-called schools of international law. In the literature we may come across examples of references to such schools. For instance, the Scots international jurist Iain Scobbie emphasized the particular position of Hersch Lauterpacht. He even claimed that “For British international jurists, Hersch Lauterpacht is still predominant. His works are a model, an intellectual paradigm summarizing the approach to international law”³⁹. Moreover, the quoted author indicated that his lecturer at Cambridge was Iain McGibbon – a student of Lauterpacht, whose lectures reveal perceptible admiration of his master as a kind of *sui generis* manifesto. Sir Hersch Lauterpacht’s thought was also continued by his son Elihu Lauterpacht⁴⁰. Therefore, one may encounter a certain phenomenon of formation of a specific scholarly trend around a given authority. If a given person is able to convince a significant number of followers to their views, such an occurrence evidences the influence of scholarship on the development of the theory of international law. In respect of Sir Hersch Lauterpacht, there can be little doubt that not only he has developed a group of followers of his views, but also, as an ICJ judge, he used his knowledge and views in practice. Moreover, continuation and development of the thought of his predecessors and scholarly colleagues, especially of Kelsen, can be inferred from his writings⁴¹, which also constitutes a sort of confirmation of the continuity of scholarship and its role in organizing systemic issues.

In connection with the search for the authority of legal scholarship, one may also invoke the view of Professors Remigiusz Bierzanek and Janusz Symonides, who stated in their international law textbook that the ICJ Statute “aptly describes the role of judicature and doctrine as subsidiary means for determination of legal provisions”⁴². Sub-

³⁸ M. Lachs, *Rzecz o nauce...*, p. 206.

³⁹ I.G.M. Scobbie, *The Theorist as Judge: Hersch Lauterpacht’s Concept of the International Judicial Function*, EJIL (1997), vol. 2, pp. 264-298.

⁴⁰ *Ibidem*.

⁴¹ *Ibidem*, p. 265.

⁴² R. Bierzanek, J. Symonides, *Prawo międzynarodowe publiczne*, 2nd ed., Warszawa 1992, p. 106.

stantiating the validity of the assumed formula, they claimed that although scholarly authority may serve as a guarantee of proper interpretation of a provision, it has no competence to imbue a rule of proceeding with the nature of a legal norm. Such a possibility, as pointed out by the quoted authors, found application historically at a certain point of development of Roman law. By emperor's decree, courts were obliged to adjudicate in accordance with unanimous opinion of a group of jurists having the *ius publice respondendi*⁴³. This certain analogy between international law and Roman law is also emphasized by other authors, indicating that there is probably no other legal system (except international law – *author's note*) where scholars have such a significant impact on the shaping of the contents of rules or even principles of law⁴⁴. However, it is still and consistently “contents” which would confirm the potential substantive nature of doctrine as a source and exclude the norm-making (decisive) one.

The text by Gaius implies that legal scholars in the 2nd century AD directly participated in the law-making process: “Responses of legal scholars are views and opinions of those who have been allowed to create laws. If the views of all of them are unanimous, this unanimous view achieves the power of law. If they do not agree, the judge is allowed to follow any view he wishes. This is stated in the rescript of divine Hadrian”⁴⁵. However, it seems that the essence of such a solution is the reflection concerning the results of this law-making method. In the textbook by Professor Kolańczyk, a specialist in Roman law, he concludes that “under the influence of the jurists’ activity, Roman law quickly became a ‘scholarly law’, rich in content, precise in its terminology and its conceptual structures”⁴⁶. These characteristics determine the unquestionable value of the significant contribution of scholars to the law-making process. Who else besides theoretically and substantively prepared scholars would develop legal norms? Therefore, the influence of legal scholarship on the shape and reality of law, particularly in its systemic approach, to preserve the coherence and logic of the assumed legal solutions, seems natural.

Here, referencing the position of views of scholars in the Roman legal order, one should point out that an interesting approach to doctrine is present in the Swiss Civil

⁴³ *Ibidem*, p. 105. *Ius publice respondendi* – a right, privilege granted to certain Roman lawyers by the emperor. It was granted for the first time by Augustus. This right, according to the *ex aequo et bono* („according to what is fair and good”) principle, allowed jurists to correct severe and unjust rules of law. Jurists gave opinions „under the emperor’s authority” (*ex auctoritate principii*). These opinions were known as *responsa prudentium* („responses by scholars”). This led to development of a category of jurists with an authority officially recognized by the emperor. These „authorized” jurists determinedly impacted the direction of judicature, and their consensus – according to the rescript of Hadrian – gained a power of law; in case of difference of opinions, opting for a view of any of these authorities was left to the court’s discretion.

⁴⁴ R. Jennings, *International Lawyers and the Progressive Development of International Law*, [in:] J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century*, The Hague, London, Boston 1996, p. 413.

⁴⁵ K. Kolańczyk, *Prawo rzymskie*, Warszawa 2001, pp. 48-49.

⁴⁶ *Ibidem*.

Code. Article 1(3) in conjunction with Article 1(2) of this legal act stipulates that “in the absence of a provision, the court shall decide in accordance with customary law and, in the absence of customary law, in accordance the rule that it would make as a legislator. In doing so, the court shall follow the established doctrine and judicature”⁴⁷. Such approach to the competencies of a judge is a corollary of ideas assumed by the so-called Free Law School. The followers of the Free Law School, positing the existence of significant decision-making freedom of bodies applying the law (such as courts), recommended the open and conscious exercise of this freedom, or even exceeding the boundaries of the applicable law if it would result in making fair and just decisions. The element of equity is typical of international law, although it does not have the nature of a formal source in this legal system. There is even a serious discussion taking place in the doctrine of international law concerning the significance and impact of judicial decisions on the shape of it⁴⁸. Indeed, a process known as “judge law-making” can be observed, and it is surely much more visible and clear than the influence of scholarship. However, if one consistently remembers the double competence of most international judges hailing from the scholarly environment, one may easily observe that, as the law-making nature of the judicature is increasing, the penetration of scholarly opinions into the process of formation and shaping of law is also taking place in parallel.

The interpenetration of the functions of judge and scholar is actually discussed by many writers. Anthony Aust, for instance, in his 2005 international law textbook, describes doctrine as a subsidiary source of law. He characterizes its significance as admittedly “influential”, but rather in the formative days of international law than today⁴⁹. Although it is hard to ignore that this area exhibits a dynamic quality, which means it is constantly undergoing development, and consequently formation (e.g. through the process of fragmentation or response to the development of technology, biology, medicine). Ultimately, however, if he attributes any practical importance to legal scholarship at all, he does it in the context of its influence on judges⁵⁰.

M.D. Evans says that the distinction made between the sources mentioned in items a-c of Article 38(1) of the ICJ Statute and those included in item d is clear. Judicature and doctrine as subsidiary sources serve determination of a norm resulting from a treaty, cus-

⁴⁷ Text available on: <https://www.admin.ch/opc/en/classified-compilation/19070042/201801010000/210.pdf>, access: 25.12.2017

⁴⁸ See e.g. N. Boschiero, T. Scovazzi, C. Pitea, Ch. Ragni (ed.), *International Courts and the Development of International Law. Essays in Honour of Tulio Treves*, The Hague 2013; G.I. Hernandez, *The International Court of Justice and the Judicial Function*, Oxford 2014; R.A. Posner, *How Judges Think*, Harvard 2010; I. Venzke, *How Interpretation Makes International Law. On Semantic Change and Normative Twists*, Oxford 2012.

⁴⁹ A. Aust, *Handbook of International Law*, Cambridge 2005, p. 10.

⁵⁰ *Ibidem*.

tom, or general principles. This implies that the first three sources mentioned in Article 38 are formal sources, and the fourth one is rather a material one (but emphasizing that it has a special degree of authority)⁵¹. As do other writers, Evans also supports the view that the significance of doctrine was much greater at the onset of development of international law. Among those eminent scholars, he traditionally mentions de Vittoria, de Vattel, Grotius, and Bynkershoek. He also points out that the cited theorists based their views more on natural law rather than the practice of states or judicial decisions. However, with regard to modern times, he presents general principles of law as a source and expression of natural law to a much greater extent than scholarly or judicial opinions. The most meaningful part of the argument presented in the quoted textbook is the statement that judges and arbitrators are often outstanding scholars and practitioners, which blurs the distinction between judicial precedence and teachings⁵².

Ian Brownlie, as regards judicature, admits that doctrine as a source “only constitutes evidence of the law” rather than law as such⁵³. However, this does not minimise the significant formative influence of such authors as Gidel on certain areas of international law, such as the law of the sea. This is not an isolated opinion, as it has also been expressed by such scholars as Malcolm Shaw. Moreover, Brownlie observes regularity in the practice of arbitration and national courts which, not being characterized by excessive knowledge of international law, eagerly reach for the views of scholarship⁵⁴. As analogies to doctrine, Brownlie mentions works performed by collective bodies responsible for organization, codification, and development of norms of international law (such as the International Law Commission, the Institute of International Law, Harvard Research Drafts)⁵⁵.

Whereas decisions of international courts are of greater persuasive importance, the opinions of writers are important in describing and analyzing the norms being created. In particular, they are useful in distinguishing and identifying general principles of law⁵⁶. Unquestionably, the historical impact of doctrine on the development of international law cannot be overstated. Particularly because the output of judicature is not very abundant, but also because states have been quite reluctant to subject themselves to the jurisdiction of the PCIJ or, currently, the ICJ.

⁵¹ M.D. Evans, *International Law*, 2nd ed., Oxford 2006, p. 129.

⁵² *Ibidem*.

⁵³ I. Brownlie, *op. cit.*, 23-24.

⁵⁴ One should agree with this opinion, confirmed e.g. by rulings of the Supreme Court of Republic of Poland, where the international element is reflected, at best, in referencing of international conventions with indication of a specific article, but without going into the essence of its contents. See e.g. the Decision of the Supreme Court of 10 April 2015, III KK 14/15; Decision of the Supreme Court of 27 October 2005, III CK 155/05

⁵⁵ I. Brownlie, *op. cit.*, pp.23-24.

⁵⁶ G.D. Triggs, *International Law Contemporary Principles and Practices*, LexisNexis Butterworths 2006, p. 93.

From the viewpoint of structure and form of a source of law, doctrine is sometimes criticized as overly diverse, heterogeneous, and uncertain. For example, in the Congo vs. Belgium case (par. 44), the judges argued that the views of scholarship are mixed. Therefore, admitting that opinions of outstanding international law experts are important and stimulating, they nevertheless cannot prove the existence of a legal norm in their own right, without reference to other sources of law.

An argument against the law-making force of doctrine is the relation between scholarship and politics. In the 1925 case of Great Britain vs. Spain, the PCIJ adopted the stance that “A large majority of writers point out a clear trend to limit the responsibility of states. However, their views are often politically inspired and constitute a natural reaction against unjustified intervention in matters of some nations”⁵⁷.

The view of G.D. Triggs seems interesting, implying that the lack of quotations of scholarly views in decisions of international courts is caused by an inability to reference them in the final decision of a court⁵⁸. Such a thesis implies a formalist approach to sources of international law, requiring a strict definition of what is a source of law and what is not, through naming these sources and providing them with an attribute of a source in the sense of a form which could be referenced by a judge. Simultaneously, such an approach does not deny the significance of doctrine as a factor influencing the formation of legal norms. Therefore, the knowledge of views of leading international lawyers and opinions of both national and international courts is an important part of the practice of an international judge, as well as in the process of shaping norms of international law.

If we take the view that “Sources of law are all facts or events leading to creation, modification and invalidation of binding legal norms” as a point of departure, the law-making role of doctrine will be unquestionable in this broad approach (especially in its substantive dimension)⁵⁹. However, at the same time, a constant issue raised in the subject literature in the context of creation and applicability of law is the undisputed role of consent of a state for being bound with a given norm.

If we were to treat judicature and doctrine as equal sources of law, in the sense of subsidiary means for determination of law, then, to quote G. Schwarzenberger, who claims that “The ICJ is a law-determining rather than law-making agency”, we should attribute similar importance to doctrine⁶⁰. Thus we will recognize that the function of legal scholarship is indeed of a subsidiary nature within the meaning of Article 38 of the

⁵⁷ *Ibidem*, p. 94.

⁵⁸ *Ibidem*, p. 95.

⁵⁹ S. Besson, *Sources of International Law* [in:] S. Besson, J. Tasioulas, *The Philosophy of International Law*, Oxford 2010, p. 169.

⁶⁰ G. Schwarzenberger, *International Law*, 3rd ed, London 1957, p. 30.

ICJ Statute, but simultaneously that judicature does not exceed the form of a subsidiary source of law either.

In the subject literature one may encounter studies that directly indicate the authority of doctrine. For instance, Oscar Schachter, law professor, member of the Institute of International Law, editor of the *American Journal of International Law* and a former president of the American Society of International Law, proposed a distinct thesis in his article *The Invisible College of International Lawyers*, that the community of international lawyers dispersed around the world and performing different professions and different functions, constitutes a kind of an “invisible college” dedicated to common intellectual work. This process of communication and cooperation between eminent experts on the subject is evidenced by journals and annuals dedicated to international law, as well as participation of professors and students in numerous conferences, seminars, and colloquia in different parts of the world. Moreover, he also emphasizes the participation of these lawyers in official bodies and institutions, which facilitates the spread of this peculiar invisible college into the sphere of governments and the work of non-governmental organizations⁶¹. Following the thinking of de Visscher, Schachter rightly observes that international law is not a scholarly discipline in the same sense as physics or chemistry, since it is based not only on objective findings but, above all, on values drawn from national interests and attitudes deeply rooted in social and cultural differences. However, a certain canon of arrangements common for all states may be identified among these values: *pacta sunt servanda*, *bona fide*, state sovereignty, equality of rights, territorial integrity, prohibition of intervention in internal affairs, and obligation of peaceful settlement of disputes. These general and fundamental principles, repeated and expressly emphasized in the Charter of the United Nations, constitute the foundations of the modern international community. Thus, through reference to common and universally accepted principles, the concept of the invisible college implicitly assumes that international law, in spite of its wide material scope, is a uniform discipline. This assumption seems to be accepted by the community of international law experts, as evidenced by the will and capability of most members of this intellectual community to address each other and conduct dialogue⁶². In the thus-assumed systemic understanding of international law, the role of scholarship is significant and true. Opinions, analyses, conclusions of individual scholars and such bodies as the International Law Commission, the International Law Association, and the Institute of International Law, significantly affect the shape of the law of treaties and customary law, as well as understanding and application of general principles

⁶¹ O. Schachter, *The Invisible College of International Lawyers*, “Northwestern University Law Review” (1977), vol. 72, pp. 217-226.

⁶² *Ibidem*, p. 221.

of law. Therefore, one should fully agree with the conclusion of the author of the concept of invisible college of international lawyers that, since state governments have a rather ambivalent attitude to the issue of “legal conscience” as an important law-making element, the role played by the unofficial community of jurists in providing a specific meaning to this concept may also be the noblest function of this invisible college.

The concept of the “invisible college” found its adherents. In 2013, Santiago Villalpando, under the auspices of the European Society of International Law, published the study *The Invisible College of International Lawyers Forty Years Later*. He elaborated his predecessor’s thesis, taking a bold step forward by formulating a conclusion that the value of the metaphor proposed by Schachter, concerning the existence of the “invisible college of scholars”, exceeds the concept of a professional community of intellectuals, heading towards direct influence on state governments. Therefore, the main message running through Villalpando’s study is the thought that the community of international scholars – experts in international law – is not locked in ivory towers, but exerts a decisive influence on the matters of the world. The image ultimately obtained is highly exciting. These members of an intellectual elite become members of a peculiar community that, coming out from under the shadow of scholarly work, directs international affairs in pursuit of such noble goals as the peace and welfare of mankind⁶³. One should admit that, although this concept has the attributes of a highly exalted and quite immodest view regarding the position of experts on international law in the system of this law, it is nevertheless not unfounded, and brings the prospect, pleasant to the researchers, of recognition of their contribution in the development of the international community and of the canon of rules and norms adopted thereby. It is also worth mentioning that the role of scholarship reveals itself most prominently in how it ensures the coherence, transparency and order of the system of international law as a unified branch of law, in jurisdiction in disputes and in codification.

The impact of the opinion of doctrine has been made very clear in international criminal law. In his 2014 study *Towards a Truly Universal Invisible College of International Criminal Lawyers*, Claus Kreß, referencing the concept of the “invisible college”, proved the strong and clear impact of scholarly views on the development of international law⁶⁴. Beginning from the results of the Nuremberg and Tokyo Trials, proceeding through the Cold War up to modern-day issues of international criminal law, he pointed out the specific intellectual contribution to the development of this branch of law. As

⁶³ S. Villalpando, “*The Invisible College of International Lawyers*” *Forty Years Later*, ESIL Conference Paper Series, vol. 3, no 1, pp. 1-15, available under: <http://ssrn.com/abstract=2363640>, accessed on 1 January 2016.

⁶⁴ C. Kreß, *Towards a Truly Universal Invisible College of International Criminal Lawyers*, Torkel Opsahl Academic EPublisher, Brussels 2014, pp. 1-45.

in other branches of international law, he emphasized the conceptual and clarifying role of the scholarship. He also stressed the impact of the views of eminent lawyers on the systemic understanding of law, emphasizing their advisory or even control functions. In his conclusion, he evaluated the influence of the invisible college of specialist criminal and international lawyers on the formation of international criminal law. As the most important issue, he singled out the fact that true universalization of international criminal law may constitute a significant and necessary step to universal application of the principles of this system. This vision, which had already been the hope of the inter-war pioneers, still remains an important aspiration. Therefore, from these deliberations one can infer the idea that scholarship not only inspires the law-making process, but, which is of key significance in the international community, is the source of the universalization of adopted principles and norms which become universal and uniform; this also significantly reinforces the systemic nature of international law.

It seems that the essence of doctrine in international law is reflected most accurately in the view arrived at by M. Wood, according to which: “The reasoning (argumentation) of particular writers may be convincing and influential in a specific matter, without a need of granting it with the authority of a source of law”⁶⁵. Thus doctrine gains practical meaning as a significant factor in the formation, development, and interpretation of international law, without aspiring to a norm-making role in the strict sense of the word. Therefore, it can definitely be considered a substantive source. It is rather formal by virtue of name and classification in the formula of Article 38 of the ICJ Statute, simultaneously being limited to a source of subsidiary importance in the process of determination of a legal norm. Therefore, the essence of international law scholarship is its profound and significant impact on the formation of legal norms from a supplementary and informal position. Paradoxically, such an approach does not weaken the strength of the influence of doctrine on legal reality. Quite the contrary, it opens up the possibility of unlimited inspiration by the output of scholarship to states and other international actors, but always with the reservation of the ultimate, prevalent and decisive role of the will of these entities in relation to findings of the brightest and most prominent specialists. The function of doctrine, formed and understood as described above, seems optimal, since it is difficult to assume that under conditions of the law-making process typical of the international community, where the position of states is predominant, norms applicable in this system would be dictated by individual – even if most eminent – natural persons. The final conclusion, therefore, is that doctrine, as expressed in the formula and contents of Article 38 of the ICJ Statute, plays a subsidiary role in the process of determining norms of international law, as an inspiring and evaluating, suggesting, determining, confirming or eliminating, sup-

⁶⁵ M. Wood, *op. cit.*

porting, argumenting, convincing element, whereas it has no law-making nature in its own right in the sense of creation of a legal norm with a nature that is binding on subjects of international law. The direct creative force in this matter belongs to subjects of international law, as confirmed by the currently predominant positivist theory, according to which the creation and applicability of a norm is determined by the will of states (or more widely, of the relevant subjects of international law).

d. The significance of doctrine in formation of *de lege ferenda* opinions

The textbook by Professor Wojciech Góralczyk openly states that “judicature and case-law are not sources of international law”⁶⁶. This view is substantiated by the simple and already referenced ascertainment that “judicature and doctrine cannot be regarded as sources of international law since they are not forms of expressing of will of states”⁶⁷. The quoted author, on the other hand, recognizes the subsidiary function of legal scholarship, strongly emphasizing its practical importance and influence on the law-making process, in particular through formulation of *de lege ferenda* opinions. He even strongly emphasises this causative factor of doctrine, invoking the views of his own and his co-authors, Profs. Berezowski and Libera, in stating that: “The creative role of scholarship consists (...) in inspiring and affecting the action of states, and thus, directly, in creation of specific legal norms and development of international law, as well as, furthermore, in facilitation of determination whether a given norm exists, what is its specific content, what is its scope of application and what legal consequences this causes”⁶⁸.

In the latest and most wide-ranging Polish international law textbook by Professors Anna Wyrozumska and Władysław Czapliński, we read that: “The importance of doctrine to the development of international law exceeds the formula of a subsidiary source, especially in cases when the doctrine remains critical towards the existing state of law and formulates *de lege ferenda* conclusions, and, consequently, indirectly affects the shaping of law in certain cases”⁶⁹. Here, the authors’ thinking dovetails with the views of Professor Manfred Lachs, who places a very clear emphasis on the significance of both individual (in the sense of teachers/scholars) and collective (e.g. in the form of the International Law Commission) codifiers who “(...) whenever they convincingly removed doubts concerning norms or practice of their place in the system, they played a very useful role. They reinforced the authority of law and of government

⁶⁶ W. Góralczyk, *Prawo międzynarodowe publiczne w zarysie*, ed. 7, Warszawa 2000, p. 69.

⁶⁷ *Ibidem*.

⁶⁸ C. Berezowski, W. Góralczyk, K. Libera, *Prawo międzynarodowe publiczne*, Warszawa 1970, pp. 22-23. Quotation from: W. Góralczyk, *op. cit.*, p. 70.

⁶⁹ Wł. Czapliński, A. Wyrozumska, *Prawo międzynarodowe publiczne. Zagadnienia systemowe*, 3rd ed., Warszawa 2014, p. 54.

advisors who opposed 'latitude' and 'arbitrariness', which are often tempting and often lead governments astray"⁷⁰.

A sign of the clear impact of the International Law Commission on the application of international law is the simple relation between the composition of this body and the composition of the ICJ. It turns out that a significant number of judges had previously performed duties as members of the Commission. Data from 2000 show that 26 ICJ judges came from the composition of the Commission⁷¹. The significance of the opinions prepared by the Commission is also evidenced by numerous references to these findings in judgments by the ICJ (e.g. the case of the North Sea continental shelf, the *Gabcikovo-Nagymaros* case, the case of South Africa, the case of the Tunisian/Libyan continental shelf)⁷². It is worth stressing that cooperation of both bodies even shows a certain trend. In the first years of its activity, the court had a dominant role in the considerations on issues under its jurisdiction. However, since the *Gabcikovo* case (1997), an upward trend has been noticeable concerning invocation of the works of the Commission as an authority.

Besides emphasizing the role of law in the formation of law for the future, we should also recall the significance of the views of well-known authors, as *Malcolm Shaw* does. He recognizes the authority and influence of Gentilis, Grotius, Pufendorf, Bynkershoek and de Vattel as the highest-ranking authors in the 16th, 17th and 18th century on the formation of international law. At the same time, touching upon a similar thread to the quote from Evans above, he explains that the authority of representatives of doctrine was significant in the period of domination of natural law. In the positive approach to law, among sovereign subjects of international law or states, it had to give way to agreements and customs. Nowadays, Shaw understands the role of doctrine more as stimulating and organizing law-making entities. At the same time, he emphasizes the issue of responsibility of doctrine for the coherence and order of international law, which indeed seems to be hard to overestimate⁷³.

As for the formation of new branches of international law and regulation of issues which have been hitherto reserved for national law, doctrine has a very significant role to play. An example of a branch in which the law-making process is based very clearly on findings and conclusions of scholars is international environmental protection law, including the law of conservation of water resources or the law of protection of so-called environmentally disabled persons (also known less precisely as climate refugees). For

⁷⁰ M. Lachs, *Rzecz o nauce...*, p. 230.

⁷¹ S.M. Schwebel, *The Inter-active Influence of the International Court of Justice and the International Law Commission* [in:] A. Armas Barea et al. (Board of Editors), *Liber Amicorum in Memoriam of Judge Jose Maria Ruda*, Kluwer 2000, p. 480.

⁷² *Ibidem*, pp. 484-488.

⁷³ M.N. Shaw, *International Law*, 4th ed., Cambridge 1997, pp. 88-89.

instance, Professor Karol Wolfke admits that educated naturalists have been the driving force for the idea of environmental protection, but action towards regulation of this protection is, above all, a role for international lawyers⁷⁴. As examples of such initiatives he cites the so-called Helsinki Rules, adopted in 1966 by the International Law Association, or the Madrid Declaration of the Institute of International Law, banning all changes harmful to water. However, what emphasizes the weight of doctrine most profoundly is the view of Uttonas quoted by Wolfke that “the Helsinki Rules are the most precise expression of the international river law”⁷⁵. This sentence expresses the essence and strength of projects or findings by individual scholars and those associated in bodies, consisting in formulation of legal norms and principles in a clear, precise, logical, and coherent manner. These features are often scarce in law created directly by the interested entities.

An unquestionable advantage and strength of doctrine is determination of what may be classified as a consensus of the international community, or the point of departure for determination of a norm binding upon it. In the case of international environmental protection law, and in particular the law of water resources, the contents of the Helsinki Rules, already invoked in the study by Professor Wolfke, are clearly viewed as a foundation for later regulations⁷⁶.

4. References to doctrine in the practice of international courts

In his 2012 study on doctrine as a source of law, Michael Peil made important findings which should be taken into consideration in the context of deliberations regarding the significance of opinions of respected lawyers in the system of sources of international law. As a point of departure, the quoted author observed that the ICJ only invoked the aforementioned opinions in 22 of 139 judgments and advisory opinions (having adopted a methodology under which he had worked on English-language material comprising 112 judgments, 27 advisory opinions, 489 rulings, as well as roughly 1300 declarations, separate opinions and individual opinions issued through 1 May 2012)⁷⁷.

Simultaneously, the author under consideration, seeking the reason for such a low number of references to doctrine, developed certain theses based on views of scholars and international judges. Quoting Waldock in the context of the voluntarist theory of international law, he pointed out that the cause of the low number of references to schol-

⁷⁴ K. Wolfke, *Międzynarodowe prawo ochrony środowiska (tworzenie i egzekwowanie)*, Wrocław 1979, p. 97.

⁷⁵ *Ibidem*, p. 98.

⁷⁶ B.J. Wohlwend, *The Teachings of the Most Highly Qualified Publicists as a Subsidiary Source of International Water Resources*, materials of the conference *Legal Aspects of Sustainable Water Resources Management*, Serbia, 14-18 May 2001.

⁷⁷ M. Peil, *op. cit.*, p. 143 and 147.

arly findings is the fact that the court prefers, if possible, findings coming directly from a state or from courts granted by states with law-determining authority⁷⁸. The second concept is subordination of doctrine to judicature as the preferred subsidiary source. As stated by Jennings and Watts, “with the growth of international judicial activity ... it is natural that reliance on the authority of writers as evidence of international law should tend to diminish”⁷⁹. The third path of reasoning leads to the conclusion that the cause of devaluation of doctrine may be technology, in the sense that direct access to sources is simpler and quicker than to commentary. That said, such reasoning is quite surprising and rather groundless in the age of the Internet – access to various sources is widely available and its forms are rather similar. Simultaneously, as stressed by McNair, it does not take account of the synthetic and organizing role of doctrine, which can show the line between actual law development and erroneous reasoning as well⁸⁰. The fourth concept is based on analysis of separate opinions, implying that judges often agree concerning the conclusion of a court, while significantly differing on the issue of legal bases of an issued decision. As stressed by Rosenne, the practice of inclusion of views of individual writers into a court opinion is not well-suited to the concept of joint declaration what is law⁸¹. And finally, the last proposed thesis is the issue of etiquette, pointed out by an entire group of authors (including Rosenne, Pellet). It is an embarrassing difficulty to determine who belongs to the category of most highly qualified publicists, and who may be deemed less qualified. In the close-knit environment of international lawyers, making such a distinction is rather dangerous and undiplomatic, and the court (the ICJ) does not claim the right to judge scholars as good or bad⁸².

Maybe it is indeed difficult or awkward to select members for the gallery of eminent lawyers responsible for shaping international legal scholarship. Nevertheless, practice shows that this pantheon is not very large, and there is rather a consensus concerning the authors it includes. Based on research performed by a team led by Michael Peil, one may assume a criterion based on the number of citations and order specific names according to this criterion. Thus, a number of citations exceeding 80 in more than 40 opinions characterises the International Law Commission, Shabtai Rosenne, Sir Hersch Lauterpacht, the Institute of International Law, *Sir Gerald Fitzmaurice*, the textbook by *Oppenheim* (all editions), Manley Hudson, Charles de Visscher. The group of authors

⁷⁸ *Ibidem*, p. 144. For more, see: H. Waldock, *General course on public international law*, (1962/II) 106 Hague Recueil 1, at. 96.

⁷⁹ *Ibidem*. For more, see: R. Jennings, A Watts (ed.), *Oppenheim's International Law*, Longman 1992, p. 42.

⁸⁰ *Ibidem*, p. 145. For more, see: A. McNair, *The Development of International Justice*, NYU Press, 1954, p. 17.

⁸¹ *Ibidem*. For more, see: S. Rosenne, *The Law and Practice of International Court, 1920-2005*, Brill 2006, vol. III, p. 1551.

⁸² *Ibidem*, p. 146.

quoted between 20 and 40 times in more than 20 opinions includes: *Sir Ian Brownlie*, *Sir Humphrey Waldock*, *Sir Robert T. Jennings*, and *Emerich de Vattel*. And finally, among writers invoked between 20 and 30 times in 10 to 20 opinions, the following have been mentioned: Julius Stone, James L. Brierly, Georg Schwarzenberger, C. Wilfred Jenks, Sir Arnold McNair, Eduardo Jimenez de Arechaga, Georges Scelle, Philip C. Jessup, Dioniso Anzilotti, Roberto Ago, and Oscar Schachter. Moreover, those quoted incidentally or several times were: Joe Verhoeven, Nagendra Singh, William Schabas, Edvard Hambro, Grotius, the International Committee of the Red Cross, the International Law Association (ILA), Hans Kelsen, Paul Reuter, D.P. O'Connell, Quincy Wright, Malcolm Shaw, Bong Cheng, Dame Rosalyn Higgins, and Mohammed Bedjaoui⁸³.

Analysis of this list clearly shows that authority in the field of international law is attributed both individually and institutionally. The invoked persons and organizations/institutions are also mentioned in the category of the most recognized writers, as adopted in the formula of Article 38(1)(d) of the ICJ Statute by authors of leading textbooks on the subject. Therefore, in spite of certain doubts, the gallery of scholars is determined quite unanimously by scholarship itself, as well as by case-law and practice. The second important conclusion is the thought that most of the quoted scholars are also judges of the court of courts (ICJ). Hence the further conclusion, already presented in the earlier discussion, that scholarship is strictly connected with judicature, comprising one common bloodstream in the organism of international law. Moreover, it is easy to see the rule that the milieu of international judges is willing to place far-reaching trust in its members as regards competence, knowledge, skills, and proficiency in international law. Therefore, an evident cohesion is visible between the directive to rely on views of eminent lawyers as a subsidiary source to determine legal norms and the requirements for judge candidates of international courts and tribunals, as well as institutions treated with authority and respect by the international community. If we take a closer look, the formula indicating knowledge and competence as a requirement for candidates is repeated in most of the mentioned bodies. Persons aspiring for the role of an ICJ judge are required to have, apart from impeccable morals, qualifications to hold the highest judiciary offices in a given state or, alternatively, an attribute of "recognized competence in international law" (Article 2 of the ICJ Statute). In the International Criminal Court, it is specified that a judge candidate should have established competence in relevant areas of international law, such as international humanitarian law and the law of human rights, as well as broad legal knowledge and related professional experience (Article 35 of the Statute of the ICC). The European Convention on Human Rights foresees that judges of the European Court of Human Rights "shall be of high moral character and must ei-

⁸³ *Ibidem*, pp. 158-160.

ther possess the qualifications required for appointment to high judicial office or be jurisconsults of recognized competence” (Article 21(1)). Similarly, to hold the function of a judge in the Court of Justice of the European Union, one should meet the requirement of possessing qualifications required for appointment to highest judicial offices in Member States or be a jurisconsult of recognized competence (Article 253 of the TFEU and Article 19 of the TEU). Assuming the requirement of knowledge and competence of highest recognized level as the criterion for judge candidates, the conclusion should be obvious that persons appointed to international judicial bodies should guarantee their views and legal reasoning are evidence of their broad, thorough, up-to-date and reliable knowledge of the branch of law on which they make pronouncements. Thus, the logic of reliance on opinions of international judges as representatives and/or experts in doctrine of this branch of law becomes clear as well.

As for the context in which citations from doctrine appear in the international case-law, then, following the qualification made by Michael Peile, we may assume the following categories: presentation of common (widespread) practice of states, interpretation of provisions of an agreement, presentation of a general principle of law, explanation of the practice of the ICJ, use of the general context for a specific issue in the case, direct presentation of existence of the rule of law, making the case for the need of a change in law. Therefore, it seems that, in line with the subsidiary nature of doctrine, as suggested in Article 38, the practice of its invocation/application falls within this concept. Thus, scholarship consistently plays the role of an evidencing, supporting, inspiring, clarifying, organizing, strengthening factor, or possibly (in the farthest-reaching interpretation) of a catalyst for the suggested changes.

The most emphatic and directly expressed view of an international court, coherently aligned with the thread of international law scholarship, is probably evaluation of the competence of the ruler of Abu Dhabi. Although in no way can this fragment be considered diplomatic or sublime, it indicates the power of the authority of scholarship as both a basic and ultimate argument concerning rules, principles and norms applicable in international law. Judges, referencing error as a potential premise for invalidity of a contract concerning a concession for search and drilling of oil in the area specified as “the entire area under the reign of the Sheikh of Abu Dhabi, together with its appurtenances as well as any and all islands and marine waters belonging to this area”, clearly stated that: “Every state is an owner and sovereign in relation to its territorial waters, sea bed and marine underground underneath, whether or not the ruler has read the works by Bynkershoek”⁸⁴. Such reasoning implies, on the one hand, that the knowledge of teachings does not matter in view of the norms in force, but it may contribute to the conscious

⁸⁴ ILR 1951, vol. 28, p. 144. Quotation from: Wł. Czapliński, A. Wyrozumska, *op. cit.*, p. 633.

application of law. Therefore, this case shows a kind of analogy with the established principle *Ignorantia iuris nocet*, transcribed to *Ignorantia doctrinae nocet*.

Therefore, no matter what form the significance of doctrine in the system of sources of international law assumes, either emphasizing its importance or minimizing its influence, it will not be possible to adopt a simple view that scholarship has a law-making nature. It will not have such power in isolation from actions of subjects of international law. A factor constituting a necessary law-making element in international law is always the will of its subjects, so even if it is possible to prove the significant impact of doctrine on formation of international law (especially in the historical context), views of most respected jurists, in their own right, cannot be deemed to be a source of international law in the full sense of the word. However, one cannot deprive them of substantive meaning as an element affecting the creation, interpretation and application of norms of international law, with emphasis on the sphere of influence on law-making entities, including, above all, obviously states.

The thought which seems the most relevant to reality is that the formal significance of doctrine is indeed limited to its subsidiary nature in the process of determining norms of international law, whereas its impact on the shape, content and understanding of these norms seems undisputed and significant. Even if the stance of scholarship is not emphasized outright or on a numerically or quantitatively imposing scale, it can unquestionably be proven that the practice of the application of law is reflected in its scholarship, both as a causative and commenting (assessing) factor. Therefore, it seems that the metaphor of doctrine and judicature as a *sui generis* system of connected vessels, and of international law with all parts thereof as a bloodstream linking all elements of causative, evaluating and applying nature, is not misguided.

Looking at the case-law of international courts in search of references to doctrine, we may invoke and analyze several examples. In the case of the ship *Lotus*, for instance, the PCIJ indicated that the French party was pointing out that the rule of exclusive jurisdiction of a state towards a vessel flying its flag is confirmed in works of doctrine, decisions of national and international bodies, as well as in treaties. Finally, the court concluded that such a rule has not been proven finally (conclusively)⁸⁵, since existence of a custom in this sphere has not been proven. Hence the conclusion that even if an opinion of scholarship indicates existence of some form of a norm of international law in a manner conforming and coherent with case-law or even contractual obligations, this does not constitute a prevailing argument for recognition of such a norm as binding. To a court, the prevailing indicator is a source of universal and undoubted nature. Consequently, based on the cited example, one could build a theory of development of doc-

⁸⁵ *Lotus*, Judgment of 27 October 1927, PCIJ Series A, p. 26.

trine on the shaping of a legal norm, especially that today, ultimately, both custom and agreement (in the form of the Convention on the Law of the Sea from *Montego Bay*) confirm the rule of exclusive jurisdiction of the flag state. Nevertheless, the significance of opinions of experts on the subject will still have an inspiring and organizing nature, or even, in a stronger interpretation, an inductive one, but still not a causative one. Although, if we assume an indirect creative role, in the sense of causing a result in the form of a final law-making and executive initiative held by the interested parties, especially by states, proving and maintenance of the indirect causative function of doctrine would not be as difficult. One cannot fail to notice, as has already been raised in earlier parts of this study, the impact of scholarly views on the development of international law, not only in the theoretical sense but, after all, in the practical one as well. An example may be introduction into the legal circulation of the term of baselines, which evolved from a demonstrative structure to a normative one.

In the *Arrest Warrant* case, the motif of doctrine appeared in the separate opinions of Judges Higgins, Kooijmans, and Buergenthal. On the one hand, we may come across information that the issue of reservations, including reservations to treaties dedicated to human rights, is a subject of significant practice and extensive literature of the subject. Yet this reference at the same time has the nature of a general remark, without invoking specific examples. The opinion itself was deemed by its authors, which may be regarded as surprising but significant at the same time, to be the wrong place to reference and analyse doctrine.⁸⁶ Such distrust towards the validity of scholarly views is explained by the influence of political factors on scholars' opinions⁸⁷. Therefore, one can conclude that the role of scholarship in this case was simultaneously emphasized and reduced to the subsidiary, supplementary, supportive functions. However, such a function of the opinions of doctrine should not be easily ruled out or neglected. It seems that every fully-formed legal theory, later translated into practical solutions, should be built with consideration for any and all possible factors of importance for the entirety of the reasoning. Hypothesis-based reasoning, in spite of the practical dimension it contains, should be supported by inquiry grounded in all available sources. Therefore, scholarly views are of unquestionable importance to the coherence of the adopted legal solutions. Structures created without solid support in the form of prior practice and explanation by scholars are rather devoid of the power to survive and take root in practice.

In some rulings, like in the case of the ship *Wimbledon*, the Permanent Court uses a highly enigmatic formula of "general opinions." This term may indirectly suggest that

⁸⁶ *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), Joint separate opinion (Higgins, Kooijmans, Buergenthal), ICJ Reports 2002, p. 71, par. 26 and p. 75, par. 44.1.

⁸⁷ G.D. Triggs, *op. cit.* (chapter 2. *Sources and Methodology of International Law*), p. 94.

what lies behind it is also a view represented in the doctrine. Nevertheless, it is quite a loose analogy, and it is difficult to use it as grounds for proving any special importance of scholarship in law formation⁸⁸. On the other hand, reasoning may lead us to deduce a strict relation between *opinio iuris* and opinion of doctrine as an element of the universal conviction of the legal importance of a given kind of action by subjects of international law.

It is also worth paying attention to the stance of bodies other than courts with their judges. As rightly pointed out by Prof. Karol Wolfke, “similarly as the Hague Court in its rulings, the International Law Commission also seldom referenced the authority of scholars, especially in the draft law of the sea.” Commentaries to this draft mention writers on only two occasions, in reference to the article on piracy (Article 39 of the draft, Article 15 of the Convention on the High Seas). Hence the reflection that, even if the contribution of scholars in codifying works is unquestionable and significant, “proving thereof in a specific way, indicating provisions, is not easy”⁸⁹. Nevertheless, the quoted author stresses that important evidence of scholarly participation in the process of creation and codification of norms of international law is the composition of international bodies (such as the ICJ or the ILC). In particular, such scholars as Francois, Scelle, Spiropoulos, Yepes, Brierly, Lauterpacht, Fitzmaurice, and Gidel have both undisputed authority and actual influence on this process. Therefore, the difficulty lies not within the recognition of the contribution of scholars in the development of international law itself, but proving their activity using specific examples. A good illustration of this issue may be the fact that “for example, an essential document serving as a point of departure for work of the International Law Commission on the high seas regime – the Memorandum of the UN Secretariat, has been developed by Gidel, which, however, is not made apparent anywhere”⁹⁰. However, at the same time a report by the Special Rapporteur of the ILC, Francois, made clear the role of scholars, including Gidel himself (which is hardly surprising, given the fact that more than one in four of the delegates in the Codification Conference concerning the law of the sea were university professors). In relation to the issue of police on the high seas, “[he] cites extensive quotes from works by Gidel, Higgins, Colombos, and Smith, claiming that **based on these views, one could propose a norm to the Commission** (emphasis by the author)”⁹¹. The function of doctrine has been expressed even stronger in the general commentary to Section I of the Convention on Diplomatic Relations, including the phrase that “the Commission followed the third

⁸⁸ *S.S. Wimbledon*, Judgment of 17 August 1923, PCIJ Series A, p. 28.

⁸⁹ K. Wolfke, *Rozwój i kodyfikacja prawa międzynarodowego. Wybrane zagadnienia z praktyki ONZ*, Wrocław 1972, p. 147.

⁹⁰ *Ibidem*, p. 149.

⁹¹ *Ibidem*, p. 151.

theory (functional necessity) in resolving issues to which practice would give no clear answer, simultaneously keeping in mind the representative character of the Head of Mission and the mission itself”⁹².

The final conclusion drawn by Professor Wolfke, despite reflections on the infrequency of invocation of views of specific scholars as direct inspiration in the process of formation of legal norms, emphasizes the significance of doctrine. In the quoted author’s opinion, “the role of scholarship is by no means limited to assistance in codification of existing norms. It participates directly in creation of norms of international law”⁹³. The role of scholarship, as presented above, is evidenced by scholarly views being taken into account in discussions at the level of preparatory works, as well as by critical remarks formulated in reference to the drafts of the ILC. The final conclusion adopted by Professor Wolfke boils down to the view that not only is the role of scholarship in international law not declining, but it is even increasing, undergoing a kind of renaissance. From the viewpoint of international law scholars this is an optimistic conclusion, although, in the context of the data on the quantity and scope of citations of scholarly views, as already mentioned in this study, it is not entirely clear. However, it seems it could be understood to the effect that the opinion of scholars is still being taken into account, especially in situations which are difficult and doubtful to determine or resolve. It may serve as a helpful and useful tool which could significantly impact both judicial reasoning and the shape and development of international law, as a whole and within its constituent parts.

5. Conclusions

When comparing the views of various writers, certain conclusions may be drawn. The primary one is the observation that doctrine has the nature of a subsidiary source, whose role is to aid in ascertaining the existence or lack of as well as form and content of a legal norm. The quoted authors, however, stress the impact of doctrine on the development and formation of international law; above all, its historical significance, but also through the master/apprentice mechanism in judicial practice. Thus an additional internal relation reveals itself between the two subsidiary sources: scholarship and judicature. It consists in the impact of doctrine on judicial reasoning to the effect that, firstly, judges are frequently professors of law as well, and secondly, they have been formed by specific scholarly centres and recognized scholars lecturing there, well-established in their views or open to factors impacting the development of law and new ideas in the international

⁹² YILC, 1958, II, p. 95. Quotation from: K. Wolfke, *Rozwój...*, p. 156.

⁹³ K. Wolfke, *Rozwój...*, p. 162.

law. Going even further with this reasoning, one may conclude that the bond between judicature and doctrine as sources of law is tight. Just as the views of the doctrine and individual scholars may affect the reasoning of a particular judge or of a court as a whole, a test in the form of application of a given norm by a judge/court indicates whether or not the existence of a given norm in the system of international law may be ascertained. Therefore, it is possible that both sources indicated in Article 38(1)(d) of the ICJ Statute are, in a certain sense, connected vessels whose essence consists in interpenetration of their contents, provided that the form remains traditional as a subsidiary means of determination of a legal norm; however, the matter changes depending on the influence of external factors, such as the political situation, current problems facing the international community, individual views of a judge (from conservative to progressive), individual perspective of representatives of the doctrine, access to other formal sources of law (in the sense of their existence or absence in a given context and, consequently, the risk of a *non liquet* situation).

In conclusion, it is also worth stressing that Article 38(1)(d) of the ICJ Statute defines doctrine as “teachings of the most highly qualified publicists of the various nations”, which is aptly interpreted by Prof. Genowefa Grabowska as “universally accepted, well-established, highest-class product of international scholarly thought.” She adds in conclusion that “doctrine in international law does not have an impersonal character; on the contrary, there are always great names behind it (such as Grotius, Kelsen, Anzilotti, Jellinek, Hart, Bynkershoek)”⁹⁴. Such a personalist understanding of international law scholarship allows one to assume that opinions in this area, developed by scholars but also by judges and scholars-members of collective bodies and organs responsible for researching, ordering and codification of international legal norms, reflect the research of particular individuals with verifiable scholarly output, publicly presenting their observations and theories, individually responsible for their propagated views.

Mention should also be made of the different weight of the two subsidiary sources mentioned in Article 38 of the ICJ Statute. This subtle distinction has been pointed out very aptly by Prof. Wolfke. Of course, he described both sources as subsidiary, yet, at the same time, he attributed a different role to judicature than to doctrine. Specifically, he pointed out that judicial decisions as law-making factors are legal, formal and self-sufficient only to the parties of a dispute; however, when stated *expressis verbis* in positive international law, they are legal, although due to the fact no law-making role has been attributed to them, they have an informal nature. However, doctrine does not determine

⁹⁴ G. Grabowska, Entry „Doktryna”, [in:] B. Hołyst (editor-in-chief), J. Symonides, D. Pyć (scientific eds. of vol. IV), *Wielka Encyklopedia Prawa, tom IV – Prawo międzynarodowe publiczne*, Warszawa 2014, pp. 72-73.

the rules of international law in an unambiguous manner, but rather confronts them with a new practice by formulating and shaping them. And due to the fact that scholars sit in the International Law Commission and act in the capacity of experts appointed by this institution, one may even risk the statement that scholarly views are becoming a formal law-making factor as expressly foreseen in the procedures of the ILC⁹⁵. A significant factor boosting arguments in favour of recognition of the peculiar formal significance of subsidiary sources is, therefore, a clear indication of these sources in acts of international law.

Simultaneously, it should be recalled that the overwhelming majority of scholars attribute a greater role to judicature than to doctrine (unlike Professor Wolfke), basing their view on the increasing quantity and role of judicature for the process of interpretation, application, and creation of norms of international law. However, given the already stressed mutual influence and interpenetration of legal scholarship doctrine and judicature, it is difficult to accept without reservation one of the quoted views. It rather seems as though the conclusion that both subsidiary sources mentioned in Article 38(1) (d) of the ICJ Statute are of equal weight is not incorrect.

Ultimately, we should agree with the view that “creation of international law is a highly complex and sophisticated process.” The entire network of rules and principles, in turn, is a product of interactions between actors/entities/creators in the international community.⁹⁶ Thus, the influence of doctrine on the shaping and understanding of norms of international law, recognizing the leading role of the will of subjects of this legal system, seems rather obvious. The views of scholars constitute a significant factor in the development of law, yet they always remain in the background of actual decisions made by way of consensus. However, without scholarship, it would be hard to imagine the system of international law created by states and international organizations could remain coherent, logical and clear, and such effect should be an immanent characteristic of every law.

⁹⁵ K. Wolfke, *International Law-making Factors. An Attempt at Systematization*, PYIL, vol. XV, 1986, p. 246 and quoted M. Virally, *The Sources of International Law*, [in:] *Manual of Public International Law*, London 1968, p. 153.

⁹⁶ J. Detter, *The international legal order*, Cambridge 1994, p. 146.

Conclusion

In the rather slow but also quite free process of development of the law of nations, the first quarter of the 20th century brought a change with serious consequences. It was a product of the creation of the League of Nations and the related first permanent international court. The founders of the League of Nations, without being fully aware of this fact, opened the circle of subjects of international law, hitherto restricted exclusively to states. At the same time, creation of a permanent court to settle disputes with the power to bind litigants required precise determination of legal bases of adjudication. This was achieved in Article 38 of the Statute of the Permanent Court of International Justice, established in 1921. It stipulated that the established court would adjudicate on the basis of law of treaties and international customary law. Beside these two bases of international law, overlapping with its classical sources, it also mentioned general principles of law, without restricting them to those of an international nature. Because of this approach to general principles, international law was not limited only to treaty and customary norms created by states. It was also opened to other law-making processes. Therefore, in modern international law scholarship, one may encounter enumeration of several new, more or less convincingly argued sources of contemporary international law. Some of them enjoy recognition and function in the international law arena, causing growing confusion in the scholarship occupied with sources of the contemporary order of international law.

This study has conducted a closer analysis of several “supposed” sources indicated in the literature, apart from the unquestioned classical sources in the form of international agreements and customary law. These include unilateral acts of international organizations, unilateral acts of states, general principles of (international) law and judicial precedents, internal law of states, as well as scholarship of international law. The study made an attempt at determining the characteristics of the new sources, and how they contribute to our knowledge of the sources of contemporary international law. Where is the core of such a source?

The first two sources, *i.e.* unilateral acts of international organizations and unilateral acts of states, are most widely recognized as new sources of international law, both in scholarship and in judicature. Their common general trait is the lack of consensual basis of states, so important as a characteristic of the classical sources, *i.e.* those mentioned in Article 38 of the ICJ Statute. Both a law-making act of an international organization and a law-making act of a state has the nature of a unilateral act. It simply takes the form of an individual decision of one entity.

These characteristics emerge even more clearly in reference to a source of so-called judicial legislation. Both determination of a precedent as a source of law and derivation of a detailed legal norm from general principles of law, including general principles of international law, takes place by way of so-called legal reasoning or judicial reasoning. This process has nothing in common with negotiation. It consists in thorough expert inquiry of the perceived norm within the strict context of the binding order of international law. It is concluded by a decision adopted by a majority vote. This judicial source of law is also characterized by the fact there are no law-making competencies at the foundations of its formation. The capacity of an international court also remains doubtful as a rule.

Municipal law is unquestionably penetrating the system of international law increasingly broadly. However, upon incorporation into an international act, it loses its original character, becoming international law. Human rights law may serve as an example. A less obvious situation in this regard occurs in certain international courts, especially commercial and criminal ones, which apply national law subsidiarily. Yet the practice is too fresh and heterogeneous to draw any general reliable conclusions.

The status of international law scholarship also appears differently in this regard. It would be rather difficult to prove that it is a new source of international law; but on the other hand, its tremendous impact on the process of development and functioning of this law cannot be overestimated. Scholarship also determines the quality of law. It occurs in combination with the law everywhere: it initiates creation of new law, provides advice in negotiations thereof, and assesses the results and functioning. Scholarship consolidates and integrates the system of international law, and keeps watch over the values connected therewith. It is its soul, but not a source.

It should be kept in mind that international law today is not created in a vacuum. It is formed within a specific framework of the binding order of international law and has a systemic nature, as termed by A. Kozłowski. On the one hand, the current integrated system outlines the limits of creation thereof, while on the other hand the system itself provides new means and paths of development. Judicial legislation takes particular advantage of this fact. It is extracted, interpreted by way of legal reasoning, out of the binding legal order.

The new sources of international law, as mentioned above, have particular features distinguishing them not only from the sources mentioned in Article 38 of the ICJ Statute, but among one another as well.

The law-making nature of a declaration of an international organization is derived not from its own competence, but from one delegated by member states. The scope of this competence is determined in its statute. However, it should be stressed that to the

extent under consideration, this source of law is of autonomous nature. It also has another important feature. Apart from certain UN declarations, binding resolutions of other international organizations are a source of law elaborated in fields of international relations which have been determined in advance, being, in a certain sense, a law of particular, sectoral nature.

Unilateral acts of states should be regarded in two separate groups – acts of autonomous nature with regard to law-making, and acts dependent on other entities or international law acts in this regard. The former evoke the foreseen binding legal effects in their own right, without assistance from any other acts of law. It should be noted that such an act may only be a source of obligations to its author. However, such obligations may give rise to rights, and usually favourable ones, of the addressees of such acts (e.g. a promise). Under the basic assumptions of the legal system presently in effect, such an act may not take the form of a source of obligations for the addressee. The addressee is not even obliged to exercise the rights included in this act. In spite of such a systemic restriction, it is a source of law capable of regulating inter-state relations on a wide or even universal scale (e.g. the French declarations).

On the other hand, unilateral acts of a non-autonomous nature, combined with other acts of international law, may constitute a source of international law in the full sense. For instance, an act of accession to a multilateral international agreement without becoming a party thereto changes the legal situation between the author of the act of accession and all parties of the given treaty. It becomes a source of law and obligations in a given area on a multi-lateral scale.

On the other hand, a ruling of an international court becomes a component of the international legal order if it constitutes a precondition for supplementation thereof due to a need to materialize a systemic fairness, interpreted in accordance with the nature of international law. In this sense, a judgment of an international court plays the role of a substantial precedent constituting a source of rights and obligations. Obtaining of such a qualification by the ruling is enabled by use of the concept of a general principle of international law by the court.

Therefore, it seems obvious that the international law system in force consists of norms which are fairly diverse in their legal nature and of the related hierarchy of current sources of international law. It is shedding, with increasing clarity, its purely state nature although, but this happens essentially only upon the express or tacit consent of states. However, states themselves remain quite strongly bound in their actions by an elaborate legal system. The sources of modern international law may be diverse, but their core and essence lies within the system presently in force.

Jan Kolasa

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