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Contemporary Principles and Perspectives

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> norms made by some writers and international tribunals, without presenting any evidence to support the claimed superior status of the norms under consideration, pose risks for the international legal order and the credibility of the authors and tribunals.[332]

Indeed, the first time the ICJ stated that a specific norm was *jus cogens* was in 2006, in the *Armed Activities on the Territory of the Congo* case, in which it bluntly asserted that the prohibition of genocide was 'assuredly' a peremptory norm of international law, without adducing any supporting evidence.[333] Interestingly, the lack of any resistance to or substantive criticism of such a proposition increases the sense that such proscribing norms have a place somehow above the normative framework of international law, once again evoking a natural law sensibility in relation to certain norms.[334]

Although the list of *jus cogens* norms seems to be as long as the particular commentator's foot,[335] the peremptory nature of the following seven norms appears to be settled:

- *pacta sunt servanda*;
- piracy – the oldest international crime;
- use of force other than in self-defence, as expressed in Article 2(4) of the UN Charter;
- genocide – arguably the most abhorrent of international crimes;
- crimes against humanity;
- slavery – universally considered an anathema after the American Civil War; and
- torture – the frequent breaches of this rule have never been justified on the basis that torture is lawful.[336]

Additionally,

- the laws of armed conflict, a great many of which, in the opinion of the ICJ, are 'so fundamental to the respect of the human person and

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[332] Shelton, above note 315, 292.

[333] *Armed Activities on the Territory of the Congo* (*Democratic Republic of Congo v Rwanda*) [2005] ICJ Rep 168. Note that the point about *jus cogens* was not central to the Court's decision, as it held that its jurisdiction did not depend on whether the norm invoked had the character of *jus cogens*: ibid.

[334] Norms relating to 'laws of humanity and the requirements of the public conscience'. For a discussion of natural law theory and its place in the development of international law, see chapter 1, section 1.4.2.1.

[335] See, e.g., Shelton, above note 315, 303.

[336] Higgins, above note 196, 20.

"elementary considerations of humanity" . . . [that] they constitute intransgressible principles of international customary law';[337]

- apartheid or systemic racial discrimination, given the South African experience; and
- international terrorism

also seem settled *jus cogens*, even though there is no consensus as to the exact meaning of the latter or where to draw the line separating a 'terrorist' from a 'freedom fighter'.[338]

2.2.2.8 *Erga omnes* obligations

A sibling of *jus cogens* is the concept of obligations *erga omnes* – obligations owed 'towards all' states. Like *jus cogens*, *erga omnes* lays down a procedural consequence flowing from the importance of certain substantive norms to the international public order. If an obligation is *erga omnes*, then it is owed to the whole community of states, such that any state has standing under international law to enforce compliance with it.

In the 1949 *Reparations* case, the ICJ formulated the general rule of standing in international law: 'only the party to whom an international obligation is due can bring a claim in respect of its breach'.[339] This mirrors the general principle of national public law in the major systems of the world, that persons whose interests are not affected (that is, mere busybodies) cannot sue.

The seminal case in this area is the *Barcelona Traction* case before the ICJ.[340] The question before the Court was whether Belgium had standing to sue Spain in carrying out its duty of diplomatic protection of Belgian nationals who had sustained economic damage as a result of Spain's activities towards a Canadian company in which the Belgian nationals were shareholders. The Court began by stating:

> [A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights

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[337] *Nuclear Weapons* (Advisory Opinion), above note 210, 257.

[338] Ben Saul, *Defining Terrorism in International Law* (Oxford: Oxford University Press, 2006) 182, 186, 188, 200–201, 254, 258, 270.

[339] *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 180–81.

[340] *Barcelona Traction, Light and Power Co. Ltd* (*Belgium v Spain*), above note 4.

> involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.[341]

Although the Court did not expressly say so, it made it clear that only those norms the importance of which approached that of *jus cogens* would give rise to obligations owed *erga omnes*:

> Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning basic rights of the human person including protection from slavery and racial discrimination.[342]

If, however, there exists a specific international body monitoring compliance with treaty provisions relating to an obligation *erga omnes* – such as the UN Committee against Torture – standing would be accorded to such a body in preference to states. The ICTY has held that 'these bodies enjoy priority over individual states', so as to make it possible 'for compliance with international law to be ensured in a neutral and impartial manner'.[343]

Despite the conceptual similarities, there is no necessary identity between obligations *erga omnes* and *jus cogens*. To be captured by both concepts, a norm must attain a certain level of importance. However, the *way* in which a norm must be important differs. For *jus cogens*, it is the norm's non-derogability that must be of fundamental importance to the international community, such that it must apply to every state, even against its will. For obligations *erga omnes*, it is the norm's ability to be enforced that must be of fundamental importance. Hence, international public order is more likely to demand that a norm be *erga omnes* if the norm regulates the internal behaviour of the state, with the consequence that no other state is directly affected.[344] Thus, there is more scope to argue that certain human rights obligations possess an *erga omnes* character. In this sense, *erga omnes* can be wider than *jus cogens*, though the area is far from settled.[345]

2.2.2.9 Regional custom

The custom of states need not be of general application to be normative. While general international law does bind every state in the international

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341 Ibid., [33].
342 Ibid., [34].
343 *Prosecutor v Furundžija*, above note 314, [152].
344 Shelton, above note 315, 318.
345 Note that the ICJ considers *erga omnes* and *jus cogens* as separate concepts: *East Timor* (*Portugal v Australia*) [1995] ICJ Rep 90, [29].

community, except possibly persistent objectors,[346] a custom can also develop as between a group of states, or even between two states.[347] Like general custom, regional custom requires practice by states that are sought to be bound by the norm, and *opinio juris* whereby they consider the norm to be legally obligatory. There is, however, a further requirement for the creation of regional custom: a state will not be bound by it unless it has *itself* manifested at least tacit consent to the norm.[348] This differs from general custom, which does not insist on uniformity of state practice or *opinio juris*.[349]

Some commentators have stated that *opinio juris* for a regional custom, as opposed to a general custom, cannot be inferred solely from consistent state practice.[350] This is a claim unsupported by judicial decisions and arguably is not a necessary corollary of the requirement that the practice be opposable to the state sought to be bound. A better view is that state practice can occur in circumstances that strongly compel the inference of *opinio juris* – for example, state A may continuously grant state B access to lucrative gold mines on state A's territory. In the absence of any evidence suggesting that state A is being compensated with, for example, political or military protection, the inference is open that state A is granting state B a right of passage because it believes itself legally obliged to do so. In the *Right of Passage* case,[351] Portugal claimed that it was entitled to the benefit of a regional custom with India whereby Portugal had a right of passage through Indian territory in order to practically exercise its sovereignty over Portuguese enclaves on the subcontinent. The Court found considerable state practice consistent with such a right. On *opinio juris* it had only the following to say:

> This practice having continued over a period extending beyond a century and a quarter unaffected by the change of regime in respect of the intervening territory which occurred when India became independent, the Court is, in view of all the circumstances of the case, satisfied that that practice was accepted as law by the Parties and has given rise to a right and a correlative obligation.[352]

Thus, the Court was inferring *opinio juris* from a veritable mountain of state practice. Note that this finding was restricted to the passage of

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346 See section 2.2.2.6 above.
347 *Right of Passage* case (*Portugal v India*) [1960] ICJ Rep 6, 39.
348 Jennings and Watts, above note 16, 30; Cassese, above note 7, 164.
349 See discussion above at sections 2.2.2.2 and 2.2.2.3.
350 Brownlie, above note 236, 11. For discussion about the inference of *opinio juris* from general custom, see discussion above at section 2.2.2.3.
351 *Right of Passage* case, above note 347.
352 Ibid., 40.

civilian persons and goods. In respect of military forces, police, arms and ammunition, the Court considered that 'the course of dealings established between the Portuguese and the British authorities with respect to the passage of these categories excluded the existence of any such right'.[353]

Perhaps the most significant case on regional custom is the ruling of the ICJ in the *Asylum* case.[354] In 1948, the leader of a failed rebellion in Peru sought asylum at the Colombian Embassy. While under general international law this was an unlawful intervention by Colombia in the sovereign affairs of Peru, Colombia argued that there was a regional custom among Latin American states to the contrary. It relied upon the principle that where a regional custom and a general dispositional custom conflict, the regional custom is preferred to the extent of the inconsistency, applying the general principle *lex specialis derogat legi generali* – special laws prevail over general laws. The ICJ did not consider it a barrier that Article 38(1)(b) of the ICJ Statute uses the words 'international custom, as evidence of a *general* practice accepted as law'.[355] The Court held:

> The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State.[356]

In holding that the practice of Latin American states had not been uniform or supported by *opinio juris*, the Court denied the existence of the local custom. Even if a custom had crystallized, in the Court's view, 'it could not be invoked against Peru which, far from having by its attitude adhered to it, has on the contrary repudiated it'.[357] Although some commentators have seen this latter statement as a formulation of the persistent objector rule,[358] the better view is that the Court was applying the rule that regional custom is only opposable against states that have consented to it. Also, as the extracts from the judgment indicate, the burden of proving that another state is bound by the regional custom rests on the state seeking to

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[353] Ibid., 43. Note that when India became independent from Britain in 1947, it succeeded Britain's international obligations incurred in respect of the territory, in accordance with the law of state succession, discussed in Chapter 4.

[354] *Asylum* case, above note 201.

[355] Emphasis added.

[356] Ibid., 276.

[357] Ibid., 277–8.

[358] Thirlway, above note 188, 126–7; see discussion above at section 2.2.2.6.

have the court recognize the custom. This is in contrast to general custom, which is a matter the decision-maker must positively determine without recourse to burden of proof principles.[359]

2.2.3 General Principles of Law

2.2.3.1 The nature and role of general principles of law

The third source of international law in Article 38(1)(c) of the ICJ Statute is referred to as 'general principles of law recognised by civilised nations'. The term 'civilised' is at best old-fashioned, at worst a hangover of colonialist thinking. Despite the wording of the ICJ Statute, this source has more commonly been considered as 'general principles of law recognised by the community of nations', excising the qualifier altogether,[360] although it seems that the term 'civilised' should be transmuted to mean 'nations with a mature legal system'.[361] For example, in the *Abu Dhabi* arbitration,[362] the arbitrator considered whether there were general principles of law dealing with oil concessions. In doing so, he disregarded the law of Abu Dhabi, as it had no principles that could be applied to modern commercial instruments.

Although listed as a source proper, rather than a 'subsidiary' source like judicial decisions and learned publicists, general principles tend to perform a gap-filling function, where there appears to be no settled custom or treaty on the question.[363] Although international courts and tribunals had applied general principles before the source's material appearance in Article 38(1)(c) of the ICJ Statute (and its precursor in the Permanent Court of International Justice Statute), its continued acceptance as a source of law relied on the perception that international law – being an anarchic, horizontal legal system – required a formal source other than treaty and custom to function.[364] Rules such as those on circumstantial evidence[365] were unlikely to be the subject of state practice and *opinio*

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[359] Cassese, above note 7, 164. Note that in international criminal trials, the burden always rests on the prosecution to prove the existence of a customary norm.

[360] See, e.g., Cassese, above note 7, 188.

[361] Thirlway, above note 188, 128.

[362] *The Sheikh of Abu Dhabi* [1951] 18 ILR 144.

[363] Cassese, above note 7, 128.

[364] Hersch Lauterpacht, 'Some Observations on the Prohibition of "*Non Liquet*" and the Completeness of the Law', in Elihu Lauterpacht (ed.), *International Law: Being the Collected Papers of Hersch Lauterpacht* (Cambridge: Cambridge University Press, 1975), Vol. 2, 213, 220–21.

[365] See *Corfu Channel* (*United Kingdom v Albania*) (Merits) [1949] ICJ Rep 4, 18.

juris, or be important enough to be the subject of an applicable treaty. Thus, recourse to 'general principles' would be required to prevent decision-makers from either pronouncing a *non liquet* (failure to decide) or, worse, deciding the issue according to their personal whim. An example of the latter occurred in 1831 when the King of the Netherlands, acting as arbitrator in a boundary dispute between the United States and Great Britain, found that the law of nations contained insufficient rules on the subject and proceeded to draw the boundary in a way that seemed to him 'most appropriate'.[366] The nature of a *non liquet* will be further discussed below.[367]

The question remains how such 'general principles' should be derived, and it appears that there are two sources for these principles. First, a court may find that there is a principle that is, in substance,[368] recognized by the domestic legal systems of the world. The process is thus one of induction: the general principle at international law is deduced from the separate instances at domestic law. The reason why a general review of legal systems is required is that, as Lord Asquith has stated, 'almost any national system is a mixture of modern and antiquated principles, of those of general applicability and those of historic or national peculiarity'.[369] Not all principles are in substance shared among domestic orders and a principle may not, by its nature, be translatable into international law, at least without adjustment. Judge Cassese stated in his Dissenting Opinion in the ICTY Appeals Chamber decision in *Prosecutor v Erdemović*:[370]

> [N]ormally it would prove incongruous and inappropriate to apply in an inter-State legal setting a national law concept as such, that is, with its original scope and purport. The body of law into which one may be inclined to transplant the national law notion cannot but reject the transplant, for the notion is felt as extraneous to the whole set of legal ideas, constructs and mechanisms prevailing in the international context. Consequently, the normal attitude of international courts is to try to assimilate or transform the national law notion so as to adjust it to the exigencies and basic principles of international law.

At first blush, it might be thought difficult to derive general principles from across the diverse cross-section of legal systems of the world. However,

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366 Lauterpacht, above note 364, 219.

367 See discussion below at section 2.2.3.3.

368 Wolfgang Friedmann, 'The Uses of "General Principles" in the Development of International Law' (1963) 57 *American Journal of International Law* 279, 284–5.

369 Quoted in Friedmann, ibid., 284.

370 *Prosecutor v Erdemović* (Appeals Chamber Judgment) IT-96-22-A (7 October 1997), Dissenting Opinion of Judge Cassese, [3].

many principles – such as the principle that a party cannot take advantage of its own wrong[371] – are rooted in fairness and logic and hence suggest that there are areas of significant similarity in substance between the national legal systems of the world. Additionally, the course of history has seen many of the major European legal systems attain dominance in most of the world, thus lessening the chance of a fundamental clash of principles. Domestic principles potentially of use to international law – those of a 'jurisdictional' or 'incidental' character – are precisely those which are most likely to be substantially homogenous among domestic orders.[372]

The second form of general principles does not depend on any process of induction from domestic law. General principles may be derived directly from international legal relations and legal relations generally. The suite of interpretive principles used by international courts fall into this category, for example, the principle that special laws prevail over general laws (*lex specialis derogat legi generali*). Interestingly, this very principle can be applied to assert that general principles derived specifically from international legal relations prevail over those induced from domestic law.[373] Foundational principles of the international community – such as the sovereign equality of states, and core principles of certain areas of law such as 'elemental considerations of humanity'[374] in the field of international humanitarian law – are more than gap-fillers and provide a standard according to which conflicting norms, where two outcomes are reasonably open, can be resolved.

Many of these principles, such as *pacta sunt servanda* (that promises must be kept) also have the character of customary law.[375] In *Prosecutor v Furundžija*,[376] the ICTY had to decide what the specific elements were of rape as a war crime or crime against humanity. Having found no unanimity in the domestic legislation of states regarding whether forced oral penetration constituted rape, the Court found that the 'general principle of respect for human dignity is the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law' and

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[371] *Factory at Chorzów* (*Germany v Poland*) (Jurisdiction) (1927) PCIJ (Ser. A) No. 9, 31.

[372] Jennings and Watts, above note 16, 95; Hersch Lauterpacht, 'Decisions of Municipal Courts as a Source of International Law', in Elihu Lauterpacht (ed.), *International Law: Being the Collected Papers of Hersch Lauterpacht* (Cambridge: Cambridge University Press, 1975), Vol. 2, 245–6.

[373] Cassese, above note 7, 194.

[374] *Nuclear Weapons* (Advisory Opinion), above note 210, 257; *Corfu Channel* case, above note 365, 22.

[375] Brownlie, above note 236, 19; Thirlway, above note 188, 128.

[376] *Prosecutor v Furundžija*, above note 314.

hence it was 'consonant with this principle that such an extremely serious sexual outrage as forced oral penetration should be classified as rape'.[377] This case illustrates that customary law (for example, that relating to rape) may at times only provide the broad legal doctrine to be applied and that general principles are thus essential for fleshing out and putting into practical effect such customary norms.

2.2.3.2 The identification of general principles by international courts and tribunals

When deriving a general principle from the domestic legal systems of the world, international courts and tribunals do not undertake an exhaustive comparative study. Generally, judgments cite from a few major Western legal systems, and then presume that these principles are self-evidently universal.

Examples abound before the international criminal tribunals of reference to general principles derived from national legal systems, where a handful of sources from a small sample of states (usually traversing the common and civil law legal systems) are considered.

Adding to the sense that general principles are being derived from a limited pool of states is the sometimes confusing terminology employed to describe general principles as a source of international law. The following statement by the Trial Chamber in the *Kupreškić* case before the ICTY serves as a prime example:

> [A]ny time the Statute does not regulate a specific matter, and the *Report of the Secretary-General* does not prove to be of any assistance in the interpretation of the Statute, it falls to the International Tribunal to draw upon (i) rules of customary international law or (ii) general principles of international criminal law; or, lacking such principles, (iii) general principles of criminal law common to the major legal systems of the world; or, lacking such principles, (iv) general principles of law consonant with the basic requirements of international justice.[378]

The reference to customary international law in the extract is meaningful as a primary source of international law itself. However, the reference to the three forms of general principles does not facilitate any comprehension of their meaning or relationship with the 'general principles of law'

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[377] Ibid., [183].

[378] *Prosecutor v Kupreškić, Kupreškić, Kupreškić, Josipović, Papić and Šantić* (Judgment) IT-95-16-T (14 January 2000), [591]. Similarly confusing is a passage in *Prosecutor v Furundžija* (Trial Chamber Judgment) IT-95-17/1-T (10 December 1998) ('*Furundžija* trial judgment'), [182].

as it is enshrined as a source of international law in Article 38 of the ICJ Statute.

2.2.3.3 *Non liquet* in international law

The gap-filling function of general principles was designed to prevent courts from pronouncing a *non liquet* – that the law is 'not clear' – and thus refusing to decide the case, or deciding it according to arbitrary whim.[379] This view, of the 'completeness' of international law,[380] was one firmly held by Lauterpacht:

> [T]he principle of completeness of international law – the prohibition of *non liquet* – constitutes one of the most indisputably established rules of positive international law as evidenced by an uninterrupted continuity of international arbitral and judicial practice.[381]

Nonetheless, at least in respect of Advisory Opinions, the ICJ has accepted that a *non liquet* may be declared. In its controversial decision in the *Nuclear Weapons* Advisory Opinion, the Court ultimately held:

> [I]n view of the present state of international law viewed as a whole, as examined above by the Court, and of the elements of fact at its disposal, the Court is led to believe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a state in an extreme circumstance of self-defence, in which its very survival would be at stake.[382]

The prohibition against declaring *non liquet* most likely still holds good in contentious proceedings. The general rule in the *Lotus* case that 'restrictions upon the independence of states cannot . . . be presumed'[383] operates to place the burden of proof on the claimant. Hence, when uncertain or ambivalent about the outcome, the Court may declare that the case is 'not proven' instead of declaring that the law itself is 'not clear'. However, practice suggests that the Court must determine for itself questions relating to whether particular customary rules exist, without reference to

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379 See discussion above at section 2.2.3.1.

380 Lauterpacht, above note 364.

381 Lauterpacht, ibid., 217. See also the Dissenting Opinion of Judge Higgins in the *Nuclear Weapons* (Advisory Opinion), above note 210; Lauterpacht, above note 6, 97.

382 *Nuclear Weapons* (Advisory Opinion), ibid., 263. See Timothy McCormack, 'A *Non Liquet* on Nuclear Weapons – The ICJ Avoids the Applications of General Principles of International Humanitarian Law' (1997) 316 *International Review of the Red Cross* 92.

383 *SS 'Lotus'* (*France v Turkey*), above note 209, 18–19

burden of proof principles.[384] A more solid foundation for the prohibition of *non liquet* in contentious proceedings is Article 38(1) of the ICJ Statute, which states that the Court's 'function is to *decide* in accordance with international law such *disputes* as are submitted to it'.[385] By its nature a failure to decide, a *non liquet*, seems inapplicable to disputes.

It may be said that the function of any court is to make an authoritative pronouncement on legal questions that are submitted to it – whether the proceedings are advisory or contentious. A strong argument can be made that the *Nuclear Weapons* Advisory Opinion was an abdication of the judicial function. The implications are even more troubling in the context of the subject matter of that case. Given the destructive power of nuclear weapons, Judge Shahabuddeen considered in his Dissenting Opinion that 'it would, at any rate, seem curious that a World Court should consider itself compelled by the law to reach the conclusion that a state has the legal right, even in limited circumstances, to put the planet to death'.[386]

2.2.4 Judicial Decisions and Highly Regarded Publicists – Subsidiary Sources

2.2.4.1 Judicial decisions

2.2.4.1.1 No precedent in international law: Article 59 ICJ Statute Article 38(1)(d) of the ICJ Statute recognizes that, 'subject to the provisions of Article 59, judicial decisions . . . are a subsidiary means for the determination of rules of law'. The reference to 'subsidiary' means that judicial decisions are only material and not formal sources of law. Reinforcing this restriction is the reference to Article 59 of the ICJ Statute: 'The decision of the Court has no binding force except between the parties and in respect of that particular case'. This Article is the material source for the principle that international law knows no doctrine of precedent (*stare decisis*) as it is understood in common law, and less so in certain civil law, systems.[387]

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[384] Cassese, above note 7, 164. Note that in international criminal trials the burden always rests on the prosecution to prove the existence of a customary norm.

[385] Emphasis added.

[386] *Nuclear Weapons* (Advisory Opinion), above note 210, 34 (Dissenting Opinion of Judge Shahabuddeen).

[387] For a discussion of the differing approaches across common and civil law systems, as well as the position in international criminal law, see Gideon Boas, 'The Case for a New Appellate Jurisdiction for International Criminal Law', in Göran Sluiter and Sergey Vasiliev (eds), *International Criminal Procedure: Towards A Coherent Body of Law* (London: Cameron May Ltd, 2008).

The reasoning in previous judgments, even if it constitutes an essential step leading to the ultimate outcome in those judgments (*ratio decidendi*), will not inescapably bind subsequent decision-makers, regardless of their place in the international system.

The reference to 'judicial decisions' includes decisions of both international and national courts and tribunals.[388] Given the relative sparseness of international decisions, the ICJ has examined the decisions of national courts where they provide useful commentary on the existence and scope of an international norm. This is not to be confused with the other (albeit limited) role of domestic decisions as evidence of state practice and *opinio juris*. The *Arrest Warrant* case[389] provides an example of where the ICJ has considered the views of national courts as a material source of a rule of international law. In argument, the Democratic Republic of the Congo raised several decisions of higher national courts in support of its claim that an incumbent Foreign Minister was immune from the criminal process of national courts, even where the minister was suspected of war crimes or crimes against humanity. For instance, the Congo cited Lord Browne-Wilkinson's statement in the UK House of Lords decision in *Pinochet No.3*[390] that 'a complete immunity attached to the person of the head of state or ambassador . . . rendering him immune from all actions or prosecutions'.[391] The ICJ agreed with the Congo's submission, after examining 'state practice, including national legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation'.[392]

The position of judicial decisions in the determination of international law is clearly far more complex than simply saying that there is no doctrine of binding precedent and that such decisions may assist a Court in identifying evidence of a rule or principle. As discussed in respect of the determination of the existence of customary international law rules by the ICJ, a troubling practice of referring to the Court's own past rulings as support for the existence of a rule – as opposed to reference to *evidence* of a rule – has started to creep into the practice of the

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[388] Lauterpacht, above note 372; Donald Anton, Penelope Mathew and Wayne Morgan, *International Law: Cases and Materials* (Oxford: Oxford University Press, 2005) 243.

[389] *Arrest Warrant of 11 April 2000*, above note 244.

[390] *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)* [2000] 1 AC 147.

[391] *Arrest Warrant of 11 April 2000*, above note 244, [57].

[392] Ibid., [58]. Compare the difference in approach of Judge van Wyngaert in his Dissenting Opinion: ibid., [9]ff.

Court.[393] This may be indicative of a weakening of the requirements for the identification of sufficient state practice and *opinio juris* for the identification of a rule of custom.

2.2.4.1.2 A de facto *normative system of precedent at international law?* Although ostensibly only a material source of international law that is not of precedential value, decisions of the ICJ are highly persuasive and have done much to clarify norms of international law. For example, the decision of the ICJ in the *North Sea Continental Shelf* cases[394] has laid down invaluable guidelines for the derivation of custom.[395] Other cases have arguably assumed normative significance, such as the ICJ's decision in the *Reservations* case,[396] breaking with the traditional doctrine that the consent of all contracting states is necessary for a reservation to be admissible, as well as the Court's broad formulation in the *Reparations* case[397] of the nature of the international personality of intergovernmental organizations as being related to the purposes of the particular organization. Insofar as the ICJ has made new law (and hence, in effect, binding precedent) in judgments such as these, Cassese points out that the international community of states have acquiesced to them, such that they have acquired the status of general principle.[398]

More routinely, the ICJ cites profusely from its own previous decisions, sometimes even at the expense of examining actual evidence of state practice. For example, in the *Israeli Wall* case,[399] the ICJ relied almost exclusively on its previous decisions, in preference to finding relevant custom by its own endeavours.[400]

Other international courts and tribunals have also followed this trend of citing previous decisions, perhaps none more so than the international

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[393] See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, above note 246; *Delimitation of the Maritime Boundary on the Gulf of Maine Area*, above note 242. See also discussion above at sections 2.2.2.3.1 and 2.2.2.5.

[394] *North Sea Continental Shelf* cases, above note 112.

[395] See discussion at section 2.2.2.

[396] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, above note 96.

[397] *Reparation for Injuries Suffered in the Service of the United Nations*, above note 339. See Chapter 5.

[398] Cassese, above note 7, 196.

[399] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, above note 246.

[400] See also the discussion above at section 2.2.2.5.

criminal tribunals. In *Prosecutor v Kupreskić et al.*,[401] the ICTY Trial Chamber was assessing the international criminal responsibility of accused parties charged with war crimes and crimes against humanity perpetrated against the village of Ahmići during the Bosnian war. The ICTY openly defended its pervasive use of its own prior judgments and those of other international tribunals:

> The Tribunal's need to draw upon judicial decisions is only to be expected, due to the fact that both substantive and procedural criminal law is still at a rudimentary stage in international law. In particular, there exist relatively few treaty provisions on the matter. By contrast, especially after World War II, a copious amount of case law has developed on international crimes. Again, this is a fully understandable development: it was difficult for international law-makers to reconcile very diverse and often conflicting national traditions in the area of criminal law and procedure by adopting general rules capable of duly taking into account those traditions. By contrast, general principles may gradually crystallise through their incorporation and elaboration in a series of judicial decisions delivered by either international or national courts dealing with specific areas. This being so, it is only logical that international courts should rely heavily on such jurisprudence.[402]

Indeed, the ad hoc criminal tribunals for the former Yugoslavia and Rwanda have expressly determined that a strict form of binding precedent operates in those institutions[403] – a point that is less certain at the permanent International Criminal Court.[404]

Thus it appears that there is at least a *de facto* system of precedent at international law, in the sense that international courts and tribunals often take what was said in earlier cases at face value where it would require the expenditure of a considerable amount of resources to properly examine

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401 *Prosecutor v Kupreskić, Kupreškić, Kupreškić, Josipović, Papić and Šantić*, above note 378.

402 Ibid., [537].

403 For ICTY, see *Prosecutor v Delalić, Mucić, Delić and Landžo* (Appeals Chamber Judgment) IT-96-21-A (20 February 2001) ('*Čelebići* Appeal Judgment'), [8]; *Prosecutor v Aleksovski* (Appeals Chamber Judgment) IT-95-14-1-A (24 March 2000) ('*Aleksovski* Appeal Judgment'), [112]–[113]. For ICTR, see *Prosecutor v Semanza* (Appeals Chamber Judgment) ICTR-97-20-A (20 May 2005) ('*Semanza* Appeals Judgment'), [92]. For a discussion of precedent in international criminal law, see generally Boas, above note 387.

404 See Statute of the International Criminal Court, entered into force 1 July 2002, UN Doc. A/CONF. 183/9 (1998) ('Rome Statute'), Art. 21(1). See also *Prosecutor v Bemba* (Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties) ICC-01/05-01/08-424 (31 July 2008), [14]. It would appear that there is at least an informal system of precedent as between decisions of the Appeals Chamber and lower chambers.

state practice and *opinio juris* every time a case comes up for decision. It may be suggested that this *de facto* doctrine of precedent is the product of a need to accommodate the divide in the international community largely between common law and civil law legal systems. As the editors of the ninth edition of *Oppenheim's International Law* state:

> [A]pparent differences in basic notions and methods of approach resulting from divergences in national systems and traditions have been satisfactorily bridged by an assimilation and mutual approximation of apparently opposed concepts. This is shown, for instance, in the manner in which the practice of the Permanent Court of International Justice and its successor have combined formal disregard of the doctrine of judicial precedent with constant and fruitful regard for their previous decisions.[405]

Nonetheless, the lack of a frank and honest discussion by some of these courts about the reliance on precedent, and the effect of this on the basic principle expressed in Article 59 of the ICJ Statute, leaves a sense of uncertainty about the meaning and scope of such developments and their impact on the sources of international law.

2.2.4.2 Writings of publicists

The influence of academic writers has diminished markedly over the course of the history of international law. Until the second half of the twentieth century, writers such as Grotius, Vattel, Lauterpacht and Oppenheim were central to the development of an area of law that was mostly customary and the subject of few treaties or judicial decisions. Indeed, these publicists were instrumental in affirming and building the legitimacy of international law as a system of law.[406]

However, with the increasing proliferation of international organizations, the development of a world order based around the UN Charter, the explosion of treaty-making, the birth of *sui generis* areas of law producing a breadth of judicial, administrative and quasi-judicial opinion (such as in the areas of human rights, trade, law of the sea and international criminal law) and the advent of globalization, heralding technological change and a flatter, more interconnected world, international courts and tribunals have seen less need for the opinions of publicists, which are often tainted with bias.[407] It is ironic that the growth of international law, which has contrib-

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405 Jennings and Watts, above note 16, 95.

406 Harris, above note 32, 54–5. See Chapter 1.

407 See, e.g., C. Parry, *The Sources and Evidences of International Law* (Manchester, UK: Manchester University Press, 1965) 103–5.

uted to the proliferation of academic writing on international law, is also responsible for the diminution in importance of such works as a material source of law.

This is not to say that international courts and tribunals ignore extra-judicial commentary altogether. It is inevitably relied on by judges (and, far less visibly, judges' assistants) to familiarize themselves with the law and to conduct research, though such reliance – however deep – may not make it into their judgments because of the perceived lessening of their legitimacy and authoritative voice.[408] There are, however, some publicists who still exert considerable influence. For instance, the three-volume study undertaken by the ICRC in finding and collating voluminous evidence on state practice relating to international humanitarian law[409] is often cited in the judgments of international criminal tribunals. The ILC's Draft Articles on Responsibility of States for Intentionally Wrongful Acts (2001) has also been cited by the ICJ in the *Hungarian Dams* case,[410] among others.

In this way, while the golden era of the international law scholar's significance may be over, they continue to exert considerable influence on the development of international law through sometimes less visible means. This may be, as explained above, through reliance by international decision-makers and their staff upon such writings. It may also be seen in the engagement of such scholars in the process of international law interpretation and even law-making. For example, the appointment of highly regarded scholars to the Bench of the ICJ or other international courts, to the ILC or as UN Rapporteurs or other consultants may extend their influence from scholarly opinion into the realm of hard international law.

2.3 CONCLUSIONS

The extraordinary development of international law over the past century has invariably impacted upon the nature of international law sources, as well as how they are defined, applied and of course developed. From a nascent global system of law with relatively few treaties and areas of specialization, international law has grown exponentially in size and complexity. Indeed, the velocity at which international law had developed by

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[408] Brownlie, above note 236, 24–5.

[409] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge: Cambridge University Press, 2005) Vols 1–3.

[410] *Gobčikovo-Nagymaros Project (Hungary v Slovakia)*, above note 33.

the end of the twentieth century led some to fear that it was 'in crisis', even on the verge of collapse.[411] The ILC's fragmentation study explored this concern and found that the proliferation of semi-autonomous strands of international law – human rights, international criminal law, international environmental law, to name a few – did not put an unbearable strain on the integrity of the system. Judges had plenty of sources from which to derive tie-breaker principles, such as *lex specialis*, and they had the foresight to emphasize harmonization over conflict where two norms ostensibly covered the same ground.[412]

The establishment of a new international public order under the United Nations system catalyzed a number of enduring trends that have changed the fabric of the international system. One of these trends has been the codification and progressive development of international law. Once dominated by relatively uncertain and in many cases inadequate customary law, the international plane has seen the proliferation of an increasingly cohesive network of treaties – bilateral and multilateral – regulating diverse aspects of relations between nations. The Vienna Convention on the Law of Treaties 1969 did much to regularize and facilitate the harmonization of national interests that only treaty-making can achieve. There exist today a vast number of multilateral treaties, including the constitutive instruments of international organizations – such as the UN and the WTO – which have assisted in the pursuit of the common interests of states and act as fora for diplomatic dialogue and even the expression of *opinio juris*.[413]

Custom as a source of international law has not remained static either. Ever since the classical formulation of this source of law in the *North Sea Continental Shelf* cases,[414] successive attempts by the ICJ to grapple with the once uncertain concepts of *opinio juris* and state practice have lent them greater content.[415] It is, however, a cause for concern that the ICJ and international criminal tribunals have occasionally indulged in an over-reliance on their past decisions instead of undertaking an open and comprehensive analysis of *opinio juris* and state practice in each case.[416] There is also latent uncertainty about the content of *jus cogens* and the troubling advent of decisions such as the *Nuclear Weapons* Advisory Opinion, which can only be explained as placing politics over law. Some

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411 See Fragmentation Report, above note 3.
412 Ibid. See also discussion above at section 2.1.4.
413 See discussion above at section 2.2.2.3.3.
414 *North Sea Continental Shelf* cases, above note 112.
415 See discussion above at sections 2.2.2.2 and 2.2.2.3.
416 See discussion above at section 2.2.2.5.

commentators have suggested that the sources of customary international law are undergoing a fundamental methodological change.[417] However, these developments have stopped short of jettisoning the traditional elements of customary law as the courts still acknowledge that state practice and *opinio juris* are indispensable, even though they may show a laxity in articulating evidence of the establishment of these elements in certain cases.[418]

Today's increasingly integrated international society has its own challenges and the mechanisms for determining the sources of international law, as developed over the course of the last century, contribute to the unity and coherence of the system. The key to overcoming future challenges could be the continuing general rejection of confusing appeals to 'relative normativity' – that is, obscuring what the sources of law recognize as binding and not binding. As Dinah Shelton observes:

> [F]or practitioners, governments, and intergovernmental organizations, there is not a continuum of instruments from soft to hard, but a binary system in which an instrument is entered into as law or not-law. The not-law can be politically binding or morally binding, and expectations of compliance with the norms contained in the instrument can be extremely strong, but the difference between a legally binding instrument and one that is not appears well understood and acted upon by government negotiators. . . . Such instruments may express trends or a stage in the formulation of treaty or custom, but law does not come with a sliding scale of bindingness, nor does desired law become law by stating its desirability, even repeatedly.[419]

At several points in this chapter, the attenuation of formal requirements for the identification of a rule of customary international law has been discussed. The ICJ rulings in the *Gulf of Maine* and *Israeli Wall* cases provide two examples of the World Court relying on its own past rulings as automated evidence of the existence of a customary rule, in apparent contradiction to Article 59 of its Statute relating to precedent.[420] The Court has also been criticized for over-reliance upon General Assembly Resolutions and for the identification of customary rules without providing any evidence of such a rule's existence.[421] The consequence of this may well be a watering down of the rigorous requirements for the establishment of

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417 See discussion above at section 2.2.2.4.
418 See discussion above at section 2.2.4.1.2.
419 Shelton, above note 315, 321.
420 See above section 2.2.4.1.1.
421 See *Arrest Warrant of 11 April 2000*, above note 244, [58] and text accompanying note 392.

custom by pointing to sufficient state practice and *opinio juris*. It may also signal a greater role for judicial (and perhaps arbitral) decisions on the formation of international law.

Whether these developments are desirable depends considerably on one's point of view and may differ from case to case. It does invoke consideration of the discussion in Chapter 1 about the nature of international law (what it is and what it is used for) and the different theoretical perspectives about how international law functions.[422] Critical theorists like Koskenniemi see this lack of formalism in the application of international law as precisely what is wrong with the international legal system.[423] Viewed more as a normative system, international law is invariably developed by courts and tribunals, as well as other decision-makers and actors in the international community. In this way, international law is more a process;[424] variations and changes in the identification of rules, more or less desirable, are inevitable aspects of the reality of a functioning international law system.

Higgins argues that a normative system can legitimately be developed in the decision-making of institutions, as well as courts and tribunals, so long as there is openness about external influences (political or social) on decision-makers. I have argued in Chapter 1 that, while there is merit in this view, it also requires a frank discussion about the competence and capacity of these decision-makers in a given context. The treatment of the sources of international law by some of the international tribunals discussed in this chapter, including the approach to the question of custom by the ICJ, accentuates some of these concerns. Are the requirements for the identification and articulation of rules of customary international law attenuating? Or should we take such rulings by international courts as an aberration? It is difficult to assess the impact of this judicial practice, both upon the substantive process of identifying rules, as well as upon the role of courts and judicial decisions in the norm creating process. What can be said with certainty is that courts should be frank about what they are doing in this respect. A failure to do so suggests that either a relaxed approach is being taken to the identification of binding international law, or that a normative shift is taking place beneath the disapproving eyes of the primary subjects of international law – states – as well as other stakeholders.

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422 See Chapter 1, section 1.4.
423 See Koskenniemi, above note 324.
424 See Higgins, above note 196.

3. The relationship between international and national law

A fundamental issue in international law is the nature of the relationship that exists between international and national law.[1] Monism and dualism (as well as transformation and incorporation) are important theoretical frameworks that speak to the relationship between the state as an internal entity and the state as a member of the international legal community and how this impacts on the international legal system.

As well as theoretical considerations, the relationship between national and international law gives rise to a host of practical considerations and the resolution of a dispute may differ considerably depending upon which legal regime applies. At the essence of the interplay between these differing systems of law is a critical question: where they cover a common field, and there is a dispute between them, which should be supreme over the other?[2]

This chapter addresses both the theoretical and practical implications of the relationship between international and national law. Different conceptions of this relationship from an international law perspective are expressed in the monist and dualist theories, which will be discussed first, as will contemporary perspectives on these theoretical frameworks. The relationship between national and international law naturally suggests two opposing perspectives. This chapter will first examine the operation of national law in international law, exploring practical implications and the use of national law as a source of international law, either as general principles of international law or as evidence of state practice in relation to a principle of international law. How international law is implemented into, and influences, national law will then be examined. As this varies across states and legal traditions, examples of these jurisdictions will be

[1] Reference in the cases and literature is made interchangeably to the terms 'national', 'domestic' and 'municipal' in relation to the internal law of a state. Reference in this book is largely made to 'national law', although any use of other synonymous terms holds no technical significance.

[2] See, e.g., Ian Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 2008, 7th edn), 31.

considered and themes explored in relation to this important aspect of the international legal system.

3.1 DIFFERENT CONCEPTIONS OF THE RELATIONSHIP BETWEEN INTERNATIONAL AND NATIONAL LAW

The relationship between international law and national law is one that is fiercely debated.[3] At a theoretical level, there exist two dominant theories for explaining this relationship: monism and dualism.

3.1.1 Dualism

The dualist approach views international and national law as two separate systems that exist independently of one another. This theory is based upon the 'assumption that international law and municipal legal systems constitute two distinct and formally separate categories of legal orders'[4] because they 'differ as to their sources, the relations they regulate and their legal content.'[5] Therefore, these two systems are seen to be firmly independent from one another, as neither can claim supremacy.[6] Where international law is incorporated into national law by the state, this is seen as an exercise of authority by the state, rather than international law imposing itself into the domestic sphere.[7] From a practical perspective, if a national court in a dualist state is considering a case and there is a conflict between international and national law, the court (in the absence of any legislative guidance to the contrary) would apply domestic law.[8]

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[3] For an early discussion of the monist/dualist debate, see Edwin M. Borchard, 'The Relation between International Law and Municipal Law' (1940–41) 27 *Virginia Law Review* 137; see also Hans Kelsen, *General Theory of Law and State* (New York: Russell & Russell, 1961), 363–88.

[4] Antonio Cassese, *International Law* (Oxford: Oxford University Press, 2005, 2nd edn), 214.

[5] Gillian D. Triggs, *International Law: Contemporary Principles and Practices* (Sydney: LexisNexis Butterworths, 2011, 2nd edn), 153, referring to H. Lauterpacht and L. Oppenheim, *International Law: A Treatise*, Vol. I, 'Peace' (London: Longmans Green, 1955, 8th edn), 35.

[6] Malcolm Shaw, *International Law* (Cambridge; New York: Cambridge University Press, 2008, 6th edn), 132–3; Brownlie, above note 2, 32.

[7] Brownlie, ibid., 32.

[8] Ibid., 32; Cassese, above note 4, 214. See also discussion below at sections 3.4.1 and 3.4.2 on the transformation and incorporation approaches.

3.1.2 Monism

The monist theory, developed by Kelsen, asserts that there is a relationship between national and international law, with international law being supreme.[9] Monists argue that as law ultimately regulates the conduct of individuals, there is a commonality between international and national law which both ultimately regulate the conduct of the individual. Therefore, each system is a 'manifestation of a single conception of law'.[10] Hersch Lauterpacht was a great proponent of the monist approach, by which a single, superior order of law could better protect fundamental legal principles and values, particularly in the area of human rights:

> The main reason for the essential identity of the two spheres of law is, it is maintained, that some of the fundamental notions of international law cannot be understood without the assumption of a superior legal order from which the various systems of municipal law are, in a sense, derived by way of delegation. It is international law that determines the jurisdictional limits of the personal and territorial competence of states. Similarly, it is only by reference to a higher legal rule in relation to which they are all equal that the equality and independence of a number of sovereign states can be conceived.[11]

This final assertion by Lauterpacht – that only by reference to a higher legal rule can the fundamental principle of the equality of states be achieved – has attraction, although it has to be acknowledged that it is somewhat conclusory. It suggests a preference for the predominance of international law and views the effectiveness of the system as a dominant concern of states. While protecting – or at least promoting – the equality of states seems a desirable goal, it risks attracting the countervailing argument that if international law is not solid enough to ensure fulfilment of its own fundamental principles then it may not be a stable legal system.

The monist/dualist theoretical conception of international law is of clearly practical significance. Ian Brownlie provides the following hypothetical example that illustrates the importance that adopting a monist or dualist approach can have in a concrete dispute:

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[9] Hans Kelsen, *Pure Theory of Law* (Berkeley, CA: University of California Press, 1967), 332–4. This concept was first outlined by the German scholar W. Kaufmann in 1899 (W. Kaufmann, *Die Rechtskraft des Internationales Rechtes und das Verhältnis der Staastsgesetzgebungen und der Staastorgane zu demselben* [Stuttgart: F. Enke, 1899]).

[10] Lauterpacht and Oppenheim, above note 5, 38.

[11] Ibid., 36–7.

> An alien vessel may be arrested and the alien crew tried before a municipal court of the arresting authority for ignoring customs laws. The municipal law prescribes a customs enforcement zone of x miles. The defendants argue that international law permits a customs zone of x–4 miles and that the vessel, when arrested, had not yet entered the zone in which enforcement was justified under international law.[12]

Should national law or international law apply in such a dispute? Applying a dualist approach, domestic law would apply; applying a monist approach, international law should prevail. Either approach would lead to a very different practical outcome for the alien crew in this instance.

3.1.3 An Alternative Approach

An alternative theory to monism and dualism has been advanced by Fitzmaurice and Rosseau.[13] They argue that international law and national law lack a common field of operation, never operating within the same sphere, or dealing with the same subject matter.[14] Therefore, they do not come into conflict as systems. This formulation, at least in relation to its relevance to contemporary international law, has been criticized by scholars on the basis that the Fitzmaurice approach is 'essentially dualist', and has been 'overtaken by the extensive contemporary interaction' between international and national law.[15] On the other hand, Brownlie notes that 'if one has to choose between the theories . . . then the views of Fitzmaurice and Rosseau might be preferred as coming close to the facts. Each system is supreme *in its own field*, and neither has a hegemony over the other'.[16]

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[12] Brownlie, above note 2, 41.

[13] G. Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law'(1957-II) 92 *Hague Recueil* 68–94; Shaw, above note 6, 132–3; Brownlie, ibid., 33.

[14] Shaw, ibid., 132–3; Martin Dixon, *Textbook on International Law* (Oxford: Oxford University Press, 2005, 5th edn), 83; Brownlie, ibid., 33.

[15] Triggs, above note 5, 154.

[16] Brownlie, above note 2, 53.

3.2 NATIONAL LAW IN INTERNATIONAL LAW

3.2.1 International Law Is Supreme in its Domain

Breaches of international law cannot be justified by reference to a state's own internal laws.[17] A state cannot legitimately argue that it has behaved in a manner contrary to international law because its conduct was permissible, or even required, under its own law. In this way, international law, from the perspective of international courts, tribunals and arbitral bodies, is supreme.[18]

There exists much authority to support this proposition. In the *Greco-Bulgarian Communities* Advisory Opinion[19] – which concerned the Greco-Bulgarian Convention created in the aftermath of the First World War to provide for the reciprocal emigration of persecuted minorities between the two states – one of the questions considered by the Court was, in the case of a conflict between the application of the Convention and the national law of one of the two signatory powers, which provision should be preferred?[20] The Court replied by clearly articulating the supremacy of international law in its domain:

> It is a generally accepted principle of international law that in the relations powers who are contracting parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty.[21]

Similar statements were made in the *Free Zones* case,[22] and the principle has more recently been affirmed in leading cases of the International Court of Justice.[23] It is also reflected in Article 27 of the Vienna Convention on the Law of Treaties, which states that a party 'may not invoke the

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[17] See, e.g., Art. 27 of the Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331; Draft Declaration on Rights and Duties of States (1949), *Yearbook of the International Law Commission 1949*, Art. 13; Brownlie, above note 2, 34–5; Shaw, above note 6, 133; Eileen Denza, 'The Relationship between International and National Law', in Malcolm Evans (ed.) *International Law* (Oxford: Oxford University Press, 2010), 424.

[18] Shaw, above note 6, 133–4.

[19] *Greco-Bulgarian Communities* case (1930) PCIJ (Ser. B) No. 17.

[20] Ibid., 32.

[21] Ibid., 32.

[22] *Free Zones* case, (1932) PCIJ (Ser. A/B) No. 46, 167.

[23] See, e.g., *Applicability of the Obligation to Arbitrate* case [1988] ICJ Rep 12, 34; Judge Shahabuddeen's judgment in *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (*Provisional Measures*), (*Libya v United States*; *Libya v United Kingdom*) (1992) ICJ Rep 3, 32; *LaGrand* (*Federal Republic of Germany v United States of America*)

provisions of its internal law as justification for its failure to perform a treaty'.[24] Many international law scholars also agree that this principle is established law.[25]

3.2.2 The Application of National Law within International Law

As a corollary, the fact that an act may be illegal in national law does not necessarily mean it is in breach of international law.[26] However, this does not mean that there is no role for national law within the international sphere. Indeed, cases in which an international tribunal in dealing with matters of pertinence to international law also give rise to an examination of the internal laws of one or more states, are far from exceptional.[27] As Shaw notes:

> [E]xpressions of the supremacy of international law over municipal law in international tribunals do not mean that the provisions of domestic legislation are either irrelevant or unnecessary. On the contrary, the role of internal legal rules is vital to the workings of the international legal machine.[28]

There exists a growing body of academic literature supporting the approach of an enhanced recognition of national law by international courts and tribunals.[29] From a practical perspective, there are a number of reasons why international courts utilize national law. If there is a

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[2001] ICJ Rep 466, 497–8; *Avena* case (*Mexico v United States of America*) [2004] ICJ Rep 12, 65. See also Shaw, above note 6, 135.

[24] Vienna Convention on the Law of Treaties, above note 17, Art. 27. Art. 46 provides for very limited circumstances in which a state may utilize its internal law to invalidate its consent to an international treaty, Art. 46(1) stating: 'A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.'

[25] Brownlie, e.g., states: 'The law in this respect is well settled. A state cannot plead provisions of its own law or deficiencies in that law in answer to a claim against it for an alleged breach of its obligations under international law': Brownlie, above note 2, 34. See also Dixon, above note 14, 84; Cassese, above note 4, 217–8; C Wilfred Jenks, *The Prospects of International Adjudication* (London: Stevens & Sons, 1964), 556.

[26] *Elettronica Sicula S.p.A* case (*United States of America v Italy*) [1989] ICJ Rep 15, 73–4. See also *Compania de Aguas del Aconquija v Argentine Republic* (2002) 41 ILM 1135, 1154; Shaw, above note 6, 136.

[27] See, e.g., Jenks, above note 25, 547–603; Brownlie, above note 2, 36.

[28] Shaw, above note 6, 126.

[29] See e.g., James Crawford, 'International Law and the Rule of Law' (2003) 24 *Adelaide Law Review* 3, 10; André Nollkaemper, 'Internationally