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INTERNATIONAL AND MUNICIPAL LAW BEFORE THE WORLD COURT: ONE OR TWO LEGAL ORDERS?

Abstract:

This article provides an overview of the approach taken by the International Court of Justice and its predecessor, the Permanent Court of International Justice, to questions of municipal law. Beginning with an outline of the theoretical framework, it discusses the conventional position that domestic law is a factual issue for the Court, before considering the ways in which the two Courts have utilised municipal law. It also considers to what extent the Court employs domestic law in ascertaining international legal rules.

Keywords: International Court of Justice, Permanent Court of International Justice, international courts, international tribunals, international law, domestic law, monism, dualism, judicial interpretation, sources; evidence.

INTRODUCTION

The question of how municipal law (also referred to as “domestic” or “national” law¹) and international law relate to one another has generated a large degree of interest

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¹ E.g. J. Crawford, *Brownlie's Principles of Public International Law* (8th ed.), Oxford University Press, Oxford: 2012, p. 48 (fn 2) (“the terms ‘national’, ‘municipal’, ‘domestic’, and ‘internal’ ... refer to the legal order of or within the state”); similarly A. Pellet, *Article 38*, in: A. Zimmerman, C. Tomuschat, K. Oellers-Frahm, C. J. Tams (eds.), *The Statute of the International Court of Justice: A Commentary* (2nd ed.), Oxford University Press, Oxford: 2012, p. 776 (fn 298).

in scholarly circles and in legal professional communities.² It is apparent that international law and municipal law at times address the same subject-matter³ and interesting questions therefore emerge as to the interaction of both normative schemes, along with the relationships that each seeks to regulate.⁴

Most scholarly discussions about such questions begin with at least some reference to understandings based on theory, which typically pit the monist and dualist approaches against each other.⁵ Adherents of monism contend that international law and domestic

² See Sir R. Jennings, Sir A. Watts, *Oppenheim's International Law* (9th ed.), Longman, Harlow: 1992, vol. I, p. 52. The extensive academic work on this topic includes, e.g. Crawford, *supra* note 1, pp. 48-111; Jennings et al, *supra* note 2, pp. 52-86; E. Denza, *The Relationship between International and National Law*, in: M. Evans (ed.), *International Law* (4th ed.), Oxford University Press, Oxford: 2014, pp. 412-440; G. Arangio-Ruiz, *International Law and Interindividual Law*, in: J. Nijman, A. Nollkaemper (eds.), *New Perspectives on the Divide Between National and International Law*, Oxford University Press, Oxford: 2007, p. 15; G. Gaja, *Dualism: A Review*, in: J. Nijman, A. Nollkaemper (eds.), *New Perspectives on the Divide between National and International Law*, Oxford University Press, Oxford: 2007, p. 52; Pellet, *supra* note 1, pp. 776-783 and see the authorities p. 776 (fn 299). See further *infra* notes 14-15.

³ Arangio-Ruiz, *supra* note 2, p. 31 (referring to Kelsen and arguing: "For a dualist, international law and national law deal perfectly well ... with the same *materiae*, namely the same 'subject matters'") also p. 16; W. Danilowicz, *The Relation between International Law and Domestic Law in the Jurisprudence of the International Court of Justice*, 12 Polish Yearbook of International Law 153 (1983), p. 159; J. Nijman, A. Nollkaemper, *Introduction*, in: J. Nijman, A. Nollkaemper (eds.), *New Perspectives on the Divide between National and International Law*, Oxford University Press, Oxford: 2007, p. 11 ("the subject matter of national and international law look more and more alike"); A. Nollkaemper, *The Role of Domestic Courts in the Case Law of the International Court of Justice*, 5(2) Chinese Journal of International Law 301 (2006), p. 301 ("the escalating degree to which international law deals with matters that are (also) regulated by domestic law"); Y. Shany, *Regulating Jurisdictional Relations between National and International Courts*, Oxford University Press, Oxford: 2007, p. 13 and generally pp. 9-15; see also H. E. Kjos, *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law*, Oxford University Press, Oxford: 2013, p. 1; J. Crawford, *International Law as an Open System: Selected Essays*, Cameron May, London: 2002, p. 23. Cf with Sir G. Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, 92 Recueil des cours 1 (1957), p. 71 (domestic and international law share no "common field ... of activity"), quoted and discussed in Danilowicz, *supra* note 3, p. 160 and Arangio-Ruiz, *supra* note 2, p. 32; see also Jennings et al, *supra* note 2, p. 53; Crawford, *supra* note 1, p. 50.

⁴ See Arangio-Ruiz, *supra* note 2, p. 31 ("The dualist distinction, far subtler than one of just 'subject matter', is one of relationships and *milieux*" and discussing "the verb 'regulate'"); Gaja, *supra* note 2, p. 54 (noting, *inter alia*, the dualist approach "that the subjects of international law and municipal laws are different, and therefore the legal systems govern different types of relations", and see discussion pp. 55-56); Crawford, *supra* note 1, p. 48; Kjos, *supra* note 3, p. 1, see also p. 171; G. Arangio-Ruiz, *Dualism Revisited: International Law and Interindividual Law* 86 Rivista di diritto internazionale 909 (2003), pp. 913-914; Crawford, *supra* note 3, p. 23; Shany, *supra* note 3, p. 2 (international/domestic "jurisdictional interaction gives rise to a series of difficult theoretical issues that are woven into the long-standing debates over the nature of the intricate relationship between national and international law") *et seq.* For a recent account of the difficulty that municipal law might face in this context, see H. Owada, *Problems of Interaction between the International and Domestic Legal Orders*, 5 Asian Journal of International Law 246 (2015).

⁵ E.g. Crawford, *supra* note 1, p. 48 ("The relationship between international and national law ... is often presented as a clash at a level of high theory, usually between 'dualism' and 'monism'" (reference omitted)); Nijman et al, *supra* note 3, p. 2 ("Every textbook on international law still uses the concepts of monism and dualism to describe the main perspectives on the relationship between international and national

law exist as part and parcel of a sole legal order; conversely, those subscribing to dualism insist that international and national law are independent systems of law.⁶

It would be fair to ponder, as some scholars do, whether either of these approaches actually reflects today's reality on the international scene.⁷ By way of example, one sceptical commentator suggests that "the dualistic perspective can no longer conceptualize, or explain, the interactive process between international law and the national law of many states."⁸ That said, these "opposing extremes"⁹ do give some guidance in attempting to explain the interrelationship of the international and domestic legal orders.¹⁰

Interestingly, scholarly discussion of the intellectual opposition between monism and dualism has often centred on the impact of such theories on the nature of domestic legal orders.¹¹ For instance, one distinguished scholar once opined that "[t]he key

law."); Jennings et al, *supra* note 2, p. 53; D. Shelton, *Introduction*, in: D. Shelton (ed.), *International Law and Domestic Legal Systems*, Oxford University Press, Oxford: 2011, p. 2 (describing "the Classic Debate" between the monist and dualist) and p. 3 ("academic discourse on the relationship between international law and domestic legal systems continues in large part to refer to monism and dualism"); Gaja, *supra* note 2, p. 53; Kjos, *supra* note 3, p. 1; Denza, *supra* note 2, p. 418; G. Slyz, *International Law in National Courts*, in: T. M. Franck, G. H. Fox (eds.), *International Law Decisions in National Courts*, Transnational, New York: 1996, p. 72.

⁶ Crawford, *supra* note 1, p. 48; Shany, *supra* note 3, pp. 3-4, also 79; Jennings et al, *supra* note 2, pp. 53-54; Arangio-Ruiz, *supra* note 2, pp. 16-17, 20; Owada, *supra* note 4, p. 250; Gaja, *supra* note 2, pp. 52-53; Denza, *supra* note 2, p. 418; Shelton, *supra* note 5, p. 2; Slyz, *supra* note 5, pp. 72-73.

⁷ See e.g. A. Nollkaemper, *National Courts and the International Rule of Law*, Oxford University Press, Oxford: 2011, p. 13, cited *infra* note 8; Kjos, *supra* note 3, p. 1 ("[i]n recent times, however, the value of these doctrines in accurately depicting practice has been questioned or even disparaged"), see also p. 302; J. Nijman, A. Nollkaemper, *Beyond the Divide*, in: J. Nijman, A. Nollkaemper (eds.), *New Perspectives on the Divide Between National and International Law*, Oxford University Press, Oxford: 2007, p. 341 ("dualism has only limited power to describe, explain, and predict the multiple interactions between the international legal order and domestic legal spheres that characterizes our age."); Shelton, *supra* note 5, pp. 3-4; C. Chinkin, *Monism and Dualism: The Impact of Private Authority on the Dichotomy Between National and International Law*, in: J. Nijman, A. Nollkaemper (eds.), *New Perspectives on the Divide between National and International Law*, Oxford University Press, Oxford: 2007, pp. 136, 149; Gaja, *supra* note 2, p. 53; Shany, *supra* note 3, pp. 4, 5, 15; Slyz, *supra* note 5, p. 75; Denza, *supra* note 2, p. 418; Jennings et al, *supra* note 2, p. 54 ("distinction between international law and national law less clear and more complex"), quoted and discussed in Arangio-Ruiz, *supra* note 2, pp. 34-35; Owada, *supra* note 4, pp. 252-253.

⁸ Nollkaemper, *supra* note 7, p. 13.

⁹ Jennings et al, *supra* note 2, p. 53.

¹⁰ Nijman et al, *supra* note 3, p. 3; M. Bedjaoui, *The Reception by National Courts of Decisions of International Tribunals*, in: T.M. Franck, G.H. Fox (eds.), *International Law Decisions in National Courts*, Transnational, New York: 1996, p. 23 (the "dying embers [of the "quarrel between monists and dualists"] still shed a fair amount of light upon the theme under discussion"); Shany, *supra* note 3, p. 4 ("as far as regulation of the relationship between national and international courts is concerned, the monism/dualism debate continues to have considerable influence over conceptualization of this jurisdictional relationship"). But cf Denza, *supra* note 2, p. 418; Jennings et al, *supra* note 2, p. 54 ("the doctrinal dispute is largely without practical consequences"), quoted in Arangio-Ruiz, *supra* note 2, p. 34 and see criticism of this position at p. 35.

¹¹ Gaja, *supra* note 2, p. 59, cited *infra* note 12; see also Arangio-Ruiz, *supra* note 2, pp. 19-20; Owada, *supra* note 4, pp. 249-250. See generally Bedjaoui, *supra* note 10; Slyz, *supra* note 5; see also

question in the discussion between dualists and monists concerns the status of international law from the perspective of state organs, in particular national courts.”¹²

This is not to say that consideration has not also been given to the methodology adopted by international courts with respect to questions of domestic law,¹³ including the decisions of the International Court of Justice (Court or ICJ)¹⁴ and its predecessor institution, the Permanent Court of International Justice (PCIJ or Permanent Court).¹⁵ This article will endeavour to provide an updated overview of the role played by domestic law in the judgments of the ICJ and the PCIJ. The United Nations Charter itself provides a basis for the ongoing relevance of the decisions of the latter in the work of the current Court, as the ICJ “shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter.”¹⁶ Consequently, the ICJ can, and does, refer to PCIJ jurisprudence¹⁷ and discussion of the case law of both shall be undertaken in exploring this topic.

In section 1 of this article, we turn our minds to a more thorough exploration of the theory of dualism in international law and test its validity by investigating, in section 1.1, international law’s so-called “supremacy”, and, in section 1.2, the traditional

Denza, *supra* note 2, pp. 417-437; Crawford, *supra* note 1, pp. 55-110; Jennings et al, *supra* note 2, pp. 54-82.

¹² Gaja, *supra* note 2, p. 59.

¹³ See e.g. Crawford, *supra* note 1, pp. 51-55; Denza, *supra* note 2, pp. 413-417.

¹⁴ See e.g. Danilowicz, *supra* note 3; Nolkaemper, *supra* note 3; Pellet, *supra* note 1, pp. 776-783.

¹⁵ See e.g. C. W. Jenks, *The Interpretation and Application of Municipal Law by the Permanent Court of International Justice*, 19 British Yearbook of International Law 67 (1938); also Pellet, *supra* note 1, pp. 776-783, and see generally for authorities on this point and those made *supra* notes 13-14: Pellet, *supra* note 1, p. 776 (fn 299).

¹⁶ Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945), Art. 92. Noting that “continuity [between the ICJ and PCIJ] was ... to be preserved” as “reflected in the extensive adoption in the ICJ Statute of provisions of the PCIJ Statute” and that “[t]his makes it possible to treat the case law of the two Courts as a continuously developing system”: K. Oellers-Frahm, *Article 92 UN Charter*, in: A. Zimmerman, C. Tomuschat, K. Oellers-Frahm, C. J. Tams (eds.), *The Statute of the International Court of Justice: A Commentary* (2nd ed.), Oxford University Press, Oxford: 2012, p. 166.

¹⁷ Making this same point, with reference to Art. 92 of the Charter, see P. Tomka, *The Rule of Law and the Role of the International Court of Justice in World Affairs*, Inaugural Hilding Eek Memorial Lecture, Stockholm Centre for International Law and Justice, 2013, available at: <http://www.icj-cij.org/presscom/files/9/17849.pdf> (accessed 20 April 2016), p. 4. See generally Oellers-Frahm, *supra* note 16, p. 166. For a recent example, see ICJ, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* (Compensation, Judgment), [2012] ICJ Rep. 324, p. 331, para. 13 (referring to PCIJ, *Case Concerning the Factory at Chorzów* (Merits) (1928), PCIJ Rep. Series A, No. 17, pp. 27-28 on reparation in the diplomatic protection context). See further on the ongoing influence of *Chorzów Factory*, e.g., P. Tomka, *The ICJ in the Service of Peace and Justice: Words of welcome by President Tomka*, Statement at the Conference Celebrating the Centenary of the Peace Palace, The Hague, 2013, available at: <http://www.icj-cij.org/presscom/files/8/17538.pdf> (accessed 20 April 2016), p. 1; S. Ripinsky, K. Williams, *Damages in International Investment Law*, British Institute of International and Comparative Law, London: 2008, p. 16; J. Crawford, *The International Court of Justice and the Law of State Responsibility*, in: C. J. Tams, J. Sloan (eds.), *The Development of International Law by the International Court of Justice*, Oxford University Press, Oxford: 2013, p. 72.

relevance of domestic law to the work of the Court. Section 2 examines the possible role of domestic law in informing the Court's decision-making in respect of the cases it hears. In that section, we focus our analysis on the Court's use of municipal law in appropriate circumstances before addressing the interpretation of such law by the Court. Section 3 then moves on to considering the broader role that domestic law plays in establishing international legal norms.

1. INTERNATIONAL LAW AND DUALISM

It has been suggested by some that international law espouses a dualist approach as regards domestic law.¹⁸ In this light, one interpretation of dualism leads Shany to identify two important effects of that intellectual inclination: the first is that rules of domestic and international law are not applied, without incorporation, across systems; the second is that breach of the rules of one system cannot be justified by reference to the rules of another.¹⁹

1.1. International law's "supremacy"²⁰

As scholars writing on the topic of the relationship of domestic and international law observe, the second point is incontrovertibly supported by contemporary international legal doctrine, with it being well established that a state is unable to rely on its municipal law in order to excuse the violation of international obligations.²¹ This foundational rule was captured by the International Law Commission when it produced its *Articles on Responsibility of States for Internationally Wrongful Acts*, with Art. 3 providing that "[t]he characterization of an act of a state as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the

¹⁸ Shany, *supra* note 3, p. 81, *also* p. 4; Nollkaemper, *supra* note 7, pp. 244, 299; and, arguing specifically that the ICJ and PCIJ have applied the dualist approach, *see e.g.* Arangio-Ruiz, *supra* note 2, p. 22; Arangio-Ruiz, *supra* note 4, p. 931; *see also* Crawford, *supra* note 3, pp. 22-23 (PCIJ); Danilowicz, *supra* note 3, p. 161 (PCIJ); *similarly* Pellet, *supra* note 1, p. 778; Nollkaemper, *supra* note 3, pp. 301, 322 (ICJ). *Cf with infra* note 77.

¹⁹ Shany, *supra* note 3, p. 80. *See also* on the first point Nollkaemper, *supra* note 7, pp. 301, 69; Jennings et al, *supra* note 2, p. 53; Gaja, *supra* note 2, p. 58 ("The implication of the self-contained character that dualists attribute to the international and municipal legal systems is that, within each system, rules pertaining to a different system are not *per se* relevant."); *infra* section 1.2; and, on the second point, Crawford, *supra* note 3, pp. 22-23; *infra* section 1.1; *see also* Arangio-Ruiz, *supra* note 2, p. 16 (discussing, *inter alia*, in respect of "the coexistence of the two sets of norms", the question "as to which norm or set of norms is valid or existing and eventually which norm or set of norms should prevail").

²⁰ Using this terminology, *see e.g.* Gaja, *supra* note 2, p. 61; Nollkaemper, *supra* note 7, pp. 197-198, 280-281, 286; *cf* Jennings et al, *supra* note 2, p. 53. *See also* Pellet, *supra* note 1, p. 777 ("the 'superiority' of international law"); Kjos, *supra* note 3, p. 236 ("its superiority vis-à-vis national law").

²¹ Crawford, *supra* note 1, p. 51; Shany, *supra* note 3, pp. 6, 81; Pellet, *supra* note 1, p. 777; Jennings et al, *supra* note 2, pp. 84-85; Kjos, *supra* note 3, p. 239; Nollkaemper, *supra* note 7, pp. 11, 198, 286, and the provisions and case law discussed *infra*.

same act as lawful by internal law.”²² Unsurprisingly, in its commentary to Art. 3, the Commission confirmed the significance of this principle in international law, emphasising “[t]hat conformity with the provisions of internal law in no way precludes conduct being characterized as internationally wrongful is ... well settled” and canvassing relevant jurisprudence supporting this proposition.²³

The Vienna Convention on the Law of Treaties also enshrines one manifestation of this important principle, specifically in Art. 27, which states that a party to a treaty “may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”²⁴ In its commentary to Art. 3 mentioned above, the International Law Commission highlighted the nexus between that provision and Art. 27 of the Vienna Convention, and pointed out that an expression “similar to” the latter “has the merit of making it clear that States cannot use their internal law as a means of escaping international responsibility.”²⁵

Scholars similarly observe that both the ICJ and its predecessor institution, the PCIJ, have had occasion to support this important rule, with the key cases widely cited.²⁶ One of the earliest such cases was the 1923 decision of the PCIJ in the *Case of the S.S. “Wimbledon”*.²⁷ In that case, the Permanent Court noted that neutrality orders related to the Russo-Polish War could not justify Germany refusing to permit the Wimbledon, an English ship, to travel through the Kiel Canal, in violation of the Treaty of Versailles.²⁸ Along similar lines, in the 1930 *Greco-Bulgarian “Communities”* case, the Permanent Court stressed that “it is a generally accepted principle of international law that in the relations between ... contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty.”²⁹ Yet again, the PCIJ echoed these

²² Crawford, *supra* note 1, p. 51, quoting Art. 3. Art. 3 is also produced in J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, Cambridge: 2002, p. 86 and cited in this context in, e.g., Gaja, *supra* note 2, p. 61; Pellet, *supra* note 1, p. 777; Shany, *supra* note 3, p. 6; Nollkaemper, *supra* note 7, pp. 11, 286.

²³ Crawford, *supra* note 22, p. 86 and *see* discussion at pp. 86-88. *See also* Nollkaemper, *supra* note 7, p. 198.

²⁴ Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980), 1155 UNTS 331, Art. 27, quoted in this context in Denza, *supra* note 2, p. 414; Gaja, *supra* note 2, p. 61; *see also* Shany, *supra* note 3, p. 6; Crawford, *supra* note 1, p. 51; Kjos, *supra* note 3, p. 263; Nollkaemper, *supra* note 7, pp. 11, 286; Crawford, *supra* note 22, p. 89.

²⁵ Crawford, *supra* note 22, p. 89.

²⁶ *See e.g.* Crawford, *supra* note 1, pp. 51-52 and Pellet, *supra* note 1, pp. 777-778, referencing many of the cases discussed *infra*. *See also* Nollkaemper, *supra* note 7, p. 286; and for further references to the case law Jennings et al, *supra* note 2, pp. 84-85; Crawford, *supra* note 22, pp. 86-88.

²⁷ Pellet, *supra* note 1, p. 777, referring to PCIJ, *Case of the S.S. “Wimbledon”* (1923), PCIJ Rep. Series A, No. 1, p. 29; *see also* Crawford, *supra* note 1, p. 51 (fn 22); Crawford, *supra* note 22, pp. 86-87.

²⁸ PCIJ, *Case of the S.S. “Wimbledon”*, pp. 28-30, and *generally* on the factual background pp. 18-20, cited in Pellet, *supra* note 1, p. 777; *see also* Crawford, *supra* note 22, pp. 86-87.

²⁹ PCIJ, *The Greco-Bulgarian “Communities”* (Advisory Opinion) (1930), PCIJ Rep. Series B, No. 17, p. 32, quoted in Jennings et al, *supra* note 2, p. 84 (fn 9); Crawford, *supra* note 22, p. 87; also cited in Pellet, *supra* note 1, p. 777 (fn 306); Crawford, *supra* note 1, p. 51 (fn 25).

remarks in the *Free Zones of Upper Savoy and the District of Gex* case when it declared, in respect of the collection of taxes and duties by France at its border with Switzerland, “that France cannot rely on her own legislation to limit the scope of her international obligations”.³⁰

Lending further support to what was by then a well-established principle, the ICJ affirmed the statement of the PCIJ in the *Greco-Bulgarian “Communities”* case over five decades later: in an Advisory Opinion relating to the *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, the Court, discussing a potential interpretation to be given to a statement by the United States that its actions were “irrespective of any obligations ... under the [Headquarters] Agreement”, observed that it is a “fundamental principle of international law that international law prevails over domestic law”, referring to the relevant passage from *Greco-Bulgarian “Communities”*.³¹ Needless to say, and as publicists highlight, statements have been issued by the Court in a number of other judgments to the effect that the position in municipal law is not determinative with respect to international law claims.³²

More recently, in the case concerning *Questions relating to the Obligation to Prosecute or Extradite*, the Court was confronted with a claim by Belgium that Senegal had, by not prosecuting or extraditing Mr Habré, a past President of Chad, violated certain provisions of, *inter alia*, the United Nations Convention against Torture.³³ The Court referred to Art. 27 of the Vienna Convention noted above, “which reflects customary law”, to emphasise that Senegal could not “justify its breach of the obligation” to prosecute or extradite Mr Habré under the Convention “by invoking provisions of its internal law, in particular by invoking the decisions as to lack of jurisdiction rendered

³⁰ PCIJ, *Case of the Free Zones of Upper Savoy and the District of Gex* (Judgment) (1932), PCIJ Rep. Series A/B, No. 46, p. 167, quoted in Crawford, *supra* note 1, p. 51; Crawford, *supra* note 22, p. 87; the case is also cited in Pellet, *supra* note 1, p. 777 (fn 306), together with PCIJ, *Case of the Free Zones of Upper Savoy and the District of Gex* (Order) (1930), PCIJ Rep. Series A, No. 24, p. 12; *see also* Nollkaemper, *supra* note 7, p. 286 (fn 37).

³¹ ICJ, *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* (Advisory Opinion), [1988] ICJ Rep. 12, p. 34, para. 57, and p. 35, para. 57 for the quote from *Greco-Bulgarian “Communities”*. The quoted ICJ passage is reproduced in Jennings et al, *supra* note 2, p. 85 (fn 9) and referenced in Pellet, *supra* note 1, p. 777 (fn 306); Crawford, *supra* note 1, p. 51 (fn 23).

³² *See e.g.* those referenced in Pellet, *supra* note 1, p. 777 (fn 306), particularly ICJ, *Fisheries (United Kingdom v. Norway)* (Judgment), [1951] ICJ Rep. 116, p. 132; ICJ, *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)* (Judgment), [2009] ICJ Rep. 3, p. 18, para. 47 (“considerations of domestic law which have so far hindered the implementation of the obligation incumbent upon the United States, cannot relieve it of its obligation.”). Crawford also lists “leading cases” from the ICJ: *supra* note 1, p. 51 (fn 23). *See also* Jenks, *supra* note 15, p. 85. Cf Gaja, *supra* note 2, p. 56, quoted *infra* note 90.

³³ ICJ, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (Judgment), [2012] ICJ Rep. 422, p. 426, para. 1, pp. 428–429, para. 13. This case is referenced in this context by Pellet, *supra* note 1, p. 777 (fn 301).

by its courts in 2000 and 2001, or the fact that it did not adopt the necessary legislation pursuant to ... that Convention until 2007.”³⁴

Finally, just last year, in joined cases concerning Costa Rica and Nicaragua, the Court was faced with an argument that Costa Rica was not obliged to carry out an environmental impact assessment relating to a “road project because of an emergency”.³⁵ Costa Rica had argued “that an emergency can exempt a state from the requirement to conduct an environmental impact assessment, either because international law contains a *renvoi* to domestic law on this point, or because it includes an exemption for emergency situations.”³⁶ The Court relevantly acknowledged its earlier jurisprudence that “it is for each state to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case”.³⁷ However, the Court “observe[d] that this reference to domestic law does not relate to the question of whether an environmental impact assessment should be undertaken” and consequently that “the fact that there may be an emergency exemption under Costa Rican law does not affect Costa Rica’s obligation under international law to carry out an environmental impact assessment.”³⁸

While this principle of international law’s “supremacy” unquestionably applies to domestic legislation, as then Professor Crawford noted, its validity holds equally in respect of domestic constitutions,³⁹ with the Permanent Court speaking to this question very plainly in its Advisory Opinion on the *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory* when it highlighted that “a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force.”⁴⁰

³⁴ ICJ, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, p. 460, para. 113, cited in Pellet, *supra* note 1, p. 777 (fn 301) and quoted in A. Nollkaemper, *Wither Aut Dedere? The Obligation to Extradite or Prosecute after the ICJ’s Judgment in Belgium v. Senegal*, 4 *Journal of International Dispute Settlement* 501 (2013), p. 515.

³⁵ ICJ, *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)*, Judgment of 16 December 2015, available at: <http://www.icj-cij.org/docket/index.php?p1=3>, para. 157.

³⁶ *Ibidem*, para. 148.

³⁷ *Ibidem*, para. 157, quoting ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (Judgment), [2010] ICJ Rep. 14, p. 83, para. 205.

³⁸ *Ibidem*, para. 157.

³⁹ Crawford, *supra* note 1, p. 51, quoting PCIJ, *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory* (Advisory Opinion) (1932), PCIJ Rep. Series A/B, No. 44, p. 24, reproduced *infra* note 40. See also I. Brownlie, *System of the Law of Nations: State Responsibility Part I*, Clarendon Press, Oxford: 1983, p. 141 (“state cannot plead the principles of municipal law, including its constitution, in answer to an international claim”).

⁴⁰ PCIJ, *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, p. 24, quoted in Crawford, *supra* note 1, p. 51; similarly Pellet, *supra* note 1, p. 777; Jennings et al, *supra* note 2, p. 85 (fn 10); Crawford, *supra* note 22, p. 87; see also Nollkaemper, *supra* note 7, p. 286 (fn 37).

Moreover, it is clear that domestic court judgments are not binding on international tribunals;⁴¹ rather, the latter must often judge whether actions taken under municipal law are consistent with the international obligations of the states appearing before them.⁴² Thus, for instance, in the 2012 case concerning *Jurisdictional Immunities of the State*, the Court had to consider whether the Italian courts were correct that they were able to entertain claims against Germany, or rather whether Germany was immune from those Italian courts' jurisdiction.⁴³

By way of conclusion, it thus follows that domestic rules, be they regular or constitutional, or decisions by the national judiciary, cannot prevent the ICJ from determining whether a state has violated its international obligations.

1.2. The evidential⁴⁴ relevance of domestic law

The first aspect of the dualist approach noted above, namely the question of the application of domestic rules in international law,⁴⁵ warrants further comment. As scholars writing on the place of domestic law in the judgments of the Court observe, the starting point in appreciating the interaction between the Court and rules of domestic law is that it does not apply municipal law, but international law, when adjudicating and deciding cases;⁴⁶ indeed, Art. 38(1) of the Court's own Statute defines its function as one according to which it "is to decide *in accordance with international law* such disputes as are submitted to it".⁴⁷ In its Advisory Opinion of 2010 concerning the *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, the

⁴¹ Nollkaemper, *supra* note 7, p. 245, *also* p. 255; *similarly* Shany, *supra* note 3, p. 81. *See also* Pellet, *supra* note 1, p. 778; Crawford, *supra* note 1, p. 59. *See also infra* notes 205 *et seq* on the "subsidiary" role of domestic court decisions.

⁴² *See* Nollkaemper, *supra* note 7, pp. 245, 247, 253; *similarly* Shany, *supra* note 3, pp. 6, 81; Nollkaemper, *supra* note 3, p. 317; and *see* Pellet, *supra* note 1, p. 778 and fn 307 for cases on municipal court decisions. *See further infra* notes 73-75.

⁴³ ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (Judgment), [2012] ICJ Rep. 99, p. 117, paras. 37-38, p. 122, para. 53. This point is made in, *e.g.*, Nollkaemper, *supra* note 7, p. 247, and the case cited in this context in Pellet, *supra* note 1, p. 778 (fn 307). However, *see infra* section 3 on other uses that may be made of municipal decisions.

⁴⁴ *See* Crawford, *supra* note 3, p. 22 (international and domestic law "live in distinct spheres, communicating via the rules of evidence"); Danilowicz, *supra* note 3, p. 162 ("in the proceedings before the Court domestic law plays the role of evidence"). On proving domestic law: Jenks, *supra* note 15, pp. 89-92; *also* Crawford, *supra* note 1, pp. 52-53.

⁴⁵ *Supra* note 19.

⁴⁶ Nollkaemper, *supra* note 3, p. 311 (Court "applies international rather than domestic law"); *similarly* Nollkaemper, *supra* note 7, p. 244, *also* p. 69; Pellet, *supra* note 1, p. 776 ("municipal law does not operate as a 'formal source' of the law, even though it can have a 'decisive' influence on the Court's decisions"), *also* p. 778; Shany, *supra* note 3, p. 80. *See also* Kjos, *supra* note 3, p. 3 ("[international courts'] *lex fori* is international law") and pp. 4-5, 44.

⁴⁷ Statute of the International Court of Justice, annexed to Charter of the United Nations, Art. 38(1) (emphasis added), referred to in Pellet, *supra* note 1, p. 776, *also* p. 778; Danilowicz, *supra* note 3, p. 161; *see also* Nollkaemper, *supra* note 3, p. 311; Nollkaemper, *supra* note 7, p. 244; Shany, *supra* note 3, p. 80. *Cf with* Jenks, *supra* note 15, pp. 100-101.

Court mirrored this approach and reminded readers that it had “not been asked to give an opinion on whether the declaration of independence [was] in accordance with any rule of domestic law but only whether it [was] in accordance with international law.”⁴⁸ It went on to say that it could “respond to that question by reference to international law without the need to enquire into any system of domestic law.”⁴⁹

Therefore, a distinction should be drawn between the Court’s role, as envisaged in its Statute, and that of other international tribunals, which may be required to apply both international and national law.⁵⁰ By way of example, Art. 42(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States provides for that very possibility and states:

The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, *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.*⁵¹

It is, on the contrary, well known that from early in its history, in the *Case concerning Certain German Interests in Polish Upper Silesia*, the Permanent Court declared that “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.”⁵² A Chamber of the ICJ called upon to investigate the principle of *uti possidetis juris* in the context of the *Frontier Dispute (Burkina Faso/Republic of Mali)* spoke specifically to the role played by domestic law in the framework of its analysis:

⁴⁸ ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion), [2010] ICJ Rep. 403, p. 415, para. 26.

⁴⁹ *Ibidem*. Cf with discussion of this case in J. d’Aspremont, *The Permanent Court of International Justice and Domestic Courts: A Variation in Roles*, in: C. J. Tams, M. Fitzmaurice (eds.), *Legacies of the Permanent Court of International Justice*, Martinus Nijhoff, Leiden: 2013, p. 239. See also discussing this case Owada, *supra* note 4, pp. 248-249.

⁵⁰ See e.g. Kjos, *supra* note 3, pp. 4-5, also pp. 6-7; Crawford, *supra* note 3, pp. 23-25.

⁵¹ Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966), 575 UNTS 159, Art. 42(1) (emphasis added). See generally on this provision Kjos, *supra* note 3, pp. 87-91, 168; Pellet, *supra* note 1, p. 746; E. de Brabandere, *Investment Treaty Arbitration as Public International Law: Procedural Aspects and Implications*, Cambridge University Press, Cambridge: 2014, p. 124 (noting, *inter alia*, “[t]he majority of BITs today include applicable provisions very similar to the second limb of Article 42(1) of the ICSID Convention”, referring to A. Kulick, *Global Public Interest in International Investment Law*, Cambridge University Press, Cambridge: 2012, p. 11 *et seq.*).

⁵² PCIJ, *Case concerning Certain German Interests in Polish Upper Silesia* (Merits) (1926), PCIJ Rep. Series A, No. 7, p. 19, cited and quoted in Pellet, *supra* note 1, p. 777; Crawford, *supra* note 1, p. 52; Shany, *supra* note 3, p. 81; Nollkaemper, *supra* note 3, p. 303, also p. 311; Kjos, *supra* note 3, p. 253, and cited in Jennings et al, *supra* note 2, p. 83. On this being a dualist approach see, e.g., Danilowicz, *supra* note 3, p. 161; Arangio-Ruiz, *supra* note 4, p. 936 (fn 40). See also P. Tomka, V-J. Proulx, *The Evidentiary Practice of the World Court*, in: J. C. Sainz-Borgo (ed.), *Liber Amicorum Gudmundur Eiriksson*, University for Peace Press, San José: 2016 (forthcoming), available at: <http://ssrn.com/abstract=2693558> (accessed 20 April 2016), pp. 17-18.

[I]nternational law does not effect any renvoi to the law established by the colonizing State, nor indeed to any legal rule unilaterally established by any State whatever; French law – especially legislation enacted by France for its colonies and *territoires d'outre-mer* – may play a role not in itself (as if there were a sort of *continuum juris*, a legal relay between such law and international law), but only as one factual element among others, or as evidence indicative of what has been called the ‘colonial heritage’, i.e., the ‘photograph of the territory’ at the critical date.⁵³

As then Professor Gaja pointed out, describing a given rule in terms of “fact” indicates that it “does not pertain to the system and ... is neither incorporated nor given any legal effect.”⁵⁴ Another influential commentator, and former ILC Special Rapporteur, posited that municipal law is therefore pertinent “not as a part of international law as applied by the Court (*quaestio iuris*) under Article 38 of the Statute but as an aspect of a state’s conduct (*quaestio facti*).”⁵⁵

In respect of the latter, there is little doubt that, in Professor Gaja’s again apposite words, “[t]he merits of the case may consist in finding out whether a certain conduct is inconsistent with international law and the State’s law may be examined as part of that conduct.”⁵⁶ Indeed, it has been suggested that “the determination of whether municipal laws are consistent with international law is an essential part of the function of any international court.”⁵⁷

Accordingly, the Court’s jurisprudence is replete with instances in which it was called upon to address the consistency of domestic law actions with a state’s international legal obligations.⁵⁸ It should be noted in passing that *how* international obliga-

⁵³ ICJ, *Frontier Dispute (Burkina Faso/Republic of Mali)* (Judgment), [1986] ICJ Rep. 554, p. 568, para. 30, quoted in Pellet, *supra* note 1, p. 779, and affirmed in ICJ, *Frontier Dispute (Benin/Niger)* (Judgment), [2005] ICJ Rep. 90, p. 110, para. 28, also cited in Pellet, *supra* note 1, p. 779 (fn 316). See also Shany, *supra* note 3, p. 79; Nollkaemper, *supra* note 3, p. 311; Nollkaemper, *supra* note 7, p. 244.

⁵⁴ Gaja, *supra* note 2, p. 58. See also Jennings et al, *supra* note 2, p. 83 (domestic law “generally regarded as a fact ... rather than as a rule to be applied on the international plane as a rule of law”). Crawford outlines “six distinct aspects” of treating domestic law as fact, which are addressed at appropriate points herein: *supra* note 1, p. 52 *et seq.* Pursuant to the private international law rules of a given state, “foreign law” may also be regarded as fact: see Lord Collins (gen. ed.), *Dicey, Morris and Collins on The Conflict of Laws* (15th ed.), Sweet & Maxwell, London: 2012, vol. I, p. 318 *et seq.*; similarly in the PCIJ context Arangio-Ruiz, *supra* note 4, p. 935 (fn 39). However, *cf with* Jenks, *supra* note 15, p. 68 (PCIJ did not conclude from the statement quoted *supra* note 52 “that municipal laws must be proved as facts in the manner in which foreign law is generally required to be proved in an English court”). See also Nollkaemper, *supra* note 3, p. 314. See further *infra* notes 157-159.

⁵⁵ Arangio-Ruiz, *supra* note 2, p. 22; similarly Arangio-Ruiz, *supra* note 4, p. 931. See also Nollkaemper, *supra* note 3, p. 311 (“there is no difference between a decision of a domestic court, a legislative or executive act, or some other ‘fact’ that causes a dispute.”).

⁵⁶ Gaja, *supra* note 2, p. 58. Similarly Crawford, *supra* note 1, p. 52; see also Pellet, *supra* note 1, pp. 780-781; Danilowicz, *supra* note 3, p. 162.

⁵⁷ Jenks, *supra* note 15, p. 67.

⁵⁸ See e.g. Crawford, *supra* note 1, p. 54; Pellet, *supra* note 1, pp. 780-781, also pp. 777-778; Jenks, *supra* note 15, p. 68; Danilowicz, *supra* note 3, p. 154 *et seq.*; d’Aspremont, *supra* note 49, p. 239; Nollkaemper, *supra* note 3, p. 311 (national court decisions); similarly Shany, *supra* note 3, p. 1. See also Denza, *supra* note 2, pp. 414-415.

tions are implemented in domestic law is not generally of consequence to international courts, provided the outcome is compliant therewith.⁵⁹ A salient example of this arose in the *LaGrand* case, in which the Court underscored that application of “the procedural default rule” of United States municipal law led to a violation of obligations under the 1963 Vienna Convention on Consular Relations because the affected individuals were thereby rendered unable “to effectively challenge their convictions and sentences” on the ground that they had not been provided with “consular information” pursuant to Art. 36(1) of that Convention.⁶⁰ However, the Court directed that, in cases of “severe penalties”, the United States was “by means of its own choosing, [to] allow the review and reconsideration of [a] conviction and sentence” rendered following breach of the Consular Relations Convention “by taking account of the violation of the rights set forth in that Convention”.⁶¹ Similar reasoning was espoused by the Court in the more recent case concerning *Avena and Other Mexican Nationals*, which concerned violations committed by US authorities of the same Convention in respect of a number of Mexican individuals.⁶² Accepting “that the concrete modalities for ... review and reconsideration should be left primarily to the United States”,⁶³ it was nonetheless necessary for such review to “be effective”,⁶⁴ with the Court observing “that what is crucial in the review and reconsideration process is the existence of a pro-

⁵⁹ Denza, *supra* note 2, pp. 412, 416; Kjos, *supra* note 3, p. 238, referring to Nollkaemper, *supra* note 7, p. 70, *see also* p. 195; *infra* note 67; A. Tzanakopoulos, *Domestic Courts in International Law: The International Judicial Function of National Courts*, 34 *Loyola of Los Angeles International & Comparative Law Review* 133 (2011), p. 144; Jennings et al, *supra* note 2, pp. 82-83; and vis-à-vis treaties Shelton, *supra* note 5, p. 3 (“the treaty will often leave to the state the determination of how ... compliance is to occur ... Such provisions seem to support a dualist notion”); *similarly* on this approach marking a “dualist system”: Slyz, *supra* note 5, p. 73; *see also* A. Cassese, *Towards a Moderate Monism: Could International Rules Eventually Acquire the Force to Invalidate Inconsistent National Laws?*, in: A. Cassese (ed.), *Realizing Utopia: The Future of International Law*, Oxford University Press, Oxford: 2012, pp. 189-190.

⁶⁰ ICJ, *LaGrand (Germany v. United States of America)* (Judgment), [2001] ICJ Rep. 466, pp. 497-498, paras. 90-91, discussed in Nollkaemper, *supra* note 3, pp. 313, 319; Nollkaemper, *supra* note 7, pp. 89, 90, *also* 195; Denza, *supra* note 2, pp. 414-415; Shany, *supra* note 3, pp. 48, 53, 171, 190; Pellet, *supra* note 1, p. 781. Noting “while states can determine the most fitting remedies within domestic law, eventually the result that is required by international law will have to be achieved ... [as] illustrated by reference to the Vienna Convention on Consular Relations”, and considering ICJ case law: Nollkaemper, *supra* note 7, p. 195. *See also infra* notes 66-67.

⁶¹ ICJ, *LaGrand (Germany v. United States of America)*, p. 516, para. 128(7), and *see* discussion in Denza, *supra* note 2, pp. 414-415; Shany, *supra* note 3, pp. 48, 53, 171, 190; M. Kawano, *Decisions of the International Court of Justice on Disputes Concerning Internal Law*, in: G. Gaja, J. Grote Stoutenburg (eds.), *Enhancing the Rule of Law through the International Court of Justice*, Brill Nijhoff, Leiden: 2014, pp. 125-126.

⁶² ICJ, *Avena and Other Mexican Nationals (Mexico v. United States of America)* (Judgment), [2004] ICJ Rep. 12, pp. 53-55, para. 106, p. 57, para. 114. *See* discussion of the case in e.g. Nollkaemper, *supra* note 3, pp. 319-320; Kawano, *supra* note 61, pp. 130-131; Shany, *supra* note 3, pp. 49, 53, 171, 190; Nollkaemper, *supra* note 7, pp. 195, 254; Denza, *supra* note 2, p. 415; Owada, *supra* note 4, pp. 272-273.

⁶³ ICJ, *Avena and Other Mexican Nationals (Mexico v. United States of America)*, p. 62, para. 131, referring to *LaGrand* quoted *supra* note 61.

⁶⁴ *Ibidem*, p. 65, para. 138. *See also* Kawano, *supra* note 61, p. 130.

cedure which guarantees that full weight is given to the violation of the rights set forth in the Vienna Convention, whatever may be the actual outcome”.⁶⁵ At the conclusion of proceedings concerning a request for interpretation of its Judgment in *Avena*, the Court affirmed that what had been in issue was “an obligation of result which clearly must be performed unconditionally”, albeit that “the United States [was] to choose the means of implementation”.⁶⁶

Thus, these cases demonstrate that, even if the Court is prepared to give the state some scope in respect of implementing its obligations under domestic law, it will insist that those obligations are met.⁶⁷ Indeed, as Pellet observes, in the *Case concerning Certain German Interests in Polish Upper Silesia*, the Permanent Court, having equated domestic law with fact, went on to say that “there is nothing to prevent the Court’s giving judgment on the question whether or not, in applying [a Polish] law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention.”⁶⁸

As scholars observe, the Court’s case law provides numerous other examples of circumstances in which the Court was called upon to pronounce on the consonance of domestic legal measures with international law.⁶⁹ Thus, for instance, in the *Fisheries* case between the United Kingdom and Norway, the Court was called upon to rule on whether the establishment of fishing zones by Norway, pursuant to a Royal Decree, was consistent with international law.⁷⁰ More recently, in the *Whaling* case, the Court was confronted with the question of whether the issuance of particular whaling permits

⁶⁵ ICJ, *Avena and Other Mexican Nationals (Mexico v. United States of America)*, p. 65, para. 139, also quoted in Kawano, *supra* note 61, p. 130.

⁶⁶ ICJ, *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)*, p. 17, para. 44, quoted in Nollkaemper, *supra* note 7, p. 125 and Kawano, *supra* note 61, p. 135; also cited in A. Nollkaemper, *The Reception by the International Court of Justice of Decisions of Domestic Courts* (2009), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1515747 (accessed 20 April 2016), p. 7. See also Abraham, quoted *infra* note 67.

⁶⁷ Nollkaemper, *supra* note 7, p. 195; R. Abraham, *The Effects of International Legal Obligations in Domestic Law in Light of the Judgment of the Court in the Medellín Case*, in: G. Gaja, J. Grote Stoutenburg (eds.), *Enhancing the Rule of Law through the International Court of Justice*, Brill Nijhoff, Leiden: 2014, p. 118 (discussing the *Avena Request for Interpretation*, noting a state’s “free[dom] to decide whether or not to give direct effect to [an] obligation, according to what its constitutional law provides”, and observing “[t]he only important point being that, by one means or the other, the obligation is ultimately implemented within a reasonable time”). See also Kawano, *supra* note 61, p. 126; Shany, *supra* note 3, p. 190.

⁶⁸ Pellet, *supra* note 1, p. 778, quoting PCIJ, *Case concerning Certain German Interests in Polish Upper Silesia*, p. 19 and see *supra* note 52 for the Court’s earlier statement. See also Arangio-Ruiz, *supra* note 4, p. 936 (fn 40); Jenks, *supra* note 15, p. 68.

⁶⁹ See e.g. Crawford, *supra* note 1, p. 54, also p. 52; Pellet, *supra* note 1, pp. 777-778, 780-781; Danilowicz, *supra* note 3, pp. 154, 155-160, 162; also Jenks, *supra* note 15, p. 68.

⁷⁰ ICJ, *Fisheries (United Kingdom v. Norway)*, particularly pp. 125, 132, discussed in Danilowicz, *supra* note 3, p. 155 and cited in Pellet, *supra* note 1, p. 777 (fn 306); also Crawford, *supra* note 1, p. 54 (fn 44). See also discussion of ICJ, *Fisheries Jurisdiction (Spain v. Canada)* (Jurisdiction, Judgment), [1998] ICJ Rep. 432 in Kawano, *supra* note 61, pp. 122-124.

under Japanese law was consistent with Japan's obligations pursuant to the International Convention for the Regulation of Whaling.⁷¹ In the *dispositif* of its Judgment, it concluded that "Japan shall revoke any extant authorization, permit or licence granted in relation to [the relevant programme], and refrain from granting any further permits in pursuance of that programme."⁷²

Moreover, the Court has often been asked to rule on the consistency of domestic court judgments with a state's international legal obligations.⁷³ As noted above, the Court did so not only in relation to cases concerned with alleged violations of the Vienna Convention on Consular Relations,⁷⁴ but also more recently in the case concerning *Jurisdictional Immunities of the State*.⁷⁵

Certain scholars have been prompted to query whether decisions promoting the precedence of international law over municipal law can really be reconciled with the dualist outlook.⁷⁶ Some thus suggest that if the Court attempts to ascertain whether international law and domestic law are compatible, it must itself be embracing a monist view.⁷⁷ However, it is suggested that this is not necessarily the case, and would only be so if, in identifying inconsistency between domestic law and what is required by an international obligation, the Court queried the lawfulness of a given rule under *domestic* law.⁷⁸ On the

⁷¹ See ICJ, *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)* (Judgment), [2014] ICJ Rep. 226, p. 242, para. 30. For details of the relevant Japanese legal process, see Counter-Memorial of Japan, para. 5.112.

⁷² *Ibidem*, p. 300, para. 247(7).

⁷³ Nollkaemper, *supra* note 3, pp. 311-313; Pellet, *supra* note 1, p. 778 and fn 307 for ICJ decisions concerning national courts' conduct; see also Nollkaemper, *supra* note 7, pp. 247, 253.

⁷⁴ *Supra* notes 60-66. See also Nollkaemper, *supra* note 3, p. 313; Nollkaemper, *supra* note 7, p. 253; Shany, *supra* note 3, p. 45 *et seq.*

⁷⁵ See *supra* note 43.

⁷⁶ See Pellet, *supra* note 1, p. 778 ("In pure logic, this approach is not very consistent with the Court's 'dualist' assertion that municipal laws are 'merely facts' from an international law perspective") and *infra* note 77. See also Kjos, *supra* note 3, p. 236 (referring to "the monist ... notion of [international law's] superiority vis-à-vis national law" (emphasis added, reference omitted)).

⁷⁷ Danilowicz, *supra* note 3, pp. 153-154 and Pellet, *supra* note 1, p. 778, both referring to K. Marek, *Les rapports entre le droit international et le droit interne à la lumière de la jurisprudence de la Cour Permanente de Justice Internationale*, 66 Revue Générale de Droit International Public 260 (1962). Both authors quote p. 268 thereof: "Admettre qu'une règle de droit interne peut être conforme – ou non conforme – au droit international, c'est admettre l'unité des deux ordres." Marek apparently argues that PCIJ practice took such a monist view: see summaries in Danilowicz, *supra* note 3, pp. 153-154 and particularly Arangio-Ruiz, *supra* note 4, pp. 931-935. However, *cf with* Arangio-Ruiz, *supra* note 4, pp. 932-936 and Danilowicz, *supra* note 3, p. 158 (suggesting that ICJ, *Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v. Sweden)* (Judgment), [1958] ICJ Rep. 55 provides "the only trace of the monist theory in the jurisprudence of the Court").

⁷⁸ Arangio-Ruiz, *supra* note 4, p. 933 (fn 39) (responding to Marek's arguments vis-à-vis various PCIJ cases and noting "the dualist view that the national rules not in conformity with international law are not invalidated or annulled by international law" and that "[l]egality was re-established in any of those cases by national action under national law"); see also Danilowicz, *supra* note 3, pp. 159, 153-154; Arangio-Ruiz, *supra* note 2, p. 19 and p. 35 (referring to Jennings et al, *supra* note 2, p. 54, and emphasising "that the supremacy of international law is direct only on the international plane ... In the domestic sphere

contrary, as Professor Crawford has observed, an international court “cannot declare the unconstitutionality or invalidity of rules of national law as such.”⁷⁹ Thus, in its Judgment in *Interpretation of the Statute of the Memel Territory* in 1932, the Permanent Court referred to the fact that a given action was “contrary to [a] treaty”, but noted that this did not entail that it “was of no effect in the sphere of municipal law.”⁸⁰ In any event, it should be emphasised that the Court made clear in the *LaGrand* Judgment that it is not an appellate court for domestic legal matters, pointing out that it was asked:

to do no more than apply the relevant rules of international law to the issues in dispute between the Parties to this case. The exercise of this function, expressly mandated by Article 38 of its Statute, does not convert this Court into a court of appeal of national criminal proceedings.⁸¹

Professor Gaja suggests that treating municipal law as fact “may not seem inappropriate” as an approach when an international tribunal is considering the *conduct* of a state – which may include that very law – so as to ascertain whether it violates the state’s international legal obligations.⁸² Nonetheless, he has viewed the description of domestic law in terms of fact as “go[ing] too far”, in the sense that “it appears to call into question the legal nature of rules pertaining to a different system.”⁸³ Granted, the flip-side to this line of argument could be that international law only regards domestic law as a question of fact for the purposes of international law.⁸⁴ Nonetheless, as publicists have observed, there appear to be a range of situations in which international tribunals, including the Court, arguably examine domestic law in a legal sense in deciding cases,

national law is supreme, international law prevailing only where national law implicitly or explicitly so provides.”). See also Jennings et al, *supra* note 2, p. 84 (fn 6); Nollkaemper, *supra* note 7, p. 198 (“the claim to supremacy of international law is confined to the international level”); Gaja, *supra* note 2, p. 61; Pellet, *supra* note 1, p. 779; *infra* note 84.

⁷⁹ Crawford, *supra* note 1, p. 53, citing PCIJ, *Interpretation of the Statute of the Memel Territory* (Judgment) (1932), PCIJ Rep. Series A/B, No. 49, referred to *infra* note 80. See similarly Denza, *supra* note 2, p. 414; Arangio-Ruiz, *supra* note 4, pp. 932-934, 932-934 (fn 39); Jennings et al, *supra* note 2, p. 84 (fn 6).

⁸⁰ PCIJ, *Interpretation of the Statute of the Memel Territory*, p. 336, cited in Crawford, *supra* note 1, p. 53 (fn 37) and quoted and discussed in Nollkaemper, *supra* note 7, p. 69; Jenks, *supra* note 15, pp. 81-84.

⁸¹ ICJ, *LaGrand (Germany v. United States of America)*, p. 486, para. 52, quoted and discussed in Nollkaemper, *supra* note 3, p. 314 and Nollkaemper, *supra* note 66, p. 13. See also Crawford, *supra* note 1, p. 53; cf Pellet, *supra* note 1, p. 780.

⁸² Gaja, *supra* note 2, p. 58. See also Crawford, *supra* note 1, p. 52 and *supra* notes 55-57.

⁸³ Gaja, *supra* note 2, p. 58. See also Crawford, *supra* note 1, p. 52; Nollkaemper, *supra* note 3, p. 321; Danilowicz, *supra* note 3, p. 161.

⁸⁴ Cf Arangio-Ruiz, *supra* note 4, pp. 935-936 (if PCIJ considered domestic law “in order to verify ... conformity or difformity to international law or for any other international legal purpose”, it was treated as fact), p. 934 (fn 39) (discussing *Certain German Interests*: “[t]he Court did not interfere ... with any finding by any internal jurisdiction on the civil law point for internal law purposes. It merely maintained, for the international legal purposes ... a positive finding on the issue of ownership”); similarly Jenks, *supra* note 15, p. 71 (discussing the same case: “the Court’s ruling only decided the question of ownership under municipal law for the purpose of determining whether there had been any breach of an international engagement”).

and not solely as fact.⁸⁵ Some examples that might fall within this judicial approach are examined in the next section.⁸⁶

2. THE POSSIBLE ROLE OF DOMESTIC LAW IN DECIDING INTERNATIONAL LEGAL CASES

As prefaced, this section will suggest that domestic law and municipal court decisions cannot be excised altogether from international adjudication. On the contrary, they can play a role in appropriate cases – sometimes instrumental – in shedding light on a legal avenue available to the Court, and thus become an important tool in its decision-making.

2.1. Domestic law as an aspect of the law to be applied

By way of overarching principle, it is probably fair to suggest that an international court will be able to apply municipal law in instances where international law makes “some kind of reference” to domestic legal rules;⁸⁷ where municipal law forms, in some

⁸⁵ Jenks, *supra* note 15, p. 67 (article to consider PCIJ “interpretation and application ... of municipal law as the law which determines the existence of rights or obligations, or the effect of transactions”), p. 100 (“in a variety of types of cases the functions of the Court necessarily include the interpretation and application of municipal law”), and discussion of actual and potential uses at pp. 67-89; Crawford, *supra* note 1, pp. 52, 53-54; Kjos, *supra* note 3, p. 241 (quoting Crawford, *supra* note 22, p. 89 as saying: “In every case it will be seen on analysis that either the provisions of internal law are relevant as facts in applying the applicable international standard, or else that they are actually incorporated in some form, conditionally or unconditionally, into that standard.” Kjos goes on to note that “tribunals may be required to apply – rather than merely consider – national law in order to determine the parties’ rights and obligations pursuant to that national law”: Kjos, *supra* note 3, p. 241. *See similarly* pp. 255 and 270); Nollkaemper, *supra* note 7, p. 253 (“In [certain] situations provisions of national law are not to be considered as facts, but may be applied as law”), also pp. 255, 265-266; *similarly* Nollkaemper, *supra* note 66, p. 4. *See also* Jennings et al, *supra* note 2, p. 83; d’Aspremont, *supra* note 49, pp. 238-239; Gaja, *supra* note 2, p. 59; and *generally* Shany, *supra* note 3, p. 80, quoted *infra* note 158. *But cf* Pellet, *supra* note 1, p. 779 (noting argument that Court “applies [domestic rules] as legal norms” but arguing “[t]his is not so”) and pp. 782-783 quoted *infra* note 87; Arangio-Ruiz, *supra* note 4, pp. 934-935 (PCIJ did not apply domestic law “in the sense of directly affecting juridical relationships (*i.e.* rights and obligations) of domestic law”), also pp. 935-936.

⁸⁶ *See similarly* Crawford, *supra* note 1, pp. 52, 53-55, 111; Jenks, *supra* note 15, pp. 67-89; Nollkaemper, *supra* note 7, pp. 265-266; Pellet, *supra* note 1, pp. 782-783; d’Aspremont, *supra* note 49, p. 239. *See also* the relevant chapters in Sasson, *infra* note 158 and on the ICJ’s use of domestic decisions “in the settlement of individual disputes”: Nollkaemper, *supra* note 3, p. 311 and discussion pp. 311-314.

⁸⁷ Gaja, *supra* note 2, p. 59; *see also* Nollkaemper, *supra* note 7, p. 253 (“where international law expressly refers to or relies on national law ... provisions of national law ... may be applied as law”) and p. 265 (“[w]hen international law ... incorporates rules of domestic law”); *cf* Pellet, *supra* note 1, pp. 782-783 (“when [international law] expressly ‘falls back on’ (*renvoie au* ...) domestic law ... In these cases, the Court is called upon to ‘apply’ municipal law, not as such, but as being incorporated into international law” (references omitted)); *similarly* on “*renvoi*”: Crawford, *supra* note 1, p. 53. *See also* Kjos, *supra* note 3, p. 241 (“[i]n cases in which international law primarily applies to a dispute, certain aspects of the case may necessitate recourse to national law”).

way, “part of the ‘applicable law’”.⁸⁸ In fact, this type of scenario can arise even if reliance on domestic law is not express,⁸⁹ and even if a given rule of domestic law is not conclusive as to the application of international law.⁹⁰

For one thing, the Court has been confronted with some cases in which a treaty or other agreement refers to municipal law.⁹¹ In this light, Professor Crawford referred to Permanent Court jurisprudence in concluding that “[t]reaties having as their object the creation and maintenance of certain standards of treatment of minority groups or aliens may refer to a national law as a method of describing the status to be created and protected.”⁹² For a more recent example, in the case concerning *Ahmadou Sadio Diallo*, the Court was entrusted with determining whether there had, among other things, been a violation of certain human rights obligations.⁹³ One of the human rights at issue pertained to “the expulsion of an alien”, with the Court underscoring that relevant international legal instruments indicated that such expulsion needed to be “decided in accordance with ‘the law’, in other words the domestic law applicable in that respect.”⁹⁴ As a result, the Court highlighted that “[c]ompliance with international law [was] to some extent dependent here on compliance with internal law”;⁹⁵ the Court then went on to examine whether the expulsion in question was carried out consistently with the conditions prescribed by municipal law.⁹⁶ Another central aspect of the *Diallo* case related to

⁸⁸ Crawford, *supra* note 1, p. 52. See also Crawford, *supra* note 3, p. 22 (“us[ing] the term ‘applicable law’ in the sense of the legal system or rules which purport directly to apply to a given range of persons and transactions”), also pp. 23–25. See generally vis-à-vis investment law Kjos, *supra* note 3 and domestic courts Nollkaemper, *supra* note 7, ch. 4.

⁸⁹ See Crawford, *supra* note 1, p. 54 (“treaties ... employing concepts which *by implication* are to be understood in the context of a particular national law” (emphasis added), referring to PCIJ, *Exchange of Greek and Turkish Populations* (Advisory Opinion) (1925), PCIJ Rep Series B, No. 10) and cf with Nollkaemper, *supra* note 7, p. 253, and Pellet, *supra* note 1, pp. 782–783, both extracted *supra* note 87.

⁹⁰ See Gaja, *supra* note 2, p. 56 (certain “internal rules ... are generally regarded as decisive” but “the relevance of municipal laws is not unlimited”); Nollkaemper, *supra* note 7, p. 256 (on nationality) and, e.g., *infra* notes 113–118, 127–131.

⁹¹ See Crawford, *supra* note 1, p. 54; Pellet, *supra* note 1, pp. 782–783. See also Denza, *supra* note 2, p. 413 (“questions of national law usually arise ... [*inter alia*] if relevant to the construction of an international agreement”). Holding that a treaty did not refer to domestic law: PCIJ, *Exchange of Greek and Turkish Populations*, pp. 19–20, discussed in Jenks, *supra* note 15, p. 84 and Jennings et al, *supra* note 2, pp. 83–84 (fn 4).

⁹² Crawford, *supra* note 1, p. 54, referring specifically to PCIJ, *Jurisdiction of the Courts of Danzig* (Advisory Opinion) (1928), PCIJ Rep. Series B, No. 15 and PCIJ, *Interpretation of the Statute of the Memel Territory*.

⁹³ ICJ, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* (Merits, Judgment), [2010] ICJ Rep. 639, particularly p. 645, para. 1, pp. 647–650, paras. 13–14, p. 662, para. 63. The case is cited and quoted in this context in Pellet, *supra* note 1, p. 783. See also Kawano, *supra* note 61, pp. 121–122; Crawford, *supra* note 1, p. 54.

⁹⁴ ICJ, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* (Merits, Judgment), p. 663, para. 65.

⁹⁵ *Ibidem*, quoted in this context in Pellet, *supra* note 1, p. 783. See also Crawford, *supra* note 22, p. 89, quoted in de Brabandere, *supra* note 51, p. 128.

⁹⁶ ICJ, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* (Merits, Judgment), pp. 664–666, paras. 69–73. See also Kawano, *supra* note 61, p. 121, also p. 122.

detention, including its allegedly unlawful character and potential arbitrariness,⁹⁷ with the former also requiring the Court to examine whether the “arrest and detention were ... in accordance with the requirements of the law of the DRC.”⁹⁸ In another context, a Chamber of the Court discussed the role played by domestic judiciaries with respect to questions of legality and arbitrariness, noting in its Judgment in *Elletronica Sicula S.p.A. (ELSI)*, that “[a] finding of the local courts that an act was unlawful may well be relevant to an argument that it was also arbitrary; but by itself, and without more, unlawfulness cannot be said to amount to arbitrariness”, and further adding that “the qualification given to the impugned act by a municipal authority may be a valuable indication.”⁹⁹

In addition, although it has already been noted that questions of state responsibility and treaty compliance are not determined by municipal law,¹⁰⁰ international law does, to some degree, refer to municipal law in determining whether an entity is an organ of the state such that its acts should be attributed to the state in order to establish its international responsibility.¹⁰¹ In this respect, paragraph 2 of Art. 4 of the *Articles on State Responsibility* specifies that “[a]n organ [of the state] includes any person or entity which has that status *in accordance with the internal law of the State*.”¹⁰² In the *Bosnian Genocide* case, the Court had to decide whether genocidal conduct was attributable to Serbia.¹⁰³ Of relevance to the discussion here is that, in considering “whether the [relevant] acts ... were perpetrated by organs of the Respondent”,¹⁰⁴ the Court referred to Art. 4,¹⁰⁵ and noted that this issue “call[ed] for a determination whether the acts of genocide commit-

⁹⁷ ICJ, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* (Merits, Judgment), p. 667, para. 76.

⁹⁸ *Ibidem*, p. 668, para. 78 and for the Court’s consideration pp. 668-669, paras. 78-79. See also Kawano, *supra* note 61, p. 121, also p. 122.

⁹⁹ ICJ, *Elletronica Sicula S.p.A. (ELSI)* (Judgment), [1989] ICJ Rep. 15, p. 74, para. 124, quoted in Pellet, *supra* note 1, p. 781; Crawford, *supra* note 22, p. 88. See also ICJ, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* (Merits, Judgment), p. 669, para. 81.

¹⁰⁰ *Supra* notes 22-24.

¹⁰¹ Gaja, *supra* note 2, p. 56; d’Aspremont, *supra* note 49, p. 239; J. Crawford, *State Responsibility: The General Part*, Cambridge University Press, Cambridge: 2013, p. 115 (for “organs and agencies of state” attribution “operates largely though not exclusively by *renvoi* to the internal constitutional and legal arrangements of the state in question”). See also Nollkaemper, *supra* note 7, p. 266; Arangio-Ruiz, *supra* note 4, pp. 921, 940-941.

¹⁰² Art. 4(2) (emphasis added), reproduced in Crawford, *supra* note 22, p. 94, and referred to in this context in d’Aspremont, *supra* note 49, p. 239 (fn 118). Art. 4 is referred to more generally in, e.g., Nollkaemper, *supra* note 7, p. 266.

¹⁰³ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Judgment), [2007] ICJ Rep. 43, p. 199, para. 379, p. 201, para. 384. Serbia was formerly Serbia and Montenegro: see *ibidem*, pp. 73-76, paras. 67-79; similarly M. Milanović, *State Responsibility for Genocide: A Follow-Up*, 18 *European Journal of International Law* 669 (2007), p. 669 (fn 2). See also generally discussion of the case in this context in Sasson, *infra* note 158, pp. 12-13.

¹⁰⁴ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, p. 201, para. 384.

¹⁰⁵ *Ibidem*, p. 202, para. 385.

ted in Srebrenica were perpetrated by ‘persons or entities’ having the status of organs of the Federal Republic of Yugoslavia (as the Respondent was known at the time) under its internal law, as then in force.”¹⁰⁶ It determined, *inter alia*, that “neither the Republika Srpska, nor the VRS were *de jure* organs of the [Federal Republic of Yugoslavia], since none of them had the status of organ of that State *under its internal law*.”¹⁰⁷ In respect of certain VRS officers, among whom was General Mladić, the Court relevantly observed “that no evidence ha[d] been presented that either General Mladić or any of the other officers whose affairs were handled by the 30th Personnel Centre were, *according to the internal law of the Respondent*, officers of the army of the Respondent – a *de jure* organ of the Respondent.”¹⁰⁸ Finally, in examining whether Serbia was responsible for acts carried out by the ‘Scorpions’ paramilitaries, the Court considered a decree, and certain documents – “the authenticity of which was queried” – which may have suggested connections with the state.¹⁰⁹ Ultimately, “[j]udging on the basis of these materials, the Court [was] unable to find that the ‘Scorpions’ were ... *de jure* organs of the Respondent” at the material time.¹¹⁰

International law similarly relies on municipal law, at least to some degree, in determining whether a given entity is able to bind the state by treaty obligations under international law,¹¹¹ with Art. 46(1) of the Vienna Convention on the Law of Treaties providing that

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*.¹¹²

Needless to say, and as Professor Gaja suggests, such regard to domestic law “is not unlimited”.¹¹³ In respect of the attribution to a state of acts of its organs, for instance,

¹⁰⁶ *Ibidem*, p. 202, para. 386.

¹⁰⁷ *Ibidem* (emphasis added); see also Milanović, *supra* note 103, p. 673.

¹⁰⁸ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, p. 203, para. 388 (emphasis added). See also Milanović, *supra* note 103, p. 673 (ICJ “rejected Bosnia’s argument that many VRS officers were indeed organs of Serbia, as they received their salaries from the so-called 30th Personnel Center of the FRY army” *inter alia* “because there was no evidence that these payments conferred organ status to these officers under Serbian law” (emphasis added)), also p. 674.

¹⁰⁹ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, p. 204, para. 389.

¹¹⁰ *Ibidem*. See discussion in Milanović, *supra* note 103, pp. 674-675.

¹¹¹ Gaja, *supra* note 2, p. 56. See also Denza, *supra* note 2, p. 414.

¹¹² Vienna Convention on the Law of Treaties, Art. 46(1) (emphasis added), referred to in e.g. Gaja, *supra* note 2, pp. 56-57; Denza, *supra* note 2, p. 414 and Crawford, *supra* note 1, p. 51 (fn 19) (both contrasting with Art. 27, *supra* note 24); Pellet, *supra* note 1, p. 783 (fn 337) (this Art. is a “clear hypothesis of ... an express *renvoi*” to domestic rules). See also on this rule d’Aspremont, *supra* note 49, p. 239.

¹¹³ Gaja, *supra* note 2, p. 56 (“the relevance of municipal laws is not unlimited”). See also Arangio-Ruiz, *supra* note 2, p. 23.

the ILC commentary to Art. 4 recognises that while “[w]here the law of a State characterizes an entity as an organ, no difficulty will arise”, nonetheless “it is not sufficient to refer to internal law for the status of State organs. In some systems the status and functions of various entities are determined not only by law but also by practice, and reference exclusively to internal law would be misleading.”¹¹⁴

Indeed, the Court in the *Bosnian Genocide* case went on to consider whether the relevant entities were “notwithstanding their apparent status ... ‘*de facto* organs’ of the FRY”,¹¹⁵ accepting that “persons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law” in certain circumstances.¹¹⁶ Likewise, acts may be attributable if there has been an exceeding of the authority of the organ,¹¹⁷ and treaties can still be binding even if the obligations have been undertaken in breach of municipal law, unless – as Art. 46 provides – that breach was both “manifest” and of a “fundamental” rule.¹¹⁸

A decade ago, in the case concerning *Armed Activities on the Territory of the Congo (New Application: 2002)*, the question of the relationship between municipal law and international law in respect of treaty powers arose when the Court had to consider whether a *décret-loi* had resulted in the withdrawal of a Rwandan reservation to the Genocide Convention’s compromissory clause.¹¹⁹ It said that:

... in the Court’s view the question of the validity and effect of the *décret-loi* within the domestic legal order of Rwanda is different from that of its effect within the international legal order. Thus a clear distinction has to be drawn between a decision to withdraw a reservation to a treaty taken within a State’s domestic legal order and the implementation of that decision by the competent national authorities within the international legal order, which can be effected only by notification of withdrawal of the reservation to the other States parties to the treaty in question.¹²⁰

Upholding the sanctity of treaty-making processes, particularly as regards the relevant procedural dimensions governing the withdrawal of reservations to treaties,¹²¹ the

¹¹⁴ Crawford, *supra* note 22, p. 98. See also Crawford, *supra* note 101, p. 115, extracted *supra* note 101, and pp. 124-125; Gaja, *supra* note 2, p. 56; Arangio-Ruiz, *supra* note 2, pp. 23, 38-39.

¹¹⁵ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, p. 204, para. 390.

¹¹⁶ *Ibidem*, p. 205, para. 392; see also Crawford, *supra* note 101, p. 125; Sasson, *infra* note 158, p. 13. See further S. Talmon, *The Responsibility of Outside Powers for Acts of Secessionist Entities*, 58 International and Comparative Law Quarterly 493 (2009), particularly pp. 497-502.

¹¹⁷ Gaja, *supra* note 2, p. 57, referring to Art. 7 of the *Articles on State Responsibility*.

¹¹⁸ Gaja, *supra* note 2, p. 57. See also Arangio-Ruiz, *supra* note 2, p. 23.

¹¹⁹ ICJ, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)* (Jurisdiction and Admissibility, Judgment), [2006] ICJ Rep. 6, p. 22, paras. 29-30, pp. 25-26, paras. 39-44. The case is cited and quoted in this context in Pellet, *supra* note 1, p. 782.

¹²⁰ ICJ, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, p. 25, para. 41, quoted in Pellet, *supra* note 1, p. 782.

¹²¹ See ICJ, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, pp. 25-26, paras. 41-43.

Court ultimately concluded that this particular Rwandan law “did not, as a matter of international law, effect a withdrawal by that State of its reservation to Article IX of the Genocide Convention.”¹²²

Domestic law may also be relevant to questions relating to an international claim’s admissibility.¹²³ By way of example, in the event that an individual is injured by the actions of a state, it is the state of which they are a national that may mount a claim against the former state through diplomatic protection.¹²⁴ However, generally the circumstances in which a state is able to grant citizenship to an individual are not governed by international law,¹²⁵ this question being one for the discretion of states on the basis of their national law.¹²⁶ It does not follow, as Liechtenstein discovered in the *Nottebohm* case which it brought against Guatemala, that a state’s decision as to nationality necessarily generates the intended outcome.¹²⁷ In determining whether Liechtenstein could bring a claim of diplomatic protection against Guatemala, the Court indicated that it would not be “considering ... the validity of Nottebohm’s naturalization according to the law of Liechtenstein”,¹²⁸ but rather its “international effect”.¹²⁹ While there is no doubt that the existence of “the bond of nationality” is a usual condition for a state to bring a diplomatic protection claim,¹³⁰ the Court held that in the circumstances Liechtenstein’s domestic law conferral of nationality was unable to be invoked with respect to Guatemala.¹³¹

¹²² *Ibidem*, p. 26, para. 44.

¹²³ See Kjos, *supra* note 3, p. 241 (“recourse to national law” may be required “with respect to issues of nationality and the capacity of parties to bring claims”); d’Aspremont, *supra* note 49, p. 239 (nationality and local remedies); similarly Jenks, *supra* note 15, p. 87. Discussing domestic law relevance to local remedies, see *infra* notes 132 and 134 and to nationality, see *infra* notes 125–126. On these being admissibility issues see Crawford, *supra* note 22, Art. 44, p. 264, and vis-à-vis local remedies Pellet, *supra* note 1, p. 783.

¹²⁴ See Denza, *supra* note 2, p. 413; International Law Commission, *Draft Articles on Diplomatic Protection with commentaries*, Yearbook of the International Law Commission (2006), vol. II, Part Two (UN Doc. A/61/10), pp. 26–55, Arts. 1 and 3 and commentaries thereto. See also Nollkaemper, *supra* note 7, p. 247.

¹²⁵ Denza, *supra* note 2, p. 413; see also Nollkaemper, *supra* note 7, p. 246.

¹²⁶ Nollkaemper, *supra* note 7, p. 256, also p. 266 (both referring to *Draft Articles on Diplomatic Protection*, *supra* note 124, Art. 4 and see further the commentary thereto); Arangio-Ruiz, *supra* note 2, pp. 31–32. See also Denza, *supra* note 2, p. 413; Crawford, *supra* note 1, p. 54; Danilowicz, *supra* note 3, p. 159, referring to ICJ, *Nottebohm (Liechtenstein v. Guatemala)* (Second Phase, Judgment), [1955] ICJ Rep. 4, p. 20. But see *Draft Articles on Diplomatic Protection*, *supra* note 124, Art. 4 and commentary paras. 6–8.

¹²⁷ Denza, *supra* note 2, p. 413; Pellet, *supra* note 1, p. 782; Danilowicz, *supra* note 3, p. 159, all discussing ICJ, *Nottebohm (Liechtenstein v. Guatemala)*.

¹²⁸ ICJ, *Nottebohm (Liechtenstein v. Guatemala)*, p. 20, discussed in Danilowicz, *supra* note 3, p. 159; Pellet, *supra* note 1, p. 782; Denza, *supra* note 2, p. 413; Jennings et al, *supra* note 2, p. 84 (fn 6).

¹²⁹ ICJ, *Nottebohm (Liechtenstein v. Guatemala)*, p. 21, quoted in Pellet, *supra* note 1, p. 782 and discussed in Denza, *supra* note 2, p. 413; Danilowicz, *supra* note 3, p. 159. See also Jennings et al, *supra* note 2, p. 84 (fn 6).

¹³⁰ *Draft Articles on Diplomatic Protection*, *supra* note 124, commentary to Art. 3, para. 1, and see generally Art. 3 and commentary thereto.

¹³¹ ICJ, *Nottebohm (Liechtenstein v. Guatemala)*, p. 26; see also Pellet, *supra* note 1, p. 782; Danilowicz, *supra* note 3, p. 159.

A similar question relates to the doctrine of local remedies, which also raises municipal law issues.¹³² The rule on local remedies requires that prior to bringing a diplomatic claim on the inter-state level, any remedies that are available under the municipal law of the state that is said to have committed the wrongful act are first exhausted.¹³³ In determining whether such remedies are available, the Court may have to enquire into matters of municipal law.¹³⁴ Thus, for instance, a Chamber of the Court in the *Ellettronica Sicula* case considered Italian law in some detail in determining whether remedies remained available, concluding that it was “impossible to deduce, from the recent jurisprudence cited, what the attitude of the Italian courts would have been had” certain claims been pursued, and ultimately that “it was for Italy to show, as a matter of fact, the existence of a remedy ... which [the stockholders] failed to employ”, which it had not done.¹³⁵

Finally, there may be circumstances in which an international legal claim has its ultimate source in rights arising under municipal law; where the legality of an act depends on whether there are certain rights as a matter of domestic law.¹³⁶ One such example arises where there are allegations of interference with the property rights of individuals, including claims of expropriation, in relation to which consideration of municipal law may be required.¹³⁷ For instance, in the famous *Barcelona Traction, Light and Power Company* case the Court was confronted with a claim brought by Belgium against Spain relating to damage said to have been done to Belgian shareholders of a company incorporated

¹³² Crawford, *supra* note 1, p. 54; Pellet, *supra* note 1, p. 783; d’Aspremont, *supra* note 49, p. 239; Arangio-Ruiz, *supra* note 2, p. 22.

¹³³ See e.g. *Draft Articles on Diplomatic Protection*, *supra* note 124, Art. 14 and commentary. See similarly Shany, *supra* note 3, pp. 27-28. See also Tzanakopoulos, *supra* note 59, p. 152.

¹³⁴ See Jenks, *supra* note 15, p. 87; d’Aspremont, *supra* note 49, p. 239. See also Pellet, *supra* note 1, p. 783; Nollkaemper, *supra* note 3, pp. 315-316; Nollkaemper, *supra* note 7, pp. 259-260; and see generally *Draft Articles on Diplomatic Protection*, *supra* note 124, Art. 14 and commentary.

¹³⁵ ICJ, *Ellettronica Sicula S.p.A. (ELSI)*, p. 47, para. 62, quoted and cited in Nollkaemper, *supra* note 3, p. 316, and discussion in the Judgment at pp. 46-48, paras. 61-63; similarly Nollkaemper, *supra* note 66, p. 16.

¹³⁶ See Nollkaemper, *supra* note 7, p. 266 (fn 109) cited *infra* note 137; Kjos, *supra* note 3, p. 241, quoted *supra* note 85, p. 242 quoted *infra* note 137, and p. 255 (“[i]n the case of expropriation and ‘umbrella’ clauses ... the tribunal may need to look to national law in order to determine the *rights and obligations* of the parties pursuant to the property or contract ... as part of the determination of the international claim”); similarly p. 270; Jenks, *supra* note 15, p. 67, quoted *supra* note 85, also pp. 68-69, 88 thereof. See also Crawford, *supra* note 1, p. 52 (“[n]ational law may be ... governing the basis of a claim”), pp. 53-54, quoted *infra* note 151, and pp. 54-55.

¹³⁷ See Kjos, *supra* note 3, p. 242 (“an expropriation presupposes and depends on the existence of an investment in the form of proprietary rights” and “[s]uch rights are generally defined by national law ... consequently, the arbitrators may need to apply national law in order to determine whether an expropriation has in fact taken place” (reference omitted); and see authorities discussed at pp. 242-246); similarly Nollkaemper, *supra* note 7, p. 253 and particularly p. 266 (fn 109), citing Z. Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74 British Yearbook of International Law 151 (2003), pp. 197-199; see also Crawford, *supra* note 1, p. 54 (Court’s consideration of domestic law in claims involving expropriation and shareholder rights); de Brabandere, *supra* note 51, p. 127.

in Canada.¹³⁸ Having outlined the necessity of determining whether “a right of Belgium [had] been violated on account of its nationals’ having suffered infringement of their rights as shareholders in a company not of Belgian nationality”,¹³⁹ the Court indicated:

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.¹⁴⁰

The Court emphasised that “[m]unicipal law determines the legal situation not only of such limited liability companies but also of those persons who hold shares in them” and noted the “firm distinction between the separate entity of the company and that of the shareholder, each with a distinct set of rights.”¹⁴¹ While acknowledging “that there are rights which municipal law confers upon [shareholders] distinct from those of the company”,¹⁴² the Court observed “that an act directed against and infringing only the company’s rights does not involve responsibility towards the shareholders”.¹⁴³ A similar exercise was conducted by the Court more recently in the *Diallo* case where the Court examined municipal law in order to determine what rights belonged to the individual in question and were alleged to have been breached, independent from those of the companies involved.¹⁴⁴

¹³⁸ ICJ, *Barcelona Traction, Light and Power Company, Limited* (Judgment), [1970] ICJ Rep. 3, p. 31, paras. 28, 30. The case is cited in this context in, e.g., Pellet, *supra* note 1, p. 779; Crawford, *supra* note 1, p. 54; Nollkaemper, *supra* note 7, p. 266; Kjos, *supra* note 3, p. 241; Gaja, *supra* note 2, p. 58; Jennings et al, *supra* note 2, p. 83.

¹³⁹ ICJ, *Barcelona Traction, Light and Power Company, Limited*, pp. 32-33, para. 35.

¹⁴⁰ *Ibidem*, pp. 33-34, para. 38, cited and quoted in part in Pellet, *supra* note 1, p. 779; Kjos, *supra* note 3, p. 241; Sasson, *infra* note 158, pp. 78-79; and cited in Nollkaemper, *supra* note 7, p. 266. See further on the personality of a University under domestic law: PCIJ, *Appeal from a Judgment of the Hungarian-Czechoslovak Mixed Arbitral Tribunal (The Peter Pázmány University)* (1933), PCIJ Rep. Series A/B, No. 61, discussed in d’Aspremont, *supra* note 49, p. 235; O. Spiermann, *International Legal Argument in the Permanent Court of International Justice: The Rise of the International Judiciary*, Cambridge University Press, Cambridge: 2005, pp. 349-350; Jenks, *supra* note 15, pp. 75-77.

¹⁴¹ ICJ, *Barcelona Traction, Light and Power Company, Limited*, p. 34, para. 41.

¹⁴² *Ibidem*, p. 36, para. 47.

¹⁴³ *Ibidem*, p. 36, para. 46. See also Crawford, *supra* note 1, p. 54.

¹⁴⁴ See ICJ, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* (Merits, Judgment), pp. 673-691, paras. 99-159, particularly pp. 675-676, paras. 104-105, p. 679, paras. 114-115, p. 680, paras. 119, 121, p. 681, para. 123, p. 683, paras. 129-131, p. 687, paras. 143-144, pp. 689-690, paras. 155-157. See also Sasson, *infra* note 158, p. 79.

Another set of pertinent examples arose in the jurisprudence of the Permanent Court, particularly in the *Serbian Loans* and *Brazilian Loans* cases in 1929.¹⁴⁵ Those cases, between France and Serbia and France and Brazil respectively, concerned the payment terms of certain bonds held by French nationals.¹⁴⁶ While, in the *Case concerning the Payment of Various Serbian Loans issued in France*, the Permanent Court observed that its “true function” was “to decide disputes between States ... on the basis of international law”, it indicated that it could proceed even where “the point at issue” was to “be decided by application of the municipal law of a particular country”¹⁴⁷ and notwithstanding “that the dispute relates to a question of municipal law rather than to a pure matter of fact.”¹⁴⁸

Certain scholars have regarded these cases as atypical given that, on one view, they were determined under municipal law alone.¹⁴⁹ One commentator endeavours to explain the decision of the Permanent Court on the grounds that the Court’s jurisdiction was based on a *compromis* (special agreement), that the Statute of the Permanent Court was not identical to that of the present-day Court insofar as the latter requires the Court to engage in “the application of international law”, and that the Permanent Court “referred both to national laws ... and to international law.”¹⁵⁰ On the other hand, these cases may simply demonstrate that the Court can recognise, such as where contracts are involved, that parts of a case are subject to a law other than international law.¹⁵¹

¹⁴⁵ For discussion of these cases in this context of international/domestic law relations, see, e.g., Crawford, *supra* note 1, pp. 53-54, 55; Pellet, *supra* note 1, pp. 779-780, 782 (fn 336); Denza, *supra* note 2, p. 413; Jenks, *supra* note 15, pp. 77-78; Kjos, *supra* note 3, pp. 107, 171-172.

¹⁴⁶ PCIJ, *Case Concerning the Payment of Various Serbian Loans Issued in France* (Judgment) (1929), PCIJ Rep. Series A, No. 20, pp. 6-7; PCIJ, *Case Concerning the Payment in Gold of Brazilian Federal Loans Contracted in France* (Judgment) (1929), PCIJ Rep. Series A, No. 21, p. 94.

¹⁴⁷ PCIJ, *Case Concerning the Payment of Various Serbian Loans Issued in France*, p. 19, cited and quoted in part in Jenks, *supra* note 15, p. 78; see also Denza, *supra* note 2, p. 413. See also PCIJ, *Case Concerning the Payment in Gold of Brazilian Federal Loans Contracted in France*, p. 101, where the Court “refers to th[e] observations” made in *Serbian Loans*; Jenks, *supra* note 15, p. 78. See also Crawford, *supra* note 1, pp. 53-54; Kjos, *supra* note 3, p. 107 (PCIJ employed “the technique of characterization” in these cases).

¹⁴⁸ PCIJ, *Case Concerning the Payment of Various Serbian Loans Issued in France*, p. 19, quoted in Pellet, *supra* note 1, p. 779; see also PCIJ, *Case Concerning the Payment in Gold of Brazilian Federal Loans Contracted in France*, p. 101. Pellet also makes reference to PCIJ, *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City* (Advisory Opinion) (1935), PCIJ Rep. Series A/B, No. 65 where, it is said, the PCIJ decided under municipal law: Pellet, *supra* note 1, pp. 779-780 (fn 319); see also on this latter case d’Aspremont, *supra* note 49, p. 235; Spiermann, *supra* note 140, pp. 350-351; Jenks, *supra* note 15, pp. 79-81.

¹⁴⁹ See Pellet, *supra* note 1, pp. 779-780 (describing, at p. 779, *Serbian Loans* as “astonishing”); also Crawford, *supra* note 1, p. 55; Jenks, *supra* note 15, p. 77.

¹⁵⁰ Pellet, *supra* note 1, p. 780. Nonetheless, it has been suggested “that the PCIJ was first and foremost expected to apply international law”: d’Aspremont, *supra* note 49, p. 231.

¹⁵¹ Crawford, *supra* note 1, pp. 53-54 (referring to these cases in noting “international law may designate a system of domestic law as the applicable law in respect of some claim or transaction”); Kjos, *supra* note 3, pp. 171-172 (PCIJ “held [in *Serbian Loans*] that insofar as an agreement is not concluded between subjects of international law, it is governed by national law”), similarly p. 214. See further on tribunals’

Jenks, among others, highlights that similar questions have also arisen in state succession cases, observing that the pivotal issue in such instances “often consists of differences of opinion as to the nature and validity, under the law by which they were originally created, of obligations alleged to be binding upon the successor state.”¹⁵² As scholars indicate, relevant manifestations of this dimension of international law arose in the *Lighthouses case between France and Greece*, where the Permanent Court was confronted with determining if a particular concession contract between a national of France and the Ottoman government was binding under Ottoman law and thus on Greece as a question of succession.¹⁵³ Similar questions arose in the context of German property rights in the Permanent Court’s 1923 Advisory Opinion concerning *Settlers of German Origin in the Territory ceded by Germany to Poland*¹⁵⁴ and of the correct position as to the owner of a factory under national law in the 1926 *Case concerning Certain German Interests in Polish Upper Silesia*.¹⁵⁵

In sum, when handling such disputes it may be essential for the Court to determine aspects of municipal law, including rights thereunder, and, in so doing, it must sometimes establish the proper application of domestic law.¹⁵⁶ However, as Nollkaemper has suggested in respect of domestic court judgments

the international legal order itself may accept under certain conditions the[ir] authority ... These conditions and their actual application are eventually determined by international law ... and in that respect this construction is not incompatible with the continuing validity of dualism as the basic theory explaining the relationship between international law and national law.¹⁵⁷

approach to the law applying to contracts *ibid*, pp. 172-176, 180. See also Crawford, *supra* note 3, p. 25; Jenks, *supra* note 15, p. 88; de Brabandere, *supra* note 51, p. 127.

¹⁵² Jenks, *supra* note 15, p. 68.

¹⁵³ d’Aspremont, *supra* note 49, p. 236; Spiermann, *supra* note 140, pp. 351-352; Jenks, *supra* note 15, pp. 72-73; also Crawford, *supra* note 1, p. 53; PCIJ, *Lighthouses Case between France and Greece* (1934), PCIJ Rep. Series A/B, No. 62, particularly pp. 5, 13-14, 15, 16, 18.

¹⁵⁴ Jenks, *supra* note 15, p. 69, discussing PCIJ, *Certain Questions Relating to Settlers of German Origin in the Territory Ceded by Germany to Poland* (Advisory Opinion) (1923), PCIJ Rep. Series B, No. 6, p. 29 *et seq*; also discussed in Pellet, *supra* note 1, p. 778.

¹⁵⁵ See the excellent discussion of this and related cases in Jenks, *supra* note 15, pp. 70-71; PCIJ, *Case Concerning Certain German Interests in Polish Upper Silesia*, particularly p. 42.

¹⁵⁶ See Jenks, *supra* note 15, pp. 67 and 100, quoted *supra* note 85, also p. 69 (state succession decisions may require “detailed consideration of the law under which rights and obligations are alleged to have arisen”), p. 73 (“the Court will, when necessary, interpret and apply rules of municipal law”) (also quoted in Spiermann, *supra* note 140, p. 351); Kjos, *supra* note 3, p. 255 (noting *inter alia* “the tribunal may need to look to national law in order to determine the rights and obligations of the parties pursuant to the property or contract ... [i]n such cases, the better perspective is to consider national law as being truly applied to the merits, albeit indirectly as part of the determination of the international claim”), *similarly* pp. 298-299, and see the authorities discussed at pp. 255-256; *similarly* Crawford, *supra* note 1, p. 53 (“[w]hen it is called on to apply rules of national law, an international tribunal will interpret and apply domestic rules as such”), also p. 111; Nollkaemper, *supra* note 7, pp. 265-266. See also de Brabandere, *supra* note 51, p. 127.

¹⁵⁷ Nollkaemper, *supra* note 7, pp. 255-256, *cf* p. 301. *Cf* also Danilowicz, *supra* note 3, p. 160.

Indeed, the definition of dualism noted above allows for the application of domestic norms when incorporated into international law,¹⁵⁸ a process which, as scholars have observed, may also occur as between domestic legal systems.¹⁵⁹

2.2. The interpretation of municipal law

Mention should be made that the classic position relating to the question of interpreting domestic law is that the Court does not undertake this exercise.¹⁶⁰ Nonetheless, when the Court sets out to consider whether domestic legal actions are, or have led to, a violation of a state's obligations, the Court may be required to examine municipal law, so as to understand "their real meaning and scope."¹⁶¹ Moreover, as already observed, when the Court is faced with a situation in which it refers to municipal law for any of

¹⁵⁸ *Supra* note 19, referring to Shany, *supra* note 3, p. 80 ("acknowledging the distinction between national and international law does not negate, in itself, the possibility that some norms which originate in one legal system would have a legal effect in the other legal system" and noting dualism's "preclusive effect" of "prevent[ing] the application of norms derived from one legal system in a polity governed by a different legal system unless such norms have been positively incorporated"); also Gaja, *supra* note 2, pp. 52-53 (for dualism "[r]ules which are not created within the system may nevertheless be relevant for the system if they are referred to by a rule included in the system"), also p. 59; see also Kjos, *supra* note 3, p. 238 ("the question of supremacy is different from that of whether national or international law should primarily govern the claim at hand."); similarly p. 270, quoting M. Sasson, *Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship between International Law and Municipal Law*, Kluwer, Alphen aan den Rijn: 2010, p. 201 as saying "renvoi does not affect the supremacy of international law. It permits the application of concepts developed for many years at a municipal level when such application does not ... affect the characterization of an act as internationally wrongful"; Crawford, *supra* note 22, p. 89, quoted *supra* note 85; Nollkaemper, *supra* note 7, pp. 265-266; Pellet, *supra* note 1, pp. 782-783; Crawford, *supra* note 3, p. 23 ("there are many open situations where the choice of law process ... may have to operate on the material of international law as well" (reference omitted)).

¹⁵⁹ See Shany, *supra* note 3, p. 80 ("the different systemic contexts in which national and international law operate bar the direct penetration of norms from one legal order to the other (in the same way that English law has no legal effect in France, unless and to the degree that French law ascribes such an effect)"); and on the Court's rules for choice of domestic law see Jenks, *supra* note 15, pp. 95-97. Cf. Arangio-Ruiz, *supra* note 4, p. 935 (fn 39) referring to private international law rules treating other states' law as fact and cf. with Arangio-Ruiz, *supra* note 2, p. 33, who refers to Fitzmaurice, *supra* note 3, p. 72 and criticises the "questionable equation of the relationship between international law and domestic law with an allegedly identical relationship between two national legal systems" therein. Arangio-Ruiz goes on that "while domestic legal systems are so interchangeable as to 'borrow', so to speak, chunks of private law from one another by means of conflicts of law rules, international law and domestic law are far less interchangeable": Arangio-Ruiz, *supra* note 2, p. 33; see also Crawford, *supra* note 1, p. 50. See generally on "international law as an open system": Crawford, *supra* note 3, p. 17; and arguing "legal systems are open systems": J. Raz, *The Authority of Law: Essays on Law and Morality* (2nd ed.), Oxford University Press, Oxford: 2009, p. 120.

¹⁶⁰ See e.g. Crawford, *supra* note 1, p. 53, quoting PCIJ, *Case concerning Certain German Interests in Polish Upper Silesia*, p. 19 ("[t]he Court is certainly not called upon to interpret the Polish law as such"), but noting this position "is open to question"; similarly Jenks, *supra* note 15, p. 68; see also Nollkaemper, *supra* note 7, p. 252; Pellet, *supra* note 1, p. 782.

¹⁶¹ Pellet, *supra* note 1, p. 781; similarly Jenks, *supra* note 15, p. 68; d'Aspremont, *supra* note 49, pp. 233, 239.

the reasons mentioned above, the Court may also need to examine the application of that internal law.¹⁶²

In doing so, the Court ought to proceed, as noted by Professor Crawford, “to apply [municipal] law as it would be applied in the state concerned”.¹⁶³ It is no doubt with this rationale firmly in mind that in the well-known *Case concerning the Payment of Various Serbian Loans issued in France*, the Permanent Court declared that “[i]t is French legislation, as applied in France, which really constitutes French law”.¹⁶⁴ Similar thinking unquestionably animated the same Court in the *Case concerning the Payment in Gold of Brazilian Federal Loans Contracted in France*, when it made the oft-quoted pronouncement that “[i]t would not be applying the municipal law of a country if it were to apply it in a manner different from that in which that law would be applied in the country in which it is in force.”¹⁶⁵ Moreover, in the *Serbian Loans* case the Permanent Court supplemented this analysis by pointing out that “[f]or the Court itself to undertake its own construction of municipal law ... would be a most delicate matter”.¹⁶⁶

Most recently, the present-day Court affirmed in the *Diallo* case that “[t]he Court does not, in principle, have the power to substitute its own interpretation for that of the national authorities, especially when that interpretation is given by the highest national courts”.¹⁶⁷ However, it provided the following proviso: “[e]xceptionally, where a State puts forward a manifestly incorrect interpretation of its domestic 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.”¹⁶⁸

¹⁶² See Crawford, *supra* note 1, p. 53 and Jenks, *supra* note 15, p. 73, both cited and quoted *supra* note 156.

¹⁶³ Crawford, *supra* note 1, p. 53, citing PCIJ, *Case Concerning the Payment of Various Serbian Loans Issued in France*, p. 46, quoted *infra* note 164 and PCIJ, *Case Concerning the Payment in Gold of Brazilian Federal Loans Contracted in France*, p. 125. See similarly Pellet, *supra* note 1, p. 781 and see also generally on these cases Jenks, *supra* note 15, pp. 93-94, 97-99; d’Aspremont, *supra* note 49, pp. 233-234; Denza, *supra* note 2, p. 413.

¹⁶⁴ PCIJ, *Case Concerning the Payment of Various Serbian Loans Issued in France*, p. 46, quoted in Crawford, *supra* note 1, p. 53 (fn 33); Jenks, *supra* note 15, p. 93 and Denza, *supra* note 2, p. 413.

¹⁶⁵ PCIJ, *Case Concerning the Payment in Gold of Brazilian Federal Loans Contracted in France*, p. 124, quoted in Pellet, *supra* note 1, p. 781; Jenks, *supra* note 15, p. 94; d’Aspremont, *supra* note 49, p. 233 and Nollkaemper, *supra* note 7, p. 226.

¹⁶⁶ PCIJ, *Case Concerning the Payment of Various Serbian Loans Issued in France*, p. 46, quoted in Jenks, *supra* note 15, p. 93 and cited and quoted in part in Denza, *supra* note 2, p. 413; see also PCIJ, *Case Concerning the Payment in Gold of Brazilian Federal Loans Contracted in France*, pp. 124-125, cited in d’Aspremont, *supra* note 49, p. 234.

¹⁶⁷ ICJ, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* (Merits, Judgment), p. 665, para. 70, quoted in Pellet, *supra* note 1, p. 781; similarly Kawano, *supra* note 61, p. 121. See also ICJ, *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* (Judgment), [2008] ICJ Rep. 177, pp. 229-230, para. 146 (Court accepting domestic court conclusions), cited in Crawford, *supra* note 1, p. 53 and discussed in Nollkaemper, *supra* note 7, p. 252.

¹⁶⁸ ICJ, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* (Merits, Judgment), p. 665, para. 70, quoted in Pellet, *supra* note 1, pp. 781-782; Kawano, *supra* note 61, p. 121; and cited in Crawford, *supra* note 1, p. 53; d’Aspremont, *supra* note 49, p. 240, the latter also citing in this

Thus, it becomes apparent that when the Court needs to examine municipal law, it will rely predominantly on the interpretation given by the state concerned – and particularly its courts.

3. THE ROLE OF DOMESTIC LAW IN ESTABLISHING INTERNATIONAL LAW

Thus far, our focus has been on the position that municipal law is generally not applied by international courts, including the present-day Court and its predecessor,¹⁶⁹ and it has been observed that there are some considerable limitations to this general principle in circumstances in which municipal law is relevant as regards certain questions.¹⁷⁰ A distinct but related aspect of the relationship between municipal and international law is how domestic law, and domestic court decisions, can nonetheless, and at least indirectly, be a *source* for the Court of rules at the international level.¹⁷¹ In this regard, domestic law may be pertinent in three separate ways.¹⁷²

3.1. Customary international law

First, as is well known, customary international law is formed when there is state practice “together with *opinio juris*”,¹⁷³ that is, a subjective perception of legally required

context ICJ, *Elletronica Sicula S.p.A. (ELSI)*, p. 47, para. 62, where the Court said: “Where the determination of a question of municipal law is essential to the Court’s decision in a case, the Court will have to weigh the jurisprudence of the municipal courts, and ‘If this is uncertain or divided, it will rest with the Court to select the interpretation which it considers most in conformity with the law’” (quoting PCIJ, *Case concerning the Payment in Gold of Brazilian Federal Loans Contracted in France*, p. 124). See further Jenks, *supra* note 15, p. 94.

¹⁶⁹ See *supra* notes 19, 46 *et seq.*

¹⁷⁰ See particularly *supra* notes 87 *et seq.*; Crawford, *supra* note 1, p. 52.

¹⁷¹ See H. Lauterpacht, *Decisions of Municipal Courts as a Source of International Law*, 10 British Yearbook of International Law 65 (1929), particularly pp. 65, 81, 85-86, and p. 84 (on national judgments’ “indirect effect”); *vis-à-vis* general principles Pellet, *supra* note 1, p. 783; also Nollkaemper, *supra* note 7, pp. 10, 267. See generally *infra* note 172.

¹⁷² Cf Pellet, *supra* note 1, p. 783 (“at least two other functions” of domestic law: analogy and general principles); Nollkaemper, *supra* note 3, p. 302 (municipal court decisions “relevant for the ICJ” in “two ways”: “the development of international law ... and for the settlement of particular disputes”), and on the former, pp. 304-305 (pertinent for custom, general principles, being a subsidiary source and as analogy) and see discussion pp. 303-311; Nollkaemper, *supra* note 7, p. 264 (“decisions of national courts also may have an effect on the development and determination of rules of international law”), and see pp. 267-279 (on *inter alia* custom and general principles); see also generally p. 278 (“decisions of domestic courts are more than facts and help to determine the nature and contents of a rule of international law”); Nollkaemper, *supra* note 66, pp. 19-29.

¹⁷³ ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, p. 122, para. 55, referring to ICJ, *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* (Judgment), [1969] ICJ Rep. 3, p. 44, para. 77. See generally, e.g., Crawford, *supra*

obligation.¹⁷⁴ This source of international law is expressly referred to in Art. 38(1)(b) of the Statute of the Court.¹⁷⁵ While state practice may be evidenced by a range of different actions,¹⁷⁶ there is broad acknowledgment that they can include domestic legislation and municipal court decisions.¹⁷⁷ It is apparent that many states mirror international obligations in their internal law, including by way of incorporation in legislation,¹⁷⁸ and that municipal courts apply international law in a variety of fields.¹⁷⁹ This process of applying international law in domestic legal orders may, in turn, result in assisting international legal development.¹⁸⁰

An example of one area in which the role and influence of domestic law in developing international custom is undeniable is that of immunities.¹⁸¹ It is no surprise, therefore, that in the *Arrest Warrant of 11 April 2000* case, the Court referred to “State practice, including national legislation and those few decisions of national higher courts” in determining that Ministers of Foreign Affairs were entitled to immunity before domestic criminal jurisdictions.¹⁸² More recently, the Court in the *Jurisdictional*

note 1, pp. 24-27; Jennings et al, *supra* note 2, pp. 25-31; Pellet, *supra* note 1, pp. 814-826; Nollkaemper, *supra* note 7, p. 268.

¹⁷⁴ See e.g. Jennings et al, *supra* note 2, p. 28, quoting *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, p. 44, para. 77. See also Crawford, *supra* note 1, pp. 25-26.

¹⁷⁵ Statute of the International Court of Justice, Art. 38(1)(b) and see ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, p. 122, para. 55.

¹⁷⁶ See e.g. Pellet, *supra* note 1, pp. 815-816; Crawford, *supra* note 1, p. 24; Jennings et al, *supra* note 2, p. 26.

¹⁷⁷ See Pellet, *supra* note 1, pp. 815-816; Crawford, *supra* note 1, p. 24; Jennings et al, *supra* note 2, p. 26, and specifically on national courts: Nollkaemper, *supra* note 3, pp. 303-304; Nollkaemper, *supra* note 7, pp. 267-269; Tzanakopoulos, *supra* note 59, p. 155; Lauterpacht, *supra* note 171, pp. 80-81, 85-86; A. Roberts, *Comparative International Law? The Role of National Courts in Creating and Enforcing International Law*, 60 *International and Comparative Law Quarterly* 57 (2011), pp. 59, 62; I. Wuerth, *International Law in Domestic Courts and the Jurisdictional Immunities of the State Case*, 13 *Melbourne Journal of International Law* 819 (2012), p. 821.

¹⁷⁸ See e.g. Nollkaemper, *supra* note 7, p. 218; Shany, *supra* note 3, p. 12; Tzanakopoulos, *supra* note 59, pp. 142-143; Owada, *supra* note 4, pp. 251-252. And see the discussion of domestic approaches in e.g., Crawford, *supra* note 1, pp. 62-103; Denza, *supra* note 2, pp. 418-425. Cf Roberts, *supra* note 177, pp. 74-75.

¹⁷⁹ See, e.g., Nollkaemper, *supra* note 7, pp. 7-8; Shany, *supra* note 3, pp. 12-13; Lauterpacht, *supra* note 171, pp. 67-72; Roberts, *supra* note 177, pp. 57-59, cf p. 80; Jennings et al, *supra* note 2, p. 41. See also Tzanakopoulos, *supra* note 59, p. 144.

¹⁸⁰ Nollkaemper, *supra* note 7, pp. 10, 264 (quoted *supra* note 172), 267-270, citing (p. 267, fn 116) Lauterpacht, *supra* note 171 (who says, at p. 67: “there is ... hardly a branch of international law which has not received judicial treatment at the hands of municipal tribunals”, and see as to legal development pp. 85, 86-89); Roberts, *supra* note 177, pp. 58, 62, 71-72. See also Nollkaemper, *supra* note 3, pp. 303-304; Tzanakopoulos, *supra* note 59, pp. 154, 155; Wuerth, *supra* note 177, p. 829.

¹⁸¹ Nollkaemper, *supra* note 7, pp. 10, 267; Nollkaemper, *supra* note 3, p. 303; Tzanakopoulos, *supra* note 59, p. 155; Lauterpacht, *supra* note 171, pp. 69-70; Roberts, *supra* note 177, pp. 69, 73.

¹⁸² ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (Judgment), [2002] ICJ Rep. 3, p. 24, para. 58, quoted in Nollkaemper, *supra* note 7, p. 267 and Nollkaemper, *supra* note 3, p. 304; see also Tzanakopoulos, *supra* note 59, p. 155; Wuerth, *supra* note 177, p. 821.

Immunities of the State case considered whether Germany was entitled, under custom, to immunity before courts in Italy.¹⁸³ It observed that in that regard “State practice of particular significance [was] to be found in [*inter alia*] the judgments of national courts faced with the question whether a foreign State is immune [and] the legislation of those States which have enacted statutes dealing with immunity”¹⁸⁴ and went on to refer to domestic legislation and the decisions of national courts.¹⁸⁵

As prefaced above, there is today no doubt that municipal court decisions, along with national legislation, may therefore amount to state practice pursuant to Art. 38(1)(b) of the Court’s Statute.¹⁸⁶ Some publicists even put forth the view that domestic court decisions are reflective of *opinio juris*.¹⁸⁷ One commentator volunteers a helpful clarification in relation to the establishment of such *opinio juris* when he states that:

This will be relatively easy when national courts apply what they consider to be rules of international law. It is to be presumed that a national court applying rules on, for instance, jurisdiction or immunities, will consider that it is applying those rules in a way that is required or, in any case, permitted by international law. Where a national court applies rules of national law, its qualification in terms of *opinio iuris* may be less evident.¹⁸⁸

In any event, as already observed, many domestic laws are themselves based on international law, or seek inspiration from that normative scheme.¹⁸⁹ It will therefore be a question for consideration in each case just how much importance should be accorded to municipal law rules and decisions of domestic courts as indicators of state practice and *opinio juris*.¹⁹⁰ By way of example, in respect of one aspect

¹⁸³ See ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, pp. 122-123, paras. 53-55. For discussion, see, e.g., Wuerth, *supra* note 177.

¹⁸⁴ ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, p. 123, para. 55.

¹⁸⁵ See for discussion of national case law and legislation: *ibidem*, pp. 126-127, paras. 62-64, p. 129, para. 68, pp. 130-135, paras. 70-77, pp. 136-138, paras. 83-88, pp. 141-142, para. 96; see also Wuerth, *supra* note 177, pp. 821-822. Prior to this case, the view had been expressed that “[t]he Court rarely engages in an extensive analysis of State practice, let alone extending that to the practice of domestic courts”: Nollkaemper, *supra* note 3, p. 304; similarly Nollkaemper, *supra* note 66, p. 21. Another author has said this case “relies more extensively on national court cases as evidence of state practice than any prior ICJ decision”: Wuerth, *supra* note 177, p. 820. Reviewing how the Court identifies custom: A. Alvarez-Jiménez, *Methods for the Identification of Customary International Law in the International Court of Justice’s Jurisprudence: 2000-2009*, 60 *International and Comparative Law Quarterly* 681 (2011), pp. 686-703; S. Talmon, *Determining Customary International Law: The ICJ’s Methodology between Induction, Deduction and Assertion*, 26 *European Journal of International Law* 417 (2015).

¹⁸⁶ *Supra* note 177.

¹⁸⁷ See e.g. Nollkaemper, *supra* note 7, p. 268; Tzanakopoulos, *supra* note 59, p. 155; Lauterpacht, *supra* note 171, pp. 82-83; and see generally on *opinio juris* *supra* note 174. See also *infra* notes 192-193.

¹⁸⁸ Nollkaemper, *supra* note 7, p. 268.

¹⁸⁹ See generally *supra* notes 178-179 and see Tzanakopoulos, *supra* note 59, particularly pp. 142-143; Nollkaemper, *supra* note 7, p. 269 (fn 131); Lauterpacht, *supra* note 171, p. 77.

¹⁹⁰ See Crawford, *supra* note 1, p. 24 (“[t]he value of these [customary] sources varies and will depend on the circumstances”); *supra* note 188; Nollkaemper, *supra* note 7, pp. 265, 267-271; Roberts, *supra* note 177, pp. 62, 63-64.

of the *Jurisdictional Immunities of the State* case, the Court concluded that the relevant

State practice in the form of judicial decisions support[ed] the proposition that State immunity for *acta jure imperii* continues to extend to civil proceedings for acts occasioning death, personal injury or damage to property committed by the armed forces and other organs of a State in the conduct of armed conflict, even if the relevant acts take place on the territory of the forum State.¹⁹¹

Importantly, it went on to say that “[t]hat practice [was] accompanied by *opinio juris*, as demonstrated by the positions taken by States and the jurisprudence of a number of national courts which have made clear that they considered that customary international law required immunity.”¹⁹² As Wuerth observes, the Court accepted that municipal court decisions could be equated with *opinio juris* as well as state practice in the context of the law governing state immunity.¹⁹³

3.2. General principles

Second, as widely underscored in academic commentary, domestic law is pertinent in the context of “general principles of law”, which the Court is entitled to apply in accordance with Art. 38(1)(c) of its Statute.¹⁹⁴ As one commentator observes, the application of such principles may entail “unearth[ing] convergences in national law”.¹⁹⁵

Needless to say, one must be careful of taking rules and concepts designed for use in domestic legal settings to be “transplanted to the vastly different legal, institutional and political context of the Court.”¹⁹⁶ That said, the Court has nonetheless engaged in the identification of general principles, albeit – as Professor Crawford points out – “sparingly”.¹⁹⁷ Reference has, for instance, already been made to the *Barcelona Traction* case,¹⁹⁸ in which the present-day Court made use of domestic legal notions in referring

¹⁹¹ ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, pp. 134–35, para. 77.

¹⁹² *Ibidem*, p. 135, para. 77 (emphasis added).

¹⁹³ Wuerth, *supra* note 177, p. 821, citing ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, paras. 55 and 77.

¹⁹⁴ See Pellet, *supra* note 1, p. 783; Crawford, *supra* note 1, pp. 34–35, quoting Jennings et al, *supra* note 2, pp. 36–37. See also Nollkaemper, *supra* note 7, p. 272; Nollkaemper, *supra* note 3, p. 304. Art. 38(1)(c) refers to “the general principles of law recognized by civilized nations” (see Statute of the International Court of Justice, Art. 38(1)(c)), however Pellet observes that a “requirement of recognition ‘by civilized nations’ ... is nowadays entirely devoid of any particular meaning”: Pellet, *supra* note 1, p. 836. For a comparative approach to general principles see J. Ellis, *General Principles and Comparative Law*, 22 European Journal of International Law 949 (2011).

¹⁹⁵ d’Aspremont, *supra* note 49, p. 230 (vis-à-vis the PCIJ). See also Pellet, *supra* note 1, pp. 837–840; Crawford, *supra* note 1, pp. 34–35.

¹⁹⁶ Nollkaemper, *supra* note 3, p. 305, see also p. 308; similarly Nollkaemper, *supra* note 7, p. 274. See also Jennings et al, *supra* note 2, p. 37; Crawford, *supra* note 1, pp. 34–35; Pellet, *supra* note 1, pp. 840–841.

¹⁹⁷ Crawford, *supra* note 1, p. 36. See also Jennings et al, *supra* note 2, pp. 37–38; Pellet, *supra* note 1, pp. 838–839.

¹⁹⁸ See *supra* notes 138 et seq.

“to rules generally accepted by municipal legal systems which recognize the limited company whose capital is represented by shares”.¹⁹⁹ Another example to which scholars refer²⁰⁰ is the principle noted by the Permanent Court in the jurisdictional phase of the *Chorzów Factory* case:

It is ... a principle generally accepted in the jurisprudence of international arbitration, *as well as by municipal courts*, that one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open, to him.²⁰¹

Moreover, the Court has had occasion to reflect upon the principle of *res judicata*.²⁰² In its 2007 *Bosnian Genocide* decision, the Court gave consideration to this notion, observing that “[t]wo purposes, one general, the other specific, underlie the principle of *res judicata*, internationally *as nationally*”.²⁰³ Just this year, the Court considered the principle again, referring to its 2007 decision in “recall[ing] that the principle of *res judicata*, as reflected in Articles 59 and 60 of its Statute, is a general principle of law”.²⁰⁴

3.3. Domestic law’s “subsidiary” status

Finally, Art. 38(1)(d) of the Court’s Statute provides that “judicial decisions” may be employed “as subsidiary means for the determination of rules of law”.²⁰⁵ As specified in the scholarly commentary to the Statute of the Court, such decisions “are not sources of *law*” like treaties or custom, but rather “they are *documentary* ‘sources’ indicating where the Court can find evidence of the existence of the rules it is bound to apply”.²⁰⁶ Two points are worthy of note.

¹⁹⁹ ICJ, *Barcelona Traction, Light and Power Company, Limited*, p. 37, para. 50, quoted in Gaja, *supra* note 2, p. 58, and quoted in the context of general principles in Pellet, *supra* note 1, p. 839 (fn 768). See similarly for discussion of the point in the general principles context: Crawford, *supra* note 1, p. 37.

²⁰⁰ Giving this passage in this context as an example of the Permanent Court “refer[ing] to general notions of responsibility”: Crawford, *supra* note 1, p. 36. See similarly Nollkaemper, *supra* note 7, p. 272.

²⁰¹ PCIJ, *Case Concerning the Factory at Chorzów* (Jurisdiction) (1927), PCIJ Rep. Series A, No. 9, p. 31 (emphasis added), quoted in part in Crawford, *supra* note 1, p. 36.

²⁰² Crawford, *supra* note 1, p. 36, also p. 59; see also Pellet, *supra* note 1, p. 836.

²⁰³ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, p. 90, para. 116 (emphasis added), referred to in e.g. Crawford, *supra* note 1, p. 59.

²⁰⁴ ICJ, *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)* (Preliminary Objections), Judgment of 17 March 2016, available at: <http://www.icj-cij.org/docket/files/154/18956.pdf> (accessed 20 April 2016), para. 58.

²⁰⁵ Statute of the International Court of Justice, Art. 38(1)(d) and see generally Crawford, *supra* note 1, p. 37; Nollkaemper, *supra* note 7, p. 277; Jennings et al, *supra* note 2, pp. 41–42; Pellet, *supra* note 1, pp. 853–862.

²⁰⁶ Pellet, *supra* note 1, p. 854.

First, in practice, the Court has historically made limited use of the decisions of tribunals other than those rendered by it.²⁰⁷ However, the Court has, in recent years, more frequently referred to decisions of other international tribunals, including international criminal tribunals and human rights bodies.²⁰⁸ The latest Judgment delivered in the *Ahmadou Sadio Diallo* case, relating to the question of compensation, highlighted this greater citation of non-ICJ case law, with the Court making reference to the decisions of various courts and tribunals, particularly in the human rights field.²⁰⁹

The second point is that there is some disagreement in scholarly circles over whether Art. 38(1)(d) of the Court's Statute was intended to refer to municipal court decisions as well as those of international tribunals.²¹⁰ For instance, Hersch Lauterpacht once opined, at the time of the Permanent Court of International Justice, that

judicial decisions here referred to are in the first instance individual decisions of the Permanent Court itself ... Possibly it refers also to individual decisions of municipal courts. But it is submitted that the true *sedes materiae* of uniform decisions of municipal courts in their cumulative effect as international custom is in the second paragraph of Article 38.²¹¹

As Lauterpacht suggests, and already noted, the decisions of municipal courts may be constitutive of international customary law – this was unequivocally the stance adopted by the Court in the *Jurisdictional Immunities of the State* case²¹² – and it is no surprise, therefore, that some prefer to view such decisions from this perspective.²¹³ Nonetheless, at the end of the day, there is no reason in principle why municipal court decisions – at least to the extent that they purport to apply international law – could not also be of assistance in considering international legal norms.²¹⁴

²⁰⁷ *Ibidem*, pp. 855, 858, and generally pp. 855-860. See also on national decisions: Nollkaemper, *supra* note 3, pp. 310-311; Nollkaemper, *supra* note 7, p. 278; Nollkaemper, *supra* note 66, p. 19.

²⁰⁸ See Pellet, *supra* note 1, pp. 859-860. See also Crawford, *supra* note 1, p. 40; d'Aspremont, *supra* note 49, p. 238; *infra* note 209. See also Higgins, *infra* note 221, p. 4.

²⁰⁹ See ICJ, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* (Compensation, Judgment), particularly p. 333, para. 18, pp. 334-345, para. 24, p. 337, para. 33, pp. 339-340, para. 40, p. 342, para. 49, pp. 343-344, para. 56; Tomka, *Rule of Law*, *supra* note 17, p. 7, referring to S.D. Murphy, *What a Difference a Year Makes: The International Court of Justice's 2012 Jurisprudence*, 4 *Journal of International Dispute Settlement* 539 (2013), p. 540.

²¹⁰ See Pellet, *supra* note 1, p. 862, who considers municipal decisions rather as state practice; similarly Lauterpacht quoted *infra* note 211. Pellet, *supra* note 1, p. 862 notes, however, that others take a different view, citing *inter alia* Jennings et al, *supra* note 2, pp. 41-42. See also Crawford, *supra* note 1, p. 41 ("Article 38(1)(d) ... not limited to international decisions"); similarly Nollkaemper, *supra* note 7, p. 277; Roberts, *supra* note 177, pp. 62-63.

²¹¹ Lauterpacht, *supra* note 171, p. 86.

²¹² *Supra* notes 183-185, 191-193.

²¹³ See *supra* notes 210-211.

²¹⁴ Nollkaemper, *supra* note 7, pp. 277-278 and see *supra* note 188; Jennings et al, *supra* note 2, p. 42. See also Crawford, *supra* note 1, p. 41; Roberts, *supra* note 177, p. 63.

CONCLUSIONS

Notwithstanding the dualist approach traditionally taken by international courts,²¹⁵ the foregoing discussion has demonstrated that the international judiciary is very much alive to domestic legal situations, and domestic law can be illuminating for the work of the Court.²¹⁶ Indeed, in this respect, the Court is not alone amongst international bodies dealing with the settlement of disputes and claims.²¹⁷ To take just one example, the United Nations Claims Commission is acknowledged to have drawn on aspects of United States mass claims processes under tort law.²¹⁸ Even if they remain different legal orders, municipal law exerts influence in shaping some facets of international law, both within the jurisprudence of the World Court and beyond, as well as in assisting the Court to fulfil its judicial mission when the circumstances so warrant.²¹⁹

While many scholars have observed “the risks of fragmentation” that arise from a “proliferation” of tribunals applying international law both internationally and domestically,²²⁰ the then ICJ President Rosalyn Higgins suggested that this “so-called ‘fragmentation of international law’ is best avoided by regular dialogue between courts and exchanges of information”.²²¹ In this respect, international law is certainly applied

²¹⁵ *Supra* note 18.

²¹⁶ See Nollkaemper, *supra* note 66, p. 29 (“while formally the Court maintains the traditional separation between the international and the domestic legal spheres, in several ways we also see complementarity and dialogue”). See similarly Nollkaemper, *supra* note 3, p. 321 and p. 322 (observing “a slight crack in the traditional dualistic position”); Nollkaemper, *supra* note 7, p. 301.

²¹⁷ See generally, e.g., the authorities *supra* note 137; Roberts, *supra* note 177, p. 69; *infra* note 218.

²¹⁸ V.-J. Proulx, *Transnational Terrorism and State Accountability: A New Theory of Prevention*, Hart, Oxford: 2012, pp. 197-198 and authorities cited therein. See also Nollkaemper, *supra* note 3, p. 310 (on the European Court of Human Rights’ use of domestic law).

²¹⁹ See generally Nollkaemper, *supra* note 3, p. 302, quoted *supra* note 172, but cf pp. 310, 321. See also Roberts, *supra* note 177, p. 80.

²²⁰ Nollkaemper, *supra* note 7, p. 217 and see the authorities cited therein. See also Pellet, *supra* note 1, pp. 860-862 and see generally also, e.g. on fragmentation: International Law Commission, *Report of the Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Finalized by Martti Koskenniemi, UN Doc A/CN.4/L.682 (2006); G. Guillaume, *L’Unité du Droit International Public Est-elle Aujourd’hui en Danger?* 55 *Revue Internationale de Droit Comparé* 23 (2003); P. Webb, *International Judicial Integration and Fragmentation*, Oxford University Press, Oxford: 2013. See also Roberts, *supra* note 177, p. 81.

²²¹ *Speech by H.E. Judge Rosalyn Higgins, President of the International Court of Justice, at the Meeting of Legal Advisers of the Ministries of Foreign Affairs*, New York, 2007, available at: <http://www.icj-cij.org/presscom/files/7/14097.pdf>, p. 3, and quoted in *Speech by H.E. Judge Peter Tomka, President of the International Court of Justice, to the Sixth Committee of the General Assembly*, New York, 2012, available at: <http://www.icj-cij.org/presscom/files/6/17156.pdf> (both accessed 20 April 2016), p. 12. Similarly Nollkaemper, *supra* note 7, p. 235 and see Nollkaemper, *supra* note 3, p. 302 and authorities cited therein (fn 4); Nollkaemper, *supra* note 66, p. 29 quoted *supra* note 216. See further on “dialogue”: e.g. Pellet, *supra* note 1, p. 862; Roberts, *supra* note 177, p. 81; Proulx, *supra* note 218, p. 192 and authorities cited within these.

through national law,²²² but, as this article has discussed, the inverse also takes place; indeed one author suggests that key for both kinds of courts is “which is the *appropriate* system to apply to particular issues arising”, recognising “the character of the rules of both systems as flexible instruments for dealing with disputes”.²²³ Kjos makes a concluding suggestion that perhaps

the two legal orders do not only coexist and may be applied simultaneously; they are also interdependent, each complementing and informing the other both indirectly and directly for a larger common good: enforcement of rights and obligations regardless of their national or international origin.²²⁴

Indeed, municipal law remains a channel between states’ domestic constitutional orders and the international legal system²²⁵ and, in many ways, confirms the international law community’s – and its members’ – profound attachment to “the rule of law”, be it fashioned domestically, internationally, or in some mixed configuration.²²⁶

²²² See *supra* notes 178-179; also Crawford, *supra* note 1, p. 111. See also on international law’s reliance on domestic law *e.g.* Nollkaemper, *supra* note 7, p. 301; Roberts, *supra* note 177, pp. 58-59; Tzanakopoulos, *supra* note 59, pp. 151, 163.

²²³ Crawford, *supra* note 1, p. 111. See also Nollkaemper, *supra* note 3, p. 321 (“international and domestic courts play interlocking functions in dispute settlement”); similarly Tzanakopoulos, *supra* note 59, p. 163; and *supra* section 2.1.

²²⁴ Kjos, *supra* note 3, p. 302. See also Owada, *supra* note 4, p. 277 (on “the two legal orders ... work[ing] together to promote the common public policy of this global community”); Roberts, *supra* note 177, p. 80.

²²⁵ See Nollkaemper, *supra* note 7, p. 301; Roberts, *supra* note 177, p. 80; also Denza, *supra* note 2, p. 437. Cf Gaja, *supra* note 2, p. 53 (referring to “monism impl[y]ing that a link between international law and municipal laws necessarily exists”) and see also p. 57.

²²⁶ Nollkaemper, *supra* note 7, p. 301 (noting *inter alia* “[t]he rule of law at the international and domestic levels is not a normative ideal or a requirement of separate legal orders, but is intimately connected and mutually reinforcing”), and see generally p. 1 *et seq* on “the international rule of law” and domestic courts’ role in its achievement; see also Tomka, *Rule of Law*, *supra* note 17.