

# ABHANDLUNGEN

## The Relationship between Customary International Law and Municipal Law in Western European Countries

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### *1. Introduction*

The question of the relationship between customary international law and municipal law may be of great importance in domestic judicial proceedings. We do not propose to discuss here the extent and content of customary international law or of general legal principles as such, nor their codification in international treaties and conventions. Instead, we shall concentrate on an examination of the specific question, whether a civil law jurisdiction, which makes reference to public international law in its constitution as being an integral part of its laws, will indeed give priority to general international law requirements, even when faced with statutes and decrees that appear clearly to violate them. For this purpose, it will be

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Abbreviations: AJIL = American Journal of International Law; BGE = Entscheidungen des Schweizerischen Bundesgerichts; BVerfGE = Entscheidungen des Bundesverfassungsgerichts; BYIL = The British Year Book of International Law; Clunet = Journal du Droit International; EC = European Community; ECHR = European Convention on Human Rights; EPIL = Encyclopedia of Public International Law, ed. by Rudolf Bernhardt; EuGRZ = Europäische Grundrechte-Zeitschrift; FRG = Federal Republic of Germany; GG = Grundgesetz; ICJ = International Court of Justice; ICLQ = International and Comparative Law Quarterly; IPrax = Praxis des Internationalen Privat- und Verfahrensrechts; JöR = Jahrbuch des öffentlichen Rechts; NILR = Netherlands International Law Review; ÖZöR = Österreichische Zeitschrift für öffentliches Recht und Völkerrecht; PCIJ = Permanent Court of International Justice; RdC = Académie de Droit International, Recueil des Cours; RGDIP = Revue Générale de Droit International Public; SJIR = Schweizerisches Jahrbuch für internationales Recht; StGH = Staatsgerichtshof; ZSR = Zeitschrift für Schweizerisches Recht.

useful to give an analysis of how doctrine and practice in Western European countries give effect to the primacy of international law.

As we limit our examination to customary international law (and the general principles of international law as part of customary international law) we do not discuss treaties or conventions. Therefore we also exclude an analysis of municipal law in relation to the European Community (EC) and the European Convention on Human Rights (ECHR).

## *2. General Remarks on the Relationship between International Law and Municipal Law*

### 2.1. The determination of the relations between international law by municipal law

General international law leaves the arrangements of the relationship between international law and municipal law by way of a *renvoi* to municipal law and in this manner recognizes the sovereignty and autonomy of organisation of the states. It demands to be implemented one way or another. But it is not concerned with the method of achieving this result. While it is true that national courts are necessary instruments for the application of international law, there is no general rule in international law that national courts have to apply international law directly and regardless of their municipal legal order. Furthermore, although states are under an obligation to ensure that their legislative, executive and judicial acts conform to international law, international law does not impose its priority as such on municipal law<sup>1</sup>.

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<sup>1</sup> F. Berber, *Lehrbuch des Völkerrechts* (2nd ed.1975), pp.93 and 107f., W. L. Gould, *Judicial application of international law*, in: L. Erades/W. L. Gould, *The Relation between International Law and Municipal Law in the Netherlands and in the United States* (1961), pp.223ff.; H. Mosler, *L'application du droit international public par les tribunaux nationaux*, *RdC* vol.91 (1957I), pp.625ff.; J. P. Müller/L. Wildhaber, *Praxis des Völkerrechts* (2nd ed.1982), pp.96ff.; D. P. O'Connell, *International Law*, vol.1 (2nd ed.1970), p.44; A. Verdross/B. Simma, *Universelles Völkerrecht* (3rd ed.1984), pp.37ff.; L. Wildhaber, *Treaty-Making Power and Constitution* (1971), pp.3 and 183. Cf. already H. Triepel, *Völkerrecht und Landesrecht* (1899), p.271 (passage translated by A. Cassese, *Modern Constitutions and International Law*, *RdC* vol.192 [1985 III], pp.331ff., 342).

## 2.2. International law requirements concerning the relations between international law and municipal law

Even though the details of the relations between international law and municipal law are governed by the various municipal legal systems, nonetheless, municipal statutes, decrees and decisions have to be interpreted so as to conform to the standards of international law. In the case concerning certain *German interests in Polish Upper Silesia*, the Permanent Court of International Justice (PCIJ) has stressed that "from the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures"<sup>2</sup>.

As a general rule, a state "cannot plead a rule or a gap in its own municipal law as a defence to a claim based on international law"<sup>3</sup>. In the case of the *Free Zones of Upper Savoy and the District of Gex*, the PCIJ held that in international law a country cannot rely on its own legislation to limit the scope of its international obligations<sup>4</sup>. Already in its Advisory Opinion on the *Treatment of Polish Nationals in Danzig*, the Court said, that "while on the one hand, according to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter's Constitution, but only on international law and international obligations duly accepted, on the other hand and conversely, 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"<sup>5</sup>.

In the Advisory Opinion concerning the *Greco-Bulgarian "Communities"* the question arose, which of two conflicting provisions should be preferred – where the application of a convention was at variance with a provision of municipal law in force in the territory of one of the two Signatory Powers –, that of the law or that of the Convention? The PCIJ held that "it is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the pro-

<sup>2</sup> Series A No.7, p.19. I. Brownlie, *Principles of public international law* (3rd ed.1983), pp.41 ff.

<sup>3</sup> M. Akehurst, *A modern introduction to international law* (4th ed. 1982), p.43. See also Wildhaber (note 1), pp.184–189.

<sup>4</sup> Series A/B No.46, p.167.

<sup>5</sup> *Treatment of Polish nationals and other persons of Polish origin or speech in the Danzig territory*, Series A No.44, p.24. G. Schwarzenberger, *International Law*, vol.I (3rd ed.1957), pp.69f.

visions of municipal law cannot prevail over those of the treaty", and that, "if a proper application of the Convention were in conflict with some local law, the latter would not prevail over the Convention"<sup>6</sup>.

In addition to these fundamental principles regarding the relations between international law and municipal law, mention must be made of two presumptions, which are generally recognized regardless of the specific legal system. These two presumptions enable and oblige national courts to apply rules of international law which have not been explicitly incorporated into their municipal law:

a) As mentioned above, municipal courts must apply their own municipal law even if it conflicts with norms and standards of international law and if there is no provision in the constitution which requires them to examine municipal law so as to conform to international law. But, since international law is based upon the common consent of the different states (a consent which may be assumed particularly among Western countries) and since it must be presumed that a civilised country would not intentionally enact a rule conflicting with international law, there is a presumption against the existence of such a conflict: "A rule of Municipal Law, which ostensibly seems in conflict with the Law of Nations, must, therefore, if possible, always be so interpreted as to avoid such conflict"<sup>7</sup>.

b) In case of a gap in the statutes or in customary (or common) law of a country "regarding certain rules necessitated by the Law of Nations, such rules ought to be presumed by the courts to have been tacitly adopted by such Municipal Law"<sup>8</sup>. Also in such cases it may be taken for granted that a country does not intentionally want its municipal law to be deficient in such rules<sup>9</sup>.

In modern doctrine and practice these presumptions are called "interpretation favouring international law" (*völkerrechtskon-*

<sup>6</sup> Series B No.17, pp.32f.

<sup>7</sup> L. Oppenheim/H. Lauterpacht, *International Law*, vol.I (8th ed.1955), p.45f. §23; Akehurst (note 3), p.46; L. Wildhaber, *Völkerrecht und Landesrecht*, ZSR 1969I, pp.537-557.

<sup>8</sup> Oppenheim/Lauterpacht, *ibid.*, p.46 §24.

<sup>9</sup> Oppenheim/Lauterpacht adduce a third presumption of the existence of certain municipal rules in conformity with international law, if a country has not by its laws explicitly renounced the applicability of international law rules: "There is no doubt that a State need not make use of all the rights it has by the Law of Nations, and that, consequently, every State can by its laws explicitly renounce the whole or partial use of such rights, provided always it is ready to fulfil such duties, if any, as are connected with those rights" (p.46 §25).

*forme Auslegung*) or attitude inspired by “friendliness to international law” (*Völkerrechtsfreundlichkeit*)<sup>10</sup>.

### 2.3. State responsibility with respect to the enforcement of international law

It will be quite instructive to show the impact of state responsibility on the relationship between international law and municipal law.

If a state does not pay heed to the harmonizing principles mentioned above<sup>11</sup>, but creates or enforces statutes, which are admittedly constitutional, but which are not in conformity with international law, the organs and citizens of such a state are still bound to their municipal law. As a consequence, however, the state becomes responsible for all acts of its organs – the judiciary as well as the executive and the legislature – that are contrary to international law: “It is a well recognised rule that a State is internationally responsible for the decisions of its courts, even if given in conformity with the law of the State concerned, whenever that law happens to be contrary to International Law”<sup>12</sup>. Added to the claim of damages may be the claim of revocation (*restitutio in integrum*) or at least of non-application of the norms violating international law<sup>13</sup>.

In the case concerning the *Factory at Chorzow (Claim for Indemnity)*, the PCIJ held as follows:

“The essential principle contained in the actual notion of illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine

<sup>10</sup> A. Bleckmann, *Die Völkerrechtsfreundlichkeit der Deutschen Rechtsordnung, Die öffentliche Verwaltung* 1979, pp.309ff.; Cassese (note 1), p.343; A. Ross, *Lehrbuch des Völkerrechts* (1951), pp.66f.; I. Seidl-Hohenveldern, *Transformation or adoption of international law into municipal law*, ICLQ 1963, pp.88ff. (99).

<sup>11</sup> Cf. 2.2 above.

<sup>12</sup> Oppenheim/Lauterpacht (note 7), p.39; Gould (note 1), p.225.

<sup>13</sup> P. Guggenheim, *Répertoire suisse de droit international public*, vol.III (1975), pp.1673ff.; Verdross/Simma (note 1), pp.845ff.; K. Zemanek, *Die völkerrechtliche Verantwortlichkeit und die Sanktionen des Völkerrechts*, in: *Österreichisches Handbuch des Völkerrechts*, vol.I (1983), pp.368ff.

the amount of compensation due for an act contrary to international law<sup>14</sup>.

The fact that reparation (*restitutio in integrum*) is one of the most important forms of reestablishing and maintaining the legal status which existed before the violation, has been confirmed in several other international judgments<sup>15</sup>. Although most international judgments regarding *restitutio in integrum* concern violations of treaties, the doctrine also accepts this principle with respect to customary international law<sup>16</sup>. Also in these cases the plaintiff country may ask for *restitutio in integrum*.

Nullity is another possible consequence of illicit acts in international law<sup>17</sup>. This is a confirmation of the fundamental principle *ex injuria non oritur jus*. A famous incident of 1919 may illustrate the applicability of this legal institute: Article 61 (2) of the Weimar Constitution stated that Austria was allowed to delegate representatives to the Council of the Reich (*Reichsrat*). According to the Allied Powers, this provision constituted a violation of the Versailles Treaty. Subsequently, Germany confirmed that all provisions of the constitution which were not in conformity with the Versailles Treaty be null and void.

According to Frederick Alexander Mann, in legal systems, where customary international law is adopted by municipal law without any transformation act, the national courts should declare acts violating international law as null and void:

“By the nature of things the (relative) harmony between the international and the municipal legal order can, in the sphere of State responsibility, be achieved only in so far as the nullity of the internationally wrongful act is concerned. Monetary compensation lies outside the reach of a municipal court. So does

<sup>14</sup> Series A No.13, p.47.

<sup>15</sup> Cf. R. J. Dupuy in the case *Topco/Calasiatic v. Libya*, Clunet 1977, pp.350ff. (pp.380–388 [pp.384 §102 and 387 §109]); Müller/Wildhaber (note 1), pp.401–407.

<sup>16</sup> E. J. de Aréchaga, International Responsibility, in: Manual of Public International Law (ed. M. Sørensen [1968]) pp.531–603, pp.564–567; F. A. Mann, The Consequences of an International Wrong in International and National Law, BYIL 1976/77, pp.1ff. (2–14); R. B. von Mehren/N. Kourides, International Arbitrations Between States and Foreign Private Parties: The Libyan Nationalization Cases, AJIL 1981, pp.476ff. (pp.533–545); L. B. Sohn/R. R. Baxter, Responsibility of States for Injuries to the Economic Interests of Aliens, AJIL 1961, pp.545ff. (Art.27, pp.580–581); Verdross/Simma (note 1), pp.873–875.

<sup>17</sup> P. Guggenheim, La validité et la nullité des actes juridiques internationaux, RdC vol.74 (1949.1), pp.195ff. (237); Mann (note 16), pp.5–8; cf. also Sir Gerald Fitzmaurice's Separate Opinion in the *Barcelona Traction Case*, ICJ Reports 1970I, p.106: "... the whole bankruptcy proceedings were, for excess of jurisdiction, internationally null and void *ab initio*, and without effect on the international plane".

restitution in kind in the strict sense. But nullity ... acknowledges the continued existence of the status quo and is, therefore, a type of *restitutio in integrum*. It exists *erga omnes*. Hence it should, in principle, be fully cognizable by municipal courts, though the circumstances in which such recognition is appropriate need definition"<sup>18</sup>

Thus, the validity of municipal law or of a pronouncement of a national court violating international law in domestic proceedings is purely provisional. As the PCIJ said in the Advisory Opinion on the *Exchange of Greek and Turkish Populations*, there is a self-evident principle, "according to which a State which has contradicted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfillment of the obligations undertaken"<sup>19</sup>.

In order to avoid such collisions with the possible consequences of *restitutio in integrum*, nullity of unilateral acts and statutes, or liability, states apply the principles of "favouring international law" and "friendliness to international law" (*Völkerrechtsfreundlichkeit*) when they interpret and enforce their municipal law. According to these principles, there is a presumption that the legislator did not intend to derogate from international law and that it therefore wanted to avoid a conflict between international law and municipal law whenever possible<sup>20</sup>.

#### 2.4. The incorporation of international law into municipal law

Since international law does not impose on states an obligation to execute international law in a particular way, a state is free either to adopt international law automatically and globally or to adopt each international norm specifically. The relationship between international law and municipal law, evidenced by the method of incorporation of international law into municipal law, is one of the classic questions, both in general international law and in the various domestic legal systems. As O'Connell states, "it would be difficult to discover a municipal law system which did not utilise international law rules as the norms of decisions"<sup>21</sup>. In order to justify this resort to standards which were not laid down directly by the

<sup>18</sup> Mann (note 16), p.16.

<sup>19</sup> Series B No.10, p.20.

<sup>20</sup> Berber (note 1), p.107; O'Connell (note 1), p.51.

<sup>21</sup> O'Connell, *ibid.*, p.49.

national sovereign, the famous theories of monism and dualism offered abstract solutions<sup>22</sup>.

#### 2.4.1. *The theory of dualism (or pluralism).*

The traditional dualist conception of the relationship between international and municipal law was developed by Heinrich Triepel and subsequently vigorously expanded by Dionisio Anzilotti, Gaetano Morelli, Angelo Piero Sereni and Walter Rudolf. According to the dualist view, international law and municipal law are two self-contained legal systems which are essentially different from each other in three respects:

a) They differ, first, with regard to their sources: International law (custom grown on the international plane and law-making treaties) is based on the collective will of the states; municipal law (custom grown within the territory of each state, statutes, decrees, rules and ordinances) is based on the state's constitution.

b) International law and municipal law differ, secondly, regarding the relations they regulate: International law contains inter-state law, that is to say norms concerning international relations between two or more states; municipal law regulates relations between individuals and their state or between the various state organs or levels.

c) Thirdly, international law and municipal law differ with respect to the substance: international law is a law between sovereign and equal states and has, therefore, a force weaker than municipal law<sup>23</sup>.

It is a logical necessity of the dualistic *a priori* dichotomy of international law and municipal law that international law can not be a part of municipal law *per se*, in fact neither as a whole nor in part. States decide for themselves if and under what conditions they incorporate international legal rules into their own national legal systems: Dualism explains that international

<sup>22</sup> "From a logical point of view, that is to say if law is considered to be an objective structure of legal norms from which inductions and deductions can be made by pure logic, there seems to be no *tertium* between the dualist and monistic conceptions" (J.H.F. van Panhuys, Relations and interactions between international and national scenes of law, RdC vol.112 (1964II), pp.1ff., 14; 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, RGDI 1962, p.260).

<sup>23</sup> Brownlie (note 2), pp.33f.; O'Connell (note 1), p.42; E. Menzel/K. Ipsen, Völkerrecht (2nd ed.1979), pp.49ff.; P. Lardy, La force obligatoire du droit international en droit interne (1966), pp.15ff.; Ch. Rousseau, Droit international public, vol.I (1971), pp.38ff.

law may not be automatically and directly applied in municipal law as international law. On the contrary, international law is only applicable for the authorities and individuals after having been incorporated by act of transformation. It is then applicable as municipal law (and because it has been transformed into municipal law). Such an explicit or tacit transformation may take place by a general acceptance of norms of international law in municipal law (with regard to customary international law and general principles of international law), or by means of a special municipal statute or decree (with regard to international treaties and conventions). After such a transformation, conflicts between international law and municipal law are considered to be no longer possible. If, according to the municipal law of a dualist country, "international law is part of the law of the land", this formula, according to the dualist theory, has to be understood in the sense that a transformation will be necessary for the applicability of treaty law in municipal law<sup>24</sup>. With respect to customary international law, we also refer to later developments in this essay<sup>25</sup>.

#### 2.4.2. *The theory of monism*

The monistic school, whose main representatives are Hans Kelsen, Josef Kunz und Georges Scelle, rejects the three premises of the dualists mentioned above. It maintains that international law and municipal law are two different elements of one single concept of law. In the monistic view, both legal elements are deduced from one basis, and the addressees are always the individuals. According to this unity, international law is automatically and directly adopted (by way of reception) in municipal law as international law: Due to this adoption, international law does not change its legal nature and is therefore to be applied as such, not by virtue of the creation of parallel municipal norms<sup>26</sup>.

If the international norm is a treaty or a convention (and not a general principle of customary or common international law), it has to be self-executing in order to be directly applicable in municipal law. It must, in

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<sup>24</sup> F. Ermacora, *Völkerrecht und Landesrecht*, in: *Österreichisches Handbuch des Völkerrechts*, vol.I (1983), p.111; Menzel/Ipsen, *ibid.*, pp.49ff.; O'Connell (note 1), p.49; Oppenheim/Lauterpacht (note 7), pp.37f.

<sup>25</sup> Cf. 2.5.2 below.

<sup>26</sup> Ermacora (note 24), p.111; H. Kelsen, *Principles of International Law* (2nd ed. 1966), pp.553ff.; Menzel/Ipsen (note 23), pp.51f.; Lardy (note 23), pp.21ff.; Mosler (note 1), p.644; O'Connell (note 1), pp.39ff., 49f.; Rousseau (note 23), pp.42ff.

other words, be clear and specific enough (in terms of its nature, purpose and wording) to constitute a valid legal basis. If a treaty is non-self-executing, then a specific municipal statute is necessary in addition<sup>27</sup>. (The act of approval by Parliament is not an act of transformation: the treaty is valid, because it is legally correctly concluded, and not because it is allegedly incorporated in a municipal statute).

Monistic authors differ with respect to the claim of validity (*Geltungsgrund*): One monistic view emphasizes the self-engagement of states as relevant. Should a conflict between the two legal planes arise, they would hold international law inferior to municipal law. This variant of the monistic conception, holding municipal law supreme, has been almost universally discarded<sup>28</sup>. The opposite alternative, represented in particular by Kelsen, Kunz and Scelle, recognizes the inherent jurisdictional superiority of international law before municipal courts. As a consequence, norms of municipal law violating international law are to be considered as null and void.

#### 2.4.3. Doctrine and practice today

By and large, modern doctrine has given way to a more tolerant outlook and is stipulating moderate and mixed theories: Those authors who favour the monistic conception (with priority of international law), but realize that municipal acts violating international law are not automatically null and void, advocate a "moderated monism" (Alfred Verdross, Georg Dahm) or a "pluralism with primacy of international law" (Michel Virally). Those authors inclined to support a dualism not obstructing internationalism speak of "dualism but interpenetration" (Louis Cavaré), or, if they are opposed to the rigid transformation dogma, they urge support for the doctrine of "adoption" of international agreements (Hermann Mosler), and stress that all modern states incorporate international customary law into municipal law automatically and globally<sup>29</sup>.

Another quite useful view is that of the possibility of "harmonization" or "co-ordination". O'Connell argues that an international or municipal judge has no *a priori*-mandate to treat international law or municipal law as normatively superior: "When faced with a conflict he (the judge)

<sup>27</sup> Müller/Wildhaber (note 1), pp.116ff.; I. Seidl-Hohenveldern, *Völkerrecht* (5th ed. 1985), pp.140f.; Verdross/Simma (note 1), pp.550ff.

<sup>28</sup> O'Connell (note 1), p.42; Seidl-Hohenveldern (note10), p.89 note 10.

<sup>29</sup> Wildhaber (note 1), pp.4f.

must take that course which his jurisdictional rule enjoins, and hence he may be required to apply international law to the exclusion of municipal law, or *vice versa*<sup>30</sup>. This theory of harmonization or co-ordination (or, as we called it above, "theory of friendliness to international law" or "interpretation in favour of international law") assumes that international law forms part of municipal law and hence is available to a municipal judge even though he is bound by his municipal jurisdictional rules.

Particularly in common law countries, the discussion about monism and dualism is not regarded as decisive. The problem is discussed in a more pragmatic (and we would add felicitous) way<sup>31</sup>.

In any case, to answer the question whether a country follows the monistic or dualist conception in one or another moderated way, it will be necessary to examine pragmatically its actual constitutional position, its jurisprudence, as well as its doctrine.

## 2.5. Monism and dualism as applied to the different sources of international law

Although basically the relations between international law and municipal law are determined by the internal constitutions, the question of the applicability of international law in municipal law also depends specifically on the different sources of international law.

### 2.5.1. *The nature of customary international law and general principles of international law*

The binding basis of customary international law is composed of two elements: "The first is factual (*usus*) and derives from a uniform and continuous repetition over the years of the same behaviour, while the second is psychological (*opinio juris*) and lies in the conviction that such behaviour is legally necessary"<sup>32</sup>. In the international legal system, custom

<sup>30</sup> O'Connell (note 1), p.44; Brownlie (note 2), p.36; Rousseau (note 23), p.48.

<sup>31</sup> Berber (note 1), p.96 note 20; Brownlie, *ibid.*, p.36; Sir G. Fitzmaurice, *The general principles of international law*, RdC vol.92 (1957 II), pp.5 ff. (72 ff.). For a prior example, see *Mortensen v. Peters* (1906), 14 SLR 227 (Scotland).

<sup>32</sup> R. Monaco, *Sources of International Law*, in: EPIL 7 (1984), p.427. Cf. also P. Hagenmayer, *La doctrine des deux éléments du droit coutumier dans la pratique de la cour internationale*, RGDIP 1986 I, pp.5 ff.; B. Stern, *La coutume au cœur du droit international, quelques réflexions*, in: *Mélanges à P. Reuter* (1981), pp.479 ff.; M. E. Villiger, *Customary international law and treaties* (1985), pp.12 ff.

is, together with international treaties and generally recognized principles of international law, "a primary source of law since it is itself capable of giving force to the rules which result from it"<sup>33</sup>.

In our opinion, the general principles of international law also fall within the notion of "standards and principles of general or common international law" as stated in several constitutions<sup>34</sup>. The term "general principles of law" lends itself to various meanings. In one of these variations, "general principles of law mean principles recognized in all kinds of legal relations, regardless of the legal order to which they may belong, be it municipal law, international law, the internal order of international organizations, or any other autonomous legal system"<sup>35</sup>. Art.38 of the Statute of the International Court of Justice (and of its predecessor, the PCIJ), in listing the rules applicable, lays down in paragraph 1 *lit.* (c) that the Court, in addition to the rules established by agreement and those created by custom, should take account of the "general principles of law recognized by civilized nations"<sup>36</sup>.

The question arises whether such fundamental and well-recognized principles as e.g. good faith and *pacta sunt servanda* may also be regarded as rules of customary international law. In this respect, we may look at first to the Vienna Convention of the Law of Treaties of May 23, 1969. In this Convention, the general principles of good faith and *pacta sunt servanda* are mentioned in the third paragraph of the preamble:

"Noting that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized, ..."

Art.26 of the Convention then states that "every treaty in force is bind-

<sup>33</sup> Monaco, *ibid.*, p.427; Müller/Wildhaber (note 1), pp.8ff.

<sup>34</sup> E.g. Art.8 (1) of the Constitution of Portugal; cf.3.1.6 below.

<sup>35</sup> H. Mosler, General Principles of Law, in: EPIL 7 (1984), p.90. Cf. also B. Cheng, General principles of law (1953); P. Guggenheim, Die Anwendung allgemeiner Rechtsprinzipien des Völkerrechts im Landesrecht, in: Festschrift für G. Leibholz (1966), pp.701ff.; H. Kelsen (note 26); L. McNair, The general principles of law recognized by civilized nations, BYIL 1957, pp.1ff.; Karl M. Meessen, Zur Theorie allgemeiner Rechtsgrundsätze des internationalen Rechts, Jahrbuch für Internationales Recht 1974, pp.283ff.; Monaco (note 32), p.429f.; Müller/Wildhaber (note 1), pp.24ff.; G. Schwarzenberger, The inductive approach to international law (1965), pp.72ff.

<sup>36</sup> I. von Münch/A. Buske, International Law/The Essential Treaties and other relevant Documents (1985), pp.23ff. (32).

ing upon the parties to it and must be performed by them in good faith"<sup>37</sup>.

Many of the rules laid down in this Convention are also regarded as customary international rules. Thus, the International Court of Justice (ICJ) stated in its Advisory Opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia*: "The rules laid down by the Vienna Convention on the Law of Treaties ... may in many respects be considered as a codification of existing customary law on the subject"<sup>38</sup>.

According to doctrine and practice, "an indispensable requirement of a well functioning legal order is that legal relations be conducted in good faith"<sup>39</sup>. The most important principle emanating from this fundamental rule is the principle *pacta sunt servanda*, i. e. the obligation to comply with commitments duly undertaken. In the *Nuclear Tests Cases*, the ICJ explained the relationship of these two concepts as follows:

"One of the basic principles governing the creation and performance of legal obligations, whatever their source [emphasis added], is the principle of good faith. Trust and confidence are inherent in international cooperation, in particular in an age when this cooperation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration"<sup>40</sup>.

Due to the universally accepted validity of the two principles at issue, a distinction between customary international law and general principles of

<sup>37</sup> Von Münch/Buske, *ibid.*, p.42; R. G. Wetzel/D. Rauschnig, *The Vienna Convention on the Law of Treaties* (1978), pp.48 and 209ff.

<sup>38</sup> ICJ Reports 1971, p.47. The Court did not refer to a special provision. Cf. also the decisions on *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, ICJ Reports 1972, pp.46ff. (67, referring to Art.60 of the Vienna Convention); *Fisheries Jurisdiction Case (United Kingdom v. Iceland)*, *Jurisdiction of the Court*, ICJ Reports 1973, pp.3ff. (14, referring to Art.52); (18, referring to Art.62), (21, referring to Arts.65-66); *Fisheries Jurisdiction Case (Federal Republic of Germany v. Iceland)*, *Jurisdiction of the Court*, ICJ Reports 1973, pp.49ff. (59, referring to Art.52), (63, referring to Art.62); *Aegean Sea Continental Shelf Case (Greece v. Turkey)*, ICJ Reports 1978, pp.3ff. (39, referring to Arts.2, 3, 11); *Beagle Channel Arbitration*, *International Legal Materials* 1978, pp.634ff. (646, referring to Art.31). Cf. Müller/Wildhaber (note 1), p.91.

<sup>39</sup> Cheng (note 35), pp.105ff.; Mosler (note 35), p.103.

<sup>40</sup> ICJ Reports 1974, pp.253ff. (268). Als Mosler states, "the extension made by the Court to unilateral declarations presupposes that the declaration is made to one or more subjects of international law on the understanding that the intention is to create a legal link between both sides" (Mosler [note 35], p.103). Also A. D'Amato, *Good Faith*, in: *EPIL* 7 (1984), pp.107ff. (109).

international law can hardly be made<sup>41</sup>. In the case of *pacta sunt servanda*, for instance, "the claim is still made that it is a principle of natural law, while many see in it a rule of customary law (e.g. Basdevant, Guggenheim, Kunz, de Louter, Oppenheim, Lauterpacht)"<sup>42</sup>.

As an important part of customary international law, the general principles of good faith and *pacta sunt servanda* are fundamental principles of both public and private law. They have to be applied in all states as a general rule of public order and public policy (*ordre public*) and of *lex mercatoria*<sup>43</sup>. Or, as Villiger writes, "there should not be any *a priori* or inherent problem of a municipal court applying customary international law"<sup>44</sup>.

To conclude, there is no reason to make any difference between the two sources of international law, as regards the relationship between international law and municipal law. From now on, we shall therefore only use the notion of "customary international law", instead of speaking of "customary international law and the general principles of law".

### 2.5.2. *The automatic and direct applicability of customary international law*

Even if it were theoretically possible to transform customary international law into municipal law according to the dualist conception, such a

<sup>41</sup> As regards the change from general principles of international law to customary international law in general cf. Berber (note 1), p.71; Menzel/Ipsen (note 23), p.61.

<sup>42</sup> M. Lachs, *Pacta sunt servanda*, in: EPIL 7 (1984), pp.364 ff. (365): According to Seidl-Hohenveldern, "there can be no doubt that this rule is one of the generally recognised rules of customary international law" (note 10), p.97. Of the same opinion is I. G. Caytas, *Vorrang des Völkerrechts im Landesrecht* (1980), p.20. Also the Socialist school of law "views the whole law of treaties as a product of customary law" (Lachs, *ibid.*, p.366); of different opinion are Hobbes, Spinoza and Hegel and their successors, whose school of thought emphasizes a wide interpretation of the *raison d'Etat* (Lachs, p.366).

<sup>43</sup> Cf. Supreme Court of Austria, decision of 18.11.1982, IPRax 1984, pp.97 ff. The application of general principles of law – instead of municipal law – is possible, when consented to by the parties, or *a fortiori* by the choice of an equity-decision of the contracting parties: B. von Hoffmann, *Grundsätzliches zur Anwendung der lex mercatoria durch internationale Schiedsgerichte*, in: Festschrift für Gerhard Kegel (1987), pp.215 ff.; *idem*, «Lex mercatoria» vor nationalen Schiedsgerichten, IPRax 1984, pp.106 ff. (107). Cf. also A. Bucher, *Transnationales Recht im IPR*, in: Veröffentlichungen der Kommission für Europarecht Nr.5 (1986), pp.11 ff. (55 ff.); B. Goldmann, *La lex mercatoria dans les contrats et l'arbitrage internationaux: réalité et perspectives*, Clunet 1979, pp.475 ff.

<sup>44</sup> Villiger (note 32), p. XXXIII note 50, with further references.

procedure would not make any practical sense. The legislature would then be obliged to confirm explicitly all changes, modifications and new creations of norms and principles of international law. As a consequence, an examination of all questions regarding international law (e.g. nationalization of investments, environment, law of the sea and space, responsibility, immunities etc.) would be needed at least once a year, followed by an update of the respective treaty law. No parliament and no administrative body would ever be capable of tackling, let alone mastering such a titanic work<sup>45</sup>. Such a "rolling process of steady adaptation" would be difficult to understand. It would create never-ending modifications, which in turn would lead to uncertainties<sup>46</sup>. Finally, the obligation to transform customary international law into municipal law by special statutes and by acts of legislation would be in contradiction with the nature of customary international law itself.

For these reasons, states incorporate the norms and principles of customary international law into their municipal law, either with the help of the general formula "international law is part of the law of the land", or without any specific norm about special transformation or monism and dualism<sup>47</sup>. The principle of automatic and direct applicability of customary international law is therefore generally recognized in the doctrine and practice of Western countries, even in states with a dualist legal system as for example the Federal Republic of Germany or Italy<sup>48</sup>. With respect to customary international law, Western European countries follow the same basic pattern as the common law-countries, where the famous formula "international law is part of the law of the land" has been the rule since the 18th century<sup>49</sup>. In both legal systems, "all such rules of customary International Law as are either universally recognised or have at any rate received

<sup>45</sup> Müller/Wildhaber (note 1), p.97; Verdross/Simma (note 1), p.541; L. Wildhaber, Legal Opinion concerning the applicability of international law in the Principality of Liechtenstein of 1979/1980, summarized in the Report of the Government of the Principality of Liechtenstein of November 17, 1981, p.3.

<sup>46</sup> Compare the analogous problems in the English legal system, as exemplified by C. H. Schreuer, *The Applicability of Stare Decisis to International Law in English Courts*, NILR 1978, pp.234ff.

<sup>47</sup> H. Weber/H. v. Wedel, *Grundkurs Völkerrecht* (1977), p.26.

<sup>48</sup> Müller/Wildhaber (note 1), p.97; Verdross/Simma (note 1), p.541.

<sup>49</sup> Blackstone (in: *Commentaries on the Laws of England* [1765], Book IV, Chapter 5), cited by Berber (note 1), p.96, and O'Connell (note 1), p.57; F. A. Mann, *Foreign Affairs in English Courts* (1986), pp.120ff.; Oppenheim/Lauterpacht (note 7), p.43; P. De Visser, *Les tendances internationales des constitutions modernes*, RdC vol.80 (1952I), pp.511ff. (522).

the assent of (the states) are *per se* part of the law of the land"<sup>50</sup>. National courts must automatically and directly apply customary international law and the principles of general international law. However, the fact that international law is part of the law of the land and is binding directly on courts and individuals does not mean that customary international law is in all circumstances superior to municipal law:

"The inclusion in many modern constitutions of clauses stipulating that international law (or general international law) is considered to be part of the law of the land can be understood as a recognition of the superiority of the international legal order. This is shown by the interpretation commonly followed, according to which international law rules are given in the municipal system a rank that allows them to override national rules, even if the international rules are issued later. However, this situation can also be viewed as evidence of the need of a constitutional device to assure the smooth transfer of international legal values to the municipal law level"<sup>51</sup>.

#### 2.6. The rank of international law in municipal law

The question of the rank of international law in municipal law is very important both in theory and practice with respect

- to collisions of norms between international law and municipal law;
- to the effects of such collisions;
- to the incorporation of international law into municipal law;
- to the interpretation of municipal law;
- to the question of responsibility;
- to the termination of international obligations and their municipal effects; and
- to the obligation of individuals<sup>52</sup>.

In spite of this importance, most Western European constitutions do not contain any provisions referring to the rank of international law<sup>53</sup>. So the question arises whether customary international law (including the general principles of law) have a higher rank, within the municipal legal order, than statutes and decrees or even than constitutions. Because international law "does not contain any general rule according to which customary

<sup>50</sup> Oppenheim/Lauterpacht (note 7), p.39.

<sup>51</sup> L. Ferrari-Bravo, International and Municipal Law: The Complementarity of Legal Systems, in: The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory (ed. by R. St. J. Macdonald/D. M. Johnston) (1983), p.737.

<sup>52</sup> Ermacora (note 24), p.110.

<sup>53</sup> Cf. below 3.

international law and treaty law are to be supreme in the sphere of municipal law and directly binding on State organs and citizens alike, and the risk of certain abuses may even to some extent reduce the desirability of such a rule"<sup>54</sup>, we must analyse the legal situation in the Western European states in this respect, too.

### 3. *The Reference to International Law in the Constitutions of Western European States*

#### 3.1. Constitutions with an explicit reference to customary international law<sup>55</sup>

##### 3.1.1. *The Federal Republic of Germany (FRG)*

The Weimar Constitution of 1919 was the first constitution in Western Europe proclaiming the observance of customary international law. Art.4 stated:

"The generally recognized rules of international law are deemed to form part of German federal law and, as such, have binding force"<sup>56</sup>.

According to the prevailing interpretation of this provision, only those parts of customary international law, which had been assented to by Germany and by the vast majority of other states became immediately and automatically applicable. Because of the rule *lex posterior derogat legi priori*, violations of international law were still possible<sup>57</sup>.

Today, Art.25 of the Basic Law (GG) is among the most favourable provisions in Western Europe with regard to customary international law:

"The general rules of public international law shall be an integral part of

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<sup>54</sup> Seidl-Hohenveldern (note 10), pp.89f.

<sup>55</sup> Also Art.29 (3) of the Irish Constitution states: "Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other states" (A. P. Blaustein/G. H. Flanz, *Constitutions of the countries of the world*, vol.VIII). Ireland's refusal to sign the 1977 European Convention on the Suppression of Terrorism was based on this provision, see T. Stein, *Die Europäische Konvention zur Bekämpfung des Terrorismus*, ZaöRV vol.37 (1977), p.668ff. (671).

<sup>56</sup> Cassese (note 1), p.357; Lardy (note 23), pp.37ff. But even before the adoption of this provision, a high German tribunal rejected in the case *Hellfeld v. Russland* in 1910 the view that international law is applicable only in so far as it has been adopted by German customary law. This decision (AJIL [1911], p.511) is mentioned by Oppenheim/Lauterpacht (note 7), pp.40f. note 2.

<sup>57</sup> Berber (note 1), pp.99f.; Cassese (note 1), pp.357ff.; O'Connell (note 1), pp.72f.

federal law. They shall take precedence over the laws and shall directly create rights and duties for the inhabitants of the federal territory"<sup>58</sup>.

According to the practice of the Federal Constitutional Court and the predominant doctrine<sup>59</sup>, the general rules of international law are norms which are recognized as binding by a predominant majority of countries (but not necessarily by the FRG itself<sup>60</sup>). They include – among others – customary law (but not regional customary law) and the principles generally recognized by civilized countries<sup>61</sup>. Treaty law, on the contrary, acquires municipal validity only after a special transformation act; indeed, according to Art.59 (2) GG, "treaties which regulate the political relations of the Federation or relate to matters of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies competent in any specific case for such federal legislation"<sup>62</sup>. Contrary to customary international law, treaty law is not superior to municipal law; likewise, however, it may be overruled by a *lex posterior*.

The two fundamental principles at stake belong to those general rules of international law which are, according to Art.25 GG, automatically adopted into municipal law with a superior rank<sup>63</sup>.

The task of ensuring some uniformity in the application of general international law is entrusted to the Federal Constitutional Court. Art.100 (2) GG provides as follows:

<sup>58</sup> Blaustein/Flanz (note 55), vol.VII; Cassese (note 1), p.374.

<sup>59</sup> BVerfGE 15, pp.25ff. (34); 16, pp.27ff. (33); 23, pp.288ff. (300); 31, pp.145ff. (177); 75, pp.1ff. (18); K. Doehring, Die allgemeinen Regeln des völkerrechtlichen Fremdenrechts und das deutsche Verfassungsrecht (1963), pp.125ff.; R. Ferdinand, Die Rechtsprechung der Gerichte der Bundesrepublik Deutschland zum Völkergewohnheitsrecht (1985), pp.64ff.; R. Geiger, Grundgesetz und Völkerrecht (1985), pp.189f.; Menzel/Ipsen (note 23), p.61; I. von Münch, Völkerrecht (2nd ed.1982), p.78; W. Pigorsch, Die Einordnung völkerrechtlicher Normen in das Recht der Bundesrepublik Deutschland (1959), pp.11ff.; Verdross/Simma (note 1), pp.383f. Of a different opinion, but with the same result: W. Rudolf, Völkerrecht und deutsches Recht (1967), pp.255ff.

<sup>60</sup> This was held by the Constitutional Court in BVerfGE 15, pp.25ff. (34). M. Silagi, Die allgemeinen Regeln des Völkerrechts als Bezugsgegenstand in Art.25 GG und Art.26 EMRK, EuGRZ 1980, pp.632ff. (640).

<sup>61</sup> Some German authors deny that the notion "general rules of public international law" also includes the generally recognized principles of international law.

<sup>62</sup> Blaustein/Flanz (note 55). The treaty-law, transformed in this way, has only the rank of statutes in the municipal law-system. Instead of the "theory of transformation" this procedure is called by the new doctrine "theory of execution" (*Vollzugstheorie*): K. Y. Partsch, Die Anwendung des Völkerrechts im innerstaatlichen Recht, in: Reports of the German Society for public international law, vol.6 (1964), pp.19ff. and 44ff.

<sup>63</sup> Berber (note 1), p.101; T. Maunz/G. Dürig, Grundgesetz/Kommentar (1958), Art.25 notes 16 and 20.

"If, in the course of litigation, doubt exists whether a rule of public international law is an integral part of federal law and whether such rule directly creates rights and duties for the individual (Article 25), the court shall obtain a decision from the Federal Constitutional Court"<sup>64</sup>.

In 1968, the Federal Constitutional Court made some interesting remarks concerning the relationship between international law and municipal law in general:

"Through the incorporation of the general rules of international law into federal law with priority over the statutes, effected by Art.25 GG, the constitution enforces a shape of federal law which must correspond to general international law. The purpose of the direct force of the general rules of international law lies in eliminating conflicting municipal law or in assuring its application in conformity with international law. As the general rules of international law are steadily in evolution, the number of possible collisions between general international law and municipal law cannot be forecast. The process of transformation of municipal law through the incorporated 'international federal law' (federal law of international nature) takes place outside of the formal legislative procedure provided under the constitution. The general rules of international law consist in most cases of universal customary international law, they are completed by generally recognized principles of international law ... They are evident only in some cases; in many cases their existence and bearing have first to be determined ..."<sup>65</sup>.

In a previous decision, the Court had stated that customary international law in general was flexible so that it could be overruled by the *lex specialis* of subsequent treaty law:

"According to Art.25 GG, the general rules of international law become an integral part of federal law only to the extent of their respective content and range ... Art.25 GG opens the German legal system to them only insofar as they are valid under international law ... In the relations with specific states, the general rules may be restricted by treaty law. Art.25 GG does not prevent treaties, which have been validly concluded under international law, but which are not fully in accordance with the general rules of international law, from receiving, by way of a statute, the force of German municipal law"<sup>66</sup>.

A decision of 1981 shows that the Federal Constitutional Court aims at

<sup>64</sup> Blaustein/Flanz (note 55).

<sup>65</sup> BVerfGE 23, pp.288 ff. (316 f.) (translation by the authors). This definition of customary international law and the general principles of international law corresponds to Art.38 (1) *lit.* b) and c) of the Statute of the ICJ. Also BVerfGE 46, pp.342 ff. (403 f.).

<sup>66</sup> BVerfGE 18, pp.441 ff. (448) (translation by the authors).

avoiding collisions between international law and municipal law by way of the harmonizing rule of "friendliness to international law"<sup>67</sup>:

"In its jurisdiction, the Federal Constitutional Court has to take particular care to avoid or eliminate as far as possible any violations of international law, which could result from a faulty application or ignorance of norms of international law by German courts and could bring about a responsibility of the Federal Republic of Germany under international law. In specific cases, this can require an extensive review"<sup>68</sup>.

The constitutional principle of an interpretation and application of the municipal law in conformity with international law requests that German courts refrain from recognizing either foreign laws which violate general international law or the general reservation of the international *ordre public*, even where international law itself does not proscribe such an application.

### 3.1.2. Italy

Art.10 (1) of the Italian Constitution of 1948 provides that "Italy's legal system conforms with the generally recognized principles of international law"<sup>69</sup>.

Already three years after this provision had been adopted, the Court of Cassation said:

"There thus exist overriding principles based upon the need to secure mutual existence among civilised States, and between the latter in relation to their nationals and to nationals of [other] States ... These principles applied already before they were embodied in Article 10 ... They require that Italian municipal law must conform to customary international law ..."<sup>70</sup>.

In the FRG – the other (moderate) dualist country in Western Europe –, Art.25 GG had been drafted as an "order of execution", integrating general

<sup>67</sup> This principle of "friendliness to international law" may be derived from the preamble and the Arts.9 (2) and 24–26 GG. It includes the duty to give effect to international law in municipal law: K. Vogel, *Die Verfassungsentscheidung des Grundgesetzes für eine internationale Zusammenarbeit* (1964); E. Petersmann, *Act of State Doctrine, Political Question Doctrine and gerichtliche Kontrolle der auswärtigen Gewalt*, JöR 1976, pp.587ff. (619 note 189); Caytas (note 42), pp.19f.

<sup>68</sup> BVerfGE 58, pp.1ff. (34) (translation by the authors), with annotation by J. A. Frowein in EuGRZ 1982, pp.179ff.; cf. already BVerfGE 4, pp.157ff.

<sup>69</sup> Blaustein/Flanz (note 55), vol.VIII. According to Art.10 (2), "the legal status of foreigners is regulated by law in conformity with international rules and treaties".

<sup>70</sup> *Colomi v. Ministry of War*, International Law Reports 1950, case no.138, cited by O'Connell (note 1), p.69.

principles of law as such into municipal law, without changing their character as international law. In Italy, by contrast, the generally recognized principles of international law become an integral part of the Italian legal system only after what is called a procedure of "automatic conformance", i.e. after having been transformed into parallel Italian customary law. But this different position "has only the effect of a *petitio principii*, since it does not have any influence upon the practical value of the norms concerned"<sup>71</sup>. Seidl-Hohenveldern even sees in this "automatic conformance" a "departure from the principle of transforming international law into municipal law by specific individual acts of legislation", which is justified by the inevitably vague and uncertain character of customary international law: "Thus, the advantage otherwise offered by transformation, namely the certainty of the law, is abandoned in favour of a sort of general reception of the rules of international law, which result could be achieved just as well or even better by the method of adopting the rules as such"<sup>72</sup>.

As Cassese elaborates, two main consequences, which are also very informative, are derived from Art.10 (1) of the Italian Constitution:

"First, the Italian legal system has to adjust itself continuously to general international rules. As soon as a customary rule of international law comes into existence, a corresponding rule evolves in the Italian legal system; by the same token, as soon as a general rule is terminated or changes in content, the corresponding rule existing in Italy comes to an end or acquires a new scope and import. Thus, the reference made by Article 10, paragraph 1, to general international law was not made only to the law existing at the time when the Constitution was passed but also to the evolving rules of international law. It is for each court to ascertain whether a rule of customary international law is applicable in the case at issue, and what its content is: in Italy the power to pronounce on international law is not vested in one special body, although of course the Constitutional Court has the final say on the matter.

The second consequence is that in cases where the Italian Parliament enacts statutes contrary to general international law, these are unconstitutional because they infringe upon the command of Article 10, paragraph 1. Consequently, they can be impugned before the Constitutional Court. In Italy individuals cannot take a case directly before that Court; the issue of a conflict with the Constitution can be raised in a lower court, either by one of the parties or by

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<sup>71</sup> K. Oellers-Frahm, Das Verhältnis von Völkerrecht und Landesrecht in der italienischen Verfassung, ZaöRV vol.34 (1974), pp.330ff. (350).

<sup>72</sup> Seidl-Hohenveldern (note 10), p.92f.

the court itself; it is for the court to submit the case to the Constitutional Court, which pronounces on the constitutionality of the statute and, if it holds it contrary to Article 10, paragraph 1, declares it null and void *ex nunc*, i.e., 'from the day following the publication of the decision' (Art.136, para.1)<sup>73</sup>.

In contradistinction from what the Federal Constitutional Court and the predominant doctrine in the Federal Republic of Germany assume, the general principles of law, as stated in Art.38 (1) *lit.* (c) of the Statute of the ICJ are held not to fall within the scope of Art.10 (1) of the Italian Constitution. The same is true, incidentally, of international treaty law. According to the doctrine, there is no indirect constitutional recognition of treaties by means of the general principle of *pacta sunt servanda*. Therefore, only customary international law is within the scope of application of Art.10 (1)<sup>74</sup>.

The Italian Constitution does not regulate the rank of customary international law in the hierarchy of the municipal legal order. Nevertheless, according to the predominant doctrine, Art.10 (1) "implies that in the Italian legal system rules of general international law are superior to ordinary legislation, although according to most authorities they do not possess the same status as provisions of the Constitution"<sup>75</sup>.

Summing up the jurisprudence by the Constitutional Court, Cassese makes four remarks, which are quite instructive here:

"First of all, so far the Court has had no occasion to declare that an Italian law is contrary to a rule of general international law. Although it has passed judgment on many Italian statutes allegedly conflicting with customary rules of international law, it has always concluded that the international rule asserted did not in fact exist, or that the Italian statute challenged did not run counter to it.

Second, in considering general international law, the Court has never acted on the principle that a refusal by Italy to acquiesce in an international customary rule or any opposition to its purport and scope might negate the operation of Article 10, paragraph 1. In other words, the Court has not taken the view that a customary rule could only be applied by Italian courts and other State bodies if it had been previously accepted by Italy on the international level. The Court has implicitly held the view that consent or acquiescence by a large majority of

<sup>73</sup> Cassese (note 1), pp.371 f. According to Cassese, the three general commands contained in Art.10 (1) are directed to all executive organs, to Parliament and to the Constitutional Court, and equally to the State officials responsible for the conduct of foreign policy (Cassese p.372).

<sup>74</sup> Oellers-Frahm (note 71), pp.335 ff.

<sup>75</sup> Cassese (note 1), p.452 note 56; Oellers-Frahm, *ibid.*, pp.341 ff.; contra Seidl-Hohenveldern (note 10), p.95 note 57, who refers to the divergent views of Sereni and Miele.

States, regardless of whether Italy belongs to such a majority, is sufficient for a rule to be considered applicable in the international community, hence binding on Italian domestic authorities.

Third, the Court has not spelled out the reasons why a statute conflicting with a general norm of international law is unconstitutional. It has not specified whether in its view the unconstitutionality follows from the constitutional status of the rule of international law or from its infringing upon the command of Article 10, paragraph 1. I believe that the Court has been wise in shunning any legal quibbling on this issue: what matters is the final result: whatever the formal justification, any statute disregarding international law must fall under the axe of the highest judicial body.

Fourth, the court has had occasion to pronounce on the possibility of an international norm derogating from a provision of the Constitution. The issue was settled by the Court's ruling that the customary precepts of international law at issue were 'special' with respect to some provisions of the Constitution, and could therefore coexist with them<sup>76</sup>.

### 3.1.3. Austria

Also in Austria customary international law may display an effect within the sphere of municipal law. Art.9 of the Austrian Federal Constitution was reproduced from Art.4 of the Weimar Constitution; it reads: "The generally recognized principles of International Law are valid parts of the Federal Law"<sup>77</sup>. With regard to monism and dualism, the Austrian Constitution is neutral and does not take any position for one or the other theory<sup>78</sup>.

According to the Austrian doctrine and practice, "a rule of international law does not have to be recognized unanimously by all states in order to be considered a 'generally recognized rule of international law' under Art.9 of the Constitution"<sup>79</sup>. This provision is interpreted extensively as comprising the generally recognized rules of private and of administrative international law<sup>80</sup>.

Art.145 of the Austrian Constitution gives power to the Constitutional

<sup>76</sup> Cassese, *ibid.*, p.373.

<sup>77</sup> Blaustein/Flanz (note 55), vol.I; M. Rotter, *Die allgemein anerkannten Regeln des Völkerrechts im österreichischen Verfassungsrecht*, ÖZöR 1976, pp.1 ff. (6ff.).

<sup>78</sup> L. Adamovich, *Handbuch des österreichischen Verfassungsrechts* (6th ed.1971), pp.53f.

<sup>79</sup> I. Seidl-Hohenveldern, *Relation of international law to internal law in Austria*, AJIL 1955, pp.451 ff. (452).

<sup>80</sup> Seidl-Hohenveldern, *ibid.*, p.454.

Court to decide on “violations of International Law in accordance with a special Federal Law”. This provision, however, has remained a “dead letter”, because such a law has not been enacted until today<sup>81</sup>.

It is controversial whether the “generally recognized principles of international law” may be overridden by ordinary statutes. In a decision more than thirty years old, the Constitutional Court explicitly – but without any substantiation – declared that these rules ranked equally with ordinary statutes but were not on the same level as the Constitution<sup>82</sup>. The Court simply stated that Art.9 declared that these rules were “to be held to be component parts of the Federal Law” and not of “Federal Constitutional Law”. Subsequently, this decision was strongly criticized by the whole Austrian doctrine: According to Seidl-Hohenveldern, “it may be open to doubt whether Article 9 did not refer to Federal Law merely in contradistinction to the law of the various Austrian *Länder*”, and, “in any event Art.9 must also be understood in this sense”<sup>83</sup>. Ermacora and Simma summarize the predominant view as follows: Art.9 continuously integrates customary international law with its respective content into the Austrian legal system; according to this “dynamic reception”, international legal rules are incorporated either as constitutional law or as ordinary federal law, depending on their substantive content. The two authors deny that a real conflict concerning rank had to be solved by the jurisdiction until now<sup>84</sup>. According to Rill, the predominant doctrine concludes from the theory of general transformation that rules of international law have a lower rank than the provisions of the Austrian Constitution, but a higher rank than federal statutes<sup>85</sup>. Into Art.9 he reads an order of the Constitution, binding on the legislator, not to violate the incorporated (transformed) principles of international law; otherwise, a statute violating a rule of international law, which had been generally transformed into municipal law, would at the same time violate the constitutional order

<sup>81</sup> Cassese (note 1), p.359; H. J. Faller, *Zur Entwicklung der nationalen Verfassungsgerichte in Europa*, EuGRZ 1986, pp.42 ff. (45).

<sup>82</sup> Decision of June 24, 1954, Off. Coll. No.2680 (p.173); Rotter (note 77), pp.11 ff.

<sup>83</sup> Seidl-Hohenveldern (note 10), pp.94 f. note 49.

<sup>84</sup> Ermacora (note 24) and B. Simma, *Das Völkergewohnheitsrecht*, both in: *Österreichisches Handbuch des Völkerrechts*, vol.I (1983), pp.53 and 117; Adamovich (note 78), p.56; F. Ermacora, *Österreichische Verfassungslehre*, vol.1 (1971), pp.83 f.

<sup>85</sup> H. P. Rill, *Der Rang der allgemein anerkannten Regeln des Völkerrechts in der österreichischen Rechtsordnung*, ÖZöR 1959/60, pp.439 ff. (442, 450).

of Art.9. But until the Constitutional Court would have stricken down the statute as unconstitutional, such a statute would be valid<sup>86</sup>.

#### 3.1.4. Greece

In the new Greek Constitution of 1975, the same rule is found as in Art.25 of the Constitution of the FRG, regarding the relationship between customary international law and municipal law. Art.28 (1) is worded thus:

"The generally acknowledged rules of international law, as well as international conventions as of the time they are sanctioned by law and become operative according to the conditions therein, shall be an integral part of domestic Greek law and shall prevail over any contrary provision of the law. The enforcement of the rules of international law and of international conventions to aliens does always depend on the condition of reciprocity"<sup>87</sup>.

Again, like in the FRG, a special Supreme Court has the task of settling disputes concerning any uncertainties as to the content of the term "generally accepted rules of international law" (Art.100 (1) (vi) of the new Greek Constitution).

Already under the previous Greek Constitutions, which did not contain such provisions, "the place of international law rules in internal Greek law has been fairly well settled in legal theory and case law". As a result, the "principle that the 'generally accepted rules of international law' (i.e. customary international law) form an integral part of Greek law, with no need for explicit incorporation by law, has been settled for a long time"<sup>88</sup>. The new provisions "serve to bring Greek law more or less in line with most other Western European Constitutions"<sup>89</sup>.

As in other dualist countries, international agreements will only acquire internal validity after having been sanctioned by an act of Parliament. Under the previous Greek Constitutions, treaties superseded earlier statutes and were superseded in turn by later acts of Parliament. During the drafting of the new Constitution, a controversy arose concerning the legal effect of treaties:

<sup>86</sup> Rill, *ibid.*, pp.448, 450.

<sup>87</sup> Blaustein/Flanz (note 55), vol.VI; Cassese (note 1), pp.369 and 451 note 44. Also Art.2 provides that "Greece, adhering to the generally recognized rules of international law, seeks the strengthening of peace and justice, and the development of friendly relations among peoples and states".

<sup>88</sup> A. A. Fatouros, *International law in the new Greek constitution*, AJIL 1976, pp.492ff. (501).

<sup>89</sup> Fatouros, *ibid.*, p.503.

“The issue was resolved in the same manner as to both customary and conventional international law. They were given enhanced formal validity, so that they supersede both prior and subsequent acts of Parliament. The constitutional language of Article 28 (1) is not quite clear on this point ... However, ..., an eloquent defense of the superiority of customary international law over domestic legislation by an opposition deputy met with nearly unanimous assent. More important, in closing the debate, the Minister of Justice, spokesman for the government, expressly stated: ‘We accept that the generally accepted rules of international law must have increased validity. We also accept this with respect to treaties, indeed *par excellence*’. That last authoritative statement suggests that ‘any contrary provision of law’ was understood to include both prior and subsequent statutes”<sup>90</sup>.

### 3.1.5. France

In France, a formulation almost identical with Art.10 of the Italian Constitution figured in the fourteenth paragraph of the preamble of the Constitution of the Fourth Republic of October 27, 1946:

“The French Republic, faithful to its tradition, abides by the rules of international law”<sup>91</sup>.

In several decisions, the Supreme Administrative Court («Conseil d’Etat») applied general principles of international law by way of interpretation of this preamble<sup>92</sup>. According to this merely declaratory provision, which represented no modification of prior practice concerning the relationship between international law and municipal law, international law was applied *per se*:

“Like other Continental courts, the French tribunals have regarded the rules of customary international law as directly applicable whenever they are relevant to the adjudication of an issue of which they have jurisdiction, and concerning which there is no controlling legislative or executive act. They appear never to have doubted that they, as well as other organs of the French state, were obligated to apply the rules of international law in any appropriate case, although they have developed no coherent doctrine of ‘adoption’ or ‘incorporation’ as the basis of this obligation. On the other hand, they have not been influenced by the doctrines of dogmatic dualism, which would require the

<sup>90</sup> Fatouros, *ibid.*, pp.502f.

<sup>91</sup> A. J. Peaslee, *Constitutions of Nations*, vol.II (1950), p.9; J. Donnedieu de Vabres, *La Constitution de 1946 et le droit international*, Recueil Dalloz 1948, pp.5ff.; O’Connell (note 1), p.65.

<sup>92</sup> F. Pfloeschner, *Les dispositions de la Constitution du 27 octobre 1946 sur la primauté du droit international et leur effet sur la situation des étrangers en France sous la IVe République* (1961), pp.35ff.

specific 'transformation' of a rule of international law into one of internal law as a prerequisite to its judicial application"<sup>93</sup>.

In the new preamble of the Constitution of the Fifth Republic of 1958 it is now stated, that "the French people hereby solemnly proclaims its attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789, reaffirmed and complemented by the Preamble of the Constitution of 1946"<sup>94</sup>.

Notwithstanding some doubts as to whether that preamble constituted a source of law, French courts do not hesitate to apply rules of customary international law<sup>95</sup>. Indeed it is argued that an explicit reference to these rules of international law would not be necessary, "as it would merely be the expression of what is in any event a general conviction"<sup>96</sup>. According to Seidl-Hohenveldern, the legal situation in France therefore appears to be similar to that in the Netherlands, in Switzerland and in the United States, where the constitutions contain "no express reference to customary international law, yet that law is applied by their courts"<sup>97</sup>.

The predominant doctrine in France, however, regards the reference of the Constitution of 1958 to the preamble of the Constitution of 1946 as a sufficient legal basis for applying international law<sup>98</sup>.

Cassese has a different opinion: The fact that the new French Constitution lacks an explicit reference to customary international law, is for him an "eloquent evidence of the wide-spread scepticism and reserve about

<sup>93</sup> L. Preuss, The relation of international law to internal law in the French constitutional system, AJIL 1950, pp.641 ff. (643). At p.668 he repeats: "The reference to the general law in the Preamble, while essentially declaratory, furnishes an unquestionable basis for the practice of the tribunals in resorting directly to customary rules whenever they are susceptible of judicial application". Of a different opinion Lardy (note 23), pp.98 ff.: According to him, the French courts constantly applied international law regardless of this "only declaratory" preamble.

<sup>94</sup> Blaustein/Flanz (note 55), vol.VI.

<sup>95</sup> D. Nguyen Quoc, Le Conseil Constitutionnel Français et les règles du droit public international, RGDIP 1976, pp.1001 ff.; S. Sur, L'application du droit international, in: H. Thierry/J. Combacau/S. Sur/Ch. Vallée, Droit international public (2nd ed.1979), pp.155 ff.

<sup>96</sup> According to O'Connell "French judges have never doubted that they were bound to apply rules of customary international law whenever appropriate, although no constitutional rule enjoined them to do so" (note 1), p.65f. Seidl-Hohenveldern (note 10), p.91.

<sup>97</sup> Seidl-Hohenveldern, *ibid.*, p.91.

<sup>98</sup> Nguyen Quoc (note 95), pp. 1002, 1010 ff., 1027 ff.; Sur (note 95), pp.180 and 183. Of a different opinion: Lardy (note 23), pp.98 ff.

the contents, scope and impact of the traditional rules of international law"<sup>99</sup>.

We do not share this opinion of Cassese. We do not think that the French legislator has abandoned the reference to customary international law simply by omitting the wording of the previous preamble. It seems to us that the Constitution of 1958 only has a different formal concept: Instead of many long paragraphs, it refers in one short sentence to the still valid principles embodied in the preamble of the Constitution of 1946. Therefore, these principles are still an integral part of the monistic Constitution of 1958, which shows its "friendliness to international law" also by stipulating the precedence of treaty law over municipal law: According to Art.55, "treaties and agreements duly ratified or approved shall, upon their publication, have an authority superior to that of laws, subject, for each agreement or treaty, to its application by the other party"<sup>100</sup>.

This view seems to be confirmed by Sur, who also gives a constitutional validity to customary international law:

«Quant à la coutume, à la différence des traités, elle est virtuellement intégrée, au titre du Préambule, dans le bloc de constitutionnalité ... Mais son application demeure largement à la discrétion du Conseil. Rien ne l'empêche de déclarer inconstitutionnelle une loi qui serait contraire à une règle du <droit public international>, même s'il n'y paraît pas pour l'instant très disposé.

En revanche, les juridictions ordinaires ne semblent pas pouvoir faire prévaloir la coutume sur la loi. Tout au plus peuvent-elles, le cas échéant, interpréter la législation dans le contexte des règles coutumières ...»<sup>101</sup>.

Nguyen Quoc also concludes that «l'application de la coutume internationale par les tribunaux judiciaires est conforme à leur pratique traditionnelle et constante, et ils le reconnaissent ouvertement»<sup>102</sup>.

According to O'Connell, "French courts acknowledge the supremacy of the legislative will, but endeavour to construe it as not being in conflict with international law"<sup>103</sup>.

<sup>99</sup> Cassese (note 1), p.393.

<sup>100</sup> Blaustein/Flanz (note 55), vol.VI; G. Ress, Der Rang völkerrechtlicher Verträge nach französischem Verfassungsrecht, ZaöRV vol.35 (1975), pp.445ff.; Wildhaber (note 1), pp.206–210.

<sup>101</sup> Sur (note 95), p.190; cf. also p.183. Of a diverging opinion: Lardy (note 23), p.160.

<sup>102</sup> Nguyen Quoc (note 95), p.1034.

<sup>103</sup> O'Connell (note 1), p.66.

### 3.1.6. Portugal

What does Art.8 (1) of the Portuguese Constitution mean, which provides that "standards and principles of general or common international law are an integral part of Portuguese law"<sup>104</sup>?

According to Cassese, Portugal and other states<sup>105</sup> with similar special provisions "solemnly pledge compliance with general international law and in addition enjoin individuals and State bodies to abide by it"<sup>106</sup>.

As we have seen above, such an explicit provision indicates the willingness of a country to favour international law. But as we have further seen, the practice of courts and administrative bodies also leads to an affirmation of the principle of "friendliness to international law". Finally, other constitutional provisions concerning the examination of the conformity of municipal law with international law by judicial bodies may equally be relevant.

With respect to the latter point, the First Section (*secção*) of the Constitutional Court<sup>107</sup> decided in 1984 that municipal legislation which violated international treaties was unconstitutional and not simply illegal. The Court quoted Gomes Canotilho's «Direito constitucional» (3rd ed.1983, p.725), according to which the hypothesis of unconstitutionality and not illegality is in conformity, not only with "the theory of the constitutional character of the norms of general (or common) international law", but "even with a theory that attributes them *supra*-legal, even though *infra*-constitutional validity"<sup>108</sup>. This decision is of prime importance, since the Constitutional Court is only empowered to consider questions of constitutionality<sup>109</sup>. As the Constitutional Court has the power to review

<sup>104</sup> Blaustein/Flanz (note 55), vol.XIII; A. Thomashausen, Die revidierte Verfassung der Republik Portugal von 1976, JöR 1983, pp.443ff. (452). The Portuguese Constitution does not surround this acceptance of general international law with reservations or limitations.

<sup>105</sup> Ireland, Italy, the FRG, Japan, Greece, Malawi, the Philippines and Korea.

<sup>106</sup> Cassese (note 1), p.391.

<sup>107</sup> The establishment of the Constitutional Court instead of the former Constitutional Committee («Comissão Constitucional») was one of the most important results of the revision of the Portuguese Constitution in 1982 (Faller [note 81], p.54).

<sup>108</sup> Constitutional Court, Acórdão 62/84, Diário da República (1984 II), pp.11'681 ff. (11'685) (translation by the authors).

<sup>109</sup> The Second Section of the Constitutional Court did not yet decide this disputed question: J. Polakiewicz, Völkervertragsrecht und Landesrecht in Portugal, ZaöRV vol.47 (1987), pp.265 ff. (270 note 27). According to Polakiewicz "it might be appropriate to declare the Court competent even if these are not clear-cut cases of unconstitutionality, thereby assuming a uniform interpretation" (ibid., p.277).

the constitutionality of municipal norms both in an actual (concrete) and abstract (general) way (Arts.280 and 281 of the Constitution), it follows that all Portuguese courts are empowered not to apply allegedly unconstitutional norms (Arts.207 and 277 of the Constitution):

“Under the internal order the norms of international public law have the same force as those of municipal law, also with respect to the hierarchical subordination to the Constitution – being thus unconstitutional if they infringe on the norms of the Constitution or its principles (Art.277 [1]). The norms of international public law – be it common or conventional – affected with unconstitutionality cannot be applied by the courts (Art.207). Their unconstitutionality may be declared, with general and obligatory force, by the Constitutional Court (Art.281). In the case of conventional norms, they are also subject to preventive review of their constitutionality (Art.278 [1]). To summarize, the Constitution prevails over international public law, be it common or conventional<sup>110</sup>”.

In deciding that an incompatibility of statutory law with treaty law is not only a pure illegality (*ilegalidade*), but a case of unconstitutionality (*inconstitucionalidade*), the First Section of the Constitutional Court also referred to Art.8 (1). It declared that a violation of treaty law might violate the general principle of *pacta sunt servanda*. In this *obiter dictum*, the Court stated, invoking Art.8 (1): “... two fundamental principles in matters of treaty law – undiscussed and beyond discussion (even if we skip over the fact that the actual principle of primacy of conventional law is a principle of general or common international law), – are ‘an integral part of Portuguese law’, i.e. the principle of *pacta sunt servanda* and the principle of good faith in the execution of the international obligations, today codified in Art.26 of the Vienna Convention of the law of treaties of May 23, 1969 ...”<sup>111</sup>.

In the cases focused on the conflict between Art.4 of Decree-Law No.262/83 and the Convention providing a Uniform Law for Bills of Exchange and Promissory Notes of June 7, 1930, the First Section of the Constitutional Court solved the conflict by applying the principle of *clausula rebus sic stantibus* as a general rule of international law. As Portugal had not yet ratified the Vienna Convention on the Law of Treaties, the principle of *clausula rebus sic stantibus* was said to be in

<sup>110</sup> J. J. Gomes Canotilho/V. Moreira, *Constituição da República Portuguesa*, Anotada, vol.I (2nd ed.1984), p.92 (translation by the authors).

<sup>111</sup> Constitutional Court, Acórdão 62/84, *Diário da República* 1984 II, pp.11'681ff. (11'684) (translation by the authors).

force *ipso jure*: The Constitutional Court applied Art.44 (3) of the Vienna Convention as an expression of customary international law<sup>112</sup>.

According to the predominant doctrine, the Portuguese Constitution follows the monistic theory<sup>113</sup>. It is understood that international law and municipal law are a unity. As we have seen above, in a monistic legal system the courts apply both conventional and customary international law directly and immediately as such, and not by virtue of a transformation into municipal law. We find this view confirmed in the commentary of Canotilho and Moreira:

Art.8 section 1

“establishes the rule of ‘automatic reception’ for a part of international law – the norms and principles of general international law – which thus profits from a general clause of full reception, since it is incorporated as an ‘integral part of Portuguese law’, without any need to observe specific constitutional rules or forms for expressing the state’s obligation to international law (approval, ratification, publication). It is enough that the rules really are international law rules and that they are general or common. – The first condition naturally excludes the rules without judicial character, be it norms of international morality or courtesy, or those which derive from the so-called ‘doctrines of external policy’ (such as the ‘Monroe doctrine’, the ‘Hallstein doctrine’, the ‘Breznev doctrine’ etc.); the second condition excludes norms of public international law which do not possess general character, i.e. which cannot claim to be binding with respect to all countries.

Norms of general public international law are customary norms (‘international custom’) of general nature. Principles of general public international law are the fundamental principles generally recognized in the municipal law of the States which, due to their widespread rooting in the judicial consciousness of the collectivities, end up acquiring normative sense on the level of international law (e.g. principle of good faith, *clausula rebus sic stantibus*, prohibition of abuse of law, principle of legitimate defense).

These norms and principles of common international law are an integral part of Portuguese law, with the content and extent they possess on the international legal plane, independent of whether the Portuguese Constitution opted for the theory of transformation (international law becomes municipal law) or the theory of adoption (international law does not lose its charac-

<sup>112</sup> Cf. Polakiewicz (note 109), pp.274f. notes 51–53, citing decision (Acórdão) 24/85 of the Constitutional Court, *Diário da República* 1985 II, p.4698 (4701f.); 67/85, p.5495 (5498f.); 119/85, p.8617 (8619).

<sup>113</sup> Cf. the Portuguese doctrine cited by Polakiewicz, *ibid.*, p.267 note 9.

ter of international law). The Portuguese law 'opens itself' to the general international law to the extent of the existence and international legal validity of the norms of the latter"<sup>114</sup>.

As the Portuguese Constitution does not say anything about the rank of customary international law, it is up to the doctrine and practice to discuss and decide this important question. Again in the above mentioned decision, the First Section of the Constitutional Court recognized that in any case general international law should have a rank superior to that of the statutes, if not equal to that of the constitution. It seemed difficult to the Court "to advocate an infra-constitutional, even though supra-legislative level, that means to contest the constitutional character of the norms and principles referred to"<sup>115</sup>. As we have seen, the Court quoted a passage of Canotilho's «Direito constitucional», in which the *supra*-legal validity of the norms of general (or common) international law is also advocated<sup>116</sup>.

Canotilho and Moreira write in their new commentary:

"As far as common public international law is concerned, however, it is understood that the formula 'are an integral part of Portuguese law' (sec.1) implies the supremacy of its norms over municipal norms ...

If one thus opts for the primacy of adopted international law over ordinary municipal law, then the latter cannot contradict the former, as the State is inhibited from validly editing norms which would be at a discrepancy with those of the international law, as long as one maintains the obligation of the State to these international norms (which in the case of general international law does not even depend on the will of the State)<sup>117</sup>".

As both Sections of the Constitutional Court have repeatedly made statements concerning the legal situation in other European countries<sup>118</sup>, one may conclude that there will be the same "friendliness to international law" in Portugal as in the other Western European countries with respect to the question of the relationship between international law and municipal law. Like in the other European countries the general clause of Art.8 (1)

<sup>114</sup> Canotilho/Moreira (note 110), pp.90f. (translation by the authors); also Polakiewicz (note 109), p.267.

<sup>115</sup> Constitutional Court (note 111), p.11'684 (translation by the authors).

<sup>116</sup> Ibid., p.11'685.

<sup>117</sup> Canotilho/Moreira (note 110), p.92f. According to Polakiewicz also the «travaux préparatoires» show that the legislator wanted to give treaty-law in Art.8 (2) a superior rank over statutory law (note 109), p.270.

<sup>118</sup> Acórdão 118/84, Diário da República 1985 II, p.2090 (2091f.); 119/85, 1985 II, p.8617 (8619); 120/85, p.8646 (8647); 121/85, p.8649 (8650); cited by Polakiewicz, *ibid.*, p.272 notes 38 and 39.

aims at guaranteeing the application of international law in municipal law whenever possible<sup>119</sup>.

The membership of Portugal in the European Communities (since 1986) and the European Convention on Human Rights (ECHR) (since 1978) confirm our view that Art.8 (1) may be understood as a statement and program to favour international law whenever possible or – in case of a conflict between international law and municipal law – necessary. In a more general and political view these memberships show the willingness of Portugal to be part of the Western European traditions and to share their political and legal purposes. As is natural, both treaties exert a great influence on the Portuguese law:

“Certainly, Portugal’s willingness to be subjected to the international supervisory machinery in Strasbourg, both in respect of the right of individual petition and the compulsory jurisdiction of the European Court of Human Rights, appears to confirm the country’s confidence in its new democratic institutions<sup>120</sup>”.

In both treaties there are references to the general rules of international law. Art.26 ECHR states:

“The Commission may only deal with the matter after all domestic remedies have been established, according to the generally recognized rules of international law ...<sup>121</sup>”.

Although the EC treaties do not contain an explicit reference to general rules of international law, the principle of “friendliness to international law” is implied and well established in the EC legal system. According to the doctrine and the practice of the European Court, the primary law of the EC includes the general principles of law, in particular the ECHR law which is common to the constitutional traditions of the member States. As

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<sup>119</sup> Cf. Mosler (note 1), p.704 note 62.

<sup>120</sup> A. Z. Drzemczewski, *European Human Rights Convention in domestic law* (1983), p.158. Cf. also C. Dominicé, *La convention européenne des droits de l’homme devant le juge national*, SJIR 1972, pp.9ff.

<sup>121</sup> Emphasized by the authors.

a consequence, the general principles of law are immediately applicable and have a rank superior to that of the law of the EC<sup>122</sup>.

### 3.2. Constitutions with no explicit reference to customary international law

#### 3.2.1. *Switzerland*

In the Swiss Federal Constitution, there is no explicit provision concerning the relationship between international law and municipal law. But according to the unanimous doctrine, there is an unwritten rule, implicit in the Constitution, that customary international law and the general principles of international law are valid immediately and without any special procedure, i.e., that they become municipally applicable upon their international entry into force:

«Il n'est besoin d'aucune procédure spéciale pour incorporer les règles du droit international coutumier au droit interne suisse. Elles y ont une validité immédiate»<sup>123</sup>.

The Federal Tribunal repeatedly confirmed this view<sup>124</sup>. It held that international law had to be considered as Swiss federal law, "because its

<sup>122</sup> A. Bleckmann, Die Position des Völkerrechts im inneren Rechtsraum der Europäischen Gemeinschaften, *Jahrbuch für internationales Recht* (1975), pp.300ff. (311 ff.); *idem*, Grundgesetz und Völkerrecht (1975), pp.302ff.; U. Everling, Sind die Mitgliedstaaten der Europäischen Gemeinschaften noch Herren der Verträge?, in: *Festschrift für Hermann Mosler* (1983), pp.173ff. (179f.); Geiger (note 59), pp.229f.; P. Pescatore, Die Rechtsprechung des Europäischen Gerichtshofs zur innergemeinschaftlichen Wirkung völkerrechtlicher Abkommen, in: *Festschrift für Hermann Mosler* (1983), pp.661ff. (671ff.); H. G. Schermers, *Judicial Protection in the European Communities* (2nd ed.1979), §§126–131, pp.69ff. The European Court has held in several decisions that in difference to general international law, the European law contains a rule for conflicts which gives the latter precedence over the national law of the member States (A. Bleckmann, *Vorrang des Völkerrechts im Landesrechtsraum?* *ZaöRV* vol.32 (1972), p.516ff. (526).

<sup>123</sup> P. Guggenheim, *Traité de droit international public* (2nd ed.1967), p.73; C. Dominicé, *Le droit international coutumier dans l'ordre juridique suisse*, in: *Recueil de travaux* 1969, pp.11ff. (14); Lardy (note 23), p.182 note 2; J. P. Müller, *Völkerrecht und schweizerische Rechtsordnung*, in: *Handbuch der schweizerischen Aussenpolitik* (1975), pp.223ff.; Müller/Wildhaber (note 1), pp.103ff.; L. Wildhaber, *Bemerkungen zum Fall Schubert betreffend das Verhältnis von Völkerrecht und Landesrecht*, *SJIR* 1974, pp.195ff.

<sup>124</sup> BGE 1, 411; 49 I 188; 50 II 507; 52 I 218; 52 II 235; 56 I 237; 57 II 550; 86 I 23; 96 I 648; 108 Ib 264; cf. also P. Guggenheim, *Practice of international law*, *SJIR* 1950, pp.146ff.; as regards the administrative jurisprudence cf. Lardy (note 23), p.182.

nature requires general municipal applicability, so that it has to be equated with the uniform domestic law”<sup>125</sup>.

In the context of judicial proceedings, the Federal Tribunal also equated the violation of customary international law with that of treaty law:

«Quant à l'inobservation des «principes du droit des gens», elle doit, conformément à la jurisprudence, être assimilée à la violation d'un traité ... D'ailleurs en Suisse, les principes du droit des gens sont considérés comme du droit interne»<sup>126</sup>.

The Federal Tribunal even applies rules of customary international law by analogy to cases of conflicts between two Swiss cantons (member states)<sup>127</sup>. The court does this, where directly relevant constitutional law rules are lacking, and, where international law functionally deals with the same kind of problems.

Rules of customary international law have only to be completed and implemented by Swiss federal law, if they are not clear enough and therefore unfit for immediate application and execution<sup>128</sup>.

With respect to treaties, no formal transformation into a federal statute is required. Treaties become municipally applicable upon their international entry into force (i.e. upon exchange of ratifications, acceptance, or signature). As far as the treaty is capable of direct application (i.e. is duly published and self-executing), it is considered by the courts as *ipso jure* binding upon officials and individuals alike. In order to be held obligatory upon individuals, a treaty admittedly requires domestic publication<sup>129</sup>.

The most controversial problem is that of the rank of international law in relation to Swiss constitutional and statutory law. A proposal, submitted in the National Council (one of the two chambers of the Federal Assem-

<sup>125</sup> BGE 44 I 49 (pp.53f.).

<sup>126</sup> BGE 82 I 75 (82); 61 I 259. According to Dominicé (note 123), pp.30 and 35, and Lardy (note 23), p.186, customary international law generally enjoys the same “internal authority” as treaty law.

<sup>127</sup> BGE 8, 43 (*clausula rebus sic stantibus*); 23 II 1415 (territoriality of intercantonal rivers); 31 II 828 and 54 I 203 (charge upon an estate in international law); 44 I 53 (immunity of states); 26 I 450 and 96 I 648 (interpretation of treaties between two cantons); 106 Ib 154 (also in: Müller/Wildhaber (note 1), pp.218ff. (border dispute rules); EuGRZ 1987, p.7 (validity in international law of unconstitutional concordats between two cantons). See generally R. Lüdin, *Die Anwendung von Völkerrecht in interkantonalen Konflikten* (1987).

<sup>128</sup> Guggenheim (note 123), p.34.

<sup>129</sup> Guggenheim, *ibid.*, pp.34ff.; Lardy (note 23), pp.186ff.; Wildhaber (note 1), pp.202ff. And see the 1986 Publication Act, *Sammlung der eidgenössischen Gesetze* 1987, 600.

bly), to give a superior rank to international law, did not become law<sup>130</sup>.

According to the unanimous doctrine and practice in Switzerland, customary and conventional international law both override the law of the 26 cantons (states) and federal regulations, even if these regulations are enacted subsequent to the rules of international law. It is also well-established that rules of international law have a higher rank than previous federal statutes<sup>131</sup>.

As stated in Art.113 (3) of the Swiss Federal Constitution "statutes and general «arrêtés» enacted by the Federal Assembly, as well as the treaties approved by it, are binding upon the Federal Tribunal". Swiss courts have no power to review the constitutionality of treaties. As a consequence, treaties which derogate from constitutional law cannot be reviewed by courts. Only the application of unpublished agreements may judicially be rejected<sup>132</sup>. Doctrine and practice equate custom with treaties and draw the same conclusions with respect to customary international law<sup>133</sup>.

On the other hand, in case of a conflict between international law and a federal statute, Art.113 (3) also serves as a basis for the interpretations by way of *lex posterior derogat legi priori*<sup>134</sup> and of *lex specialis derogat legi generali*<sup>135</sup>.

In order to avoid the *lex posterior*-rule and to give international law precedence over federal statutory law, doctrine and practice refer to the principle of "friendliness to international law". They suggest to interpret statutory law in conformity with international law<sup>136</sup>: The courts presume that the legislature did not intend to violate international law. This pre-

<sup>130</sup> SJIR 1969/70, pp.92ff.; Wildhaber (note 7), pp.553ff.; Müller/Wildhaber (note 1), pp.103f.

<sup>131</sup> J. F. Aubert, *Traité de droit constitutionnel suisse* (1967), No.1326f.; W. Burckhardt, *Kommentar zur Schweizerischen Bundesverfassung* (3rd ed.1931), p.674; Caytas (note 42), p.12; Z. Giacomietti, *Schweizerisches Bundesstaatsrecht* (1949), pp.830f.; Müller (note 123), p.224; Müller/Wildhaber, *ibid.*, p.103; Lardy (note 23), p.203; L. Wildhaber, *Verfassungsrang der Europäischen Menschenrechtskonvention?*, *Zeitschrift des Bernischen Juristenvereins* 1969, p.259; *idem*, *Erfahrungen mit der Europäischen Menschenrechtskonvention*, ZSR 1979 II, pp.328-333.

<sup>132</sup> BGE 54 I 40; 57 I 19; Aubert, *ibid.*, No.1327; Caytas, *ibid.*, pp.12f.; Dominicé (note 123), p.34; Lardy, *ibid.*, pp.204ff.; Müller, *ibid.*, p.224; Wildhaber, ZSR (note 131), p.351.

<sup>133</sup> BGE 44 I 49; 82 I 75; Dominicé, *ibid.*, p.34.

<sup>134</sup> BGE 99 Ib 39.

<sup>135</sup> BGE 96 V 140; Dominicé (note 123), p.30; Müller (note 123), p.225.

<sup>136</sup> BGE 94 I 669; 99 Ib 43; Caytas (note 42), p.24; Dominicé, *ibid.*, p.35; Müller, *ibid.*, p.225. Wildhaber, ZSR (note 7), pp.550-557.

sumption may only be overcome by an explicit, clear statement by the legislature itself<sup>137</sup>.

Although the question of the rank of international law continues to be disputed in doctrine and practice, there is a strong tendency to grant both customary and conventional international law a rank above federal statutes or even the same rank as the Constitution<sup>138</sup>. Also former Federal Councillor Spühler stated in Parliament, in the context of a discussion on the rank of international law in the Swiss legal order:

“To conclude, it seems unavoidable to me to give precedence to international law”<sup>139</sup>.

In two new decisions of 1982 and 1986, the Federal Tribunal confirmed the precedence of the international *ordre public* over treaty law and municipal law:

«Les demandes d'extradition déposées par la République argentine ... ont été rejetées par le Tribunal fédéral sur la base de principes qui appartiennent à l'ordre public international, et qui l'emportent sur toutes considérations faites à partir du droit conventionnel ou du droit interne»<sup>140</sup>.

<sup>137</sup> BGE 94 I 669 (cf. Wildhaber's annotation in ZSR [note 7], pp.537ff.), 99 Ib 44; Caytas, *ibid.*, pp.17ff.; Dominicé, *ibid.*, p.33. That the legislature may explicitly deviate from an international obligation is criticised by Müller (note 123), pp.225ff. and Wildhaber (note 123), pp.195ff.; Caytas, *ibid.*, p.17.

<sup>138</sup> Caytas, *ibid.*, pp.13 and 22f.; Dominicé, *ibid.*, pp.29ff.; J. Freymond, *La ratification des traités et le problème des rapports entre le droit international et le droit interne* (1947), p.158; P. Guggenheim, *Völkerrechtliche Schranken im Landesrecht* (1955), pp.10f.; O. Jacot-Guillarmod, *La primauté du droit international*, ZSR 1985, vol.1, pp.398 and 406f.; H. Schultz, *Das schweizerische Auslieferungsrecht* (1953), pp.134ff.; St. Trechsel, *Die Europäische Menschenrechtskonvention, ihr Schutz der persönlichen Freiheit und die schweizerischen Strafprozessrechte* (1974), pp.161f.; B. Wagner, *Ehegattenbesteuerung – Auslegungsfragen zu Artikel 13 des Beschlusses über die direkte Bundessteuer* («BdBSt») im Lichte der Bundesverfassung und der Europäischen Menschenrechtskonvention, EuGRZ 1986, p.421; Wildhaber, ZBJV (note 131), pp.259ff.; *idem*, ZSR (note 131), pp.328ff. Also BGE 7, 783; 21, 59/79/710; 22, 950/1030; 35 I 596; 49 II 361; 93 II 197; 95 I 465; 97 I 375/534. Favouring the precedence of municipal law: Aubert (note 131), No.1326; A. Favre, *Droit constitutionnel suisse* (2nd ed.1970), pp.446f.; Giacometti (note 131), p.830; Lardy (note 23), pp.203ff. Also BGE 59 II 337; 99 Ib 39 (criticized by Wildhaber in SJIR 1974 [note 123], pp.195ff.).

<sup>139</sup> SJIR 1969/70, pp.92ff.; Wildhaber (note 7), pp.553ff.; Müller/Wildhaber (note 1), p.104.

<sup>140</sup> BGE 112 Ib 222, 108 Ib 410–413; cf. also BGE 109 Ib 72. As regards the ECHR, which is an integral part of Swiss Federal Law, e.g. BGE 109 Ib 183; 110 Ib 201; 111 Ib 1; Dominicé (note 120), pp.9ff.

### 3.2.2. *The Principality of Liechtenstein*

According to a Legal Opinion prepared at the request of the Liechtenstein Government<sup>141</sup>, the Principality of Liechtenstein quite generally recognizes the principle of direct incorporation of customary international law into municipal law without any legislative or executive transformation. Accordingly, the Constitutional Court applied customary international law unhesitatingly. In the *Glatt* case, it relied on international criminal law and qualified the positive principle of territoriality as a starting-point. Furthermore, it held in that decision that international law did not prohibit the extradition of state citizens<sup>142</sup>. In the *Mächler* case, the Constitutional Court, relying on international practice, interpreted an equal rights-clause in a settlement treaty on the basis of substantive, not of formal reciprocity. Regarding the law of foreigners, the Court decided that there was a minimal standard of guarantees for them<sup>143</sup>.

### 3.2.3. *The Netherlands*

Also in the Dutch Constitution, there has never been any provision concerning the applicability and the rank of customary international law. On the other hand, international treaties have long ago been given a most favourable position in the text of the Constitution. The previous Constitution (adopted in 1953 and revised in 1956) went even as far as to permit international treaties to modify and lawfully overrule provisions of the Constitution itself<sup>144</sup>.

In the new text, passed in 1983, however, it is not quite clear whether the primacy of international law is only proclaimed with respect to statutory law, while the Constitution remains unaffected. Unquestionably, according to Art.94 of the new Constitution, international treaties override at least statutory rules:

“Statutory regulations in force within the Kingdom shall not be applicable if

<sup>141</sup> Cf. above note 45.

<sup>142</sup> Decision of April 29, 1975 (StGH 1975/3): L. Wildhaber, *Liechtensteinische Gerichtssentscheide zum Völkerrecht*, SJIR 1975, pp.270ff.

<sup>143</sup> Decision of January 12, 1976 (StGH 1976/1): L. Wildhaber, *Liechtensteinische Gerichtssentscheide zum Völkerrecht*, SJIR 1978, pp.163ff.

<sup>144</sup> Art.66 provided that:

“Legislation in force within the Kingdom shall not apply if this application would be incompatible with provisions of agreements which are binding upon anyone and which have been entered into either before or after the enactment of such legislation” (cited by Cassese [note 1], p.410, and Müller/Wildhaber [note 1], p.99).

such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions”<sup>145</sup>.

According to van Panhuys, these rules should be extended to unwritten customary international law *per analogiam*:

“In our opinion there is much authority in support of the thesis that the courts are indeed obliged to recognize the supremacy of international customary law as well: the legally binding force of international agreements being a rule of customary law (i.e. the rule *pacta sunt servanda*), the Constitution, in recognizing the supremacy of conventional international law, may be deemed to have recognized implicitly the superior character of international customary law in general. Moreover, the supremacy of customary law has already been recognized by the Netherlands legislature in enacting certain laws laying down that the jurisdiction of the Netherlands courts, the executability of judgments and the territorial scope of penal law are limited by the exceptions recognized under international law (including in the first place customary international law, like rules relative to the immunities of diplomatic envoys, foreign men-of-war, etc.)”<sup>146</sup>.

As van Panhuys shows in a second essay on the same subject, decisions on this question did occur:

“So the Supreme Court had to express itself incidentally on the question whether it had authority to pass judgment on the conformity of Netherlands prize legislation enacted in 1940–1942 with generally accepted notions of the law of nations concerning prize law. This was *The Nyugat* case. The Court held that it had no competence to review the relevant legislation. From the fact that in 1956 the supremacy of international law was only recognized with respect to international agreements of a self-executing nature, the Court argued *a contrario* that this was not the case as regards unwritten international law. It should be observed, however, that this *a contrario* argument is not a strong one if one takes into account that, as far as the present author is aware, during the parliamentary debates on the 1953 and 1956 revisions, no statements were made which might be construed as ruling out the priority of rules of customary

<sup>145</sup> Blaustein/Flanz (note 55), vol.XI; Cassese, *ibid.*, p.411. Cassese infers from the interpretation of this provision (combined with Art.91 [3] “a step backward”, while according to Alkema the Constitution of 1983 does not depart from the previous text as far as the relations between international treaties and the Constitution are concerned (E. A. Alkema, *Foreign Relations in the 1983 Dutch Constitution*, NILR 1984, pp.307ff. (320ff.)). Generally speaking there was no intention of introducing politically disputed alterations to the new Constitution: M.C.B. Burkens, *The complete revision of the Dutch constitution*, NILR 1982, pp.323ff.

<sup>146</sup> J. H. F. van Panhuys, *The Netherlands Constitution and International Law*, AJIL 1953, pp.537ff. (557).

international law, if susceptible of being applied by the courts, over municipal law. This decision may have been influenced by the fact that the plaintiff corporation had pleaded the argument that Article 66 (new) embodied a broad principle which could be applied to rules of customary international law as well as to agreements of a non-self-executing nature. In this broad sense the argument seems to be unfounded<sup>147</sup>.

An analysis of the Netherlands jurisprudence now clearly shows that the judges have constantly recognized their competence to apply customary international law. Accordingly, the three statutory Articles, mentioned by van Panhuys<sup>148</sup>, which empower the courts to apply rules of customary international law "must be considered being no more than declaratory statements of the Legislature approving a pre-existing judicial practice in respect to the fields concerned"<sup>149</sup>.

According to their monistic legal system, the Netherlands courts apply customary international law directly and immediately as such, and not by virtue of a transformation into municipal law<sup>150</sup>.

Regarding the question of the rank of customary international law in cases of conflicts with statutory law, some old decisions of domestic tribunals held that statutes which violated rules of customary international law, nevertheless had a legal validity, because an examination of their constitutionality was not provided for by the constitution. On the other hand, the domestic courts applied the traditional principle of an interpretation of municipal law in conformity with international law. Also they recognized the presumption, according to which the legislature did not intend to violate rules of customary international law, until such an intention was not explicitly and clearly proved. This presumption and this interpretation in conformity with international law ("friendliness to international law") «sont de nature à conférer à celle-ci [i.e. customary international law] une place réellement privilégiée dans l'ordre juridique interne»

<sup>147</sup> J. H. F. van Panhuys, *The Netherlands Constitution and International Law*, AJIL 1964, pp.88ff. (105).

<sup>148</sup> Art.13 a of the statute of May 15, 1829, concerning the general principles of the legislation of the Kingdom; Art.8 of the criminal-law statute; Art.38 of the statute of criminal-law in the military service.

<sup>149</sup> L. Erades/W. L. Gould, *The Relation between International Law and Municipal Law in the Netherlands and the United States* (1961), p.232. Erades concludes that "judicial practice crystallized into a rule of customary law enabling the Netherlands courts to apply all rules of customary international law" and that "recognition of this custom by the Legislature was declarative and in no way constitutive" (ibid., p.232).

<sup>150</sup> Erades, ibid., pp.271f.; Lardy (note 23), pp.163f.; van Panhuys (note 146), p.553.

and «cette solution est d'ailleurs fort proche de celle qui est appliquée dans les pays anglo-saxons, en France et en Suisse où elle s'est révélée être très favorable aux normes internationales»<sup>151</sup>. Erades and van Panhuys go even further and would in any case give precedence to customary international law over conflicting Dutch statutory law<sup>152</sup>.

### 3.2.4. Belgium

Several attempts to revise the written constitutional law have failed. So there is no explicit provision in the Belgian Constitution concerning the relationship between international law and municipal law<sup>153</sup>.

Belgian doctrine does not regret this lack of explicit provisions,

«car il est sans doute plus sage de laisser d'indispensables articulations entre ordres juridiques différents se dégager progressivement de l'œuvre du juge, au départ de quelques formules constitutionnelles de principe. La jurisprudence belge n'a pas manqué d'expliciter ces articulations. Force est cependant d'admettre qu'elle ne rend guère compte des évolutions et des ambiguïtés, de la «richesse», des sources du droit des gens. Le traité seul y fait en effet l'objet d'une construction spécifique, destinée à en déterminer les règles d'application dans l'ordre interne. Toutes autres sources sont à l'ordinaire – car il existe quelques notables exceptions – ignorées ou confondues sous une appellation générique – «principes» de droit international – qui dispense opportunément d'identifications plus spécifiques. De même, il est difficile de trouver dans cette jurisprudence quelque trace sérieuse d'un transnationalisme, hors le respect de certains usages commerciaux particuliers. Il est vrai que se définissant par sa soustraction à l'emprise des Etats, ce dernier ne saurait *a priori* occuper dans leur jurisprudence qu'une place marginale. Cette apparente insensibilité à des évolutions ne saurait toutefois être tenue pour une indifférence au droit des gens; tout au contraire, la jurisprudence belge paraît dans l'ensemble témoigner, dès l'origine, d'un internationalisme constant<sup>154</sup>».

The Belgian Cour de Cassation derived the supremacy of international treaties over municipal law from the general nature of international law. It held in an *obiter dictum* of a most remarkable decision of 1971, «que

<sup>151</sup> Lardy (note 23), p.165; van Panhuys (note 146), pp.554 ff.

<sup>152</sup> Erades (note 149), p.351; van Panhuys, *ibid.*, pp.556 ff.

<sup>153</sup> F. Rigaux, Quelques réflexions sur l'évolution constitutionnelle de la Belgique et les relations internationales, in: Hommage à P. De Visscher (1984), pp.173 ff.; J. Verhoeven, Sources et principes du droit des gens et ordre juridique belge: certitudes et vraisemblances, in: Hommage à P. De Visscher (1984), pp.23 ff. (26f.).

<sup>154</sup> Verhoeven, *ibid.*, p.27.

le conflit qui existe entre une norme de droit établie par un traité international et une norme établie par une loi postérieure, n'est pas un conflit entre deux lois; ... que la règle, d'après laquelle une loi abroge une loi antérieure dans la mesure où elle la contredit, est sans application au cas où le conflit oppose un traité et une loi; ... que, lorsque le conflit existe entre une norme de droit interne et une norme de droit international qui a des effets directs dans l'ordre juridique interne, la règle établie par le traité doit prévaloir; que la pré-éminence de celle-ci résulte de la nature même du droit international conventionnel»<sup>155</sup>. In various other decisions, the Cour de Cassation confirmed that statement<sup>156</sup>.

### 3.2.5. Spain

Also the Spanish Constitution of 1978 does not say anything about the incorporation and the rank of customary norms of international law in municipal law<sup>157</sup>. However, as the *travaux préparatoires* show, the supremacy of customary international law over municipal statutory law (*Übergesetzesrang*) was never disputed or contested<sup>158</sup>.

### 3.3. Conclusions

To sum up, it may be concluded that both the written and nonwritten constitutional law of Western European countries recognize conventional and customary international law as "part of the law of the land", and that the practice in states without an explicit provision concerning the relationship between international law and municipal law is no different from the practice in states with such a clause in their constitutions:

<sup>155</sup> *Etat belge, ministre des Affaires économiques c. S.A. «Fromagerie Franco-Suisse de ski»*, Journal des tribunaux 1971, pp.460ff. (478f.), with the "Conclusions" of Ganshof van der Meersch, procureur général, pp.461ff.; also cited in EuGRZ 1975, pp.308ff., and by Müller/Wildhaber (note 1); pp.111f.; annotations to this decision by A. Bleckmann, ZaöRV (note 122), pp.516ff.; Verhoeven, *ibid.*, p.39ff.

<sup>156</sup> See, e.g., EuGRZ 1979, p.609.

<sup>157</sup> Art.96 (1) provides: "Validly concluded international treaties once officially published in Spain shall constitute part of the internal (legal) order. Their provisions may only be abolished, modified or suspended in the manner provided for in the treaties themselves or in accord with general norms of international Law" (Blaustein/Flanz [note 55], vol.XIV).

<sup>158</sup> A. Weber, Die Spanische Verfassung von 1978, JöR 1980, pp.209ff. (234); Weber refers in particular to M. Hilf, Les relations du droit international public et du droit interne dans la nouvelle constitution de l'Espagne du 27 décembre 1978, a hectographed report held on the German-Argentinian colloque of international law in 1979, Buenos Aires.

«A défaut de dispositions de cette nature, les tribunaux de la plupart des Etats appliquent en fait les normes générales du droit des gens en tant que partie du droit national»<sup>159</sup>.

This change from a former "nationalist introversion" into an attitude inspired by the principle of "friendliness to international law"<sup>160</sup> has a long tradition: The former decisions of the German *Reichsgericht* for instance applied the general rules of international law without referring explicitly to Art.4 of the Constitution of the Weimar Republic<sup>161</sup>. Also in Italy, before the new Constitution in 1947, the general rules of international law were applied on a customary base<sup>162</sup>. The same customary rule was recognized in Greece before 1975<sup>163</sup>.

Where there is no explicit constitutional provision, customary international law is applied by virtue of customary law of the state concerned (e.g. Belgium, France, the Netherlands, the Principality of Liechtenstein, Switzerland). It may indeed be argued that in every constitution an explicit or an implied general incorporation of customary international law is a logical prerequisite of the validity of customary law in municipal law in general so that it would have to be a necessary part of every constitution<sup>164</sup>. Unless it is explicitly excluded by the constitution itself, courts will assume such a general incorporation in practice. The following quotation may therefore have a general validity:

<sup>159</sup> A. Favre, *Principes du droit des gens* (1974), p.303. And P. De Visscher writes: «En ce qui concerne l'insertion du droit international coutumier dans l'ordre interne, les systèmes en vigueur révèlent une grande identité de vues. En vertu des principes constitutionnels énoncés, de manière expresse en Italie et en Allemagne, ou de manière tacite dans les pays anglo-saxons, le juge interne est généralement habilité à faire application des normes du droit international coutumier sans que soit exigé un acte formel et spécifique, de réception ou de transformation. Pour que cette application judiciaire directe du droit international coutumier puisse se produire, il est nécessaire que le litige soumis au juge interne relève de la compétence de celui-ci telle qu'elle est définie par le droit interne et que la norme internationale vantée soit, par sa nature, directement applicable au fond du litige ou qu'elle ait trait à une situation de fait ou de droit dont l'existence, en droit international, conditionne l'applicabilité de la norme de droit interne régissant le fond du droit. Le principe 'International law is part of the law of the land', qui exprime la pratique judiciaire à laquelle nous nous référons ici et dans lequel on est fondé à voir le moyen indispensable au service d'une obligation de résultat découlant du droit international, est indubitablement une règle technique de l'ordre juridique interne» (*Cours général de droit international public*, RdC vol.136 (1972 II), pp.1ff. (29), with references to W. Wengler, *Réflexions sur l'application du droit international public par les tribunaux internes*, RGDIP 1968, pp.921 ff. (929 ff.)).

<sup>160</sup> Cf. A. Bleckmann (note 10), pp.309 ff.; Cassese (note 1), p.343.

<sup>161</sup> Silagi (note 60), p.634.

<sup>162</sup> O'Connell (note 1), p.69.

<sup>163</sup> Silagi (note 60), p.634.

<sup>164</sup> Caytas (note 42), p.20.

"The outstanding thing demonstrated by the judges of both the Netherlands and the United States when confronted with cases dealing with customary international law is their willingness to apply that law. Silence of Constitution and of most statutes in the one country and incomplete authorization in the other did not leave the judges without a capacity to apply international custom. It might be said that they took advantage of the absence of a direct prohibition in the written municipal law to do what they wanted to do and felt they ought to do<sup>165</sup>".

An explicit provision has therefore only declarative character. It has the purpose to make the relationship between international law and municipal law more evident, in order to help international law to be realized in the future<sup>166</sup>.

With regard to the rank of customary international law, most countries give priority to it over conflicting rules of statutory municipal law. Courts regularly try to reach a harmonization between international obligations and municipal law by way of interpretation in accordance with the principle of "friendliness to international law"<sup>167</sup>.

From this point of view, we find it difficult to agree with Cassese, who sees a new tendency to downgrade or even disparage customary international law, not only in developing and socialist countries, but also in Western countries. According to Cassese, also France, Spain and the Netherlands have lately changed their constitutions without making provision for general international law. Cassese believes that one of the main reasons of this new tendency lies in the changes which international customary law is currently undergoing:

"It is well known that a few basic rules of the international community are under strong attack by a conspicuous segment of its members; their general binding force is therefore in a sort of limbo: some States claim that they are still applicable to the whole of the international community while others flatly reject their applicability and rely upon other international standards. Among these rules one may mention those on expropriation and nationalization of foreign assets, on exploitation of mineral and other resources on the high seas, as well as some norms on the lawful use of force by States<sup>168</sup>".

<sup>165</sup> Gould (note 1), p.294; Silagi (note 60), p.635 note 41. According to Gould the United States directly adopt the international law as such without any transformation into rules of municipal law (Gould, *ibid.*, pp.275 and 291).

<sup>166</sup> Oellers-Frahm (note 71), p.330; Lardy speaks of «garantie de permanence et de stabilité» (note 23), p.254; De Visscher (note 49), p.573.

<sup>167</sup> Mosler (note 1), pp.704f.

<sup>168</sup> Cassese (note 1), p.383. A second reason for the defensive attitude and extreme caution or even suspicion is seen by Cassese in the resolutions adopted by the United

We do not think that in modifying their constitutional charters, these states have given up their constitutional adherence to international law. Our analysis revealed the contrary of the tentative explanation suggested by Cassese. Whatever defensive attitudes Western countries may assume towards new rules and resolutions, particularly in the economic sphere, advocated by developing countries, we do not believe that such attitudes can be claimed to extend to generally recognized fundamental principles and standards of customary international law. In our view, one has to differentiate between the various norms and principles of customary international law. As we have seen above<sup>169</sup>, the two principles *pacta sunt servanda* and good faith are recognized by all states all over the world as a solid and clear-cut basis for the decisions of both national and international courts called upon to settle disputes concerning customary international law. These principles are in no way disputed.

As we have also seen, constitutional provisions concerning the relationship between international law and municipal law have a declaratory character only. Courts are in an even better position to apply customary international law if there is no strict constitutional frame<sup>170</sup>. Finally, the new Constitutions of Greece (1975) and Portugal (1976/1982) show that there is certainly no general trend of the kind mentioned by Cassese.

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Nations General Assembly: "the 'cumulative effect' of the resolutions brings about a qualitative leap in that they gradually change from political standards agreed upon by the vast majority of States and solemnly proclaimed by the 'quasi-legislative' body of the United Nations into general rules producing legal rights and obligations" (Cassese, *ibid.*, p.383).

<sup>169</sup> Cf. 2.5.1.

<sup>170</sup> Lardy (note 23), pp.253f.