9 General Principles of Law in the Practice of International Courts and the European Court of Justice

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9.1 Introduction

The general principles of law, developed in the practice of national courts, which decant centuries of legal wisdom and human experience, represent a shared cultural treasure of mankind. The general principles of law are now widely recognized as paramount legal sources for both international and European law.[1] This cultural treasure served as a basis for international courts of arbitration, for the Permanent Court of International Justice in The Hague, it's successor, the International Court of Justice and the European Court of Justice in Luxemburg.

The concept of general principles of law has long been at the forefront of legal thinking, especially due to the uncertainty surrounding the extent, the nature and the function of the principles. Several detailed studies have been conducted on the subject, but, until this day, there is no comprehensive comparison of the general principles of international and European law. It is thus worth investigating the connections between the general principles of law, both European and international, as they are to be found in the decision making practice of judges. Special attention is to be given to examining the question of whether the general principles of European law are drawn exclusively from the legal practice of member states or whether the decisions of international courts and courts of arbitration, according to which a principle is considered to be a general principle of law in international forums, can influence its acceptance as a general principle of law in the practice of the European Union as well. The analysis also touches upon the measure in which the leading values of the European Union, the principles related to good governance and the principle of the rule of law contribute to the process by which the rules of international law are filled with new values.

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1 *The International and Comparative Law Quarterly*, 27 (1978) 3, pp. 597-598.

The present study does not strive to be a comprehensive analysis touching upon all the aspects of the general principles of law in international and European practice. Instead, by analyzing the legal practice of international courts and the European Court of Justice it wishes to focus on the principles of law which are being shaped through the interaction of international and European law, with particular attention to the developmental result of this relationship with regard to legal practices. Finally, the study provides a glimpse into the possibilities to be found in the European reception of the general principles of international law.

9.2 GENERAL PRINCIPLES OF INTERNATIONAL AND EUROPEAN LAW: SIMILARITIES AND DIFFERENCES

9.2.1 The Recognition of General Principles as Sources of Legislation in International and European Law

There is wide consensus in international law regarding the fact that the legal source referred to in Article 38 of the International Court of Justice Statute, the "general principles of law recognized by civilized nations" are the legal principles which evolved through the internal legislative process of different countries. The Statute of the International Court of Justice of The Hague hardly deviates from its predecessor, while at the 1944 San Francisco conference establishing the founding documents of the United Nations, the rules dictating the functioning of the Permanent Court of International Justice tied to the League of Nations were fundamentally accepted without changes.

Géza Herczegh has proven, based on the *travaux preparatoires* preceding the creation of the Permanent Court of International Justice, that the text in its initial formulation was referring without doubt exclusively to the internal legal principles used *in foro domestico*.[2] Proving this was important because the international jurists of the Soviet Union and its allies were pushing for the acceptance of the general principles of international law – such as the principle of non-intervention in internal affairs – as general principles of all law.[3]

Thus, in international law, the general principles of law have the accepted role of sources of law. European law also considers the general principles of law as sources of law, but there are no clear references to this aspect in the founding documents, the statute of the general principles of law as a legislative source is given by the legal practice of the European Court of Justice and the legal doctrine used for its interpretation. There are three references

2 Géza Herczegh, *General Principles of Law and the International Legal Order*, Közgazdasági és Jogi Könyvkiadó, Budapest, 1969, pp. 11-16.

3 Lauri Hannikainen, 'Peremptory Norms (Jus Cogens)', in: *International Law: Historical Development*, Criteria, Present Status, Finnish Lawyers' Publishing Company, Helsinki, 1988, p. 243.

to the general principles of law in the founding documents. Article 220 of the consolidated version of the Treaty on the Functioning of the European Union (henceforward TFEU) stipulates that it is the duty of the European Court of Justice, during decision making, to take into account 'the law', which belongs to a field beyond the explicit primary and secondary sources of law, and is defined taking into account the internal laws of the member states. The TFEU further stipulates that when analyzing founding documents the rules of the law can be used as means of interpretation, which judicial practice and doctrine shows to also go beyond explicit regulations. Finally, with regard to the contractual liability of the EU, the TFEU[4] specifically stipulates that its practices are based on the principles common to the laws of the member states.[5]

According to the doctrine of international law, only those principles can become general principles of international law which are recognized as such by the international legal practice of states. In international law, we can consider a principle as general once an international court of justice has declared it as such. In European law, the will of member states is not considered as a criterion for the existence of legal principles. According to certain authors, it is not necessary for the European Court of Justice to accept it as such, as it can become a part of the European legal system by other means, for example as the outcome of a parliamentary decree.[6] Furthermore, the internal principles of law shared by member states can be considered as general tenets of EU law even without such decrees.

9.2.2 *Possible Sources of the General Principles of European Law*

Studies on European law list the possible sources of the general principles of EU law as: the internal law of member states, international law, the case law of the European Court

4 As per Art. 288 of the TFEU: "The contractual liability of the Union shall be governed by the law applicable to the contract in question. In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties. Notwithstanding the second paragraph, the European Central Bank shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by it or by its servants in the performance of their duties. The personal liability of its servants towards the Union shall be governed by the provisions laid down in their Staff Regulations or in the Conditions of Employment applicable to them."

5 International legal doctrine differentiates between the principles of international law and the general principles of law, and European law takes a similar approach. The general principles underlying European legislation, such as solidarity, loyalty, free movement and free trade are to be differentiated from the general principles of EU law itself.

6 Gerald Barling & Mark Brealey, *Practitioner's Handbook of EC Law*, Trenton Publishing, Trenton, 1998, pp. 86-87.

of Justice,[7] as well as the founding documents.[8] European legal doctrine has acknowledged in several instances that the general principles of law can also be derived from international public law. It is most likely that in such cases the authors are referring to the human rights principles of the European Convention on Human Rights crystallized through the practice of the Strasbourg Court of Justice, but it cannot be excluded that European legal doctrine does not distance itself *ab ovo* from accepting principles considered as general by international law in European law as well.

9.2.3 *Questions Surrounding the Universal Acceptance of the General Principles of Law*

International public law considers a principle to be general if it is to be found in the internal law of almost every state. This general acceptance is considered to be a prerequisite, yet international law does not strive for an exception free universality. Interestingly, European law has a lower threshold regarding general principles of law. For a principle to be accepted as general by the European Court of Justice it is not necessary that the principle be accepted by the internal law of each member state, it is sufficient if in practice all the legal systems of the member states function in harmony with it. One such example is the acceptance as principle of law of the confidentiality of communication between an attorney and the individual they represent.[9] Although each member state has provisions congruent with this principle, it has only been elevated to the status of principle of law in English law. Notwithstanding, the European Court of Justice has shown willingness to accept the principle as a general one. Customarily, the European Court of Justice does not recognize as a principle of law the smallest common denominator, but strives to choose complex principles which are most in tune with the general spirit of European law.[10]

7 Evelyn Ellis & Takis Tridimas, *Public Law of the European Community: Text, Materials and Commentary*, Sweet & Maxwell, London, 1995, p. 535.

8 Penelope Kent, *Law of the European Union*, Longman, London, 2001, p. 40; Karen Davies, *Understanding EU Law*, Cavendish Publishing, London, 2001, p. 58.

9 C-155/79, *AM & S Europe Ltd v. European Commission* [1982] ECR 1575.

10 Margot Horspool & Matthew Humphreys, *European Union Law*, Oxford University Press, USA, 2006, p. 130.

9.2.4 *The Nature of the General Principles of International and European Law*

International law generally recognizes as general principles of law those principles which are derived from civil law and the procedural law connected to it,[11] however, European law justly builds on the shared democratic past of its member states, the constitutional traditions of the states, and as such, primarily on the protection of human rights and the principles connected to 'good governance' as the basis for its general principles of law.

9.2.5 *Functions of the General Principles of Law*

The general principles of law function as stopgaps both in international and European law: in questions where neither legal system has explicit rules regulating the matter, courts try to find solutions consulting the internal law of member states.[12] However, in European law, certain general principles, such as those of equality and proportionality, can override specific legal regulations.[13] The general principles of EU law can furthermore regulate the responsibility of the Union and its member states in cases of non-contractual liability.

9.2.6 *The Sphere of Congruent Principles*

In spite of the many differences, we can still discover a shared number of principles which are the basis for both international and EU law. The sphere of congruent principles is made up by the general principles of law which entered international law and European law directly from the legal practice of member states. Among the most important shared general principles we can mention the principles concerning liability in case of damages, the principle of *nemo auditur turpitudinem suam allegans*, the maxims of *vis maior*, *res judicata*, *ultra posse nemo obligatur* and *nemo plus juris*. In the case of a smaller group of general principles of law we can demonstrate an interactive relationship built on shared influence between international and European law. We will now proceed with a detailed analysis of these principles.

11 Hersch Lauterpacht, *The Function of Law in the International Community*, The Lawbook Exchange, New Jersey, 2008, p. 115.

12 Kent, op. cit., p. 39.

13 Horspool, op. cit., p. 131.

9.3 THE PRINCIPLES EVOLVING UNDER THE SHARED INFLUENCE OF INTERNATIONAL AND EUROPEAN LAW

9.3.1 The Principle of Good Faith

The principle of good faith (*bona fides*), besides international contracts, is also used in customary law, but is primarily considered a general principle of law.[14] The Permanent Court of International Justice formulated the following with regard to the *Lighthouses* case:[15] 'Contracting parties are always assumed to be acting honestly and in good faith. That is a legal principle, which is recognized in private law and cannot be ignored in international law.' The legal practice of the WTO considers the *pacta sunt servanda* principle, the prohibition of the abuse of rights and the protection of legitimate expectations as a consequence of the good faith principle. The Dispute Settlement Body of the WTO can only invoke this principle with regard to the rulings of the WTO, whereas the dispute settlement panels use the principle freely to bridge the stopgaps in WTO agreements.

The *Opel Austria* case is the standard decision of the European Court of Justice regarding the principle of good faith. The decision regarding the creation of the European Economic Area, which prohibits the levying of taxes which function as tolls, came into effect with regard to the relationship between the European Community and Austria on 1 January 1994. Council Regulation 3697/93 dated 20 December 1993, provides for a 4.5% tariff on a type of Austrian made gearbox produced by the Opel Austria company. In accordance with Article 18 of the 1969 Vienna Convention, states must refrain from activities which would circumvent the object and aim of an already signed, but not yet ratified contract. Austria claimed that the principle of good faith is a part of the internal law of member states, thus it represents a general principle of community law, and is also recognized as such in international law.[16] As per the court's decision, in this situation the principle of good faith would have required taking into consideration the justified interest of the other party in the period prior to the contract coming into effect. The European Court of Justice did not analyze the legal practice of member states when referring to the principle, instead, it argued that the principle of good faith is a part of international customary law, thus it is compulsory with regard to the European Community as well. From the Court's standpoint, the principle of good faith springs from the principle of legitimate expectation, which is a recognized general principle of European law as well.[17] The European

14 Marion Panizzon, *Good Faith in the Jurisprudence of the WTO: The Protection of Legitimate Expectations, Good Faith Interpretation and Fair Dispute Settlement*, Hart Publishing, Oxford, 2006, p. i.

15 PCIJ: *Lighthouse* case (France/Greece) 1934 S.O. Séfériadès, A/B 62, p. 42.

16 T-115/94, *Opel Austria v. Council* [1997] ECR II-39, pp. 82-83.

17 Ibid., pt. 93.

Court of Justice has therefore set up a hierarchy which goes against the practice of the WTO, which considers the principle of good faith to be the primary one.

The principle of good faith has also been referred to in cases brought forth to international forums. In the case of *Certain German Interests in Polish Upper Silesia*,[18] Poland disputed the legality of German proceedings through which a state owned company situated in an annexed territory was conceded to an individual, thus removing it from the effect of regulations applicable in the case of a succession of states. The proceedings took place in the period in between the signature by Germany and the ratification of the Treaty of Versailles. The Permanent Court of International Justice of The Hague, albeit rejecting the Polish point of view, confirmed the principle of good faith. This decision was referred to by the European Court of Justice as well in the above mentioned *Opel Austria* case.

In the *Lac Lanoux* case[19] the responsible court of arbitration had to come to a verdict with regard to a conflict between Spain and France. France diverted the course of a river situated on the national border of the two countries, at Lac Lanoux, without notifying Spain, with the purpose of building a hydropower plant. Although France gave assurance that it would provide the necessary water quantity to Spain by means of an underground tunnel, the Spanish state feared that France would breach its promise. The arbitration court decreed with regard to the case that 'there is a general and well-established principle of law according to which bad faith is not presumed.'

9.3.2 Pacta sunt servanda

Grotius described the *pacta sunt servanda* principle as one of the manifestations of the principle of good faith.[20] According to Hans Wehberg the *pacta sunt servanda* principle is of paramount importance from the point of view of the doctrine of international law.[21] Besides being a general principle of law, *pacta sunt servanda* is also considered to be a customary rule in public law, furthermore, the 1969 Vienna Convention on the Law of Treaties also makes reference to it.

In the *Texaco-Calasiatic v. Libya* case[22] the responsible court of arbitration ruled on the compulsory nature of concession agreements. Governments can come to contractual agreements with foreign private parties without questioning their own sovereignty, quite the contrary, such contractual commitments are to be considered precisely the manifestation of the sovereign right to self-determination. It derives from this that principles based on

18 *Certain German Interests in Polish Upper Silesia* (1927) PCIJ, Series A, No. 7, pp. 30-39.

19 *Lac Lanoux* case, Court of Arbitration verdict, 1 November 16, 1957, RSA, Vol. XII, p. 305.

20 Hugo Grotius, *On the Law of War and Peace*, Cambridge University Press, 2012.

21 Hans Wehberg, 'Pacta Sunt Servanda', *The American Journal of International Law*, 53 (1959) 4, p. 782.

22 *Texaco Overseas Petroleum Company v. The Government of the Libyan Arab Republic* arbitral award of January 19, 1977, 17 I.L.M. i, 15-16 (1978).

sovereignty cannot serve as a basis for breaching prior commitments. In the *Texaco* case the court of arbitration deliberated that the regulation making possible the commitment of states together with the principle of *pacta sunt servanda* require that states keep all international commercial agreements to which they are parties. Commitments made by sovereign states towards foreign nationals are compulsory even though the legislative bodies of the states are in the position to make alterations of law which would be disadvantageous to the foreign party. In the *Revere* case[23] the court of arbitration pointed out that the Jamaican government would otherwise not be able to obtain foreign private capital, as no foreign party would risk the government modifying the rights laid down in the investment agreement with an ulterior legislative decision.

The *Racke* ruling[24] illustrates the case of international agreements ceasing due to a fundamental change of circumstances. Racke GmbH & Co. is a German based international wine importer, which delivered most of its goods to the territory of the Community from Yugoslavia. The European Economic Community and the Socialist Federal Republic of Yugoslavia signed a cooperation agreement in 1980, which conceded Yugoslavia several allowances on import duties, with the aim of improving good neighbourhood relationships. Following the breakout of war in Yugoslavia, the Council issued Decision 91/589/ECSC through which it suspended, with immediate effect, the cooperation agreement citing a fundamental change of circumstances, while through Council Regulation 3300/91 it also suspended the related trade concessions. As a result, Racke had to pay higher import duties on their products. The company, based on its direct and individual concern, as definable by the Plaumann test, instituted proceedings with the European Court of Justice, arguing that as per the criteria stated by Article 62, Paragraph 1 of the Vienna Convention, the prerequisites for a fundamental change of circumstances were not met, therefore the unilateral suspension of the agreement was unlawful. The European Court of Justice made the following statement:

> The rules invoked by Racke form an exception to the pacta sunt servanda principle, which constitutes a fundamental principle of any legal order and, in particular, the international legal order.[25]

The ruling is a conclusive example of the open attitude practiced by the Court with regard to the integration of general principles of law into European law.

23 A *Revere Copper & Brass, Inc. v. Overseas Private Inv. Corp* arbitral award of August 24, 1978 17 I.L.M. 1321, 1338 (1978).

24 C-162/96, *Racke GmbH & Co. v. Hauptzollampt Mainz* [1998] ECR I-3655.

25 Ibid., pt. 49.

9.3.3 Clausula rebus sic stantibus

The *clausula omnis conventio intelligitur rebus sic stantibus* Latin formula, in contract law, refers to changes in fundamental circumstances, and the dissolution of the contract as a consequence. The principle is also mentioned in Article 62 of the Vienna Convention on the Law of Treaties. The *clausula rebus sic stantibus* principle is in close connection with the above discussed *pacta sunt servanda* principle. This relationship is well illustrated in practice by the above discussed *Racke* case, where the principle of fundamental change of circumstances invoked by the Racke company was considered to be an exception to the *pacta sunt servanda* principle by the European Court of Justice.

In the case of *Free Zones of Upper Savoy and the District of Gex*,[26] The Permanent International Court of Justice had to deliberate on whether France acted lawfully when it repealed, without Switzerland's consent, one of the articles of the Final Treaty of the Congress of Vienna of 1815 which were favourable to Switzerland. The article established free zones in Upper Savoy and the District of Gex, to cater for the city of Geneva, and Switzerland acquired contractual rights over the territories. Article 435 of the 1919 Treaty of Versailles stated that the free zones were not compliant with present circumstances, and it is the duty of the two states to regulate the situation of these territories. In a compromise signed in 1924, France and Switzerland agreed that they are unable to agree on the interpretation of Article 435 and will therefore take the case to the Court. France argued that the change of circumstances has made the ruling obsolete. The Court rejected the reference to the *clausula rebus sic stantibus* principle, as it considered that the nature of the rights held by Switzerland does not allow for calling into cause the principle of fundamental changes of circumstances.

In the case concerning the *Gabčikovo-Nagymaros project* the International Court reiterated the importance of the principle when stating: 'the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases.' The Court also concluded that the fundamental change of circumstances has to be unforeseeable, and at the time when a treaty is signed the circumstances must constitute an essential basis of consent of the parties to be bound by the treaty.[27]

9.3.4 *The Protection of Legitimate Expectations*

The doctrine of protecting legitimate expectations is rooted in the principles of legal certainty and good faith. The principle ensures that individuals acting rationally and in good

26 The case of Free Zones of Upper Savoy and the District of Gex (*France v. Switzerland*) PCIJ, AJIL 1930, p. 801.

27 The Gabčikovo-Nagymaros project case (*Hungary v. Slovakia*) 1997, ICJ Reports, p. 7, pt. 104.

faith, within the framework of the law, will not be deceived in their legitimate expectations. According to Mendelson the simple fact that states expect the fulfillment of signed treaties and the enactment of the rulings of the International Court of Justice of The Hague confirms the existence of the principle of legitimate expectations.[28]

However, the doctrine of legitimate expectations is outlined in a stricter manner in international law, and is interpreted in narrower terms than those described by Mendelson. According to the observations of Panizzon, the doctrine of legitimate expectations was created by the legal pratice of the 'GATT 1947' arbitration court,[29] with the purpose of impeding states from issuing rulings which would undermine the concessions given to foreign investors, rulings which, albeit being congruent with the content of the GATT, would contravene the spirit of the treaty.[30]

European legal studies trace back the principle of legitimate expectations to German law.[31] Geo Quinot does however notice that, whereas in German law the *Vertrauensschutz* is only used in procedural law, in European law it was expanded to substantive law as well.[32] It seems that in other legal systems the principle did not exist beforehand, the English one, for example, adopted it only around the turn of the millennium.[33] The European Court of Justice has stated that the principle of legitimate expectations can be applied only with regard to European law, individuals cannot have legitimate expectations with regard to the European Community's international commitments.[34]

The European Court of Justice first referred to the principle in the *Defrenne v. Sabena* case.[35] In connection to this case, the Court mentioned that the principle of legal certainty is present in the legal system of all member states, albeit the exact content of the principle varies from state to state. The principle of legal certainty, which is one of the principles with the widest interpretation in community law, is used in two explicit ways, the first of which is the principle of legitimate expectations. The principle of legitimate expectations gained traction in European law in connection with the so called milk quotas. The Council

28 Maurice Mendelson, 'Custom, Power and the Power of Rules. By Michael Byers', *The American Journal of International Law*, 94 (2000) 2, p. 423.

29 See for example GATT Panel Report, *Italian Discrimination Against Imported Agricultural Machinery*, L/833, adopted 23 October 1958, BISD 7S/60; GATT Panel Report, *Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, L/6216, adopted 10 November 1987, BISD 34S/83.

30 Panizzon, op. cit., p. 98.

31 Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge University Press, Cambridge, 2006, p. 2.

32 Geo Quinot, 'Substantive Legitimate Expectations in South African and European Administrative Law', *German Law Journal*, 5 (2004) 1.

33 *R v. North and East Devon Health Authority*, ex parte Coughlan (1999) LGR 703.

34 T-19/01, *Chiquita Brands International, Inc. Chiquita Banana Co. BV and Chiquita Italia, SpA v. Commission of the European Communities* [2005] ECR II-315, pt. 256.

35 C-43/75, *Gabrielle Defrenne v. Société anonyme belge de navigation aérienne (Sabena)* [1976] ECR 455.

introduced a programme aimed at reducing milk overproduction in the Community, which resulted in the temporary decrease of milk production.

In the *Mulder* case,[36] the plaintiff accepted the subsidies offered by the programme and agreed to cease milk production for five years from 1979 onwards. By the beginning of the 1980s, it had become clear that the programme was not efficient enough, and the Council issued regulation 856/84/EEC introducing a levy on those milk producers who exceeded the quota. The levy was calculated based on the milk production for years 1981, 1982 and 1983. When Mulder restarted production in 1984, he was also required to pay the levy. Mulder argued that this measure contravenes his legitimate expectations regarding the agreement made in 1979. The European Court of Justice upheld Mulder's argument, and stated that a producer who voluntarily ceased production for a definite period of time pursuant to an undertaking entered into under council regulation, during this period, is entitled to expect not be a subject to restrictions imposed on them specifically because they chose to adhere to a Community programme.[37]

In European law, the principle is mainly meant to protect the reasonable expectations of individuals with regard to government rulings. This approach has also influenced the international interpretation of the principle. The panel of NAFTA's arbitration court brought a similar reasoning with regard to legitimate expectations in the *International Thunderbird Gaming Corp. v. Mexico* case. The panel, taking into account the practices of investment law and the principle of good faith, deliberated that the protection of legitimate expectations hints towards a situation in which the NAFTA member state, as contractual party, makes reasonable and justifiable demands from the investor, who is expected to act in a trusting manner, nevertheless, the contracting state does not respect these expectations, thus causing harm to the investor.[38] American based company Thunderbird wanted to commercialize gambling machines in Mexico, however, this practice is illegal in the target country. The company therefore requested a certification from the Mexican authorities, stating that its machines do not qualify as gambling machines, but 'ability enhancing instruments'. Lower level authorities granted the permit, but in the end, commercialization was not approved at federal level. The arbitration panel decided, based on the above mentioned interpretation of the principle, that the activity of the investor was not grounded on legitimate expectations.[39]

European legal doctrine attributes the principle of legitimate expectations to the influence of German law, however, it is undoubtable that its evolution was influenced by the legal concepts created by the GATT arbitration court. In turn, European legal evolutions

36 C-120/86, *Mulder v. Minister van Landbouwen Visserij (Mulder I)* [1988] ECR, p. 2345. pt. 2321.

37 Damian Chalmers & Adam Tomkins, *European Union Public Law, Text and Materials*, Cambridge University Press, Cambridge, 2007, p. 455.

38 *Thunderbird Gaming Corp. v. Mexico*, UNCITRAL (*NAFTA, Canada/Mexico*), January 26, 2006, pt. 147.

39 Idem, pt. 208.

have visible effects on NAFTA's practices. In this case, a principle presumed to be shared by all member states had a productive effect on both European and international law.

9.3.5 *The Prohibition of Retroactive Effect*

The European Court of Justice accepted the principle of *nullum crimen, nulla poena sine lege*, based on Article 7 of the European Convention on Human Rights, in connection with the *R. v. Kirk* case,[40] as an international legislative rule which originates in the internal law of member states, and is thus a general principle of European law. In European law the prohibition of retroactive effect is upheld strictly in criminal law only. In conformity with the *nullum crimen sine lege* principle, a behaviour which was considered legal at the time of occurrence cannot be declared unlawful with retroactive effect. During the case, the British authorities arrested a Danish fisherman who was fishing twelve miles inside United Kingdom coastal waters. Kirk defended himself by stating that as a citizen of the European Community, he has the right to fish anywhere in community waters. The United Kingdom, when joining the European Community in 1973, received a temporary ten year exemption according to which it could forbid fishing boats of other member states from entering a twelve mile area of its coastal waters. This exemption ended on 31 December 1982. The United Kingdom then requested another exemption, which was approved by the Council with effective date January 25, 1983. The Danish fisherman was fishing on 6 January 1983, so in the period between the end of the first exemption and the beginning of the second. European law assumes lawmaking to be *ex nunc*, unless it is formulated in *expressis verbis* that the given legal act has a retroactive effect. In the *Racke*[41] case it was stated that a community legislative act can have retroactive effect only in exceptional cases, provided it is indispensable for the purpose at hand, and the legitimate expectations of the impacted individuals are protected as required.[42]

Rafaraci and Belfiore pointed it out that retroactive effect can play a role in the interpretative obligation of member state courts as well. The courts of member states are obliged to interpret national law in accordance with the text and purpose of European law, nevertheless making sure that this does not lead to a *contra legem* interpretation of national law. General principles of law, among them the prohibition of retroactive effect, put a barrier to interpretative obligations.[43]

40 C-63/83, *R v. Kirk* [1984] ECR 2689, pts. 21-22.

41 C-98/78, *Firma A. Racke v. Hauptzollamt Mainz* [1979] ECR 69.

42 Jo Shaw, *Law of the European Union*, Palgrave Law Masters, Houndmills, 2000, p. 337.

43 Tommaso Rafaraci & Rosanna Belfiore, 'Judicial Protection of Individuals under the Third Pillar of the European Union', *The Jean Monnet Working Papers*, 10/07, p. 13.

The prohibition of legislation with retroactive effect was described by Lauterpacht in his 1948 study as a general principle recognized in public law.[44] Woodhouse, in a talk held in front of the Grotious Society in 1955, concluded, based on cases from English legal practice, that the principle is recognized in cases with international bearing, and is thus a principle of English common law as well.[45]

However, in 1987 a debate occurred within the International Law Commission of the United Nations, on whether the principle in question is a part of international law, with regard to the activity of the International Military Tribunal at Nuremberg.[46] The status of the prohibition of retroactive effect as a general principle was questioned in spite of the fact that the Universal Declaration of Human Rights, Article 11, Paragraph 2 states:

> No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 22 of the Statute of the International Criminal Court, ratified on July 18, 1998 clearly states that the *nullum crimen sine lege* principle is a general principle of international criminal law. It seems that with the advent of different institutionalized forms of international criminal justice, the *nullum crimen, nulla poena sine lege* principle has undoubtedly become a part of international public law.

9.4 Human Rights as General Principles of Law

9.4.1 The Fundamental Rights Contained within the Principles of EU Law

The protection of human rights has paramount importance both in international and European law. However, while in the framework of EU law fundamental rights are recognized as general principles of law, widespread general opinion does not classify them as such in international law.[47] The European Court of Justice has confirmed with regard to several human rights that they are based on the shared constitutional practice of member

44 Nathan Feinberg & Jacob Stoyanovsky (Eds.), *The Jewish Yearbook of International Law*, 1948, Rubin Mass, Jerusalem (1949), p. 38.

45 J.T. Woodhouse, 'The principle of retroactivity in international law', *The Grotius Society*, Transactions for the Year 1955, London, 41 (1956), pp. 69-89.

46 A/CN.4/SR.1933 Summary record of the 1933rd meeting. Extract from the *Yearbook of the International Law Commission*, 1 (1985), p. 328.

47 Takis Tridimas, *The General Principles of EU Law*, Oxford University Press, Oxford, 2006, p. 299.

states and accepted in international law, and thus recognized by EU law as general principles as well. The founding documents did not initially have explicit provisions on fundamental rights, and the practice of the Court was also negative with respect to demands based on internally accepted constitutional rights. This is due to the fact that the Court tried to avoid subordinating EU law to member states' constitutions, which could have led to undermining the principle of supremacy.

The *Stauder* case provided a turning point, with the Court highlighting that the protection of human rights is safeguarded by the European legal system as well, namely through the general principles of community law:

> the provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the general principle of community law and protected by the court.[48]

The general principles of law have therefore provided the adequate framework for the Court to ensure the protection of fundamental human rights without compromising the precedence of community law. The general principles of European law have been laid down in the EU Charter of Fundamental Rights, issued in 2000, which became legally binding with the ratification of the Treaty of Lisbon.

9.4.2 *The Status of Human Rights Norms in International Law*

In international law, the most important sources for the protection of human rights are the Charter of the United Nations (1945) and the Universal Declaration of Human Rights (1948), further to this, several agreements were issued regarding specific rights. According to mainstream opinion, the agreements and the resolutions of the United Nations are merely evidences of a general practice and verify the existence of rules regarding human rights in customary law. In international law, human rights norms are therefore considered to have originated from customary law.

Nevertheless, some authors are of a different opinion, considering that human rights agreements contain pre-existing general principles of law.[49] This school of thought is reflected by the statement of Soviet jurist Goutsenko as well:

48 C-26/69, *Stauder v. City of Ulm* [1969] ECR 419, pts. 233-234.

49 Kaufman Hevener & Mosher, op. cit., pp. 602-603.

> the adoption of the Covenants on Human Rights [is] considered a long and difficult stage of the elaboration of standards of international law, in which very important principles of law have been confirmed.[50]

Simma and Alston also steer away from the mainstream view of international legal doctrine, in that they disagree with the opinion that the recognition of human rights as rules of customary law provides more protection with regard to imposing the recognition of fundamental rights in states which are not signatories of the Declaration. The authors consider general principles of law to be better suited for the protection of human rights.[51] Namely, the rules of customary law, if not properly codified, can contain numerous uncertainties. Difficulties can arise when trying to prove the constant and congruent practice of different states, and it is even more problematic to identify and prove the belief of legal obligation, the *opinio juris sive necessitatis* of the states.

Kaufman Hevener and Mosher conducted a comparative study of the constitutions of the United States, the Soviet Union, France and the People's Republic of China and concluded that they all contain the fundamental provisions of the Universal Declaration of Human Rights, which were most likely inferred from the judicial practices reflected by the constitutions. The authors believe that a more wide-ranging study is needed. In case the results of such a study would conclude that the provisions are present in the legal system of the majority of the states, then the theory that human rights regulations are present as general legal principles in international law would gain considerable traction.[52]

9.4.3 *The Human Rights Regulation Accepted as General Legal Principle in Both International and European Law: The* audi alteram partem *Principle*

The right to a fair hearing is a legal principle related to the requirement of judicial impartiality. French administrative law uses the term of *droits de la défense* to describe this principle.[53] In English law the principle is known as *audi alteram partem* (or *audiatur et altera pars*), and this denomination has gained widespread usage, being referred to as such in several international and European legal cases. The meaning of the Latin maxim is 'may the other party be heard as well.' In accordance with this principle the contending parties

50 K.F. Goutsenko, 'Problems of the Realization of Human Rights and the role of the United Nations in the Development of International Co-operation', A/CONF. 32/L.5, pp. 37-64, cited in Kaufman Hevener & Mosher, op. cit., pp. 602-603.

51 Bruno Simma & Philipp Alston, 'The Source of Human Rights Law: Custom, Jus Cogens and General Principles', 12 *Australian Y.B.I.L.* 82 (1992), p. 107.

52 Kaufman Hevener & Mosher, op. cit., p. 613.

53 Stephen Weatherill, *Cases and Materials on EEC Law*, Blackstone Press, London, 1993, p. 39.

have the right to present their case in court, however, this does not apply to parties who do not appear in court and do not provide an acceptable explanation for their absence, or parties who do not provide the requested documents within the established timeframe.[54]

The equality of the parties is negatively impacted if one of them is unable to appear and speak in court. This happened during WWI in Belgium, where the indicted city of Antwerpen was unable to represent itself in front of the arbitration court (*Schiedsgericht*) set up by the invading German forces.[55]

In the *Corfu Channel* case Albania was at first unwilling to appear in court for the International Court of Justice hearing, but later it changed its position and requested from the Court that the hearing be delayed. However, the request was at this point no longer accepted, and the International Court of Justice deliberated in Albania's absence.[56] Similarly, in *The Electricity Company of Sofia and Bulgaria case*, when Bulgaria missed the counter-claim deadline and could not provide reasonable justification, the International Court of Justice did not delay the hearing, in accordance with the principle of *audi alteram partem*.[57]

National legislations – especially in the domain of administrative law – play a dynamic effect on the evolution of community law. We can witness this in the *Transocean Marine Paint Association* case.[58] The European Court of Justice, in spite of the explicit provision of a secondary community law source, Directive 99/63, deliberated that the right to a fair hearing can be invoked with regard to the case. Analyzing various member state legal standpoints, Advocate General Warner came to the conclusion that, although not all member states have explicit or similar regulations, the right to a fair hearing must be considered a part of the 'right' described in Article 220. The Court, in its ruling, did not refer to the Advocate General's analysis, but called into cause the general principle according to which 'persons whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to make their point of view known.' This rule has been since invoked on several occasions[59] by the European Court of Justice.[60]

54 As per Art. 53 of the Statute of the International Court of Justice: "1. Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim. 2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Arts. 36 and 37, but also that the claim is well founded in fact and law."

55 Cheng, op. cit., p. 290.

56 The *Corfu Channel* case (1949) ICJ Reports 1949, p. 248. pt. 244.

57 The *Electricity Company of Sofia and Bulgaria* case (*Sofia v. Bulgaria*) PCIJ Ser. E 16, p. 149.

58 C-17/74. *Transocean Marine Paint Association v. Commission* [1974] ECR 1063.

59 See for example the T-129/95. 2/96. and 97/96., *Neue Maxhütte Stahlwerke GmbH and Lech-Stahlwerke GmbH v. Commission* unified cases [1993] 3 C.M.L.R. Arts. 366, 228.

60 Chris Kerse, 'General Principles of Community Law: Procedural Guarantees – A Note', in: Ulf Bernitz & Joakim Nergelius (Eds.), *General Principles of European Community Law*, Kluwer Law International, The Hague, 2000, p. 207.

In the *Hoffmann-La Roche & Co. AG v. Commission* case[61] the European Court of Justice stated that in all cases which lead to sanctions, especially of a financial nature, the right to a fair hearing is considered to be a general principle of community law, which must be obeyed even if the cases in question are not of a judicial, but of an administrative nature. In European law this principle is also alluded to as an aspect of the general principle of the right of defence.

9.5 Conclusion

The role of the general principles of law as sources of law is by now generally recognized both in international and European law. Nevertheless, we can find numerous differences when analyzing their status in the two legal systems. The general principles of law have a much more wide ranging usage in European law, they are frequently referred to in the cases of the European Court of Justice and due to the Court's role in legislation development they have gained a status equal to that of primary legislation. In European case law the general principles of law can themselves be the basis of a given decision, in international law however the accent falls on their supporting, subsidiary nature. To this day, no decision was reached by an international forum based on general principles of law solely.[62]

The sphere of principles accepted by international and European law respectively also varies greatly. International law has integrated mostly principles which are based on common law, furthermore the principles of interstate relations are also of paramount significance. European law, however, tends to regard as general principles those principles which are connected to human rights and 'good governance.'

It has been proven that the principles of *pacta sunt servanda*, *clausula rebus sic stantibus*, legal expectation and some others that international and European law have an interactive, mutually beneficial relationship. Nevertheless, this two way influence is present only with regard to a limited number of principles, there is still great potential for a much wider range of interaction.

Literature on the general principles of international and European law shows few similarities at a first glance: Trakis Tridimias's 'The General Principles of European Law' and Bing Cheng's 'The General Principles of Law as Applied by International Courts and Tribunals' differ so greatly regarding both structure and the principles they discuss, that we can hardly find any similarities. The matching principles are sometimes referred to by different names, and are handled with a very different focus in international and European literature on law. As opposed to monographs on international law, those handling the

61 C-85/76. *Hoffmann-La Roche & Co. AG v. Commission* [1979] ECR 461.

62 Hugh Thirlway, 'The Law and Procedure of the International Court of Justice 1960-1989', *British Yearbook of International Law* (1990) 61, p. 110.

subject of European law hardly ever discuss the concept of general principles of law, and even if they do, only a restricted number of principles is mentioned. Nevertheless it can be concluded that the principles of the *rule of law* and those connected to good governance, having their roots in member state legislation, cannot be ignored by international law either. The rule of law, democracy, legal order, the principle of the supremacy of law, legal certainty and the unconditional acceptance of human rights can be considered definitive principles of the European Union. The above mentioned legal cases show that the shared national legislative traditions of member states contribute to the international emergence of the *rule of law* and the creation of an international legal system based on value criteria.

The institutions of the European Union should first and foremost declare that every generally accepted principle of international law should also be considered a general principle of European law. According to Koen Lenaerts and Piet van Nuffel international law has special precedence in the hierarchy of European law norms. Namely, some principles of international law have priority over other sources of EU law as general principles of European law.[63] The European Court of Justice has made it clear on several occasions that the European Union is subject to the rules of international law. The international responsibility of the Union for non-contractual liabilities provides striking evidence for this. It would therefore be advisable to state in a generally binding way that the general principles of international law are a part of the Union's *acquis*, with the exception of principles which cannot be brought in agreement with the structure of the Union.[64] Similarly, the shared internal principles of law should also be automatically considered general principles of European law. The European Court of Justice could play a paramount role in this process, as through its legal practice it could actively participate in instilling the general principles recognized in international law in European law as well, thus acting as a window for the two directional flow of principles from one legal system to the other. It is not only the general principles of law which could enrich the law of the Union – a system made up of shared principles drawn from national legislations could crystallize into a regional international law, which could at its turn inspire the principles of international law in general.

This theory is particularly well grounded based on Article 2, Paragraph 5 of the Treaty on the functioning of the European Union, as modified by the Treaty of Lisbon, which states that the Union 'shall contribute (...) to the strict *observance* and the *development* of international law.'[65] Based on the same directive, the Union 'in its relations with the wider

63 Koen Lenaerts and Piet van Nuffel, *Constitutional Law of the European Union*, Sweet & Maxwell, London, 2005, pp. 530-531.

64 Some principles cannot be used within the framework of the European Union, such as the reciprocity with regard to fulfilling interstate obligations.

65 Emphasis by the author.

world, (...) shall uphold and *promote its values*' and 'shall contribute to (...) *the protection* of *human rights*, in particular the rights of the child.'[66]

It can be thus said that in spite of the many differences which can be observed between the general principles of international and European law, one can clearly discern a shared segment, which is continuously growing as a result of the two way interaction of the principles. This interaction can contribute to the development of both international and EU law, especially if the international forums and the European Court of Justice alongside other institutions of the Union, recognizing this process, will mutually rely on each other's practice and will use the developmental results of the other legislation.

66 Emphasis by the author.