Direct application of international criminal law in national courts
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Chapter IV
The Public International Law Framework of Implementation

1 Introduction

This Chapter analyzes the international legal framework that governs the implementation of public international law in the national legal order. While setting out this framework in general terms, it will focus primarily on national courts. It will thus form a basis for the more specific analysis of the international legal framework governing the direct application of international criminalizations in national courts. The lay-out of this Chapter is as follows. First, it will give a short comment on the theories of monism and dualism and their (limited) relevance for today's practice (para. 2). Second, it will set forth the general rule that States are free to shape the implementation of their international obligations as they see fit, as well as its practical implications (para. 3). Third, it will show how the doctrine of self-executing treaties can be seen as a manifestation of the freedom rule (para. 4). Fourth, it will analyze the limits and qualifications of the freedom rule (para. 5). Particular attention will be paid to the tension between freedom of implementation and the principle of pacta sunt servanda, as well as the fact that national courts interpret national law in conformity with international law with considerable consistency. I will also analyze whether a specific qualification of the freedom rule is required for the particular fields of international law of a humanitarian character and peremptory norms (jus cogens).

2 Theory: Monism-Dualism

Academic writing regarding the relationship between national and international law has long been dominated by the dichotomy between monism and dualism. Taken literally, these terms postulate that national and international law are part of one and the same legal order (monism), or that they constitute separate legal orders (dualism).\footnote{A variant of dualism is pluralism, expressing the plurality of national legal orders. See Partsch 1992, p. 238. See for recent analysis of the monism-dualism debate and copious references to older literature Arangio-Ruiz 2003; Gaja 2003; Wasilkowski 1996; Heiskanen 1992, p. 1-10; Partsch 1992, p. 238-242.} In this basic form, the dichotomy between monism and dualism establishes a starting point for the analysis of the effects of international law in the national legal order. It brings to the fore the fundamental question whether international law is actually part of, and thus presumptively valid in, the national legal order or not. How and to what extent States can alter that presumption of domestic validity (monism) or non-validity (dualism), and do so in practice, is then a topic for further analysis.

However, the monism-dualism dichotomy is the starting point for a highly complicated discourse that requires a thorough separation of theory and practice and clarifies State practice only to a limited extent. For many instances of State practice can be explained both under monist and dualist theories. National rules of reference to international law,
for example, may evidence a monist attitude when they are declarative, but a dualist attitude when they are constitutive.\textsuperscript{775} In the Netherlands, the legislature in its 1953 revision of the Constitution expressed the standpoint that the new constitutional provisions on the domestic validity of treaties were only declaratory of the legal situation that was dictated by international law.\textsuperscript{776} This position finds some support in the fact that all international law is since long incorporated in the Dutch legal order by way of an unwritten rule rather than constitutional provisions.\textsuperscript{777} However, in 1956 the legislature abandoned this view when it altered the provisions on the domestic validity of treaties only slightly, but now declared them to be constitutive instead of declaratory.\textsuperscript{778} The same ambiguity extends to many other aspects of the role of international law in national legal orders. Even the fact that many national courts do not in principle apply treaties as a source of law can be conceptualized either as a jurisdictional limitation of national origin permitted by international law (fitting monism) or as international law’s lack of authority in this sphere (fitting dualism).\textsuperscript{779} Since State practice seldomly reveals the doctrinal positions underlying the practical results, let alone in a conclusive manner,\textsuperscript{780} the explanatory power of monism and dualism is limited.\textsuperscript{781}

Moreover, many writings on monism and dualism take these notions far beyond their literal meaning, which merely questions the existence of one or two legal orders. First, most scholars include the question of hierarchy in their definition of monism. They assert that monism stands not only for the proposition that international and national law make up one legal order, but also that one, most often international law, is superior in rank to the other.\textsuperscript{782} These are, however, separate questions and treating them as one distorts the analysis of both.\textsuperscript{783} A second complication in the monist-dualist debate concerns its “ideological and political overtones.”\textsuperscript{784} Some writers defend monism or dualism as an article of faith rather than a tool for legal analysis.\textsuperscript{785} Third, others use monism and dualism as labels for particular legal systems, asserting that certain States are monist and others dualist.\textsuperscript{786} Generally, this use of the terms focuses on the direct applicability of

\textsuperscript{776} See Fleuren 2004, p. 188; Brouwer 1992, p. 138.
\textsuperscript{777} See above, note 417 and accompanying text.
\textsuperscript{778} See Brouwer 1992, p. 252.
\textsuperscript{779} Cf. Fleuren 2004, p. 15.
\textsuperscript{780} That legislatures are not always firmly decided in their doctrinal stand on international law is evidenced not only by the Dutch and German examples, but also by the preparatory work on Art. 4 of the Constitution of the Weimar Republic, in which the legislature quickly meandered between different conceptions of the obligatory nature of international law for inter-state relations. See Simma 1995, p. 41-43.
\textsuperscript{782} See e.g. Arangio-Ruiz 2003, p. 917; Heiskanen 1992, p. 3-4.
\textsuperscript{784} Partsch 1992, p. 238.
\textsuperscript{786} See e.g. Aust 2000, p. 146-156; Buergenthal 1992, p. 316-317.

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international law, or even only treaty law, in practice rather than the doctrinal position of the State. All in all, the variance in meaning ascribed to the terms monism and dualism has confused the debate and further undermined their usefulness for the analysis of the relationship between national and international law.

Doctrine has by now mostly abandoned the monism-dualism debate, making a move to pragmatism. Scholarship regarding the interaction of national and international law has predominantly moved away from conceptual analysis of the legal framework to focus on practical results. As some scholars have noted, the lack of attention for a unifying theory has serious drawbacks. Lack of a proper theoretical grounding, to name but one example, likely contributes to the unfortunate tendency of various scholars to equate the application of international law in national courts to that of foreign law, ignoring the obvious and important differences between the two. Yet, a rejuvenation of the theoretical discourse does not necessarily imply a resurrection of the monism-dualism debate, in fact far from it.

An attempt to classify this study as either “monist” or “dualist” will quickly illustrate the problems with these terms. This study inquires into the demands of international law regarding the direct application of core crimes law in national courts. It thus assumes that international law can, at least partly, regulate its own application in national courts, a premise that some will strike as irremediably monist. Some observations on the role of international law in national courts, in particular the principle of consistent interpretation in para. 5.2, likewise reflect a belief that national and international law do not constitute fundamentally separated legal orders. But on the other hand, I do acknowledge that in many States so many obstacles in national law impede the effective application of international law that the practical result amounts to a de facto separation of national and international law. Commentators who use monism and dualism in a practical, result oriented rather than doctrinal sense may regard such observations as “dualist.” Thus, I will not use the terms monism and dualism in this study, because of their limited explanatory power and diffuse meaning.

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791 See e.g. Arangio-Ruiz 2003, p. 914-915. Not also that the need for a renewed theoretical understanding of the relationship between national and international law is a central premise of the Amsterdam Center for International Law’s research project on “Interactions between International Law and National Law,” of which this study is a part.
792 To be sure, there are certainly parallels to be drawn between the judicial application of foreign and international law, and valuable lessons to be learned by doing so. See above, note 40. Yet, to equate the two disregards crucial differences in bindingness and authoritativeness and misconstrues their respective positions in the national legal order. See e.g. The International Judicial Dialogue: When Domestic Constitutional Courts Join the Conversation 2001, 114 Harvard LR 2049 at 2051 (2001) (contending “that [national] courts’ willingness to analyze and then either to follow or disregard foreign and supranational precedents suggests that they do not view domestic law as subordinate to international law.”).
As a general rule, international law leaves States free to implement and fulfil their international obligations in any way they see fit. For some time, an extensive scholarly debate questioned the applicability of the freedom of implementation to human rights law. Still today, the holdings of several international bodies keep the door open for an appeal to the principle of effectiveness to argue that the nature of human rights treaties requires their direct application in national courts. Yet, it is commonly accepted that human rights treaties, like international law in general, are not directly applicable per se. Thus, the oft-noted general rule remains that "international law does not itself prescribe how it should be applied or enforced at the national level." Also, the case law of international courts reflects a deference to actors on the national level in the margin of appreciation. Both human rights courts and the ICJ consistently give States substantial leeway to choose the means of implementation of their international obligations.

In doctrine, far-going freedom of implementation is often regarded as beneficial for both individual States and international law. First, the most traditional argument postulates that this freedom is a pivotal aspect of State sovereignty. According to this view, a more intrusive regime of implementation would infringe on the internal separation of powers and/or the democratic legitimacy of the law, the shaping of both of which is a prerogative of the State.

Second, the bottom-up approach of having States regulate the implementation of their international obligations themselves is generally thought to be more effective than a top-down regime detailed by international law. Since the intricacies of their national legal orders are best known to States themselves, freedom of implementation allows them to choose the most effective way of implementing their international obligations. It also allows them to mitigate some of the complexities of international law. A mediating role

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794 See below, notes 976-985 and accompanying text.
795 See ECHR, Swedish Engine Drivers' Union v. Sweden, 6 February 1976, para. 50 (stating that the ECHR does not lay down "for the Contracting States any given manner for ensuring within their internal law the effective implementation of any of the provisions of the Convention."). See also Germany, Bundesverfassungsgericht, In re G., 14 October 2004, 2 BvR 1481/04, para. 31 and 45; above, note 793.
798 See e.g. ICI, Germany v. United States (LaGrand case), 27 June 2001, para. 125. But compare below, note 1032.
799 See above, note 628.
800 See above, Chapter III, para. 3, 4 and 5.
of national law may be valued in particular to alleviate the vagueness and uncertainty of (customary) international law for national courts.\(^{802}\)

It may be countered, however, that a more intrusive framework of implementation could reduce and prevent inequalities in the effectuation of international law by imposing the same standards on all States. More rigid and precise international rules on implementation could, for example, prevent the situation that the courts of one State hold their executive branch strictly to its treaty obligations while the courts of another State party refuse to remedy comparable violations. Since national courts may hesitate to enforce various rules of international law in order to avoid imposing limitations on other branches of government which do not constrain foreign counterparts,\(^{803}\) a more intrusive regime of implementation may also have positive effects on the effectuation of international law.

The freedom of implementation itself is uncontroversial.\(^{804}\) International legal scholarship commonly understands the freedom of implementation as giving States the liberty to separate\(^{805}\) national and international law,\(^{806}\) to choose which State organs will enforce international obligations, to order other organs to ignore those obligations,\(^{807}\) and to make

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\(^{802}\) See above Chapter III, para. 6; Jackson 1992, p. 324-325.


\(^{804}\) But see below, para. 5.3 for an analysis of the question whether the freedom of implementation fully applies to all categories of international norms.

\(^{805}\) Or keep separated, depending on one's doctrinal viewpoint regarding the unity or separateness of national and international law.

\(^{806}\) See Betlem and Nollkaemper 2003, p. 573; Reydam 2003, p. 137, note 40 ("Whether an international convention can be directly applicable in the domestic legal order is [...] purely a matter of national law.").

\(^{807}\) Partsch 1992, p. 242 and Jacobs 1987, p. xxiv:

\[\text{"}[\text{The effect of international law generally, and of treaties in particular, within the legal order of a State will always depend on a rule of domestic law. The fundamental principle is that the application of treaties is governed by domestic constitutional law. It is true that domestic law may, under certain conditions, require or permit the application of treaties, which are binding on the State, even if they have not been incorporated into domestic law. But this application of treaties "as such" is prescribed by a rule of domestic constitutional law. It is not a situation reached by the application of a rule of international law, since such a rule, to have effect, itself depends upon recognition by domestic law."]\]

Fitzmaurice 1958, p. 68-69 ("When it is said that international law in a number of ways prescribes what States must do or not do in their own territory, this does not mean that international law has, as such, direct and immediate application in State territory."). But see Pescatore 1987, p. 281-282 (arguing that requiring the transformation of international obligations allows States to abstain from internal execution and deprives treaties from their contractual and international character; as a result "incorporation procedures and methods based on 'transformation' are ... by their very essence incompatible with good faith in international relations.").

\(^{807}\) See e.g. Verdross and Simma 1984, p. 539-540:

\[\text{"}[\text{International law} \text{überträgt seine Durchführung den verpflichteten Staaten, die es durch ihre Organen zur Anwendung zu bringen haben.... Bezweckt eine Völkerrechtsnorm Rechtswirkungen im innerstaatlichen Bereich, so muß ihr Inhalt in die innerstaatliche Rechtsordnung eingeführt ('inkorporiert') werden, um durch die staatlichen Organe erfüllt werden zu können.} \]

\text{[International law delegates its effectuation to the obliged States, which are to execute it through their organs.... If a norm of international law has the purpose of taking legal effect within the} \]

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the judicial application of international law subject to various demands such as the principle of reciprocity and the doctrine of self-executing treaties, or to limit it altogether. They especially overestimate the extent to which international law allows States to keep international obligations separated from and subordinated to national law. An extreme view in this regard, notably expressed in a Separate Opinion of a Judge of the ICJ, is Sir Percy Spender's assertion that “assuming the constitutionality and validity of the Act within the domestic legal system of the State concerned, it is competent for a State party to any treaty or convention to pass a law binding on its own authorities to the effect that, notwithstanding anything in the treaty or convention, certain provisions thereof binding on that State shall not apply, or to legislate in terms clearly inconsistent with, and intending to override, the terms of an existing treaty. [...] But that in no way would be relevant to the question whether that legislation—or an act done pursuant to it—is or is not in breach of or incompatible with obligations binding upon the State by virtue of a treaty or convention.”

Sir Spender's statement, it is submitted here, does not correctly reflect the demands of international law. All liberties flowing from the freedom of implementation are subject to the condition of effective compliance with international law. States are allowed to separate national and international law and to order certain State organs to ignore international obligations only if they fulfil these obligations in another way. International law does not allow States to violate their obligations and accept State responsibility as a suitable price to pay. In a general institutional sense, international law may accept the

State, its content must be introduced (incorporated) in the national legal order to enable State organs to comply with it. – translation by this author; Fitzmaurice 1958, p. 90-91. But see Conforti 2001, p. 18 and 21-23; Danienko 1999, p. 54; Lauterpacht 1970, p. 280 (“To say that the State – and the State only – is the subject of international duties is to say ... that international duties bind no one; it is to interpose a screen of irresponsibility between the rule of international law and the agency expected to give effect to it.”). See for an elaborate problematization of the international obligations of State organs, or lack thereof, Ferdinandusse 2003.

See Partsch 1992, p. 245.

See Tomuschat 2001, p. 363; Henkin 1993, p. 149 and 153: “The international obligation is upon the state, not upon any particular branch, institution, or individual member of its government [...]. Since a state's responsibility to give effect to international obligations does not fall upon any particular institution of its government, international law does not require that domestic courts apply and give effect to international obligations.”

See below, notes 819-821 and 871-872.


Unless one interprets the word “competent” as denoting mere factual possibility rather than international legality. Such an interpretation seems stretched, however, given the place of this citation in a separate opinion of a judge of the ICJ.

See in this regard Jackson 2004 and Jackson 1997.
need for exceptional cases of violation and adaptation,\(^{814}\) but in concrete situations these remain violations and thus prohibited until they gather enough weight to change the rule in question. States are obviously in a practical sense able to legislate in contravention of their international obligations, but international law does not allow them to do so. Sir Percy Spender admits so himself when he states earlier in the same separate opinion that "[a] State, party to the Convention, may not, whatever the subject-matter of the law under which it acts, do anything which contravenes the provisions of the Convention."\(^{815}\) This rather straightforward statement is hard to reconcile with the one quoted above.

When the general rule of freedom comes into conflict with the basic principle that States must perform their international obligations in good faith (\textit{pacta sunt servanda}),\(^{816}\) the latter must prevail.\(^{817}\) This is perhaps a trite observation, but in practice national courts show considerable divergence in their appreciation of the limits of the freedom of implementation.\(^{818}\) National courts look predominantly, sometimes even exclusively, to national law in order to decide whether and to what extent to give effect to international law.\(^{819}\) They regularly allow the executive and the legislature to violate international obligations.\(^{820}\) It is not at all uncommon for a national court to assert that "[i]nternational practice is law only in so far as we adopt it, and like all common or statute law it bends to the will of the Congress,"\(^{821}\) or words to that effect. It is especially telling that even initiatives for reform that aim at more effective enforcement of international obligations at the national level often focus on national law's endorsement of international law.\(^{822}\) On

\(^{814}\) See D'Amato 1987, p. 376-377.
\(^{815}\) Id., at 119.
\(^{817}\) Cf. Rosenne 1989, p. 39 ("It is axiomatic that a treaty, made between States, is binding upon each State as a whole, upon each one of its organs. This is implicit in the lapidary formulation of the \textit{pacta sunt servanda} rule in article 26 of the Vienna Conventions.");
\(^{819}\) See e.g. U.K., Blackburn v. Attorney-General, 1971, 2 All ER 1380, 1 WLR 1037, 52 ILR 414: "Even if a treaty is signed, it is elementary that these courts take no notice of treaties as such. We take no notice of treaties until they are embodied in laws enacted by Parliament, and then only to the extent that Parliament tells us.");
\(^{820}\) See e.g. Germany, Bundesverfassungsgericht, \textit{In re G.}, 14 October 2004, 2 BvR 1481/04, para. 35; South-Africa, South African Constitutional Court, Azanian Peoples Organization (AZAPO) and Others v. President of the Republic of South Africa and Others, 25 July 1996, para. 27; Australia, High Court, Horta v. The Commonwealth, 18 August 1994, 181 CLR 183 at 195 (all holding that their respective constitutions allow the legislature to violate international law).
\(^{821}\) See e.g. U.S., Supreme Court, Rainey v. United States, 1914, 232 U.S. 310 at 316 ("Treaties are contracts between nations, and by the Constitution are made the law of the land."). But compare U.S., Supreme Court, Breard v. Greene, 14 April 1998, 523 U.S. 371 at 375 ("[I]t has been recognized in international law that, \textit{absent a clear and express statement to the contrary}, the procedural rules of the forum State govern the implementation of the treaty in that State." – emphasis added). See also Denza 2003, p. 420-421.
\(^{822}\) See Resolution of the Institut de Droit International (1993 Milan, 65 Annuaire De L'Institut De Droit International 321, Art. 1 ("National courts should be empowered by their domestic legal order to interpret and apply international law with full independence").
the other hand, numerous national judgments are notably stricter in their adherence to international obligations, even if that requires a limitation of the freedom of implementation.\textsuperscript{823}

For this thesis, the limits of the freedom of implementation, imposed \textit{inter alia} by the principle of \textit{pacta sunt servanda}, are very relevant. Clearly, the freedom rule is not compatible with a general international obligation of States to directly apply international norms. Still, the question remains if, and under what conditions, national courts should directly apply international norms where necessary to prevent violations of these norms. Such situations normally result from a failure of the government to take appropriate steps to fulfil its international obligations, such as the drafting of implementing legislation. As shown above, this is not at all uncommon in core crimes law.\textsuperscript{824} Therefore, the remainder of this Chapter will further explore the manifestations and limits of the freedom rule, as well as possible qualifications of the rule for specific categories of international norms.

4 The Doctrine of Self-Executing Treaties

States' freedom of implementation finds visible expression in the doctrine of self-executing treaties. Many States incorporate treaties in their domestic law, but differentiate between treaty provisions that are directly applicable in national courts, or self-executing, and those that are not. The doctrine of self-executing treaties, a term originating in American law,\textsuperscript{825} is found in some form or another in many different States.\textsuperscript{826} It is a limitation on the enforceability of treaties in national courts imposed by national law,\textsuperscript{827} and thus a clear manifestation of the freedom of implementation in State practice.

What makes a treaty provision self-executing or non-self-executing is not readily definable, due to the confused state of national practice in various States.\textsuperscript{828} National courts have applied many different tests in this regard, employing both objective and subjective criteria. Under the most common objective test, courts will find a treaty provision non-self-executing when its subject is not amenable to adjudication in national courts or when its effectuation requires legislative action. The former is often assumed for foreign affairs matters like the pacific settlement of disputes.\textsuperscript{829} The latter is generally

\textsuperscript{823} See cases cited below, para. 5.1.
\textsuperscript{824} See above, Chapter II, para. 2 and Chapter III, para. 2 and 8.
\textsuperscript{829} See Iwasawa 1986, p. 679-684.
implications. Thus, self-executingness is effectively a compound concept that allows courts to put aside treaty provisions for very different reasons.

On closer scrutiny, it appears that the doctrine of self-executing treaties functions primarily as a stand-in for other avoidance doctrines, predominantly those that flow from separation of powers concerns. The objective test whether treaty provisions are precise and complete enough actually has little or no independent meaning and national courts have subordinated it to institutional concerns from the very beginning of the doctrine of self-executing treaties. After all, there are no technical standards which establish an objective minimum threshold for provisions of law to be applicable by the courts. Courts can apply even vague or incomplete rules in a meaningful way, be it that the effects of such rules will often be more limited than those of "mature" rules. In fact, imprecision and incompleteness can amount to a (possibly intentional) strengthening of the powers of the courts. Both national and international courts regularly apply international provisions which (other) national courts consider non-self-executing. The relativity of the precision and completeness test also shows in the fact that national courts often employ different standards of precision and completeness depending on the rank and character of the law involved, for example applying constitutional provisions that are far less detailed than treaty provisions they consider non-self-executing.

All of this is not to say that the entire doctrine of self-executing treaties is superfluous or wrong. There are legitimate separation of powers concerns involved in the direct

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840 See above, notes 618 and 619. See also Vazquez 1995, p. 711 and 715-716.
842 See for an overview of various avoidance doctrines employed by national courts Collins 2002; Benvenisti 1993, para. II C.
844 See U.K., In re N. (Child Abduction: Jurisdiction), 31 August 1994, [1995] Fam 96 at 100, per Wilson J:

"The terminology [of Art. 7, 8 and 11 of the Hague Convention on the Civil Aspects of International Child Abduction 1980] is noticeably wide. I consider myself to be under a duty, as the judicial authority of a contracting state, to act expeditiously, [...], in proceedings for the return of this child. I interpret the language both of the Articles of the Convention and of the text of the [British implementing] Act as being deliberately wide in its instruction to this court to co-operate with all other Contracting States in making orders which will secure the return of wrongfully taken children;"

See also U.K., Family Division, In re C. (Abduction: Interim Directions: Accommodation by Local Authority), 12 December 2003, [2003] EWHC 3065 (Fam), [2004] 1 FLR 653 (similarly endorsing and using the discretion stemming from the broad language of Art. 7 Hague Convention on the Civil Aspects of International Child Abduction 1980, which reads:

"Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.
In particular, either directly or through any intermediary, they shall take all appropriate measures-
(b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;"

the case when the provision regulates a subject that falls under the exclusive competence of the legislature, \(^{330}\) lacks precision \(^{331}\) or contains an explicit reference to envisaged legislation, for example to "such conditions as the law may establish." \(^{332}\) In this sense, the doctrine of self-executing treaties merely requires national courts to leave aside treaty provisions that are incomplete, imprecise or otherwise unfit for national judicial application. While the intent of the parties to the treaty may be taken into account as an additional factor, the primary criterion is the content and language of the treaty provision in question.

A subjective test gives far greater weight to the intent of the parties, considering treaty provisions non-self-executing whenever the parties intended to prevent these provisions from being enforced in national courts. \(^{333}\) In this way, the doctrine of self-executing treaties no longer hinges on the content of the treaty, but provides a "switch" for the treaty makers to turn judicial review in national courts off at will. This can be done by a clause to that effect in the treaty \(^{334}\) or, when courts accept the intent of their own executive or legislature as sufficient regardless of the view of the other parties, by a unilateral declaration at any stage in the conclusion and implementation of the treaty. \(^{335}\) Some national courts presume that treaties are as a rule non-self-executing, requiring an indication that the parties intended to make them self-executing rather than the other way round. \(^{336}\) Others have (mis)interpreted provisions calling for domestic implementation of the treaty as a sign that the treaty as a whole is intended to be non-self-executing. \(^{337}\)

Yet, the contrast between objective and subjective tests \(^{338}\) is only the beginning of the differences and complications in practice. Courts have applied complex and confused combinations of objective and subjective tests as well as others that, even if they do not violate international law, have no apparent legal basis. Some courts, echoing European Community law, have characterized only treaty provisions creating rights for individuals as self-executing. \(^{339}\) Some national judgments have held treaty provisions to be non-self-executing simply because their direct application would bring unwelcome practical

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\(^{331}\) See Fleuren 2004, p. 287-298; Paust 1988, p. 767-768.

\(^{332}\) See e.g. Art. 14 (1) ACHR: "Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish."


\(^{335}\) See Nolkaemper 2002, p. 171.


\(^{337}\) See Vazquez 1995, p. 705; Iwasawa 1986, p. 656


\(^{339}\) Compare Nolkaemper 2002, p. 161 (distinguishing subjective and objective direct effect of international law, whereby the first denotes the right of the individual to invoke a provision rather than the intent of the parties to the treaty to make it self-executing, and the second corresponds to the content based test set out here).

application of treaty provisions, especially when these are broad or imprecise. A limited test of self-executingness can provide a useful tool to maintain a proper institutional balance. The point is rather that the precision and completeness test is not actually of a technical or objective nature, but a step in a separation of powers inquiry that allows courts to set aside treaty provisions where their application would bring the courts into (unwanted) conflict with other branches of government.\textsuperscript{846} This partly explains why courts apply such different standards in ascertaining precision and completeness: these vary with the institutional balance in the cases concerned.

Scholars have vigorously criticized the doctrine of self-executing treaties. Commentators in different States have called the practice of their courts in this regard confused and unpredictable,\textsuperscript{847} even unconstitutional.\textsuperscript{848} One scholar has criticized the tendency of some national courts “to engage in an open-ended inquiry to determine on a case-by-case basis whether judicial enforcement of a particular treaty is a good idea” as “incompatible with our society’s conceptions about what it means for a norm to have the status of ‘law,’ and, in particular, about the judiciary’s role in enforcing norms having such status.”\textsuperscript{849} Others have implored courts to use narrower avoidance doctrines instead.\textsuperscript{850}

Significantly, however, none of these commentators asserts that the doctrine of self-executing treaties in itself violates international law. For, it is generally accepted, if States are at liberty to preclude their courts from applying treaties entirely, they must also be free to employ any limitation that falls short of a complete bar.\textsuperscript{851} Yet, certain applications and consequences of the doctrine do in fact violate international law. The refusal by some courts to find certain treaty provisions self-executing because their direct application would lead to unwelcome consequences directly leads to a violation of those treaty norms. Likewise, States which deny self-executingness to certain provisions or entire treaties while at the same time failing to ensure their effectuation through implementing legislation violate the principle of \textit{pacta sunt servanda}.\textsuperscript{852}

5 Limits and Qualifications of the General Rule

Practice shows diverse legal phenomena that call into question the limits of the freedom of implementation, as well as possible qualifications of the freedom rule for specific categories of international norms. This paragraph will discuss the limits of the freedom rule (5.1), zoom in on the practice of national courts to interpret national law in conformity with international obligations (5.2), and analyze whether the ground rule of State freedom is valid in its entirety for the specific categories of international law of a humanitarian character and peremptory norms (5.3).

\textsuperscript{847} See above, note 828.
\textsuperscript{848} See Paust 1988, p. 760.
\textsuperscript{849} Vazquez 1995, p. 715-716.
\textsuperscript{850} See Fleuren 2004, p. 423-454.
\textsuperscript{851} Cf. Iwasawa 1986, p. 651, particularly note 103.
\textsuperscript{852} See Källin 2000, p. 117.

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5.1 Limits of the Freedom of Implementation

Both scholars and national courts easily overestimate the extent of the freedom of implementation. They regularly assume that the freedom rule implies that international law is silent on its effects in the national legal order, and consequently that “the effect of international law [...] within the legal order of a State will always depend on a rule of domestic law.”\(^{853}\) While numerous national courts have adopted this view,\(^{854}\) there are good reasons to doubt it.

First, in most States, courts take international obligations into account in their interpretation of national law. More often than not, they do so without a clear obligation to that effect in national legislation. Numerous national judgments assert or suggest that international, not national law requires this practice of consistent interpretation. In light of its importance, this practice will be analyzed separately, in para. 5.2 below.

Second, a historical analysis of the reception of international law in various legal orders suggests otherwise. The fact that the courts of many States gave effect to international law before their national laws contained any provisions requiring them to do so suggests that, at least originally, they perceived the domestic validity of international law as flowing from international law itself, rather than from national law.\(^{855}\) In the U.S., for example, the domestic validity and direct applicability of international law was silently accepted in the early days of the Republic.\(^{856}\) While the historical understanding of the reception of international law in the U.S. is complex and disputed,\(^{857}\) there are clear indications that traditionally, the direct applicability of international law did not depend on a rule of national law.\(^{858}\) The same is true for numerous other States, in particular for custom but also for treaty law.\(^{859}\) The shift in position of the Dutch legislature described

\(^{853}\) See above, note 806.

\(^{854}\) See above, note 819-821.


\(^{857}\) See e.g. Flaherty 1999 and Yoo 1999a.

\(^{858}\) See Perkins 1997, p. 485-489 (“In the understanding of the founders of the republic, the law of nations was applicable in our courts because it was binding on the United States. [...] The Constitution reflected their understanding of a binding law of nations that stood on its own authority.”); Wright 1916, p. 223-227. See also U.S., Supreme Court, *Chisholm v. Georgia*, February Term, 1793, 2 U.S. 419 at 474:

> "Prior [to the enactment of the Constitution], the United States had, by taking a place among the nations of the earth, become amenable to the laws of nations; and it was their interest as well as their duty to provide, that those laws should be respected and obeyed;"

\(^{859}\) See Stirling-Zanda 2000, p. 120-125; Danilenko 1999, p. 61 (“Judicial practice also indicates that some CIS judges embrace international law even in situations where neither the constitutional provisions nor the general political environment favours the direct application of international standards.”); Buergenthal 1997, p. 214 (“[I]n some states where the constitution failed to deal expressly with the question of the domestic status of treaties, the courts have on their own adopted the article VI [of the U.S. Constitution] solution, provided always that the national parliament had a role in the ratification process.”, citing the example of Uruguay); Buergenthal 1992, p. 348 (quoting judgment of 27 May 1971 (*Le Ski*) of the Belgium Court of Cassation, which held that in case of conflict treaties prevail over national law and, crucially, that their supremacy “is attributable to the very nature of international law”).
above\(^{860}\) shows that national rules of reference to international law can be interpreted as declarative or constitutive. Thus, one cannot, as some scholars do,\(^{861}\) without further analysis take national rules of reference as evidence of international law's silence on its effects in the national legal order.\(^{862}\)

Third, an analysis of the role of various international norms of a procedural character in national legal orders also casts doubt on the notion that international obligations only take effect in the national legal order to the extent that national law so determines. For example, a moderating role of national law is hardly feasible for the duty to refrain from defeating the object and purpose of a treaty before its entry into force.\(^{863}\) After all, this obligation serves a preliminary and temporary role - one meant to precede the treaty's operation and implementation through national law. It seems unrealistic to argue that State organs are only bound by the duty to refrain from defeating the object and purpose of a treaty if national law contains an explicit rule to that effect. In fact, the more general understanding of the duty in the few national judgments employing it suggests otherwise.\(^{864}\)

In practice, national courts do not subject all rules of international law to the same tests and standards. They frequently apply international rules of a predominantly procedural character, such as those on immunities and treaty interpretation, as a matter of routine, but subject more substantive ones, especially those governing the rights and duties of individuals, to rather rigid justiciability tests like the doctrine of self-executing treaties.\(^{865}\) Thus, the need for a national “trigger” to effectuate international obligations in the national legal order, may be less clear-cut than often thought.

Varying interpretations of the extent of the freedom of implementation can often be seen in particular cases where there is a tension between the freedom rule and the principle of \textit{pacta sunt servanda}. When the legislature and executive have failed to take adequate implementing measures, national courts often refrain from upholding international law

\(^{860}\) See notes 776 and 778 and accompanying text.

\(^{861}\) See e.g. Arangio-Ruiz 2003, p. 937-939; Rogers 1999, p. 31 (“The very application of [different authorizations in national law to apply international law] by United States domestic courts is an inherent rejection of the idea that international law is \textit{ipso facto} binding in United States courts \textit{without an independent basis for reference to it in domestic law}.” (italics in original)).

\(^{862}\) See Nollkaemper 2002, p. 168; Simma 1995, p. 43.

\(^{863}\) See Art. 18 VCLT. See also Klabbers 2001a.

\(^{864}\) See Botswana, Court of Appeal, \textit{Unity Dow v. Attorney-General of Botswana}, 3 July 1992, 1994 (6) Butterworths Constitutional Law Reports 1 at 137-140 (Per Aguda J., striking down discriminatory legislation on the basis of unincorporated treaties, noting \textit{inter alia} that if a treaty “has merely been signed but not incorporated into domestic law, a domestic court must accept the position that the Legislature or the Executive will not act contrary to the undertaken given on behalf of the country by the Executive in the convention, agreement, treaty, protocol or other obligation” and that it was “bound to accept the position that this country will not deliberately enact laws in contravention of its international undertakings and obligations.”). See also Argentina, Judge Gabriel Cavallo of the Buenos Aires Federal Court, \textit{Julio Simon (Case no. 8686/2000, “Simon, Julio, Del Cerro, Juan Antonio s/sustracción de menores de 10 años”), 6 March 2001, 2000/B Nueva Doctrina Penal 527} (striking down several amnesty laws, \textit{inter alia} on the basis that they are incompatible with the object and purpose of the CAT) and Klabbers 2001a, p. 319-322.

\(^{865}\) See Nollkaemper 2002, p. 169.
through direct application, finding that they cannot substitute for the political organs in choosing the mode of compliance with international obligations. In such cases, the freedom to choose how to implement in practice extends to a freedom to choose whether to implement at all.866

An apt illustration is the Belgian Vermeire case.867 In a 1979 judgment, the ECtHR had found the different inheritance rights of legitimate and illegitimate children in Belgium discriminatory and in violation of the ECHR.868 The Belgian legislature acknowledged the problem but was rather slow in its reform of the legislation in question. So it could happen that in 1983 Mrs. Vermeire, an illegitimate child, presented an inheritance claim to a Brussels Court of First Instance which was ruled out by the still unchanged Belgian law, but clearly warranted under the ECHR.869 In these circumstances, the Court of First Instance adhered to the terms of the ECHR and granted Mrs. Vermeire the same inheritance rights as legitimate children, in contravention of the Belgian law.870

On appeal, however, the Brussels Court of Appeal quashed the judgment in first instance and denied Mrs. Vermeire her right of inheritance. The Court of Appeal followed the Belgian law rather than the ECHR, because there were various ways to comply with Belgium’s obligations under the ECHR and, the Court of Appeal held, those choices should be made by the legislature and not the courts.871 The Belgian Court of Cassation upheld this decision.872 Thus, the higher Belgian courts in this particular case sanctioned a breach of an international obligation in order to uphold the freedom of implementation. The ECtHR did not agree with this approach, finding that “[t]he freedom of choice allowed to a State as to the means of fulfilling its obligation under Article 53 [(now Article 46 ECHR)] cannot allow it to suspend the application of the Convention while waiting for such a reform to be completed...”873

It is not uncommon for national courts to uphold the freedom of implementation to the point of violating international obligations because the legislature and/or executive have

866 See above, text preceding note 644.
870 Id. at para. 10, citing the Court of First Instance:

“[T]he prohibition on discrimination between legitimate and illegitimate children as regards inheritance rights [was] formulated in the [1979 ECHR] judgment sufficiently clearly and precisely to allow a domestic court to apply it directly in the cases brought before it.”

871 Id. at para. 11, citing the Court of Appeal:

“[I]n so far as Article 8 (Art. 8) entails negative obligations prohibiting arbitrary interference by the State in the private or family life of persons residing within its territory, it lays down a rule which is sufficiently precise and comprehensive and is directly applicable, but this is not the case in so far as Article 8 (Art. 8) imposes a positive obligation on the Belgian State to create a legal status in conformity with the principles stated in the said provision of the Convention; (...) given that on this point the Belgian State has various means to choose from for fulfilling this obligation, the provision is no longer sufficiently precise and comprehensive and must be interpreted as an obligation to act, responsibility for which is on the legislature, not the judiciary.”

872 Id., para. 12.
873 Id. at para. 25–26.
not decided on a means to effectuate those obligations. But there is also contrary practice. National courts have rendered many judgments that uphold the principle of *pacta sunt servanda* over the freedom of implementation. Nowadays, such contrary practice is especially strong in human rights law, but it is not limited to that field. In the last decades, both national and international courts have given judgments in various fields of law that lay more emphasis on an effective enforcement of international law than on the State’s freedom of implementation. It should be noted that much of this contrary case law is inconsistent and contains the proverbial exceptions to the rule. National courts regularly curtail the State’s freedom of implementation in exceptional cases only to revert to more conservative positions in subsequent cases of a similar nature.

However, some of this contrary practice is of considerable authority and consistency. A particularly interesting example in this regard, both because of its consistency and its far-going consequences, is a quite recent group of cases in predominantly Latin-American courts that use Art. 27 of the Vienna Convention of the Law of Treaties to establish supremacy of international law over national law. The import of Art. 27 VCLT, which establishes that “a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty,” is on its face limited to inter-State relationships, to be settled on the international plane. Yet, several national judgments have credited Art. 27 with far-going effects in the national legal order.

In *Ekmekdjian v. Sofovich* (1992), a case concerning the right of reply under Art. 14 (1) ACHR, the Argentinean Supreme Court ascribed far-going effects to the incorporation of the VCLT in the national legal order, concluding that Art. 27 effectively required all State organs “to accord normative priority to treaties and imposed on them the obligation to emit the necessary regulations to ensure that treaty provisions be fully implemented.” Indeed, in *Ekmekdjian* the Supreme Court regulated the right of reply by judicial decree to make it effective, despite the fact that the Argentinean legislature had failed to establish by law the conditions under which the right could be exercised as envisaged in Art. 14 ACHR. Of broader importance was its holding that Art. 27 VCLT

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875 See for examples and a separate analysis of international law concerning the rights and duties of individuals below, para. 5.3.a.
877 See Ferdinandusse 2003, p. 65-100; Denza 2003, p. 419-420.
879 Art. 14 (1):

“Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish.”
requires State organs to give primacy to treaty obligations and ensure their effective application even in the face of contrary national law or gaps therein.\textsuperscript{881}

Furthermore, the Supreme Court explicitly rejected the proposition that States are at liberty to keep international law out of their national courts, stating that “it should be borne in mind that when the Nation ratifies a treaty which it has signed with another State, it is making an international commitment that its administrative and jurisdictional bodies will apply that treaty to the cases covered thereby, provided that it contains sufficiently specific descriptions of such cases to permit its immediate application.”\textsuperscript{882}

Argentinean courts have adhered to the interpretation of Art. 27 VCLT in\textit{ Ekmekdjian} in several later cases.\textsuperscript{883}

The Peruvian \textit{Consejo Supremo de Justicia Militar} followed the interpretation of Art. 27 VCLT of the Argentinean Supreme Court in the \textit{Barrios Altos} case (2001).\textsuperscript{884} Confronted with a judgment of the IACtHR demanding prosecutions of members of the military for certain crimes on the one hand, and two amnesty laws impeding those prosecutions on the other, the Peruvian military court relied \textit{inter alia} on Art. 27 VCLT to give effect to the international judgment. It ordered investigation and prosecution of the crimes, stating:

“That Peru is a party to the Vienna Convention on the Law of Treaties, which establishes by its twenty-seventh article that “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty,” in the spirit of which, the \textit{Consejo Supremo de Justicia Militar}, as an integral part of the Peruvian State, must comply with the international ruling in accordance with its terms and in such manner as to implement the decision it contains in its entirety, vesting it with full effect and eliminating any

\textsuperscript{881} Argentina, Supreme Court, \textit{Ekmekdjian v. Sofovich}, 7 July 1992, para. 19:

\textit{"Que la necesaria aplicación del Art. 27 de la Convención de Viena impone a los órganos del Estado argentino asignar primacía al tratado ante un eventual conflicto con cualquier norma interna contraria o con la omisión de dictar disposiciones que, en sus efectos, equivalgan al incumplimiento del tratado internacional en los términos del citado Art. 27."}

[That the necessary application of article 27 of the Vienna Convention places an obligation upon the organs of the Argentine State to give primacy to the treaty in the event that a conflict arises with any contrary provision of domestic law or in the event it has omitted to enact provisions and that such omission, in its effects, tantamount to non observance of the international treaty under the terms set out in article 27. – unofficial translation]

\textsuperscript{882} Id., para. 20:

\textit{“Que en el mismo orden de ideas, debe tenerse presente que cuando la Nación ratifica un tratado que firmó con otro Estado, se obliga internacionalmente a que sus órganos administrativos y jurisdiccionales lo apliquen a los supuestos que ese tratado contemple, siempre que contenga descripciones lo suficientemente concretas de tales supuestos de hechos que hagan posible su aplicación inmediata.”}


\textsuperscript{884} Peru, Consejo Supremo de Justicia Militar, \textit{In re Barrios Altos}, 4 June 2001, Case No. 494-V-94, on file with the author. See for a description in some detail below, Chapter V, para. 5.
obstacle presented by substantive or procedural internal law that might stand in the way of its due execution and full performance..."

In Spain, both the Tribunal Supremo and the Audiencia Nacional have in a more cursory manner invoked Art. 27 VCLT simultaneously with Art. 96 of the Spanish Constitution to require national law's conformity with international treaties. Chilean courts have likewise relied on a combination of national law and Art. 27 VCLT to substantiate the supremacy of treaties in the national legal order.

In these cases, one could say that the national courts involved use Art. 27 VCLT to import the supremacy of international law through the back door. A more traditional approach, which can be seen in other national courts, limits the import of Art. 27 to the international plane in order to preserve the freedom of the State to decide how and when to give effect to its international obligations. For example, an appeal to Art. 27 VCLT before the Senegalese Court of Cassation in order to overcome lacunae in Senegalese law and ensure the prosecution of Hissene Habré failed. The Court of Cassation did not explicitly address the argument but clearly refused to vest Art. 27 VCLT with the same far-going effects as its Latin-American counterparts did.

The contrast between Vermeire and Ekmekjian, both cases concerning the position of national courts where the legislature has failed to act in order to ensure the effective enjoyment of human rights, is notable. Unlike the higher Belgian courts in Vermeire, the Latin-American and Spanish courts in the cases just described place an effective enforcement of international obligations above prolonged freedom of implementation of the State. These courts assume that international law may in general be silent on how it is to be effectuated in the national legal order, but not that it is to be effectuated there. The

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885 Unofficial translation by Mason Weisz. Peru, Consejo Supremo de Justicio Militar, In re Barrios Altos, 4 June 2001, Case No. 494-V-94, on file with the author, unnumbered paragraph: "Que, el Perú es parte de la Convención de Viena sobre Derecho de los Tratados, la misma que establece en su artículo veintisiete que "no se puede invocar disposiciones de derecho interno como justificación del incumplimiento de un Tratado", en tal sentido, el Consejo Supremo de Justicia Militar, como parte integrante del Estado Peruano, debe dar cumplimiento a la sentencia internacional en sus propios términos y de modo que haga efectiva en todos sus extremos la decisión que ella contiene, otorgándole plenitud de efectos y levantado todo obstáculo de derecho material y procesal propios del derecho interno que impida su debida ejecución y su cumplimiento en forma integral."


887 See Chile, Court of Appeals (Santiago), In re Fernando Laureani Maturana y Miguel Krassnoff Marchenko, 5 January 2004 para. 51-52. Confirmed in Chile, Supreme Court, In re Miguel Angel Sandoval Rodriguez, 17 November 2004.

888 See e.g. U.K., Chancery Division, NEC Semi-Conductors Ltd and other test claimants v Inland Revenue Commissioners, 24 November 2003, para. 50 (rejecting an appeal to Arts. 26 and 27 VCLT as 'codification of public law principles'): "[Arts. 26 and 27 VCLT] are concerned with the obligations in international law between the states which are the parties to international treaties, not with issues of how private parties may or may not be able to rely against a state on the contents of a treaty."

889 Senegal, Cour de Cassation, Souleymane Guengueng et autres Contre Hissène Habré, Arrêt n° 14, 20 March 2001, 7th moyen de cassation.

890 See above, Chapter II, para. 3.3.e.
same assumption underlies the practice of most national courts to interpret national law in conformity with international law, to which I now turn.

5.2 The Principle of Consistent Interpretation

National courts all over the world interpret national law in conformity with international law to the greatest extent possible. This principle of consistent interpretation has a long history, and is also called the rule of presumptive conformity or *interprétation conforme*. It is found in Argentina, Botswana, Germany, Japan, the Netherlands, Switzerland, the U.K., the U.S., and many other States on all continents. Some commentators have judged State practice sufficiently consistent to

891 See Conforti 1997, p. 11 (calling the presumption of conformity of domestic law to international law “the most common criterion” in case-law of national courts regarding human rights); Lauterpacht 1970, p. 157.
894 See Botswana, Court of Appeal, Unity Dow v. Attorney-General of Botswana, 3 July 1992, 1994 (6) Butterworths Constitutional Law Reports 1 at 139-140:

“[I]t is the clear duty of this court when faced with the difficult task of the construction of provisions of the Constitution to keep in mind the international obligation. If the Constitutional provisions are such as can be construed to ensure the compliance of the State with its international obligations then they must be so construed. It may be otherwise, if fully aware of its international obligations under a regime creating treaty, convention, agreement or protocol, a State deliberately and in clear language enacts a law in contravention of such treaty, convention, agreement, or protocol.”


“[T]here is a presumption, albeit rebuttable, that our municipal law will be consistent with our international obligations [...]I do not doubt that, in considering how far we should extend the application of contempt of court, we must bear in mind the impact of whatever decision we may be minded to make upon the international obligations assumed by the United Kingdom under the [ECHR].”

See also Denza 2003, p. 433; Cassese 1985, p. 356; Buergenthal 1992, p. 360-361.
900 In the U.S., the principle is generally called the Charming Betsy canon, after the 1804 Supreme Court case that stated that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.” U.S., Supreme Court, Murray v. The Schooner Charming Betsy, 1804, 6 U.S. (2 Cranch) 64 at 118. See for a recent application U.S., United States Court of International Trade, The Timken Company v. U.S., 5 September 2002, 240 F.Supp.2d 1228 at 1238-1239 (“While an unambiguous statute will prevail over a conflicting international obligation, an ambiguous statute should be interpreted so as to avoid conflict with international obligations.”). See also Rogers 1999, p. 36-73; Bradley 1998; Rogers 1998.
901 See Betlem and Nolkaemper 2003, p. 575 (citing examples from Australia, Israel and the U.K.); Stirling-Zanda 2000, p. 127-129 (Italy, Portugal, Germany and Greece); Benvenisti 1994, notes 28 and 29 (Canada, Israel, Namibia and Zimbabwe); Jacobs 1987, p. xxvi (mentioning “the principle common to many systems that [domestic] legislation should wherever possible be so construed as not to conflict with the international obligations of the State”, followed by country reports describing the canon of construction
infer "an international duty of [national] courts to interpret, within their constitutional mandates, national law in the light of international law." 902 Indeed, it appears that the principle of consistent interpretation is a general principle of law in the sense of Art. 38 (1) sub c ICJ Statute. 903 Even if national courts regularly fail to interpret their laws in such a way as to heed relevant international obligations, they seldomly if ever dispute the existence of the principle. 904 Numerous States have embodied the principle of consistent interpretation in their national laws, either explicitly 905 or implicitly. 906 That does not mean, however, that in those States the principle is of national origin. In many of these cases the legislature followed the courts, rather than the other way round. Both in South-Africa and Russia, for

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902 Betlem and Nollkaemper 2003, p. 574.
903 See Benvenisti 1994, p. 428 ("[T]he may well be considered a general principle of law, that domestic law is prima facie compatible with international law."); Committee on Economic, Social and Cultural Rights, General comment 9, 3 December 1998, UN Doc E/C.12/1998/24, para 15:

"It is generally accepted that domestic law should be interpreted as far as possible in a way which conforms to a State's international legal obligations. Thus, when a domestic decision maker is faced with a choice between an interpretation of domestic law that would place the State in breach of the [International Covenant on Economic, Social and Cultural Rights] and one that would enable the State to comply with the Covenant, international law requires the choice of the latter.");

HRC, Concluding Observations on Ireland, Doc. CCPR/C/79/Add.21, 3 August 1993, para. 18 ("Notwithstanding that the [ICCPR] cannot be directly invoked in the [Irish] courts, the need to comply with the international obligations should be taken fully into account by the judiciary."). Cf. Iwasawa 1998, p. 83 ("In most states, the principle is established that courts must interpret domestic laws in conformity with international law.")

904 See e.g. Barak-Erez 2004, p. 615.
905 See Section 233 of South-Africa's 1996 Constitution:

"When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

See also Section 39 (1); Art. 13 (2) Ethiopia's 1994 Constitution:

"The fundamental rights and freedoms specified in this Chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and International instruments adopted by Ethiopia."

906 See Art. 17 (1) of Russia's 1993 Constitution:

"The basic rights and liberties in conformity with the commonly recognized principles and norms of international law shall be recognized and guaranteed in the Russian Federation and under this Constitution."

See also Art. 7 (1) of Hungary's Constitution, cited above, text preceding note 508 and Hungary, Constitutional Court, Decision No. 53/1993, On War Crimes and Crimes against Humanity, 13 October 1993, English translation in Sólyom/Brunner 2000, p. 273-283 at 277:

"Article 7 § (1) of the Constitution also means that by the Constitution's order, the Republic of Hungary participates in the community of nations; this participation, therefore, is a constitutional command for domestic law. It follows therefrom [that the Constitution and domestic law must be interpreted in a manner whereby the generally recognized international rules are truly given effect."
example, the courts adhered to the principle of consistent interpretation before their constitutions instructed them to do so. Likewise, the English courts accepted an obligation to interpret national law in conformity with the ECHR long before Section 3 of the Human Rights Act codified it.

National courts approach the principle of consistent interpretation from two different angles. First, courts may concentrate on the intent of the legislature and strive to honor it. In doing so, they consider internationalist interpretation to be the most accurate way to ascertain the meaning of the national law. According to this theory, the legislature would only violate international law after explicit deliberation and motivation. If such explicit intent to violate can not be found, the law must have been meant to conform to international law. While the result is international law friendly, the motivation behind it is to honor national rather than international law.

Second, courts may be focused more on honoring international obligations than on finding the most accurate interpretation of national law. In such cases, the reasoning of the courts often evinces a strong urge to uphold international law. A historic example

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907 See respectively Dugard 1997, p. 84-86; Danilenko 1999, p. 56.
908 Section 3 (1) 1998 Human Rights Act, available at www.legislation.hmso.gov.uk ("So far as it is possible to do so, legislation and subordinate legislation must be read and given effect in a way which is compatible with the [European] Convention rights.").
909 See e.g. U.K., Court of Appeal, Schering Chemicals Ltd v. Falkman Ltd, 27 January 1981, [1982] Q.B. 1 at 18, per Lord Denning (“I take it that our law should conform so far as possible with the provisions of the European Convention on Human Rights.”); U.K., House of Lords, Derbyshire County Council v Times Newspapers Limited, 1992, (1992) 1 Q B 770 at 830, per Lord Butler-Sloss:

“[T]he principles governing the duty of the English court to take account of article 10 [ECHR] appear to be as follows: where the law is clear and unambiguous, either stated as the common law or enacted by Parliament, recourse to article 10 is unnecessary and inappropriate. [...] But where there is an ambiguity, or the law is otherwise unclear or so far undeclared by an appellate court, the English court is not only entitled but, in my judgment, obliged to consider the implications of article 10.”

See also Meron 1989, p. 116-117.
910 See Rogers 1998, p. 640; Gulmann 1987, p. 32-33 (describing consistent interpretation in Danish law and distinguishing the rule of interpretation, that focuses on compliance with international obligations, and the rule of presumption, that focuses on the intent of the legislature).
911 See Betlem and Nolkaemper 2003, p. 576.
912 See Australia, High Court, Newcrest Mining (WA) Ltd v The Commonwealth, 14 August 1997, 190 CLR 513 at 657-658, per Kirby J:

“[T]he inter-relationship of national and international law, including in relation to fundamental rights, is "undergoing evolution". [...] To the full extent that its text permits, Australia's Constitution, as the fundamental law of government in this country, accommodates itself to international law, including in so far as that law expresses basic rights." - footnotes omitted;

Australia, High Court, Minister for Immigration and Ethnic Affairs v Teoh, 7 April 1995, 183 CLR 273 at 287, per Mason CJ and Deane J:

“It is accepted that a statute is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law. [...] In this context, there are strong reasons for rejecting a narrow conception of ambiguity. If the language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations which it imposes on Australia, then that construction should prevail.”;
is the British case *Le Louis* (1817), where Lord Stowell stated that "no nation can privilege itself to commit a crime against the law of nations by a mere municipal regulation of its own... the Legislature must be understood to have contemplated all that was within its power, and no more."913 Some modern cases take such an internationalist approach to the principle that they effectively transform it into a mandate to uphold international obligations rather than use it as a tool to resolve ambiguities in national law.914

While the results of these two approaches can differ considerably,915 in practice the two categories can not always be adequately separated. Many national judgments silently adhere to the principle of consistent interpretation without clear motivation.916 Other judgments fuse the two approaches with varying emphasis on one or the other.917 For example, courts may sanction a breach of international law by an ambiguous national law only if the legislature clearly intended to bring about that factual situation and explicitly stated its intent to breach the international obligation by doing so.918 In the absence of an explicit intention to breach, the intent of the legislature to bring about the specific result is not enough and will be overruled by the court in favour of an internationalist interpretation.919

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"This Court has in numerous cases emphasised that while discussing constitutional requirements, court and counsel must never forget the core principle embodied in the International Conventions and Instruments and as far as possible give effect to the principles contained in those international instruments. The Courts are under an obligation to give due regard to International Conventions and Norms for construing domestic laws more so when there is no inconsistency between them and there is a void in domestic law."

917 Compare e.g. in Germany, Bundesverfassungsgericht, *In re G.*, 14 October 2004, 2 BvR 1481/04, para. 30-33 to 46. See also Rogers 1998, p. 640-645.
918 See Conforti 1997, p. 12 (stating that this rule is followed mostly by American and Swiss courts).
919 See Italy, Court of Cassation, *Ministero Finanze v. Societa Compagnia di Navigazione Marsud*, 20 October 1976, 3 Italian Yearbook of International Law 361 at 364:

"[T]t is difficult to imagine that the State would wish to break an agreement which it had just recognized. Use must, therefore, be made of the principle of interpretation which requires that, failing written provision to the contrary, the State must, when enacting a provision, be presumed to have intended to honour rather than to breach international commitments. The fact that, as the preparatory work on the provision makes clear, the legislature (wrongly) considered the introduction of the new charge to be compatible with the agreement and on that account intended it to apply to GATT-originated goods as well, is in no sense a conclusive reason for the adoption of an interpretation consonant with that intent;"

It is also not uncommon to see national courts pay lip-service to the goal of ascertaining legislative intent, but go to such lengths to avoid violations of international law that the resulting judgments really belong to the second, internationally oriented category. These cases generally involve national laws that are in conflict with international law rather than ambiguous on their face,920 and the resulting judgments hardly disguise their dedication to the enforcement of international law.921 In Sharon and Yaron (2003), the Belgian Court of Cassation first acknowledged that Art. 5 (3) of Belgium’s 1993 Law relating to the suppression of grave violations of international humanitarian law ruled out a defense of immunity.922 However, it then “interpreted” this provision in such a way as to avoid a violation of the international obligation to grant immunity that had just been affirmed by the ICJ in Congo v. Belgium.923 The Court of Cassation held that “if this provision of Belgian domestic law were interpreted as setting aside the immunity principle of customary international criminal law, this provision would contravene the aforementioned principle; that the aforementioned rule cannot therefore be considered to have such a meaning, but instead must be understood as only excluding the official capacity of a person as a basis for penal non-accountability for the crimes enumerated in this statute.”924 Thus, in order to avoid a violation of international law, Belgium’s highest court effectively overruled the clear intent of the legislature925 to set aside immunity for core crimes prosecutions under the guise of interpretation.

920 See Benvenisti 1994, p. 428 (calling the principle “a potent tool that judges in a great number of jurisdictions use to apply international norms despite apparent conflicts with domestic law”).
921 See e.g. U.S., Court of Appeals (Fifth Circuit), United States v Columba-Colella, 604 F.2d 356 at 360-361 (federal court avoided extraterritorial application of very general but not ambiguous criminal statute in violation of international law by deciding “that because the defendant’s act in this case is beyond its competence to proscribe, Congress did not intend to assert jurisdiction here under 18 U.S.C. para. 2313,” and ended its judgment with the statement that “[the result we reach is part of the price a nation must pay to support mutuality of comity between sovereign nations.”). But see for a different reading of this case Rogers 1999, p. 46-48.
922 Belgium, Court of Cassation, In re Sharon and Yaron, 12 February 2003, para. IV:

"Attendu que, sans doute, aux termes de l'article 5, § 3, de la loi du 16 juin 1993 relative à la répression des violations graves du droit international humanitaire, l'immunité attachée à la qualité officielle d'une personne n'empêche pas l'application de ladite loi;"

("Whereas, without doubt, in pursuance of Article 5, § 3 of the statute of June 16 1993, relating to the suppression of grave violations of international humanitarian law, immunity attaching to a person’s official status does not prevent application of the aforementioned statute;")

924 Belgium, Court of Cassation, In re Sharon and Yaron, 12 February 2003, para. IV:

"Attendu que, toutefois, cette règle de droit interne contreviendrait au principe de droit pénal coutumier international précité si elle était interprétée comme ayant pour objet d'écarte l'immunité que ce principe consacre ; que ladite règle ne peut donc avoir cet objet mais doit être comprise comme excluant seulement que la qualité officielle d'une personne puisse entraîner son irresponsabilité pénale à raison des crimes de droit international énumérés par la loi;"

925 See Belgium, Law for the punishment of Genocide, Report of the Justice Commission, Belgian Senate, 1 December 1998, No. 1-749/3, para. II (B) sub 2 ("Famendement gouvernemental vise à confirmer explicitement la règle de la non-pertinence des immunités de juridiction et d'exécution dans la cadre de l'application de la loi"). See also Panken, et al. 2004, p. 27-31; Wouters 2004, p. 34.
Another rather extreme example of the fictitious construction of intent in order to observe an international obligation is the famous PLO Mission case. In 1987, the U.S. Congress passed an Anti-Terrorism Act that inter alia banned all PLO offices within the jurisdiction of the United States. Closing the PLO’s Observer Mission in New York would violate the Headquarters Agreement with the United Nations, but it was clear from the text and drafting history of the Act that Congress intended to do so. Accordingly, the Justice Department filed suit in the Federal District Court of the Southern District Court of New York to secure closure of the PLO Mission. Faced with this conflict between the Act and a treaty, Judge Palmieri, writing for the District Court, first affirmed Congress’ competence to violate a treaty and stated that other branches of government were bound to implement such a violation when Congress’ intent was sufficiently clear. In a surprising move, he then ruled that the intention to violate the Headquarters Agreement was not manifest in the Act, which declared it unlawful “notwithstanding any provision of law to the contrary” to establish or maintain PLO facilities or establishments within U.S. jurisdiction. Therefore, he “interpreted” the Act in conformity with the Headquarters Agreement, with the result that it did not apply to the PLO Mission in New York. Since the Justice Department decided not to appeal, this was the final word in the case and the PLO Mission remained open.

It should be noted that cases like In re Sharon and Yaron and the PLO Mission case give a good idea of the strong potential of the principle of consistent interpretation, but are not representative for its application in national courts. Most national courts do no more than what the principle requires: to interpret national law in conformity with international obligations, not to effectively overrule it. The principle of consistent interpretation under international law does not require contra legem interpretation as found in these more extreme cases.

The important role of the principle of consistent interpretation in national courts constitutes a limit to the freedom of interpretation in two ways. First, it disproves the theory that international law needs a “trigger” in national law in order to take effect on the national level. The fact that international law obliges national courts to heed international obligations in interpreting national law means that it is not silent on its effects in the national legal order, nor allows States to keep international norms out of their courts entirely.

927 See Reisman 1989, p. 415-17 (“It was of little concern to its drafters that the legislation would have violated an international agreement. Despite Judge Palmieri’s opinion, there was no question that such was its intention and consequence”).
929 Id., at 1471.
930 See also Germany, Bundesverfassungsgericht, In re G., 14 October 2004, 2 BvR 1481/04, para. 51: “Hat der [ECtHR] eine innerstaatliche Vorschrift für konventionswidrig erklärt, so kann diese Vorschrift entweder in der Rechtsanwendungspraxis völkerrechtskonform ausgelegt werden, oder der Gesetzgeber hat die Möglichkeit, diese mit der Konvention unvereinbare innerstaatliche Vorschrift zu ändern.”

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Second, as a more practical effect, the principle of consistent interpretation may bypass certain obstacles raised by national law to the application and effectuation of international law in national courts. For example, the case of *Timken Co. v. U.S.* (2002) demonstrates how the principle can be used by litigants to overcome limitations of standing. The *Timken* court held that a private party can not challenge government action on the ground that it violates the World Trade Organization agreement because national law explicitly precludes such an action. However, the court held, a litigant is free to claim that the government’s application and interpretation of United States antidumping law is contrary to congressional intent on the ground that it violates the WTO agreement which Congress intended to implement. Obviously, the result is by and large the same. Thus, in this case the principle was used to indirectly challenge rather than interpret national law on the basis of a treaty, where national law would normally rule out such a challenge. Such effects of the principle of consistent interpretation can significantly curtail the freedom of implementation in practice by limiting a State’s ability to control the justiciability of rules of international law and the standing of private parties to invoke them.

**5.3 Separate Regimes for Specific Categories?**

The previous two sub-paragraphs have discussed the limits of the freedom of implementation in general. It may also be asked whether this freedom of the State applies equally to all international law, or requires qualification for particular categories of international norms. In contemporary international law, this question appears most pertinent for international norms of a humanitarian character, as well as those of *jus cogens* status.

**5.3.a International Law of a Humanitarian Character**

Numerous commentators have noted that international law’s increased focus on and direct ties to the individual call into question the continued viability of the freedom of

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932 Id., at 1238.
933 Id.
935 Note in this regard that a recent study on the implementation of Security Council resolutions concludes that “despite the proliferation of sanctions, the quasi-constitutional nature of Security Council resolutions contrasts with the place and formal ranking given to these resolutions in domestic law” and “[d]espite the importance of these resolutions, at the domestic level, even in monist states they are assimilated to non self-executing treaty obligations and do not have immediate legal effects for individuals in member states.” Gowlland-Debbas 2003, p. 69-70. See elaborately Gowlland Debbas and Tehindrazanarivelo 2004. Therefore, Security Council resolutions will not be studied as a separate category of international norms here.
implementation as a general rule.\textsuperscript{936} Conceptually, the fact that international law is to a lesser and lesser extent exclusively inter-State law erodes the rationale for complete State control over its implementation at least to a certain degree.\textsuperscript{937} Where international law governs the rights and duties of individuals, it may not require the same freedom of implementation as where it functions primarily as a contract between States.\textsuperscript{938}

The question whether the general freedom rule applies to international law governing individuals is particularly pertinent for international law of a humanitarian character.\textsuperscript{939}

This category of international law has been loosely, and somewhat circularly, defined as those norms "that uphold and promote humanitarian principles and the human dignity of individuals."\textsuperscript{940} These norms are found in the closely related bodies of human rights law, international criminal law and international humanitarian law. There are strong indications that this field of international law has particular characteristics, which set it apart from public international law in general and have practical consequences for its creation and application. It may be asked whether these characteristics also have their bearing on the implementation regime for this field of law, possibly resulting in a modification of the freedom rule.

The first characteristic that distinguishes international law of a humanitarian character from general international law is its largely non-reciprocal nature.\textsuperscript{941} While this category of international law undoubtedly creates (often \textit{erga omnes}) obligations between States, it is not simply State-to-State law. The ICJ held long ago that the Genocide Convention "was manifestly adopted for a purely humanitarian and civilizing purpose. [...] Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties."\textsuperscript{942} The authoritative commentary on the Geneva Conventions asserts

\textsuperscript{936} See Stein 1994, p. 450:
"Despite the pervasive mutation in the international system, the state is not about to "whither away." Yet, because of this mutation, one may question the continued functionality of the rule that a state is free, subject only to the broad international "good faith" standard, to choose the ways and means of implementing a treaty to which it is a party, and specifically to determine whether a treaty should or should not directly apply in its internal legal order. Unfettered discretion in the hands of national political institutions is particularly problematic in the case of treaties aimed at granting rights to, and imposing obligations upon, individuals."."

\textsuperscript{937} Cf. Ferdinandusse 2003, p. 102-109; Nollkaemper 2000, p. 6-7, 13, 20 and 27; Bothe 1996, p. 302; Pescatore 1987, p. 274; Buergenthal 1985, p. 20 ("A legal system developed over centuries to regulate relations between states must make considerable conceptual adjustments to accommodate the extension of its normative reach to individuals.").

\textsuperscript{938} Cf. Kelsen 1942, p. 89-97.


\textsuperscript{940} See Rasulov 2003, p. 144 (drawing on the term "treaties of a humanitarian character" in Art. 60 (5) VCLT, which is generally understood to comprise human rights law as well as international humanitarian law). See also Provost 1995, p. 402-403.

\textsuperscript{941} See e.g. Common Art. 1 GI/IV; Art. 1(1) AP I; Art. 4(1) AP II. See also Meron 1989, p. 246.

\textsuperscript{942} ICJ, \textit{Reservations to the Convention on the Prevention and Punishment of Genocide (Advisory Opinion)}, 19511951 ICIJ 23.
that the obligation “to respect and to ensure respect for the present Convention in all circumstances” in common Art. 1 “is not an engagement concluded on a basis of reciprocity, binding each party to the contract only in so far as the other party observes its obligations. It is rather a series of unilateral engagements solemnly contracted before the world […] so universally recognized as an imperative call of civilization.”

Human rights bodies have adopted the same line of reasoning. The IACtHR has emphasized that “modern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States,” but rather that the ACHR is a “multilateral legal instrument or framework enabling States to make binding unilateral commitments not to violate the human rights of individuals within their jurisdiction.” Similar observations have been made by other human rights bodies. That international obligations of a humanitarian character are not to the same extent as general international law subject to a condition of reciprocity has various concrete consequences. It means obligations of this kind may not be affected by countermeasures, while relevant treaty provisions can not be terminated or suspended in case of a material breach by another contracting party. Second, the practice of international bodies shows a trend to limit not only the principle of reciprocity, but also the principle of consent for (at least certain) international obligations of a humanitarian character. The HRC has repeatedly asserted that “human rights treaties devolve with territory, and that States continue to be bound by the obligations under the [ICCPR] entered into by the predecessor State. Once the people living in a territory find themselves under the protection of the International Covenant on Civil and Political Rights, they cannot be stripped of that protection on account of a


946 See Art. 50 (1) sub b and c Articles on State Responsibility (2001) (excluding “obligations for the protection of fundamental human rights” and “obligations of a humanitarian character prohibiting reprisals” from obligations that can be affected by countermeasures). Note that in this article, obligations of a humanitarian character refer to humanitarian law only, while human rights law is mentioned separately. See Commentary to Art. 50, p. 336.

947 See Art. 60 (5) VCLT (prohibiting the termination or suspension of “provisions relating to the protection of the human person contained in treaties of a humanitarian character” in case of the material breach of a treaty).
change in sovereignty."\textsuperscript{948} This position thus denies States the choice to be bound by the ICCPR or not in respect of territories which they have acquired from States Parties to the Covenant. It further implies "that international law does not permit a State which has ratified or acceded or succeeded to the Covenant to denounce it or withdraw from it."\textsuperscript{949} There is also support for the assertion that treaties of a humanitarian character are subject to automatic succession for new States\textsuperscript{950} and a strong presumption against the admissibility of reservations, which, however, falls short of a total ban.\textsuperscript{951}

Likewise, the ICJ has observed on different occasions that "a great many rules" of humanitarian law are "fundamental to the respect of the human person" as well as "elementary considerations of humanity", and "are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law."\textsuperscript{952} Of course, all customary international obligations must be observed also by States that have not ratified treaties containing identical norms. This is not particular for international law of a humanitarian character. However, the language quoted in the paragraphs above suggests that something more is at stake than just the familiar situation of parallel sources of international obligations. Terms like "an imperative call of civilization," "elementary considerations of humanity" and "intransgressible principles," suggest that these norms are always binding, at least partly because of their humanitarian character.\textsuperscript{953}

Third, it appears that the formation of new customary rules of a humanitarian character is subject to more lenient demands than those for customary international law in general. This method of ascertaining custom essentially puts more emphasis on the requirement of

\textsuperscript{948} HRC, Concluding Observations on Portugal (Macau), 4 November 1999, Doc. CCPR/C/79/Add.108, para. 3. See also HRC, Concluding Observations on Portugal, 5 May 1997, Doc. CCPR/C/79/Add.77, para. 4 and references cited there.

\textsuperscript{949} HRC, General Comment 26 (Continuity of obligations), 8 December 1997, para. 5.


\textsuperscript{952} ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 8 July 1996, para. 79 (quoting Corfu Channel 1949, 1949 IJC 22).

\textsuperscript{953} See ICJ, Reservations to the Convention on the Prevention and Punishment of Genocide (Advisory Opinion), 1951 IJC 23:

"The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (I) of the General Assembly, December 11th 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation." (emphasis added)
opinio juris, and less on that of State practice. Courts and commentators speak in this regard of an “enlightened analysis” of customary law, the utilization of opinio necessitatis or modern positivism. The ad hoc tribunals have relied on it for important findings, such as the existence of individual criminal responsibility for acts committed in internal armed conflicts. Recently, the Ethiopia-Eritrea Arbitration Commission observed that there are “important modern authorities [...] for the proposition that rules that commend themselves to the international community in general, such as rules of international humanitarian law, can more quickly become part of customary international law than other types of rules found in treaties.” While this particular method is closely tied to the limited direct and public interaction between States in this field of law, the humanitarian character of the norms in question also plays a role.

Yet, the law is more complex than many of the statements above suggest. An elaborate study on the principle of reciprocity in human rights and humanitarian law published in 1995 concludes that “reciprocity permeates both bodies of law without constituting a fundamental principle of either.” Humanitarian law may contain a strong presumption against reprisals, but various States have explicitly asserted their right to resort to reprisals under certain circumstances as recently as their ratification of the ICC Statute. Also, two recent studies conclude that State practice does not on the whole reflect a principle of automatic succession for treaties of a humanitarian character.

Thus, it would be an overstatement to say that the principles of reciprocity and consent play no role at all in international law of a humanitarian character. In this regard, it is important to realize that international law of a humanitarian character is, and long has been, the subject of continuous efforts by various actors to enhance its efficacy, inter alia through a diminution of the role of reciprocity and consent. Humanitarian law in particular was traditionally a fully contractual and reciprocal field of law, but has

956 See ICTY, Trial Chamber, Kupreskic, 14 January 2000, para. 527.
958 See below, Chapter V, para. 3.1.
960 See Steiner and Alston 2000, p. 227-232; Meron 1989, p. 44:
developed more and more towards a model of unconditional and universal application.\textsuperscript{964} This development explains why law of a humanitarian character and its constitutive instruments contain both reciprocal and non-reciprocal elements, sometimes in awkward combinations.\textsuperscript{965}

International courts and bodies, as well as NGO's, play a leading role in the quest for a more effective international law of a humanitarian character and the corresponding curtailment of the principles of reciprocity and consent. There is, therefore, good reason for a critical assessment of their findings on the particular nature of this field of law, as these may well be more progressive than existing law. A certain scepticism is in order especially when particular effects, such as unconditional and universal application, are grounded not on legal arguments but on normative appeals to notions such as an "imperative call of civilization" or "elementary considerations of humanity." Such normative claims can also be characterized as techniques in a hegemonic struggle for greater control between different actors in international law, and there may indeed be some truth in the oft-cited notion that "whoever invokes humanity wants to cheat."\textsuperscript{966}

Even when leaving aside the institutional interests of the actors involved, appeals to the tenets of humanity and civilization may be criticized as indeterminate and therefore unworkable. This indeterminacy calls into question exactly which rule and principles of a humanitarian character are subject to particular regimes such as a limitation of the principles of reciprocity and consent. After all, the obligation to refrain from genocide can be more convincingly characterized as an "imperative call of civilization" than, say, the obligation to guarantee the right of reply.\textsuperscript{967} In general, the imperative character of legal rules is more often than not debatable. For example, some people would characterize bull-fighting as "a violation of the plain dictates of the law of humanity,"\textsuperscript{968} whereas others would certainly disagree.

Still, it seems there is sufficient consensus on at least the limited core of standards of humanity and civilization necessary to attach tangible legal consequences to such notions. Few people would deny that acts of genocide or crimes against humanity are incompatible with basic notions of humanity and civilization.\textsuperscript{969} This core, however, is

\textsuperscript{965} Compare e.g. common Arts. 1 and 2 Geneva Conventions.
\textsuperscript{966} See Koskenniemi 2003, p. 97 and 108-110.
\textsuperscript{967} See on the right of reply as embodied in the ACHR above, note 879.
\textsuperscript{968} U.S., Supreme Judicial Court of Massachusetts, Commonwealth v. Tilton, October Term, 1844, 49 Mass. 232 at 234-235:

"[T]he game or sport of cock-fighting is unlawful, because it is a violation alike of the prohibitions of a statute, and of the plain dictates of the law of humanity [...] As being barbarous and cruel, leading to disorder and danger, and tending to deaden the feelings of humanity, both in those who participate in it, and those who witness it, it appears to us to stand on the same footing with bull-fighting..."

\textsuperscript{969} See Koskenniemi 1990, p. 1946-1947:

"It is inherently difficult to accept the notion that states are legally bound not to engage in genocide [...] only if they have ratified and not formally denounced the 1948 Genocide Convention. Some norms seem so basic, so important, that it is more than slightly artificial to