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## The Role of National Courts in Inducing Compliance with International and European Law—A Comparison

*André Nollkaemper\**

### 1. Introduction

This chapter assesses how national courts can induce compliance with international and European law, and compares the relative strengths of national courts in this regard under, respectively, international and European law.

The chapter is based on the assumption that while national courts are obviously not the primary or only cause of compliance,<sup>1</sup> they can, in particular circumstances and under particular conditions, ensure that states comply with their obligations under international and/or European law, both in individual cases and at a more structural level. In this context it is to be recalled that independent courts are a critical element of the rule of law.<sup>2</sup> This is most obviously so under national law, and it is indeed in that context that the common understanding of independent courts as core elements of the rule of law finds its basis. But given the support for the rule of law at European<sup>3</sup> and international level,<sup>4</sup> and given the intertwining between European, international, and national law,<sup>5</sup> it is a compelling argument that (national) courts

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<sup>1</sup> Other and probably more important mechanisms to secure compliance include self-interest and reputation: J.L. Goldsmith and E.A. Posner, *The Limits of International Law* (2005); A.T. Guzman, *How International Law Works* (2007). Of course, there is good evidence that accountability processes can help to spur compliance; see Koh, 'Transnational Legal Process', 75 *Nebraska Law Review* (1996) 181, at 194–206.

<sup>2</sup> B.Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (2004), at 124; Raz, 'The Rule of Law and its Virtue', 83 *The Law Quarterly Review* (1977) 195, at 200.

<sup>3</sup> Art 2 of the Treaty on the European Union, OJ 2010 C 83/13.

<sup>4</sup> See 2005 World Summit Outcome, UNGA Res 60/1, 24 October 2005, para 134; UNGA Res 63/128, 15 January 2009; UNSC Presidential Statement, S/PRST/2006/28, 22 June 2006.

<sup>5</sup> See generally on the intertwining of international and domestic law Ferrari Bravo, 'International and Municipal Law: The Complementarity of Legal Systems', in R. St. J. Macdonald and D.M. Johnston (eds), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (1986) 715, at 738; H. Keller, *Rezeption des Völkerrechts* (2003), at 6; Thürer, 'Völkerrecht und Landesrecht.

likewise should play a key role in the protection of the rule of law at European and international level. They will not guarantee effective compliance. But the rule of law is not only and certainly not primarily concerned with guaranteeing or causing general patterns of rule-conforming behaviour; it is also concerned with ensuring compliance in those cases where public powers choose not to comply with their obligations.

Comparing the role of national courts in inducing compliance with European and international law may not be to some observers an obvious approach, given the structural differences between the international and the national legal order. However, both the common roots and the shared ideals justify a comparative perspective.

As to the common roots, for some time subsequent to the introduction of Community law, in the late 1950s, there was little difference in the way in which national courts handled arguments involving public international law, on the one hand, and E(E)C law, on the other. The courts' reception of *all* rules of international law, including E(E)C law, was governed by disparate constitutional provisions and the undeveloped doctrine on the invocability of treaties in national courts set forth by the Permanent Court of International Justice (PCIJ) in the *Danzig Case*.<sup>6</sup> According to the common wisdom of modern international legal scholarship, all this changed with the judgments of the European Court of Justice (ECJ) in *Van Gend en Loos*<sup>7</sup> and *Costa/ENEL*.<sup>8</sup> The Court's finding that E(E)C law was different from ordinary international treaties was on the whole accepted by member states; it transformed EC law from being purely inter-state law to include rights and responsibilities of private parties, and brought national courts to centre stage in the enforcement of EC law. In cooperation with the ECJ, national courts proceeded to develop subtle and intricate doctrines pertaining to the rights and liabilities of private parties in regard to EC law. When we contrast this development with the common understanding of public international law in general, which in all major textbooks is still depicted as a system of law whose enforcement is primarily in the hands of *states*,<sup>9</sup> public international law looks 'ordinary' indeed.

As to the shared ideals, EU law is one particularly successful form of deep integration—it has parted ways with general international law. But it is not principally different and it constitutes a model that may be followed in other regions and perhaps in functional regimes. Charles Leben wrote:

Community law is 'successful international law', and...is thus a possible horizon of international law, indicating the route that international law must follow if it is to move forward.<sup>10</sup>

Thesen zu einer theoretischen Problemumschreibung', 9 *Schweizerische Zeitschrift für internationales und europäisches Recht* (1999) 217; Weiler, 'The Geology of International Law: Governance, Democracy and Legitimacy', 64 *Heidelberg Journal of International Law* (2004) 547; Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis', 15 *European Journal of International Law* (2004) 907.

<sup>6</sup> *Jurisdiction of the Courts of Danzig (Advisory Opinion)*, 1928 PCIJ Rep Series B, No 15, at 17–18.

<sup>7</sup> Case 26/62, *Van Gend en Loos*, [1963] ECR 1.

<sup>8</sup> Case 6/64, *Costa v ENEL*, [1964] ECR 585.

<sup>9</sup> P. Malanczuk, *Akehurst's Modern Introduction to International Law* (1997), at 3–5.

<sup>10</sup> Leben, 'Hans Kelsen and the Advancement of International Law', 9 *European Journal of International Law* (1998), at 298.

Indeed, the differences in how courts treat public international law, on the one hand, and EC law, on the other, are less black and white than is often assumed. The distinctive features of the operation of Community law ‘almost all exist but in a far less developed and efficient state in the international legal order’.<sup>11</sup> In certain legal contexts, the reception of public international law has moved beyond the purely inter-state model, and shares some features of EC law.

There is another aspect to the relationship between international and European law that makes it relevant to consider international and European law in a comprehensive manner. International law has increasingly become part of the legal order of the EU.<sup>12</sup> In practical terms, the ECJ case law ‘absorbs’ international agreements—both mixed and non-mixed<sup>13</sup>—to which the Community is a party<sup>14</sup> and also, to a degree, decisions of international organizations and customary international law, into the Community legal system. As far as international agreements are concerned, this case law is based on what is now Article 216(2) TFEU, according to which international agreements concluded under the procedure laid down in that article ‘shall be binding on the institutions of the Community and on Member States’.<sup>15</sup>

To the extent that international law indeed becomes part of the European legal order, the application of ‘Europeanized’ rules of international law is no longer only a function of the combination of weak principles of international law and constitutional law, but becomes a matter of EU law proper, notably with a view to its uniform application and interpretation.<sup>16</sup> Rules of international law become a part of the legal order of the EU and can ‘profit’ from the principles and procedures governing the role of national courts, such as direct effect, consistent interpretation, and liability.

The chapter first discusses the relative role of courts as agents of compliance (Section 2) and the key condition of independence of courts (Section 3). It then examines four key principles that govern the practice of national courts in terms of their compliance-effects: supremacy, direct effect, consistent interpretation, and liability (Section 4). Section 5 explores the interaction between international and

<sup>11</sup> *Ibid*, at 295.

<sup>12</sup> See generally J. Wouters, P.A. Nollkaemper and E. de Wet (eds), *The Europeanization of International Law* (2008).

<sup>13</sup> See Case 12/86, *Demirel v Stadt Schwabisch Gmuend*, [1987] ECR 3719, Rec 9 and Case C-13/00, *Commission v Ireland*, [2002] ECR I-2943, Rec 14: ‘mixed agreements concluded by the Community, its Member States and non-member countries have the same status in the Community legal order as purely Community agreements, as these are provisions coming within the scope of Community competence’.

<sup>14</sup> See already Case 181/73, *Haegemann v Belgian State*, [1974] ECR 449, Rec 5, where it is held that the provisions of an international agreement concluded by the Community ‘from the coming into force thereof, form an integral part of Community law’.

<sup>15</sup> See Case 104/81, *Kupferberg*, [1982] ECR 3641, Rec 13, where it is derived from this provision that ‘... [i]n ensuring respect for commitments arising from an agreement concluded by the Community institutions the Member States fulfill an obligation not only in relation to the non-member country concerned but also and above all in relation to the Community which has assumed responsibility for the due performance of the agreement’. See also Case 12/86, *Demirel*, *supra* note 13, Rec 11; Case C-13/00, *Commission v Ireland*, *supra* note 13, Rec 15.

<sup>16</sup> Case 104/81, *Kupferberg*, *supra* note 15, Rec 15.

European law in so far as they relate to the practice of national courts. Finally, Section 6 draws some conclusions.

## 2. Courts as Agents of Compliance

### A. The Concept of Compliance

The concept of compliance is used here to refer to the conformity of behaviour of states with a specified legal rule.<sup>17</sup> The concept of compliance does not necessarily entail a cause–effect relationship between a rule and behaviour: it is ‘agnostic about causality’.<sup>18</sup> The only question is whether behaviour conforms to a rule.<sup>19</sup>

In the concept of compliance as used here, the law is external to behaviour. It assumes that what the law is can be objectively defined with reference to its source, and in principle is not dependent on compliant or non-compliant behaviour. Approaches that make law more dependent on actual behaviour<sup>20</sup> make the concept of compliance largely irrelevant. Even though it is recognized that non-compliant behaviour can lead to changes in the law, particularly as a matter of customary law,<sup>21</sup> the core of the problem of compliance as it presents itself in respect to both European law and international law is not so much states seeking to develop new rules, as it is a problem of states simply failing to comply with their obligation without any intention to effect a change in the law.

The concept of compliance is distinguished from implementation. This latter term refers to the process of putting obligations into practice, whether at international level or (in the context of this chapter) at national level.<sup>22</sup> Implementation is

<sup>17</sup> Raustiala and Slaughter, ‘International Law, International Relations and Compliance’, in W. Carlsnaes, T. Risse and B. Simmons (eds), *The Handbook of International Relations* (2002), at 539; Simmons, ‘Money and the Law: Why Comply with the Public International Law of Money’, 25 *Yale Journal of International Law* (2000) 323, at 333, referencing O. Young, *Compliance and Public Authority* (1979), at 2; Kingsbury, ‘The Concept of Compliance as a Function of Competing Conceptions of International Law’, 19 *Michigan Journal of International Law* (2000) 345. Kingsbury also notes that ‘the concept of “compliance” with law does not have, and cannot have, any meaning except as a function of prior theories of the nature and operation of the law to which it pertains. “Compliance” is thus not a free-standing concept, but derives meaning and utility from theories, so that different theories lead to significantly different notions of what is meant by “compliance”’. Thus as a research concept, “compliance” cannot stand on its own, but must depend on a stipulated and shared theory of law.’ *Ibid.*, at 346.

<sup>18</sup> Raustiala and Slaughter, *supra* note 17. But see Ho, ‘Compliance and international Soft Law: Why do Countries Implement the Basle Accord?’, 5 *Journal of International Economic Law* (2002) 647, at 649 (defining ‘compliance as state behavior that conforms to and arises out of an obligation of international law’). Also Koh, ‘Review Essay: Why Do Nations Obey International Law?’, 106 *Yale Law Journal* (1997) 2599, discusses compliance in terms of obedience, suggesting some form of causation.

<sup>19</sup> That of course does not preclude that the question is examined, as is done in this article, how a particular agent or factor, such as courts, may or may not contribute to conformity.

<sup>20</sup> For approaches that make the concept of law itself more dependent on behaviour, see eg, A.T. Guzman, *How International Law Works* (2007); J. Alvarez, *International Organizations as Law-makers* (2006).

<sup>21</sup> *Military and Paramilitary Activities in and Against Nicaragua, Nicaragua v United States, Merits, Judgment* (1986), ICJ Reports (1986) 14, para 186.

<sup>22</sup> Raustiala and Slaughter, *supra* note 17, at 539 (defining implementation as ‘the process of putting international commitments into practice: the passage of legislation, creating of institutions (both domestic and international) and enforcement of rules’).

often important for compliance, but it is neither a necessary<sup>23</sup> nor sufficient condition.<sup>24</sup> In particular, through the mechanisms of direct effect, courts may secure compliance without implementing measures.<sup>25</sup>

The term 'compliance' is also to be distinguished from the effectiveness of a particular rule. The term 'effectiveness' refers to the degree to which a rule contributes to achieving the goals of that rule.<sup>26</sup> Compliance generally helps effectiveness, but there may be effectiveness without compliance or compliance without effectiveness.<sup>27</sup> A regime can be effective with little compliance if it induces changes in behaviour that are not required by the rule, yet helps to achieve the objectives. On the other hand, a regime can have high compliance and still be ineffective.<sup>28</sup>

Finally, compliance needs to be distinguished from 'enforcement'. This term refers to processes of mechanisms 'by which the law is made effective'<sup>29</sup> and by which actors are compelled to comply with the law.<sup>30</sup> As a legal concept, it includes legal sanctions that can be applied to the violator with a view to compelling compliance.<sup>31</sup> The role of national courts can be a part of the process of enforcement, at least as far as their role in individual cases is concerned, since they can compel the political branches of the state into compliance with the law.

In short, this chapter is concerned with the role of courts in ensuring conformity between the acts of the legislature and political branches, on the one hand, and a predetermined rule of European and international law, on the other. It is not really dependent on implementation by these branches, and rather can be seen as a correction when such implementation is not forthcoming. The role of national courts may in specific cases be construed as enforcement, but that

<sup>23</sup> Ibid (noting that compliance can also happen without implementation through continuing practice that already happens to comply with international rules, or other events that happen to cause compliance with international rules).

<sup>24</sup> Simmons, *supra* note 17, at 333 (noting that implementation is 'the adoption of domestic rules or regulations meant to facilitate, but which themselves do not constitute, compliance with international agreements').

<sup>25</sup> See this chapter Section 4. C.

<sup>26</sup> Raustiala and Slaughter, *supra* note 17, at 539 (defining effectiveness as 'the degree to which a rule induces changes in behavior that furthers the rule's goals; improves the state of the underlying problem; or achieves its policy objectives'); O. Young (ed), *The Effectiveness of International Environmental Regimes: Causal Connections and Behavioral Mechanisms* (1999), at 1 (defining effectiveness as a 'regime that channels behavior in such a way as to eliminate or substantially ameliorate the problem that led to its creation'); Young, 'The Effectiveness of International Institutions: Hard Cases and Critical Variables', in J.N. Rosenau and E.-O. Czempiel (eds), *Governance Without Government: Order and Change in World Politics* (1992) 161 (stating that effectiveness 'impels actors to behave differently than they would if the institution did not exist or if some other institutional arrangement were put in place').

<sup>27</sup> Raustiala and Slaughter, *supra* note 17. This is also stated by Simmons, *supra* note 17, at 333.

<sup>28</sup> Raustiala and Slaughter, *supra* note 17. But see A. and A.H. Chayes, 'On Compliance', 47 *International Organization* (1993) 176, at footnote 3 (noting that 'compliance may be a fair first approximation surrogate for effectiveness').

<sup>29</sup> Smiley, 'Taking the Force out of Enforcement: Giving Effect to International Human Rights Law Using Domestic Immigration Law', 28 *California Western International Law Journal* (1998) 339, at 341–2 quoting *Black's Law Dictionary* 528 (1990, 6th edn). See for a narrower definition Hayashi, 'Soviet Policy on International Regulation of High Seas Fisheries', 5 *Cornell International Law Journal* (1972) 131, at 133 (referring to 'the process of putting rules of law into execution through actual use or threat of legitimate physical force').

<sup>30</sup> Ouma, 'Optimal Enforcement of Music Copyright in Sub-Saharan Africa: Reality or a Myth?', 9 *Journal of World Intellectual Property* (2006) 592.

<sup>31</sup> Ibid, at 592.

depends on the nature of the case, and is not a useful concept for the diversity of ways in which national courts can consider and apply rules of international law.

## B. Courts as Agents of Compliance

For the EU, the role of courts, both the ECJ and national courts, in inducing conformity of national law and policy with EU law is generally recognized.<sup>32</sup> The ECJ has established and obtained acceptance of the broad principle of direct integration of Community law into the national legal orders of the member states and of the supremacy of Community law.<sup>33</sup> By co-opting domestic courts, the legal order of the EU has helped to ensure compliance with EU law (however imperfect that may remain).<sup>34</sup> National courts also have remedied the lack of enforcement power of the ECJ. It has become impossible for governments to ignore EU law, without countering their own courts.<sup>35</sup> In the rule of law systems that characterize the legal systems of most member states, that will not be possible in a systemic form. The cooperation between national courts and the Court has produced what Weiler has called an ‘all-or-nothing effect’ requiring a state to either leave the Community or basically comply completely.<sup>36</sup>

At first sight, the situation in international law is entirely different. In most compliance theories, the role of courts is relatively marginal. In realist theory, courts obviously are not assigned any particular role as agents that have to secure compliance.<sup>37</sup> Also in rational choice theory, courts are considered as irrelevant. If it is accepted that states ‘do not comply with norms of [customary international law] because of a sense of moral or legal obligation; rather, their compliance and the norms themselves emerge from the states’ pursuit of self-interested policies on the international stage’,<sup>38</sup> courts will not play any relevant role. Goldsmith and Posner note that even domestic courts change their opinion of what customary international law is to suit their best interests.<sup>39</sup> Guzman attaches critical weight to such factors as reputation, reciprocity, and retaliation<sup>40</sup>—in none of them are (national) courts of much significance.

<sup>32</sup> Raustiala and Slaughter, *supra* note 17, at 541.

<sup>33</sup> Stein, ‘Lawyers, Judges, and the Making of a Transnational Constitution’, 75 *American Journal of International Law* (1981) 1.

<sup>34</sup> Raustiala and Slaughter, *supra* note 17, at 541; Mattli and Slaughter, ‘Law and Politics in the European Union: A Reply to Garrett’, 49 *International Organization* (1995) 183; Burley and Mattli, ‘Europe before the Court: A Political Theory of Legal Integration’, 47 *International Organization* (1993), at 41–76.

<sup>35</sup> Raustiala and Slaughter, *supra* note 17, at 541.

<sup>36</sup> Weiler, ‘Community, Member States, and European Integration: Is the Law Relevant?’, 21 *Journal of Common Market Studies* (1982) 39, at 55.

<sup>37</sup> D’Amato, ‘The Concept of Human Rights in International Law’, 82 *Columbia Law Review* (1982) 1110.

<sup>38</sup> J.L. Goldsmith and E.A. Posner, *A Theory of Customary International Law* (University of Chicago Law School, John M. Olin Law and Economics Working Paper, No 63, 1998), at 3.

<sup>39</sup> *Ibid.*, at 10.

<sup>40</sup> A.T. Guzman, *How International Law Works: A Rational Choice Theory* (2007).

Legitimacy theories likewise do not accord any particular role to national courts. For none of the four elements that Franck thought relevant as indicators of a rule's legitimacy—determinacy, symbolic validation, coherence, and adherence to a normative hierarchy—are national courts of any relevance.<sup>41</sup> Franck did recognize that *international* courts may play a relevant role. In respect of determinacy (or 'the ability of a text to confer a clear meaning'), courts have a role in clarifying international legal provisions.<sup>42</sup> In respect of symbolic validation, 'a new rule may be taken more seriously if it arrives on the scene under the aegis of a particularly venerable sponsor such as a widely ratified multilateral convention, or a virtually unanimous decision of the International Court of Justice.'<sup>43</sup> Franck also pointed to the International Court of Justice, various regional courts, and arbitral tribunals to show that the international legal system does have some measure of adherence to a normative hierarchy.<sup>44</sup> However, in none of this did he appear to assign any particular role to national courts.

The situation is not very different in regime theory. Though regime theorists focus on the role of institutions, they do not appear to accord any significant role to (national) courts. They theorize that states establish regimes when it is in their long-term interest to cooperate,<sup>45</sup> and regimes can tip the cost-benefit analysis towards compliance. In principle this may allow for a role of courts, as one form of institution, in explaining behaviour and thus compliance. However, it is significant that in Keohane's *After Hegemony*, the entire section of the book devoted to addressing the question of why states comply with international laws makes no mention at all of courts.<sup>46</sup>

Also in managerial theory, courts play a negligible role. Chayes and Chayes write that 'when nations enter into an international agreement of this kind, they alter their behavior, their relationships, and their expectations of one another over time in accordance with its terms'.<sup>47</sup> They credit a state's propensity to comply with international commitments to the fact that, first, the legal rules are largely endogenous and 'an assumption of rational behavior predicts that states have an interest in compliance with rules', and secondly, 'compliance is efficient from an internal, decisional perspective. Extant norms induce a sense of obligation in states to comply with legal undertakings'.<sup>48</sup> Courts play little to no role in their view of why states comply with international law. Even though Chayes and Chayes see ambiguity and indeterminacy of treaty provisions as one of the primary reasons for non-compliance,<sup>49</sup> due to the fact that compulsory adjudication is so rare and most interpretation issues do not arise in a two-party context that is easily amenable to a court setting, they do not see the role of courts as important for the interpretation or clarification of international law.<sup>50</sup>

<sup>41</sup> Franck 'Legitimacy in the International System', 82 *American Journal of International Law* (1988) 706.

<sup>42</sup> *Ibid.*, at 724.

<sup>43</sup> *Ibid.*, at 727. <sup>44</sup> *Ibid.*, at 752. <sup>45</sup> Raustiala and Slaughter, *supra* note 17, at 540.

<sup>46</sup> R. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (1984), at 98–107.

<sup>47</sup> A. and A.H. Chayes, *supra* note 28, at 176.

<sup>48</sup> Raustiala and Slaughter, *supra* note 17, at 542.

<sup>49</sup> Downs, 'Enforcement and the Evolution of Cooperation', 19 *Michigan Journal of International Law* (1998) 328.

<sup>50</sup> A. and A.H. Chayes, *supra* note 28, at 190.

Beyerlin and Marauhn, in an analysis that shares many features with managerial scholarship, note that the best way to attain compliance with international environmental law is through a flexible approach, including reporting, monitoring, fact-finding, consultation, education, training, and technology transfers, rather than traditional, repressive means of law enforcement.<sup>51</sup> Courts, again, are not attributed any particular relevance.

Other theories, however, do accord a role to national courts as agents of compliance.<sup>52</sup> In his *How Nations Behave*, Henkin views courts as one of the factors aiding compliance. While he argues that states comply with international law because of forces such as reciprocity, dislike of criticism, and desire for friendly relations,<sup>53</sup> he recognizes that the extent to which national institutions, including domestic courts, accept international law is a relevant factor.<sup>54</sup> Hathaway too recognizes that compliance in part is a matter of 'legal enforcement of the terms of the treaty', in addition to 'collateral consequences for state interests'.<sup>55</sup> Legal enforcement happens not only at the transnational level (where international bodies or other states that are party to the treaty respond to violations in ways provided for in the treaty), but also at a domestic level, where 'domestic actors use the country's own legal system to enforce the terms of international legal agreements'.<sup>56</sup>

The role of national courts as agents of compliance is best developed in the so-called transnational legal process theory, which in its explanation of compliance attributes considerable weight to the extent to which international law is incorporated in domestic legislation and given effect in the domestic courts.<sup>57</sup> Koh critiques the managerial theories of Chayes and Chayes and the legitimacy theories of Franck, as they overlook the 'process of interaction, interpretation, and internalization of international norms into domestic legal systems' which 'is pivotal to understanding why nations "obey" international law, rather than merely conform their behavior to it when convenient'.<sup>58</sup> He states that the most effective form of law enforcement 'is not the imposition of external sanction, but the inculcation of internal obedience'.<sup>59</sup> Courts, including domestic, regional, and international courts, have a role in the interpretation of international norms into the domestic legal system.<sup>60</sup> For Koh, '[j]udicial internalization occurs when

<sup>51</sup> U. Beyerlin and T. Marauhn, *Law-Making and Law-Enforcement in International Environmental Law After the 1992 Rio Conference* (1997).

<sup>52</sup> See also Ginsburg and Adams, 'Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution', 45 *William and Mary Law Review* (2004) 1229, at 1232 (arguing that pronouncements of third-party legal adjudicators can influence the behaviour of states towards compliance); Downs, *supra* note 49, at 328 discussing adjudication as mode of enforcement with international agreements, in particular in relation to regulatory agreements and that as multilateral organizations such as the EU or WTO increase their level of cooperation they also increase their level of enforcement).

<sup>53</sup> L. Henkin, *How Nations Behave* (1979), at 50–3, 60–8. <sup>54</sup> *Ibid.*, at 60–8.

<sup>55</sup> Hathaway, 'Between Power and Principle: An Integrated Theory of International Law', 71 *University of Chicago Law Review* (2005) 469, at 473. <sup>56</sup> *Ibid.*

<sup>57</sup> Koh, *supra* note 18, at 2602. See also R. Fisher, *Improving Compliance with International Law* (1981).

<sup>58</sup> Koh, *supra* note 18, at 2603.

<sup>59</sup> Koh, 'How Is International Human Rights Law Enforced?', 74 *Indiana Law Journal* (1998–1999) 1401.

<sup>60</sup> Koh, *supra* note 18, at 2640.

litigation in domestic courts provokes judicial incorporation of international law norms into domestic law, statutes, or constitutional norms.<sup>61</sup>

From a different angle, Slaughter and Helfer also underscore the role of national courts as possible agents of compliance.<sup>62</sup> Examining the causes of compliance with judgments of international courts, Slaughter and Helfer note that such compliance is determined by three categories of factors: factors within the control of states establishing a court (composition, functional capacity, binding nature of decisions); factors within the control of courts (awareness of audience, partnership with domestic courts, autonomy from politics, incrementalism, deference, quality of reasoning, dialogues); and factors beyond the control of states or judges (nature of the violations, autonomous domestic institutions, relative homogeneity of states).<sup>63</sup> Depending on one's perspective on the independence of courts (see Section 3 below), national courts can qualify in each of these three categories. Either way, the degree of interaction between the international and national levels, with consequences for the role of national courts, is one of the variables relevant to compliance.<sup>64</sup>

It is quite obvious that none of the above theoretical approaches holds a compelling claim to an exhaustive account of compliance. They provide alternative perspectives, which in part operate at different levels of analysis, but together combine to enhance our understanding.<sup>65</sup> Cassell notes:

As each theory stems from a different theory about law and society, it would be insufficient to limit oneself to one theory and thereby construe the meta-rule of identification on a too narrow concept of society. To the contrary, it is more probable that each theory reveals a particular aspect of the truth.<sup>66</sup>

The relative strength of the theories that accord a strong role to national courts depends in large part on the internal focus of the rules of international law in question, that is, on the degree to which international law does not so much share the features of the historical purely intra-state model, but has in its substance and procedural aspects significant domestic effects.<sup>67</sup> Apart from EU law, that internal focus is particularly present in regard to human rights law. Also in that area, national courts are far from being the only or even the dominant cause, but their role seems inextricably interwoven with other factors. Cassel argues that domestic legal institutions deserve some credit for the improvement in human rights, as part of a 'complex interweaving of mutually reinforcing processes'. He argues that 'what pulls human rights forward is not a series of separate, parallel cords, but a "rope" of multiple, interwoven strands. Remove one strand, and the entire rope is weakened. International human

<sup>61</sup> Koh, *supra* note 59, at 1413.

<sup>62</sup> Helfer and Slaughter, 'Toward a Theory of Effective Supranational Adjudication', 107 *Yale Law Journal* (1997) 273.

<sup>63</sup> *Ibid.*

<sup>64</sup> See also Tan, 'Upholding Human Rights in the Hemisphere: Casting Down Impunity Through the Inter-American Court of Human Rights', 43 *Texas International Law Journal* (2008) 276, at 283–4.

<sup>65</sup> See also Nollkaemper, 'On the Effectiveness of International Rules', 27 *Acta Politica* (1992) 49.

<sup>66</sup> Goldmann, 'Inside Relative Normality: From Sources to Standard Instruments for the Exercise of Public International Authority', in A. von Bogdandy et al (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (2010) 661, at 683.

<sup>67</sup> Slaughter and Burke-White, 'The Future of International Law is Domestic', in P.A. Nolkaemper and J. Nijman, *New Perspectives on the Divide between International and National Law* (2007), at 111–12.

rights law is a strand woven throughout the length of the rope.’ The fact that national courts increasingly look to human rights treaties is one part of that rope.<sup>68</sup>

The role of national courts in other areas of international law, such as humanitarian law, international trade law, and international environmental law remains much weaker.<sup>69</sup> In such areas, other compliance theories may have a stronger claim to accuracy. Much depends on bottom-up processes, rather than on what is expected from international obligations themselves.<sup>70</sup> But there is little doubt that we are bound to see a differentiation in international law between different areas, and between states, where the power of national courts to induce compliance may vary.

### 3. Independence

A preliminary problem for considering national courts as an institutional force that can help to secure compliance is the fact that these courts are organs of the very entities that they are to control.<sup>71</sup> Apart from the formal status of courts as organs of the state, and the resulting tension with the assumption against self-judging, several factors undermine the independent role of national courts. These include the courts’ perception of the need to speak with one voice, their association with the national interests of the state, and the power of political branches over the courts. Such factors make any assumption that national courts can be expected and trusted to properly hold their state to the requirements of international law shaky.<sup>72</sup>

In EU law these problems seem comparatively modest. Although it is easy to underestimate the problems caused by a national rather than European orientation of national courts, it is inherent in the partnership between the ECJ and national courts that national courts are to adjudicate the application of EU law independently from the political branches.

In international law, the problems, and resulting barriers against considering national courts as agents of compliance, are to some extent mitigated by the principle of independence of the judiciary. The principle requires that courts are independent from the executive branch<sup>73</sup> and the legislative branch,<sup>74</sup> as well as from

<sup>68</sup> Cassel, ‘Does International Human Rights Law Make a Difference?’, 2 *Chicago Journal of International Law* (2001) 121.

<sup>69</sup> O’Connell, ‘Enforcement and the Success of International Environmental Law’, 3 *Indiana Journal of Global Legal Studies* (1995) 47.

<sup>70</sup> Slaughter and Burke-White, *supra* note 67, at 113.

<sup>71</sup> Cf., Bell, ‘Judicial Cultures and Judicial Independence’, 4 *Cambridge Yearbook of European Legal Studies* (2001) 47, at 50 (referring to independence in general, not confined to the international domain).

<sup>72</sup> W. Friedmann, *The Changing Structure of International Law* (1964), at 146–7.

<sup>73</sup> *Ringeisen v Austria*, ECHR (1971) Series A, No. 13, 95; see also *Van de Hurk v Netherlands*, ECHR (1994) Series A, No. 288, 54 (holding that the power of the Crown of the Netherlands, part of the government, to deprive the judgments of the Industrial Appeal Tribunal, an administrative tribunal, of their effect to the detriment of an individual party, was incompatible with the principle of independence). See also, *Oló Bahamonde v Equatorial Guinea*, Human Rights Committee, Communication No. 468/1991 (20 October 1993) UN Doc CCPR/C/49/D/468/1991 (considering that ‘a situation where the functions and competences of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent and impartial tribunal within the meaning of Art 14, paragraph 1, of the Covenant’).

<sup>74</sup> *Assanidze v Georgia*, App no 71503/01 (ECtHR, 8 April 2004), 129 (holding that ‘the rule of law and the notion of fair trial enshrined in Art 6 of the Convention preclude any interference by the legislature with the administration of justice designed to influence the judicial determination of the dispute’).

the parties to the dispute: in the type of compliance problem cases with which we are concerned, this is the forum state.<sup>75</sup>

Where it exists, the principle of independence is quite powerful and allows us to consider courts as compliance-inducing agents. In human rights law, the principle of independence has two bases. The first is the obligation to provide effective remedies. The right to a fair trial by an independent court with respect to civil and criminal cases, or ‘suits at law’, requires that the courts adjudicating such claims are independent. And under Article 13 of the ECHR and comparable articles in other human rights treaties, remedies are only effective if the courts are independent.<sup>76</sup>

However, these requirements hardly extend beyond human rights law. There is some support for a broader principle of independence to extend to international law as such. For instance, the *Institut de Droit international* (IDI) recommended that national courts should be allowed to decide on international claims independently from the government.<sup>77</sup> Such a broader principle of independence, beyond human rights law, may be based on the concept of the international rule of law as such. At least to the extent that international law intertwines with domestic law, the performance of international obligations—not necessarily limited to human rights law—should be subject to similar rule of law principles as apply to national law.<sup>78</sup> It may also be said that the independence of the judiciary is a general principle of law as all major legal systems, and perhaps all states, appear to formally embrace the principle.<sup>79</sup>

Even leaving aside the very imperfect application of the principle of independence as such in practice,<sup>80</sup> it seems most doubtful that this would apply in full to the domestic judicial application of *international* law. General international law has traditionally not opposed the wide variety of doctrines that limit the independent power of courts—on the contrary, it has protected them. Indeed, it would be surprising if it were to have been otherwise: traditional (European) international law was founded precisely by the same executive powers that, at the domestic level, profited from those principles that limit the power of courts. In these areas, states have intentionally allowed the rule of law to give way and to allow the executive

<sup>75</sup> *Ringeisen v Austria*, *supra* note 73, 95.

<sup>76</sup> *Leander v Sweden*, ECHR (1987) Series A, No 116, 9, 433, 80–1; *Al-Nashif v Bulgaria*, App no 50963/99 (ECtHR, 20 June 2002), 136; *Muminov v Russia*, App no 42502/06 (ECtHR, 11 December 2008), 101 (discussing Art 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, hereinafter the ‘European Convention on Human Rights’, as amended).

<sup>77</sup> Art 1(1) of the 1993 Resolution of the Institute of International Law on the Activities of National Judges and the International Relations of their State. See for an overview of international principles Olbourne, ‘Independence and Impartiality: International Standards for National Judges and Courts’, 2 *The Law and Practice of International Courts and Tribunals* (2003) 97.

<sup>78</sup> Crawford, ‘International Law and the Rule of Law’, 24 *Adelaide Law Review* (2004) 3, at 12.

<sup>79</sup> *Supreme Court of the Republic of Serbia v People’s Assembly of the Republic of Serbia*, Constitutional Court of the Republic of Serbia, Case No 17/2003, in Oxford Reports on International Law in Domestic Courts (hereinafter ‘ILDC’) 31 (CSXX 2003), 9 (holding that the provisions of a domestic statute that lowered the achieved level of autonomy and independence of the courts and judges ‘is in violation of the generally accepted principle of international law proclaimed in the European Charter on the Statute for Judges adopted in Strasbourg between 8 and 10 July 1998’); see for a comparative overview P.H. Russell and D.M. O’Brien (eds), *Judicial Independence in the Age of Democracy: Critical Perspectives from around the World* (2001).

<sup>80</sup> Paulsson, ‘Enclaves of Justice’, 4 *Transnational Dispute Management* (2007) 1.

power to perform acts that are not conceivable in a domestic, rule-of-law-based society.<sup>81</sup>

The freedoms left by international law for the internal organization of a state and the domestic separation of powers to be arranged are thus mutually supportive. In many areas, most notably the law of armed conflict, the application of international law retains its 'high politics' nature, and courts may be inclined to step back and leave the matter to the executive. Indeed, it is precisely in these areas, where the one-voice argument prevails, that the unity of the state at the international level is mirrored by a unitary stance at the domestic level.<sup>82</sup> International law cannot neglect that practice.<sup>83</sup>

The weakness of international law in securing independence may in part be compensated by a bottom-up process. Many states, by accepting international law as part of national law, have granted their courts an independent role in adjudication of international claims against the state. Where international law is part of national law and in principle can be subject to regular proceedings in the courts, there may not be a need for a separate principle of independence. However, this remains a feeble basis, and there are significant differences across the world in the degree to which national courts indeed are able to play a role in securing compliance in those cases where the political branches choose otherwise.

## 4. The Role of National Courts in International Law and European Law Compared

### A General Aspects

It is commonly thought that one of the key differences between EC law and public international law is that while in public international law the effect of a norm in the national legal order (a critical determinant of the role of national courts in inducing compliance) is determined by national law, not international law, in EC law such effect is a matter of EC law, not national law.

This was indeed the distinction the ECJ created in *Van Gend en Loos*.<sup>84</sup> The Court held that unlike 'normal' international conventions, the EEC Treaty is more than an agreement creating mutual obligations between the Contracting States. An independent legal order shared by the member states has been created: Community law is intended to confer rights upon individuals, independently of the legislation of member states. Moreover, the Court held that EC law, rather than national law,

<sup>81</sup> Allott, 'State Responsibility and the Unmaking of International Law', 29 *Harvard International Law Journal* (1988) 3, at 15.

<sup>82</sup> See eg, *Campaign for Nuclear Disarmament v The Prime Minister of the United Kingdom*, EWHC 2777 (Admin) (47) (2002); ILDC 662 (UK 2002) (forthcoming), discussed in Reece Thomas, 'The Changing Status of International Law in English Domestic Law', 53 *Netherlands International Law Review* (2006) 371, at 386.

<sup>83</sup> See also Russell, 'Towards a General Theory of Judicial Independence', in P.H. Russell and D.M. O'Brien (eds), *Judicial Independence in the Age of Democracy. Critical Perspectives from Around the World* (2001) 1, at 12.

<sup>84</sup> Case 26/62, *Van Gend en Loos*, *supra* note 7.

determines the effects in the national legal order. This ruling also had institutional consequences: in order to ensure that the particular provision of EC law has the same effect throughout this new legal order, it is for the ECJ and not the national courts to rule on the effect of Community law.<sup>85</sup>

In contrast, public international law is thought to be silent on the validity and the effects of international law in the national legal order. Many states, in particular those in which parliamentary approval is not a precondition for the entry into force of treaty obligations, consider themselves at liberty to separate their international rights and obligations from the national legal order and disallow their organs to apply rules of international law that are not made part of national law. No international court has said that these practices as such are 'illegal' and that international law creates, out of its own force, effects in the national legal order.<sup>86</sup> These effects are conditional upon a prior decision of states to accept the validity of public international law. Without the unqualified acceptance of the principle of validity, international law lacks the force to empower national courts to apply international law—and to secure compliance—where national law fails.<sup>87</sup>

However, this fundamental distinction between EU law and international law needs to be qualified in two respects. On the one hand, EU law necessarily remains contingent and potentially limited by national (constitutional) law.<sup>88</sup> On the other hand, the national law of a substantial number of states has accepted the validity of international law. These include such diverse states, and from such diverse regions,

<sup>85</sup> This also follows from the subsequent case 6/64, *Costa v ENEL*, *supra* note 8: 'The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty set out in Article 5 (2) and giving rise to the discrimination prohibited by Article 7.'

<sup>86</sup> While the European Court of Human Rights, which supervises a part of international law that is particularly integrated with national law, has held that while incorporation of the European Convention on Human Rights in national law would be a faithful method of applying the Convention (see *Ireland v United Kingdom*, ECHR (1978) Series A, No 25, 239), the European Convention formally is neutral as to the mode of implementation and does not require incorporation. See the case of *Swedish Engine Drivers' Union v Sweden* ECHR (1976) Series A, No 20, 50 (stating that the Convention 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 Frowein, 'Incorporation of the Convention into Domestic Law', in The British Institute of International and Comparative Law and The British Institute of Human Rights, *Aspects of Incorporation of the European Convention into Domestic Law* (1993) 2–11 (noting that while arts 1 and 13 may suggest an obligation to apply the convention directly, the fact that six of the original contracting parties did not allow for incorporation makes an interpretation to that effect implausible). What matters is that the substance of the rights should in fact be enjoyed by individuals, see M.A. Janis, R. Kay and A. Bradley, *European Human Rights Law. Text and Materials* (2000), 472.

<sup>87</sup> See Buergenthal, 'Self-Executing and Non-Self-Executing Treaties in National and International Law', in *Recueil des Cours* (1992) IV, at 320–1, noting that 'a treaty that, as a matter of international law, is deemed to be directly applicable is not self-executing ipso facto under the domestic law of the states parties to it. All that can be said about such a treaty is that the States party thereto have an international obligation to take whatever measures are necessary under their domestic law to ensure that the specific provisions of the treaty . . . , not only of its substantive obligations, are accorded the status of domestic law.'

<sup>88</sup> Craig, 'National Courts and Community Law', in J. Hayward and A. Menon (eds), *National Courts and Community Law in Governing Europe* (2003), at chapter 2.

as Benin,<sup>89</sup> Cape Verde,<sup>90</sup> China,<sup>91</sup> Côte d'Ivoire,<sup>92</sup> the Czech Republic,<sup>93</sup> the Dominican Republic,<sup>94</sup> Egypt,<sup>95</sup> Ethiopia,<sup>96</sup> France,<sup>97</sup> Japan,<sup>98</sup> the Netherlands,<sup>99</sup> Portugal,<sup>100</sup> Senegal,<sup>101</sup> the Russian Federation,<sup>102</sup> Switzerland,<sup>103</sup> Turkey,<sup>104</sup> and the United States.<sup>105</sup> In this group of states, the condition of validity is fulfilled on the basis of a general (mostly constitutional) rule of reference that makes international law part of national law, and that as such empowers the courts to give effect to international law—and to insure compliance. This practice may or may not be based on a perceived obligation, but that is of little relevance for the actual consequences in terms of empowering courts as agents for ensuring compliance.

However, significant differences exist between states. A thorough search during the start-up phase of what is now the International Law in Domestic Courts module of the *Oxford Reports on International Law* has shown about 30–40 states in which courts very frequently give effect to international law, and about 40 more in which courts with some regularity give effect to international law. The list is certainly not exhaustive, but it seems certain that there are dozens of states in which courts, at best very infrequently, give effect to international law and dozens more states in which courts hardly ever give effect to it or do not do so at all. In that respect, any trend by which state practice resembles part of the practice in respect of EU law is limited to a relatively small number of states.

It can be added that both in EU law and in international law the integration of international law in national law and the recognition of the principle of supremacy can in part be based on and explained by the principle of effectiveness.<sup>106</sup> As to the

<sup>89</sup> Art 147 of the Constitution of the Republic of Benin (1990).

<sup>90</sup> Art 11 of the Constitution of the Republic of Cape Verde (1980).

<sup>91</sup> B. Ahl, *Die Anwendung völkerrechtlicher Verträge in China*. Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Band 207 (2009), at chapter 8; Guo, 'Implementation of Human Rights Treaties by Chinese Courts: Problems and Prospects', 8 *Chinese Journal of International Law* (2009) 161, at 165.

<sup>92</sup> Art 87 of the Constitution of the Republic of Côte d'Ivoire (2000).

<sup>93</sup> Art 10 of the Constitution of the Czech Republic (1992).

<sup>94</sup> Art 3 of the Constitution of the Dominican Republic (1994).

<sup>95</sup> Art 151 of the Constitution of the Arab Republic of Egypt (1971).

<sup>96</sup> Art 9(4) of the Constitution of the Federal Democratic Republic of Ethiopia (1994).

<sup>97</sup> Art 55 of the Constitution of the French Republic (1958).

<sup>98</sup> Iwasawa, 'The Relationship Between International and National Law: Japanese Experiences', 64 *BYIL* (1993) 343, at 345.

<sup>99</sup> Nollkaemper, 'The Netherlands', in D. Sloss et al (eds), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (2009), at 326.

<sup>100</sup> Eg, Art 8(2) of the Constitution of Portugal; see eg, *A and B v Portuguese State*, Supreme Administrative Court of Portugal, Case No 0308/07; ILDC 1441 (PT 2007).

<sup>101</sup> Art 91 of the Constitution of the Republic of Senegal (2001).

<sup>102</sup> Art 15(4) of the Constitution of the Russian Federation (1993); V.I. Kuznetsov and B.R. Tuzmukhamedow (eds), *International Law—A Russian Introduction* (2009), at 188.

<sup>103</sup> *A and B v Government of the Canton of Zurich*, Federal Supreme Court of Switzerland, BGE 126 I 242; ILDC 350 (CH 2000) [2b].

<sup>104</sup> Art 90(5) of the Constitution of Turkey; see also *Ray Sigorta AS v Nunner Lojistik Ticaret Limited Sti*, Court of Cassation of Turkey, E 2007/2970, K 2008/4599; ILDC 1034 (TR 2008).

<sup>105</sup> Art VI of the Constitution of the United States.

<sup>106</sup> See generally, Accetto and Zleptnig, 'The Principle of Effectiveness: Rethinking its Role in Community Law', 11 *European Public Law* (2005) 375; Becker, 'Application of Community Law by

former, the ECJ said that ‘any recognition that national legislative measures which encroach upon the field within which the Community exercises its legislative power or which are otherwise incompatible with the provisions of Community law had any legal effect would amount to *a corresponding denial of the effectiveness of obligations* undertaken unconditionally and irrevocably by member states pursuant to the treaty and would thus imperil the very foundations of the Community’.<sup>107</sup> As to the latter, acceptance of the principle of supremacy of international law is in line with the principle of effective treaty performance.<sup>108</sup> The basis, scope, and effect of the principle of effectiveness as it operates in both legal systems differ.

## B. Supremacy

The principle of supremacy (or ‘precedence’) is key to the compliance-inducing potential of national courts. Where the principle is fully recognized, it allows courts to set aside a law adopted by the political branches, in particular the legislature, and thereby to ensure conformity of the policy and law of the state with its international or European obligations. Apart from its application in individual cases, the mere power of courts to apply the principle can be expected to exert a systematic incentive for compliance since political branches will know that contraventions of international legal obligation may not survive judicial scrutiny.

In *Costa v ENEL*, the Court said:

The integration into the laws of each member state of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the states, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system.<sup>109</sup>

And in *Simmenthal* it added that directly applicable provisions of EU law not only by their entry into force render automatically inapplicable any conflicting provision of current national law but—in so far as they are an integral part of, and take

Member States’ Public Authorities: Between Autonomy and Effectiveness’, 44 *Common Market Law Review* (2007) 1035, at 1043.

<sup>107</sup> Judgment of the Court of 9 March 1978 for *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, reference for a preliminary ruling: Pretura di Susa, Italy. Discarding by the national court of a law contrary to Community law. Case 106/77, para 18.

<sup>108</sup> *Exchange of Greek and Turkish Populations*, (Advisory Opinion), 1925 PCIJ Series B, No 10, 51; see also *Greco-Bulgarian ‘Communities’*, (Advisory Opinion), 1930 PCIJ Series B, No 17, 84. See in this context also Art 33 proposed by Special Rapporteur Fitzmaurice in his ‘Fourth Report on the Law of Treaties’, II *Yearbook of the International Law Commission* (hereinafter the ‘YB ILC’) (1959), at 49 (providing that ‘where a treaty provides for rights, interests or benefits to be enjoyed by private parties, or where the treaty otherwise rebounds to their advantage, it is the duty of the contracting States to place no obstacle in the way of enjoyment of these rights, interests, benefits or advantages by the individuals or juristic entities concerned, and to take all such steps as may be necessary to make them effective on the internal plane’). Special Rapporteur Waldock thought that this provision was superfluous as it was inherent in the principle *pacta sunt servanda*, II *YB ILC* (1964), UN Doc A/CN.4/167, 47. Also: G. Schwarzenberger, *International Law* (1976), at 68–9. See also Zimmermann, ‘Is it Really All about Commitment and Diffusion? Why Do States Incorporate International Law in Their Domestic Constitutions?’, 1 *Illinois Law Review* (2008) 253.

<sup>109</sup> Case 6/64, *Costa v ENEL*, *supra* note 8.

precedence in, the legal order applicable in the territory of each of the member states—also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions.<sup>110</sup>

This includes primacy over their national constitutional law. From the perspective of EU law, this principle is independent from the system laid down in national constitutions.

In international law all this is very different. It is true that the supremacy of international law prioritizes international law over national law. Gerald Fitzmaurice wrote that the principle of supremacy is ‘one of the great principles of international law, informing the whole system and applying to every branch of it’.<sup>111</sup> In general terms, the principle of supremacy of international law seeks to subordinate the sovereignty of states to international law.<sup>112</sup> One of its manifestations is that international law is supreme over—and takes precedence in the international legal order over—national law.<sup>113</sup> In the event of a conflict between international law and domestic law, international law will have to prevail in the international legal order, domestic law being considered a fact from the standpoint of international law. This aspect is at the heart of the law of treaties<sup>114</sup> and the law of international responsibility.<sup>115</sup> The principle of supremacy of international law is central to the international rule of law, which, if anything, requires that states exercise their powers in accordance with international law, not domestic law.<sup>116</sup> There cannot be any rule of law without the precedence of some principles over others deemed to be of lesser importance.<sup>117</sup>

However, none of this extends to the domestic level. The general understanding is that international law cannot itself realize supremacy at the domestic level and indeed does not contain the normative ambition to realize such domestic

<sup>110</sup> Case C-106/77, *Simmenthal II*, [1978] ECR 629.

<sup>111</sup> Fitzmaurice, ‘The General Principles of International Law Considered from the Standpoint of the Rule of Law’, in *Recueil des Cours* (1957) 92, at 85 *et seq.*

<sup>112</sup> *Ibid.*, at 6.  
<sup>113</sup> See for a comprehensive treatment of this aspect of the principle of supremacy D. Carreau, *Droit International* (2004), at 43 *et seq.*; Fitzmaurice, *supra* note 111, at 68 *et seq.* See also C. Santuli, *Le Status International de L’Ordre Juridique Étatique* (2001), at 427.

<sup>114</sup> Arts 27 and 46 of the Vienna Convention on the Law of Treaties (hereinafter the ‘VCLT’), adopted 23 March 1969, entered into force 29 January 1980, 1155 UNTS 331.

<sup>115</sup> Arts 3 and 32 of the Articles on the Responsibility of States for Internationally Wrongful Acts (hereinafter the ‘Articles on State Responsibility’). The Articles on State Responsibility are contained in the Annex of UNGA Res 56/83, 28 January 2002 and reproduced in J. Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (2002). A comparable principle is contained in Art 35 of the Draft Articles of the International Law Commission (hereinafter the ‘ILC’) on the Responsibility of International Organizations, UN Doc A/CN.4/L.270 (2007). The Draft Articles of the ILC on the Responsibility of International Organizations do not contain an article comparable to Art 3 of the Articles on State Responsibility, see discussion in ILC Report on the work of its 55th Session (2003), UN Doc A/58/10, Suppl 10, paras 9–10 of the Commentary to draft Art 3.

<sup>116</sup> I. Brownlie, *The Rule of Law in International Affairs, International Law at the Fiftieth Anniversary of the United Nations* (1988), at 213 *et seq.* See also G. Fitzmaurice, *The Law and Procedure of the International Court of Justice Vol II* (1986), at 587 (noting that the principle is generally accepted as ‘a *sine qua non* of the efficacy and reality of international obligation’).

<sup>117</sup> Fitzmaurice, *supra* note 111, at 69 (equating the principle that the sovereignty of states is subordinated to the supremacy of international law with the rule of law in the international field). See also (more critically) Watts, ‘The International Rule of Law’, 36 *German Yearbook of International Law* (1993) 15.

supremacy. This is true even for a relatively integrated treaty such as the EEA Agreement, of which the EFTA Court said that its scope and objective goes beyond what is usual for an agreement under international law.<sup>118</sup> The Court concluded from the fact that the EEA Agreement does not entail transfer of legislative powers that individuals cannot rely directly on non-implemented EEA rules and that this entails that EEA law does not require that non-implemented EEA rules take precedence over conflicting national rules that fail to transpose the relevant EEA rules correctly into national law.<sup>119</sup> Only in the case of a transfer of powers would the conditions under which international law could mandate supremacy be fulfilled; this is the case in integrated regional systems such as the EU.<sup>120</sup>

However, again the difference between EU law and international law is somewhat less absolute than it may appear. On the one hand, ultimately the scope and operation of the principle of supremacy in EU law remains conditional on national constitutional law—notwithstanding the case law of the ECJ. Several national constitutional courts have great difficulty in accepting this view of the ECJ on absolute primacy of Community law.<sup>121</sup> On the other hand, a not insignificant number of states have given effect to the monist ambition of the principle and allow for legal restitution by ‘disapplying’ the Act or statute of national law that conflicts with international law.<sup>122</sup> There is a large practice of states and courts that has placed international law at the level of constitutional law, and thus accepted domestic supremacy of all or some (notably human rights) rules of international law, whether domesticated or not, impliedly recognizing the hierarchically higher status of international law.<sup>123</sup> In effect, this locks international law into the constitution and provides a barrier against (easy) deviation through legislation.<sup>124</sup> This, for instance, is the case in Cape Verde,<sup>125</sup> the Czech Republic,<sup>126</sup> Japan,<sup>127</sup> the Netherlands,<sup>128</sup> and for human rights in Bulgaria,<sup>129</sup>

<sup>118</sup> Case E-1/07, *Request for an Advisory Opinion from the EFTA Court by Fürstliches Landgericht by decision of that court of 31 January 2007 in the criminal proceedings against Sedin Poric*, [2007], Rec 37.

<sup>119</sup> *Ibid*, Rec 40.

<sup>120</sup> Case 6/64, *Costa v ENEL*, *supra* note 8; T.C. Hartley, *The Foundations of European Community Law* (1994), at 234.

<sup>121</sup> Craig, *supra* note 88.

<sup>122</sup> Eg, *Re Víctor Raúl Pinto*, Supreme Court of Chile, Case No 3125-04; ILDC 1093 (CL 2007), 23 (holding that the international obligation binding upon Chile to prosecute crimes against humanity made an amnesty law inapplicable in the case at hand); *Chile v Arancibia Clavel*, Supreme Court of Justice of Argentina, Case No 259, A 533 XXXVIII; ILDC 1082 (AR 2004), 28 (holding that customary international law of *ius cogens* nature stipulated the non-applicability of statutory limitations to war crimes and crimes against humanity); *Mazzeo (Riveros v Office of the Public Prosecutor)*, Supreme Court of Justice of Argentina, M 2333 XLII; ILDC 1084 (AR 2007), 28.

<sup>123</sup> Cassese, ‘Modern Constitutions and International Law’, in *Recueil des Cours* (1985) 192, 331, at 402.

<sup>124</sup> Ginsburg, ‘Locking in Democracy: Constitutions, Commitment and International Law’, 38 *New York University Journal of International Law and Politics* (2006) 707.

<sup>125</sup> Art 11(4) of the Constitution of the Republic of Cape Verde (1980).

<sup>126</sup> Art 10 of the Constitution of the Czech Republic (1992).

<sup>127</sup> Iwasawa, *supra* note 98, at 372.

<sup>128</sup> Art 94 of the Constitution of the Kingdom of the Netherlands (1983).

<sup>129</sup> *Al-Nashif v National Police Directorate at the Ministry of the Interior*, Supreme Administrative Court of Bulgaria, Administrative Case No 11004/2002; ILDC 608 (BG 2003) [H11] (holding

Norway,<sup>130</sup> and Portugal.<sup>131</sup> Some states have even done so in express recognition of the international principle of supremacy—requiring that international law, once duly introduced in domestic law, also prevails over domestic law in the *domestic* legal order. Courts in Argentina,<sup>132</sup> Belgium,<sup>133</sup> Chile,<sup>134</sup> Indonesia,<sup>135</sup> Latvia,<sup>136</sup> and Peru<sup>137</sup> have set aside domestic law that conflicted with international law, expressly referring to Article 27 of the Vienna Convention on the Law of Treaties. There are also cases where courts have suggested that domestic conflict rules, which grant precedence to international law, were appropriate since they respect the supremacy claimed by international law, or by particular international treaties or courts, such as the ECtHR.<sup>138</sup> In Nigeria, Justice Uwaifo said in *Abacha*:

[T]he African Charter is a special genus of law in the Nigerian legal and political system; the Charter has some international flavor and in that sense it cannot be amended or watered down or sidetracked by any Nigerian law; ... But like the experience under the

that ‘... [t]he provision of Article 6(1) of the ECHR proclaiming the right to a fair trial was a directly applicable norm and took priority over the provision of Article 46(2) of the Law for Foreigners, which contradicted it’).

<sup>130</sup> Under the Human Rights Act 1999, the European Convention on Human Rights and the International Covenant on Civil and Political Rights (hereinafter the ‘ICCPR’, adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171) enjoy, under para 3, precedence over other Norwegian law. See eg, *A v The Norwegian Immigration Appeals Board*, Supreme Court of Norway, HR-2008-681-A, Norwegian Supreme Court Gazette (Rt, Retstidende) 2008, 513; ILDC 1326 (NO 2008) (forthcoming), 35–6.

<sup>131</sup> *A and B v Portuguese State*, Supreme Administrative Court of Portugal, Case No 0308/07; ILDC 1441 (PT 2007).

<sup>132</sup> *Ekmejdjian, Miguel A v Sofovich and Gerardo*, Supreme Court of Justice of Argentina, Codices No E.64.XXIII, ARG-1995-3-002, (1992), Fallos de la Corte Suprema de Justicia de la Nación (Official Digest), Vol 1492, *Revista Jurídica La Ley*, Vol 1992-C, 540; Buerghenthal, ‘International Tribunals and Courts: the Internationalization of Domestic Adjudication’, in U. Beyerlin et al (eds), *Recht Zwischen Umbruch und Bewahrung. Festschrift für Rudolf Bernhardt* (1995) 687, at 698.

<sup>133</sup> *ING België v B I*, Court of Cassation of Belgium, Case No C.05.0154.N; ILDC 1025 (BE 2007) (forthcoming). This builds on the Belgian Court of Cassation’s judgment in the case *Minister for Economic Affairs v Franco-Suisse ‘Le Ski’*, Court of Cassation of Belgium, *Common Market Law Reports* (1972) 330; *Journal des Tribunaux*, 460 (1971) 93 ILR 203, in which it was established case law that a directly effective treaty provision had primacy over a conflicting legislative act.

<sup>134</sup> *Perú v Chile*, Supreme Court of Chile, Rol No 2242-06; ILDC 1443 (CL 2007) (forthcoming).

<sup>135</sup> *Sianturi v Indonesia*, Constitutional Court of Indonesia, Nos 2-3/PUU-V/2007; ILDC 1041 (ID 2007).

<sup>136</sup> *Linija v Latvia*, Constitutional Court of Latvia; ILDC 189 (LV 2004). The court had to consider whether the Latvian Code of Administrative Penalties was compatible with the International Convention on Facilitation of International Maritime Traffic, which provides that states shall not impose any penalty upon ship owners if their passengers possess inadequate control documents. The Court derived from the obligations of Latvia under the VCLT, in particular the obligation to perform treaties in good faith that in a case of contradiction between rules of international law and national legislation, the provisions of international law must be applied. Hence, the court set aside the domestic law.

<sup>137</sup> *Martin Rivas v Constitutional and Social Chamber of the Supreme Court*, Constitutional Court of Peru, 679-2005-PA/TC; ILDC 960 (PE 2007), 49 (accepting that a party could not invoke the provisions of its internal law as justification for its failure to perform a treaty and, partially on that basis, deciding that amnesty laws that violated the American Convention on Human Rights, adopted 22 November 1969, entered into force 18 July 1978, 1144 UNTS 123, lacked legal effect.

<sup>138</sup> *Al-Nashif v National Police Directorate at the Ministry of the Interior*, *supra* note 129, at 10–11.

European Communities Act, 1972 in regard to the policy towards the European Economic Communities Treaty, by comparison, the African Charter cannot also be submitted, as I hope I have shown, to the sheer vagaries of any other municipal or domestic law.<sup>139</sup>

The parallel between EU law and international law has one other dimension. Both in regard to EU law and international law, states have retained the right as a matter of national law (though not necessarily as a matter of EU law and international law), to protect fundamental constitutional values.<sup>140</sup> That reservation may collide with the requirements of EU law and international law. However, it is also an inevitable consequence of the incomplete political system of, respectively, the EU and the international legal order. That reservation of ultimate authority is critical for explaining the pluralistic relation of legal orders. In incidental cases it may preclude compliance with international (or even EU) demands that may collide with national constitutional law. However, questions of ultimate authority are not decisive for explaining general patterns of compliance or non-compliance when no such collisions occur.

### C. Direct Effect

Like supremacy, direct effect has a significant compliance-inducing potential. A court that gives 'direct effect' to an obligation, is not dependent on an intervening legislative step. More precisely: it can then give effect to an international obligation also when the political branches fail to give effect, and thereby secure compliance.<sup>141</sup> This compliance-inducing potential can be caught in the notion of direct effect as a 'sword': the power of the court to give direct effect to an international obligation allows enforcement of international law in the national legal order where this, without direct effect, would not be possible.

The power-controlling potential of direct effect was well reflected in *Foster v Neilson*, perhaps the earliest pronouncement of the concept of self-executingness—a notion that is conceptually closely related to the notion of direct effect. Chief Justice Marshall first described the normal effect of treaties in international law and in other states: 'A treaty is in the nature of a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished . . . but is carried into execution by the sovereign power of the respective parties to the instrument.'<sup>142</sup> He added that in the United States a different principle is established: 'Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an

<sup>139</sup> *Abacha v Fawehinmi*, Supreme Court of Nigeria, SC 45/1997; ILDC 21 (NG 2000) (discussing the African Charter on Human and People's Rights, adopted 27 June 1981, entered into force 21 October 1986 1520 UNTS 217).

<sup>140</sup> Von Bogdandy, 'Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law', 6 *International Journal of Constitutional Law* (2008) 397.

<sup>141</sup> Skouris, 'Effet Utile versus Direct Effect: The Case-law of the Court of Justice on the Direct Effect of Directives', 17 *European Business Law Review* (2006) 241, at 242.

<sup>142</sup> *Foster v Neilson*, US Supreme Court, 2 Pet. 253, 314 (1829); J.J. Paust, *International Law as Law of the United States* (2003), at 71–3.

act of the legislature, whenever it operates of itself without the aid of any legislative provision.<sup>143</sup> This clearly expresses a principally different choice—a system in which international law is regularly part of the law to be applied by the courts also when political branches do not act.<sup>144</sup>

The choice for such a different principle can only be understood as a will to control executive power, and reflects the conviction that an open constitution is better able to achieve that purpose. Indeed, this choice has commonly been made in post-revolutionary constitutional developments.<sup>145</sup> While provisions for domestic legal effect had no place in states with autocratic or dictatorial leadership, the trend towards opening constitutions towards international law so as to allow for control of the previously unassailable government could be seen in the Constitution of the Weimar Republic, the German Constitution of 1949, the 1946 Constitution of Japan,<sup>146</sup> the Spanish Constitution of 1978, and a range of Eastern European constitutions set in place after the fall of the Berlin Wall in 1989.<sup>147</sup>

The concept of direct effect plays a key role in the doctrinal understanding of the application of EC law by national courts and takes centre stage in the textbooks on EU law. Even though the original treaty did not provide a hint that EU law would deviate from general international law,<sup>148</sup> since its *Van Gend en Loos* judgment, and (for directives) *Van Duyn*,<sup>149</sup> the ECJ routinely holds that private individuals can rely on provisions of EC law before the national courts of the member states, if the Community law provision invoked is ‘sufficiently clear and precise, and unconditional’.<sup>150</sup> This is regardless of the system laid down in national constitutions with respect to the relationship between international law and domestic law.

The leading textbooks on public international law do not consider direct effect to be a matter of much interest and relegate the topic to national law.<sup>151</sup> International

<sup>143</sup> Ibid.

<sup>144</sup> Vazquez, ‘Treaties as Law of the Land: the Supremacy Clause and Presumption of Self-Execution’, 122 *Harvard Law Review* (2009) 599, at 622.

<sup>145</sup> Stein, ‘International Law in Internal Law: Towards Internationalization of Central-Eastern Constitutions’, 88 *American Journal of International Law* (1994) 427, at 428; Cassese, *supra* note 123, at 351.

<sup>146</sup> Iwasawa, *supra* note 98, at 375.

<sup>147</sup> Vereschetin, ‘New Constitutions and the Old Problem of the Relationship between International Law and National Law’, 7 *European Journal of International Law* (1996) 29.

<sup>148</sup> Becker and Campbell, ‘The Direct Effect of European Directives: Towards the Final Act’, 13 *Columbia Journal of European Law* (2006–2007) 401.

<sup>149</sup> Case 41/74, *Van Duyn v Home Office*, [1974] ECR 1337.

<sup>150</sup> See also Case C-194/08, *Susanne Grasmayr v Bundesminister für Wissenschaft und Forschung*, judgment of 1 July 2010, not yet published. (Rec 44: ‘According to settled case law, whenever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may be relied on before the national courts by individuals against the State where the latter has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly.’)

<sup>151</sup> See eg. I. Brownlie, *Principles of Public International Law* (2008, 7th edn), at 53–4. Also M. Shaw, *International Law* (1997), at chapter 4, confines himself to a discussion of how various states proceed. A similar approach is taken in M. Sorensen, *Manual of Public International Law* (1968), at 166. More appreciative of the significance of international law for the question of direct effect is the treatment in A. Cassese, *International Law* (2001), at 173–4, 166–81.

law generally respects the right of states to determine for themselves whether or not they allow their courts to give direct effect to an international obligation. International obligations are generally formulated as obligations of result, stopping 'short at the outer boundaries of the State machinery'.<sup>152</sup> The holding of the ICJ in its Request for Interpretation of the Judgment of 31 March 2004 in the *Case concerning Avena and Other Mexican Nationals*<sup>153</sup> reflects the situation in general international law. The Court said:

The *Avena* Judgment nowhere lays down or implies that the courts in the United States are required to give direct effect to paragraph 153(9). The obligation laid down in that paragraph is indeed an obligation of result which clearly must be performed unconditionally; non-performance of it constitutes internationally wrongful conduct. However, the Judgment leaves it to the United States to choose the means of implementation, not excluding the introduction within a reasonable time of appropriate legislation, if deemed necessary under domestic constitutional law.<sup>154</sup>

The neutrality of customary international law in this respect reflects the continuing significant differences in the practice of states as regards the way in which they give effect to their international obligations.<sup>155</sup> Given these differences, international law could indeed hardly do otherwise than express a liberty. States are at liberty to determine, according to their own national legal systems, whether direct effect is possible at all and, if so, what conditions<sup>156</sup> and consequences<sup>157</sup> apply. All this excludes what Iwasawa called the 'given-theory': the idea that international law would determine whether or not a particular rule of international law has direct effect.<sup>158</sup> The European Free Trade Association (EFTA) Court opined that direct effect would only be mandatory in the case of a transfer of powers as had been given in EU law, and would not extend to the European Economic Area

<sup>152</sup> ILC, 'Report of the Commission to the General Assembly on the work of its twenty-ninth session, 9 May–29 July 1977', Commentary to Art 21 of the draft Articles on State Responsibility 'Breach of an international obligation requiring the achievement of a special result adopted on first reading', (1977) II *YB ILC* (Part Two), 19(1).

<sup>153</sup> *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v United States of America)* (2008), ICJ Reports (2008) 13, at 44.

<sup>154</sup> *Ibid.*

<sup>155</sup> Sørensen, 'Die Verpflichtungen eines Staates im Bereich seiner nationalen Rechtsordnung auf Grund eines Staatsvertrages', *Menschenrechte im Staatsrecht und im Völkerrecht* (1967) 15, at 21.

<sup>156</sup> This of course also holds for the procedural conditions governing the actions of interested parties that seek to protect their legal interests under a treaty; also here the liberty left by EU law is magnified (see Case C-228/98, *Kharalambos Dounias v Minister for Finance*, [2000] ECR I-577, at 58).

<sup>157</sup> For instance, this holds for the question of whether international law can be applied directly in a horizontal sphere; in public international law there is not even the beginning of the relative uniformity that exists on this point in EU law. This applies also to the European Convention on Human Rights; P. van Dijk, F. van Hoof and A. van Rijn (eds), *Theory and Practice of the European Convention on Human Rights* (2004), at 22–6.

<sup>158</sup> Iwasawa, 'The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis', 26 *Virginia Journal of International Law* (1986) 627, at 650. For a somewhat curious example of a case where a national court found an international obligation to give direct effect in Art 48(2) of the Charter of the United Nations (adopted 26 June 1954, entered into force 24 October 1945) 1 UNTS 16, see *Kadi v Prime Ministry and Ministry of Foreign Affairs of Turkey*, Council of State of Turkey, E 2006/2824, K 2007/115; ILDC 311 (TK 2007) (forthcoming).

(EEA) Agreement, even though that is an integrated treaty regime, with a scope and objective that goes beyond what is usual for an agreement under international law:<sup>159</sup>

It follows from Article 7 EEA and Protocol 35 to the EEA Agreement that EEA law does not entail a transfer of legislative powers. Therefore, EEA law does not require that individuals and economic operators can rely directly on non-implemented EEA rules before national courts.<sup>160</sup>

It is only in the EU, which has acquired a further degree of integration, with a corresponding transfer of powers, that a binding requirement of direct effect is expressed—one that is generally recognized by the member states.<sup>161</sup>

The fact that general international law does not require states to allow their courts to apply international law directly is perhaps the single greatest limitation of the role of national courts as a systemic force in the protection of the international rule of law. The position of national courts is thus totally different from that of international courts, where by their very nature international law is part of the applicable law and can be applied as such.<sup>162</sup> In the absence of any rules that require direct effect, the decision whether to allow courts to give direct effect to international law—as well as the decision of courts whether to grant direct effect—is primarily a political and normative choice, both for states and their courts.<sup>163</sup>

But again, considering direct effect as a matter that is of no interest for international law fails to recognize the diversity between states and indeed within international law. Direct effect is possible in a great many states, including such diverse states as Belgium,<sup>164</sup> Bulgaria,<sup>165</sup> the Czech Republic,<sup>166</sup> the Dominican

<sup>159</sup> Case E-1/07, Rec 37, *supra* note 118, discussing the European Economic Area Agreement, (hereinafter the 'EEA Agreement'), OJ 1994 L 1/3, and Protocol 35 adjusting the EEA Agreement, OJ 1994 L 1/572.

<sup>160</sup> Case E-4/01, *Karl K Karlsson hf v The Icelandic State, Request for an Advisory Opinion to the EFTA Court by Héraðsdómur Reykjavíkur (Reykjavík District Court)*, [2002], Rec 28.

<sup>161</sup> The Constitutional Court of Italy said that Art 11 of the Constitution—stipulating that Italy 'agrees, on equal footing with other states, to limitations of sovereignty where they are necessary to a legal system which ensures peace and justice amongst nations; it promotes and encourages international organizations furthering such ends'—provided the basis for the constitutional rank of EU law, see *EP v Municipality of Avellino*, Case No 349/2007 in *Rivista di diritto internazionale* (2008) 1, at 230; ILDC 301 (IT 2007) [6.1].

<sup>162</sup> Verhoeven, 'Article 21 of the Rome Statute and the Ambiguities of Applicable Law', 33 *Netherlands Yearbook of International Law* (2002) 3, at 15.

<sup>163</sup> See generally on the political nature of judicial decisions D. Kennedy, *A Critique of Adjudication: (Fin de Siècle)* (1997), at 40; B. de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (1995), at 114, referring to 'the politics of definition of law'.

<sup>164</sup> *BM v Belgium*, Court of Cassation of Belgium, Judgment on Appeal, No P.04.0644.N (2004); ILDC 58 (BE 2004).

<sup>165</sup> *Council of Ministers v TSD and ors*, Supreme Court of Cassation of Bulgaria, Cassation appeal, Judgment No 1177, Civil Case no 241/2007 (2007); ILDC 972 (BG 2007).

<sup>166</sup> Art 10 of the Constitution of the Czech Republic (1992); see for an application eg, *Minister of Justice v Šenk*, Supreme Court of the Czech Republic, 8 Tz 38/2000; ILDC 1444 (CZ 2000) (holding that Art 6 of the European Convention on Human Rights was directly binding on the state).

Republic,<sup>167</sup> Egypt<sup>168</sup> France,<sup>169</sup> Latvia,<sup>170</sup> the Netherlands,<sup>171</sup> Portugal,<sup>172</sup> and Switzerland.<sup>173</sup>

For all the states that allow for direct effect, the neutrality of *general* international law is deceptive. The fact that public international law does not *oblige* states to allow for direct effect in the same manner as is done by EC law does not negate the influence of international law over direct effect. To the extent that domestic law allows its courts to give direct effect to international law, if the appropriate conditions are satisfied, international law will exert a considerable influence.<sup>174</sup>

The reasons why these states have allowed for direct effect may vary, but they will have in common that this practice is not driven by a perceived obligation of international law. It may be true that direct effect furthers the effectiveness of international law, but there is no obligation to do so.<sup>175</sup> However, this is not different to EU law, where at least initially the direct effect of directives is more based on a choice of legal policy by the Court, seeking to further the effectiveness of EU law,<sup>176</sup> than on a coherent legal basis.<sup>177</sup>

A dominant explanatory variable of direct effect is the allocation of individual rights by international law. Individual rights at the same time pierce the veil of dualism in the relationship between state and individual, and empower national courts. For instance, the Federal Supreme Court of Switzerland held that a provision of a treaty is only self-executing if it regulates the legal position of an individual, even though the question of whether that is the case is then made dependent on the substantive completeness of the norm.<sup>178</sup>

<sup>167</sup> Art 3 of the Constitution of the Dominican Republic (1994). See eg, *Gallardo Montilla v Gallardo Concepción*, Supreme Court of Justice, ILDC 1490 (DO 1997) (forthcoming) (holding that treaties, duly approved by Congress, had the authority of an Act of Congress and that tribunals must apply treaty provisions that are relevant to the resolution of a legal dispute).

<sup>168</sup> Art 151 of the Constitution of the Arab Republic of Egypt (1971). See eg, *Public Prosecution of Egypt v Salah Aldian Mustafá Ismail*, Supreme Court of State Security of Egypt, No 4190/86 Ozbekia (121 Koli Shamal) (1987); ILDC 1483 (EG 1987) (forthcoming) (stating that a treaty that had satisfied the constitutional requirements to be incorporated into national law thus became part of the national laws, and courts are obliged to apply its provisions).

<sup>169</sup> *X v Y*, Court of Cassation of France, Cassation appeal, Information Bulletin of the Court of Cassation No 626 of 1 October 2005, No 1810 (2005); ILDC 770 (FR 2005).

<sup>170</sup> *Re Latvian Education Law*, Constitutional Court of Latvia, Constitutional Review Case No 2004-18-0106 (2005); ILDC 190 (LV 2005).

<sup>171</sup> *Reinier van Arkel Foundation and ors v Minister for Transport, Public Works and Water Management*, Council of State of the Netherlands, 200401178/1 (2004); ILDC 129 (NL 2004).

<sup>172</sup> *Merck & Inc and Merck Sharp & Dohme Lda v Merck Genéricos-Produtos Farmaceuticos Lda*, Supreme Court of Justice of Portugal, final Appeal Judgment No 4416/04 (2005); ILDC 667 (PT 2005).

<sup>173</sup> *A. and B. v Government of the Canton of Zurich*, Federal Supreme Court of Switzerland, Appeal Judgment, Case No 2P.273/1999 (2000); ILDC 350 (CH 2000).

<sup>174</sup> Buergethal, *supra* note 87, at 319 (noting that in some states, the determination of whether a treaty is self-executing is made dependent on its international characterization).

<sup>175</sup> *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals*, *supra* note 153.

<sup>176</sup> Dashwood, 'From Van Duyn to Mangold via Marshall: Reducing Direct Effect to Absurdity?', 9 *Cambridge Yearbook of European Legal Studies* (2006–2007) 81, at 85; Skouris, *supra* note 141, at 242.

<sup>177</sup> Becker and Campbell, *supra* note 148, at 413.

<sup>178</sup> *A. and B. v Government of the Canton of Zurich*, BGE 126 I 242; ILDC 350 (CH 2000) [2b]. Similarly Belgium, see *Art Research & Contact Naamloze Vennootschap v BS*, ILDC 44 (BE 2001)

However, there is no necessary or automatic connection between individual rights and direct effect. It is to be recalled that while in EU law the direct effect of primary law was based on the recognition of subjective rights, that did not initially hold for directives, which were addressed to states, not individuals, even though individuals were always the true beneficiaries.<sup>179</sup> In regard to the latter, EU law has decoupled the connection between direct effect and subjective rights, and replaced it with an objective conception.<sup>180</sup>

The practice of states with regard to international law on this point is varied and, within states, often inconsistent. While in some states, such as in the above example Switzerland, direct effect is coupled with subjective international rights, in other states it has been recognized that the concepts of direct effect and subjective rights are best kept separate.<sup>181</sup> This was clear in the follow-up to the *Avena* case in the United States. While there continues to be considerable uncertainty as to whether the Vienna Convention on Consular Relations (VCCR) creates individually enforceable rights in domestic courts, there was no dispute as to the self-executing nature of the Convention.<sup>182</sup> What counts, both in EU law and international law, is whether a norm is part of the applicable law for the courts and whether it is sufficiently unconditional and precise so that the courts can apply it as a rule of decision.

#### D. Indirect Effect: Consistent Interpretation

The practice of consistent interpretation has much potential to secure compliance with European and international obligations. It allows a court to give effect to an international obligation which, though binding on the state, has not been

[29] (holding that a treaty had direct effect in regard to citizens of a state party if the provision was clear, precise, and unconditional; and if the state parties had intended to confer subjective rights and obligations to individuals).

<sup>179</sup> Becker and Campbell, *supra* note 148, at 403; Dougan, 'When Worlds Collide! Competing Visions of the Relationship Between Direct Effect and Supremacy', 44 *Common Market Law Review* (2007) 931, at 934.

<sup>180</sup> Becker and Campbell, *supra* note 148, at 405.

<sup>181</sup> See for the distinction also Jackson, 'Status of Treaties in Domestic Legal Systems: A Policy Analysis', 86 *American Journal of International Law* (1992) 310, at 318. The distinction is also made, eg, in Simma et al, 'The Role of German Courts in the Enforcement of International Human Rights', in B. Conforti and F. Francioni (eds), *Enforcing International Human Rights in Domestic Courts* (1997). See also Vázquez, 'Treaty-Based Rights and Remedies of Individuals', 92 *Columbia Law Review* (1992), at 1133–41, who distinguishes between the questions of whether a treaty is self-executing and whether individuals have standing to invoke it. He rightly notes that the two issues may overlap: 'standing doctrine addresses the same issue that the courts sometimes address as a "self-execution" issue: whether the duty imposed by the treaty gives rise to a correlative primary right of the litigant such that the litigant may enforce the rule in court.'

<sup>182</sup> *Medellin v Texas*, US Supreme Court, 552 US 491, 128 S Ct 1346 (2008); ILDC 947 (US 2008), 21 (noting on the Vienna Convention on Consular Relations 596 UNTS 261, adopted 24 April 1963 and entered into force 19 March 1967, that '... [e]ven when treaties are self-executing in the sense that they create federal law, the background presumption is that "[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts"', citing the Restatement (Third) of Foreign Relations Law of the United States §907, Comment a, 395,1986); *Sanchez-Llamas (Moises) v Oregon*, US Supreme Court, 548 US 331, 126 S Ct 2669 (2006); ILDC 697 (US 2006) 8 (Judge Breyer dissenting) (noting that 'it is common ground that the Convention is "self-executing"... That is to say, the Convention "operates of itself without the aid of any legislative provision." *Foster v Neilson*, 2 Pet. 253, 314 (1829)').

incorporated or transformed into domestic law and as such is not part of the applicable law of that court. In this respect, seen from an integrated perspective on the rule of law, consistent interpretation is a key element of the rule of law.<sup>183</sup>

Its powers are particularly clear in so-called dualist states, where delays may occur between the entry into force of treaties and domestic implementation, and courts may, through a process of interpretation, ensure domestic compliance with a treaty even if the political branches are not (yet) ready for it. By construing national law in the light of international law, national courts compensate for the refusal of the legislature to give effect to a treaty and can themselves ensure that international obligations are performed. In many cases, through this process, national courts in dualist states were as powerful in securing conformity of national with international law as their counterparts in 'monist' states.<sup>184</sup> For instance, the Supreme Court of Bangladesh held that even though Bangladesh had not yet incorporated all the provisions of the Convention on the Rights of the Child into its domestic laws, '[i]f the domestic laws were not clear enough or there was nothing therein', the national courts should draw upon the principles incorporated in the treaty.<sup>185</sup> The Canadian Supreme Court held that even while international obligations pertaining to freedom of association were not incorporated and thus not part of Canadian law, they could assist courts in interpreting guarantees under the Canadian Charter of Rights and Freedoms. This led, for instance, to the court recognizing a process of collective bargaining as part of the Charter's guarantee of freedom of association.<sup>186</sup> The Court also said that the Charter should be presumed to provide at least as great a level of protection as that found in the international human rights documents which Canada had ratified.<sup>187</sup> In *Sabally v Inspector General of Police*, the Supreme Court of Gambia said that as Gambia had not legislated to implement the African Charter, it could not directly apply it, yet the principles laid down in the Charter were 'pertinent and relevant to the instant case'.<sup>188</sup>

<sup>183</sup> Drake, 'Twenty Years after Von Colson: The Impact of "Indirect Effect" on the Protection of the Individual's Community Rights', 30 *European Law Review* (2005) 329.

<sup>184</sup> Buergethal, *supra* note 132, at 700–1.

<sup>185</sup> *State v Metropolitan Police Commissioner*, Supreme Court of Bangladesh, 60 DLR (2008) 660; ILDC 1410 (BD 2008), 28; see also *Ersbad v Bangladesh*, Supreme Court of Bangladesh, 21 BLD (AD) (2001) 69; ILDC 476 (BD 2000), 3 (BB Roy Chowdhury) (discussing the Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, noting that national courts should not ignore the international obligations undertaken by a country. National courts should draw upon the principles incorporated in the international instruments if the domestic laws are ambiguous or absent.) See also *Dr Shipra Chaudhury and another v Government of Bangladesh and ors*, Supreme Court of Bangladesh, 29 BLD (HCD) (2009); ILDC 1515 (BD 2009) (forthcoming), at 28 (holding that courts could look to the ICCPR and the International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3, 1966, hereinafter the 'ICESCR', as an aid to interpretation of the provisions of Part III of the Constitution, particularly to determine the rights implicit in rights such as the right to life and the right to liberty, that were not enumerated in the Constitution).

<sup>186</sup> *Health Services and Support—Facilities Subsector Bargaining Assn v British Columbia*, *The Supreme Court of Canada*, 2 SCR 391, 2007 SCC 27 (2007); ILDC 857 (CA 2007), 69 (discussing the African Charter on Human and People's Rights, 1520 UNTS 217, 27 June 1981, entered into force 21 October 1986).

<sup>187</sup> *Ibid*, at 70.  
<sup>188</sup> *Sabally v Inspector General of Police*, Supreme Court of Gambia, Civil ref No. 2/2001; AHRLR 87 (GaSC 2001) (2002); ILDC 11 (GM 2001), 13.

The practice of consistent interpretation is not contingent on the question of whether a rule of international law can be given direct effect, and thus may allow a court to circumvent the shield that the concept of direct effect may set up. This is both true for EU law and international law.<sup>189</sup> While courts generally restrict direct effect to a narrow category of rules that satisfies the criterion of completeness, application of the principle of consistent interpretation is not dependent on any a priori qualities of a rule of international law. In quite a few instances, national courts, in jurisdictions where the criteria for direct effect may function as a shield against the application of international law, were able to circumvent that shield by engaging in consistent interpretation.<sup>190</sup>

In the EU the principle of consistent interpretation is, similarly to the principle of direct effect, governed by EU law, not national law.<sup>191</sup> EU law obliges the national courts to construe their domestic law in conformity with the law of the EU. In the *Von Colson* case, the ECJ held that ‘all the authorities of the member states’ must interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of Article 189 EC (now Article 288 TFEU).<sup>192</sup> The courts must, insofar as they are given discretion to do so according to national law, construe and apply that national law, and in particular the implementing legislation, in conformity with the requirements of Community law.<sup>193</sup> In *Marleasing*<sup>194</sup> the ECJ elaborated on this issue as follows: ‘[I]n applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and purpose of the directive . . .’<sup>195</sup> The ECJ finds that this requirement for national law to be interpreted in conformity with European Union law is inherent in the system of the Treaty, since it permits the national court, within the limits of its jurisdiction, to ensure the full effectiveness of EU law when it determines the dispute before it.<sup>196</sup>

<sup>189</sup> Eg, *Mathilda/RK Schoolbestuur (Mathilda v School Management)*, Supreme Court of the Netherlands, NJ 1995/259; AB 1993 (1993), 440 (stating that Art 7 ICESCR does not have direct effect, but its purpose must be taken into account).

<sup>190</sup> *Ibid*; *Ziers v Gedeputeerde Staten Gelderland*, Council of State of the Netherlands, Case No AB 1995/24 (1993); Decision of South African Constitutional Court which held that the concept of sustainable development in the law of South Africa must be construed and understood in the light of developments in the international law of environment and sustainable development.

<sup>191</sup> Dashwood, *supra* note 176, at 90.

<sup>192</sup> Case 14/83, *Von Colson and Kamann*, [1984] ECR 1891, Rec 26; see also Case 79/83, *Harz*, [1984] ECR 1921. See discussion in Drake, *supra* note 183, at 329.

<sup>193</sup> See *Von Colson and Kamann*, *supra* note 192, at para 28.

<sup>194</sup> Case C-106/89, *Marleasing*, [1990] ECR I-4135, Rec 8.

<sup>195</sup> See also Case C-98/09, *Francesca Sorge v Poste Italiane SpA*, judgment of 24 June 2010, not yet published, Rec 51 (holding that the national courts are bound to interpret domestic law, so far as possible, in the light of the wording and the purpose of the framework agreement in question in order to achieve the result sought by the latter and, consequently, to comply with the third paragraph of Art 288 TFEU).

<sup>196</sup> Case C-555/07, *Seda Küçükdeveci v Swedex GmbH & Co. KG*, [2010] ECR I-00365, Rec 48; Joined Cases C-378/07 and C-380/07, *Kiriaki Angelidaki and Others v Organismos Nomarkhiaki Afiodiikisi Rethimnis and Dimos Geropotamou*, [2009] ECR I-3071, Rec 198.

It is also significant that the practice of consistent interpretation is not contingent on the question of whether a rule of international law can be given direct effect, and thus may allow a court to circumvent the shield that the concept of direct effect may set up. The obligation to interpret national law in conformity with European Union law concerns all provisions of national law, whether adopted before or after the framework agreement in question.<sup>197</sup>

In public international law, one cannot find a comparable authoritative formulation of the principle that as a matter of public international law courts should construe their domestic law in conformity with international law. However, there appears sufficient acceptance of the notion of international law as ‘higher law’ that must be given effect in the national legal order, and that courts, as state organs, are responsible for the proper application of international law within their jurisdiction,<sup>198</sup> to accept that the position that public international law is neutral on the matter of consistent interpretation is too narrow.<sup>199</sup> It has been said that state practice allows one to infer an international duty of courts to interpret, within their constitutional mandates, national law in the light of international law.<sup>200</sup>

The practice of courts that engage in consistent interpretation is widespread. It includes both civil law<sup>201</sup> and common law systems.<sup>202</sup> It also includes states that allow for automatic incorporation and those that require transformation. The former category includes states like Austria,<sup>203</sup> Ethiopia,<sup>204</sup> Japan,<sup>205</sup> Latvia,<sup>206</sup>

<sup>197</sup> Case C-98/09, *Francesca Sorge*, *supra* note 195, Rec 51.

<sup>198</sup> This notion seems also to underlie the case law of the Court of Justice, see Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Bundesrepublik Deutschland* and *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, [1996] ECR I-1029, Rec 34.

<sup>199</sup> There is truth in the observation of Morgenstern, ‘Judicial Practice and the Supremacy of International Law’, 27 *British Yearbook of International Law* (1950) 92, stating that true supremacy of public international law would be ‘obscured by the fact that, owing to the absence of compulsory judicial dispute settlement in the international sphere, responsibility is not always the automatic consequence of violation of rules of law’.

<sup>200</sup> *Ibid.*, at 85–6. Morgenstern states that ‘The trend of judicial opinion is significant. It shows that courts have realized that international law, by its very nature, must be enforced contrary provisions of municipal law notwithstanding’.

<sup>201</sup> *Eg.*, *Switzerland v A and B*, Federal Supreme Court of Switzerland, BGE 128 IV 117; ILDC 347 (CH 2002) [6d].

<sup>202</sup> *Eg.*, *Minister for Immigration and Ethnic Affairs v Teob*, High Court of Australia, 183 CLR 273; HCA 20, 128 ALR 353 (1995); ILDC 779 (AU 1995) (forthcoming) (holding that the provisions of an international convention to which Australia is a party, especially one which declares universal fundamental rights, may be used by the courts as a legitimate guide in developing the common law); *Evans v New South Wales*, Federal Court of Australia, FCAFC 130 (2008) 79; *A (FC) v Secretary of State for the Home Department, A (FC) v Secretary of State for the Home Department (joined appeals)*, *Appellate Committee of House of Lords*, 71[2005]; ILDC 363 (UK 2005), 33 (holding that the principles of English common law did not stand alone and regard should be had to international instruments prohibiting torture).

<sup>203</sup> Balthasar, ‘“Pacta sunt servanda. Zur innerstaatlichen Relevanz von durch Staatsvertrag” eingegangenen Verpflichtungen Österreichs’, 50 *ZOR* (1996) 161, at 169.

<sup>204</sup> Art 13(4) of the Constitution of the Federal Democratic Republic of Ethiopia (1995) (providing that ‘[t]he fundamental rights and freedoms enumerated in this Chapter shall be interpreted in a manner consistent with the Universal Declaration of Human Rights, international human rights covenants and conventions ratified by Ethiopia’).

<sup>205</sup> Iwasawa, ‘The Domestic Impact of International Human Rights Standards; The Japanese Experience’, in P. Alston and J. Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (2000) 245, at 259.

<sup>206</sup> *Re Latvian Education Law*, *supra* note 170, 5.

the Netherlands,<sup>207</sup> Poland,<sup>208</sup> and the United States;<sup>209</sup> in the latter category are states like Australia,<sup>210</sup> Canada,<sup>211</sup> Iceland,<sup>212</sup> Israel,<sup>213</sup> Uganda,<sup>214</sup> South Africa,<sup>215</sup> Zambia,<sup>216</sup> and the United Kingdom.<sup>217</sup>

It indeed may be possible to infer from this practice, in combination with the general principle of effective treaty interpretation,<sup>218</sup> a general principle of interpretation such that, within the limits of their domestic powers, national courts should interpret domestic law in conformity with the international obligations of the state. It is noteworthy that the ECtHR, in considering the interpretation of the jurisdictional aspects of 'genocide' by German courts, noted that 'the German courts' interpretation of the applicable provisions and rules of public international law, *in the light of which the provisions of the Criminal Code had to be construed*, was not arbitrary'.<sup>219</sup> Apparently, the 'had to' refers to an obligation under international law. In this context, the decision of the EFTA court in *Karlsson* is also relevant. It stated that even though the EFTA Agreement, unlike EU law, did not require direct effect,

it is inherent in the general objective of the EEA Agreement of establishing a dynamic and homogeneous market, in the ensuing emphasis on the judicial defence and enforcement of the rights of individuals, as well as in the public international law principle of effectiveness, that national courts will consider any relevant element of EEA law, whether implemented or not, when interpreting national law.<sup>220</sup>

<sup>207</sup> *TSM Compagnie d'Assurance Transports v Geisseler Transport AG*, Supreme Court of the Netherlands, NJ 1992/107, (1990). The Supreme Court has ruled that 'Dutch courts should, as far as is possible, interpret and apply Dutch law in such a way that the State meets its treaty obligations'.

<sup>208</sup> *Stanisław K v Zakład Techniczno-Budowlany P Spółka Zoo*, Supreme Court of Poland, II PK 100/05; ILDC 388 (PL 2005), 10.

<sup>209</sup> *Murray v The Charming Betsy 2 Cranch 64*, US Supreme Court, 6 US 64 (1804), 118. See generally R.G. Steinhardt, 'The Role of International Law as a Canon of Domestic Statutory Construction', 43 *Vanderbilt Law Review* (1990) 1103.

<sup>210</sup> *Minister for Immigration and Ethnic Affairs v Teoh*, *supra* note 202, 27.

<sup>211</sup> *United States (Minister of Justice) v Burns and Rafay*, Supreme Court of Canada, 1 SCR 283, 2001 SCC 7; (2001) 195 DLR (4th) 1; ILDC 187 (CA 2001).

<sup>212</sup> *State Social Security Institute v Organization of the Disabled in Iceland*, Supreme Court of Iceland, Case No. 125/2000, H 2000 4480 (2000); ILDC 68 (IS 2000).

<sup>213</sup> *Kurtz and Letushinsky v Kirschen*, Supreme Court of Israel sitting as a Court of Civil Appeal, 21 Piskei Din (II) 20, 47 ILR 212 (1967), 214–15; *Kav La'oved Association v Israel*, Supreme Court of Israel sitting as the High Court of Justice, HCJ 4542/02; ILDC 382 (IL 2006) 37 (holding that '... [e]ither way, everyone agrees that by virtue of the "presumption of compliance" between internal law and the provisions of international law, we are required to interpret statutes—as well as powers acquired by government authorities—in a manner which complies with the provisions of international law').

<sup>214</sup> *Onyango-Obbo and Mwenda v Attorney-General*, Supreme Court of Uganda, Case No 2 (2002); ILDC 166 (UG 2004).

<sup>215</sup> *Mazibuko v City of Johannesburg*, High Court of South Africa, ZAGPHC 128 (2008); ILDC 973 (ZA 2008), 31 ('In terms of section 39(1) (b) of the Constitution, the Courts in interpreting the Bill of Rights must consider international law. In terms of section 233 of the Constitution a reasonable interpretation of any legislation which is consistent with international law, must be preferred.').

<sup>216</sup> *Re Order 53 of the Rules of the Supreme Court and Re Application for Leave for Judicial Review by Roy Clarke, Attorney General v Roy Clarke*, Supreme Court of Zambia, Appeal No 96A/2004; ILDC 1340 (ZM 2008).

<sup>217</sup> *R v Secretary of State for the Home Department, ex parte Brind, House of Lords*, 1 AC 696 (1991).

<sup>218</sup> Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties', 26 *British Yearbook of International Law* (1949) 67.

<sup>219</sup> *Jorgic v Germany*, App no 74613/01 (ECtHR, 12 July 2007), 70 (emphasis added).

<sup>220</sup> Case E-4/01, *supra* note 160.

Such an interpretative principle is formulated in Principle 7 of the Bangalore Principles:

It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes—whether or not they have been incorporated into domestic law—for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.<sup>221</sup>

The principle of consistent interpretation straddles international law and national law. As such it is one of the most visible manifestations of the situation of mixity that results from the interplay of international and national law. It is both induced by the international legal requirement to perform international obligations, and by the domestic mandate to interpret national law in the light of international law.

However, it has to be taken into account that there are major differences in the concept as it applies in different states. The practice of consistent interpretation, while fairly uniform across the world, shows substantial differences in conditions under which it can be applied, as well as differences in the scope and limits of judicial powers. In some jurisdictions, it has been understood that the principle was primarily intended to limit the extra-territorial reach of legislation, resulting in a much narrower scope than if the practice were applied to the interpretative application of substantive international law that had not been made part of national law.<sup>222</sup> Another major cause of variation is that in some jurisdictions the practice of consistent interpretation is limited to incorporative statutes,<sup>223</sup> whereas in other jurisdictions it can be applied to all rules of international law. In this respect, the normative guidance of the principle is relatively limited. It does create a presumption, but it can only function under the conditions set by national law. International courts, while not irrelevant to the application of international law at the national level,<sup>224</sup> cannot perform the role of the ECJ in controlling uniformity. All this is in keeping with the normal process of auto-appreciation in the application of international law.<sup>225</sup>

<sup>221</sup> Conclusions of Judicial Colloquia and other meetings on the Domestic Application of International Human Rights Norms and on Government under the Law ('Bangalore Principles'), 1988–92, Principle 7. The Principles were cited in *RM and Cradle v Attorney General*, High Court of Kenya, Civil Case 1351; ILDC 699 (KE 2006), 2. See also General Comment No 9 of the UN Committee on Economic, Social and Cultural Rights on the Domestic application of the Covenant, UN Doc A/CONF.39/27, 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 that state in breach of the Covenant and one that would enable the State to comply with the Covenant, international law requires the choice of the latter' (emphasis added). See on the existence of an obligation of consistent interpretation also S. Bhuiyan, *National Law in WTO Law Effectiveness and Good Governance in the World Trading System* (2007), at 35.

<sup>222</sup> J.F. Coyle, 'Incorporative Statutes and the Borrowed Treaty Rule', 50 *Virginia Journal of International Law* (2010) 655, at 702.

<sup>223</sup> See *supra* Section 3.  
<sup>224</sup> This is daily routine for the European Court on Human Rights. Also decisions of the ICJ can be relevant, for instance in *LaGrand Case, Germany v United States, Judgment* (2001), ICJ Reports (2001) 466.

<sup>225</sup> Weil, 'Le droit international en quête de son identité. Cours général de droit international public', in *Recueil des Cours* (1992) 237, at 220–3.

## E. Liability

Compared to the previous three principles, the compliance-inducing potential of the principle of liability is uncertain. Liability for non-compliance with European and international law primarily serves to provide relief to individuals who have suffered damage as a result of such non-compliance.

Nonetheless, in EU law the development of the principles of liability appears based on the presumption that liability can have a compliance-inducing and preventive potential.<sup>226</sup> In any case, if such potential exists, it would prima facie appear to depend on a fairly consistent pattern of application of such a principle and a reasonable certainty on the side of the non-compliant state that determinations of liability will follow.

In EU law the principle of liability is now well established. If the result prescribed by a directive cannot be achieved by way of interpretation, EU law requires the member states to make good damage caused to individuals through failure to transpose that directive.<sup>227</sup> The Court said that the principle of state liability for loss and damage caused to individuals as a result of breaches of European Union law for which the state can be held responsible 'is inherent in the system of the treaties on which the European Union is based'.<sup>228</sup> According to settled case law, harmed individuals have a right to reparation where three conditions are met: the rule of European Union law infringed must be intended to confer rights on them; the breach of that rule must be sufficiently serious; and there must be a direct causal link between the breach and the loss or damage sustained by the individuals.<sup>229</sup>

Significantly for the scope of this chapter, liability can extend to decisions of a Member State's judiciary.<sup>230</sup>

In contrast to EC law, no general principle of liability for imputable breaches of international law exists that requires a state to provide compensation at national level. It is true that a state, by non-compliance with an international obligation, commits an internationally wrongful act, and on that basis is obliged to provide reparation.<sup>231</sup> Depending on the situation, this may imply that measures have to be taken at national level, for instance by withdrawing or annulling a law that contravenes the international obligation or by adopting a law that ensures that the result required by that international obligation is achieved. However, significantly, international law leaves states much freedom to choose the remedies required. Moreover, international law has to recognize that in some states, such as the United States, the state enjoys immunity from damage claims.<sup>232</sup>

<sup>226</sup> See eg, S. Douglas-Scott, *Constitutional Law of the European Union* (2002) 329.

<sup>227</sup> Joined Cases C-6/90 and C-9/90, *Francovich and Others v Italian Republic*, [1991] ECR I-5357, Rec 39; Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur and Factortame*, *supra* note 198, Rec 51; Case C-5/94, *Hedley Lomas*, [1996] ECR I-2553, Rec 25; and Case C-278/05, *Robins and Others v Secretary of State for Work and Pensions*, [2007] ECR I-1053, Rec. 69; Joined Cases C-378/07 and C-380/07, *Angelidaki*, *supra* note 196, Rec. 202.

<sup>228</sup> Case C-118/08, *Transportes Urbanos y Servicios Generales SAL v Administración del Estado*, [2010] ECR I-00635, Rec 29.

<sup>229</sup> *Ibid.*, Rec. 30.

<sup>230</sup> Case C-224/01, *Köbler v Republik Österreich*, [2003] ECR I-10239; Pfander, 'Köbler v Austria: Expositional Supremacy and Member State Liability', 17 *European Business Law Review* (2006) 275.

<sup>231</sup> Art 31 of the Articles on State Responsibility.

<sup>232</sup> Meltzer, 'Member State Liability in Europe and the United States', 4 *International Journal of Constitutional Law* (2006) 39.

It is also to be recalled that under EU law, national law inevitably plays a role. It is on the basis of the rules of national law on liability that the state must make reparation for the consequences of the loss and damage caused.<sup>233</sup> However, the situation is fundamentally different in EU law as compared to international law. In EU law reparation on the basis of national law is subject to the right to reparation which flows directly from EU law. More particularly, it is subject to the requirement that the conditions for reparation of loss and damage laid down by national law are not less favourable than those relating to similar domestic claims (principle of equivalence) and are not so framed as to make it, in practice, impossible or excessively difficult to obtain reparation (principle of effectiveness).<sup>234</sup> These conditions do not exist in general international law.

The gap between EU law and general international law is only narrowed in particular treaty regimes that provide for liability. Specific obligations grant individuals a right to reparation within the domestic legal order for the breach of an international obligation by the state. Examples are Article 14 of the Convention Against Torture (providing that ‘each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation’); Article 14(6) of the ICCPR (stating that individuals who have suffered punishment as a result of miscarriage of justice, ‘shall be compensated according to law’). Under the ECHR, the Court has declared, for instance, that in the case of a breach of Articles 2 and 3 of the Convention, ‘compensation for the non-pecuniary damage flowing from the breach should, in principle, be available as part of the range of redress’.<sup>235</sup>

Particularly instructive is the situation under Article 5(5) of the ECHR, according to which ‘[E]veryone who has been the victim of arrest or detention in contravention of the provisions of this Article [Articles 5(1)–5(4)] shall have an enforceable right to compensation’. This right to compensation presupposes that a violation of Article 5(1)–(4) has been established—whether by the ECtHR or indeed by a domestic authority.<sup>236</sup> Violation of Article 5(1)–5(4) leads to two questions of compensation on ‘two different levels’.<sup>237</sup> On the one hand, at the international level, Article 41 authorizes the Court to afford compensation to the victim if a national measure violates Article 5. On the other hand, Article 5(5) guarantees an individual a right to compensation that is to be provided at national level—and in that respect it is, as in EU law, a direct consequence of non-compliance.

Although there is some discussion about the possibility of applying Article 5(5) directly,<sup>238</sup> most states apply an obligation to compensate under domestic liability law. More generally, while the ECHR defines the principle of right to compensation and some modalities (for instance, the ability to claim compensation for distress), it does not prohibit Contracting States from making the award of compensation

<sup>233</sup> Case C-118/08, *Transportes Urbanos y Servicios Generales SAL v Administración del Estado*, *supra* note 228, Rec 31.

<sup>234</sup> *Ibid.*

<sup>235</sup> *Bubbins v The United Kingdom*, App no 50196/99 (ECtHR, 17 March 2005), para 171.

<sup>236</sup> *Vachev v Bulgaria*, App no 42987/98 (ECtHR, 8 July 2004), para 78.

<sup>237</sup> *Neumeister v Austria*, App no 1936/63 (ECtHR, 27 June 1968).

<sup>238</sup> *Ciulla v Italy*, ECHR, (1989) Series A, No 148, dissenting opinion of Judge Valcitos.

dependent upon, for instance, the ability of the person concerned to show damage resulting from the breach.<sup>239</sup>

Compared with EU law, the scope of such principles for liability is extremely narrow, and international law otherwise leaves the matter to national law, which may or may not provide for compensation for breach of international law.<sup>240</sup>

## 5. International and European Law Connected

It appears from the above that there remain fundamental differences between EU law and international law with respect to the principles that underlie the compliance-inducing role of national courts. The principles of EU law, with regard to supremacy, direct effect, consistent interpretation, and liability are more developed, more powerful, and more embedded in national law. The distinction is mitigated in states which, through a bottom-up process, move in the direction of EU law, a practice that moreover is supported by the general principles of effective treaty performance which may, depending on the contents and nature of the international obligation, require adjustment of national law. Nonetheless, practice is very uneven and even in Europe significant differences remain.

In this context a significant additional compliance-inducing potential is provided by the connection between international law and EU law. As bits and pieces of public international law become a part of the sphere of competence of the EU, they become part of the EU legal order. In *Haegemann*, the Court said that the provisions of an international agreement concluded by the Community ‘from the coming into force thereof, form an integral part of Community law’.<sup>241</sup> From the case law on association agreements, it can be inferred that this also applies to decisions of international organizations.<sup>242</sup> In *Poulsen* the Court stated that this also applies to customary international law.<sup>243</sup>

This is even true in instances where the EU is not as such a party to a treaty. For example, although the European Community was not a party to the GATT 1947, it effectively assumed the powers of EC member states due to its exclusive competences in the area of common commercial policy and hence became bound

<sup>239</sup> *Wassink v The Netherlands*, ECHR (1990) Series A, No 185-A, para 38.

<sup>240</sup> Note that where such liability is available, that generally will be related to the application of directly effective treaty provisions. In this regard also the conceptual basis of liability in EU law (which is separated from direct effect) is quite different. See generally on the relationship between direct effect and liability Prechal, ‘Member State Liability and Direct Effect: What’s the Difference After All?’, 17 *European Business Law Review* (2006) 299, at 300.

<sup>241</sup> Case 181/73, *Haegemann*, *supra* note 14.

<sup>242</sup> Case 30/88, *Greece v Commission*, [1989] ECR 3711, Rec 13; Case C-192/89, *Sevince v Staatssecretaris van Justitie* [1990] ECR I-3461; Kuijper, ‘Customary International Law, Decisions of International Organisations and Other Techniques for Ensuring Respect for International Legal Rules in European Community Law’, in J. Wouters, P.A. Nollkaemper and E. de Wet (eds), *The Europeanisation of International Law* (2008) 87, at 98.

<sup>243</sup> Case C-286/90, *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp*, [1992] ECR I-6019; Case C-308/06, *Intertanko and Others v Secretary of State for Transport*, [2008] ECR I-4057, Rec 51.

by GATT 1947.<sup>244</sup> At the same time, the ECJ made it clear that the question of possible invocability and direct effect of GATT was to be addressed on its own terms.<sup>245</sup>

The extent to which they do so ultimately depends on EU law. The EU has constituted itself as a separate legal order—separate from national law, but also separate from international law; this latter separation was recognized by the ECJ in its *Kadi* judgment.<sup>246</sup>

In such cases, the substance and procedure of public international law as it applies within the EU are influenced and transformed by EU law. To this extent public international law is ‘Europeanized’ and becomes a system that is distinguishable from general international law.

Significantly for present purposes, this development also has an impact on the status of public international law within the national legal orders of the EU’s member states. Normally, the constitutional law of each state determines the implementation of international obligations and the status and effect of such obligations on the national law level. However, for EU member states, this ‘classical’ dual legal relationship *international law/national law* is gradually becoming replaced by a new triangular relationship *international law/EU law/national law*. The ‘Europeanization’ of international law means that it is EU law that determines how international law is to be applied in the EU member states. Concretely, this means that the ECJ typically determines the status and direct effect of ‘Europeanized’ international instruments, from treaties to decisions adopted by international organizations and bodies.<sup>247</sup> The Court also has jurisdiction to interpret agreements that are approved by the Community—these are acts of the Community institutions which the Court has jurisdiction to interpret in preliminary ruling proceedings.<sup>248</sup>

<sup>244</sup> See *inter alia* Joined Cases 21-24/72 *International Fruit Company NV and Others v Produktschap voor Groenten en Fruit* [1972] ECR 1219, Rec. 18, where reference is made to the fact that ‘the Community has assumed the powers previously exercised by Member States in the area governed by the General Agreement’; Joined Cases 267/81, 268/81 and 269/81 *Società Petrolifera Italiana and Michelin Italiana*, [1983] ECR 801, Rec 17.

<sup>245</sup> It is interesting to recall the two defining considerations of the Court of Justice from the *International Fruit Company* case, *supra* note 244, Rec 7: ‘Before the incompatibility of a Community measure with a provision of international law can affect the validity of that measure, the Community must first of all be bound by that provision’ (this question was answered affirmatively later in the judgment); *ibid*, Rec 8: ‘Before invalidity can be relied upon before a national court, that provision of international law must also be capable of conferring rights on citizens of the Community which they can invoke before the courts’ (this question was answered negatively).

<sup>246</sup> Joined Cases C-402/05 P and C-415/05 P, *Kadi & Al Barakaat v Council of the European Union and EC Commission*, [2008] ECR I-6351. But see the Arbitral Award in *AES Summit Generation Limited and AES-Tisza Erőmű Kft. v Republic of Hungary*, International Centre for Settlement of Investment Disputes, Case No. ARB/07/22, para 7.6.6 (stating ‘that the Community competition law regime, it has a dual nature: on the one hand, it is an international law regime, on the other hand, once introduced in the national legal orders, it is part of these legal orders’, apparently not considering the option of a third way in between international and national law).

<sup>247</sup> See eg, decisions of the Association Council in the context of the EC–Turkey Association Agreement: Case C-192/89, *Sevince*, *supra* note 242.

<sup>248</sup> See, to this effect, Case 181/73, *Haegemann*, *supra* note 14, Rec 4–6; Case C-162/96, *Racke GmbH and Co v Hauptzollamt Mainz*, [1998] I-3655, Rec. 41; and Case C-301/08, *Irène Bogiatzi, Married name Ventouras v Deutscher Luftpool and Others*, [2009] ECR I-10185, para 23.

As far as status is concerned, a corollary of being part of Community law means that there will in any event be primacy over conflicting provisions of national law, irrespective of the position of these provisions in the national legal system,<sup>249</sup> and that even in the hierarchy of sources in the Community legal system proper there will be primacy over instruments of secondary Community law.<sup>250</sup> The Court based this in part on Article 216(2) TFEU, providing that Agreements concluded by the Union are binding upon the institutions of the Union and on its member states.<sup>251</sup>

This is particularly significant for those member states which commonly transformed international law into national law—as a result of this Europeanization, such member states become as it were ‘monistic’.

In principle, it also follows that provisions of treaties and decisions of international organizations that are part of the legal order of the EU can acquire direct effect as defined by EU law, not international law. Moreover, that question is ultimately determined by the ECJ, not national law. In *Ioannis Katsivardas—Nikolaos Tsitsikas OE v Ipourgos Ikonomikon*,<sup>252</sup> the Court was asked whether an individual can plead before a national court the most-favoured-nation clause in Article 4 of the Cooperation Agreement concluded between the European Economic Community, on the one hand, and the Cartagena Agreement and the member countries thereof—Bolivia, Colombia, Ecuador, Peru, and Venezuela—on the other (‘the Cooperation Agreement’), in order to oppose the application of a national fiscal provision. This question thus concerned the ability of that clause to give rise to direct effect for an individual.

However, treaties are not entirely equated to internal EU rules, and the principle of direct effect as it applies to treaties is not identical to the principle as it applies to internal rules. In particular, examination of the direct effect of provisions contained in an agreement concluded by the European Union with non-member countries invariably involves an analysis of the spirit, general scheme, and terms of that agreement—not only of the criteria of unconditionality and so on.<sup>253</sup> These conditions have in particular been developed in the Court’s case law on the question whether the Court can review measures of secondary law against international agreements. In *Christian Dior*, the Court said that ‘having regard to their nature and structure, the WTO Agreement and the annexes thereto are not in principle among the rules in the

<sup>249</sup> See Lenaerts and Cort Haut, ‘Of Birds and Hedges: the Role of Primacy in Invoking Norms of EU Law’, 31 *European Law Review* (2006) 287, at 289–91, with interesting reflections on the relationship between primacy and direct effect. See also J. M. Prinssen, *Doorwerking van Europees recht. De verhouding tussen directe werking, conforme interpretatie en overheidsaansprakelijkheid* (2004), at 11.

<sup>250</sup> Case C-61/94, *Commission v Germany*, [1996] ECR I-3989, Rec 52. See Holdgaard, ‘Principles of Reception of International Law in Community Law’, 25 *Yearbook of European Law* (2006) 263, at 266–7. No such primacy is recognized over instruments of *primary* Community law: see, with arguments, Peters, ‘The Position of International Law Within the European Community Legal Order’, 40 *German Yearbook of International Law* (1997) 9, at 38–40; see also, Cheyne, ‘International Agreements and the European Community Legal System’, 19 *European Law Review* (1994) 581, at 586.

<sup>251</sup> Case C-308/06, *Intertanko and Others*, *supra* note 243, Rec 13.

<sup>252</sup> Case C-160/09, *Ioannis Katsivardas—Nikolaos Tsitsikas OE v Ipourgos Ikonomikon*, [2010] ECR I-04591.

<sup>253</sup> *Ibid.*, Rec 36.

light of which the Court is to review measures of the Community institutions'.<sup>254</sup> In *Intertanko*, the Court said that the Court can examine the validity of Community legislation in the light of an international treaty only when, first, the treaty's provisions as regards their content are unconditional and sufficiently precise and, second, where the nature and the broad logic of the latter do not preclude this.<sup>255</sup>

On this basis, the Court has found that the WTO agreements, but also the UN Convention on the Law of the Sea, do not have direct effect. As to the latter, the Court found in *Intertanko* that this Convention regulates inter-state rights and obligations and states which breach the Convention are liable to other state parties; in consequence, it 'does not establish rules intended to apply directly and immediately to individuals and to confer upon them rights or freedoms capable of being relied upon against States, irrespective of the attitude of the ship's flag State'.<sup>256</sup> It is to be added that in such cases the result is not that member states retain their discretion in determining whether or not to accord direct effect, but rather that they are not allowed to provide direct effect.

These additional conditions do not preclude direct effect of all rules of international law, in the sense that the Court could not review compliance with the obligations of the Community. The Court said that they do not apply to the Convention on Biological Diversity, 'which, unlike the WTO agreement, is not strictly based on reciprocal and mutually advantageous arrangements'.<sup>257</sup> It can be noted that while the distinction between the WTO agreements and the Biodiversity agreement is relatively easily drawn, it is hard to follow the Court's distinction between the Law of the Sea Convention and the Biodiversity Convention—surely both treaties regulate the relationship between states, and if it is true that the Law of the Sea Convention does not create individual rights, that certainly is true for the Biodiversity Convention.

However, the Court did not pronounce on the question of direct effect for domestic courts. It noted that '[e]ven if, as the Council maintains, the CBD contains provisions which do not have direct effect, in the sense that they do not create rights which individuals can rely on directly before the courts, that fact does not preclude review by the courts of compliance with the obligations incumbent on the Community as a party to that agreement'.<sup>258</sup>

This approach also shows that the Court recognizes that the parties to an agreement can preclude that a treaty acquire effect in the EU legal order. In *Ioannis Katsivardas—Nikolaos Tsitsikas OE v Ipourgos Ikonomikon*, the Court stated, confirming earlier case law, that the question is whether 'the general scheme of the agreements and their aims show that the contracting parties intended, by the difference in drafting, to deny Article 4 of the Framework Agreement on Cooperation direct effect previously accorded to Article 4 of the Cooperation Agreement'.<sup>259</sup>

<sup>254</sup> Joined Cases C-300/98 and 392/98, *Parfums Christian Dior v Tuk Consultancy*, [2000] ECR I-11307, Rec. 43; see also Case C-149/96, *Portugal v Council*, [1999] ECR I-8395, Rec 47.

<sup>255</sup> Case C-308/06, *Intertanko and Others*, *supra* note 243, Rec. 45. <sup>256</sup> *Ibid*, Rec 64.

<sup>257</sup> Case C-377/98, *Netherlands v Parliament and Council*, [2001] ECR I-7079, Rec 53.

<sup>258</sup> *Ibid*, Rec 54.

<sup>259</sup> Case C-160/09, *Ioannis Katsivardas—Nikolaos Tsitsikas OE v Ipourgos Ikonomikon*, *supra* note 252, Rec 38.

Furthermore, national courts and authorities will be under the EU law obligation to interpret provisions of national law in conformity with such international instruments or norms.<sup>260</sup> Apart from this obligation of consistent interpretation of national provisions in light of EC law, the ECJ has also recognized the obligation to interpret EC law itself in conformity with such international law instruments since ‘the European Community must respect international law in the exercise of its powers.’<sup>261</sup> The obligation of consistent interpretation applies not only for treaties to which the EU is a party but also, in a somewhat modified form, for treaties to which the member states, but not the EU are a party, such as MARPOL.<sup>262</sup>

Finally, the non-compliance with ‘Europeanized’ international law—whether treaty-based or customary in nature—may imply that member state authorities can be held responsible under the ECJ’s *Francovich* case law on state liability—provided of course that the conditions for such state liability as developed by the ECJ are fulfilled.<sup>263</sup> This potential benefit has so far been limited, however, in the context of WTO law where the restrictive approach to direct effect has been extended to liability claims.<sup>264</sup>

The fact that in the hierarchy of norms international instruments and norms occupy an intermediate position, ie, between primary and secondary EU law, also implies that such international instruments and norms can be used as part of the ECJ’s and/or the Court of First Instance’s control of the validity of EU norms. No direct effect is required for this and the international norm may be

<sup>260</sup> See *inter alia* C-61/94 *Commission v Germany*, *supra* note 250, Rec 52, where the Court of Justice holds explicitly that ‘the primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements’; see also Case C-53/96, *Hermès v FHT*, [1998] ECR I-3603, Rec 28. See in general terms on the obligation of consistent interpretation in Community law, Joined Cases C-397/01 to C-403/01, *Bernhard Pfeiffer and Others v Deutsches Rotes Kreuz, Kreisverband Waldshut e.V.*, [2004] ECR I-8835, Rec 115: ‘The requirement for national law to be interpreted in conformity with Community law is inherent in the system of the Treaty, since it permits the national court, for the matters within its jurisdiction, to ensure the full effectiveness of Community law when it determines the dispute before it.’

<sup>261</sup> See Case C-286/90, *Anklagemyndigheden v Poulsen*, *supra* note 243, Rec 9.

<sup>262</sup> Case C-308/06, *Intertanko and Others*, *supra* note 243, Rec 52 (holding that the fact that Marpol 73/78 binds the Member States is ‘liable to have consequences for the interpretation of, first, UNCLOS and, second, the provisions of secondary law which fall within the field of application of Marpol 73/78. In view of the customary principle of good faith, which forms part of general international law, and of Article 10 EC, it is incumbent upon the Court to interpret those provisions taking account of Marpol 73/78’).

<sup>263</sup> See *inter alia*, Joined Cases C-6/90 and C-9/90, *Francovich*, and Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur and Factortame*, *supra* note 198. For an interesting linkage between the international and EC doctrine of state liability, see Case C-224/01, *Köbler*, *supra* note 230, Rec 32: ‘In international law a State which incurs liability for breach of an international commitment is viewed as a single entity, irrespective of whether the breach which gave rise to the damage is attributable to the legislature, the judiciary or the executive. That principle must apply *a fortiori* in the Community legal order since all State authorities, including the legislature, are bound in performing their tasks to comply with the rules laid down by Community law which directly govern the situation of individuals’.

<sup>264</sup> Joined Cases C-120/06 P and C-121/06 P, *FIAMM and Giorgio Fedon & Figli v Council and Commission*, [2008] ECR I-6513; Steinbach, ‘EC Liability for Non-compliance with Decisions of the WTO DSB: The Lack of Judicial Protection Persists’, 43 *Journal of World Trade* (2009) 1047; Kuijper, *supra* note 242, at 104–5.

both treaty-based<sup>265</sup> or custom-based.<sup>266</sup> Lenaerts and Corthaut rightly stress in this respect:

As long as an obligation can be identified, as long as a behavioural norm for the Community can be derived from an international agreement, this agreement can serve as a norm for reference when the validity of EC law is at stake. As a result the ECJ can also, even in the interest of individuals, assess the validity of Community law in the light of international custom, without having to wonder whether those customary norms create rights which individuals can rely on directly before the courts.<sup>267</sup>

The fact that an international instrument or norm forms part of the Community legal order also means that the Commission can—at least theoretically—bring infringement proceedings against member states that are not in compliance with it.<sup>268</sup>

The aforementioned corollaries of ‘Europeanization’ have profound effects, not just in terms of the role of the ECJ in regard to public international law, but also for the reception, interpretation, and application of public international law within Europe in general, both at the EU and national level. For the member states of the EU, the distinction in the power of national courts vis-à-vis international law and vis-à-vis EU law is very limited. However, it is also true that the full potential still remains to be realized.

## 6. Conclusion

In the 1960s, EU law largely, but never entirely, separated itself from the system of public international law from which it originated, and started to form a separate legal order within, or to a certain extent beside, public international law. One of the many institutional consequences was that national courts, which from the perspective of international law are simply an organ of a unitary state, were engaged in the process of reviewing and ensuring compliance by the very state of which they were an organ.

This model, which proved powerful and relatively successful, has provided a model for the rest of international law. (Non-)compliance remained one of the eternal problems of the decentralized international legal order based on sovereign states. Next to many other attempts to improve records of compliance, including the establishment of more and more international courts and a variety of other international

<sup>265</sup> See, eg, Case C-377/98, *Netherlands v European Parliament and Council*, *supra* note 257, Rec 54, where the Court holds, concerning the Convention on Biological Diversity, that even if it ‘contains provisions which do not have direct effect, in the sense that they do not create rights which individuals can rely on directly before the courts, that fact does not preclude review by the courts of compliance with the obligations incumbent on the Community as a party to that agreement’.

<sup>266</sup> Case C-162/96, *Racke*, *supra* note 248.

<sup>267</sup> Lenaerts and Corthaut, *supra* note 249, at 298.

<sup>268</sup> See, eg, Case C-61/94, *Commission v Germany*, *supra* note 250, on Germany’s failure to comply with the International Dairy Arrangement; Case C-13/00, *Commission v Ireland*, *supra* note 13, on Ireland’s failure to adhere within the prescribed period to the Berne Convention for the Protection of Literary and Artistic Works. See generally Kuijper, *supra* note 242, at 102–4.

institutional mechanisms such as non-compliance procedures, national courts have a significant potential for inducing and securing compliance. That holds both for individual cases, where the role of national courts takes the form of enforcement, for their role in norm-internalization, and for the possible 'deterrent' effect on political branches, as they know they may not get away with violations of the law.

Even though one can speak of EU law as a model in this regard, there is only limited evidence that it as such has an influence on states or that states intentionally seek that model. Rather, it seems that the transformation in the reception of international law in states, allowing for a greater role of national courts, is driven by processes that somehow are comparable to the processes that have characterized the transformation of EU law, notably the recognition of private parties as holders of subjective rights. This recognition pierces the shield of the national legal order, and empowers national courts to review (non-)compliance in respect of such rights.

It remains true, however, that compared with EU law, the normative pull of international law, beyond the general principle of effectiveness and beyond primary rules in particular treaty obligations, remains relatively weak. In this situation, much depends on bottom-up processes. Such processes may be induced by comparable factors (such as recognition of individual rights), and perhaps by a process of learning by example, but they cannot easily be framed in terms of legal obligation.

The cause and effect of the weak position of general international law is a very significant diversity in the practices of states; while there are dozens of states in which the principles of supremacy, direct effect and consistent interpretation, and, to a much lesser extent, liability can be found, there are at least as many states where such concepts are unknown. This process has significant effects for compliance and effectiveness across states, and indeed for the understanding of the role of international law in relation to national law as such.

It is quite obvious that with the increasing connection between international law and European law, the diversity in terms of reception of international law within the member states of the EU is problematical, and indeed has become a matter of concern to the EU itself. The principles that the ECJ has developed on the effects of international agreements in the legal order of the EU, and indirectly in the national legal order of the member states, go some way to ensuring to a much greater extent uniformity between the member states in terms of the status of international agreements in national law, and the resulting power of national courts.

The case law of the Court on the direct effect of international agreements, which is not only based on criteria of precision and unconditionally, but takes into account the inter-state nature of obligations and questions of reciprocity, shows that international obligations are not equated with the 'normal' rules of EU law, and that international agreements cannot profit to the full extent of the power of direct effect. It remains an open question, in particular in the light of the *Intertanko* judgment, which treaties would on that ground be disqualified for direct effect. In this respect, we can say that the integration of the EU in its relationship to international law is still at the crossroads, with a pivotal role for the ECJ.