Collective and collisional properties of the rubidium quantum gas
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Chapter IV
The Public International Law Framework of Implementation

1 Introduction

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

2 Theory: Monism-Dualism

Academic writing regarding the relationship between national and international law has long been dominated by the dichotomy between monism and dualism. Taken literally, these terms postulate that national and international law are part of one and the same legal order (monism), or that they constitute separate legal orders (dualism). In this basic form, the dichotomy between monism and dualism establishes a starting point for the analysis of the effects of international law in the national legal order. It brings to the fore the fundamental question whether international law is actually part of, and thus presumptively valid in, the national legal order or not. How and to what extent States can alter that presumption of domestic validity (monism) or non-validity (dualism), and do so in practice, is then a topic for further analysis.

However, the monism-dualism dichotomy is the starting point for a highly complicated discourse that requires a thorough separation of theory and practice and clarifies State practice only to a limited extent. For many instances of State practice can be explained both under monist and dualist theories. National rules of reference to international law,

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for example, may evidence a monist attitude when they are declarative, but a dualist attitude when they are constitutive. In the Netherlands, the legislature in its 1953 revision of the Constitution expressed the standpoint that the new constitutional provisions on the domestic validity of treaties were only declaratory of the legal situation that was dictated by international law. This position finds some support in the fact that all international law is since long incorporated in the Dutch legal order by way of an unwritten rule rather than constitutional provisions. However, in 1956 the legislature abandoned this view when it altered the provisions on the domestic validity of treaties only slightly, but now declared them to be constitutive instead of declaratory. The same ambiguity extends to many other aspects of the role of international law in national legal orders. Even the fact that many national courts do not in principle apply treaties as a source of law can be conceptualized either as a jurisdictional limitation of national origin permitted by international law (fitting monism) or as international law's lack of authority in this sphere (fitting dualism). Since State practice seldomly reveals the doctrinal positions underlying the practical results, let alone in a conclusive manner, the explanatory power of monism and dualism is limited.

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

777 See above, note 417 and accompanying text.
778 See Brouwer 1992, p. 252.
780 That legislatures are not always firmly decided in their doctrinal stand on international law is evidenced not only by the Dutch and German examples, but also by the preparatory work on Art. 4 of the Constitution of the Weimar Republic, in which the legislature quickly meandered between different conceptions of the obligatory nature of international law for inter-state relations. See Simma 1995, p. 41-43.
782 See e.g. Arangio-Ruiz 2003, p. 917; Heiskanen 1992, p. 3-4.
786 See e.g. Aust 2000, p. 146-156; Buergenthal 1992, p. 316-317.
international law, or even only treaty law, in practice rather than the doctrinal position of the State.\textsuperscript{787} All in all, the variance in meaning ascribed to the terms monism and dualism has confused the debate and further undermined their usefulness for the analysis of the relationship between national and international law.\textsuperscript{788}

Doctrine has by now mostly abandoned the monism-dualism debate, making a move to pragmatism.\textsuperscript{789} Scholarship regarding the interaction of national and international law has predominantly moved away from conceptual analysis of the legal framework to focus on practical results.\textsuperscript{790} As some scholars have noted, the lack of attention for a unifying theory has serious drawbacks.\textsuperscript{791} Lack of a proper theoretical grounding, to name but one example, likely contributes to the unfortunate tendency of various scholars to equate the application of international law in national courts to that of foreign law, ignoring the obvious and important differences between the two.\textsuperscript{792} Yet, a rejuvenation of the theoretical discourse does not necessarily imply a resurrection of the monism-dualism debate, in fact far from it.

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

\textsuperscript{787} See Fleuren 2004, p. 10-11 and 16-17; Arangio-Ruiz 2003, p. 915.
\textsuperscript{788} Cf. Heiskanen 1992, p. 12 ("The monist-dualist debate lacks technical specificity.").
\textsuperscript{790} Cf. Santulli 2001, p. 105-106.
\textsuperscript{791} See e.g. Arangio-Ruiz 2003, p. 914-915. Not also that the need for a renewed theoretical understanding of the relationship between national and international law is a central premise of the Amsterdam Center for International Law's research project on "Interactions between International Law and National Law," of which this study is a part.
\textsuperscript{792} To be sure, there are certainly parallels to be drawn between the judicial application of foreign and international law, and valuable lessons to be learned by doing so. See above, note 40. Yet, to equate the two disregards crucial differences in bindingness and authoritativeness and misconstrues their respective positions in the national legal order. See e.g. The International Judicial Dialogue: When Domestic Constitutional Courts Join the Conversation 2001, 114 Harvard LR 2049 at 2051 (2001) (contending "that [national] courts' willingness to analyze and then either to follow or disregard foreign and supranational precedents suggests that they do not view domestic law as subordinate to international law.").
3 The General Rule: Freedom of Implementation

As a general rule, international law leaves States free to implement and fulfil their international obligations in any way they see fit. For some time, an extensive scholarly debate questioned the applicability of the freedom of implementation to human rights law. Still today, the holdings of several international bodies keep the door open for an appeal to the principle of effectiveness to argue that the nature of human rights treaties requires their direct application in national courts. Yet, it is commonly accepted that human rights treaties, like international law in general, are not directly applicable per se. Thus, the oft-noted general rule remains that “international law does not itself prescribe how it should be applied or enforced at the national level.” Also, the case law of international courts reflects a deference to actors on the national level in the margin of appreciation. Both human rights courts and the ICJ consistently give States substantial leeway to choose the means of implementation of their international obligations.

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

Second, the bottom-up approach of having States regulate the implementation of their international obligations themselves is generally thought to be more effective than a top-down regime detailed by international law. Since the intricacies of their national legal orders are best known to States themselves, freedom of implementation allows them to choose the most effective way of implementing their international obligations. It also allows them to mitigate some of the complexities of international law. A mediating role...
of national law may be valued in particular to alleviate the vagueness and uncertainty of (customary) international law for national courts.\(^{802}\)

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

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

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


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

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

\(^{806}\) See Betlem and Nollkaemper 2003, p. 573; Reydams 2003, p. 137, note 40 (“Whether an international convention can be directly applicable in the domestic legal order is [...] purely a matter of national law.”); Partsch 1992, p. 242 and Jacobs 1987, p. xxiv:

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

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

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

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

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

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the judicial application of international law subject to various demands such as the principle of reciprocity and the doctrine of self-executing treaties, or to limit it altogether.

Yet, the conditions and limits of the freedom of implementation are a matter of debate. Both courts and scholars frequently overestimate the extent of this freedom, invoking it to defend courses of action that (potentially) violate international obligations. They especially overestimate the extent to which international law allows States to keep international obligations separated from and subordinated to national law. An extreme view in this regard, notably expressed in a Separate Opinion of a Judge of the ICJ, is Sir Percy Spender's assertion that “assuming the constitutionality and validity of the Act within the domestic legal system of the State concerned, it is competent for a State party to any treaty or convention to pass a law binding on its own authorities to the effect that, notwithstanding anything in the treaty or convention, certain provisions thereof binding on that State shall not apply, or to legislate in terms clearly inconsistent with, and intending to override, the terms of an existing treaty. [...] But that in no way would be relevant to the question whether that legislation—an act done pursuant to it—is or is not in breach of or incompatible with obligations binding upon the State by virtue of a treaty or convention.”

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

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808 See Partsch 1992, p. 245.
809 See Tomuschat 2001, p. 363; Henkin 1993, p. 149 and 153:
"The international obligation is upon the state, not upon any particular branch, institution, or individual member of its government [...]. Since a state’s responsibility to give effect to international obligations does not fall upon any particular institution of its government, international law does not require that domestic courts apply and give effect to international obligations."

810 See below, notes 819-821 and 871-872.
812 Unless one interprets the word “competent” as denoting mere factual possibility rather than international legality. Such an interpretation seems stretched, however, given the place of this citation in a separate opinion of a judge of the ICJ.
813 See in this regard Jackson 2004 and Jackson 1997.
need for exceptional cases of violation and adaptation,814 but in concrete situations these remain violations and thus prohibited until they gather enough weight to change the rule in question. States are obviously in a practical sense able to legislate in contravention of their international obligations, but international law does not allow them to do so. Sir Percy Spender admits so himself when he states earlier in the same separate opinion that “[a] State, party to the Convention, may not, whatever the subject-matter of the law under which it acts, do anything which contravenes the provisions of the Convention.”815 This rather straightforward statement is hard to reconcile with the one quoted above.

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

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815 Id., at 119.
817 Cf. Rosene 1989, p. 39 (“It is axiomatic that a treaty, made between States, is binding upon each State as a whole, upon each one of its organs. This is implicit in the lapidary formulation of the pacta sunt servanda rule in article 26 of the Vienna Conventions.”);
819 See e.g. U.K., Blackburn v. Attorney-General, 1971, 2 All ER 1380, 1 WLR 1037, 52 ILR 414: “Even if a treaty is signed, it is elementary that these courts take no notice of treaties as such. We take no notice of treaties until they are embodied in laws enacted by Parliament, and then only to the extent that Parliament tells us.”;
820 See e.g. Germany, Bundesverfassungsgericht, In re G., 14 October 1998, 523 U.S. 371 at 375 (“[i]t has been recognized in international law that, absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State.” – emphasis added). See also Denza 2003, p. 420-421.
821 U.S., District Court (Connecticut), The Over the Top (Schroeder v. Bissell), 26 February 1925, 5 F. 2d 838 at 843.
822 See Resolution of the Institut de Droit International (1993 Milan), 65 Annuaire De L’Institut De Droit International 321, Art. 1 (“National courts should be empowered by their domestic legal order to interpret and apply international law with full independence”).
the other hand, numerous national judgments are notably stricter in their adherence to international obligations, even if that requires a limitation of the freedom of implementation.\textsuperscript{823}

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

4 The Doctrine of Self-Executing Treaties

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

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

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

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

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

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840 See above, notes 618 and 619. See also Vazquez 1995, p. 711 and 715-716.


842 See for an overview of various avoidance doctrines employed by national courts Collins 2002; Benvenisti 1993, para. II C.


844 See U.K., In re N. (Child Abduction: Jurisdiction), 31 August 1994, [1995] Fam 96 at 100, per Wilson J:

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

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

"Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures- [...] (b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;"


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

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

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

832 See e.g. Art. 14 (1) ACHR:
"Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish."
834 See Nollkaemper 2002, p. 171.
838 Compare Nollkaemper 2002, p. 161 (distinguishing subjective and objective direct effect of international law, whereby the first denotes the right of the individual to invoke a provision rather than the intent of the parties to the treaty to make it self-executing, and the second corresponds to the content based test set out here).

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

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

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

5 Limits and Qualifications of the General Rule

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

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

Both scholars and national courts easily overestimate the extent of the freedom of implementation. They regularly assume that the freedom rule implies that international law is silent on its effects in the national legal order, and consequently that “the effect of international law [...] within the legal order of a State will always depend on a rule of domestic law.”

While numerous national courts have adopted this view, there are good reasons to doubt it.

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

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

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853 See above, note 806.
854 See above, note 819-821.
857 See e.g. Flaherty 1999 and Yoo 1999a.
858 See Perkins 1997, p. 485-489 (“In the understanding of the founders of the republic, the law of nations was applicable in our courts because it was binding on the United States. [...] The Constitution reflected their understanding of a binding law of nations that stood on its own authority.”); Wright 1916, p. 223-227. See also U.S., Supreme Court, Chisholm v. Georgia, February Term, 1793, 2 U.S. 419 at 474:

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

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

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

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

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

\begin{itemize}
\item See notes 776 and 778 and accompanying text.
\item See e.g. Arangio-Ruiz 2003, p. 937-939; Rogers 1999, p. 31 ("The very application of [different authorizations in national law to apply international law] by United States domestic courts is an inherent rejection of the idea that international law is \textit{ipso facto} binding in United States courts \textit{without an independent basis for reference to it in domestic law.}" (italics in original)).
\item See Nollkaemper 2002, p. 168; Simma 1995, p. 43.
\item See Art. 18 VCLT. See also Klabbers 2001a.
\item See Botswana, Court of Appeal, \textit{Unity Dow v. Attorney-General of Botswana}, 3 July 1992, 1994 (6) Butterworths Constitutional Law Reports 1 at 137-140 (Per Aguda J., striking down discriminatory legislation on the basis of unincorporated treaties, noting \textit{inter alia} that if a treaty "has merely been signed but not incorporated into domestic law, a domestic court must accept the position that the Legislature or the Executive will not act contrary to the undertaken given on behalf of the country by the Executive in the convention, agreement, treaty, protocol or other obligation" and that it was "bound to accept the position that this country will not deliberately enact laws in contravention of its international undertakings and obligations."). See also Argentina, Judge Gabriel Cavallo of the Buenos Aires Federal Court, \textit{Julio Simon} (Case no. 8686/2000, "Simon, Julio, Del Cerro, Juan Antonio s/sustracción de menores de 10 años"), 6 March 2001, 2000/B Nueva Doctrina Penal 527 (striking down several amnesty laws, \textit{inter alia} on the basis that they are incompatible with the object and purpose of the CAT) and Klabbers 2001a, p. 319-322.
\item See Nollkaemper 2002, p. 169.
\end{itemize}
through direct application, finding that they cannot substitute for the political organs in choosing the mode of compliance with international obligations. In such cases, the freedom to choose how to implement in practice extends to a freedom to choose whether to implement at all.866

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

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

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

866 See above, text preceding note 644.
870 Id. at para. 10, citing the Court of First Instance:
   “[T]he prohibition on discrimination between legitimate and illegitimate children as regards inheritance rights [was] formulated in the [1979 ECHR] judgment sufficiently clearly and precisely to allow a domestic court to apply it directly in the cases brought before it.”
871 Id. at para. 11, citing the Court of Appeal:
   “[I]n so far as Article 8 (Art. 8) entails negative obligations prohibiting arbitrary interference by the State in the private or family life of persons residing within its territory, it lays down a rule which is sufficiently precise and comprehensive and is directly applicable, but this is not the case in so far as Article 8 (Art. 8) imposes a positive obligation on the Belgian State to create a legal status in conformity with the principles stated in the said provision of the Convention; (...) given that on this point the Belgian State has various means to choose from for fulfilling this obligation, the provision is no longer sufficiently precise and comprehensive and must be interpreted an obligation to act, responsibility for which is on the legislature, not the judiciary.”
872 Id., para. 12.
873 Id. at para. 25–26.
not decided on a means to effectuate those obligations. But there is also contrary practice. National courts have rendered many judgments that uphold the principle of *pacta sunt servanda* over the freedom of implementation. Nowadays, such contrary practice is especially strong in human rights law, but it is not limited to that field. In the last decades, both national and international courts have given judgments in various fields of law that lay more emphasis on an effective enforcement of international law than on the State’s freedom of implementation. It should be noted that much of this contrary case law is inconsistent and contains the proverbial exceptions to the rule. National courts regularly curtail the State’s freedom of implementation in exceptional cases only to revert to more conservative positions in subsequent cases of a similar nature.

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

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

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875 See for examples and a separate analysis of international law concerning the rights and duties of individuals below, para. 5.3.a.
877 See Ferdinandusse 2003, p. 65-100; Denza 2003, p. 419-420.
879 Art. 14 (1):
“Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish.”
requires State organs to give primacy to treaty obligations and ensure their effective application even in the face of contrary national law or gaps therein.\textsuperscript{881}

Furthermore, the Supreme Court explicitly rejected the proposition that States are at liberty to keep international law out of their national courts, stating that “it should be borne in mind that when the Nation ratifies a treaty which it has signed with another State, it is making an international commitment that its administrative and jurisdictional bodies will apply that treaty to the cases covered thereby, provided that it contains sufficiently specific descriptions of such cases to permit its immediate application.”\textsuperscript{882} Argentinean courts have adhered to the interpretation of Art. 27 VCLT in \textit{Ekmekdjian} in several later cases.\textsuperscript{883}

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

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

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

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

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

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

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


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

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

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

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

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


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

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

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

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

5.2 The Principle of Consistent Interpretation

National courts all over the world interpret national law in conformity with international law to the greatest extent possible. This principle of consistent interpretation has a long history, and is also called the rule of presumptive conformity or *interprétation conforme*.\(^891\) It is found in Argentina,\(^893\) Botswana,\(^894\) Germany,\(^895\) Japan,\(^896\) the Netherlands,\(^897\) Switzerland,\(^898\) the U.K.,\(^899\) the U.S.,\(^900\) and many other States on all continents.\(^901\) Some commentators have judged State practice sufficiently consistent to

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

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


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

See also Denza 2003, p. 433; Cassese 1985, p. 356; Buergenthal 1992, p. 360-361.

\[^900\] In the U.S., the principle is generally called the Charming Betsy canon, after the 1804 Supreme Court case that stated that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." U.S., Supreme Court, *Murray v. The Schooner Charming Betsy*, 1804, 6 U.S. (2 Cranch) 64 at 118. See for a recent application U.S., United States Court of International Trade, *The Timken Company v. U.S.*, 5 September 2002, 240 F.Supp.2d 1228 at 1238-1239 ("While an unambiguous statute will prevail over a conflicting international obligation, an ambiguous statute should be interpreted so as to avoid conflict with international obligations."). See also Rogers 1999, p. 36-73; Bradley 1998; Rogers 1998.

\[^901\] See Betlem and Nolkaemper 2003, p. 575 (citing examples from Australia, Israel and the U.K.); Stirling-Zanda 2000, p. 127-129 (Italy, Portugal, Germany and Greece); Benvenisti 1994, notes 28 and 29 (Canada, Israel, Namibia and Zimbabwe); Jacobs 1987, p. xxvi (mentioning "the principle common to many systems that [domestic] legislation should wherever possible be so construed as not to conflict with the international obligations of the State"), followed by country reports describing the canon of construction
infer "an international duty of [national] courts to interpret, within their constitutional mandates, national law in the light of international law." Indeed, it appears that the principle of consistent interpretation is a general principle of law in the sense of Art. 38 (1) sub c ICJ Statute. Even if national courts regularly fail to interpret their laws in such a way as to heed relevant international obligations, they seldomly if ever dispute the existence of the principle. Numerous States have embodied the principle of consistent interpretation in their national laws, either explicitly or implicitly. That does not mean, however, that in those States the principle is of national origin. In many of these cases the legislature followed the courts, rather than the other way round. Both in South-Africa and Russia, for

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a.o. in Denmark (p. 33), France (p. 60), then Federal Republic of Germany (p. 69), Italy (p. 100) and United Kingdom (p. 135 and 137); Cassese 1985, p. 398 (inter alia Poland and India); Meijers 1985, p. 117-129 (inter alia Austria and Pakistan). Cf. Bangalore Principle 4, reported in 14 Commonwealth Law Bulletin 1196 at 1197 (1988):

"[T]here is a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law — whether constitutional, statute or common law — is uncertain or incomplete..." 902

902 Betlem and Nolkaemper 2003, p. 574.

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

"It is generally accepted that domestic law should be interpreted as far as possible in a way which conforms to a State's international legal obligations. Thus, when a domestic decision maker is faced with a choice between an interpretation of domestic law that would place the State in breach of the [International Covenant on Economic, Social and Cultural Rights] and one that would enable the State to comply with the Covenant, international law requires the choice of the latter."); HRC, *Concluding Observations on Ireland*, Doc. CCPR/C/79/Add.21, 3 August 1993, para. 18 ("Notwithstanding that the [ICCPR] cannot be directly invoked in the [Irish] courts, the need to comply with the international obligations should be taken fully into account by the judiciary."). Cf. Iwasawa 1998, p. 83 ("In most states, the principle is established that courts must interpret domestic laws in conformity with international law.")

904 See e.g. Barak-Erez 2004, p. 615.

905 See Section 233 of South-Africa's 1996 Constitution:

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

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

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

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

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

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

"Article 7 § (1) of the Constitution also means that by the Constitution's order, the Republic of Hungary participates in the community of nations; this participation, therefore, is a constitutional command for domestic law. It follows therefrom [that] the Constitution and domestic law must be interpreted in a manner whereby the generally recognized international rules are truly given effect."
example, the courts adhered to the principle of consistent interpretation before their constitutions instructed them to do so.\textsuperscript{907} Likewise, the English courts accepted an obligation to interpret national law in conformity with the ECHR long before Section 3 of the Human Rights Act\textsuperscript{908} codified it.\textsuperscript{909}

National courts approach the principle of consistent interpretation from two different angles.\textsuperscript{910} First, courts may concentrate on the intent of the legislature and strive to honor it. In doing so, they consider internationalist interpretation to be the most accurate way to ascertain the meaning of the national law. According to this theory, the legislature would only violate international law after explicit deliberation and motivation. If such explicit intent to violate can not be found, the law must have been meant to conform to international law. While the result is international law friendly, the motivation behind it is to honor national rather than international law.

Second, courts may be focused more on honoring international obligations than on finding the most accurate interpretation of national law.\textsuperscript{911} In such cases, the reasoning of the courts often evinces a strong urge to uphold international law.\textsuperscript{912} A historic example

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

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

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

"[T]he inter-relationship of national and international law, including in relation to fundamental rights, is "undergoing evolution". [...] To the full extent that its text permits, Australia's Constitution, as the fundamental law of government in this country, accommodates itself to international law, including in so far as that law expresses basic rights." - footnotes omitted; Australia, High Court, Minister for Immigration and Ethnic Affairs v Teoh, 7 April 1995, 183 CLR 273 at 287, per Mason CJ and Deane J:

"It is accepted that a statute is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law. [...] In this context, there are strong reasons for rejecting a narrow conception of ambiguity. If the language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations which it imposes on Australia, then that construction should prevail.";
is the British case *Le Louis* (1817), where Lord Stowell stated that "no nation can
privilege itself to commit a crime against the law of nations by a mere municipal
regulation of its own... the Legislature must be understood to have contemplated all that
was within its power, and no more." Some modern cases take such an internationalist
approach to the principle that they effectively transform it into a mandate to uphold
international obligations rather than use it as a tool to resolve ambiguities in national
law.\(^9\)

While the results of these two approaches can differ considerably,\(^9\) in practice the two
categories can not always be adequately separated. Many national judgments silently
adhere to the principle of consistent interpretation without clear motivation.\(^9\) Other
judgments fuse the two approaches with varying emphasis on one or the other.\(^9\) For
example, courts may sanction a breach of international law by an ambiguous national law
only if the legislature clearly intended to bring about that factual situation *and explicitly*
stated its intent to breach the international obligation by doing so.\(^9\) In the absence of an
explicit intention to breach, the intent of the legislature to bring about the specific result
is not enough and will be overruled by the court in favour of an internationalist
interpretation.\(^9\)

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\(^9\) U.S., Court of Appeals (D.C. Circuit), *Finzer v Barry*, 1986, 798 F.2d 1450 at 1460 ("It would be quite
improper for the judiciary to disregard international obligations that are inseparable from our
nationhood."); U.S., District Court (Connecticut), *The Over the Top (Schroeder v. Bissell)*, 26 February
1925, 5 F. 2d 838 at 842.


at 634-635:

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


\(^9\) See The International Judicial Dialogue: When Domestic Constitutional Courts Join the Conversation

\(^9\) Compare e.g. in Germany, Bundesverfassungsgericht, *In re G.*, 14 October 2004, 2 BvR 1481/04, para.
30-33 to 46. See also Rogers 1998, p. 640-645.

\(^9\) See Conforti 1997, p. 12 (stating that this rule is followed mostly by American and Swiss courts).

October 1976, 3 Italian Yearbook of International Law 361 at 364:

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

See also U.S., Court of Appeals (Fifth Circuit), *Spiess v. C. Itoh & Co. (America)*, 1981, 643 F.2d 355 at
362.
It is also not uncommon to see national courts pay lip-service to the goal of ascertaining legislative intent, but go to such lengths to avoid violations of international law that the resulting judgments really belong to the second, internationally oriented category. These cases generally involve national laws that are in conflict with international law rather than ambiguous on their face, and the resulting judgments hardly disguise their dedication to the enforcement of international law. In Sharon and Yaron (2003), the Belgian Court of Cassation first acknowledged that Art. 5 (3) of Belgium’s 1993 Law relating to the suppression of grave violations of international humanitarian law ruled out a defense of immunity. However, it then “interpreted” this provision in such a way as to avoid a violation of the international obligation to grant immunity that had just been affirmed by the ICJ in Congo v. Belgium. The Court of Cassation held that “if this provision of Belgian domestic law were interpreted as setting aside the immunity principle of customary international criminal law, this provision would contravene the aforementioned principle; that the aforementioned rule cannot therefore be considered to have such a meaning, but instead must be understood as only excluding the official capacity of a person as a basis for penal non-accountability for the crimes enumerated in this statute.” Thus, in order to avoid a violation of international law, Belgium’s highest court effectively overruled the clear intent of the legislature to set aside immunity for core crimes prosecutions under the guise of interpretation.

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920 See Benvenisti 1994, p. 428 (calling the principle “a potent tool that judges in a great number of jurisdictions use to apply international norms despite apparent conflicts with domestic law”).
921 See e.g. U.S., Court of Appeals (Fifth Circuit), United States v Columba-Colella, 604 F.2d 356 at 360-361 (federal court avoided extraterritorial application of very general but not ambiguous criminal statute in violation of international law by deciding “that because the defendant’s act in this case is beyond its competence to proscribe, Congress did not intend to assert jurisdiction here under 18 U.S.C. para. 2313,” and ended its judgment with the statement that “[the result we reach is part of the price a nation must pay to support mutuality of comity between sovereign nations.”). But see for a different reading of this case Rogers 1999, p. 46-48.
922 Belgium, Court of Cassation, In re Sharon and Yaron, 12 February 2003, para. IV:
“Attendu que, sans doute, aux termes de l’article 5, § 3, de la loi du 16 juin 1993 relative à la répression des violations graves du droit international humanitaire, l’immunité attachée à la qualité officielle d’une personne n’empêche pas l’application de ladite loi;”
(“Whereas, without doubt, in pursuance of Article 5, § 3 of the statute of June 16 1993, relating to the suppression of grave violations of international humanitarian law, immunity attaching to a person’s official status does not prevent application of the aforementioned statute;”)
924 Belgium, Court of Cassation, In re Sharon and Yaron, 12 February 2003, para. IV:
“Attendu que, toutefois, cette règle de droit interne contreviendrait au principe de droit pénal coutumier international précité si elle était interprétée comme ayant pour objet d’écarté l’immunité que ce principe consacre ; que ladite règle ne peut donc avoir cet objet mais doit être comprise comme excluant seulement que la qualité officielle d’une personne puisse entraîner son irresponsabilité pénale à raison des crimes de droit international énumérés par la loi;”
Another rather extreme example of the fictitious construction of intent in order to observe an international obligation is the famous *PLO Mission* case. In 1987, the U.S. Congress passed an Anti-Terrorism Act that *inter alia* banned all PLO offices within the jurisdiction of the United States. Closing the PLO’s Observer Mission in New York would violate the Headquarters Agreement with the United Nations, but it was clear from the text and drafting history of the Act that Congress intended to do so. Accordingly, the Justice Department filed suit in the Federal District Court of the Southern District Court of New York to secure closure of the PLO Mission. Faced with this conflict between the Act and a treaty, Judge Palmieri, writing for the District Court, first affirmed Congress’ competence to violate a treaty and stated that other branches of government were bound to implement such a violation when Congress’ intent was sufficiently clear. In a surprising move, he then ruled that the intention to violate the Headquarters Agreement was not manifest in the Act, which declared it unlawful “notwithstanding any provision of law to the contrary” to establish or maintain PLO facilities or establishments within U.S. jurisdiction. Therefore, he “interpreted” the Act in conformity with the Headquarters Agreement, with the result that it did not apply to the PLO Mission in New York. Since the Justice Department decided not to appeal, this was the final word in the case and the PLO Mission remained open.

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

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

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927 See Reisman 1989, p. 415-17 (“It was of little concern to its drafters that the legislation would have violated an international agreement. Despite Judge Palmieri’s opinion, there was no question that such was its intention and consequence”).


929 Id., at 1471.

Second, as a more practical effect, the principle of consistent interpretation may bypass certain obstacles raised by national law to the application and effectuation of international law in national courts. For example, the case of *Timken Co. v. U.S.* (2002) demonstrates how the principle can be used by litigants to overcome limitations of standing.\(^{931}\) The *Timken* court held that a private party can not challenge government action on the ground that it violates the World Trade Organization agreement because national law explicitly precludes such an action.\(^{932}\) However, the court held, a litigant is free to claim that the government's application and interpretation of United States antidumping law is contrary to congressional intent on the ground that it violates the WTO agreement which Congress intended to implement.\(^{933}\) Obviously, the result is by and large the same. Thus, in this case the principle was used to indirectly challenge rather than interpret national law on the basis of a treaty, where national law would normally rule out such a challenge. Such effects of the principle of consistent interpretation can significantly curtail the freedom of implementation in practice by limiting a State's ability to control the justiciability of rules of international law and the standing of private parties to invoke them.\(^{934}\)

5.3 Separate Regimes for Specific Categories?

The previous two sub-paragraphs have discussed the limits of the freedom of implementation in general. It may also be asked whether this freedom of the State applies equally to all international law, or requires qualification for particular categories of international norms. In contemporary international law, this question appears most pertinent for international norms of a humanitarian character, as well as those of *jus cogens* status.\(^{935}\)

5.3.a International Law of a Humanitarian Character

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

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\(^{932}\) Id., at 1238.

\(^{933}\) Id.


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

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

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

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

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

937 Cf. Gaja 2003, p. 7 (“Should one accept the view that international law confers rights and obligations on individuals, it seems reasonable to hold that international law may also impose obligations on specific State organs.”).


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

941 See e.g. Common Art. 1 G/IV; Art. 1(1) AP I; Art. 4(1) AP II. See also Meron 1989, p. 246.

that the obligation “to respect and to ensure respect for the present Convention in all circumstances” in common Art. 1 “is not an engagement concluded on a basis of reciprocity, binding each party to the contract only in so far as the other party observes its obligations. It is rather a series of unilateral engagements solemnly contracted before the world [...] so universally recognized as an imperative call of civilization.”

Human rights bodies have adopted the same line of reasoning. The IACtHR has emphasized that “modern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States,” but rather that the ACHR is a “multilateral legal instrument or framework enabling States to make binding unilateral commitments not to violate the human rights of individuals within their jurisdiction.”

That international obligations of a humanitarian character are not to the same extent as general international law subject to a condition of reciprocity has various concrete consequences. It means obligations of this kind may not be affected by countermeasures, while relevant treaty provisions can not be terminated or suspended in case of a material breach by another contracting party.

Second, the practice of international bodies shows a trend to limit not only the principle of reciprocity, but also the principle of consent for (at least certain) international obligations of a humanitarian character. The HRC has repeatedly asserted that “human rights treaties devolve with territory, and that States continue to be bound by the obligations under the [ICCPR] entered into by the predecessor State. Once the people living in a territory find themselves under the protection of the International Covenant on Civil and Political Rights, they cannot be stripped of that protection on account of a

943 Pictet, et al. 1960, Vol. IV, p. 15. Cf. Art. 63 GC I, Art. 62 GC II, Art. 142 GC III, Art. 158 GC IV, Art. 1 (2) AP I and Preamble, para. 4 AP II; ICJ, Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), 27 June 1986, para. 220; “[T]here is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions, to “respect” the Conventions and even “to ensure respect” for them “in all circumstances”, since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression.”


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

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

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

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

opinio juris, and less on that of State practice. Courts and commentators speak in this regard of an "enlightened analysis" of customary law, the utilization of opinio necessitatis or modern positivism. The ad hoc tribunals have relied on it for important findings, such as the existence of individual criminal responsibility for acts committed in internal armed conflicts. Recently, the Ethiopia-Eritrea Arbitration Commission observed that there are "important modern authorities [...] for the proposition that rules that commend themselves to the international community in general, such as rules of international humanitarian law, can more quickly become part of customary international law than other types of rules found in treaties." While this particular method is closely tied to the limited direct and public interaction between States in this field of law, the humanitarian character of the norms in question also plays a role.

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

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

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958 See below, Chapter V, para. 3.1.


960 See Steiner and Alston 2000, p. 227-232; Meron 1989, p. 44.


developed more and more towards a model of unconditional and universal application.\textsuperscript{964} This development explains why law of a humanitarian character and its constitutive instruments contain both reciprocal and non-reciprocal elements, sometimes in awkward combinations.\textsuperscript{965}

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

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

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

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

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

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

“It is inherently difficult to accept the notion that states are legally bound not to engage in genocide [...] only if they have ratified and not formally denounced the 1948 Genocide Convention. Some norms seem so basic, so important, that it is more than slightly artificial to
very limited indeed. Developments in recent years shed doubt even on the long-established\(^{970}\) characterization of the prohibition of torture as a common minimal standard. In some States that have long condemned torture as inhumane, there is a public debate on the (il)legitimacy of the use of torture against suspects of terrorism.\(^{971}\) There are indications that at least one such State actually engages in institutionalized torture of terrorism suspects.\(^{972}\) Moreover, some national courts in other liberal States have explicitly found that under circumstances extradition of individuals facing torture may be justified\(^{973}\) or that evidence resulting from torture may be admissible in court.\(^{974}\) Regrettable as these developments may be, they do not seriously challenge the international prohibition of torture. Yet, they illustrate that appeals to self-evident standards of humanity and civilization are credible only for a very limited category of norms.

The question then arises whether the particular position of international law of a humanitarian character extends to its implementation. Human rights bodies, in particular the HRC, have forwarded the argument that a specific legal regime for this field of law is necessary to ensure its effective enforcement. According to this line of reasoning, the effectuation of international law which regulates the rights and duties of individuals, as international law of a humanitarian character largely does, can not be left to the standard enforcement mechanisms on the international level but must primarily take place in the national legal order.\(^{975}\) Thus, while the importance or natural law character of the rules involved may also play a role, this argument is grounded in essence on an appeal to effectiveness. This argument implies a significant restriction of States' freedom of implementation, in its strongest form amounting to mandatory direct appliability of the international rules.

Most human rights bodies have advanced this argument in a merely aspirational formulation.\(^{976}\) The UN Committee on Economic, Social and Cultural Rights, for example, first acknowledged that the ICESCR does not formally command its incorporation in domestic law, but then stated that such incorporation was nevertheless

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argue that states are legally bound to comply with them simply because there exists an agreement between them to that effect...";  
Lauterpacht 1944, p. 65.  
\(^{970}\) See Hope 2004, p. 823-826.  
\(^{971}\) See e.g. McCarthy 2004.  
\(^{973}\) See below, note 1017.  
\(^{975}\) See Committee on Economic, General comment 9, 3 December 1998, UN Doc E/C.12/1998/24, para. 4 ("The existence and further development of international procedures for the pursuit of individual [human rights] claims is important, but such procedures are ultimately only supplementary to effective national remedies."). See also the effective remedy clauses in the human rights treaties, above note sol.1. Cf. Seibert-Fohr 2001, p. 426-429.  
“desirable” and that “[i]n general, legally binding international human rights standards should operate directly and immediately within the domestic legal system of each State party, thereby enabling individuals to seek enforcement of their rights before national courts and tribunals.” The ECtHR has similarly endorsed the advantages of incorporation while upholding its optional character.

The HRC likewise started out cautiously and has long adhered to the position that “article 2 of the Covenant generally leaves it to the States parties concerned to choose their method of implementation in their territories within the framework set out in that article.” In recent years, however, the HRC has substantially increased its demands on States. It has found that States may not rely on unwritten law but must codify human rights law, and that “the need to comply with the international obligations [under the ICCPR] should be taken fully into account by the judiciary.” Moreover, the HRC recommends and requires incorporation and direct application of the ICCPR with increasing forcefulness. In its 1994 concluding observations on Nepal, for example, the Committee emphasized “the need for the provisions of the Covenant to be fully incorporated into domestic law and made enforceable by domestic courts.” Thus, the

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977 See Committee on Economic, General comment 9, 3 December 1998, UN Doc E/C.12/1998/24, para. 4 and 8:

“In general, legally binding international human rights standards should operate directly and immediately within the domestic legal system of each State party, thereby enabling individuals to seek enforcement of their rights before national courts and tribunals. [...] While the [International Covenant on Economic, Social and Cultural Rights] does not formally oblige States to incorporate its provisions in domestic law, such an approach is desirable. Direct incorporation avoids problems that might arise in the translation of treaty obligations into national law, and provides a basis for the direct invocation of the Covenant rights by individuals in national courts. For these reasons, the Committee strongly encourages formal adoption or incorporation of the Covenant in national law.”

978 See ECtHR, Ireland v. UK, 18 January 1978, para. 239:

“[T]he drafter s of the Convention [...] intended to make it clear that the rights and freedoms set out in Section I would be directly secured to anyone within the jurisdiction of the Contracting States [...]. That intention finds a particularly faithful reflection in those instances where the Convention has been incorporated into domestic law.”

See above, note 795.

979 HRC, General Comment 3 (Article 2: Implementation at the national level), 29 July 1981, para. 1. See for an overview of the HRC’s jurisprudence to this effect Seibert-Fohr 2001, p. 429-430.


982 See above, note 903. See also Seibert-Fohr 2001, p. 434-435.

983 See e.g. HRC, Concluding Observations on Denmark, Doc. CCPR/C/79/Add.68, 18 November 1996, para. 17 (“The Committee recommends that the State party take appropriate measures to ensure the direct application of the provisions of the Covenant into domestic law.”); HRC, Concluding Observations on Gabon, Doc. CCPR/C/79/Add.71, 18 November 1996, para. 18 (“The Committee recommends that the Covenant be incorporated in the domestic legal order and that its provisions be made directly applicable before the courts.”). See also Seibert-Fohr 2001, p. 433-436

HRC assumes considerable restrictions on the freedom of implementation and is edging closer and closer towards mandatory direct applicability of the ICCPR.\textsuperscript{985}

State practice reveals some noteworthy trends regarding the implementation of international law of a humanitarian character. Numerous States have vested (parts of) international human rights law with constitutional status in deviation from the position of international law in general, thereby limiting their own ability to shape or limit the effectuation of human rights law through national law.\textsuperscript{986} Conceptually, this choice of the legislature is an exercise rather than a negation of the freedom of implementation. Also, it appears this trend is prompted largely by practical developments.\textsuperscript{987} Still, it amounts to a practical restriction of the freedom of implementation as well as a recognition of the tension between far-going freedom of the State and the effectuation of international law of a humanitarian character.

Furthermore, several national courts have enforced international norms of a humanitarian character in ways that coincide with the HRC’s stricter views on the need for effective application at the national level.\textsuperscript{988} In \textit{Tavita v Minister of Immigration} (1994), for

\textsuperscript{985} See Seibert-Fohr 2001, p. 436. See for a finding of mandatory direct applicability of the Covenant in the limited context of detention review HRC, A. \textit{v. Australia}, 30 April 1997, CCPR/C/59/D/560/1993, para. 9.5:

"By stipulating that the [national] court must have the power to order release "if the detention is not lawful", article 9, paragraph 4, [ICCPR] requires that the court be empowered to order release, if the detention is incompatible with the requirements in article 9, paragraph 1, or in other provisions of the Covenant."


\textsuperscript{987} See Buergenthal 1997, p. 214 (identifying the institutional dynamics of international human rights courts and the emergence from non-democratic rule as important incentives for States to elevate human rights norms to constitutional rank).

\textsuperscript{988} See e.g. India, Supreme Court, \textit{Vishaka v. State of Rajasthan}, 13 August 1997, (1999) Butterworths H.R.C. 261:

"There is no reason why [certain unincorporated] international conventions and norms cannot, therefore, be used for construing the fundamental rights expressly guaranteed in the Constitution of India which embody the basic concept of gender equality in all spheres of human activity. In view of the above, and the absence of enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at work places, we lay down the guidelines and norms specified hereinafter for due observance at all work places or other institutions, until a legislation is enacted for the purpose."

Australia, High Court, \textit{Minister for Immigration and Ethnic Affairs v Teoh}, 7 April 1995, 183 CLR 273 at 291, per Justices Mason and Deane:

"Ratification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act, particularly when the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights affecting the family and children. Rather, ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention."

example, a Court of Appeals in New-Zealand dismissed the suggestion that the Minister of Immigration and his Department were at liberty to ignore the (unincorporated) ICCPR and the Convention on the Rights of the Child as “an unattractive argument, apparently implying that New Zealand’s adherence to the international instruments has been at least partly window-dressing.” The court avoided a ruling on this point by granting a stay to allow the Minister to reconsider his decision in this case, but warned that “[t]he law as to the bearing on domestic law of international human rights and instruments declaring them is undergoing evolution.”

Various national courts have acknowledged the non-reciprocal nature of international obligations of a humanitarian character. In the Oubeid case (2003), the Israeli Supreme Court rejected the argument of the Israeli Attorney General that two Lebanese prisoners could be denied visits of ICRC delegates on account of Hezbollah’s refusal to allow such visits to kidnapped Israeli soldiers. Some courts have accordingly set aside limitations of national law based on the principle of reciprocity. The French Constitutional Court held in 1999 that treaties aiming to protect fundamental human rights are exempted from the constitutional requirement of reciprocal application of treaties by other States parties. But not all national courts follow this line. In Hamdi v. Rumsfeld (2003), a U.S. court of appeals held the Third Geneva Convention to be non-self-executing in order to avoid “creating disparity among nations,” thus ignoring the non-reciprocal nature of the Geneva Conventions.

However, it should be noted that these cases are generally stronger in language than in consistency, and thus not representative of national judicial practice. Judgments denying in clear terms the ability of the State to reject the direct applicability of humanitarian treaties are matched by at least as many judgments holding such treaties to be non-self-executing. Thus, it may be asked to what extent the views of the HRC reflect current...
international law, and more generally whether State practice indicates a more stringent regime of implementation for international law of a humanitarian character. As noted earlier, it is generally assumed that international law, including that of a humanitarian character, is not directly applicable per se.\textsuperscript{995} State practice reveals broad acceptance of the HRC’s demand that national courts should take relevant international obligations into account,\textsuperscript{996} but not of mandatory direct application of the ICCPR or international law of a humanitarian character more generally. As is apparent from the observations of the HRC itself, many States do not allow for direct application of (specific parts of) the ICCPR.\textsuperscript{997} In light of the absence of a clear textual basis in the ICCPR and the HRC’s own earlier findings to the contrary, it thus appears that the Committee’s cautious move towards mandatory direct application does not currently represent positive international law. Still, cases such as \textit{Tavita} demonstrate that national courts, like the HRC, can be particularly uncomfortable with the room that unfettered freedom of implementation leaves for States to distort or negate the effects of international law where it concerns obligations of a humanitarian character.

In conclusion, there is a notable difference between the potential of the idea to subject international law of a humanitarian character to a more stringent regime of implementation and its acceptance in current international law. Conceptually, it is not difficult to see the logic of a more stringent regime. If some international norms are so fundamental that they bind States \textit{per se} regardless of their consent, while proceedings on the national level provide the most, or even only, effective means of enforcement, it is difficult to accept that the applicability of those norms in national courts is subject to the discretion of the State.

But on balance, State practice shows a certain tendency to limit the freedom of implementation for international obligations of a humanitarian character, yet is far from conclusive in this regard. National courts have on various occasions limited the principle of reciprocity or the State’s freedom to disregard signed but unratified treaties, but in many other cases treated norms of a humanitarian character no different than general international law. Thus, the special position of international law of a humanitarian character appears to be in development, but should not be overstated.

5.3.b \textit{Jus Cogens}

The idea that States are governed by a category of “peremptory norms of international law”, or \textit{jus cogens}, has gained significant support both in practice and doctrine over the
The concept of *jus cogens* was developed within the law of treaties, but there is considerable support nowadays for its broader application beyond that field of law. According to the Vienna Convention on the Law of Treaties, "a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." The concept of *jus cogens* is puzzling in literally all its aspects. It is unclear exactly how a norm is elevated to or demoted from *jus cogens* status, what are the consequences of that status, and which norms currently fit into the category of peremptory norms. In 1990, a commentator ventilated his bewilderment in this regard in the aptly titled article "It's a bird, it's a plane, it's *jus cogens.*" Since then, writings and judgments of all sorts have prolifically invoked the concept of *jus cogens*, but the confusion remains.

Leaving aside the many other intricacies of *jus cogens*, this section focuses solely on its possible consequences for the implementation of international obligations in national legal systems. Although the concept of *jus cogens* principally elevates norms to a higher status on the international plane, it has been suggested that it may also affect their status and application in national legal orders. Indeed, there is both international and national practice to suggest that the effectuation of *jus cogens* norms in the national legal order is governed by a particular regime that is more demanding than that of international norms in general. On the international plane, the ICTY found in its *Furundzija* judgment that the *jus cogens* nature of the prohibition against torture has certain effects at "the inter-state and individual levels."

On the national plane, numerous courts have embraced the idea that the peremptory character of international norms is relevant for their effects in the national legal order. National courts have suggested, *inter alia*, that the consequences of *jus cogens* status

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1000 Art. 53 VCLT. See also Art. 64 and 71.
1002 D'Amato 1990.
1003 See Salcedo 1997, p. 590. While there are some excellent studies on this subject, see above note 998, these face formidable obstacles. The complexity of the concept, its minimal regulation in written international law and the tendency of many courts and writers to invoke *jus cogens* in diverse ways without substantial analysis together perpetuate the existing confusion.
1004 See for a specific analysis of the *jus cogens* status of the core crimes and its consequences for their prosecution below, Chapter V, para. 3.2.
might include domestic validity in the absence of a corresponding rule of national law, supremacy over national rules, e.g. those on immunities, and strengthened enforcement in deviation of the normal separation of powers. Numerous national judgments concerning the core crimes refer to their *jus cogens* status as a significant factor. In a rare case of legislative practice, the 1999 Swiss Constitution explicitly recognizes *jus cogens* as a limitation to the national legislative process.

However, it appears that neither international nor national practice regarding the domestic effects of *jus cogens* norms in general carries enough weight to carry a corresponding rule of customary international law. There is considerable contrary practice that treats *jus cogens* norms with less deference. The suggestion that the *jus cogens* status of international norms overrides immunities, whether contained in national or international rules, has ultimately been rejected by national and international courts alike. Numerous decisions of national courts reject the proposition that peremptory rules are exempt from the general national framework of implementation in any way. Some national courts have held that *jus cogens* status does not remove all discretion in the

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1008 See U.S., Court of Appeals (Ninth Circuit), *U.S. v. Matta-Ballesteros*, 1 December 1995, 71 F.3d 754 at 764 (“Kidnapping also does not qualify as a *jus cogens* norm, such that its commission would be justiciable in our courts even absent a domestic law.”).


“When our government’s two political branches, acting together, contravene an international legal norm, does this court have any authority to remedy the violation? The answer is “no” if the type of international obligation that Congress and the President violate is either a treaty or a rule of customary international law. If, on the other hand, Congress and the President violate a peremptory norm (or *jus cogens*), the domestic legal consequences are unclear.”

1011 See below, Chapter V, para. 5.

1012 See Art. 139 (3) (Volkswirtschaftliche Revision der Bundesverfassung):

“Verletzt die Initiative die Einheit der Form, die Einheit der Materie oder zwingendes Völkerrecht, so erklärt die Bundesverfassung sie für ganz oder teilweise ungültig”

Art. 193 (4) (Totalrevision)

“Die zwingenden Bestimmungen des Völkerrechts dürfen nicht verletzt werden.”

Art. 194 (2) (Revision)

“Die Revision muss die Einheit der Materie wahren und darf die zwingenden Bestimmungen des Völkerrechts nicht verletzen.”


1013 See e.g. Germany, Bundesgerichtshof, *Distanto Massacre Case*, 26 June 2003, BGH - III ZR 245/98, para. I sub b (holding that international law does not deny State immunity for violations of *jus cogens*); See also Gattini 2003, p. 354 (stating that all superior domestic courts which have pronounced on the matter have declined to make an exception to State immunity for grave violations of fundamental human rights); Working Group of the International Law Commission, *Report on Jurisdictional Immunities of States and their Property*, 1999 (concluding that national case law predominantly upholds immunity claims in civil suits regarding *jus cogens* violations); Bergen 1999, p. 169 (observing that in U.S. case law, immunities apply also in cases concerning violations of *jus cogens* norms).


1015 See e.g. U.S., Court of Appeals (9th Cir.), *Siderman de Blake v. Argentina*, 22 May 1992, 965 F.2d 699 (holding that the *jus cogens* character of a violated norm does not obviate the need to establish jurisdiction on the basis of the Foreign Sovereign Immunities Act).
The application of international law. In *Suresh v. Canada* (2002), for example, the Canadian Supreme Court cautiously accepted that the prohibition of torture might have *jus cogens* status, yet found that "in exceptional circumstances, deportation [of refugees who] face torture might be justified." Furthermore, the great majority of judgments, national or international, that privilege *jus cogens* norms is of limited authority. This case law consists to a significant extent of *obiter dicta* and decisions that have subsequently been overruled. Also, in many cases it is unclear whether an appeal to *jus cogens* status actually determines the outcome or merely serves to affirm a conclusion reached on other grounds. In addition, it can be unclear whether State practice actually says anything about the international rules regarding *jus cogens* or merely reflects a policy choice of the State. The value of the constitutional provisions in Switzerland, for example, is open to doubt. Does international law not prohibit national legislatures to contravene *any* international obligation, rather than just peremptory norms? From the viewpoint of international law, it is unclear whether these Swiss provisions express anything more than a partial reproduction of the well-established rule that States may not alter or contravene their international obligations through national legislation.

An additional problem that limits the authority of many relevant judgments is the quality of their reasoning. Many national courts declare international norms to be peremptory and to have far-going consequences without any analysis or substantiation. Often, it is clear from their holdings that they do not master the relevant law. This, obviously, undermines the authoritative value of their judgments. The assertion that a violation of a "*jus cogens* norm [is] justiciable in [national] courts even absent a domestic law," is an interesting and defensible proposition, but what is it worth coming from a court which believes that "murder" is a *jus cogens* norm?

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1016 See e.g. U.S., District Court (Cal.), *Sarei v. Rio Tinto PLC*, 9 July 2002, 221 F.Supp.2d 1116 at 1152-1153 and 1207 (rejecting racial discrimination as a basis for the civil claim of Papua New Guinean residents against international mining group "on international comity grounds," despite finding that racial discrimination constitutes a violation of a *jus cogens* norm and comity is a discretionary doctrine).

1017 Canada, Supreme Court, *Suresh v. Canada* (Minister of Citizenship and Immigration), 22 May 2002, 2002 SCC 1, para. 65 and 78:

> "Although this Court is not being asked to pronounce on the status of the prohibition on torture in international law, the fact that such a principle is included in numerous multilateral instruments, that it does not form part of any known domestic administrative practice, and that it is considered by many academics to be an emerging, if not established peremptory norm, suggests that it cannot be easily derogated from.

> [...] We do not exclude the possibility that in exceptional circumstances, deportation to face torture might be justified."

See also Zambia, High Court, *The People v. Davies Mumeno*, No HPR/79, 10 July 1990, 1990-1992 Zambia Law Reports 13 (while *jus cogens* is not explicitly addressed, the court cites and follows the Zambian Supreme Court's holding that "corporal punishment is a form of inhuman and degrading punishment which should be imposed sparingly and only in most serious circumstances.").


International judges may be more knowledgeable about the concept of *jus cogens*, but their holdings are not necessarily clearer or better substantiated. The ICTY’s dictum on the consequences of the *jus cogens* status of torture in *Furundzija*, for example, is rather ambiguous. In light of its broad recognition as an authoritative precedent both in practice and doctrine, it will be analyzed here in some detail. The tribunal speaks of “effects at the inter-state and individual levels” which include international de-legitimization of national acts authorising torture and, consequently, criminal responsibility of torturers notwithstanding any national measure to the contrary. Furthermore, the Trial chamber holds that the peremptory character of the norm entitles every State to prosecute and punish torturers present on its territory and disallows the application of statutes of limitations and the political offence exemption to cases of torture.

“Kidnapping also does not qualify as a *jus cogens* norm, such that its commission would be justiciable in our courts even absent a domestic law. [...K]idnapping does not rise to the level of other *jus cogens* norms, such as torture, murder, genocide, and slavery.”

1021 It has been widely cited by national and international courts alike. See e.g. ECtHR, Al-Adsani v. United Kingdom, 21 November 2001 para. 30 and U.K., House of Lords, *R. v. Bow Street Metropolitan Stipendiary Magistrate & Others, Ex Parte Pinochet Ugarte (No. 3)*, 24 March 1999, [2000] 1 A.C. 147 at 198.

1022 See e.g. Gitti 1999, p. 81-82; Wilson 1999, p. 955-956 and below, footnotes 1025 and 1026.

1023 ICTY, Trial Chamber, *Furundzija*, 10 December 1998para. 154-155:

“154. Clearly, the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate. 155. The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter-state and individual levels. At the inter-state level, it serves to internationally de-legitimise any legislative, administrative or judicial act authorising torture. It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void ab initio, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law. If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision, would produce the legal effects discussed above and in addition would not be accorded international legal recognition. Proceedings could be initiated by potential victims if they had locus standi before a competent international or national judicial body with a view to asking it to hold the national measure to be internationally unlawful; or the victim could bring a civil suit for damage in a foreign court, which would therefore be asked inter alia to disregard the legal value of the national authorising act. What is even more important is that perpetrators of torture acting upon or benefiting from those national measures may nevertheless be held criminally responsible for torture, whether in a foreign State, or in their own State under a subsequent regime. In short, in spite of possible national authorisation by legislative or judicial bodies to violate the principle banning torture, individuals remain bound to comply with that principle. As the International Military Tribunal at Nuremberg put it: "individuals have international duties which transcend the national obligations of obedience imposed by the individual State".

1024 ICTY, Trial Chamber, *Furundzija*, 10 December 1998para. 156-157:

“156. Furthermore, at the individual level, that is, that of criminal liability, it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally
One of the judges in the case has later asserted that this holding stands for the proposition that "peremptory norms may produce legal effects at the municipal law level."^1025^ Several writers have drawn similar conclusions. ^1026^ On close reading, however, this interpretation is questionable at least. First, it should be noted that the language of the decision is often ambiguous. The “inter-state and individual levels” constitute a false dichotomy, since the individual level obviously does not represent the national legal order. After all, the Tribunal finds that at the individual level, “every State is entitled to investigate, prosecute and punish torture,”^1027^ which can only be an entitlement under international law. The term “de-legitimise” in para. 155 is colloquial and has no clear-cut meaning in international law. In para. 156, the Tribunal first concludes that a right to prosecute torturers present in one’s territory is “one of the consequences” of *jus cogens* status, but subsequently states that this legal basis “bears out and strengthens” the established legal foundation for universal jurisdiction, thus leaving unclear to what extent *jus cogens* status is either necessary or sufficient for the exercise of universal jurisdiction.

Second, the holding mentions various effects that are not particular for *jus cogens*. The maxim that international law pays no heed to contrary national law, either in international proceedings or for the determination of individual criminal responsibility, applies to all rules of international law, not only peremptory norms. The proposition that international law grants States universal jurisdiction over all *jus cogens* crimes while prohibiting them to apply statutes of limitations or the political offence exemption is interesting. Yet, nothing in the judgment suggests that these effects are limited to *jus cogens* crimes only or take place directly on the municipal law level.

In conclusion, then, the *Furundzija* dictum says nothing new about the national implementation of *jus cogens* norms. The only other possible outcome requires an interpretation of para. 155 as envisaging the automatic invalidation of national acts contravening *jus cogens* directly in the national legal order rather than under international law. This interpretation is left open by the ambiguity of the relevant sentence, as it is unclear whether the finding that “the national measures [...] would produce the legal unfettered treaty-making power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad. This legal basis for States’ universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently universal character of the crime. It has been held that international crimes being universally condemned wherever they occur, every State has the right to prosecute and punish the authors of such crimes. As stated in general terms by the Supreme Court of Israel in Eichmann, and echoed by a USA court in Demjanjuk, “it is the universal character of the crimes in question i.e. international crimes which vests in every State the authority to try and punish those who participated in their commission”.

157. It would seem that other consequences include the fact that torture may not be covered by a statute of limitations, and must not be excluded from extradition under any political offence exemption.”

^1025^ See Cassese 2001c, p. 145.

^1026^ See De Wet 2003, p. 100 (speaking of a proposal to apply *jus cogens* in national law) and Seideman 2001, p. 59 (concluding that “the jus cogens character of norms carries direct legal effects vis-a-vis the legal character of all official domestic actions”).

effects discussed above” refers back to being “null and void ab initio” or to international de-legitimisation. For the interpretation of automatic invalidation pleads that “international de-legitimisation” and “not being accorded international legal recognition” would amount to the same thing, for which reason “the legal effects discussed above” must refer back to being “null and void ab initio.” This interpretation is squarely contradicted, however, by the fact that the paragraph sets out to discuss effects at “the inter-state level.” Moreover, in para. 150, the Trial Chamber found that “the mere fact of keeping in force or passing legislation contrary to the international prohibition of torture generates international State responsibility,” suggesting a more cautious approach than automatic invalidation.

The commentators who interpret the Furundzija dictum as a progressive holding on the effects of jus cogens norms are equally ambiguous in specifying its precise meaning. The judge cited earlier, for example, states that “as the ICTY held in Furundzija, peremptory norms may produce legal effects at the municipal law level: they de-legitimise any legislative or administrative act authorizing the prohibited conduct. Consequently, national measures [...] may not be accorded international legal recognition or at any rate are not opposable to other States.” This comment hardly makes things clearer. De-legitimization is not a legal effect, and a lack of international legal recognition and opposability to other States are neither “legal effects at the municipal law level” nor exclusive for jus cogens norms. Rather, they can be the fate of each and every national measure that violates international law. All in all, the holding in Furundzija is too unclear and contradictory to serve as firm evidence for the statement that the jus cogens character of a norm determines its effects in national law.

In conclusion, national and international practice regarding the domestic legal consequences of peremptory norms of international law is divided at best, and often unclear or poorly reasoned. The lack of analysis and obvious mistakes in many judgments, especially of national courts, notably undercut their authoritative value. A cautious tendency can be discerned to accept a privileged position for jus cogens norms in the national legal order, but in the absence of firm State practice a corresponding rule of customary international law currently appears to be only in the (early) formative stages.

The prospects for future development of a privileged position of jus cogens norms in the national legal order are uncertain, and plagued by two fundamental problems. First, many of the suggested consequences of jus cogens status in the national legal order rest on the assumption that the rank of a norm is in itself enough to eliminate procedural barriers to its effectuation. This assumption is problematic. If one accepts that national courts lack the authority to judge the conduct of other States or their officials, then no characteristic of any given norm, whether it is its superior rank, intrinsic value or any other feature, can cure that omission. The argument that the jus cogens status of torture in itself gives

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1029 See Seideman 2001, p. 35 and 121.
1030 See Wet 2004, p. 119-120; Seideman 2001, p. 121.
national courts a competence to judge foreign States and officials which they would otherwise lack, is not far off from the argument that murder is such a serious crime that everybody should be allowed to punish its perpetrators. Both rest on an overly simplistic connection between characteristics of the norm and the procedure for its effectuation. Of course, States may well decide that it is no longer desirable to exempt their acts from scrutiny in foreign courts where peremptory norms are at stake. But importantly, such a step primarily requires a rethinking of the concept of sovereign immunity, rather than *jus cogens*. Courts and scholars often fail to broaden their analysis accordingly when analyzing the continued viability of immunities for *jus cogens* norms.

Second, any enhancement of the position of *jus cogens* norms risks limiting the impact of non-peremptory norms of international law (*jus dispositivum*) by implication. As set out above, the constitutional reference to *jus cogens* in Switzerland may be interpreted as a licence for the Swiss legislature to ignore *jus dispositivum* at will. This problem of relative normativity has figured in the academic debate of *jus cogens* and its implications for a long time, but is still very much with us today.  

However, as the case law of national and international courts indicates despite its unclarities and imperfections, the concept of *jus cogens* is certainly not devoid of potential in the national legal order. One could think that in an optimal scenario, the manoeuvring space of States would be differentiated in such a way as to allow maximum freedom of implementation, including the capability to adapt and in exceptional cases violate international obligations, but to limit violations of international law that flow from negligence or the desire to seek a unilateral exemption from international obligations that are otherwise left intact. A strengthened implementation and/or enforcement of *jus cogens* norms could provide a first step for such a differentiation, as States have virtually no possibility to adjust or need to mitigate the effects of their peremptory obligations in any case.  

6 Conclusion

States have the freedom to implement their international obligations in any way they see fit as long as they give full effect to those obligations. Yet, the consequences of this general rule are easily and often overestimated. For national courts, taking the freedom of the State as a starting point logically leads to a predominant focus on the national rules relevant for the implementation and application of international law in the national legal order. Numerous courts and scholars even go so far as to focus exclusively on what national law has to say on the matter. This is, however, erroneous.

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1031 See principally Weil 1983. See also Wet 2004, p. 104 and 118-121.
1032 Cf. ICJ, *Oil Platforms (Islamic Republic of Iran v. United States of America)*, 6 November 2003, para. 73 and Separate Opinion Judge Kooimans, para. 46:

"[The United States] opted for means the use of which must be subjected to strict legal norms, since the prohibition of force is considered to have a peremptory character. The measure of discretion to which the United States is entitled is therefore considerably more limited than if it had chosen, for instance, the use of economic measures."
International law grants States great freedom, but does not allow national courts to ignore international obligations altogether. The principle of consistent interpretation requires national courts to take international obligations into account in their construction of national law. It also follows both from a historical analysis of the reception of international law in national courts and a review of contemporary practice that international law is not silent on its own implementation and enforcement on the national level. Therefore, the international legality of certain modern variants of the doctrine of self-executing treaties is at least doubtful. While national law may impose far-going limitations on the application of international law by national courts, the practice of some courts to declare treaties non-self-executing solely or predominantly because they perceive the practical effects of their application as unwelcome violates their duty to give effect to international obligations where national law allows it.

Finally, practice shows a certain tendency towards a limitation of the freedom of implementation for international obligations of a humanitarian character and peremptory norms. For the first category, this tendency is limited but real. In the case of jus cogens, practice is diffuse and mostly aspirational.