IS IT REALLY ALL ABOUT COMMITMENT AND DIFFUSION?

A COMMENT ON *COMMITMENT AND DIFFUSION: HOW AND WHY NATIONAL CONSTITUTIONS INCORPORATE INTERNATIONAL LAW*†

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I. INTRODUCTION

This comment on Tom Ginsburg, Svitlana Chernykh, and Zachary Elkins's excellent paper on the domestic implementation of international law norms[1] and the underlying reasons for such domestic applicability will be twofold. It will first consider some general questions[2] and then raise some more specific issues.[3] In particular it will consider whether the reasons brought forward by Ginsburg, Chernykh, and Elkins to explain why States incorporate international law are indeed compelling, or whether, instead, there are other, and indeed more important, reasons States incorporate international law, not the least of which is interest all States share in an effective and functioning system of international law.

† Written version of a comment delivered on the occasion of the conference *Public International Law and Economics: The Power of Rational Choice Methodology in Guiding the Analysis and the Design of Public International Law Institutions* held at the Max Planck Institute for Research on Collective Goods, Germany, Bonn, from 14–16 December 2006. The style of the oral presentation has largely been retained. I am particularly grateful to the organizers for having convened this conference and for having invited me since it provided me the opportunity to sail into, as far as I am concerned, so far unchartered waters—waters which I did find quite interesting indeed.

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1. Tom Ginsburg et al., *Commitment and Diffusion: How and Why National Constitutions Incorporate International Law*, 2008 U. ILL. L. REV. 201.

2. *See infra* Part II.

3. *See infra* Part III.

II. GENERAL QUESTIONS

A. Improving the Effectiveness of the International Legal System as an Incentive for Providing for the Domestic Application of Rules of International Law

The overall question underlying Tom Ginsburg, Svitlana Chernykh, and Zachary Elkins's paper is what induces States to open up their domestic legal order to international law. The paper approaches this question by asking what are the possible *advantages* for either a State generally or certain actors within a given State to provide for the domestic application of rules from either a treaty or customary international law.

Yet, the most fundamental, indeed even axiomatic, assumption, provided one agrees that international law is a legal order at all,[4] must be that States are under a *legal obligation* not to violate international law obligations binding upon them.[5] Thus, domestic implementation is, at least first and foremost, an essential tool to secure that this fundamental rule is not violated by providing that such violations simultaneously constitute a violation of domestic law.[6] By providing for the domestic application of international law, there is at least an increased chance that effective local remedies do exist that, in turn, would bar the exercise of diplomatic protection by the respective home State of a person whose rights are allegedly violated.[7]

The next obvious question would then be why States have an interest in not violating their international obligations. Ginsburg, Chernykh, and Elkins attempt to answer this question by focusing on *substantive* rules of international law that States might have an interest in.[8] In contrast, there are more important nonsubstantive *metarules* such as the *pacta sunt servanda* rule[9] or the parallel obligation to abide by customary

4. *Cf.* HERMANN MOSLER, THE INTERNATIONAL SOCIETY AS A LEGAL COMMUNITY (1980).

5. For an approach which seems to counter that assumption *inter alia*, see JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005). *But cf.* Anne van Aaken, *To Do Away with International Law? Some Limits to 'The Limits of International Law,'* 17 EUR. J. INT'L L. 289, 290 (2006).

6. For such a domestic implementation of international law (and the related supervision by the German Constitutional Court) under German constitutional law see Bundesverfassungsgericht (BVerfG) (Federal Constitutional Court) June 23, 1981, 58 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1, (34) (Germany). *See also* Helmut Steinberger, *Allgemeine Regeln des Völkerrechts* [General Principles of International Law]*, in* 7 HANDBUCH DES STAATSRECHTS 525, 566–77 (Josef Isensee & Paul Kirchhof eds., 1992).

7. *See generally* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 713(f) (1987) (regarding the local remedies rule); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 472–73 (6th ed. 2003).

8. Ginsburg et al., *supra* note 1, at 218–19.

9. For an explanation as to the obligation to abide by binding treaties, encapsulated in the notion of *pacta sunt servanda*, see HERBERT BAUER, DER SATZ "PACTA SUNT SERVANDA" IM HEUTIGEN VÖLKERRECHT (1934) and Hans Wehberg, *Pacta Sunt Servanda*, 53 AM. J. INT'L L. 775 (1959). *See also* Richard Hyland, *Pacta Sunt Servanda: A Meditation*, 34 VA. J. INT'L L. 405 (1994).

international law norms, the nonviolation of which States have an even more important interest in.

I believe that almost all States have a general underlying interest that the international legal system as such is functioning. But it is only by itself abiding by international law that a given State can make a reasonable and plausible claim that other States should similarly abide by international law.[10] Thus, domestic implementation of international law is just one of the tools to secure that this same State is indeed itself abiding by international law.

For example, by violating the prohibition on the use of force through the unilateral use of military means in an attempt to solve a given conflict, the State concerned not only puts into question the prohibition contained in Article 2, Paragraph 4 of the Charter of the United Nations,[11] but maybe more importantly, also gives an incentive to other States to follow its example and similarly violate other rules of international law, which might or might not be directly linked to the use of force. Thus, the very foundations of the international legal system, and not only those of Article 2, Paragraph 4 of the Charter of the United Nations, are thereby undermined. A constitutional provision, such as Article 26 of the German Basic Law,[12] which outlaws aggressive wars as a matter of domestic constitutional law,[13] not only serves to prevent Germany from waging such a war, but also attempts to foster the international rule of law generally. This not only constitutes a general interest of Germany as a State, but also an interest of domestic actors within Germany. *Mutatis mutandis*, the same is obviously true for more general

10. As to the relevance of reciprocity in international law, consider BRUNO SIMMA, DAS REZIPROZITÄTSELEMENT IM ZUSTANDEKOMMEN VÖLKERRECHTLICHER VERTRÄGE: GEDANKEN ZU EINEM BAUPRINZIP DER INTERNATIONALEN RECHTSBEZIEHUNGEN (1972). S*ee also* Bruno Simma, DAS REZIPROZITÄTSELEMENT IN DER ENTSTEHUNG DES VÖLKERGEWOHNHEITSRECHTS (1970).

11. As to the content of the prohibition on the use of force and possible exceptions, see Albrecht Randelzhofer, *Article* 2(4), in 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY (Bruno Simma et al. eds., 2002), and Albrecht Randelzhofer, *Article* 51, in 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 11. *See also* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion, 43 I.L.M. 1009 (2004) (the most recent holdings of the International Court of Justice dealing with the right of self-defence and its limits), Oil Platforms (Iran v. U.S.) 42 I.L.M. 1334 (Nov. 2003), Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 45 I.L.M. 271 (2005).

12. An English translation of Article 26 of the German Constitution, available at http://www.bundestag.de/htdocs_e/parliament/function/legal/germanbasiclaw.pdf, reads:

> (1)Acts tending to and undertaken with intent to disturb the peaceful relations between nations, especially to prepare for a war of aggression, shall be unconstitutional. They shall be made a criminal offense.
>
> (2)Weapons designed for warfare may be manufactured, transported, or marketed only with the permission of the Federal Government. Details shall be regulated by federal law.

13. For the specific content of Article 26 Basic Law *cf.* Ingolf Pernice, *Article 26 GG*, *in* 2 GRUNDGESETZ KOMMENTAR (Horst Dreier ed., 2006); Rudolf Streinz, *Article 26 GG*, *in* GRUNDGESETZ KOMMENTAR (Michael Sachs ed., 2003); Karl-Andreas Hernekamp, *Article 26 GG, in* 2 GRUNDGESETZ-KOMMENTAR (Ingo v. Münch & Philip Kunig eds., 2001); Udo Fink, *Article 26 GG, in* 2 KOMMENTAR ZUM GRUNDGESETZ (Friedrich Klein, Christian Starck & Hermann von Mangoldt eds., 2005).

constitutional provisions providing for the domestic application of international law.

Accordingly, securing an effective and stable international legal system constitutes *the* main incentive for providing for the domestic application of rules of international law. Doing so constitutes, however, a common interest of all States, whether they are new democracies or not, or whether indeed, they are democracies at all. The only exception one could perceive would be a State that might rationally conclude that it would be the better off with less effective international law.[14]

This issue becomes even more obvious if one looks at customary international law. Ginsburg, Chernykh, and Elkins at one point in their paper rightly point out that a State might, at a certain point in time, be neutral towards or even favour a new norm of customary law *in statu nascendi*[15] and thus become bound by it over time by not persistently objecting.[16] Yet, at a later point in time, this State might be in a position in which, although this new rule imposes significant costs, the State is no longer in a position to denounce the rule.[17] This is obviously true. Yet, one cannot but stress again, the *general* interest of States, including the State concerned, that customary international law continue functioning in that same way, since this is the only option that stabilizes international law over time. The rules on the formation of customary international law generally, and the rule of their nonderogability (unless by way of a treaty or a later rule of customary international law),[18] are therefore essential because the very normative character of the international system would otherwise be put into question. This raises a second, more theoretical question: does international law provide for its own domestic applicability?

14. Such a rational assumption would, however, only be relevant for a major power, but even those are, at least on the long term or with regard to global challenges, dependant on a functioning international legal system. Besides, at least on the long term, the importance even of a major power might *decrease* which, by the same token, would then in turn *increase* their interest in an effective international system based on international law. For examples of such changes in the past see PAUL M. KENNEDY, THE RISE AND FALL OF THE GREAT POWERS: ECONOMIC CHANGE AND MILITARY CONFLICT FROM 1500–2000, at xv–xx (1987).

15. The preconditions for the formation of a new rule of customary international law have authoritatively been set out in the still valid holding of the International Court of Justice in the North Sea Continental Shelf Case, (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3 (Feb. 20), according to which even a relatively short period of time might be sufficient in order to bring about the creation of a new rule of customary international law, provided however, state practice during the relevant period is sufficiently uniform and intense, and includes the States most concerned by the rule *in statu nascendi*.

16. *See generally* Ted L. Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT'L L. J. 457 (1985) (as to the notion of "persistent objector").

17. Ginsburg et al., *supra* note 1, at 219.

18. Obviously such derogability is limited by existing or evolving rules of customary law possessing the status of *jus cogens*. *See* STEFAN KADELBACH, ZWINGENDES VÖLKERRECHT (1992) (discussing generally as to the concept of *jus cogens* and its content); LAURI HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS (1988).

B. International Law Norms Providing for Their Own Domestic Implementation

In their paper, Ginsburg, Chernykh, and Elkins have given a very concise overview of the various concepts concerning the relationship between international law and domestic constitutions,[19] which, since Heinrich Triepel's famous and fundamental work,[20] might be considered one of the most intriguing questions for international lawyers.[21] Yet, one wonders whether we are not currently facing at least a slow process of international law *itself* providing for its own domestic applicability regardless of any constitutional provisions, if only with regard to some of the core rules of international law.

Two examples might suffice to highlight that development. In 1984, the Security Council of the United Nations in Security Council Resolution 554 determined that the then new South African constitution, at the time based on the racist concept of apartheid, was not only contrary to international law[22] and needed to be rescinded, but further, that it was "null and void."[23] Accordingly the Security Council took the position that regardless of the domestic treatment of international law in South Africa, which then clearly followed a traditional dualistic approach,[24] in-

19. Ginsburg et al., *supra* note 1, at 204–10.

20. HEINRICH TRIEPEL, VÖLKERRECHT UND LANDESRECHT (1899).

21. *See also* CHRISTOPH ENGEL, VÖLKERRECHT ALS TATBESTANDSMERKMAL DEUTSCHER NORMEN (1989). For a more recent comprehensive study as to the situation in the United States, the European Union and Switzerland see HELEN KELLER, REZEPTION DES VÖLKERRECHTS: EINE RECHTSVERGLEICHENDE STUDIE ZUR PRAXIS DES U.S. SUPREME COURT, DES GERICHTSHOFES DER EUROPÄISCHEN GEMEINSCHAFTEN UND DES SCHWEIZERISCHEN BUNDESGERICHTS IN AUSGEWÄHLTEN BEREICHEN (2003).

22. *See generally* International Convention on the Suppression and Punishment of the Crime of Apartheid, July 18, 1976, 1015 U.N.T.S. 245; Rome Statute of the International Criminal Court art. 7, ¶1(j), Jan. 7, 2002, 2187 U.N.T.S. 90 (making acts of apartheid committed as a systematic attack against a civilian population a crime against humanity). For further details see Christopher K. Hall, *Article 7, paragraph 1(j)*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 151 (Otto Triffterer ed., 1999).

23. The relevant passage of Security Council Resolution 554 reads:

> The Security Council [. . .]
>
> 1. *Declares* that the so-called 'new constitution' is contrary to the principles of the Charter of the United Nations, that the results of the referendum of 2 November 1983 are of no validity whatsoever and that the enforcement of the 'new constitution' will further aggravate the already explosive situation prevailing inside *apartheid* South Africa;
>
> 2. *Strongly rejects and declares as null and void* the so called ´new constitution' and the 'elections' to be organized in the current month of August for the 'coloured people' and people of Asian origin as well as all insidious manoeuvres by the racist minority régime of South Africa further to entrench white minority rule and *apartheid*.

S.C. Res. 554, U.N. Doc S/RES/554 (Aug. 17, 1984).

24. As to the relationship between international law and domestic law in the Republic of South Africa before the 1991 interim constitution, see *inter alia*, Rosalie P. Schaffer, *The Inter-relationship Between Public International Law and the Law of South Africa: An Overview,* 32 INT'L & COMP. L.Q. 277 (1983). As to the current situation, see Hennie Strydom, *South Africa and International Law—From Confrontation to Cooperation,* 47 GERMAN Y.B. INT'L L 160*,* 191 (2004). As to the relevant jurisprudence of the South African constitutional court, see Devika Hovell & George Williams, *A Tale of Two Systems: The Use of International Law in Constitutional Interpretation in Australia and South Africa*, 29 Melbourne U.L. REV. 91, 113–27 (2005); Strydom, *supra* note 24, at 187.

ternational law itself contained a proper rule on its domestic implementation.

Similarly in 1996, both the Swiss Government and the Swiss Parliament concluded that a proposal to amend the Swiss constitution by referendum to provide for the unconditional deportation of aliens who had illegally entered Switzerland would run counter to the peremptory prohibition of *refoulement*, which was considered to form part of *jus cogens*.[25] Accordingly, the proposal submitted by way of a popular initiative was not considered to be *capable* of forming the subject of a constitutional referendum.[26] Even more telling, since it was only three years later in 1999, the Swiss Federal constitution was amended so as to prohibit constitutional amendments that would run counter to *jus cogens* norms.[27]

Both examples demonstrate that international law is, albeit slowly, moving towards embracing the concept of a self-contained regime of mandatory domestic implementation, a concept already structurally foreshadowed by the European Court of Justice with regard to European community law in its famous *Costa v. ENEL* judgment.[28]

III. SPECIFIC QUESTIONS

A. New Instable v. Old Stable Democracies—a Valid Distinction?

One of the most interesting points Ginsburg, Chernykh, and Elkins make is that new and still somewhat instable democratic systems are

25. Botschaft des Bundestrates über die Volksinitiative, June, 22 1994, BB*l* III 1486 (1994) (Bundesrat) (Switz.) [hereinafter Bundesrat on the Volksinitiative] ("Für eine vernünftige Asylpolitik und gegen illegale Einwanderung").

26. Bundesbeschluss über die Volksinitiative, 14 March 1996, BB*l* I 1355 (1996) (Parliament) (Switz.) ("Für eine vernünftige Asylpolitik und gegen die illegale Einwanderung"); Bundesrat on the Volksinitiative, supra note 25; *see also* Erika de Wet, *The Prohibition of Torture as an International Norm of jus cogens and its Implications for National and Customary Law*, 15 EUR. J. INT'L L. 97 (2004).

27. *See* Bundesverfassung der Schweizerischen Eidgenossenschaft [BV] [Constitution] April 18, 1999, art. 193, ¶4 (Switz.), *available at* http://www.admin.ch/ch/itl/rs/1/c101ENG.pdf ("The mandatory provisions of international law may not be violated.").

28. The relevant *dictum* of the European Court of Justice in *Costa v. ENEL* reads:

> By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.
>
> By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, and have thus created a body of law which binds both their nationals and themselves.
>
> The integration into the laws of each Member State of provisions which derive from the Community and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system.

Case 6/64, Costa v. ENEL, 1964 E.C.R. 585, 586.

more inclined to provide for an implementation of international law norms as compared to old, stable democracies.[29] They attempt to support this argument through empirical facts.[30] Notwithstanding this empirical evidence, one might wonder, however, whether this is not too simplistic an assumption—indeed too simplistic for several reasons.

First, international law has undergone a rather dynamic and accelerating development over the last several decades. This development concerns the very sources of international law, where decisions by organs of international organizations—such as resolutions of the Security Council—play an ever increasing role.[31] It is that development, and the pressure by the international community to implement such decisions, which may be leading to the increase in constitutional provisions providing for the applicability of international law.

Moreover, the scope of substantive areas covered by international law has also, over the years, dramatically increased, covering vast substantive areas that in the past were considered to form part of the domestic jurisdiction of States.[32] Accordingly, a constitutional norm providing for the domestic applicability of (customary and/or conventional) international law has, as of today, a completely different scope of application and relevance as compared to the very same norm adopted two hundred years ago, when the main rules of international law were dealing, to put it bluntly, solely with pirates and diplomats.[33]

Second, the extent of interdependency of States has also significantly increased, including the impact domestic developments in one State have on other states. Thus, for example, human rights violations in a given country would normally lead to the flow of refugees into other States. The fact that the Security Council now almost regularly characterises such developments as threats to international peace and security, empowering the Council to invoke its powers under Chapter VII of the UN Charter, constitutes just one facet of this increased interdependency.[34]

29. Ginsburg et al., *supra* note 1, at 223–24.

30. *Id.* at 234–36.

31. *See, e.g.*, Munir Akram & Syed Haider Shah, *The Legislative Powers of the United Nations Security Council*, *in* TOWARDS WORLD CONSTITUTIONALISM: ISSUES IN THE LEGAL ORDERING OF THE WORLD COMMUNITY 431, 434–36 (Ronald St. John Macdonald & Douglas M. Johnston eds., 2005); Axel Marschik, *Legislative Powers of the Security Council*, *in* TOWARDS WORLD CONSTITUTIONALISM: ISSUES IN THE LEGAL ORDERING OF THE WORLD COMMUNITY, *supra*, at 457, 480–81; Stefan Talmon, *The Security Council as World Legislature*, 99 AM. J. INT'L L. 175, 177–78 (2005); Andreas Zimmermann & Björn Elberling, *Grenzen der Legislativbefugnisse des Sicherheitsrates—Resolution 1540 und abstrakte Bedrohungen des Weltfriedens*, 52 Vereinte Nationen 71 (2004).

32. *Cf.* Georg Nolte, *Article 2(7)*, *in* 1 THE CHARTER OF THE UNITED NATIONS—A COMMENTARY, *supra* note 11, at 156–58 (discussing the dynamic nature of the concept of *domaine reservée* of a State and its content).

33. *Cf.* WILHELM G. GREWE, THE EPOCHS OF INTERNATIONAL LAW 277, 304–12 (2000) (discussing the main features of international law in the 18th and 19th century).

34. *See, e.g.*, S.C. Res. 1199, U.N. Doc. 5/RES/1199 (Sept. 23, 1998) (Federal Republic of Yugoslavia/Kosovo); S.C. Res. 1078, U.N. Doc. 5/RES/1078 (Nov. 9, 1996) (Great Lakes Region); S.C. Res

These developments also lead to an increased pressure from international organizations and other States to abide by international obligations, including an increased expectation that international norms are internally applied and implemented, including, in particular, when third States and organizations decide upon issues of membership and the granting of financial and economic aid.[35] Accordingly, it is these changes in the overall international system—not whether a given State is a new or an old democracy—which favour the inclusion of constitutional provisions on the domestic applicability of international law.

Furthermore, as mentioned by Ginsburg, Chernykh, and Elkins, the geopolitical setting of a given country also plays a crucial role in its decision whether to provide, and if so, how to provide for the domestic implementation of international law.[36] More specifically, however, it is not the *geographical* setting which is relevant. Instead, it is crucial that States aspiring for *political* reasons to become members of an international organization with far-reaching competences will be more likely to provide for the far-reaching application of international law in domestic law, as compared to countries who do not have such aspirations. Thus, for example, the incentive for the Republic of Croatia, a candidate of membership in the European Union, to provide for the domestic implementation of international law is far higher than that of Belarus, even if both border-member states of the European Union and are similarly situated geographically .

B. Relevance or Irrelevance of a Specific Rank of International Law Norms?

Ginsburg, Chernykh, and Elkins have, at least to some extent, also addressed the rank and status of international law in the domestic legal order and the reasons why either a higher or lower rank is being provided for in a given constitutional setting.[37] I believe, however, that this question, whatever its importance, is not the most crucial to determining the domestic effectiveness of international law in a given country.

Rather, there are two other factors which are far more important: first, the question of a possible direct application of international law

940, U.N. Doc. 5/RES/940 (July 31, 1994) (Haiti); S.C. Res 688, U.N. Doc. 5/RES/688 (Apr. 5, 1991) (concerning Northern Iraq). It is noteworthy however, that at least in two of those instances, S.C. Res. 1199, *supra* note 34, pmbl. ¶ 14 and S.C. Res. 1564, pmbl. ¶ 14, U.N. Doc. 5/RES/1564 (Sept. 18, 2004) (Sudan), the Council slightly deviated from the language used in Article 39 of the Charter, only referring to threats to peace and security "in the region," but still purported to act under Chapter VII of the Charter.

35. For the reaction of the international community, and particularly that of the European Union towards violations of international law by successor States of the former Yugoslavia and their non-cooperation with the International Criminal Tribunal for the Former Yugoslavia, see *Commission Croatia (2005) Progress Report,* at 7–10, COM (2005) 561 final (Nov. 9, 2005); *Commission Staff Working Document Serbia 2006 Progress Report*, at 5, COM (2006), 649 final (Aug. 11, 2006).

36. Ginsburg et al., *supra* note 1, at 228–29.

37. *Id.* at 204–10.

generally and treaties in particular, and second, the role and function of the judiciary. Even if a treaty was considered in a given constitutional order to be superior in rank to a statute, such a constitutional provision would remain an empty shell unless the treaty obligation is considered self-executing and, thus, enforceable by domestic courts.

Besides, domestic courts have tools at their disposal that enable them to allow international law to prevail even where, formally speaking, it would not—the Palestine Liberation Organization (PLO) observer mission case in the United States being an example at hand. There, despite the rather unequivocal text of the then Anti-Terrorism Act,[38] which required all offices of terrorist organizations in the United States, including those of the PLO, to be closed,[39] the U.S. District Court for the Southern District of New York held that the PLO observer mission to the United Nations[40] would not be covered by the statutory provision, thus quite elegantly circumventing the later-in-time rule.[41]

Even in the United Kingdom, where the doctrine of supremacy of Parliament still governs,[42] British courts normally make every effort to bring domestic English law in line with the nation's international obligations.[43] Furthermore, the British legislature included a provision in the Human Rights Act[44] ordering English Courts to interpret domestic statutes in line with the international obligations of the United Kingdom arising under the European Convention on Human Rights.[45]

38. Anti-Terrorism Act of 1987, Pub. L. No. 100-204, 101 Stat. 131 (1987) [hereinafter *ATA*].

39. Section 1003 of the ATA provided:

> It shall be unlawful, if the purpose be to further the interests of the Palestine Liberation Organization or any of its constituent groups, any successor to any of those, or any agents thereof, on or after the effective date of this title. . . (3) notwithstanding any provision of law to the contrary, to establish or maintain an office, headquarters, premises, or other facilities or establishments within the jurisdiction of the United States at the behest or direction of, or with funds provided by the Palestine Liberation Organization or any of its constituent groups, any successor to any of those, or any agents thereof.

Id. § 1003.

40. As to the status of the PLO as it did then exist within the United Nations see Norbert J. Prill, *Die Anerkennung der PLO durch die Vereinten Nationen*, 59 Die Friedenswarte 208 (1976).

41. United States v. Palestine Liberation Org., 695 F. Supp. 1456, 1465–68 (S.D.N.Y. 1988); *see* Thomas Fitschen, *Closing the PLO Observer Mission to the United Nations in New York; The Decision of the International Court of Justice and the U.S. District Court, Southern District of New York*, 31 GERMAN Y.B. INT'L L. 595 (1988); *cf.* KELLER, *supra* note 21 at 153 (discussing in general the latter-in-time rule).

42. As to the notion and content of supremacy of Parliament under British constitutional law see, generally, ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 39–85 (9th ed. 1950).

43. Regarding the European Convention on Human Rights see Robert Blackburn, *The United Kingdom*, *in* FUNDAMENTAL RIGHTS IN EUROPE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS MEMBER STATES, 1950–2000, at 935, 950–56 (Robert Blackburn & Jörg Polakiewicz eds., 2001).

44. *See* Human Rights Act, 1998, c.42, (U.K.), *available at* http://www.opsi.gov.uk/ACTS/acts1998/19980042.htm.

45. Section 3 of the Human Rights Act provides:

> (1) 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 Convention rights.
>
> (2) This section—

Applying international law and granting it *de facto* superior status depends, however, on a truly independent judiciary. Thus, it is rather the *de facto* guarantee of effective judicial independence, instead of formal constitutional rules, that could be conceived as a precommitment device. Therefore, the relevant dividing line might not be that between democracies and nondemocratic States; rather the *de facto* relevance of international law in a given domestic setting depends on the extent of the rule of law and control of the executive by an independent judiciary.

C. Is There Really a Treaty v. Custom Divide?

In their paper, Ginsburg, Chernykh, and Elkins also hint at an allegedly essential distinction between treaty obligations *versus* customary international law obligations. Although there are obviously certain distinctions between these two sources of international law, they should not be overestimated.

First, our colleagues hinted at the fact that obligations under rules of customary international law might not be terminated. Yet, it has to be noted that the same is true for certain treaties: General Comment 26 of the Human Rights Committee with regard to the ICCPR,[46] or the practice of the United Nations with regard to the Indonesian withdrawal,[47] are just two examples at hand.[48]

Second, there are clear interlinkages between the two sources which cannot be overlooked. *Inter alia*, multilateral treaties drafted and adopted within the framework of codification conferences increasingly exercise an important influence on the development of customary international law.[49] Who would doubt, for example, that, as of today, the list of crimes against humanity has been codified in the Rome Statute of the

(a) applies to primary legislation and subordinate legislation whenever enacted;
(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

Id. § 3.

46. The relevant part of U.N. Human Rights Committee, General Comment No. 26 (61): General comment on issues relating to the continuity of obligations to the International Covenant on Civil and Political Rights, U.N. Doc. CCPR/C/21/Rev.1/Add.8/Rev.1 (Dec. 8, 1997) reads:

(5) The Committee is therefore firmly of the view that international law does not permit a State which has ratified or acceded or succeeded to the Covenant to denounce it or withdraw from it.

47. *See* Konrad Ginther, *Article 4*, *in* 1 THE CHARTER OF THE UNITED NATIONS—A COMMENTARY, *supra* note 11, at 177, 186; *see also* Egon Schwelb, *Withdrawal from the United Nations—The Indonesian Intermezzo,* 61 AM. J. INT'L L. 661 (1967) (providing a more detailed analysis of said incident).

48. See generally as to the (im)possibility of terminating treaties which do not contain an express termination clause, Théodore Christakis, *Article 56—Convention de 1969, in* 3 LES CONVENTIONS DE VIENNE SUR LE DROIT DES TRAITÉS—COMMENTAIRE ARTICLE PAR ARTICLE (Olivier Corten & Pierre Klein eds., 2006).

49. Maarten Bos, *The Identification of Custom in International Law*, 25 GERMAN Y.B. INT'L L. 9, 23 (1982).

ICC?[50] Besides, the signing of a treaty, normally to be effected by the executive alone, causes the signatory State to lose its status as a persistent objector with regard to the rules contained in the respective treaty.[51]

Third, Ginsburg, Chernykh, and Elkins argue that unlike treaty obligations, the creation of a customary law rule almost exclusively relies on the executive branch of a given state and that there is a decentralized determination of such rules. But what about judicial decisions forming part of state practice?[52] And what about systems like Germany, where Article 100, paragraph 2 of the Basic Law grants the Federal Constitutional Court a central role in the determination of the existence or nonexistence of rules of customary international law?[53]

Finally, just like customary international law obligations, treaty obligations are also subject, at least as a matter of principle, to a system of decentralized enforcement and are effected by the lack of incentives to incur the costs of a unilateral enforcement. Why otherwise has no State so far ever brought a case against another State for a violation of the ICCPR despite Article 41?[54] Instead of distinguishing between treaty and customary international law rules, it might have been more relevant to make a distinction between the *nature* of the respective substantive

50. *See, e.g.*, Phyllis Hwang, *Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court*, 22 Fordham Int'l L.J. 457 (1998).

51. Thus, for example, the United States or Israel, can no longer claim to be persistent objectors with regard to those rules contained in the First Additional Protocol to the Geneva Conventions, which were reiterated in the Rome Statute, the latter of which both States had (originally) signed, before indicating their intention to not ratify said treaty. As to both declarations, "denouncing" the respective signature see, for excerpts of the Am. Non-Governmental Org. Coal, for the Int'l Criminal Court, *ICC Ratifications,* http://www.amicc.org/icc_ratifications.html (last visited Oct. 23, 2007). The U.S. declaration reads:

> This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this treaty.

Likewise, Israel's reads:

> . . . [I]n connection with the Rome Statute of the International Criminal Court adopted on 17 July 1998, [. . .] Israel does not intend to become a party to the treaty. Accordingly, Israel has no legal obligations arising from its signature on 31 December 2000. Israel requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this treaty.

Id.

52. *See* Alain Pellet, *Article 38*, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE—A COMMENTARY 655, 750–51 (Andreas Zimmermann et al. eds., 2006).

53. For a work generally addressing the function of Article 100, paragraph 2 of Basic Law see Steinberger, *supra* note 6, at 567 n.79; *see also* Bundesverfassungsgericht (BVerfG) (Federal Constitutional Court) May 14, 1968, 23 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 288, (315) (Germany); Bundesverfassungsgericht (BVerfG) (Federal Constitutional Court) Dec., 13, 1977, 46 Entscheidungen des Bundesverfassungsgericht [BVerfGE] 342, (358) (Germany); Bundesverfassungsgericht (BVerfG) (Federal Constitutional Court) Apr. 12, 1983, 64 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1, (12) (Germany).

54. For such a possibility see Manfred Nowak, *Article 41, in* U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY (N.P. Engel ed., 1993).

obligation, for example, whether they possess an *erga omnes* character or not.[55]

If there is a relevant advantage of enforcing treaty obligations from the viewpoint of international law, such advantage would largely depend on whether the respective treaty contains an effective supervisory and enforcement mechanism of its own, such as the WTO or the ECHR system. Where this is not the case, and that is indeed true for the vast majority of multilateral treaties, or where customary international law in turn is subject to international judicial determination and enforcement,[56] there is no significant difference as to the degree of centralization of enforcement between these two sources of international law.

IV. CONCLUSION

Concluding, one might say that the idea of precommitment is probably *one* reason (among others) for the domestic implementation of international law; it is just that—one of several reasons. But, as has been argued, there might be other reasons, and maybe, even more important ones.

One last remark is in order. In a core phrase in the concluding remarks of their paper, Ginsburg, Chernykh, and Elkins state that "international law delegates decisions to outsiders."[57] This Statement, at least somewhat, reflects an understanding of international law which, unfortunately, I do not share. International law is perceived as a legal order set up and administered by "outsiders." Yet, States are free and continue to be free to respectively enter or object to the creation of new international obligations, be they of a contractual or of a customary law nature. Thus international law rules are not rules made by "outsiders," but rather rules freely accepted by States themselves, be it directly or indirectly. Thus, by providing for the prohibition on the use of force, by guaranteeing human rights, and by attempting to protect the environment of mankind, international law might be considered a precommitment device against certain domestic policies—and the domestic implementation of it would be just part of that overall strategy.

55. As to the very concept of *erga omnes* obligations and their effects in international law, see, most recently, CHRISTIAN J. TAMS, ENFORCING OBLIGATIONS *ERGA OMNES* IN INTERNATIONAL LAW (2005).

56. This is, *inter alia*, the case where the States concerned are both subject to the jurisdiction of the International Court of Justice under Article 36, paragraph 2 of the Statute of the International Court of Justice or where the Security Council effectively exercises its Chapter VII powers to counter violations of customary international law amounting to threats of the peace, breaches of the peace, or acts of aggression. For a detailed analysis of the jurisdictional system established under the optional clause, see Christian Tomuschat, *Article 36*, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, *supra* note 52, at 589, 626–31.

57. Ginsburg et al., *supra* note 1, at 225–26.